



1-1-2013

Civil Liability Approaches to the Stolen Valor Epidemic.

Lauren A. Valkenaar

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Recommended Citation

Lauren A. Valkenaar, *Civil Liability Approaches to the Stolen Valor Epidemic.*, 44 ST. MARY'S L.J. (2013). Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol44/iss4/4>

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COMMENT

CIVIL LIABILITY APPROACHES TO THE STOLEN VALOR EPIDEMIC

LAUREN A. VALKENAAR*

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* The author would like to thank Professors Michael Ariens and Vincent Johnson for their assistance in developing the topic for this Comment, Isaac Ta and the *St. Mary's Law Journal* for their tireless efforts in production, and her loving husband, Trey Valkenaar, for his unending patience and support throughout the last three years.

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I. INTRODUCTION

Military decorations, a system established by George Washington during the Revolutionary War, demand respect and tell a story about each wearer's patriotism, self-sacrifice, and heroism.¹ Besides gaining the veneration of others, military accomplishments provide recipients with many benefits, including burial in military cemeteries, increased retirement pay, license plates with attached perks, monthly cash rewards, and a lifetime of free travel on government ships and planes.²

Regrettably, not all who claim such honors are worthy of their glory. Over the years, some civilians and military members falsely claimed these honors, "stealing" the valor, reputation, and benefits bestowed upon actual medal recipients. Lawmakers have historically addressed the problem of stolen valor with criminal prosecution. Along with sanctions under state and federal criminal laws, Congress passed the Stolen Valor Act of 2005, making it illegal to lie about receiving military awards.³ Almost immediately after its enforcement, opponents challenged the Act on constitutional grounds—just as the government gained direct authority to prosecute stolen valor cases.⁴ Additionally, due to the government's

1. See B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 353 (1998) (recounting how General George Washington issued the first military award—a purple, heart-shaped cloth—to exemplary soldiers during the war).

2. *Id.* at 354.

3. Stolen Valor Act, 18 U.S.C. § 704 (2006), *held unconstitutional by* United States v. Alvarez (*Alvarez II*), 132 S. Ct. 2537 (2012).

4. See, e.g., United States v. Alvarez (*Alvarez I*), 617 F.3d 1198, 1200 (9th Cir. 2010) (challenging the Stolen Valor Act of 2005 as violating First Amendment free speech rights), *aff'd*, 132 S. Ct. 2537 (2012); United States v. Robbins, 759 F. Supp. 2d 815, 817 (W.D. Va. 2011) (discussing prior constitutional challenges to the Stolen Valor Act), *aff'd in part, vacated in part*, 494 F. App'x 387 (4th

hesitation to prosecute, higher priorities, and budgetary concerns, only a small percentage of stolen valor cases resulted in legal action.⁵

Even though media and government attention focus on preventing military deceptions, reported instances of stolen valor continue to increase.⁶ Thus far, criminal prosecution has been ineffective in deterring and punishing these pretend heroes. The expanding frequency and severity of reported military imposters mandates an exploration of alternative methods to prevent this conduct. This Comment considers whether civil liability, a solution previously unexplored in the stolen valor context, could effectively contribute a legal remedy under traditional tort law principles. Tort claims potentially provide compensation to individuals, corporations, or entities injured by these military deceptions while simultaneously deterring imposters from lying in the first place.⁷ The analysis in this Comment serves as a foundation for considering possible tort causes of action relevant to stolen valor conduct and examines circumstances conducive to successful recovery.

Part I.A begins by discussing the growing problem of stolen valor and its implications. Part II.A–B evaluates the criminal prosecutions of stolen valor cases prior to the Stolen Valor Act of 2005 and reviews the Stolen Valor Act and its constitutional controversy in the courts. Next, Part II.C examines the proposed amendments to the Stolen Valor Act in response to the recent Supreme Court decision that ruled it unconstitutional. Part II.D considers why criminal prosecution has been unsuccessful in quelling individuals from lying about military honors and appraises private efforts to remedy the issue.

In Part III, potential tort claims applicable to stolen valor conduct are

Cir. 2012); *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010) (arguing freedom of speech is violated under the Stolen Valor Act's content-based restriction), *rev'd*, 667 F.3d 1146 (10th Cir. 2012), *vacated*, 684 F.3d 962 (10th Cir. 2012) (vacating its decision "in light of the United States Supreme Court's decision in [*Alvarez II*]").

5. HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 189 (2003).

6. See Jeanette Steele, *Feds Take Aim at Phony War Heroes*, SAN DIEGO UNION-TRIB. (Jan. 14, 2010, 12:04 AM), <http://www.signonsandiego.com/news/2010/jan/14/feds-take-aim-phony-war-heroes/> (examining Congress's recent actions, but noting the increased amount of reported stolen valor cases).

7. See WILLIAM R. BUCKLEY & CATHY J. OKRENT, *TORTS AND PERSONAL INJURY LAW* 5 (Sherry Gomoll et al. eds., 3d ed. 2004) (stating the underlying purposes of tort law are the following: "(1) protecting persons and property from unjust injury by providing legally enforceable rights; (2) compensating victims by holding accountable those persons responsible for causing such harms; (3) encouraging minimum standards of social conduct among society's members; (4) deterring violations of those standards of conduct; and (5) allocating losses among different participants in the social arena").

considered. Part III.A.1 examines the claim of fraud—the action traditionally used when a defendant lies for the purpose of unlawfully obtaining a benefit. There are additional claims beyond fraud that are relevant to stolen valor analysis. Part III.B evaluates alternative causes of action—appropriation of name or likeness (Part III.B.1), tortious interference with prospective advantage (Part III.B.2), injurious falsehood (Part III.B.3), and intentional infliction of emotional distress (Part III.B.4)—to examine under what facts an individual could face civil liability for his or her military misrepresentations.

Part IV discusses the potential for recoverable damages. Finally, Part V concludes that although tort law principles will not apply to all stolen valor cases, pursuing such recourse, when applicable, will assist in punishing and deterring military imposters, while compensating those injured in meritorious cases.

A. *The Problem of Stolen Valor*

B.G. Burkett and Glenna Whitley coined the term “stolen valor” as the title to their 1998 book⁸ referring to men and women who falsely claim military honors or accomplishments in military service.⁹ Even for someone with no exposure to life in the military, twenty-first century technology can be used to help support elaborate falsifications. The Internet provides a valuable resource for these imposters who can gather information to add credence to their story or order any variety of military medals off websites such as eBay.¹⁰ Easily-forged documents coupled with no internal checking system add to the simplicity of putting forth a fake persona with a high chance of success.¹¹

8. B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* (1998).

9. Although the number of women who commit stolen valor is limited, they are not excluded from the fake medal phenomenon. *See id.* at 475 (describing photographs in Navy SEAL headquarters featuring females wearing the SEAL Trident, despite the fact that no female has ever become a SEAL).

10. *See id.* at 358 (observing that military medals can be obtained by mail-order catalogues: a Distinguished Service Cross for \$125, “a Navy Cross for \$155, a Silver Star for \$47, and a Purple Heart for \$44”); *see also* HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE 70* (2003) (“For a few dollars, a Fake Warrior can adorn himself with a Distinguished Service Cross, a Navy Cross, an Air Force Cross, a Silver Star, a Bronze Star, a Purple Heart Even our nation’s hard-earned highest decoration, the Medal of Honor, is for sale.”).

11. *See* B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 364 (1998) (illustrating how released servicemen can steam the seal of their personal files open and replace its contents with altered documents before checking into their new unit). A DD-214 form, formally called “Certificate of

The stolen valor problem is more widespread than most people would like to believe.¹² Stolen valor cases are reported on a weekly basis.¹³ An investigation into *Who's Who*, an online biographical reference for various groups of people, uncovered that “[o]f the 333 people whose profiles state they earned one of the nation’s most esteemed military medals, fully a third of those claims cannot be supported by military records.”¹⁴ In the past four decades, numerous “fake warriors” have been uncovered, prompting watchdog organizations to assemble and attempt to expose their lies.¹⁵ The number of imposters and breadth of their deception is not limited merely to service in the Vietnam War.¹⁶ For example, the number of imposters claiming to be Navy SEALs significantly increased since the raid and assassination of Osama bin Laden.¹⁷ Even worse, these

Release or Discharge from Active Duty,” is the document issued when the military discharges an active-duty servicemember. *DD Forms 214 and 215 Distribution*, ARMY STUDY GUIDE, http://www.armystudyguide.com/content/MILPER_Messages_Archive/seperation_and_retirement_milper_messages/dd-forms-214-certificate-shtml (last visited April 16, 2013). These documents can be purchased on the Internet or from actual military members and easily augmented, as one imposter described: “On the DD-214 I cut white strips of paper and pasted them over parts needed to falsify. I typed in the needed fillers. I then photo copied.” HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 71 (2003) (footnote omitted). Once this document is established, imposters can use it to obtain military automobile licenses (including license plates for Prisoners of War, the Medal of Honor, and Purple Hearts) and valid IDs from the Veterans Association. *Id.* at 70–72. Clerks at the Veterans Association rarely double-check the validity of a DD-214. *Id.* at 74. Critics took aim at the Military Order of the Purple Heart for failing to investigate a new chapter’s request for medals following the exposure of three fake chapters funded by imposter Richard Davis. *Id.* at 72.

12. See John Crewdson, *Claims of Medals Amount to Stolen Valor*, CHI. TRIB. (Oct. 26, 2008, 1:53 AM), <http://www.chicagotribune.com/news/local/chi-valor-oct25,0,4301227.story?page=1> (“A look at 273 obituaries published in the past decade alone found that in more than four of five cases, official records didn’t support decorations for bravery attributed to the deceased.”).

13. See Jane Moon, *Stolen Valor Is a Common Problem: Experts Say Military Awards, Documents Faked Regularly*, KINSTON (July 11, 2011, 12:00 AM), <http://www.kinston.com/articles/press-75029-problem-common.html> (reporting Doug Sterner, who documents actual medal recipients and investigates imposters to help prevent further impersonations, receives cases weekly), *reprinted in* CAL. ZEPHYR, Summer II 2011, at 5–6, *available at* <http://www.vvacalsc.com/> (follow “Zephyr Issues”; then follow “Zephyr Summer2 2011”).

14. John Crewdson, *Claims of Medals Amount to Stolen Valor*, CHI. TRIB. (Oct. 26, 2008, 1:53 AM), <http://www.chicagotribune.com/news/local/chi-valor-oct25,0,4301227.story?page=1>.

15. See, e.g., FAKE WARRIOR PROJECT, <http://www.fakewarriors.org/> (last visited April 16, 2013) (documenting claims of military accomplishments and exposing imposters).

16. See, e.g., Lee Lawrence, *Did a Chaplain’s Fake Purple Heart Erase Good Deeds?*, CHRISTIAN SCI. MONITOR (Apr. 3, 2011), <http://www.csmonitor.com/USA/Military/2011/0403/Did-a-chaplain-s-fake-Purple-Heart-erase-good-deeds> (reporting a man who falsified combat experience during Desert Storm).

17. See Anny Shin, *Boast-Busters: Those Who Hunt and Expose Fake Navy SEALs Are Busier Than Ever*, WASH. POST (June 13, 2011), <http://www.washingtonpost.com/local/boast-busters-those->

lies cause real emotional, financial, and physical harm to millions of Americans. Loved ones of exposed imposters feel ashamed;¹⁸ real heroes face greater suspicion regarding their heroic deeds;¹⁹ con-artists defraud citizens who try to reward or compensate war heroes;²⁰ phonies taint elections with false claims of military service;²¹ violent criminals create a war hero persona to evoke the admiration and trust of their victims;²² and undeserving scammers obtain employment contingent upon military service.²³

II. HISTORY OF STOLEN VALOR PUNISHMENT

A. *Criminal Prosecution Before the Stolen Valor Act of 2005*

The typical legal response to punish military imposers has been criminal sanctions. In 2005, Congress passed the "Stolen Valor Act"²⁴ to address the growing problem by criminalizing false claims regarding military honors, whether oral or in writing.²⁵ Before this law's enactment, the

who-hunt-and-expose-fake-navy-seals-are-busier-than-ever/2011/06/08/AGQnsbTH_story.html (asserting that ever since Osama bin Laden was killed, investigators have been overwhelmed with reports of Navy SEAL impostors).

18. See *id.* (recounting an investigator's posthumous discovery that alleged meritoriously awarded medals were false did not go over well with the fake warrior's family, stating, "If [the family] saw me on the street, they would punch me out").

19. See Editorial, *Medals of Dishonor: Real Heroes Need to Be Distinguished from the Fakes*, WASH. TIMES (July 20, 2010), <http://www.washingtontimes.com/news/2010/jul/20/attention-phony-war-heroes-dust-off-those-surplus/> (claiming false military heroes devalue medals by making them appear more commonplace and creating public distrust of deserving heroes after fakes are exposed).

20. See Jerry Davich, *Hobart Man's POW Claims Refuted, Paperwork Fraudulent*, POST-TRIB. (Aug. 2, 2011, 11:06 AM), <http://www.posttrib.suntimes.com/news/davich/6840972-452/hobart-mans-p.o.w.-claims-refuted-paperwork-fraudulent> (stating a woman collected \$500 for a man with fake prisoner of war papers and bought him dinner).

21. See Editorial, *Politicians and Their Fake War Stories*, N.Y. TIMES (May 19, 2010, 6:35 PM), <http://www.roomfordebate.blogs.nytimes.com/2010/05/19/politicians-and-their-fake-war-stories/> (reporting numerous politicians falsely claimed military service, honors, or prisoner of war status during a campaign).

22. See William Stage, *The Pretenders: The Long Arm of a Dallas Stockbroker Pulls the Mask Off Local Valor Fakes*, RIVERFRONT TIMES NEWS (Nov. 20, 2002), <http://www.riverfronttimes.com/2002-11-20/news/the-pretenders/> (discussing how a man charged with sexual assault of two young boys impressed his victims with false stories of his service as a Green Beret in Vietnam).

23. See Freda R. Savana, *Law Targets Those Who Make False Military Claims*, BUCKS CNTY. COURIER TIMES, Apr. 25, 2010 (available on Westlaw with subscription: 2010 WLNR 10019393) (criticizing a man who lied about his military background to gain an Army recruitment job).

24. Stolen Valor Act, 18 U.S.C. § 704 (2006), held *unconstitutional* by United States v. Alvarez (*Alvarez II*), 132 S. Ct. 2537 (2012).

25. *Id.*

government relied upon other criminal laws to address the problem.²⁶ However, the First Amendment, which protects “pure speech” or content expressing a particular idea or opinion, severely limited the scope of prosecution.²⁷ Prior to 2005, “A military impostor’s mere *words*—no matter how exaggerated, no matter how completely false they may be—[were] not *legally* actionable.”²⁸ Depending on the facts of the case and additional benefits received because of the false speech, however, several state and federal laws provided a remedy in criminal law.

1. State Laws

Many imposters further enhance their deception with falsified documents.²⁹ The majority of states possess a forgery act that makes it illegal to “alter, make, complete, execute, or authenticate any writing so that it purports . . . the act of another who did not authorize that act . . . [and is done] with intent to defraud or harm another.”³⁰ If the falsified document is intentionally presented to a county clerk for filing, the forger may be in violation of laws criminalizing possession of fake documents and their offering to a public entity.³¹

2. Federal Laws

Prior to 2005, two federal laws were primarily used to prosecute stolen valor cases: 18 U.S.C. § 912³² and former 18 U.S.C. § 704.³³ Section 912 involves falsely impersonating an officer of the United States, which

26. *See, e.g.*, *United States v. Clark*, 94 Fed. App’x 769, 771 (10th Cir. 2004) (prosecuting a military imposter in violation of 18 U.S.C. § 912 (1994) for impersonating a federal officer), *vacated*, 543 U.S. 1100 (2005).

27. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–07 (1969).

28. HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 169 (2003).

29. *See id.* at 71 (describing a soldier altering military discharge papers to reflect unearned service).

30. *E.g.*, TEX. PENAL CODE ANN. § 32.21 (West 2011) (exemplifying a states’ forgery act).

31. *See* HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 170–72 (2003) (discussing application of New York Penal Law to stolen valor cases, particularly Section 170.20 and Section 175.30, which distinguished between mere possession of a falsified writing, and the offering for public filing of a falsified writing).

32. 18 U.S.C. § 912 (2006).

33. *Id.* § 704 (2000), *amended by Stolen Valor Act*, 18 U.S.C. § 704 (2006), *held unconstitutional by Alvarez II*, 132 S. Ct. 2537 (2012). *Compare* *United States v. Iannone*, 184 F.3d 214, 230 (3d Cir. 1999) (noting the defendant’s wearing of a fake Purple Heart and Silver Star was particularly offensive, and stating the conduct violates federal law 18 U.S.C. § 704 (1994)), *with* *United States v. Hall*, 25 M.J. 628, 628–29 (A.F.C.M.R. 1987) (affirming a conviction of a basic airman who claimed to be a captain in the U.S. Air Force under 18 U.S.C. § 912 (1982)).

includes military officers.³⁴ The statute states:

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.³⁵

In *United States v. Clark*,³⁶ the defendant showed up at the scene of a barge accident in military uniform and presented himself as a captain of the United States Army.³⁷ After running up a motel bill, charging supplies worth hundreds of dollars at the local Army surplus store, and “borrowing” a truck from the car local dealership, it was discovered he was not a member of the military.³⁸ For impersonating a federal official, Clark was indicted under Section 912.³⁹

However, a more widely used statute was Section 704, which made it illegal to wear, purchase, solicit, sell, or manufacture “any decoration or medal authorized by Congress for the armed forces of the United States . . . or the ribbon, button, or rosette of any such badge, decoration or medal.”⁴⁰ Under the statute, if an individual was caught wearing a fake military badge, he or she could face up to six months in jail—an entire year if the badge was the Congressional Medal of Honor.⁴¹ The Act was viewed as ineffective because of its narrow approach in addressing the problem.⁴² Prosecution was only possible if a person was caught actually wearing the medals; but because the majority of stolen valor incidents are

34. 18 U.S.C. § 912 (2006).

35. *Id.*

36. *United States v. Clark*, 94 Fed. App'x 769 (10th Cir. 2004), *vacated*, 543 U.S. 1100 (2005).

37. *Id.* at 771.

38. *Id.*

39. *Id.*

40. 18 U.S.C. § 704(a) (2000), *amended by* Stolen Valor Act, 18 U.S.C. § 704 (2006), *held unconstitutional by* *United States v. Alvarez (Alvarez II)*, 132 S. Ct. 2537 (2012).

41. *Id.* § 704(a)–(b). In addition to legal ramifications, those who wear unearned military medals while on active duty “can result in a dishonorable discharge and loss of retirement benefits.” B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 178 (1998).

42. *See, e.g.*, John Salazar, *Salazar Bill Targets Military Imposters*, PROJECT VOTE SMART (July 23, 2005), <http://www.votessmart.org/public-statement/115309/salazar-bill-targets-military-imposters#.UUo1u1d5Ffw> (reporting Representative John Salazar introduced the Stolen Valor Act to Congress by emphasizing the government’s current inability to prosecute individuals who claim unearned military medals but never wear the decorations).

predicated on verbal or written misrepresentations, Section 704 proved to be an incomplete solution.⁴³

B. *The Stolen Valor Act of 2005*

On July 19, 2005, the Stolen Valor Act of 2005 was proposed in order to close the loophole that permitted citizens to claim, either verbally or in print, military honors without facing legal consequences.⁴⁴ The Stolen Valor Act amended Section 704, which only prohibited the wearing of fake military medals.⁴⁵ Congress found the former statute insufficient to protect the reputation and prestige of the decorations, and determined the original structure of the Act was too limited to prosecute adequately fraudulent claims of military honors.⁴⁶ Colorado Representative John Salazar,⁴⁷ himself a Vietnam veteran, presented the Act before Congress.⁴⁸ The bill passed, and President George W. Bush subsequently

43. See Jane Moon, *Stolen Valor Is a Common Problem: Experts Say Military Awards, Documents Faked Regularly*, KINSTON (July 11, 2011, 12:00 AM), <http://www.kinston.com/articles/press-75029-problem-common.html> (claiming the most frequent victims of stolen valor are the media, who are fooled by affirmative statements, not visibly worn medals), reprinted in CAL. ZEPHYR, Summer II 2011, at 5–6, available at <http://www.vvacalsc.com/> (follow “Zephyr Issues”; then follow “Zephyr Summer2 2011”).

44. See Tina Reed, *Bill Targets Military Phonies: House Approves Act Outlawing Bogus Claims About Valor*, LAS VEGAS REV. J. (Dec. 7, 2006), http://www.reviewjournal.com/lvrj_home/2006/Dec-07-Thu-2006/news/11275601.html (describing the scope and rationale behind the passage of the Stolen Valor Act).

45. See 18 U.S.C. § 704 (2000) (prohibiting the display of unearned military medals), amended by Stolen Valor Act, 18 U.S.C. § 704 (2006), held unconstitutional by *Alvarez II*, 132 S. Ct. 2537.

46. Stolen Valor Act of 2005, Pub. L. No. 109-437 §§ 2–3, 120 Stat. 3266, 3266 (codified as amended at 18 U.S.C. § 704 (2006), held unconstitutional by *Alvarez II*, 132 S. Ct. 2537).

47. Tina Reed, *Bill Targets Military Phonies: House Approves Act Outlawing Bogus Claims About Valor*, LAS VEGAS REV. J. (Dec. 7, 2006), http://www.reviewjournal.com/lvrj_home/2006/Dec-07-Thu-2006/news/11275601.html. In addition to the Stolen Valor Act, Representative John Salazar, proposed legislation named the Military Valor Roll of Honor Act on January 23, 2009. Military Valor Roll of Honor Act, H.R. 666, 111th Cong. (2009). The Act contemplated the creation of a national, searchable database containing the names of all military members along with any awards received. *Id.* Salazar intended the database to facilitate investigations of fraud, making them easier, less expensive, and ultimately increasing government enforcement against false military claims. Chris Roberts, *Fighting the Fakes: Bogus Military Heroes Spur Outcry for Action*, EL PASO TIMES (Jan. 24, 2010, 12:00 AM), http://www.elpasotimes.com/ci_14256738. However, the Department of Defense declined to support the bill, reasoning that, because Social Security numbers or birthdates could not be used under the Privacy Act, “the utility of such a database [would] be severely limited.” *Id.* The legislation was referred to the House Committee on Armed Services, but never became law. *H.R. 666: Military Valor Roll of Honor Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/111/hr666> (last visited April 16, 2013).

48. Rick Carroll, *Aspen Salutes Its Veterans*, ASPEN TIMES (Nov. 12, 2009), <http://www.aspentimes.com/article/20091112/NEWS/911119974>.

signed it into law on November 20, 2006.⁴⁹ The new legislation added:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof . . . shall be fined under this title or imprisoned not more than six months, or both.⁵⁰

The law also included enhanced penalties for certain higher ranking medals.⁵¹ Between the years 2005 and 2009, forty-eight people were prosecuted under the Stolen Valor Act.⁵² From 2009 to 2011, prosecutions increased to over sixty cases.⁵³

After its adoption, the Stolen Valor Act proved wildly popular with judges and attorneys.⁵⁴ In response to the Act's success, California, Kentucky, Missouri, and Utah enacted similar legislation.⁵⁵ Texas also

49. Clay Calvert & Rebekah Rich, *Low-Value Expression, Offensive Speech, and the Qualified First Amendment Right to Lie: From Crush Videos to Fabrications About Military Medals*, 42 U. TOL. L. REV. 1, 15–16 (2010).

50. 18 U.S.C. § 704(b) (2006), *held unconstitutional by Alvarez II*, 132 S. Ct. 2537.

51. *Compare id.* § 704 (2000) (not providing specifically for Medal of Honor stolen valor cases), *with id.* § 704(c)–(d) (2006), *held unconstitutional by Alvarez II*, 132 S. Ct. 2537 (adding specific language to address false claims regarding the Congressional Medal of Honor, Navy Cross, Air Force Cross, Silver Star, or Purple Heart).

52. Jonathan Turley, *Stolen Valor Is Offensive, but Is It a Crime?*, USA TODAY (Mar. 8, 2010, 5:24 PM), http://www.usatoday.com/NEWS/usaedition/2010-03-09-column09_ST_U.htm.

53. Dan Frosch, *Fighting for the Right to Tell Lies*, N.Y. TIMES, May 21, 2011, at A10, *available at* <http://www.nytimes.com/2011/05/21/us/21valor.html>; *accord* Kent Faulk, *Man, 50, Fined Over Medal Misdemeanor*, BIRMINGHAM NEWS, Sept. 9, 2011 (available on Westlaw with subscription: 2011 WLNR 18223698) (“The number of people nationwide charged under the Stolen Valor Act . . . has more than doubled in the past five years . . .”).

54. Jonathan Turley, *Stolen Valor Is Offensive, but Is It a Crime?*, USA TODAY (Mar. 8, 2010, 5:24 PM), http://www.usatoday.com/NEWS/usaedition/2010-03-09-column09_ST_U.htm.

55. *See, e.g.*, CAL. PENAL CODE ANN. § 532b (West 2005), *amended by* CAL. PENAL CODE ANN. § 532b (West Supp. 2013) (providing misdemeanor punishment for falsely claiming military medals); KY. REV. STAT. ANN. § 434.444 (West 2008), *amended by* KY. REV. STAT. ANN. § 434.444 (West 2010) (prohibiting wearing or claiming unearned military medals when done with “intent to defraud, obtain employment, or be elected or appointed to public office”); MO. ANN. STAT. § 578.510 (West 2007), *amended by* MO. ANN. STAT. § 578.510 (West 2011) (mirroring the federal stolen valor statute and proscribing fraudulently using the title “veteran” with the intent to gain a personal benefit); UTAH CODE ANN. § 76-9-706(2) (LexisNexis 2008), *amended by* UTAH CODE ANN. § 76-9-706(2) (LexisNexis 2012) (making it a Class C misdemeanor to falsely claim service medals, regardless of intent). While some of the state statutes copied the federal Stolen Valor Act, California and Kentucky took it one step further, requiring intent to defraud or gain a material benefit to remove the potential constitutional challenge. *See infra* Part II.B.1 (discussing constitutional challenges to stolen valor legislation under the First Amendment). It is interesting to note that Utah’s and Missouri’s respective statutes each have different requirements for certain types of military

passed a version of the Stolen Valor Act, making it a Class C misdemeanor to claim a fraudulent or fictitious military record, defined as “an enlistment record, occupation specialty, medal, award, decoration, or certification obtained by a person through the person’s service in the armed forces”⁵⁶ An important difference in Texas law—given later developments regarding the constitutionality of stolen valor acts—is that it specifically limits the criminality to the act of misrepresentation used to gain a material benefit.⁵⁷

A few years after its enactment, and despite the Act’s popularity, controversy arose as to whether the Act unconstitutionally violated the First Amendment’s guaranteed right to free speech.⁵⁸ If a law contains a

misrepresentation: some types require that the misrepresentation be intended to defraud or that the misrepresentation be used for personal benefit, while other types omit this intent to defraud or intent to personally benefit. Compare MO. ANN. STAT. § 578.510(3) (West 2007), *amended by* MO. ANN. STAT. § 578.510(3) (West 2011) (“Any person who misrepresents himself or herself, verbally or in writing, to have been awarded any decoration or medal . . . is guilty of a class A misdemeanor.”), and UTAH CODE ANN. § 76-9-706(2) (LexisNexis 2008), *amended by* UTAH CODE ANN. § 76-9-706(2) (LexisNexis 2012) (“Any person who intentionally makes a false representation, verbally or in writing, that the persona has been awarded a service medal is guilty of a class C misdemeanor.”), with MO. ANN. STAT. § 578.510(4) (West 2007), *amended by* MO. ANN. STAT. § 578.510(4) (West 2011) (“Any person who fraudulently uses the title of ‘veteran’ . . . in order to obtain personal benefit . . . is guilty of a class A misdemeanor.”), and UTAH CODE ANN. § 76-9-706(4) (LexisNexis 2008), *amended by* UTAH CODE ANN. § 76-9-706(4) (LexisNexis 2012) (stating a person is guilty of a misdemeanor if the person wears a medal with the intent to defraud). Given the *Alvarez II* decision, portions of these statutes may face a constitutional challenge.

56. TEX. PENAL CODE ANN. § 32.54 (West 2011).

57. *Id.* § 32.54(b)(2)(B). The statute articulates a material benefit is earned if the lie was used with the intent to:

- (i) obtain priority in receiving services or resources under Subchapter G, Chapter 302, Labor Code;
- (ii) qualify for veteran’s employment preference under Chapter 657, Government Code;
- (iii) obtain a license or certificate to practice a trade, profession, or occupation;
- (iv) obtain a promotion, compensation, or other benefit, or an increase in compensation or other benefit, in employment or in the practice of a trade, profession, or occupation;
- (v) obtain a benefit, service, or donation from another person;
- (vi) obtain admission to an educational program in this state; or
- (vii) gain a position in state government with authority over another person, regardless of whether the actor receives compensation for the position.

Id. The addition of the intent to defraud requirement is most likely in response to the challenged constitutionality of the federal Stolen Valor Act. See Anny Shin, *Boast-Busters: Those Who Hunt and Expose Fake Navy SEALs Are Busier Than Ever*, WASH. POST (June 13, 2011), http://www.washingtonpost.com/local/boast-busters-those-who-hunt-and-expose-fake-navy-seals-are-busier-than-ever/2011/06/08/AGQnsbTH_story.html (recognizing blatant liars made First Amendment defenses to the federal Stolen Valor Act, which was allowed by the federal law’s vague approach in creating criminal liability without material benefit).

58. See *Alvarez I*, 617 F.3d 1198, 1203 (9th Cir. 2010) (finding the Stolen Valor Act unconstitutional as a violation of First Amendment free speech rights), *aff’d*, 132 S. Ct. 2537 (2012).

content-based restriction on pure speech, it will be subject to strict scrutiny; thus, it will not be upheld unless narrowly tailored to serve a compelling governmental interest.⁵⁹ Because the Act clearly prohibited a certain type of speech regarding false military achievements, it needed to pass strict scrutiny analysis—unless it fell under a free speech exclusion.⁶⁰ In *Chaplinsky v. New Hampshire*,⁶¹ the Supreme Court held the only categories of speech exempt from First Amendment protection are “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance . . . tend to incite an immediate breach of the peace.”⁶² In 2010, the Supreme Court updated the list to include “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”⁶³

The Stolen Valor Act’s constitutionality was soon challenged in the courtroom, causing a split in several circuit courts.⁶⁴ Commentators opposed to the Act on constitutional grounds argued it “criminalized lying” and otherwise undermined freedom of speech interests by expanding the categories exempted from First Amendment protection beyond what the Supreme Court intended.⁶⁵ Additionally, a lower court found protecting the honor of military awards did not meet the compelling governmental interest standard that is required in order to suppress purely content-based speech.⁶⁶ While recognizing that lying to obtain a benefit

59. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

60. *Id.* (“Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum*, [the law] must be subjected to the most exacting scrutiny.”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (discussing the well-recognized categories that are excluded from First Amendment protection).

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

62. *Id.* at 572.

63. *United States v. Stevens*, 130 S. Ct. 1577, 1580 (2010).

64. *See, e.g., Alvarez I*, 617 F.3d 1198, 1218 (9th Cir. 2010) (finding the Stolen Valor Act unconstitutional), *aff’d*, 132 S. Ct. 2537 (2012); *Rickhoff v. Willing*, No. SA-10-CA-140-XR, 2010 U.S. Dist. LEXIS 96557, at *13 n.4 (W.D. Tex. Sept. 14, 2010) (“[T]he degree of First Amendment protection that must be afforded to the deliberate lie remains unsettled.”); *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1192 (D. Colo. 2010) (establishing the Stolen Valor Act violated the First Amendment), *rev’d*, 667 F.3d 1146 (10th Cir. 2012), *vacated*, 684 F.3d 962 (10th Cir. 2012) (vacating its decision pursuant to *Alvarez II*); *United States v. Robbins*, 759 F. Supp. 2d 815, 816–17 (W.D. Va. 2011) (concluding the Stolen Valor Act was constitutional where a man was prosecuted for claiming during an election campaign to have combat experience and a Vietnam Service Medal), *aff’d in part, vacated in part*, 494 F. App’x 337 (4th Cir. 2012).

65. *See* Editorial, *Criminalize Lying and We’ll All End Up in the Clink*, PUB. OP. CHAMBERSBURG, PA., June 4, 2011 (available on Westlaw with subscription: 2011 WLNR 11174254) (criticizing the Stolen Valor Act as prohibiting free speech).

66. *United States v. Strandlof*, No. 09-00497, 2009 WL 5126540, at *2 (D. Colo. Dec. 18, 2009) (declaring the court could find “no precedent from any jurisdiction holding that the protection of the

or financial gain could be proscribed by legislation, critics claimed state fraud laws could achieve the same objective without prohibiting speech.⁶⁷

Believing the Stolen Valor Act was constitutional, proponents argued false statements were excluded from First Amendment protection under the excepted class of defamatory speech.⁶⁸ Opponents of the Act responded by claiming the Supreme Court previously found in special contexts of criminal defamation, that “*knowingly* false statement[s] and . . . false statement[s] made with reckless disregard for the truth, do not enjoy constitutional protection.”⁶⁹ The Supreme Court ended the debate on June 28, 2012, when it issued an opinion on the leading stolen valor case, *United States v. Alvarez*.⁷⁰

1. *United States v. Alvarez*

In *Alvarez*, the Supreme Court found the Stolen Valor Act of 2005 unconstitutionally violated the First Amendment.⁷¹ The government charged Xavier Alvarez with violating the Stolen Valor Act stemming from an incident where he misrepresented himself as a former Marine and Congressional Medal of Honor recipient at a water district board meeting.⁷² Alvarez was formally charged with “falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the [award].”⁷³ Alvarez pled guilty to the charges and was the first person ever convicted under the Stolen Valor Act, though he reserved his right to appeal the constitutionality of the statute.⁷⁴

The Supreme Court held the Act was a content-based restriction on speech regarding military service, which placed the burden on the Government to prove the statute’s constitutionality under an exemption to

honor and reputation of military awards qualifies as a compelling government interest sufficient to justify content-based regulation of pure speech”).

67. Editorial, *Criminalize Lying and We’ll All End up in the Clink*, PUB. OP. CHAMBERSBURG, PA., June 4, 2011 (available on Westlaw with subscription: 2011 WLNR 11174254).

68. See *Alvarez I*, 617 F.3d at 1219 (Bybee, J., dissenting) (arguing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), allows for the exemption of false speech from First Amendment protection), *aff’d*, 132 S. Ct. 2537 (2012).

69. *Id.* (Bybee, J., dissenting) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)), *aff’d*, 132 S. Ct. 2537 (2012).

70. *United States v. Alvarez (Alvarez II)*, 132 S. Ct. 2537 (2012).

71. *Id.* at 2548.

72. *Id.* at 2542. Alvarez told the Board that he was “a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.” *Id.* (quoting *Alvarez I*, 617 F.3d at 1201–02).

73. *Alvarez I*, 617 F.3d at 1201.

74. *Id.*

First Amendment protection.⁷⁵ The Government asserted the Court should enumerate a new category of unprotected speech because these false statements “‘have no First Amendment value in themselves,’ and thus ‘are protected only to the extent needed to avoid chilling fully protected speech.’”⁷⁶ The Supreme Court reviewed prior criminalization of false speech, such as defamation and perjury suits, noting the traditionally limited nature of prior content-based restraints.⁷⁷ The Court took issue with the broad proscriptions under the Stolen Valor Act, stating, “The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.”⁷⁸ The *Alvarez* Court rejected the government’s argument that it had an important interest in protecting the underlying meaning of the military honors, finding the rationale unpersuasive when compared to the necessity for free speech.⁷⁹ Further, the Government’s objectives did not pass strict scrutiny because other methods, such as public identification of the military imposter would achieve the government’s interests.⁸⁰ Thus, the Supreme Court found the Stolen Valor Act unconstitutional under the First Amendment.

C. Proposed Legislation—*The Stolen Valor Act of 2013*

In response to the *Alvarez* decision, the House of Representatives⁸¹ and the Senate⁸² proposed an amendment to the Stolen Valor Act. Under the bill, the entire current paragraph of Section 704(b), which addresses prosecution for misrepresentations, would be amended.⁸³ The most important modification to the existing statute is the requirement that defendants’ lies must be given “with [the] intent to obtain money, property, or other tangible benefit.”⁸⁴ This crucial addition, in light of

75. *Alvarez II*, 132 S. Ct. at 2543–44.

76. *Id.* at 2543 (quoting Brief for United States at 18, 20, *Alvarez II*, 132 S. Ct. 2537 (No. 11-210)).

77. *Id.* at 2545–46.

78. *Id.* at 2547.

79. *Id.* at 2548–49.

80. *Id.* at 2549.

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

82. Stolen Valor Act of 2013, S. 210, 113th Cong. (2013).

83. *See id.* (proposing the Act be amended by replacing former § 704(b) with a scienter, or wrongful intent, requirement that the defendant sought personal gain); H.R. 258 (proposing the Act be amended by replacing former § 704(b) with a scienter requirement that the defendant sought personal gain).

84. S. 210; H.R. 258.

Alvarez, mandates malicious intent accompany the lie in order to gain a benefit, rather than criminalizing mere words.⁸⁵ This amendment would place such misrepresentations more in line with traditional laws against fraud.⁸⁶ This proposed legislation also mirrors the benefit requirement implemented in state stolen valor legislation.⁸⁷ Additionally, the new legislation does not include a penalty for merely wearing a medal the recipient did not earn.⁸⁸ Because the proposed amendments more narrowly tailor the Act to fit into the fraud exemption of First Amendment protection, this legislation will likely survive constitutional criticism if enacted.⁸⁹

D. *Criminal Prosecution Has Failed at Effectively Deterring Stolen Valor Cases*

1. Problems with Criminal Prosecution

With the fate of the amended Stolen Valor Act in the hands of Congress, the question remains whether certain lying individuals can be prosecuted effectively. However, even if the problems surrounding the Stolen Valor Act's constitutionality are resolved, additional issues still inhibit successful deterrence of these imposters through criminal sanctions.

At the state level, local law enforcement rarely investigate cases against military imposters, unless large sums of money are involved.⁹⁰ The

85. *Supra* note 84.

86. See Dan Frosch, *Fighting for the Right to Tell Lies*, N.Y. TIMES, May 20, 2011, at A10, available at http://www.nytimes.com/2011/05/21/us/21valor.html?_r=1& (stating the proposed legislation would make it a crime of fraud to claim military valor).

87. See, e.g., CAL. PENAL CODE ANN. § 532b (West 2012) (amending the original stolen valor statute to include intent to defraud); KY. REV. STAT. ANN. § 434.444 (West 2008) (requiring "intent to defraud, obtain employment, or be elected or appointed to public office"); TEX. PENAL CODE ANN. § 32.54 (West 2011) (listing material benefits that, if sought by a stolen valor defendant, will fall within the scope of the Act).

88. Compare 18 U.S.C. § 704 (2006) (criminalizing merely wearing an unearned military honor or award), held unconstitutional by *Alvarez II*, 132 S. Ct. 2537 (2012), with S. 210 (containing no provision criminalizing merely wearing an unearned military honor or award), and H.R. 258 § 2(a)(2) (amending the Stolen Valor Act to require representations be made "with intent to obtain money, property, or other tangible benefit").

89. See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (clarifying that fraudulent speech has traditionally been recognized as a class of speech not afforded First Amendment protections).

90. See HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 182–83, 188 (2003) (noting the Veterans Administration very rarely prosecutes stolen valor cases, but giving an extreme example of when the VA stepped in after allegations of over one-quarter million dollars in fraudulently received benefits); Chris Roberts, *Fighting the Fakes: Bogus Military Heroes Spur Outcry for*

federal government tends to focus its prosecution on more serious cases involving higher-ranking medals, such as the Medal of Honor.⁹¹ Generally, the Federal Bureau of Investigation (FBI) has jurisdiction over stolen valor matters, and it is uncertain whether the FBI will have sufficient resolve to investigate such cases.⁹² Perhaps fueling this lack of attention is the attitude that lying about military honors is a victimless crime.⁹³ With so many horrendous and violent crimes to pursue, military valor cases tend to rank low on the priority list.⁹⁴

Corresponding with the lack of high prioritization, prosecutorial discretion prevents a number of cases from ever reaching a courtroom.⁹⁵ Even if local law enforcement investigates thoroughly into the majority of stolen valor cases, the district attorney still retains discretion whether to prosecute the imposter.⁹⁶ Scarce resources, uncertainty of conviction, and political pressures are contributing factors that explain why many cases are never put on the docket.⁹⁷ Furthermore, prosecutors may feel compassion or sympathy for the perpetrator, viewing the phony as old men or women desperately searching for attention.⁹⁸ Because most people exaggerate stories from time to time, prosecutors may be hesitant to impose such harsh consequences on a person perceived as merely boasting too much.⁹⁹ Even when cases are prosecuted and reach the sentencing phase of trial, the sentences imposed are often slight and lenient.¹⁰⁰

Action, EL PASO TIMES (Jan. 24, 2010, 12:00 AM), http://www.elpasotimes.com/ci_14256738 (discussing the issues resulting from de minimis criminal prosecution of stolen valor cases in Texas).

91. Jeanette Steele, *Feds Take Aim at Phony War Heroes*, SAN DIEGO UNION-TRIB. (Jan. 14, 2010, 12:04 AM), <http://www.utsandiego.com/news/2010/jan/14/feds-take-aim-phony-war-heroes/>.

92. See HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE 189* (2003) (recounting a situation where an FBI agent was chided by his captain for “wanting to ‘embarrass an old man’”).

93. See Jeanette Steele, *Feds Take Aim at Phony War Heroes*, SAN DIEGO UNION-TRIB. (Jan. 14, 2010, 12:04 AM), <http://www.signonsandiego.com/news/2010/jan/14/feds-take-aim-phony-war-heroes/> (“[S]ome federal prosecutors don’t make time for stolen-valor cases because they see them as victimless crimes.”).

94. HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE 189* (2003).

95. *Id.*

96. *Id.* at 188–89.

97. *Id.* at 189.

98. *Id.*

99. *Id.*

100. See *id.* at 183 (criticizing the soft sentences of criminals convicted of larceny or fraud of Veteran Association benefits).

2. Alternative Organizations Attempts to Compensate for the Lack of Investigation and Prosecution

In response to the lack of criminal prosecution, several watchdog groups organized to expose individuals who publicly or privately claim false military awards.¹⁰¹ The most prominent, “Home Of Heroes,” provides a comprehensive list of all living Medal of Honor recipients and instructions on how to obtain the military records of a family member.¹⁰² Another website dedicated to uncovering military imposters is “Stolen Valor: Heroes and Patriots. Or Are They?,” which documents news reports on stolen valor cases and lists actual Medal of Honor recipients.¹⁰³

These organizations attempt to supplement investigation and deterrence functions of the criminal prosecution system.¹⁰⁴ To the extent possible, such sites have sought to publish imposters’ lies to further “punish” when criminal sanctions were evaded.¹⁰⁵

However, despite the efforts of various legislative bodies and private groups, criminal sanctions may not be the best approach in stolen valor cases.¹⁰⁶

III. POTENTIAL TORT REMEDIES

Because criminal prosecution provides an incomplete answer to the complex and expanding problem of military impersonators, it is worth

101. See, e.g., *Obtaining Citations for Military Awards*, HOME OF HEROES, <http://www.homeofheroes.com/valor/findcite.html> (last visited April 16, 2013) (providing a service that allows citizens to verify military records); *STOLEN VALOR: HEROES AND PATRIOTS. OR ARE THEY?*, <http://www.stolenvalor.com/> (last visited Mar. 20, 2013) (documenting instances of stolen valor); *Welcome to the Military Times Hall of Valor*, MILITARY TIMES, <http://www.militarytimes.com/citations-medals-awards/about/php> (last visited April 16, 2013) (explaining how to obtain records to verify military-association claims).

102. *Obtaining Citations for Military Awards*, HOME OF HEROES, <http://www.homeofheroes.com/valor/findcite.html> (last visited April 16, 2013).

103. *STOLEN VALOR: HEROES AND PATRIOTS. OR ARE THEY?*, <http://www.stolenvalor.com/> (last visited April 16, 2013).

104. See Chris Roberts, *Fighting the Fakes: Bogus Military Heroes Spur Outcry for Action*, EL PASO TIMES (Jan. 24, 2010, 12:00 AM), http://www.elpasotimes.com/ci_14256738 (discussing watchdog organizations urging lawmakers and government agencies to take more aggressive action in prosecuting stolen valor cases).

105. See *Names*, FAKE WARRIOR PROJECT, <http://www.fakewarriors.org/names.htm> (last visited April 16, 2013) (describing the organization’s previous mission and continued desire to report all stolen valor imposters, but reporting their funding prevented continuation of the practice).

106. See *Alvarez II*, 135 S. Ct. 2537 *passim* (2012) (overturning the Stolen Valor Act of 2005 as unconstitutional); *STOLEN VALOR: HEROES AND PATRIOTS. OR ARE THEY?*, <http://www.stolenvalor.com/> (last visited April 16, 2013) (exemplifying efforts taken by private groups to address stolen valor cases).

exploring whether civil liability can play a role in attaining a legal solution. Civil remedies will not be equally available or compensable for all stolen valor cases. Compared to criminal prosecution, principles of tort law will limit the scope of civil liability for stolen valor cases. For instance, to obtain civil recourse, tort law requires the existence of a private plaintiff who suffered harm.¹⁰⁷

A. *Traditional Causes of Action*

1. Fraud

Persons who misrepresent the existence of their military honors may be liable for fraud. For example: a fake Vietnam veteran who receives money from a veterans' group for a trip to the Vietnam Veterans Memorial;¹⁰⁸ an alleged Purple Heart and Navy Cross recipient who is given free tickets to the World Series and often asked to lead the pledge before baseball games;¹⁰⁹ drivers who fraudulently obtain military license plates to gain free parking; and imposters who acquire thousands of dollars in veterans' benefits.¹¹⁰ Civil fraud is regularly pursued in criminal courts and is perhaps the most obvious claim a plaintiff could bring after being induced to transfer a benefit based upon a misrepresentation of military

107. See *Sprague v. Am. Bar Ass'n*, 276 F. Supp. 2d 365, 374 (E.D. Pa. 2003) (concluding only a plaintiff who has suffered harm can recover in a civil suit); see also Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 674 (2007) ("The key variables in determining whether a particular element of damages will be awarded are the strength of the causal link between the [defendant's action] and the alleged harm, and whether the amount of the loss can be qualified with reasonable certainty.").

108. See B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 206–07 (1998) (describing the group "Operation We Remember," which gave a purportedly-disabled veteran an all-expense paid trip to the Vietnam Veterans Memorial before inquiring veterans discovered the alleged veteran was a fraud); see also HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 34 (2003) (commenting on an email sent to the POW Network from an alleged soldier, attempting to get sponsors for his trip back to Vietnam and Laos).

109. See Clark Leonard, *Man Posing As Decorated Marine at American Legion World Series Was Imposter*, SHELBY STAR (Aug. 24, 2011, 7:34 PM), <http://www.fayobserver.com/articles/2011/08/24/1117932> (reporting George "Gunny" Lauve falsely claimed he was a decorated Marine, befriended the American Legion World Series officials, and was given a free trip to the World Series).

110. See Editorial, *Phony Heroes*, COLUMBUS DISPATCH (July 26, 2010, 5:41 AM), <http://www.dispatch.com/content/stories/editorials/2010/07/26/phony-heroes.html> (emphasizing that people lie to receive a range of tangible benefits spanning from license plates to "Veterans Administration benefits totaling \$280,000"). Purple Heart license plate recipients have the additional benefit of no motor vehicle taxes. B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 206 (1998).

credentials.¹¹¹ In the United States, all jurisdictions acknowledge fraud as a valid cause of action; it is the broadest tort claim available for misrepresentations.¹¹² The Restatement (Second) of Torts defines fraud as:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.¹¹³

Although fraud claims can be based on an omission—as in the case of a speaker’s silence, telling half-truths, or giving opinions that imply fact—the majority of stolen valor cases deal with affirmative misrepresentations to the defrauded plaintiff.¹¹⁴ Fraud extends to misrepresentations even if no words are expressed,¹¹⁵ such as the case if someone impersonated a soldier by wearing a military uniform, or wore military honors-medals with the intention of giving the false impression that the wearer received those honors.¹¹⁶ To successfully bring a civil fraud claim based on an affirmative misrepresentation, the plaintiff must prove the following elements:

(1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation.¹¹⁷

Demonstrating that a defendant made a false representation based on

111. See, e.g., Sarah Brumfield, *Green Beret Impersonator Gets 21 Months*, ARMYTIMES (Aug. 30, 2011 12:22 PM), <http://www.armytimes.com/news/2011/08/ap-green-beret-impersonator-gets-21-months-083011/> (examining a stolen valor case where a man plead guilty to criminal fraud).

112. VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 11–12 (2010).

113. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

114. See Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentations by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 536–55 (2004) (discussing the various types of oral or written misrepresentations that would allow for a fraud cause of action).

115. See *Cadek v. Great Lakes Dragaway, Inc.*, 58 F.3d 1209, 1211 (7th Cir. 1995) (concluding a misrepresentation claim for the defendant’s conduct of parking an inoperable fire truck near the drag strip induced drivers to believe the facility had fire-fighting capabilities).

116. See, e.g., Joe Gould, *Faux Soldier Wore ACUs for First-Class Upgrade*, MILITARY TIMES (June 27, 2011), <http://www.militarytimes.com/blogs/outside-the-wire/2011/06/27/faux-soldier-wore-acus-for-first-class-upgrade/> (criticizing a civilian man who never expressly asked for an airline upgrade, but wore a uniform and prisoner of war patch to give the impression he was in the military).

117. *Hoffman v. Stamper*, 867 A.2d 276, 292 (Md. 2005).

his or her military credentials should be a relatively easy burden for the plaintiff to satisfy.¹¹⁸ If military records cannot be obtained over the Internet, a Freedom of Information Act request can retrieve evidence of the representation's falsity.¹¹⁹ However, in addition to proving a false statement was made, misrepresentations are not actionable unless they are "material" to the plaintiff's decision-making process.¹²⁰ Most jurisdictions include an additional obstacle for liability, increasing the plaintiff's burden of proof from "preponderance of the evidence" to "clear and convincing" evidence.¹²¹

Plaintiffs must prove defendants had the requisite state of mind to commit fraud (*scienter*), which is present when defendants either possessed actual knowledge that their representation was false or were reckless as to the truthfulness of their statements.¹²² In stolen valor cases, where a reasonable person would have personal knowledge regarding

118. There are numerous websites and books dedicated to instructing civilians on how to identify false statements about military service. *See, e.g.*, HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 91–93 (2003) (educating readers on military ranks and providing questions to ask potential imposters); *The Epidemic of Military Imposters: Are These Individuals Heroes or Villains?*, FAKE WARRIOR PROJECT, <http://www.fakewarriors.org/index.htm> (last visited April 16, 2013) (providing networked services to verify military claims and report fraudulent military representations); *Welcome to the Military Times Hall of Valor*, MILITARY TIMES, <http://www.militarytimes.com/citations-medals-awards/about/php> (last visited April 16, 2013) (explaining how to obtain records to verify military-association claims). Prior to 1972, the military identified all soldiers by serial numbers; starting in 1972, the armed forces have used social security numbers to identify all soldiers. HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 92 (2003). Using a person's serial or social security number allows for quick authentication of military valor claims. *Id.* at 137 n.1.

119. *See* HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 92 (2003) (emphasizing a foolproof way to determine whether someone was discharged from the military is through a Freedom of Information Act request, because all former members are documented in the National Personnel Records Center in St. Louis, Missouri).

120. *See* RESTATEMENT (SECOND) OF TORTS § 538 (1977) (requiring a plaintiff bringing a misrepresentation claim to show reliance based on a material misrepresentation that either a reasonable man would find important in their decision-making process or that the maker knows will influence the plaintiff's actions).

121. *Compare* *Tapestry Vill. Place Indep. Living, L.L.C. v. Vill. Place at Marion, L.P.*, No. 9-112/08-1018, 2009 Iowa App. LEXIS 331, at *8 (May 6, 2009) (requiring "clear, convincing, and satisfactory evidence" of fraud), *and* *Gibson v. Fauber*, No. 12-02-00249-CV, 2004 WL 2002560, at *9 (Tex. App.—Tyler Sept. 8, 2004, pet. denied) (mem. op.) ("A plaintiff seeking the recovery of exemplary damages resulting from fraud must establish the elements of fraud by clear and convincing evidence."), *with* *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 791–92 (Minn. 1993) (rejecting the clear and convincing evidence standard for fraud and establishing a preponderance of the evidence standard).

122. *Sedco Int'l, S.A. v. Cory*, 522 F. Supp. 254, 324 (S.D. Iowa 1981), *aff'd*, 683 F.2d 1201 (8th Cir. 1982).

whether they served in the military and achieved certain awards, proving scienter should not be a difficult hurdle—particularly if the defendant falsified documents.¹²³

The requirement that a defendant intended or expected to induce reliance of a particular person helps identify situations in which a potential plaintiff is qualified to bring a fraud action.¹²⁴ If there is no intention to influence a foreseeable recipient of the misrepresentation, there can be no civil action for fraud.¹²⁵ Therefore, if a false recipient were to receive free sports tickets or a free trip, the plaintiff seeking recompense must prove the defendant lied about his military experience with the intent to influence the plaintiff's gift of free products or privileges.¹²⁶ Even if there is no express intention, any foreseeable expectation of reliance—such as a person wearing an army uniform into a restaurant that offers military discounts—could potentially provide a basis for liability.¹²⁷

Additionally, plaintiffs must prove they reasonably relied upon the

123. See, e.g., Sarah Brumfield, *Green Beret Impersonator Gets 21 Months*, ARMYTIMES (Aug. 30, 2011 12:22 PM), <http://www.armytimes.com/news/2011/08/ap-green-beret-impersonator-gets-21-months-083011/> (reporting a man pleaded guilty to criminal fraud after he was caught intentionally falsifying his resume to state he was a colonel in the Army's special forces).

124. RESTATEMENT (SECOND) OF TORTS § 531 cmt. b (1977).

125. *Id.* § 531. The Restatement (Second) of Torts defines an intended result as when a person acts either “with the desire to cause it or acts believing that there is a substantial certainty that the result will follow from his conduct.” *Id.* cmt. c. Just because a third party observes the misrepresentation and then acts in reliance on the lie, is not sufficient to give them a cause of action against the speaker. *Id.* § 531 cmt. d. For a third party to bring suit, a reasonable person must have knowledge that their misrepresentation was especially likely to reach and influence the actions of the third party. *Id.* Thus, a maker does not need to know the identity of the person affected by their misrepresentation if there is a reasonable expectation their lie would reach a class of persons. *Id.* cmt. e. For instance, if a person lies on their resume about military accomplishments, it is reasonable to believe that persons involved with companies or organizations receiving the resume would rely on the resume's contents. See *id.* § 532 cmt. b (“[T]he maker of a fraudulent misrepresentation incorporated in a document has reason to expect that it will reach and influence any person whom the document reaches.”).

126. See *id.* § 531 (stating a person is subject to liability if they intend to influence another by their misrepresentation).

127. See *id.* (noting liability extends to those whom the party making the misrepresentation “intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation”). Compare *Woodward v. Dietrich*, 548 A.2d 301, 311 (Pa. Super. Ct. 1988) (holding a contractor was liable for fraud because the other party could be expected to rely upon the terms of their agreement), with *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 581–82 (Tex. 2001) (concluding that even if there is a general industry practice to use financial audits when considering purchasing companies, financial audits are insufficient to prove an expectation of reliance in the plaintiffs because defendants released the audits to the public, not to the plaintiffs specifically).

misrepresentation and that this reliance directly resulted in their injury.¹²⁸ Demonstrating this causation element does not require plaintiffs to show their reliance was based solely on the misrepresentation, but it must be a substantial factor in the decision-making process.¹²⁹ This “cause-in-fact” requirement mandates plaintiffs “demonstrate that, had the representation not been made, damages would not have been suffered.”¹³⁰ If plaintiffs can demonstrate they gave free baseball tickets away in part because they held the actual belief that the recipient was a Vietnam veteran, then the justified reliance element is satisfied.¹³¹ However, if plaintiffs had actual knowledge of the statement’s falsity,¹³² or if the statement is “preposterous or obviously false,”¹³³ then it will be more difficult for the plaintiff to show their reliance was reasonable.¹³⁴ Additionally, if there are indicia that would reasonably warn an average person of the speaker’s untrustworthiness, a court may find any actual reliance on the misrepresentation by the plaintiff was unreasonable, thus failing to support the reasonable reliance requirement.¹³⁵

In the Internet age, when anyone can quickly verify most claims of military service or awards, is there a duty to investigate prior to claiming reliance?¹³⁶ Generally, courts have not imposed a duty on plaintiffs to investigate prior to acting upon their reliance when a deliberate

128. See RESTATEMENT (SECOND) OF TORTS § 537 (1977) (noting a plaintiff asserting fraud must prove both his or her reliance on the misrepresentation caused his or her action or inaction and that his or her reliance was justifiable).

129. *Id.* § 546. In practice, this is a relatively low threshold because plaintiffs are not required to show they would have acted differently had it not been for the misrepresentation. *Id.* cmt. b. The only requirement for demonstrating reliance is a showing that the misrepresentation “played a substantial part . . . in influencing [the victim’s] decision.” *Id.*

130. VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 57 (2010).

131. See RESTATEMENT (SECOND) OF TORTS § 546 cmt. b (1977) (requiring the fraudulent conduct play a substantial role in the decision making process).

132. *Id.* § 541 (“The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.”).

133. *In re Estate of McKenney*, 953 A.2d 336, 343 (D.C. 2008).

134. See, e.g., *id.* at 339, 343 (finding it is not preposterous for a plaintiff to rely on a misrepresentation that his home would soon be demolished because \$100,000 in back taxes were owed).

135. See *In re AHT Corp.*, 123 F. App’x 17, 18 (2d Cir. 2005) (rejecting a plaintiff’s claim for negligent misrepresentation after a company merger failed because the plaintiff had knowledge the only major shareholder who supported the merger had just resigned and was at odds with the company); see also *Banque Franco-Hellenique de Commerce Int’l et Mar., S.A. v. Christophides*, 106 F.3d 22, 27 (2d Cir. 1997) (“A heightened degree of diligence is required where the victim of fraud had hints of its falsity.”).

136. See *Military Records Requests*, *STOLEN VALOR: HEROES AND PATRIOTS. OR ARE THEY?*, <http://www.stolenvalor.com/records.cfm> (last visited April 16, 2013) (providing links to Internet databases that can be searched to authenticate medal recipients and military service).

misrepresentation is involved.¹³⁷ The Restatement (Second) of Torts also rejects a duty to investigate, even if the misrepresentation would have otherwise been discovered with no expense or trouble to the plaintiff.¹³⁸ Regardless of whether the misrepresentation is to someone in the military with experience and knowledge of how to investigate the truthfulness of a person's claim, courts have held "sophisticated parties" may still rely on the assertions of others.¹³⁹

To succeed in proving liability under a claim for fraud, the plaintiff must suffer ascertainable damages.¹⁴⁰ This element will limit the number of situations that would be successful in a civil suit, because not all misrepresentations of military valor result in a demonstrable loss for the plaintiff.¹⁴¹ For example, a man who falsely represented himself as a Medal of Honor winner gained brief access to a Navy flight simulator at the Marshall Space Flight Center, but did not cause any reported damage to the equipment.¹⁴² Presumably, such access could not be the basis of a fraud claim; absent additional circumstances, such as loss of a job, neither the space center nor any employee suffered a legal injury. The unauthorized access into a private area resulted only in a gain for the imposter, not a loss for the space center.¹⁴³

For recovery of damages, the injury must be a direct consequence of the misrepresentation.¹⁴⁴ However, the fraud need not be the sole or predominant factor influencing the injury.¹⁴⁵ Rather, defendants will be "liable for injuries resulting from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of

137. See *Judd v. Walker*, 114 S.W. 979, 981 (Mo. 1908) (rejecting the notion that "one must deal with his fellow man as if he was a thief and a robber," and holding a speaker may rely on a material fact represented as the truth by another).

138. RESTATEMENT (SECOND) OF TORTS § 540 (1977) ("The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.").

139. See *McEvoy Travel Bureau, Inc. v. Norton Co.*, 563 N.E.2d 188, 194 (Mass. 1990) (holding a travel agent could reasonably rely on a travel company's assertions regardless of the agent's experience in the business).

140. *Hoffman v. Stamper*, 867 A.2d 276, 292 (Md. 2005).

141. See *Sprague v. Am. Bar Ass'n*, 276 F. Supp. 2d 365, 374 (E.D. Pa. 2003) (stating a plaintiff must be harmed to recover under tort liability).

142. *Imposter Falsely Gains High NASA Clearance*, SEATTLE TIMES (June 3, 1998, 12:00 AM), <http://www.community.seattletimes.nwsourc.com/archive/?date=19980603&slug=2754253>.

143. See *Urtz v. N.Y. Cent. & H.R.R. Co.*, 95 N.E. 711, 712 (N.Y. 1911) (concluding it is immaterial whether the defendant gained an advantage by fraudulent conduct; the plaintiff must have lost something of value to recover damages).

144. See RESTATEMENT (SECOND) OF TORTS § 549 (1977) (allowing for recovery under a claim of fraud only when the fraud was the legal cause of the damages sought).

145. *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009).

the wrongful act and might reasonably have been anticipated.”¹⁴⁶ Thus, the damages element is satisfied when plaintiffs establish that they suffered a personal loss by providing a benefit to the imposter, and that his or her decision was based—at least in part—on a belief that a defendant was a decorated hero.¹⁴⁷

B. *Alternative Causes of Action*

1. Appropriation of Name or Likeness

A more sinister form of stolen valor occurs when someone does not merely lie about their military accomplishments, but actually steals a war hero's identity. This assumption of identity is usually committed to fraudulently claim a soldier's Veterans Association benefits.¹⁴⁸ The high rate of economic loss due to stolen identity makes civil liability a particularly appealing option for many private citizens, especially because the government rarely brings criminal suit in veteran benefit cases.¹⁴⁹

There are several potential tort causes of action encompassed by the cause of action “invasion of privacy;” however, appropriation of another's name or likeness most closely deals with defendants who appropriate value associated with the plaintiff's name for their own pecuniary benefit.¹⁵⁰ Veteran benefits vary by state, but usually include access to progressive nursing homes, real estate and property tax exemptions, preference in employment context, funding for education, free or low cost health care, and, most significantly, money in the form of a pension or disability compensation.¹⁵¹ Therefore, a retired veteran's name and identity

146. *Phinney v. Perlmutter*, 564 N.W.2d 532, 546 (Mich. Ct. App. 1997), *abrogated by* *Wajer v. Outdoor Adventures, Inc.*, No. 294985, 2011 WL 240697 (Mich. Ct. App. Jan. 25, 2011).

147. *See Hoffman v. Stamper*, 867 A.2d 276, 292 (Md. 2005) (stating that if defendant's conduct proximately caused damages, then plaintiff can recover).

148. *See, e.g., HENRY MARK HOLZER & ERIKA HOLZER, FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 32 (2003) (reporting a man who stole his dead brother's identity and cashed in Veteran Association benefit checks).

149. *Id.* at 183.

150. *See* Lori J. Parker, *Cause of Action for Identity Theft*, 31 CAUSES OF ACTION 2d, at 1 § 8 (2011) (summarizing that the tort of appropriation of name or likeness seeks to protect against the assumption by another of “values associated with the plaintiff's name or likeness—such as reputation, prestige, social or commercial standing, or public interest [A]ppropriation is not actionable if the plaintiff's name or likeness is published for purposes other than taking advantage of the plaintiff's reputation, prestige or other similar value.”). The other causes of action under invasion of privacy are: intrusion upon seclusion, publicity given to private life, and publicity placing person in false light. RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D–652E (1977).

151. *Veteran's Benefits Explained*, MILITARY.COM, <http://www.military.com/benefits/content/veteran-benefits/veterans-benefits-explained.html> (last visited April 16, 2013).

certainly possesses financial value to the veteran and, consequently, to others who try and appropriate the veteran's identity.

The Restatement (Second) of Torts classifies the tort of appropriation of name or likeness as “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”¹⁵² The critical element of this tort requires the defendant to have the intent to use the soldier's name to benefit from its associated “reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness”; therefore, merely adopting a name identical to another will not suffice to prove the cause of action.¹⁵³ This cause of action is not strictly limited to a defendant using the plaintiff's identity for financial gain; “It applies also when the defendant who uses the plaintiff's name or likeness for his own purpose and benefit.”¹⁵⁴ However, it is imperative to check local statutes before initiating litigation, because several state laws limit recovery to only commercial uses, such as advertising.¹⁵⁵

To recover for tortious appropriation of name or likeness, the plaintiff need only prove the defendant actively sought to appropriate the plaintiff's identity.¹⁵⁶ In most identity theft cases, perpetrators are caught because they receive, or attempt to receive, a benefit under the assumption they are someone other than themselves; this would clearly indicate the requisite intent.¹⁵⁷ In addition to tort law, several states also enacted statutes to help prevent identity theft, which often provide for civil liability.¹⁵⁸ To

152. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

153. *Id.* cmt. c.

154. *Id.* cmt. b.

155. *See, e.g., D'Andrea v. Rafla-Demetrious*, 972 F. Supp. 154, 156 (E.D.N.Y. 1997) (interpreting New York law to limit appropriation cause of action to commercial use only), *aff'd*, 146 F.3d 63 (2d Cir. 1998).

156. RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (1977) (noting that adopting a similar identity is not appropriation; rather, the defendant must “pass himself off as the plaintiff or otherwise seek to obtain for himself the values or benefits of the plaintiff's name or identity”).

157. *See The Growing Problem of ID Theft*, MILITARY.COM, <http://www.military.com/money/personal-finance/credit-debt-management/the-growing-problem-of-id-theft.html> (last visited April 16, 2013) (commenting that identity theft perpetrators will have the ability to “incur fraudulent charges in your name; open new accounts (credit card, bank, etc.) or loans in your name; liquidating an existing bank or brokerage account(s); or obtain picture identification in your name”).

158. *See, e.g., LA. REV. STAT. ANN. § 51:3074* (2005) (mandating that any person conducting a business that stores personal computerized data must notify individuals if they know or reasonably believe their data was taken by an unauthorized person); *MINN. STAT. ANN. § 13.055* (West 2005) (requiring notice be given by a state agency if a database of personal information is breached); *OHIO REV. CODE ANN. § 1347.12(G)* (West 2006) (permitting the Attorney General to bring a civil action upon a state agency for failure to comply with breach of security requirements).

prevent further appropriation, a plaintiff can request an injunction along with monetary recovery.¹⁵⁹

2. Tortious Interference with Prospective Advantage

One of the most public and frequent examples of stolen valor cases occurs during an election when a candidate lies about prior military experience to gain a competitive advantage over his or her opponent.¹⁶⁰ Falsifying military awards is a powerful technique used to gain victory and distinguish a candidate from the competition.¹⁶¹ Military service and honors “recasts a politician in a new light—not some self-serving egomaniac but a selfless public servant.”¹⁶² If a candidate strongly emphasizes his or her valor during the campaign and then wins the election, not only did he or she gain benefits based in part on their lies, but also “[a]n important position that would have gone to someone else is usurped.”¹⁶³ As such, the losing candidate was defrauded out of a chance to take political office.¹⁶⁴

A similar situation arises when a job-seeker enhances his or her resume or bolsters an interview with claims of fake military valor, possibly receiving the job over another well-qualified applicant who, but for the additional “boost” of military awards, would have instead obtained

159. See VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 391 (2010) (discussing how under the law of unjust enrichment, an injunction may be granted “to prevent continuing or threatened appropriation of name or likeness”).

160. See Jonathan Turley, *Politicians and Their Fake War Stories: Not Some Walter Mitty*, N.Y. TIMES (May 19, 2010, 6:35 PM), <http://www.roomfordebate.blogs.nytimes.com/2010/05/19/politicians-and-their-fake-war-stories/> (“[T]he irresistible temptation to invent or exaggerate military service is common to politicians . . .”). For example, in a 2003 re-election campaign, Ronnie L. Robbins, Commissioner of Revenue in Virginia’s Dickenson County “produced and distributed campaign material that [falsely] stated he was a recipient of the Vietnam Service Medal and the Vietnam Campaign Medal.” *United States v. Robbins*, 759 F. Supp. 2d 815, 817 (W.D. Va. 2011), *aff’d in part, vacated in part*, 2012 WL 4017432 (4th Cir. 2012). Robbins also provided reporters with altered military discharge papers to prove that he served in Vietnam. *Id.*

161. See Jonathan Turley, *Politicians and Their Fake War Stories: Not Some Walter Mitty*, N.Y. TIMES (May 19, 2010, 6:35 PM), <http://www.roomfordebate.blogs.nytimes.com/2010/05/19/politicians-and-their-fake-war-stories/> (explaining military experience invokes sympathy in voters and “elicit[s] universal affection”).

162. *Id.*

163. HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 32 (2003).

164. See *id.* (“There is a double fraud at work here. When a Fake Warrior, seeking judicial office, claims a military record to which he is not entitled and then benefits from the lie, he steals more than a judgeship.”).

employment.¹⁶⁵ Once the misrepresentation is exposed, those slighted out of a job might desire to seek recovery from the candidate who falsified military accomplishments to help make them whole from the loss of a potential benefit.

The tort of interference with potential advantage is an often misunderstood cause of action.¹⁶⁶ Its relevance warrants a discussion concerning its application in these kinds of stolen valor cases. Tortious interference was “designed to protect plaintiffs from unjustifiable interference with their commercial or economic relationships.”¹⁶⁷ The cause of action is typically brought when a defendant allegedly interferes with an expectation of financial advantage, such as a job opportunity, between the plaintiff and a third party.¹⁶⁸

Prospective plaintiffs must first establish they held a reasonable expectancy of obtaining the job, which requires more than a mere contemplation or potential benefit.¹⁶⁹ If the plaintiff succeeds, the expected benefit establishes the plaintiff’s damages.¹⁷⁰ In both an election

165. See B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 179 (1998) (detailing a comment made about a supposed veteran). The veteran’s boss stated that the veteran’s alleged Vietnam service “add[ed] an ‘indefinable’ character to his presence.” *Id.* However, it was later discovered that the veteran doctored papers to reflect his Vietnam combat, heroic stories, and passage of the bar exam. *Id.*; see also Annys Shin, *Boast-Busters: Those Who Hunt and Expose Fake Navy SEALs Are Busier Than Ever*, WASH. POST (June 13, 2011), http://www.washingtonpost.com/local/boast-busters-those-who-hunt-and-expose-fake-navy-seals-are-busier-than-ever/2011/06/08/AGQnsbTH_story.html (discussing celebrity trainer Carter Hays who admitted he enhanced his resume by claiming he was an ex-SEAL to “fill a hole in [his] character,” later winning the coveted job of trainer on the television show *Biggest Loser*).

166. See Ronald J. Broida & Thomas J. Handler, *Tortious Interference with Contract and Prospective Advantage in Illinois*, 32 DEPAUL L. REV. 325, 325 (1983) (noting tortious interference with prospective advantage is troublesome for judges and lawyers alike).

167. *Id.* at 327.

168. The Restatement (Second) of Torts describes the claim of tortious interference as:

One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the inference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

RESTATEMENT (SECOND) OF TORTS § 766B (1977).

169. See *Robert’s Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co.*, 982 P.2d 853, 888 (Haw. 1999) (affirming a lost potential bus contract bid was not a reasonable expectation of an economic benefit because appellants never established a correlation between the contract and anticipated revenue).

170. See RESTATEMENT (SECOND) OF TORTS § 774A (1977) (“One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for (a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses for

and a job interview, obtaining definite employment is less than certain. However, prospective relationships are not required to “take the form of an offer, but there must be specific facts proving the possibility of future association.”¹⁷¹ Usually, it is sufficient for the plaintiff to prove there is a reasonable probability that but for the defendant’s interference, the economic advantage would have been achieved.¹⁷² In a campaign or job situation, where there are two final candidates for employment, it might be reasonable for the plaintiff to claim they would have obtained the position had the defendant not been elected or hired.¹⁷³ However, if an election is lost by a landslide, it is unlikely that courts will find the plaintiff had an economic expectancy in gaining office.¹⁷⁴ Additionally, proving the defendant’s misrepresentation interfered with the potential employment—and not just the defendant’s position in the competition—could prove problematic.¹⁷⁵ Courts are very hesitant in interpreting prospective relationships broadly, and a plaintiff who lost a job or election will find it difficult to convince a court of consummation that the future relationship was certain.¹⁷⁶

If a valid expectancy is established, a plaintiff must also prove the defendant possessed knowledge of the plaintiff’s expectation of an economic benefit from a third party and also intended to interfere with that expectation.¹⁷⁷ Knowledge is easily proven in a campaign scenario

which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.”).

171. *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1357 (9th Cir. 1987).

172. *See Youst v. Longo*, 729 P.2d 728, 733 (Cal. 1987) (explaining the causation requirement for maintaining a cause of action for the tort of interference with prospective economic advantage).

173. *See Gold v. L.A. Democratic League*, 122 Cal. Rptr. 732, 739 (Ct. App. 1975) (sustaining the cause of action for interference with prospective economic advantage for a losing candidate in an election and finding his expectancy was the salary he would earn if he won the election).

174. *See Youst*, 729 P.2d at 734 (criticizing *Gold*, 122 Cal. Rptr. 732 because the plaintiff lost the election by a four-to-one margin; the plaintiff’s advantage was “speculative [in] nature” and “most unlikely”).

175. *See* William G. Mayer, *Voting in Presidential Primaries: What We Can Learn from Three Decades of Exit Polling*, in *THE MAKING OF THE PRESIDENTIAL CANDIDATES 2008*, at 169–70 (William G. Mayer ed., 2008) (describing the difficulty ascertaining what factors increase a candidate’s momentum during an election).

176. *See Anderson v. Vanden Dorpel*, 667 N.E.2d 1296, 1299–1300 (Ill. 1996) (rejecting a claim for intentional interference with prospective advantage even though the plaintiff was the leading candidate during interviews and was recommended for hire). *But see Tarleton State Univ. v. Rosiere*, 867 S.W.2d 948, 952 (Tex. App.—Eastland 1993, writ dismissed) (finding the denial of a professor’s tenure qualified as a potential future relationship for tortious interference with prospective advantage).

177. *See generally* RESTATEMENT (SECOND) OF TORTS § 766B cmt. d (1977) (discussing the tortious interference requirement for intent and purpose).

where an identifiable opponent is competing publicly for the same position. However, with ordinary job interviews, individuals do not routinely know the identity of other applicants. Regardless, the defendant will know with reasonable certainty that gaining employment deprived an applicant (the plaintiff) of a contractual relationship with a third party (the employer).¹⁷⁸

To prove intent, a plaintiff must establish the defendant either desired to bring about the interference or knew with substantial certainty that the interference would result from the misrepresentations.¹⁷⁹ A plaintiff would likely be able to demonstrate the defendant perpetuated the lies about military honors for the objective or end goal of increasing the chances of successful employment or election.¹⁸⁰ Some jurisdictions also require a plaintiff to prove the defendant engaged in “[w]rongful means” or “used dishonest, unfair, or improper means” instead of merely interfering in a manner typical of healthy competition.¹⁸¹ Fraud and misrepresentation are considered wrongful means under this cause of action.¹⁸² Thus, misrepresenting one’s military honors and service would satisfy this requirement because lying is not typical behavior in the competition process and indicates deceitful intent.¹⁸³

To obtain civil liability, plaintiffs must ultimately prove causation—that but for the defendant’s lies about military service, it is reasonably probable

178. *See id.* § 16 cmt. b (explaining that under the doctrine of transferred intent it “is not necessarily an intention to cause a harmful or offensive contact or an apprehension of such contact to the plaintiff himself It is enough that the actor intends to produce such an effect upon some other person”).

179. *Cf. id.* § 766B cmt. d (“If he had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper.”).

180. *See* Jonathan Turley, *Politicians and Their Fake War Stories: Not Some Walter Mitty*, N.Y. TIMES (May 19, 2010, 6:35 PM), <http://www.roomfordebate.blogs.nytimes.com/2010/05/19/politicians-and-their-fake-war-stories/> (discussing the clear benefits obtained during an election campaign by politicians lying about military service).

181. *Am. Online Latino v. Am. Online, Inc.*, 250 F. Supp. 2d 351, 363 (S.D.N.Y. 2003). The Restatement (Second) of Torts also mandates the interference be improper, instructing courts to analyze the nature of the conduct, the actor’s motive, the plaintiff’s interests that were interfered, the gain sought, social interests, proximity of the conduct to the interference, and the parties’ relationship. RESTATEMENT (SECOND) OF TORTS § 767 (1977).

182. *See generally Am. Online Latino*, 250 F. Supp. 2d at 363–65 (recognizing fraud and misrepresentation to be wrongful means).

183. *See* RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1977) (recognizing fraudulent misrepresentations as an improper intentional interference).

the plaintiff would have succeeded over the defendant.¹⁸⁴ Thus, the lies must be a substantial factor in placing the defendant ahead of the plaintiff in the selection process.¹⁸⁵ In the employment context, plaintiffs might be able to establish causation by having the employer testify they felt the applicants were equally qualified except for the alleged military accomplishments of the defendant, thereby proving the lies swayed the employer's ultimate hiring assessment.¹⁸⁶

While elections can establish the winning margins of a campaign, it is incredibly difficult for a court to ascertain *what* controlled the voter's final decision.¹⁸⁷ Even if a plaintiff finds voters to testify they chose the defendant largely because of the military misrepresentation (which is unlikely because voters typically use a vast host of factors when making their decision), courts will face difficulty in determining if those voters were the ones who made the difference in determining the outcome of the election.¹⁸⁸

In response, a defendant who lied during a public election might attempt an affirmative defense that their speech was protected under the First Amendment. Political speech has been historically protected to allow for "free political discussion [so] that government may be responsive to the will of the people and that changes may be obtained by lawful means."¹⁸⁹ However, the Supreme Court acknowledged a right for political candidates to obtain tort recovery when their opponent deliberately tells lies about themselves.¹⁹⁰ It is unclear whether courts will extend the same ability to recover from an opponent who tells lies about

184. See *Powell v. First Republic Bank*, 274 F. Supp. 2d 660, 673 (E.D. Pa. 2003) (affirming judgment that plaintiff cannot proceed due to lack of evidence suggesting that the transaction would have occurred but for the interference).

185. See *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2635 (2011) (defining causation as the natural consequence of an action, although not requiring it be the only, last, or nearest cause).

186. See B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 179 (1998) (describing a boss who believed military valor enhanced an employee's disposition).

187. See William G. Mayer, *Voting in Presidential Primaries: What We Can Learn from Three Decades of Exit Polling*, in *THE MAKING OF THE PRESIDENTIAL CANDIDATES 2008*, at 169, 169 (William G. Mayer ed., 2008) (discussing political scientists' challenge of discovering why individuals vote for a certain candidate).

188. See Beth Simas, *Ethics and Political Behavior: A Portrait of the Voting Decisions of Santa Clara Students*, SANTA CLARA UNIVERSITY, <http://www.scu.edu/ethics/publications/submitted/simas/politicalbehaviour.html> (last visited April 16, 2013) (examining the different influences on voters, such as political party, media, perceived set of ethics, and personal background).

189. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

190. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (allowing a political official to recover for defamatory statements if the speaker has actual malice or knowledge of the statement's falsity).

themselves.¹⁹¹ Furthermore, statements made during a *private* election, such as union elections, might warrant the same level of First Amendment protection.¹⁹²

3. Injurious Falsehood

Dannion Brinkley, a self-proclaimed assassin during the Vietnam War, wrote an autobiography about his near death and spiritual experience during the war.¹⁹³ The instant best seller, *Saved by the Light*, along with several other books about Brinkley's war experience, became the subject of a movie.¹⁹⁴ However, it was recently discovered—although not well publicized—that Brinkley was nothing more than a truck driver for the military, and never left the United States during his service.¹⁹⁵ Because the story was printed and advertised as non-fiction, the revelation of Brinkley's lies could render the already-published books worthless to many readers.¹⁹⁶ Additionally, the publisher might be obligated to refund money to readers who purchased the book under the assumption its contents were true.¹⁹⁷

Would the publisher or movie production company possess a viable legal remedy against Brinkley?¹⁹⁸ What about media sources that publish

191. *Cf.* Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 830–31 (Wash. 2007) (en banc) (finding a statute unconstitutionally underinclusive because it forbade defamatory statements about political opponents, but allowed a candidate to make false statements about himself).

192. *See* Ferraioli v. City of Hackensack Police Dep't, No. 09-2663, 2010 WL 421098, at *5 (D.N.J. Feb. 2, 2010) (holding a police officers' labor union election was not beyond the reach of First Amendment protection because the speech related "to a matter of public concern").

193. *See* B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 385–86 (1998) (discussing Brinkley's autobiographical work).

194. *Id.* at 386.

195. *See id.* at 387 (exposing Brinkley as a fraud pursuant to the author's own investigation). Interestingly, the national media has not reported the revelation of Brinkley's misrepresentation. There are no news reports on this issue, which indicates the lies portrayed in Brinkley's books and movie have largely gone unnoticed.

196. *See* *Judge Approves 'A Million Little Pieces' Refund Settlement for Disgruntled Readers*, FOX NEWS (Nov. 2, 2007), <http://www.foxnews.com/story/0,2933,307837,00.html> (discussing readers who demanded their money back after a memoir they purchased contained falsehoods).

197. Such an event occurred in the highly publicized aftermath when James Frey's best-selling memoir, *A Million Little Pieces* (endorsed by the Oprah Book Club), was discovered to have major fabrications about the author's criminal record and accounts of drug abuse. *Id.* The publisher, Random House, set aside \$2.35 million for lawsuits and advertisements to offer any defrauded readers reimbursement. *Id.* In addition, Random House spent "[a]nother \$783,000 . . . in legal fees along with \$432,000 in costs associated with publicizing and carrying out the settlement." *Id.*

198. The ability to privately recover in these situations will become increasingly important because of the current popularity of war stories and memoirs—many full of inaccuracies and discrepancies. *See generally* B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE*

stories about military heroes, only later to recant reports once the subject is revealed as a liar.¹⁹⁹ Highly publicized media stories later revealed as fabrications by the subject harm the publisher and news outlets' credibility, which leads to decreased public interest and lower profits.²⁰⁰

The tort of injurious falsehood is a far-reaching but underused cause of action that includes slander of title and trade libel and typically consists of a "publication, or communication to a third person, of false statements concerning the plaintiff, his property, or his business which cause him pecuniary loss."²⁰¹ The Restatement (Second) of Torts declares a claim for injurious falsehood exists when:

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.²⁰²

VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY 385–434 (1998) (citing numerous examples of books, movies, and speaker presentations based on false or exaggerated military experiences).

199. There are numerous examples of retracted newspaper stories and magazine articles after a fellow citizen notifies the writer of incorrect information. In one such case, a trusting reporter for the *Seary Daily Citizen* printed a story titled *Mistreated Boy, Medal of Honor Man*, recounting a soldier's experience saving his general. HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 61 n.39 (2003). However, once the editor became aware of the story's falsities and retracted the story, the journalist told readers, "[W]e are in the process of considering legal action." *Id.* at 61.

200. See B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 200 (1998) (describing how the *News-Herald* editor of Panama City refused to retract a story with lies of military service because "[t]o do so might cast doubt over the veracity of the other stories in the magazine"); see also Nicole Lazare, *Stolen Valor*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2012/stolen-valor> (last visited April 16, 2013) (discussing the media and Stolen Valor cases).

201. William L. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425, 425 (1959).

202. RESTATEMENT (SECOND) OF TORTS § 623A (1977). Under some factual circumstances, the plaintiff has the option to bring a claim for either fraud or injurious falsehood. However, a plaintiff might prefer to claim injurious falsehood because:

Unlike fraud, injurious falsehood imposes no requirements of intending to induce or actually causing reliance by the plaintiff. All that needs to be proved is that the false statement in fact caused harm as a result of actions by a third party. This simplifies the litigation process and increases the likelihood of recovery by removing one issue from consideration by the judge and jury.

Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 716 (2007).

A publication is not limited to the literal publishing of words on paper, but may also be a “communication intentionally or by a negligent act to someone other than the person whose interest is affected.”²⁰³ Thus, writing a book for publication or purposefully telling a story to a journalist fulfills the intentional communication requirement.²⁰⁴ Even a situation where a person falsely boasts to his friends about his “accomplishments” who then innocently repeat this information to others could create a situation where the person is liable for negligently publishing lies.²⁰⁵

While injurious falsehood typically involves “disparagement of property in land, chattels[,] or intangible things . . . [t]he rule is not, however, limited to them.”²⁰⁶ For injurious falsehoods, it is sufficient that the defendant’s statements caused the plaintiff pecuniary loss from a venture the plaintiff had a financial stake in.²⁰⁷ Book publishers certainly hold an economic interest in the continued success of books that they have invested substantial time and capital.²⁰⁸ Media outlets possess a pecuniary interest in their business reputation for reliable and accurate news.²⁰⁹ Therefore, lies about military services would likely cause damages that are recoverable

203. RESTATEMENT (SECOND) OF TORTS § 630 (1977).

204. *See id.* cmt. b (recognizing spoken or written statements and filed legal documents as forms of publication).

205. *See id.* (discussing forms of publication). The Restatement (Second) of Torts further explains the broad interpretation of publication:

The manner in which the injurious falsehood is communicated is immaterial. It is generally communicated by words written or spoken that assert the statement. Disparaging matter is often published by filing a mortgage or other lien for record. As in the case of libel or slander, there may be a sufficient publication by any form of conduct that is intended to assert or is reasonably understood as an assertion of a disparaging statement. Thus a landowner who encloses a part of his neighbor’s adjoining premises in such a way as to indicate that it is a part of his own has as effectively disparaged his neighbor’s property in the land so enclosed as though he had expressly stated that he himself had title to it.

Id.

206. *Id.* § 623A cmt. a.

207. *Id.*

208. Even with the increasing popularity of electronic books, publishers’ initial investment is substantial. The manufacturing, printing, and distribution of printed books only accounts for approximately 12% of the book’s retail price. Michael Hyatt, *Why Do Ebooks Cost So Much? (A Publisher’s Perspective)*, MICHAEL HYATT: INTENTIONAL LEADERSHIP (Nov. 2, 2010), <http://www.michaelhyatt.com/why-do-ebooks-cost-so-much.html>. Additionally, new costs of digital preparation, quality insurance costs for formatting to e-readers, and digital distribution fees increase digital book production investments. *Id.*

209. *See* B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 200 (1998) (discussing a newspaper editor’s fear that retracting stories will damage the popularity of the publication).

under this cause of action.²¹⁰

A plaintiff must also prove the defendant intended such statements to harm the plaintiff's interest or "should recognize that it is likely to do so."²¹¹ While malicious intent to harm might not exist where the defendant merely attempts to increase his personal community standing, a reasonable person should recognize the book publisher's substantial investment would be threatened if discrepancies in the book's accuracy were revealed.²¹² Establishing recognition of potential harm to a news outlet may prove more tenuous when considering its investment is relatively small and incorrect news stories are common.²¹³ Nevertheless, the last element—knowledge of the statement's falsity—will be present in all stolen valor cases because defendants intentionally told lies they knew were false.²¹⁴

4. Intentional Infliction of Emotional Distress

Although many potentially actionable stolen valor cases cause plaintiffs financial injury, emotional distress could be an even more damaging consequence.²¹⁵ The strong emotional implications of deception, especially because of the highly sensitive nature of war, make it worth analyzing whether intentional infliction of emotional distress represents a

210. See generally RESTATEMENT (SECOND) OF TORTS § 623 cmt. a (1977) (urging "other publications of false statements" which harm a pecuniary interest may result in a claim for injurious falsehood).

211. *Id.* § 623A.

212. See *Judge Approves 'A Million Little Pieces' Refund Settlement for Disgruntled Readers*, FOX NEWS (Nov. 2, 2007), <http://www.foxnews.com/story/0,2933,307837,00.html> (reporting the large financial losses to a publisher after a highly publicized non-fictional memoir was discovered to have parts fabricated by the author).

213. See Tom McNichol, *TIME.com's First Annual Blog Index*, TIME http://www.time.com/time/specials/2007/article/0,28804,1725323_1725329_1725400,00.html (last visited April 16, 2013) (highlighting the thousands of mistakes printed and broadcasted every day in the media). An additional problem for news outlets is that most reporters refuse to admit they were deceived. B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 197 (1998). B.G. Burkett, who made a career of researching the authenticity of Vietnam soldiers' war stories, discovered that when he called to alert a newspaper or magazine of a printed story's falsity most reporters "[hung] up on me or refuse[d] to print a correction." *Id.* at 196.

214. See B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 196 (1998) (describing a man's immediate recognition of his statement's falsity when caught lying on a radio station talk show: "I fabricated the whole thing out of a lifetime of being a nobody").

215. See HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 28 (2003) (suggesting the impact of lies).

viable cause of action to combat lies regarding military honors.²¹⁶

Emotional distress will almost certainly occur when a family discovers a loved one's tales of Vietnam and claims of military decoration were false.²¹⁷ Often the family experiences public humiliation and shame after the supposed hero dies and an investigation into the obituary or denial of burial in a military cemetery uncovers the truth.²¹⁸ Irrespective of whether the emotional distress claims would succeed in these scenarios, the point is moot because the defendant is deceased.²¹⁹ Even if the person is still alive, it is unlikely (although not unprecedented) a relative would pursue legal action to recover for emotional distress.²²⁰

Countless women enter into romantic relationships, seduced by stories of heroism in Vietnam, only to end up in abusive relationships where men falsely excuse their violent behavior based on the trauma they experienced during combat.²²¹ The sympathy these lies evoke from women might influence their respective decisions to stay in abusive relationships much longer than if the men were not claiming war trauma.²²²

Intentional infliction of emotional distress is often an attractive cause of action for plaintiffs because the tort "provides the full range of recovery

216. See RESTATEMENT (SECOND) OF TORTS § 46 (1977) (outlining the requirements for a claim of intentional infliction of emotional distress).

217. See HENRY MARK HOLZER & ERIKA HOLZER, *FAKE WARRIORS: IDENTIFYING, EXPOSING, AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE* 28 (2003) ("A Fake Warrior's spouse and other family members can become so invested in their loved one's imposture that they lose all sense of judgment and often suffer severe instability and mental anguish.")

218. See *id.* at 37–45 (recounting several instances where the authors had to tell family members their dead relatives' claims of military valor were false).

219. The family members have the option to sue the decedent's estate; however, this will not be an attractive solution if they are the executors. See *Bernat v. Williams*, 916 N.Y.S.2d 614, 615 (App. Div. 2011) (hearing a claim for intentional infliction of emotional distress from the former girlfriend of the deceased against the deceased's estate).

220. See, e.g., *Hildebrand v. Hildebrand*, 736 F. Supp. 1512, 1514–16 (S.D. Ind. 1990) (reviewing a daughter's suit against her father for intentional infliction of emotional distress based on allegations of sexual abuse); *Moulton v. Moulton*, 707 A.2d 74, 75 (Me. 1998) (discussing an elder who sued his son and nephew for intentional infliction of emotional distress based on their attempts to evict him from their family home); *Johnson v. Johnson-McHenry*, 978 S.W.2d 142, 143 (Tex. App.—Austin 1998, no pet.) (analyzing an intentional infliction of emotional distress lawsuit between brother and sister when personal items in a cabin were destroyed).

221. See B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 481 (1998) (describing an outpouring of response from women in relationships with abusive men who allegedly suffer from post-traumatic stress disorder based on their experiences in Vietnam).

222. See *id.* at 489 (discussing a woman who stayed with her husband, despite the fact that he would choke her while having "nightmares" in his sleep, because she was deceived into believing he was traumatized by Vietnam combat).

including punitive damages.”²²³ Additionally, in most jurisdictions, the law progressed to allow an independent claim for emotional distress, without requiring an additional tort be pled.²²⁴ A claim for intentional emotional distress requires a plaintiff to establish: (1) the defendant’s conduct was extreme and outrageous; (2) the defendant acted with intent or reckless disregard of causing emotional distress; (3) the plaintiff actually suffered severe emotional distress; and (4) the defendant’s outrageous conduct was the actual and proximate cause of the plaintiff’s emotional distress.²²⁵

Most emotional distress claims fail because the defendant’s conduct does not satisfy the extreme and outrageous requirement.²²⁶ The action must go beyond criminal or tortious intent, and be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”²²⁷ Lying, in and of itself, does not rise to the level of outrageous conduct required for this tort.²²⁸ However, under certain circumstances, courts have considered a defendant’s lies extreme or outrageous.²²⁹ Therefore, whether a plaintiff may bring a claim for emotional distress for misrepresentations of military honors will be extremely fact specific. Lies to family members and friends boasting about false medals or heroic tales in combat, absent additional factors, will likely not be found extreme conduct by the court.²³⁰ On the other hand,

223. Sara Ruliffson, Note, *R.I.P. I.I.E.D.: The Supreme Court of Texas Severely Limits the Tort of Intentional Infliction of Emotional Distress*, 58 BAYLOR L. REV. 587, 588 (2006).

224. RESTATEMENT (SECOND) TORTS § 46 cmt. b (1977).

225. *Id.* § 46.

226. Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 689 (2007).

227. RESTATEMENT (SECOND) TORTS § 46 cmt. d (1977).

228. *See Fletcher v. Insignia/Douglas Elliman*, 768 N.Y.S.2d 197, 198 (App. Div. 2003) (rejecting a claim of intentional infliction of emotional distress because the defendant’s lies were not extreme or outrageous). The Restatement (Second) of Torts emphasizes the policy that people should “be hardened to a certain amount of rough language” and that the law should not “intervene in every case where some one’s feelings are hurt.” RESTATEMENT (SECOND) TORTS § 46 cmt. d (1977).

229. *See Perk v. Worden*, 475 F. Supp. 2d 565, 570–71 (E.D. Va. 2007) (finding an attorney’s blatant lie to plaintiff, misrepresenting she would be personally liable for her business debts, and securing a default judgment while plaintiff was contesting the debt, extreme and outrageous conduct); *see also* RESTATEMENT (SECOND) TORTS § 46 cmt. d (1977) (illustrating that if A lies about B’s husband being in a severe accident and hospitalized, “A is subject to liability to B for her emotional distress”).

230. *See Fletcher*, 768 N.Y.S.2d at 198 (holding executor’s lies to beneficiary’s family members regarding beneficiary’s mental state not extreme or outrageous).

emotional and physical abuse is often considered outrageous conduct.²³¹ Consequently, abuse perpetuated by false claims of military experience might give rise to liability for emotional distress; however, the abuse—not the misrepresentation of military trauma—creates the conduct’s egregious nature.²³²

When determining extreme and outrageous conduct, courts consider the relationship between the parties²³³ and have found an abuse of power to constitute unacceptable behavior.²³⁴ Thus, if an individual misrepresents one’s military status or medals in an attempt to assert authority over a lower ranking serviceman or civilian, the first element could be satisfied.²³⁵

In the stolen valor context, plaintiffs will also find difficulty establishing the defendant’s intention or recklessness in causing severe emotional distress. Individuals usually lie about military accomplishments because of low self-esteem or an attempt to gain a benefit given to servicemen.²³⁶ These motivating factors usually do not comply with the requirement that the defendant intended his or her misrepresentations to result in a plaintiff’s severe emotional distress.²³⁷ However, intent may still be demonstrated if emotional distress is substantially certain to occur.²³⁸ Due to the first element’s high threshold, most circumstances considered outrageous, like abuse, would reasonably result in the plaintiff suffering emotional distress.²³⁹

The third and fourth elements examine the severity of the plaintiff’s emotional distress, and examine whether the defendant’s conduct is the proximate cause. Emotional distress can induce liability only if it is “so severe that no reasonable man could be expected to endure it.”²⁴⁰

231. *See* Toles v. Toles, 45 S.W.3d 252, 261–62 (Tex. App.—Dallas 2001, pet. denied) (concluding emotional and physical abuse sufficiently extreme and outrageous conduct).

232. *See id.* (declaring abuse is extreme and outrageous conduct that should not be tolerated).

233. *Id.* at 261.

234. *See* Hailey v. Cal. Physicians’ Serv., 69 Cal. Rptr. 3d 789, 806–08 (Ct. App. 2007) (analyzing conduct between insurance company and insured).

235. *See* RESTATEMENT (SECOND) TORTS § 46 cmt. e (1997) (“The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.”).

236. *See* B.G. BURKETT & GLENNA WHITLEY, *STOLEN VALOR: HOW THE VIETNAM GENERATION WAS ROBBED OF ITS HEROES AND ITS HISTORY* 174 (1998) (discussing the emotional problems of individuals who lie about military awards and the financial incentives gained by these individuals).

237. RESTATEMENT (SECOND) TORTS § 46 cmt. i (1997).

238. *Id.*

239. *Id.*

240. *Id.* cmt. j.

Emotions that are typically experienced when discovering dishonesty, such as betrayal, sorrow, or humiliation, will not suffice to prove sufficient severity.²⁴¹ However, courts consider the intensity and duration of those emotions.²⁴² While plaintiffs must establish causation, the previous elements will most likely determine the fate of a stolen valor claim. If a plaintiff successfully establishes that “the defendant committed an outrage, that the outrage was intentional, and that the plaintiff’s emotional harm was indeed extreme, then in many cases, the court will allow the jury to infer that the plaintiff’s distress was the natural consequence of the defendant’s tortious conduct.”²⁴³

IV. RECOVERY

A. *Compensatory Damages*

The ultimate goal of civil liability, financial recovery, cannot be obtained unless the plaintiff proves he or she suffered damages.²⁴⁴ As previously discussed, not all lies about military service are punishable under tort law principles due to a lack of ascertainable damages.²⁴⁵ However, a careful analysis of many stolen valor cases illuminates types of injuries for which plaintiffs can potentially recover damages under tort law. Obviously, a plaintiff may always recover actual or compensatory damages that are “directly traceable to the wrongful act and result from it.”²⁴⁶ Compensatory damages focus “on what the plaintiff lost and awards

241. See, e.g., *Leavitt v. Wal-Mart Stores, Inc.*, 238 F. Supp. 2d 313, 317 (D. Me. 2003) (stressing the need for emotional distress claims to consist of more than “usual and insignificant traumas of daily life”), *aff’d in part, vacated in part*, 74 Fed. App’x 66 (1st Cir. 2003); *Nagy v. Nagy*, 258 Cal. Rptr. 787, 791–92 (Ct. App. 1989) (stating claims for such emotions are against public policy); *Gilbert v. Barkes*, 987 S.W.2d 772, 777 (Ky. 1999) (holding that feelings of sorrow did not rise to the level of socially intolerable).

242. RESTATEMENT (SECOND) TORTS § 46 cmt. j (1997).

243. Eric M. Larsson, *Cause of Action for Intentional Infliction of Emotional Distress*, 44 CAUSES OF ACTION 2D, at 1, 36–37 (2010).

244. See *Byington v. Mize*, No. 05-00-00786-CV, 2002 WL 1494219, at *4 (Tex. App.—Dallas July 15, 2002, no pet.) (not designated for publication) (finding defendant’s misrepresentation of medical experience harmless error because no injury was shown in conducting the surgery or in subsequent treatment).

245. See Annys Shin, *Boast-Busters: Those Who Hunt and Expose Fake Navy SEALs Are Busier Than Ever*, WASH. POST (June 13, 2011), http://www.washingtonpost.com/local/boast-busters-those-who-hunt-and-expose-fake-navy-seals-are-busier-than-ever/2011/06/08/AGQnsbTH_story.html (discussing the many stray comments made to strangers, claims of military awards on Facebook pages, or additional insignia on a military uniform that have small to no consequences).

246. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997).

compensation for ‘out of pocket losses.’”²⁴⁷ Each of the tort claims discussed allows for compensatory damages through common law remedies, although state statutes may also provide avenues for recovery.²⁴⁸

If the elements of each cause of action are established, a plaintiff may recover all compensatory damages that were proximately caused by the defendant’s military misrepresentation.²⁴⁹ Accordingly, any damages foreseeable to the defendant as a consequence of the deception are recoverable.²⁵⁰ Therefore, compensatory damages are not limited to merely reimbursing the plaintiff for the benefit lost as a result of stolen valor, but may extend to additional compensation for time and money spent rectifying the defendant’s damage.²⁵¹ For emotional injury, the tort of intentional infliction of emotional distress allows for recovery beyond emotional suffering, providing reimbursement for bodily harm, economic injury, and loss of consortium resulting from the distress.²⁵²

247. VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 74 (2010). A possible alternative to tort liability for stolen valor cases is recovery under the law of restitution; however, an in-depth discussion is beyond the scope of this Comment. *See generally* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT 51 (2011) (discussing when recovery for unjust enrichment is appropriate). In effect, restitution is the exact opposite of compensatory damages, looking to what benefit the defendant gained rather than the plaintiff’s losses, with the goal of “*forcing the defendant to disgorge benefits that it would be unjust for him to keep.*” *Slick v. Reinecker*, 839 A.2d 784, 797 (Md. Ct. Spec. App. 2003). If tort damages and unjust enrichment can both be sustained, the greater of the amounts will generally be granted to the plaintiff. VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 391 (2010).

248. *Compare* *Farfaras v. Citizens Bank & Trust of Chic.*, 433 F.3d 558, 566 (7th Cir. 2006) (allowing compensatory damages for an intentional infliction of emotional distress claim), *Sole Energy Co. v. Petrominerals Corp.*, 26 Cal. Rptr. 3d 798, 813 (Ct. App. 2005) (granting recovery on a claim for tortious interference with prospective advantage), *State ex rel. BP Prods. N. Am., Inc. v. Ross*, 163 S.W.3d 922, 928 (Mo. 2005) (en banc) (allowing recovery of pecuniary loss for injurious falsehood), *Haith v. Model Cities Health Corp. of Kanas City*, 704 S.W.2d 684, 687 (Mo. Ct. App. 1986) (appropriation of name or likeness), *and Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997) (fraudulent misrepresentation), *with* WASH. REV. CODE ANN. § 9.35.020 (West 2009) (providing “civil damages of one thousand dollars or actual damages, whichever is greater,” for identity fraud).

249. ROBERT L. DUNN, *RECOVERY OF DAMAGES FOR FRAUD* 3 (3d ed. 2004).

250. *Arthur Andersen & Co.*, 945 S.W.2d at 816.

251. *See* *Roboserve, Inc. v. Kato Kagaku Co.*, 78 F.3d 266, 274 (7th Cir. 1996) (authorizing recovery for “time and effort wasted in reliance upon misrepresentations” in a business transaction fraud claim). For example, a plaintiff whose veteran’s benefits were defrauded due to stolen identity could recover for time and expenses spent restoring their credit score. *See* Lori J. Parker, *Cause of Action for Identity Theft*, 31 *CAUSE OF ACTION* 2d, at 1, 83 (2011) (discussing the potential to recover the average out of pocket expenses and personal time spent rectifying identity theft).

252. Eric M. Larsson, *Cause of Action for Intentional Infliction of Emotional Distress*, 44 *CAUSE OF ACTION* 2D, at 1, 63–64 (2011).

B. *Punitive Damages*

A civil liability solution for the stolen valor problem should not only include relief for the injured parties, but should also increase deterrence to mitigate the likelihood of recurrence.²⁵³ Plaintiffs may decline to actively pursue civil remedies in stolen valor cases because compensatory damages are often too small to justify the cost of litigation.²⁵⁴ However, if punitive damages were recoverable for such actions, individuals would have a greater incentive to bring suit.²⁵⁵ Furthermore, punitive damages in tort claims serve the same purpose as criminal penalties. Thus, punitive damages would further the goals of deterrence and punishment for those who falsely claim military valor.²⁵⁶

Recovery of punitive damages is possible for claims of fraud, appropriation of name or likeness, tortious interference with prospective advantage, injurious falsehood, and intentional infliction of emotional distress.²⁵⁷ While punitive damages enhance deterrence, courts must consider whether such high recovery is an appropriate punishment for lies—the common thread in all stolen valor cases.²⁵⁸ Because the level of deception in stolen valor cases ranges from a slight exaggeration amongst friends to intentional forgery of documents, courts must engage in a case by case analysis when considering punitive recovery.²⁵⁹

253. See *Chatman v. Lawlor*, 831 A.2d 395, 402 (D.C. 2003) (asserting civil liability through punitive damages should “punish unlawful conduct and . . . deter its repetition”).

254. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“[T]he problem [is] that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

255. See Clay R. Stevens, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 860 (1994) (assessing the public policy purposes behind punitive damages, one of which is an increased “incentive for plaintiffs to bring claims on [] society’s behalf”).

256. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17 (2003) (asserting punitive damages pursue the identical goals of prevention and retribution as criminal prosecution); see also *Chatman*, 831 A.2d at 402 (discussing the deterrent effect of punitive damages).

257. See, e.g., *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 414–16 (recovering punitive damages for fraud and intentional infliction of emotional distress); *Wrap-N-Pack, Inc. v. Kaye*, 528 F. Supp. 2d 119, 126–27 (E.D.N.Y. 2007) (seeking punitive damages for tortious interference with prospective advantage); *Venturi v. Savitt, Inc.*, 468 A.2d 933, 935 (Conn. 1983) (requesting punitive damages for appropriation of name or likeness); *Rite Aid Corp. v. Lake Shore Investors*, 471 A.2d 735, 742–43 (Md. 1984) (determining punitive damages may be recovered for injurious falsehood).

258. See *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 419 (providing courts with guideposts to consider the reprehensibility of the defendant’s conduct when awarding punitive damages).

259. Compare *Former Dickenson County Commissioner of Revenue Sentenced on Defrauding Department of Veterans Affairs and Lying About Military Service*, U.S. ATT’Y OFF. W.D. VA. (July 12, 2011), http://www.justice.gov/usao/vaw/news/2011/robbins_12jul2011.html (describing a county commissioner who altered military discharge documents to include service medals and Vietnam combat experience), with Annys Shin, *Boast-Busters: Those Who Hunt and Expose Fake Navy SEALs Are*

As an attempt to protect civil defendants, certain constitutional and state imposed restrictions exist which hinder excessive plaintiff recovery.²⁶⁰ In *State Farm Mutual Automobile Insurance Co. v. Campbell*,²⁶¹ the Supreme Court reestablished three factors for courts to review when considering punitive damages, the most important of which limited punitive recovery only to cases where the defendant's actions were truly "reprehensible."²⁶² Courts determine reprehensibility by considering whether:

[T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.²⁶³

In *State Farm*, the defendant, an insurance company, altered documents in an attempt to reduce liability and misrepresented to the customer-plaintiff the high danger to its personal assets.²⁶⁴ However, the Supreme Court held the reprehensibility of the defendant's conduct did not require punitive damages.²⁶⁵ *State Farm* is instructive because it involves deliberate deception akin to many stolen valor cases.²⁶⁶ *State Farm* illustrates the high threshold of culpable conduct needed for reprehensibility; therefore, plaintiffs harmed by lies of military awards will

Busier Than Ever, WASH. POST (June 13, 2011), http://www.washingtonpost.com/local/boast-busters-those-who-hunt-and-expose-fake-navy-seals-are-busier-than-ever/2011/06/08/AGQnsbTH_story.html (reporting individuals who misrepresent military service to gain favor when picking up women).

260. See *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 417–18 (arguing the Due Process Clause places limitations on punitive damage decisions by the trier of fact).

261. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

262. *Id.* at 419. The *State Farm* guideposts to punitive recovery are: "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418. *State Farm* also held a defendant's wealth should not be submitted to the jury as a factor for their punitive damage consideration. *Id.* at 427–28; cf. *Chatman v. Lawlor*, 831 A.2d 395, 402 (D.C. 2003) (requiring a plaintiff to establish the wealth of a defendant at trial for punitive damages to be awarded).

263. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 419.

264. *Id.*

265. *Id.* at 429.

266. See, e.g., *Former Dickenson County Commissioner of Revenue Sentenced on Defrauding Department of Veterans Affairs and Lying About Military Service*, U.S. ATTY OFF. W.D. VA. (July 12, 2011), http://www.justice.gov/usao/vaw/news/2011/robbins_12jul2011.html (discussing a stolen valor case where a man deliberately lied about military service and altered documents to reflect his misrepresentations).

face an uphill battle in overcoming constitutional obstacles that limit the imposition of punitive damages.²⁶⁷

States have also imposed laws that make it more difficult for plaintiffs to obtain punitive recovery. Some jurisdictions require a higher level of culpability than required by the common law to entitle the plaintiff to punitive damages.²⁶⁸ The increased culpability necessitates the defendant have malicious intent to harm the plaintiff—an element not present in many stolen valor cases.²⁶⁹ Additionally, states can require a unanimous verdict at the trial level as a prerequisite for punitive liability and refuse to award damages unless the monetary amount is undisputed.²⁷⁰ Laws placing caps on punitive damages or ordering the award be furnished to the state, further limit the potential for recovery.²⁷¹

V. CONCLUSION

Historically, criminal prosecution has been the only approach utilized to combat the increasing problem of stolen valor. The Supreme Court's decision in *Alvarez* eliminated criminal prosecution as a solution for a large number of these cases. Federal and state criminal laws are increasingly limited to situations where lies about military service are used for material gain, removing the benefit of universal application. Furthermore, history demonstrates criminal prosecution of those who lie about military service

267. See Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present and Future of Punitive Damages*, 118 YALE L.J. 392, 400 (2008) (stating the Supreme Court resolved the issue of constitutionality of punitive damages by declaring “[w]e did not previously hold explicitly that a jury may not punish for the harm caused to others. But we do so hold now.” (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 356–57 (2007))).

268. See, e.g., *Kang v. Harrington*, 587 P.2d 285, 292 (Haw. 1978) (limiting punitive damage recovery to cases when defendant acts wantonly, oppressively, or with malice); *Trees v. Kersey*, 56 P.3d 765, 773 (Idaho 2002) (establishing Idaho law only awards punitive damages in “the most unusual and compelling circumstances”); *Rodriguez v. Suzuki Motor Corp.* 936 S.W.2d 104, 110 (Mo. 1996) (en banc) (finding the majority of jurisdictions require clear and convincing evidence to provide punitive damages). *But see* *Schafer v. RMS Realty*, 741 N.E.2d 155, 196–97 (Ohio Ct. App. 2000) (holding that once the elements of fraud have been established, the court can impose punitive damages when appropriate).

269. See *Kang*, 587 P.2d at 287 (requiring malicious intent to harm plaintiff for punitive damage recovery).

270. See TEX. CIV. PRAC. & REM. CODE § 41.003(d) (West 2009) (“Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.”).

271. See, e.g., ALASKA STAT. § 09.17.020(f) (2009) (requiring punitive damages not exceed \$500,000 or three times the compensatory damages); 735 ILL. COMP. STAT. ANN. 5/2-1207 (LexisNexis 2009) (allowing the trial court discretion to give punitive damages to the State of Illinois Department of Human Services); TEX. CIV. PRAC. & REM. § 41.008(b) (prohibiting punitive damages from exceeding two times the economic damages plus non-economic damages, or \$200,000).

or honors, even at its broadest application, failed to effectively deter this deceptive conduct.

Practitioners and lawmakers should actively consider and pursue civil tort liability for stolen valor cases in order to hinder the growing number of military imposters. Unlike criminal prosecution, tort law allows plaintiffs who suffered a serious and cognizable legal injury as the result of stolen valor the opportunity to seek redress. Without civil liability, individuals harmed by charlatans have no other recourse than to hope their state or federal government will prosecute—an avenue that is uncertain. Additionally, if imposters know the law will hold them accountable for their actions—either through criminal prosecution or civil liability—the incentive to lie will diminish.

As in any area of civil liability, punishment of stolen valor cases under tort law principles will depend on a close examination of the facts and will not provide redress for every military misrepresentation. However, tort law does have a role in providing a solution to this expanding problem; therefore, practitioners and courts should take note of this alternative legal remedy to explore its application further. The causes of action addressed in this Comment represent a starting point for civil liability approaches to stolen valor cases. Creatively exploring the different avenues of civil law in order to punish and deter those who seek to steal military honor is essential to a long-term resolution of the stolen valor epidemic.