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I. INTRODUCTION

In *United States v. Alvarez*, Xavier Alvarez, having pled guilty to charges of violating the Stolen Valor Act (SVA) by falsely claiming to have received the Congressional Medal of Honor, appealed the issue of the SVA's constitutionality to the Ninth Circuit.[1] Alvarez claimed that under the First Amendment, the SVA was unconstitutional both facially and as applied.[2] The Ninth Circuit agreed with Alvarez and under strict-scrutiny review held that the SVA was unconstitutional on its face and as applied to Alvarez.[3] Judge Bybee dissented and argued that false statements of fact are not protected under the First Amendment, except in limited circumstances, and that this was not one of those circumstances.[4] The Ninth Circuit declined to rehear the case en banc;[5] however, the Supreme Court granted certiorari.[6]

This Note agrees with the dissent that the SVA is constitutional but does not address the validity of the dissent's argument that false statements of fact are categorically unprotected speech. Rather, this Note argues that the SVA is constitutional because it prohibits only fraudulent misrepresentations, a recognized category of unprotected speech. First, Part II of this Note provides an overview of the facts and the Ninth Circuit opinion in *United States v. Alvarez*. Part III then discusses the legal background of fraud law so as to determine what characteristics the misrepresentations prohibited under the SVA must have in order to qualify as fraud. Finally, Part IV proposes a test based on that legal background for courts to use in deciding whether to classify speech as fraudulent and then applies that test to the misrepresentations prohibited under the SVA. Part V concludes.

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1. United States v. Alvarez, 617 F.3d 1198, 1198 (9th Cir. 2010), *cert. granted*, 132 S. Ct. 457 (2011).
2. *Id.* at 1201.
3. *Id.* at 1216–17.
4. *Id.* at 1218–21 (Bybee, J., dissenting).
5. United States v. Alvarez, 638 F.3d 666 (9th Cir. 2011).
6. United States v. Alvarez, 132 S. Ct. 457 (2011).

II. *UNITED STATES V. ALVAREZ*

A. Facts and Procedural History

Alvarez was an elected member of the Three Valley Water District Board of Directors in 2007. At a joint meeting with another water-district board, Alvarez publicly introduced himself stating, "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."[7] With the exception of the phrase, "I'm still around," everything that Alvarez stated was nothing more than "a series of bizarre lies," as he has never spent even a single day in any of the United States armed forces.[8] The FBI obtained a recording of these misrepresentations and charged Alvarez with violating the SVA, which prohibits people from falsely representing themselves as having received congressional military medals and honors.[9] Alvarez moved to dismiss the indictment, claiming the SVA was unconstitutional as applied to him and on its face. The United States District Court for the Central District of California denied his motion and convicted him. Alvarez appealed the constitutional issue.[10]

B. Ninth Circuit Opinion

In the Ninth Circuit *Alvarez* opinion, the majority held that because the SVA constitutes a content-based regulation of speech, it should be subjected to strict scrutiny unless it fits into one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[11] The majority specifically identified some of these narrowly limited classes as "obscenity, defamation, fraud,

7. *Alvarez*, 617 F.3d at 1200 (majority opinion).

8. *Id.* at 1200–01.

9. 18 U.S.C. § 704(b)–(c)(1) (2006) ("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 . . . shall be fined under this title, imprisoned not more than six months, or both. . . . [And i]f a decoration or medal involved in [the] offense . . . is a Congressional Medal of Honor . . . the offender shall be fined under this title, imprisoned not more than 1 year, or both.").

10. *Alvarez*, 617 F.3d at 1201.

11. *Id.* at 1202 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)) (internal quotation marks omitted).

incitement, . . . speech integral to criminal conduct," "the lewd," "the profane, the libelous, and the insulting or 'fighting words,'"[12] and rejected the dissent's main argument that the First Amendment does not protect false statements of fact.[13]

The dissent asserted that the Supreme Court has held false representations of fact to be categorically unprotected. In support of this assertion, the dissent cited various cases, particularly focusing on *Gertz v. Robert Welch, Inc.*,[14] where the Court held that,

> false statements of fact . . . belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[15]

However, the dissent acknowledged that there are some exceptions to this general rule to "protect speech that matters"[16] and give the First Amendment "breathing space,"[17] but argued that those exceptions do not apply in this case and that the majority has thus "turned the exceptions into the rule and the rule into an exception."[18]

In rejecting the dissent's argument, the majority held that *Gertz* (and the other cases cited by the dissent) simply illustrate that, although all speech is presumptively protected whether true or false, when false factual speech rises to the level of defamation, libel, fraud, perjury, or speech integral to criminal conduct, it becomes unprotected.[19] The majority claimed that in arguing otherwise, the

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12. *Id.* (quoting United States v. Stevens, 130 S. Ct. 1577, 1584 (2010); *Chaplinsky*, 315 U.S. at 572) (internal quotation marks omitted).

13. *Id.* at 1206.

14. *Id.* at 1218 (Bybee, J., dissenting); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. . . . [T]he erroneous statement of fact is not worthy of constitutional protection." (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *Chaplinsky*, 315 U.S. at 572) (internal quotation marks omitted))).

15. *Gertz*, 418 U.S. at 340 (quoting *Chaplinsky* 315 U.S. at 572).

16. *Alvarez*, 617 F.3d at 1219 (Bybee, J., dissenting).

17. *Id.* at 1221.

18. *Id.* at 1219.

19. *See id.* at 1205, 1207 (majority opinion) ("In defamation jurisprudence, the question has never been simply whether the speech 'forfeits [First Amendment] protection by the falsity of some of its factual statements.' The question is always whether the speech forfeits

dissent took the statements about factual misrepresentations from *Gertz* out of context.[20] Thus, the majority concluded that Alvarez's false factual misrepresentations would be presumptively protected and the SVA would be subject to strict scrutiny unless the misrepresentations it prohibits rise to the level of defamation, fraud, or speech integral to criminal conduct (as those are the only unprotected categories of speech the majority thought could possibly apply in this case).[21] However, the majority only briefly mentioned fraudulent speech and speech integral to criminal conduct and instead focused almost exclusively on whether the speech in question could be classified as defamatory, ultimately concluding that it could not.[22]

In its analysis of defamation and fraudulent speech, the majority held that both categories of speech require an element of scienter[23] and a showing of individualized or "bona fide" harm.[24] The majority briefly discussed different types of fraudulent speech, such as perjury and impersonation (though it did not specifically categorize these as fraudulent speech), but found that the prohibited misrepresentations at issue were not sufficiently similar to any of these types of speech to qualify as unprotected.[25] The majority reasoned that, unlike instances of perjury and impersonation, misrepresentations about military honors do not cause any bona fide harm or provide for the speakers, at the cost of another, any benefit to which they are not entitled.[26] After concluding that the SVA prohibits misrepresentations that do not qualify as an unprotected category of speech, the majority applied strict scrutiny to the Act and found that it was not narrowly tailored to the government's compelling interest of "preserving the

its First Amendment protection as a result of its falsity '*and by its alleged defamation of [the plaintiff].*'" (citation omitted)).

20. *Id.* at 1208 ("Unlike our dissenting colleague, we are not eager to extend a statement (often quoted, but often qualified) made in the complicated area of defamation jurisprudence into a new context in order to justify an unprecedented and vast exception to First Amendment guarantees.").

21. *See id.* at 1211.

22. *See id.*

23. *Id.* at 1209. This Note uses a Supreme Court definition of "scienter" as "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

24. *Id.* at 1211.

25. *See id.* at 1211–12.

26. *Id.*

integrity of its system of honoring our military men and women for their service and . . . sacrifice."[27]

This case was considered for rehearing en banc, but rehearing was denied in an opinion containing concurrences by Judge Smith and Chief Judge Kozinski and dissents by Judge O'Scannlain and Judge Gould.[28]

III. SIGNIFICANT LEGAL BACKGROUND

The Supreme Court has clearly established that fraud, as a category, is unprotected by the First Amendment. In *United States v. Stevens*, the Court said that "the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,'[29] . . . and [t]hese 'historic and traditional categories long familiar to the bar,'[30] includ[e] . . . fraud."[31] Circuit courts and the Supreme Court have defined fraud both narrowly and broadly, depending on whether the definition was encompassing the entire category of fraud or a specific type of fraud. For example, the Fifth Circuit has said, speaking of the broad category of fraud, that it "needs no definition; it is as old as falsehood and as versable as human ingenuity."[32] Yet that same circuit, when defining the tort of fraudulent inducement, was much more specific, requiring "a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury."[33] Similarly, the Supreme Court has defined fraud broadly saying, "[f]raud connotes perjury, falsification, concealment, [and] misrepresentation."[34] But when speaking of a particular type of

27. *Id.* at 1216.

28. United States v. Alvarez, 638 F.3d 666 (9th Cir. 2011).

29. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)).

30. *Id.* (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment).

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

32. Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958) (quoting Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941)) (internal quotation mark omitted).

33. Formosa Plastics Corp. USA v. Presidio Engin'rs & Contractors, Inc., 960 S.W.2d 41, 47 (Tex. 1998) (quoting Sears, Roebuck & Co. v. Meadows, 877 S.W.2d 281, 282 (Tex. 1994)).

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

fraud, such as securities fraud, the Supreme Court has sometimes been extremely specific, requiring many separate elements to be met.[35]

To determine which characteristics an action or representation *must* have in order to fit within the category of fraud, it is necessary to examine the requirements for various types of fraud to identify any overarching patterns or rules. Because the Supreme Court has said that fraud encompasses "perjury, falsification, concealment, [and] misrepresentation,"[36] this section will discuss cases dealing with these types of fraud as part of this brief overview of fraud law.

A. Elements of Fraud

One reason it is so difficult to strictly define fraud is that fraud is most often applied in the courts as the enacting legislatures have defined it. Although courts will often fill in the gaps with common-law-fraud principles, when it is clear that the enacting legislature intends to depart from the common law, the courts have adopted that legislature's definition of and requirements for fraud over the common law.[37] For example, in *McNally v. United States*, the Supreme Court held that there was no mail fraud where people had been deprived of their rights to "good government" because preceding case law had commonly held that people could be fraudulently deprived only of tangible property rights.[38] However, after Congress amended the mail-fraud statute in response to *McNally* to specify that it was a crime to fraudulently deprive people of the intangible right to honest services, the Court accepted that definition of fraud and now prohibits fraudulent deprivations of

35. *See, e.g.*, Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (requiring a plaintiff to prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation").

36. *Knauer*, 328 U.S. at 657.

37. *See, e.g.*, Skilling v. United States, 130 S. Ct. 2896 (2010); *see infra* note 73; *see also* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 476 (2006) (quoting Neder v. United States, 527 U.S. 1, 24 (1999)) (holding that "criminal fraud statutes '[do] not incorporate *all* of the elements of common-law fraud'"; thus, elements of reliance normally required in common-law fraud actions are not required in cases of mail fraud because it would be inconsistent with the statutes).

38. McNally v. United States, 483 U.S. 350, 357–58 (1987), *superseded by statute*, 18 U.S.C. § 1346 (2006).

intangible rights (such as rights to honest government and honest services) as well as tangible property rights.[39]

Perjury is one type of fraud that has largely been defined by legislatures, and courts have relied upon those definitions. The Supreme Court, relying on the federal-criminal-perjury statute (which "parallels typical state-law definitions of perjury"[40]), has defined perjury as false testimony under oath "concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory."[41] Moreover, the government is not required to show that the perjury actually impeded the investigation as long as the perjury was capable of doing so.[42]

Along with perjury, Congress has also prohibited other types of misrepresentations that are likely to obstruct the justice system. In a very far-reaching prohibition, 18 U.S.C. § 1001 prohibits anyone "in any matter within the jurisdiction of . . . the United States" from "knowingly and willfully . . . mak[ing] any false, fictitious or fraudulent statements or representations."[43] Because of its broad language encompassing "any" false statement, this statute has been interpreted to cover false statements "of whatever kind" in these situations.[44] Expanding the reach of § 1001 even further, the Court rejected the argument that the statute covers only those misrepresentations that "pervert governmental functions"[45] but

39. *See, e.g.*, *Skilling*, 130 S. Ct. at 2928 (holding that the legislature's addition of 18 U.S.C. § 1346 was meant to reject *McNally*, and thus the Court must accept that schemes to deprive others of the intangible right of honest services qualify as fraud).

40. United States v. Dunnigan, 507 U.S. 87, 94 (1993).

41. *Id* (citing 18 U.S.C. § 1621 (2006)).

42. *See, e.g.*, Brogan v. United States, 522 U.S. 398, 400 (1998) (citing United States v. Abrams, 568 F.2d 411, 421 (5th Cir. 1978) ("The government need not show that because of the perjured testimony, the grand jury threw in the towel. Actual impediment of the investigation is not required. . . . All the law requires is that the witness' answers were capable of influencing the tribunal on the issue before it, including any matters collateral thereto.")). The requirement that the misrepresentations be about "material" matters further ensures that only misrepresentations that have the potential to cause harm are considered fraudulent. But because this materiality requirement does not ensure that harm is actually caused, it seems clear that harm need not actually be caused in order for misrepresentations to be fraudulent.

43. 18 U.S.C. § 1001 (1994), *quoted in* Brogan v. United States, 522 U.S. 398, 400 (1998).

44. *Brogan*, 522 U.S. at 400 (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)).

45. *Id.* at 402.

maintained that even if such a requirement were implied it would most likely always be met, at least in the context of criminal investigations. The Court reasoned that "any falsehood relating to the subject of the investigation perverts [a governmental] function" because "investigation of wrongdoing is a proper governmental function; and . . . it is the very *purpose* of an investigation to uncover the truth."[46] Thus, this further illustrates that misrepresentations may be fraudulent even without actually causing harm as long as there is a potential to cause harm.

Within the broad category of misrepresentation, impersonation could also be classified as fraud. Although most impersonation cases deal with people who dress and act as someone else in order to obtain benefits they are not entitled to, it is possible under many impersonation statutes for someone to be punished based solely on misrepresentations.[47] One prominent example of such a statute is the federal-criminal-impersonation statute, 18 U.S.C.A. § 912, which makes it a crime to 1) falsely assume or pretend to be an officer or employee acting under the authority of the United States and 2) act as such *or*, in such pretended character, demand or obtain any "money, paper, document, or thing of value."[48] This has been applied in circumstances involving only verbal misrepresentations, without any accompanying actions, and thus provides some insight into what characteristics a misrepresentation must have in order to qualify as fraud. For example, in *United States v. Ramos-Arenas* the Tenth Circuit upheld the defendant's conviction for impersonating a government officer when he told a police officer that he was a

46. *Id.*

47. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2006 (2010); COLO. REV. STAT. ANN. § 18-5-113 (West 2011) ("A person commits criminal impersonation if he or she knowingly: Assumes a false or fictitious identity or legal capacity, and in such identity or capacity he or she: . . . Confesses a judgment, or subscribes, verifies, publishes, acknowledges, or proves a written instrument which by law may be recorded, with the intent that the same may be delivered as true; or . . . [p]erforms any other act with intent to unlawfully gain a benefit for himself, herself, or another or to injure or defraud another."), *cited in* People v. Borrego, 738 P.2d 59, 60 (Colo. App. 1987) (holding that misrepresentations, such as giving a false address, can qualify as "any other act intending unlawfully to gain a benefit."); W. VA. CODE ANN. § 61-1-9 (LexisNexis 2010), *cited in* Jordan v. Town of Pratt, 886 F. Supp. 555, 559 (S.D.W. Va. 1995) ("The offense contours are thus straightforward: whenever one falsely represents himself to be a law enforcement officer with the intent to deceive another, that person has violated the statute."); 18 U.S.C. § 912 (2006), *cited in* United States v. Ramos-Arenas, 596 F.3d 783, 785 (10th Cir. 2010).

48. 18 U.S.C. § 912.

border-patrol agent, and the officer reduced his girlfriend's speeding ticket to a warning.[49] The defendant in this case did not produce any fake badge in pretending to be a border-patrol agent, but simply stated that he was one and that his credentials were at his home.[50] The defendant argued that he had not obtained anything of value from this misrepresentation and thus he could not be convicted under the statute, but the court held that the forbearance of his girlfriend's speeding ticket was something of value, regardless of whether the defendant himself actually benefitted from it.[51] Moreover, the court said, "[e]ven if the statute were limited to the false impersonator obtaining a thing of value for himself, the jury could have found that Mr. Ramos did obtain something of value from doing a favor for his girlfriend, if only in elevating his status in her eyes."[52] Thus, *Ramos-Arenas* demonstrates that purely verbal misrepresentations in the context of impersonation may rise to a level constituting fraud if the misrepresentations benefitted the speaker in some way.[53]

Overall, fraud tends to be regarded primarily as a tort "hedged about with stringent requirements" rooted in the common law.[54] These requirements or elements of common-law fraud generally include an intentional and material misrepresentation, made "for the purpose of inducing another to act or refrain from action," which does induce such action or inaction because the misrepresentation was justifiably relied upon, that results in pecuniary loss.[55] But the Supreme Court has established that not all common-law requirements apply in statutorily created fraud actions.[56] So although these requirements may still be relevant[57] to courts when

49. *Ramos-Arenas*, 596 F.3d at 785.

50. *Id.*

51. *Id.* at 787–88.

52. *Id.* at 788.

53. Note also that although some impersonation statutes, like the one at issue in *Ramos-Arenas*, do not explicitly require a showing of harm, because false impersonation will likely cause harm in the aggregate, this area of fraud law, like perjury, still demonstrates an implicit requirement that misrepresentations are only fraudulent if they could potentially cause harm.

54. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 (1963) (quoting HAROLD G. HANBURY & JILL E. MARTIN, MODERN EQUITY 643 (8th ed. 1962)) (internal quotation marks omitted).

55. *See* RESTATEMENT (SECOND) OF TORTS § 525 (1977).

56. *See, e.g.*, sources cited *supra* note 37.

57. *See* McNally v. United States, 483 U.S. 350, 371 (1987) *superseded by statute*, 18

determining whether an action qualifies as fraud, it is clear that an action may qualify as fraud even when not all of these elements are present.[58]

IV. ANALYSIS

Section A of this Part asserts that misrepresentations qualify as fraud and are thus unprotected by the First Amendment when they are made with the intent to deceive, and they have the potential to effectuate some type of harm. Section B then applies this test to misrepresentations about military honors, such as those made by Alvarez, and concludes that such misrepresentations qualify as fraud and are therefore unprotected by the First Amendment.

A. Fraud as a Category of Unprotected Speech

As explained above, the Supreme Court has clearly established that the entire category of fraud is unprotected by the First Amendment.[59] Therefore, the definition that is most important for this analysis is the broad definition the Supreme Court has given for the category of fraud in *Knauer* (rather than the definitions given for specific types of fraud), which is that "fraud connotes perjury, falsification, concealment, [and] misrepresentation."[60] However, this definition is overbroad in the First Amendment context if taken on its face—as it could arguably include misrepresentations that are accidental, negligent, theatrical, or satirical. Thus, to sufficiently narrow this definition, it should be applied in tandem with the two overarching principles that have traditionally been applied to all types of fraud, which are that misrepresentations alone are fraudulent only when they (1) are made with the intent to deceive[61] and (2) have the potential to effectuate some type of harm.[62] Additionally, legislatures

U.S.C. § 1346 (2006); Neder v. United States, 527 U.S. 1, 23 (1999) ("Congress intends to incorporate the well-settled meaning of the common-law terms it uses."); sources cited *supra* note 37.

58. *See, e.g.*, sources cited *supra* note 37.

59. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (citing Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 771 (1976)).

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

61. *See, e.g.*, United States v. Dunnigan, 507 U.S. 87, 94 (1993) (perjury requires "willful intent"); Lord v. Goddard, 54 U.S. 198, 211 (1851) ("Fraud means an intention to deceive.").

62. *See* sources cited *infra* note 68 and accompanying text.

and courts also occasionally require that the speaker receive or intend to receive some benefit as a result of the deceptive speech.[63] However, in cases of statutory fraud, this seems to be a requirement the courts only impose if the statute prohibiting the fraudulent act imposes such a requirement.[64]

It is clear that speech can only be fraudulent if the speakers intended to deceive, but this intent can be presumed if it is shown that the speakers knew their statements were false or knew they lacked sufficient information to make such representations.[65] The Federal Circuit defines the intent to deceive as "a state of mind arising when a party acts with sufficient knowledge that what it is saying is not so and consequently that the recipient of its saying will be misled into thinking that the statement is true."[66] When speakers make false representations about information within their personal knowledge—such as about themselves or their own intentions—it can be presumed that those representations were made with knowledge of their falsity and with the requisite intent to deceive unless it is shown that the speaker mistakenly believed the statement was true.[67]

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63. *See* 15 U.S.C. § 77q (2000) (prohibiting misrepresentations that result in the obtaining of "money or property" within the context of security sales); COLO. REV. STAT. ANN. § 18-5-301 (West 2011) (person commits a misdemeanor if he knowingly "[m]akes a false or misleading statement in any advertisement . . . for the purpose of promoting the purchase or sale of property or services"); MINN. STAT. ANN. § 609.651 (West 2011) (prohibiting misrepresentations that result in someone "claim[ing] a lottery prize"); *see also* sources cited *supra* notes 47–53 and accompanying text.

64. *See, e.g.*, sources cited *infra* note 81 and accompanying text. It seems that it could also be argued that all fraud statutes implicitly assume that speech is only fraudulent if it at least has the *potential* to benefit the speaker. For example, although perjury statutes do not require any benefit to the speaker to be shown and the courts impose no such requirement, perjury in general has the potential to benefit speakers, since they could use the deceptive speech to protect themselves. *See, e.g.*, sources cited *supra* note 42 and accompanying text. Thus, it could be implied that statutes are only valid as prohibitions on fraud if they, like perjury statutes, include this implicit requirement that the misrepresentations have the potential to benefit the speaker. However, even if such a requirement were implied, this requirement would be met by the SVA. *See* sources cited *infra* notes 96–98 and accompanying text.

65. Pequignot v. Solo Cup Co., 608 F.3d 1356, 1362–63 (Fed. Cir. 2010), *reh'g en banc denied*, Pequignot v. Solo Cup Co., 2010 U.S. App. LEXIS 21187 (Fed. Cir. Sept. 15, 2010) (citing Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1352 (Fed. Cir. 2005) ("[U]nder *Clontech* and under Supreme Court precedent, the combination of a false statement and knowledge that the statement was false creates a rebuttable presumption of intent to deceive the public"); Gary v. Jordan, 113 S.E.2d 730, 735 (S.C. 1960).

66. *Clontech*, 406 F.3d at 1352.

67. *See, e.g.*, *id.*; *Gary*, 113 S.E.2d at 735 ("[K]nowledge of the falsity of a

Furthermore, speech can be classified as fraudulent only if the speech has the potential to effectuate some harm.[68] This requirement is very important to the courts in distinguishing "between regulation aimed at fraud," which is constitutional, and "regulation aimed at something else in the hope that it would sweep fraud in during the process," which is likely unconstitutional when regulating speech.[69] Because fraud is most often regarded (and invoked) as a tort,[70] in typical common-law fraud cases the courts will require that harm actually be demonstrated in order to determine damages.[71] However, contrary to the assumptions of the *Alvarez* majority,[72] this does not necessarily hold true when the courts are dealing with different kinds of statutory fraud.[73] In many circumstances, such as perjury, the misrepresentations need only have the potential to effectuate some harm to qualify as fraudulent. [74] In other contexts, the courts may

representation is legally inferable where one makes it as of his personal knowledge . . . ."); Mut. Life Ins. Co. of N.Y. v. Morairty, 178 F.2d 470, 473–74 (9th Cir. 1949) ("If it be shown that the applicant made false statements concerning material facts which facts were of such nature that they were presumably within the personal knowledge of the applicant, as distinguished from mere statements of opinion, the insured is guilty of legal fraud whether or not he intended to deceive the insurer."); Ocean Accident & Guar. Corp. v. Rubin, 73 F.2d 157, 165 (9th Cir. 1934) ("A presumption of intent to deceive is only raised when the statements are made with knowledge of their falsity.").

68. *See, e.g.*, 18 U.S.C. § 1344 (2006) (requiring the obtaining or intent to obtain "moneys, funds, credits, assets, securities, or other property" under the custody of a financial institution for bank fraud); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (requirement that economic loss be shown for securities fraud); United States v. Pierce, 224 F.3d 158, 165 (2d Cir. 2000) (intent "to get money or property" as a wire fraud requirement); Hammerschmidt v. United States, 265 U.S. 182, 187–88 (1924); RESTATEMENT (SECOND) OF TORTS § 525 (1977); sources cited *supra* notes 42–46 and accompanying text.

69. Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 969–70 (1984).

70. *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 (1963) (quoting HAROLD G. HANBURY & JILL E. MARTIN, MODERN EQUITY 643 (8th ed. 1962)) (internal quotation marks omitted).

71. RESTATEMENT (SECOND) OF TORTS § 531 (1977).

72. *See* United States v. Alvarez, 617 F.3d 1198, 1211–12 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 457 (2011).

73. The Supreme Court has ruled that outside of "damage suit[s] between parties to . . . arm's-length transaction[s]" proof of actual injury is not necessarily required. *Capital Gains*, 375 U.S. at 192 (1963).

74. *See supra* notes 41–42 and accompanying text. See also *supra* notes 43–45. Another example of this principle can be seen in states like Louisiana, where it is a crime to make misrepresentations during booking even if no harm is demonstrated. Misrepresentations such as these can still be punished as fraudulent because they have the potential to cause harm, even

imply that harm has been caused because the harm is either intangible (and unquantifiable)[75] or only apparent in the aggregate.[76] This is because certain misrepresentations will almost always cause harm, even if the harm is not readily apparent in each case.[77] Thus, the legislature is permitted to prohibit those misrepresentations.[78]

Most often, courts focus on the harm potentially brought by the speaker, but occasionally the legislature prohibiting the fraudulent misrepresentations also requires courts to establish that the misrepresentations resulted in some benefit to the speaker.[79] This requirement seems more apparent in areas of fraud where the harm caused by the fraud is less likely to be identifiable in individual cases. For example, in the false impersonation context, most statutes require the courts to show that the speaker gained some benefit because of the misrepresentations, though such benefit need not be tangible.[80] This type of fraud, impersonation of officers, would clearly cause harm in the aggregate, but such harm may not be apparent in individual cases such as the *Ramos-Arenas* case. Thus, likely in an effort to provide additional protections for speech, the legislatures (both state and federal) have sometimes required the courts to show that the false impersonator gained some benefit from

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if harm cannot be identified in each particular circumstance. *See, e.g.*, LA. REV. STAT. ANN. § 14:133.2 (2011).

75. *See, e.g.*, McNally v. United States, 483 U.S. 350, 357–58 (1987), *superseded by statute*, 18 U.S.C. § 1346 (2006) (Stevens, J., dissenting) (Justice Stevens argued that there are "scores of . . . examples of such schemes which, although not depriving anyone of money or property, are clearly schemes to defraud." One example he gives is the fraud of "deceptive seduction, . . . [which] often includes no property or monetary loss.").

76. *See supra* notes 43–46 & 68 and accompanying text.

77. *See supra* notes 43–46 & 68 and accompanying text. The dissenters in the *Alvarez* denial of rehearing gave various examples of such misrepresentations. For example, 18 U.S.C. § 1015 (2006) prohibits "any false statement under oath, in any case, proceeding or matter relating to . . . naturalization, citizenship, or registry of aliens." There is no requirement in this statute that the misrepresentations actually harm the naturalization and citizenship process, but because there will almost always be an inherent harm when people make misrepresentations in these matters, the statute is aimed at regulating fraud and is thus not subject to First Amendment scrutiny. 18 U.S.C. § 1015; United States v. Alvarez, 638 F.3d 666, 684 (9th Cir. 2011) (denial of rehearing).

78. *See supra* note 76.

79. This point is illustrated in the *Ramos-Arenas* case described in Part III of this Note. *See supra* notes 47–53 and accompanying text. *See also* sources cited *supra* note 63 and accompanying text.

80. *See* United States v. Ramos-Arenas, 596 F.3d 783, 788 (10th Cir. 2010).

the misrepresentations. However, this is a requirement that legislatures have added, not one that courts have demanded.[81]

Therefore, for regulated speech to be classified as fraud and thus be strictly outside of First Amendment protection, that speech must 1) fit within the areas of perjury, falsification, concealment, or misrepresentation; 2) be made with the intent to deceive; and 3) have the potential to effectuate some harm. However, it is also important to note that just because a statute regulating fraudulent speech might also regulate a small amount of speech not meeting these criteria does not automatically make that statute unconstitutional. Where such a statute is challenged under the overbreadth doctrine, the Supreme Court requires that statute to be substantially overbroad before it will be struck as facially unconstitutional.[82]

B. The Misrepresentations Prohibited Under the Stolen Valor Act Qualify as Fraud

The Ninth Circuit should have upheld the SVA because it regulates only fraudulent speech. Even if the SVA might regulate some speech that is not fraudulent, Alvarez's speech *was* fraudulent, and the number of possible unconstitutional applications of the SVA to others is so miniscule that the SVA is not substantially overbroad.[83]

The SVA's prohibition against falsely claiming to have received military honors clearly fits within *Knauer's* broad definition of fraud because such claims are easily classified as misrepresentations. But, as has been discussed, in order for a statute to truly only target fraud, it must be narrowed enough that it prohibits only those misrepresentations that are made with an intent to deceive and could

81. *See, e.g.*, sources cited *supra* note 63 and accompanying text. For example, in federal perjury, an area of fraud governed by statute, the legislature requires no benefit to result from the misrepresentations and the courts, deferring to the legislature's ability to define fraudulent speech, have not imposed such a requirement. *See, e.g.*, sources cited *supra* notes 40–42 and accompanying text.

82. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

83. As long as the SVA is interpreted to require an intent to deceive, then even in the unlikely scenario where a person actually mistakenly believed he or she had been awarded a medal of honor, that person would not be liable under the Act. *See* United States v. Alvarez, 617 F.3d 1198, 1235–41 (9th Cir. 2010) (Bybee, J., dissenting), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 457 (2011).

potentially effectuate some harm. The speech prohibited by the SVA also meets these requirements because false representations about receiving military honors are presumptively made with knowledge of their falsity (and thus with the requisite intent to deceive), and such misrepresentations effectuate an inherent harm whenever made. Even if the courts were to impose the additional requirement that the speaker receive some benefit as a result of the misrepresentations in order for the speech to be considered fraudulent,[84] the SVA still would meet all the requirements because misrepresentations about receiving military honors bring inherent benefits to the speaker. Thus, the SVA regulates only fraud and therefore should not be subject to First Amendment scrutiny.

First, the SVA only prohibits misrepresentations made with an intent to deceive. Because representations about one's reception of military honors are based on personal knowledge, courts can infer that speakers who make such misrepresentations had full knowledge that the representations were false.[85] Moreover, it is well established that knowledge of a statement's falsity creates a presumption of intent to deceive. Thus misrepresentations about one's reception of military honors are presumptively made with the requisite intent to deceive.[86] Because of the nature of these misrepresentations prohibited by the SVA, which are presumably made with knowledge of their falsity, the SVA inherently includes the requirement that representations be made with the intent to deceive in order to fall within the purview of the statute. Moreover, such a scienter requirement should be read into the statute because courts should "impose a saving interpretation of an otherwise unconstitutional statute so long as it is 'fairly possible to interpret the statute in a manner that renders it constitutionally valid.'"[87] Even the majority in *Alvarez* conceded that reading a scienter requirement into the statute "might be reasonable since most people know the truth about themselves, thereby permitting [the courts] to construe the Act to require a knowing violation."[88]

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84. Perhaps in order to further insulate possibly protected speech even though courts have not previously done this when dealing with statutory fraud.

85. *See supra* notes 65–67.

86. *Id.*

87. Gray v. First Winthrop Corp., 989 F.2d 1564, 1568 (9th Cir. 1993) (quoting Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 762 (1988)).

88. *See Alvarez*, 617 F.3d at 1209.

Second, misrepresentations about receiving military honors inherently harm the reputation and meaning of such honors, as well as the recipients of those honors. In passing the SVA, Congress found that "[f]raudulent claims surrounding the receipt of [military honors] damage the reputation and meaning of such decorations and medals."[89] Similarly, Judge Bybee argued in his *Alvarez* dissent that the harm resulting from false representations about receiving military honors "is surely self-evident."[90] Such misrepresentations "not only dishonor the decorations and medals themselves, but dilute the select group of those who have earned the nation's gratitude for their valor."[91] Misrepresentations about military honors diminish the value of those honors, and this diminished value has been recognized as a real harm that should be prevented in other areas of the law, such as trademark law.[92] Just as the law protects trademarks from diminished value as a result of misuse, the law should similarly protect the value of military honors from such harm.

When General George Washington created military awards he expected that "'these gallant men who are thus distinguished will, on all occasions, be treated with particular confidence and consideration.'"[93] When listeners are deceived into believing that the speaker has received military honors, they are tricked into bestowing their confidence and respect on an undeserving individual. This type of fraud is especially detrimental to society in situations similar to that in *Alvarez*, where such misrepresentations are made in a political context (such as during city council and board meetings) where people are likely to be deciding who to side with on various issues, who to put their confidence in to accomplish different tasks, and who to vote for in future elections. Thus, lies about military honors

89. Stolen Valor Act of 2005, Pub. L. No. 109–437, 120 Stat. 3266 (2006).

90. *See Alvarez*, 617 F.3d at 1234 (Bybee, J., dissenting).

91. *Id.*

92. In the area of trademark law, Congress has passed—and the courts have upheld—various laws that attempt to protect the value of trademarks from dilution by ensuring that trademarks (or trademarks that appear too similar) are not used by other parties not owning the trademarks. *See, e.g.*, 15 U.S.C. § 1125 (2006); Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003).

93. Petition for a Writ of Certiorari, United States v. Alvarez, 132 S. Ct. 457 (2011) (No. 11-210), 2011 WL 3645396, at *3 (citing GENERAL ORDERS OF GEORGE WASHINGTON ISSUED AT NEWBURGH ON THE HUDSON 35 (1782–1783) (Edward C. Boynton ed. 1909) (1883)).

have a particularly strong potential for harming the political process as well as bringing harm to the individual listeners.[94] Just as individualized harm may not be apparent in each instance of perjury, harm may not always be apparent in each circumstance in which people misrepresent themselves as having received military honors. But because such misrepresentations will cause harm in the aggregate, these misrepresentations should be considered fraudulent.

When dealing with statutory fraud, courts have only imposed the requirement that misrepresentations bring some benefit to the speaker when such a requirement was imposed by the legislature on a particular type of fraud.[95] However, even if such a requirement is implied, the SVA only prohibits misrepresentations that will result in inherent benefits for the speakers. As the Government states in its Petition for a Writ of Certiorari for *Alvarez*, "the government intends that military honors should bestow a rare degree of prestige on their bearers," and such honor is reserved "only for the most deserving."[96] When people falsely represent themselves as having received such honors, they are stealing that rare degree of prestige, valor, respect, deference and other intangible benefits to which they are not entitled.[97] These benefits, though hard to quantify and prove, are no less real and often are even greater than tangible benefits such

94. Some scholars have argued that all lies harm the individual listeners and human autonomy because they impose a form of "mental slavery" on the listeners. One scholar has argued that "in one respect lying is worse than outright coercion, because it is more insidious: the victim does not even know that he or she has been taken over and is being manipulated. At least in cases of outright coercion, the victim's mind is free." David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991). Clearly courts cannot consider the mental harm to every individual listener as sufficient harm to classify a misrepresentation as fraud because that would encompass almost all lies of any nature. However, because of the prestige and reputation surrounding military honors in this society, lies about military honors seem to pose an unusually great danger of manipulating and "enslaving" the minds of listeners. Thus it seems that this argument should at least be acknowledged when discussing the possible harms caused by such misrepresentations.

95. *See, e.g.*, sources cited *supra* note 81.

96. *See supra* note 93, at *24 (citing *Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 109th Cong., 2d Sess. 21, 81 (2006) (statement of Hon. Michael L. Dominguez, Principal Deputy Undersecretary of Defense for Personnel and Readiness)). Though not conclusive, it is worth noting that the very fact that there is a problem with people lying about receiving military honors seems to strengthen the assertion that such honors carry inherent benefits.

97. Ironically, if it becomes legal to lie about having military honors then people may likely lose the desire to do so because the inherent benefit that comes with being able to claim membership in such an elite group will diminish.

as money or property.[98] A price tag cannot be placed on being respected and honored in a community. Moreover, such benefits are gained at the expense of those who have received such honors. Once this elite honor becomes diluted by false claims, those benefits will no longer exist even for those who deserve them.

Therefore, the SVA is constitutional as applied to Alvarez because his misrepresentations were made with intent to deceive and they resulted in harm and unearned benefits to Alvarez. Even if no harm can actually be shown, because the misrepresentations made by Alvarez had the potential to effectuate harm, this is sufficient to qualify these misrepresentations as fraudulent. The SVA is also constitutional on its face because it prohibits only fraudulent misrepresentations and any possible overbreadth that exists is not substantial.

V. CONCLUSION

In conclusion, the legislature is free to regulate fraudulent misrepresentations without having to pass First Amendment scrutiny because fraud is categorically unprotected by the First Amendment. Speech should be considered fraudulent if it fits into the categories of perjury, falsification, concealment, or misrepresentation and if the speech is made with an intent to deceive and has the potential to cause harm. The misrepresentations prohibited under the Stolen Valor Act, including those in question in *Alvarez*, fulfill all of these requirements; thus the SVA is constitutional.

*Natali Wyson**

98. These benefits certainly seem at least as valuable as an elevated social status in the eyes of one's girlfriend, which the Tenth Circuit considered sufficient to qualify as a fraudulently gained benefit in the *Ramos-Arenas* case. *See supra* notes 47–53 and accompanying text.

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