

Summary of a Presentation by Professor Keith M. Harrison

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Before I start talking about the stolen valor act and how I got involved in writing an amicus brief, I'd like to follow up on something that concerns New Hampshire. It's a state with the population of 1.3 million, smaller than the population of the metropolitan Washington DC area. It takes about 3.5 hours to drive from the Southern border to the Northern border. The population has been steady at about 1.3 million to 1.5 million for about 3 decades.

Twenty years ago, the total prison population in the state on NH (not including the 10 county jails) was 250. Then our legislature, which consists of 450 people, the largest deliberative body in the United States after congress, and 4th in the world after the U.S. Congress, the UK parliament and the Indian Parliament, decided to change policies.

One of the legislature's favorite things to do has been to get tough on crime. So our prison population has gone from 250 to 2,500, while the state population, has remained the same. We have 2 men's prisons, and a women's prison that the state does not own; it's a former county jail that we have on a lease. The prison population, of the 2,500, fewer than 40% are there for violence. The remaining 60% are there for substance abuse or mental health issues. It costs about \$33,000 a year, minimum, to house a person in our prison, and we have very few community mental health or substance abuse treatment programs. Our current state prison commissioner is a former and retired chief of police from a smaller town, and I was at a conference with him, and he said within six months of becoming prison commissioner, his view on how to deal with crime in New Hampshire shifted 180 degrees. So it's not just a problem of how to deal with the elderly people who are incarcerated, many of whom *should* be incarcerated for the rest of their lives for committing violent crimes, but we have a lot of people there who are there for how we choose to deal with things generally.

Let me get to my main point. I will admit that what I'm about to talk to you about probably has nothing to do with what you do in your day to day practices. But I think it will be interesting to you nonetheless.

Let me tell you how we got involved in the stolen valor case. My background for the past 30 years has been teaching criminal law and criminal procedure. I work at a school that has been built on teaching intellectual property law, that's why the school was founded, to ensure a better education for those who wanted to become patent attorneys. What we have found, on the faculty, is that only about 40% of our students are there for intellectual property, the rest are there for the various reasons students go to law school. But it's like there's a huge gulf: given a choice, the IP students would never take a course that didn't have IP in the title, and vice versa.

A couple of colleagues asked me to teach a course on IP crime, to act as a bridge between the two groups. There are a growing number of intellectual property crimes in both the state and federal dockets now. Every one of the 94 US Attorneys' offices is now required to have at least one, and in some cases more than one, attorney trained in intellectual property crime prosecution. One of the reasons for this is that this is a crime that has become very lucrative. Crime goes where the money is. For example, many containers on container ships contain many things we don't want in our country: human slaves, cocaine, and counterfeit goods. Because there is money in counterfeit goods. And one of the examples I was thinking of is all of the music companies that were going after college kids for sharing music. One of the worst PR moves they could have made. While that is a crime, it's not one of the most serious crimes. We also think about fake Gucci bags. But what we're really worried about is counterfeit airplane parts. These things are working their way into the supply chain, and they are frequently not made to specification. While this is not a big deal for fashion supplies, it matters for airplane parts, or medical devices, or pharmaceuticals.

A few years ago, I could have told you that the US supply chain for pharmaceuticals was safe. But there have been a few recent instances of counterfeit drugs making their way into the supply chain. There was an incident a few years ago of several people dying in Panama from cough syrup, that had been purchased from a legitimate supplier, but the supplier had gotten the raw materials from China, and what he thought was a legitimate ingredient, was basically a chemical used for making antifreeze. Things like the yellow paint used on highways are being used to give medication their color.

As part of getting ready for this new task, last year I undertook a task of actually sitting in on several classes to pick up things like trademark and copyright law. And one of the techniques that I like to use is to give my students seemingly unconnected ideas and let them try to determine how they're connected.

There are 3 things I'd like you to think about during my presentation, and I promise they are connected:

1. The Victoria's Secrets Wonder bra
2. The Gay Games
3. The Congressional Medal of Honor

One will lead to the other, I promise.

So I'm sitting in, within a month's period, in one of my colleague's classes, and we're dealing with a case called *Mosely v. V. Secret Catalog, Inc.*

Mosely is Victor Mosely and his wife, who were proprietors in Kentucky of a novelty store which they called "Victor's Secrets" and V. Secret's Catalog incorporated. V. Secrets Catalog, Inc. is the owner of Victoria's Secrets and they did not appreciate the Mosely's choice of names, so they sent a Cease and Desist letter. The Moselys changed the name to Victor's Little Secrets, they thought that would suffice. That wasn't good enough for Victoria's Secrets, so they sought an injunction in federal court under Kentucky's trademark law to prevent the use of their chosen

name for the store. I should tell you, there's an idea that famous or "strong" trademarks are treated differently. Trade mark law is to protect consumers, so that a die hard Pepsi drinker doesn't get Coke. But for strong marks, the idea is that the law also protects the owner of the trademark from tarnishment. Obviously, there's a 1st amendment issue. But the Supreme Court in 2003 upheld the concept in trademark law of being able to squash the speech of people like Victor Mosely to protect the strong trademark.

When I read this case is when I first heard about Xavier Alvarez's case in California. Google his picture, and you will find at least one video showing him.

Alvarez was elected to the Pomona County water board, and at the first meeting, he stood up and introduced himself as a retired Marine, having served 25 years in the Marine Corps (which is odd, because every picture of him is in an Army uniform), said he was in Vietnam, got shot up by the same guy several times, and received the Congressional Medal of Honor. He also claimed to have had an affair with a famous movie star, and played for the Detroit Red Wings. Alvarez has a problem with the truth. I don't have to worry about calling him a liar, because the 9th circuit and the Supreme Court say the same thing.

He was indicted, because the 2006 Stolen Valor Act amended part of the US code that dealt with wearing unearned military awards. It made it not only a crime to wear the unearned awards, but to just say that you had earned it. Not as far as any attempt to defraud. CMH recipients have some small privileges, and Alvarez didn't try to claim them. The law made it a crime just to say that you had won the Congressional Medal of Honor.

That same time period, was when I read about the first news release of Salvatore Giunta, the soldier who became the first living recipient of the CMH from Operation Iraqi Freedom.

If you have a minute, go to the CMH website. All of the information on the medal, as well as each award citations.

So I read about Victoria's Secret, I read about Alvarez, and I read about Specialist Giunta, And I had a disconnect.

I asked a colleague about it, and we compared the idea of Victoria Secrets and the CMH, and he said the CMH is not in commerce, which differentiates it. The basis for Congress to enact IP law is split. The authorization for patent and copyright is explicitly mentioned in the constitution, while the basis for trademark is in the commerce clause.

I asked another colleague. Alvarez's case proceeded in the district court, and he pled guilty, but appealed the constitutionality of the act. The 9th Circuit panel said the act was unconstitutional. The US attorney's office used their IP attorney, so the US government must think this is a trademark issue, right?

So I asked my colleague about it, and kept her attention after the 9th Circuit refused to reconsider it en banc, and affirmed the panel. The Supreme Court granted cert, and my colleagues paid

more attention to my questions. My thanks to my colleagues and students for helping with the research on this.

I had to explain uniforms and awards and ribbons to my colleagues, and that some of them meant achievement is signified, I was here, or did this, etc., or I was in command. While the Stolen Valor Act does criminalize the wearing or the statement that you rate these awards, it has a higher penalty for the higher awards for valor, such as the CMH, Silver Star, or Purple Heart. I showed my colleagues my uniform, and that of the other JAG lawyers. My colleague decided that this wasn't the Victoria's Secret case, but rather, the Gay Games.

In another case, San Francisco Arts and Athletics Association v. The Olympic Committee. In the 80's, the SFAAA wanted to have the "Gay Olympics." Congress had passed a law to protect the Olympics, and had given the Olympic Committee the authority to protect the use of the 5 rings and the Olympics name. The Special Olympics has their permission. The Gay Olympics did not get their permission. The Supreme Court upheld this protection, and ruled against the Gay Olympics. It was clear, there would not be any confusion in the marketplace, no one would accidentally buy tickets to the Gay Olympics. However, the USOC has the authority to prevent use of that name.

Susan Ritchie, my colleague, noticed similarities between this and the CMH Society. The CMH Society received Congressional charter, and among its duties is to protect the integrity of the CMH. This is not a trademark designed to prevent confusion, nor is it designed to protect famous or strong marks. It's designed to enable a group of people to prevent having their name or symbols used in commerce. Churches do this. Fraternal organizations do this. So do some military units, the 82nd airborne, the Navy SEALs, etc. The CMH society is limited to the recipients of the Medal, and has a clear charter to protect the recipients and the integrity of the medal.

My colleagues and I then discussed the flag burning cases. A lot of us wear flag lapel pins. Not the same thing. Burning the flag is an expression of speech. The argument goes that the CMH is not a national symbol. A 1st Amendment expert begins to work with us, and we try to figure out how far the Court has gone in protecting commercial trademarks. Some of us thought that the Stolen Valor Act was trying to prevent free speech.

We decided the Supreme Court could protect the Stolen Valor act without disturbing existing jurisprudence on the 1st Amendment or trademark law.

Now there are other organizations, such as the purple heart organization, and the argument gets weaker with medals awarded in greater numbers. We argued in our amicus that the CMH society was protected through the Congressional charter and the limited number.

It was argued on February 22, and we're awaiting the decision. There are about 12 veterans' organization and fraternal organizations representing veterans' interests that filed on behalf of the government, and some organizations like the ACLU that are supporting the proposition that the Act is an unconstitutional infringement on the freedom of speech. Alvarez himself is currently in prison, and it has nothing to do with the CMH statements he made; he's in prison for

defrauding some local government in California. He stole money from the water board. He's not a sympathetic defendant.

Our brief did not support either party, we're simply pointing out to the Court is that among the tools they have available is the SFAAA case, which, as far as we can tell, is indistinguishable from this. If they can prevent private citizens from using the Olympics name, they should be able to do this. Alvarez wasn't making political speech, he was trying to claim the glory of another organization. Not many responses to our brief were very positive.

However, at oral arguments, three justices raised this trademark issue that only we had brought up. Whether they will address it, who knows. It's not the question that was granted, and my colleague said they couldn't base their decision on an issue that wasn't briefed. I replied that I think they can, because the only other time I had been to the Supreme Court, in *United States v. Solario*, we addressed the concept of service connection to court-martial jurisdiction. A Coast Guard case. I participated in the amicus brief with the ACLU. No one thought they could jettison the service connection requirement, and they did. I don't think they're bound by the issue granted. Nothing prevents them from upholding this statute under the precedent of the SFAA.

And that's all I have, if there are any questions.