

# *Nova Law Review*

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# NOVA LAW REVIEW

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## INTRODUCTION:

# WOUNDS OF WAR: MEETING THE NEEDS OF ACTIVE-DUTY MILITARY PERSONNEL AND VETERANS WITH POST-TRAUMATIC STRESS DISORDER

KATHY CERMINARA\*  
OLYMPIA DUHART\*\*

Nearly twenty percent of all returning troops are reporting symptoms of Post-Traumatic Stress Disorder (PTSD).<sup>1</sup> And those are just the ones we know about.

Despite a heightened social awareness of the problem, the numbers continue to rise. “Of the more than 2.6 million active-duty, National Guard, and reserve service members who have been deployed to Operation Enduring Freedom (OEF) in Afghanistan since 2001 and Operation Iraqi Freedom (OIF) since 2003, an estimated 13–20% of them have or may develop PTSD.”<sup>2</sup> Almost 30% of veterans treated at Department of Veterans Affairs (VA) hospitals and clinics have been diagnosed with PTSD.<sup>3</sup> Veterans advocates say even those numbers do not tell the whole story.<sup>4</sup>

While PTSD is typically associated with high anxiety and depression, the disorder is complex. Like its origins, PTSD manifests in complicated and numerous ways. Symptoms include, among others, distressing nightmares, flashbacks, diminished interest in significant activities, detachment from others, sleep problems, irritability, concentration problems, and hypervigilance.<sup>5</sup> The symptoms can be debilitating, so much so that the disorder

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\* Professor of Law and Director of Faculty Development, Nova Southeastern University Shepard Broad Law Center. This symposium could not have been organized without the superlative assistance of Amanda Sejba and Lydia Harley.

\*\* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. Thanks to Lydia Harley and Joseph Morgese for their help with this introduction.

1. *One In Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORPORATION (Apr. 17, 2008), <http://www.rand.org/news/press/2008/04/17.html>.

2. THE NATIONAL ACADEMIES, INSTITUTE OF MEDICINE, TREATMENT FOR POSTTRAUMATIC STRESS DISORDER IN MILITARY AND VETERAN POPULATIONS: INITIAL ASSESSMENT xiii (2012).

3. JAMIE RENO, *Report: Nearly 30 percent of Iraq, Afghanistan veterans have PTSD*, DENVER POST, Oct. 24, 2012, <http://www.americanhomecomings.com/news/2012/10/24/report-nearly-30-percent-of-iraq-afghanistan-veterans-have-ptsd/>.

4. Some advocates, for example, says the VA has been “underestimating” the number of veterans with PTSD for years. *Id.*

5. THE NATIONAL ACADEMIES, *supra* note 4 at 27.

can result in marital and family difficulties, loss of jobs, bankruptcies, and even suicide. According to reports, Pentagon records show 349 suicides among active-duty troops in 2012.<sup>6</sup> This number exceeded the 301 suicides recorded in 2011 and the Pentagon's own internal projection of 325.<sup>7</sup>

In our own backyard—in suburban South Florida—a decorated veteran machine gunner in the Marine Corps who had been diagnosed with PTSD took his own life.<sup>8</sup> John Lutz had earned thirteen commendations while serving in Afghanistan and Iraq, but had struggled with PTSD and depression since his discharge eighteen months prior to his death.<sup>9</sup>

These alarming statistics and the stories of people such as John Lutz drive home the importance of focusing attention on the epidemic of PTSD.

The legal system has tried in some ways to address issues raised by PTSD. Once veterans struggling with the disorder encounter the legal system through criminal charges, for example, veterans' courts have been developed across the country as pretrial diversion programs assisting veterans in obtaining the assistance they may need. Nova Southeastern University (NSU) was an appropriate place to host a national PTSD symposium because we are fortunate here in South Florida to have a veterans' court in each of Miami-Dade, Broward and Palm Beach counties. The Honorable Edward Merrigan, who recently became judge of the Broward County Veterans Court, shared his expertise with us at the symposium and discussed the functioning of that problem-solving court.

Those problem-solving courts build upon the important work of another distinguished symposium participant. The Honorable Ginger Lerner-Wren created the nation's first mental health court, another form of problem-solving court, here in Broward County around ten years ago.

Indeed, committed and innovative members of the judiciary exemplify the myriad ways in which the community has mobilized to combat the increase in incidence of soldier suicide and other manifestations of PTSD among veterans and active-duty military personnel. Problem-solving courts are a critical component to finding help for those struggling with PTSD.

All such problem-solving courts build upon the work of two law professors who developed and nurtured “therapeutic jurisprudence,” or “TJ,” as a

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6. Robert Burns, *2012 military suicides hit a record high of 349*, AP, (Jan. 14, 2013), <http://bigstory.ap.org/article/2012-military-suicides-hit-record-high-349>.

7. *Id.*

8. Mike Clary, *Marine From Davie Takes Own Life After Battling Demons of War*, SUN-SENTINEL, January 16, 2013, [http://articles.sun-sentinel.com/2013-01-16/about/fl-marine-suicide-20130115\\_1\\_john-lutz-8th-marine-regiment-helmand](http://articles.sun-sentinel.com/2013-01-16/about/fl-marine-suicide-20130115_1_john-lutz-8th-marine-regiment-helmand).

9. *Id.*

legal theory.<sup>10</sup> TJ “asks us to look at law as it actually impacts people’s lives” and focuses on the law’s influence on emotional life and psychological well-being. It suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness.”<sup>11</sup>

However, the law cannot repair all of the problems created by PTSD. In organizing the symposium at NSU, we worked hard to reach out to various experts and showcase creative approaches to the problem of PTSD as a medical, psychological, social, interpersonal, and legal problem. Speakers, for example, ranged from a physical therapist currently practicing with the Army to a representative of the National Alliance on Mental Illness; from an NSU alumnus/officer in the Florida Army National Guard to a psychiatric clinical social worker with the Broward County Veterans Administration Clinic. Most important, we were also honored to host veterans struggling with PTSD who courageously shared their stories with us. The presentations from veterans and members of veterans’ families gave all of us—organizers, participants, and attendees alike—unique insight that helped us all better understand the complexity of the issues PTSD raises.

Michael Cabbage was brave enough to take the stage at our symposium and share his story with the world. We are incredibly grateful for his willingness to help us truly see and hear the veterans who give up so much for us but often get so little in return. Cabbage, 1LT United States Army, was joined at his panel by Carlo Galluccio and Paula Lawler Gallucico, a married couple who addressed the impact of PTSD on veterans and their families. On that panel as well, D. Nicole Johnson Starr, founder of the PTSD Retreat, gave everyone in the audience a taste of what PTSD feels like with an interactive demonstration; and Dr. Kate McGraw of the Defense Centers of Excellence addressed the effects of PTSD on women warriors. And though he could not join us in person, Pulitzer-Prize-winning photographer Craig Walker shared a slide show of photographs of Scott Ostrom, a veteran living with PTSD. In raw and unforgettable images, we were able to see up close the constant and overwhelming impact of PTSD.<sup>12</sup>

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10. See, e.g., DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (1996).

11. Michael L. Perlin, “*John Brown Went off to War*”: *Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 3, 9 (2013).

12. *Craig F. Walker of Denver Post Wins Pulitzer Prize for Feature Photography*, THE DENVER POST, Apr. 16, 2012, [http://www.denverpost.com/breakingnews/ci\\_20408466/craig-f-walker-denver-post-wins-pulitzer-prize#ixzz2J1QEIZNW](http://www.denverpost.com/breakingnews/ci_20408466/craig-f-walker-denver-post-wins-pulitzer-prize#ixzz2J1QEIZNW).



The articles in this symposium reflect the desire to craft creative solutions—both in and outside the box—to combat the PTSD problem. This symposium features articles from a variety of psychological, psychiatric, medical, sociological, and philosophical experts.

Clinical psychologists Raquel Andres-Hyman and Scott M. Hyman, from the Miami Veterans Affairs Healthcare System and Carlos Albizu University respectively, lead this special issue of the *Nova Law Review* with *An Overview of Combat-Related Post-Traumatic Stress Disorder (PTSD)*.<sup>13</sup> These two authors introduce us to the difficulties faced by those fighting in Iraq and Afghanistan, in Operation Enduring Freedom, and Operation Iraqi Freedom, many of whom, as reservists and National Guard soldiers, lack the security and support inherent in residence on base as active-duty service personnel. Combined with the inherent stressors of combat; the inability to distinguish between combatant and non-combatant, friend and foe, the circumstances of deployment have combined to lead to an unprecedented number of returning warriors suffering from PTSD. PTSD is “an anxiety disorder induced by exposure to a traumatic event. Although the psychological effects of combat have long been recognized (in previous wars, the symptoms now associated with PTSD were known as ‘shell shock’ or ‘battle fatigue’), the American Psychiatric Association did not codify PTSD as a separate mental disorder until 1980.”<sup>14</sup> These authors introduce the reader to the diagnosis and its co-morbidities, effects, and treatment. Their article thus equips the reader to absorb the remaining articles in this issue with a solid grounding in clinical facts.

The most devastating effect of PTSD is suicide, and psychologist Daniel Reidenberg tackles that subject with law student co-author Natasha Shaikh in *Making Post-Traumatic Stress Disorder A Priority: Saving Veterans From Suicide*.<sup>15</sup> Suicide is rampant among the armed forces; in late January 2013, just a few days before this symposium, the Associated Press reported that Pentagon records revealed 349 suicides among active-duty troops last year, up from 301 the year before and exceeding the Pentagon's own internal projection of 325.<sup>16</sup> These authors discuss not only the problems

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13. Raquel Andres-Hyman & Scott M. Hyman, *An Overview of Combat-Related Post-traumatic Stress Disorder (PTSD)*, 37 NOVA L. REV. 3 (2013).

14. CONGRESSIONAL BUDGET OFFICE, THE VETERANS HEALTH ADMINISTRATION'S TREATMENT OF PTSD AND TRAUMATIC BRAIN INJURY AMONG RECENT COMBAT VETERANS app. A at 23 (2012), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/02-09-PTSD.pdf>.

15. Daniel Reidenberg & Natasha Shaikh, *Making Posttraumatic Stree Disorder a Priority: Saving Veternas From Suicide*, 37 NOVA L. REV. 3 (2013).

16. Burns, *supra* note 8.

faced by professionals attempting to treat combat-related PTSD, but also the ways in which the legal system contributes to those problems. Specifically, they take to task the VA's almost untrammelled authority over veterans' benefits decisions, flaws in the law governing the awarding of those benefits, and a federal law preventing the VA and the Department of Defense from learning whether military personnel and veterans own firearms. Despite efforts to improve the current state of affairs, the authors conclude that the current system is lacking. In fact, they conclude, "if we were as quick to help veterans as we are to send them off to war, suicide rates among veterans with PTSD would not be as high."<sup>17</sup>

As Reidenberg and Shaikh acknowledge in their article, the legal system has tried in some ways to address issues raised by PTSD. As discussed previously, veterans' courts exist as a form of pretrial diversion, assisting veterans in obtaining assistance after they encounter the criminal justice system as a result of their disorders. Professor Michael Perlin from New York Law School analyzes the operation of those courts in his article "*John Brown Went Off to War*": *Considering Veterans' Courts As Problem-Solving Courts*.<sup>18</sup> With a long history of representing those with mental disabilities, including representation of the plaintiff class in the case that prompted the VA to promulgate its first Patients' Bill of Rights,<sup>19</sup> Professor Perlin is uniquely situated to discuss veterans' courts as problem-solving courts within a broader TJ movement.

In efforts to assist those with mental disabilities in healing (or rehabilitating), courts such as mental health courts have sometimes pursued TJ goals without fully honoring the guarantees of due process. Professor Perlin urges that veterans' courts have the potential to significantly improve treatment of veterans with PTSD within the criminal justice system even while cautioning that the judges of those courts must respect their veteran-defendants as human beings in order to fulfill their promise.

Indeed, the law cannot provide all the answers, or even most of them. Better practice is to prevent encounters with the criminal justice system at all, rather than the use of problem-solving courts for veterans with PTSD. In *Dismantling America's Largest Sleeper Cell: The Imperative to Treat, Rather Than Merely Punish, Active Duty Offenders With PTSD Prior to Dis-*

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17. Daniel Reidenberg & Natasha Shaikh, *Making Posttraumatic Stress Disorder a Priority: Saving Veterans From Suicide*, 37 NOVA L. REV. 3, 102 (2013).

18. Michael L. Perlin, "*John Brown Went off to War*": *Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 3 (2013).

19. *Falter v. Veterans Admin.*, 632 F. Supp. 196, 203 (D.N.J. 1986) ("In December 1982, the V.A. Patients' Bill of Rights was promulgated.")

*charge From the Armed Forces*,<sup>20</sup> U.S. Army Major Evan R. Seamone, Chief of Military Justice, Maneuver Center of Excellence & Fort Benning, Georgia, argues that the armed forces must take PTSD into account within its disciplinary structure. Currently, those who have violated the military code due to PTSD are likely to be dishonorably discharged, thus effectively precluding their receipt of benefits funding treatment of that condition. Major Seamone argues that, instead, the armed forces has an obligation to recognize defendants' PTSD and to cooperate with civilian agencies in obtaining treatment for it while offenders are still under military control. Indeed, because the military has trained these offenders specifically to injure, even kill, and then discharges them into the civilian society without realistic chances of obtaining treatment, Major Seamone argues that the obligation to assist offenders in obtaining treatment before discharge rises to the level of a "mandate under the precautionary principle which guides the laws of public health and safety."<sup>21</sup>

Philosopher E. Ann Jeschke agrees with Major Seamone that it is not sufficient to rely upon the legal system to remedy PTSD's effects. In *The Moral Trauma of America's Warriors: Why We Must Treat Combat Post-Traumatic Stress Disorder as a Bio-Psycho-Social-Spiritual Phenomenon*,<sup>22</sup> Ms. Jeschke argues that combat "dismantle[s] a warrior's moral identity and must be addressed in order for the holistic healing of the warrior to occur."<sup>23</sup> Drawing on resources as diverse as literature and philosophy, Ms. Jeschke analyzes and finds wanting currently recommended VA and Department of Defense treatments for PTSD. Specifically, she argues that, rather than relying solely on currently recommended treatments, which address PTSD as an individualized, trauma-induced phenomenon, clinicians also should be attuned to the spiritual needs of their patients. She concludes that it is only by treating their entire condition, biologically, psychologically, socially, and spiritually, that America's wounded warriors can be healed.

This symposium explores nontraditional solutions for an extraordinary and persistent problem. It also represents the best of collaborative efforts among those committed to finding a solution. We hope it inspires our readers.

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20. Evan R. Seamone, *Dismantling America's Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 3 (2013).

21. *Id.* at 36.

22. E. Ann Jeschke, *The Moral Trauma of America's Warriors: Why We Must Treat Combat Posttraumatic Stress Disorder as a Bio-Psycho-Social-Spiritual Phenomenon*, 37 NOVA L. REV. 3 (2013).

23. *Id.* at 105.

## “JOHN BROWN WENT OFF TO WAR”: CONSIDERING VETERANS COURTS AS PROBLEM-SOLVING COURTS

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MICHAEL L. PERLIN\*

### I. INTRODUCTION

I am a child of the 60s. This is no surprise to anyone who has talked to me for more than five minutes or who has read any of my writings about Bob Dylan. But it is much more than musical nostalgia. I was involved, seriously involved, in the anti-war movement in college and in law school (my friends even know about the late night visit from FBI agents urging me to change the tone of anti-war editorials I had been writing when I was editor of the Rutgers Daily Targum in 1965–1966).<sup>1</sup> After I passed the written bar examination, it took me over a year to be admitted to practice in New Jersey,

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1. This followed a widely-covered university “teach-in” at which Rutgers Professor Eugene Genovese stated, “I do not fear or regret the impending Vietcong victory in Vietnam. I welcome it.” Douglas Martin, *Eugene D. Genovese, 82, Historian of South, Dies*, N.Y. TIMES, Sept. 30, 2012, at A36. My editorials cited Voltaire in the defense of his right to free speech.

as members of the “character and fitness committee” in my home county had questions about anti-war petitions I had signed when I was a law student (I solved the problem by moving to a new county). But during all that time, I never “got” the enmity that so many of my contemporaries leveled at those who were serving in the Army (many of whom, of course, were doing so involuntarily). Truth be known, at all the marches, rallies, and demonstrations I attended, I never once heard the “baby killer” phrase that was allegedly a common cry at that time (I expect that, like the bra-burning that never took place, it simply served as a rallying symbol). But, it *was* always clear to me that, once Vietnam veterans returned home, the transition to civilian society was not an easy one.

The Vietnam War ended in 1975. A year prior to that, the State of New Jersey created a new office, the Department of the Public Advocate,<sup>2</sup> to provide legal representation to those who had been ignored by the justice system, a “voice for the voiceless.”<sup>3</sup> As part of this department, a Division of Mental Health Advocacy was created,<sup>4</sup> and at the embarrassingly-young age of twenty eight, I became the first director of that division. We represented persons in individual matters in civil commitment cases, post-insanity acquittal release hearings, refusal of treatment cases, and the full range of law reform and test case litigation that challenged the way patients were treated in state hospitals and in community settings.<sup>5</sup>

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2. See George W. Conk, *People's Electric: Engaged Legal Education at Rutgers-Newark Law School in the 1960s and 1970s*, 40 *FORDHAM URB. L.J.* 503, 513 n. 40 (2012).

3. DIV. OF DISABILITY SERVS., N.J. DEP'T OF HUMAN SERVS., NEW JERSEY 2009 RESOURCES 15 (2009), available at [http://www.state.nj.us/humanservices/ddsd/documents/RD\\_09%283%29.pdf](http://www.state.nj.us/humanservices/ddsd/documents/RD_09%283%29.pdf). The public advocate was initially dismantled by Governor Christine Whitman, Cynthia N. McKee, *Resurrecting Mount Laurel: Using Title VIII Litigation to Achieve the Ultimate Mount Laurel Goal of Integration*, 27 *SETON HALL L. REV.* 1338, 1345 n.58 (1997), was revived in 2005, and then once more abolished in 2010, *Public Advocate (2005-2010)*, N.J. ST. LIBR., <https://dspace.njstatelib.org/xmlui/handle/10929/19052> (last visited Apr. 21, 2013).

4. N.J. GEN. ASSEMBLY, LEGISLATIVE FISCAL ESTIMATE TO ASSEMBLY, NO. 15, A.52:27E-1, at 1 (1994), available at [http://law.njstatelib.org/law\\_files/njlh/lh1994/L1994c58.pdf](http://law.njstatelib.org/law_files/njlh/lh1994/L1994c58.pdf). This Division survived the dismantling of the rest of the Public Advocate's office and is now housed in the Office of the Public Defender. *Id.* “The bill transfers the functions performed by the Division of Mental Health Advocacy and the Division of Advocacy for the Developmentally Disabled within the Department of the Public Advocate to the Office of the Public Defender . . .” *Id.*

5. Michael L. Perlin, *Mental Patient Advocacy by a Patient Advocate*, 54 *PSYCHIATRIC Q.* 169, 170–71 (1982); 5 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 14-7, at 119–21 (2d ed. 2002) [hereinafter 5 PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*] (reprinting the final order of *Dixon v. Cahill*, No. L.30977/y-71 P.W. (N.J. Super. Ct. Law Div. 1973)); see Michael L. Perlin, “Justice's Beautiful Face”: *Bob Sadoff and the Redemptive Promise of Therapeutic Jurisprudence*, 40 *J. PSYCHIATRY & L.* 265,

One of the facilities in our jurisdictional ambit at the time was the Veterans Hospital in Lyons, New Jersey. Initially, our staff attorneys went there to represent individuals at commitment and periodic review hearings; but, after a time, it was clear that there was other work that needed to be done. The hospital was a dreary place (not as bad, certainly, as Greystone Park Psychiatric Hospital that remains, after nearly forty years, the most wretched facility I have ever seen in the United States),<sup>6</sup> but dreary nonetheless: not particularly clean, not particularly well-staffed, and with very little sense of *life*.

But, there was more to it than that. We realized—and this took a little while to sink in—that *within* the hospital, there were clearly hierarchical tiers. Veterans of World War II (and the few remaining from World War I) and the Korean War were, by and large, treated far better than were the Vietnam veterans. This perplexed me—I certainly never spoke to a staff member who had been active in the anti-war movement at any level—and troubled me greatly.

Why did this happen? The Vietnam veterans were much younger than the others, of course, and were certainly more likely to be dually diagnosed as mentally ill *and* drug-dependent. Many more had brushes with criminal law—usually low-level misdemeanors, though there were some who were charged with more serious offenses—and many more were disaffected with the world to which they came back. There were no ticker-tape parades for these veterans, no jubilant crowds, no iconic photographs of welcome-home kisses. And these veterans were far, far angrier than veterans of other wars—staff told me that the older vets were so *grateful* and this cohort was not. The more we explored this, the more it became clear that there was a dual system at play: Vietnam vets and everyone else. We also discovered that some of the rights that we had been litigating so tirelessly for at the state and county hospitals were not available in the federally funded Department of Veterans Affairs (“VA”) hospitals—and that just did not seem right for so many reasons.

So, we filed *Falter v. Veterans’ Administration (Falter I)*,<sup>7</sup> a class action suit on behalf of all the residents of the VA.<sup>8</sup> Following the litigation in

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265, 278 n.2 (2012); Michael L. Perlin, “*May You Stay Forever Young*”: *Robert Sadoff and the History of Mental Disability Law*, 33 J. AM. ACAD. PSYCHIATRY & L. 236, 236–37 (2005).

6. See *Doe v. Klein*, 1 Mental Disability L. Rep. 475, 475 (N.J. Super. Ct. Law Div. 1977) (institutional right to treatment consent order); see also Michael L. Perlin, “*Abandoned Love*”: *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 123 n.21 (2011).

7. 502 F. Supp. 1178 (D.N.J. 1980).

8. *Id.* at 1178–79.

the *Falter I* case, the VA promulgated the first Patients' Bill of Rights on behalf of persons in its facilities,<sup>9</sup> and attention was paid to substantive areas of patients' rights that all too often were previously ignored.<sup>10</sup>

Writing some five years ago about the notion of "equality" in the context of mental disability law, I said this about the *Falter* case:

But, what has lasted with me most vividly from *Falter I* was one line of Judge Harold Ackerman's initial decision: In this opinion, "I am referring to how [plaintiffs] are treated as human beings."<sup>11</sup> I read that line in the slip opinion, and for a moment, my breath stopped. Prior to that time, I had been representing persons with mental disabilities for nearly a decade, and litigated other class actions that truly had a vast impact on the New Jersey mental health system.<sup>12</sup> But never before had a judge written a line like this in an opinion in one of my cases.<sup>13</sup>

I begin my presentation today with this anecdote, because I think it is totally on-point with regard to this entire Symposium. In my paper, I will seek to contextualize veterans courts in light of the therapeutic jurisprudence (TJ) movement, the turn to problem-solving courts of all sorts (especially focusing on mental health courts), but also, and certainly not least in terms of importance, the societal ambivalence that we have shown to veterans in the four decades since the Vietnam War.

I will discuss the meaning of TJ, and then argue that its focus on the actual impact of law on people's lives, on the law's influence on emotional life and psychological well-being, and on the need for law to value psychological health and avoid the imposition of anti-therapeutic consequences whenever possible can serve as a template for a veterans court model—if we are to expand these courts robustly. TJ is the explicit inspiration for many of the most important problem-solving courts (including Judge Ginger Lerner-

9. *Falter v. Veterans Admin. (Falter II)*, 632 F. Supp. 196, 203 (D.N.J. 1986) ("In December 1982, the V.A. Patients' Bill of Rights was promulgated.").

10. *See id.* at 203, 205–08 (noting patients' rights such as rights to privacy while using telephones, to privacy in reading mail, to visitation, and to attend religious services).

11. *Falter I*, 502 F. Supp. at 1185.

12. *See* 5 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 5, § 14-4, at 66–74 (discussing the stipulation settlement of *Schindewolf v. Klein*, No. L41293-75 P.W. (N.J. Super. Ct. Law Div. 1975)); 2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 3C-7.1i, at 442 (2d ed. 1999) (discussing the right of patients to participate in voluntary, therapeutic, compensated work programs as an aspect of the right to treatment); *see also* *Rennie v. Klein*, 720 F.2d 266, 269 (3d Cir. 1983) (discussing the right of institutionalized psychiatric patients to refuse treatment).

13. Michael L. Perlin & John Douard, "Equality, I Spoke That Word/As If a Wedding Vow": *Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y.L. SCH. L. REV. 9, 10 (2008–2009) (discussing this aspect of *Falter I*); *see also Falter I*, 502 F. Supp. at 1178, 1185.

Wren's mental health court in Broward County),<sup>14</sup> but it is also clear that many such courts—specifically, some drug courts—do not follow TJ principles, existing instead in a *due process-free zone*—implicitly rejecting the basic TJ “premise that therapeutic outcomes cannot trump due process.”<sup>15</sup> Just as mental health courts should ensure that defendants receive dignity and respect and are given a sense of voice and validation, so should veterans courts. And this must be done in the specific context of veterans who have returned—not just from Vietnam, but from the first Gulf War, the later Iraqi War, and the ongoing Afghanistani War—veterans who have been diagnosed with posttraumatic stress disorder (PTSD) at frightening rates<sup>16</sup> and who continue to bear the *invisible wounds* of battle.<sup>17</sup>

This must all be weighed through the filter of the way that our treatment of injured war veterans provides a vivid example of society's general ambivalence toward guaranteeing robust social rights, an ambivalence reflected in my experiences in the VA hospitals some thirty years ago. I believe that Judge Ackerman's observation must be at the forefront of any assessment of veterans courts.

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14. See Michael L. Perlin, “*There Are No Trials Inside the Gates of Eden*”: *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: LAW AND POLICY 193, 206–07 (Bernadette McSherry & Ian Freckelton eds., 2013) [hereinafter PERLIN, “*THERE ARE NO TRIALS INSIDE THE GATES OF EDEN*”].

15. See *id.* at 207; Andrew Fulkerson, *How Much Process Is Due in the Drug Court?*, CRIM. L. BULL. (Thomson Reuters), Summer 2012 (“The answer is the same due process that is provided in any other case wherein a defendant faces revocation of probation.”). For criticism of a court decision holding that a defendant had no right to counsel at a hearing to terminate him from a drug program, see *Dunson v. Commonwealth*, 57 S.W.3d 847, 850 (Ky. Ct. App. 2001) and Fulkerson, *supra*, note 15 (“The *Dunson* holding renders the drug court a court in name only and thus is not required to provide any of the formalities and due process protections of a *real court*.”).

16. On how the Iraqi and Afghan war experiences, for these purposes, have been significantly different from the experiences of veterans in other wars, see Steven Berenson, *The Movement Toward Veterans Courts*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y, May–June 2010, at 37, 37–38.

First, individual servicemembers have been subjected to more frequent and longer deployments to the front than in previous conflicts. Second, the counterinsurgency type of warfare blurs periods of battle and periods of rest, prompting the stressful constant vigilance that can lead to psychological ailments. Third, improvements in protective equipment and battlefield medicine have allowed more victims of battlefield trauma to survive but often with lingering effects from their injuries. And, fourth, the signature weapon of the opposition—the improvised explosive device—often causes traumatic brain injuries that are difficult to diagnose and treat and may not present symptoms until well after the injury.

*Id.* at 38 (footnotes omitted).

17. See *id.* at 37.



Despite generally low recidivism rates,<sup>18</sup> veterans courts have received criticism, as some have argued that they provide veterans with a hall pass “to certain criminal-defense rights that others don’t have,” and that, from an entirely different perspective, they are stigmatizing because they “perpetuate the stereotype that veterans are returning ‘war-crazy.’”<sup>19</sup> I will address these and other criticisms in my paper.

One issue that has received almost no attention is a critical one that we are just beginning to take seriously in the mental health courts context: How can we assure that there is experienced, dedicated, and knowledgeable counsel assigned to represent defendants in such tribunals? We know that if there has been any constant in modern mental disability law in its thirty-five year history, it is the near-universal reality that counsel assigned to represent individuals at involuntary civil commitment cases is likely to be ineffective. How can we be sure that counsel in these cases will become more effective?

I will conclude by offering some conclusions and suggestions for those jurisdictions that are implementing veterans courts, so as to optimally assure adherence to TJ values in a court setting that continues to provide litigants with the full range of constitutional rights to which they are entitled.

Bob Dylan recorded *John Brown* in 1963.<sup>20</sup> The song is a “biting screed demolishing Hollywood conceptions of war heroes”<sup>21</sup> that “links the antiwar mentality with the generation gap.”<sup>22</sup> It begins:

John Brown went off to war to fight on a foreign shore  
His mama sure was proud of him!  
He stood straight and tall in his uniform and all  
His mama’s face broke out all in a grin,<sup>23</sup>

but, later, when he returns home:

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18. See Cathy Ho Hartsfield, Note, *Deportation of Veterans: The Silent Battle for Naturalization*, 64 RUTGERS L. REV. 835, 859 (2012) (concluding that veterans courts “have seen great success in reducing recidivism rates”). But see Jack W. Smith, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004–December 31, 2010*, 29 ALASKA L. REV. 93, 107 (2012) (noting the recidivism rate is only “slightly better” in the Anchorage Veterans Court).

19. These arguments are summarized in Hartsfield, *supra* note 18, at 860. See also *infra* Part III.

20. OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 339 (Bob Nirkind & Marian Appellof eds., 2004).

21. *Id.* at 338.

22. TIM RILEY, HARD RAIN: A DYLAN COMMENTARY 51 (1992).

23. BOB DYLAN, *John Brown*, on THE BOOTLEG SERIES VOL. 9—THE WITMARK DEMOS: 1962–1964 (Columbia Records 2010).

Oh his face was all shot up and his hand was all blown off  
 And he wore a metal brace around his waist  
 He whispered kind of slow, in a voice she did not know  
 While she couldn't even recognize his face!<sup>24</sup>

and ends:

As he turned away to walk, his Ma was still in shock  
 At seein' the metal brace that helped him stand  
 But as he turned to go, he called his mother close  
 And he dropped his medals down into her hand.<sup>25</sup>

The song—the *showstopper* of Dylan's 2001 tour “as U.S. bombs were falling on Kabul”<sup>26</sup>—tells the listener “of the deception of war, and its true effects on the individual,”<sup>27</sup> and is a song “to come [on Memorial Day] after we sweep up from the parades and put away the speakers’ microphones.”<sup>28</sup> If there were a soundtrack to this Symposium, it would include this song.

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24. *Id.*

25. *Id.*

26. TRAGER, *supra* note 20, at 339. I *may* have heard Dylan sing this in the 1960s; I honestly do not remember. I do know that I have seen him sing it at least five times in more recent years, last in Brooklyn in August 2008, during the heat of the Obama/McCain campaign. My review of the concert notes the political connection: “The high points of the night were \*John Brown\* and \*Masters of War\*, both musically and politically. Here was Bob, in Brooklyn . . . with an audience as blue state as he’ll ever get, and he hammered home the reminder that we do, indeed, live in a political world.” Michael Perlin, *Reviews: Brooklyn, New York, Prospect Park Bandshell*, BOBLINKS.COM, <http://www.boblinks.com/081208r.html#10> (last visited April 21, 2013).

27. Amy Blanton, *Bob Dylan: An Impact on American Society in the 1960's 8* (Apr. 10, 2001) (unpublished student paper, University of North Carolina at Chapel Hill), *available at* <http://www.unc.edu/~ablanton/BobDylan.pdf>.

28. *A Memorial Day Song: John Brown*, NIGHTLY SONG (May 27, 2011), <http://nightlysong.com/category/bob-dylan/>.

## II. THERAPEUTIC JURISPRUDENCE<sup>29</sup>

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of TJ.<sup>30</sup> Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, TJ presents a new model for assessing the “impact of case law and legislation,” recognizing that, as a therapeutic agent, the law can have “therapeutic or anti-therapeutic consequences.”<sup>31</sup> The ultimate aim of TJ is to determine whether legal “rules, procedures, and [lawyer] roles can or should be reshaped . . . to enhance their therapeutic potential [while not] subordinating due process principles.”<sup>32</sup>

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29. This section is largely adapted from Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159, 1183–89 (2013) [hereinafter Perlin, “*Striking for the Guardians and Protectors of the Mind*”] and Michael L. Perlin, *Understanding the Intersection Between International Human Rights and Mental Disability Law: THE ROLE OF DIGNITY*, IN THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191, 199 (Bruce Arrigo & Heather Bersot eds., 2013) [hereinafter PERLIN, UNDERSTANDING THE INTERSECTION].

30. See David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 587, 588 (David B. Wexler & Bruce J. Winick eds., 1996); see also 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2D-3, at 534–39 (2d ed. 1989); DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3–4 (1990); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 7 (2005) [hereinafter WINICK, CIVIL COMMITMENT]; David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 19 (2008). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 32–33 (1992).

31. Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009); see Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in DISPUTES & DILEMMAS IN HEALTH LAW 91, 91–92 (Ian Freckelton & Kerry Petersen eds., 2006).

32. Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 719 n.195 (2003) [hereinafter Perlin, “*You Have Discussed Lepers and Crooks*”]; see Michael L. Perlin, “*And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 752–53 (2005) [hereinafter Perlin, “*And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got*”]; Michael L. Perlin, “*Everybody is Making Love/or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 489–90 (2008) [hereinafter Perlin, “*Everybody is Making Love/or Else Expecting Rain*”]. On how TJ “might be a redemptive tool in efforts to combat sanism, as a means of ‘strip[ping] bare the law’s sanist façade,’” see Michael L. Perlin, “*Baby, Look Inside*

There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] imping[e] upon justice concerns."<sup>33</sup> As I have written elsewhere, "an inquiry into therapeutic outcomes does *not* mean that therapeutic concerns 'trump' civil rights and civil liberties."<sup>34</sup>

TJ "asks us to look at law as it actually impacts people's lives"<sup>35</sup> and "focuses on the law's [influence] on emotional life and psychological well-being."<sup>36</sup> It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness."<sup>37</sup> TJ understands that, "when attorneys fail to acknowledge their clients' negative emotional reactions to the judicial process, the clients are inclined to regard the lawyer as indifferent and a part of a criminal system bent on punishment."<sup>38</sup> By way of example, TJ "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage."<sup>39</sup>

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*Your Mirror*": *The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 591 (2008) [hereinafter Perlin, "*Baby, Look Inside Your Mirror*"]. See also Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585–86 (2008); Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.111 (2005).

33. David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see also David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179, 179–80 (1996).

34. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, "*Where the Winds Hit Heavy on the Borderline*": *Mental Disability Law, Theory and Practice*, "Us" and "Them", 31 LOY. L.A. L. REV. 775, 782 (1998).

35. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

36. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in *Practicing THERAPEUTIC JURISPRUDENCE: Law as a Helping Profession* 45, 45 (Dennis P. Stolle et al. eds., 2000).

37. Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT* 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

38. Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 59 (2010).

39. Claire B. Steinberger, *Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 65 (2003). The most thoughtful, sympathetic critique of TJ remains Christopher Slobogin's *Therapeutic Jurisprudence: Five Dilemmas to Ponder*. See Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 195, 218–19 (1995).

In recent years, scholars have considered a vast range of topics through a TJ lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.<sup>40</sup> As Ian Freckelton has noted, “it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications.”<sup>41</sup> It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.<sup>42</sup> These alternative approaches optimize the psychological well-being of individuals, relationships, and communities dealing with a legal matter, and acknowledge concerns beyond strict legal rights, duties, and obligations.<sup>43</sup> In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described “as a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasise[s] psychological wellness over adversarial triumphalism.”<sup>44</sup> That is, TJ supports an ethic of care.<sup>45</sup>

One of the central principles of TJ is a commitment to dignity.<sup>46</sup> Professor Amy Ronner describes the “three Vs”—voice, validation, and voluntariness<sup>47</sup>—arguing:

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40. See Michael L. Perlin, “Things Have Changed”: Looking at Non-Institutional Mental Disability Law Through the Sanism Filter, 46 N.Y.L. SCH. L. REV. 535, 543–45 (2002–2003).

41. Freckelton, *supra* note 32, at 576.

42. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465, 465 (Dennis P. Stolle et al. eds., 2000).

43. See *id.* at 468.

44. Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); see also Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006). The use of the phrase TJ dates to CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 100 (1982).

45. See, e.g., Gregory Baker, *Do You Hear the Knocking at the Door? A “Therapeutic” Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); Brookbanks, *supra* note 44, at 328–30; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Winick & Wexler, *supra* note 44, at 607.

46. See WINICK, CIVIL COMMITMENT, *supra* note 30, at 161.

What “the three Vs” commend is pretty basic: [L]itigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.<sup>48</sup>

Problem-solving courts grew out of an interdisciplinary approach—an approach immersed in TJ—to address the underlying problem, not just the symptoms, of social issues such as substance abuse, domestic violence, child abuse, and mental illness.<sup>49</sup> The creation of these courts “acknowledge[s] that the one-size-fits-all structure of the American criminal justice system often leaves much to be desired.”<sup>50</sup> There is an extensive literature on the relationship between TJ and problem-solving courts in general,<sup>51</sup> between TJ and mental health courts<sup>52</sup> and drug courts<sup>53</sup> in particular, and, more globally,

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47. Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 *TOURO L. REV.* 601, 627 (2008). On the importance of *voice*, see Freckelton, *supra* note 32, at 588.

48. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 *U. CIN. L. REV.* 89, 94–95 (2002) (footnotes omitted); *see also* AMY D. RONNER, *LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE* 23 (2010).

49. *See, e.g.*, Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1060 (2003); *see also* Peggy Fulton Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits*, 2 *CHAPMAN J. CRIM. JUST.* 7, 7–8 (2011); Salmon A. Shomade & Roger E. Hartley, *The Application of Network Analysis to the Study of Trial Courts*, 31 *JUST. SYS. J.* 144, 146 (2010).

50. PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 207.

51. *See* Hora, *supra* note 49, at 7, 10; *see generally* Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem-Solving Practices Positively Impact Clients, the Justice Systems and Communities They Serve*, 17 *ST. THOMAS L. REV.* 781 (2005).

52. *See, e.g.*, Nicola Ferencz & James McGuire, *Mental Health Review Tribunals in the UK: Applying a Therapeutic Jurisprudence Perspective*, *CT. REV.* (Am. Judges Ass’n), Spring 2000, at 48, 51; Thomas L. Hafemeister et al., *Forging Links and Renewing Ties:*

between TJ and judging,<sup>54</sup> and TJ and lawyering<sup>55</sup> in these contexts. But there has been very little written about the specific question of the role of TJ in veterans courts.<sup>56</sup> The question to pose here is this: Do such courts make it more likely that Professor Ronner's vision—of voice, voluntariness, and validation—will be fulfilled?

### III. VETERANS COURTS

Veterans courts have been established as part of an effort to seek “systemic solutions that would allow the [judicial system] a greater range of tools to help struggling veterans than the traditional criminal justice alternatives of conviction and incarceration.”<sup>57</sup> Explicitly, “[t]he rationale for veterans’ courts is based on the combat-related stress, financial instability, and other difficulties adjusting to life that confront many soldiers returning home from Iraq and Afghanistan.”<sup>58</sup> “The focus [of such courts] is on treatment, not

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*Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 *BUFF. L. REV.* 147, 183–84 (2012).

53. See, e.g., Salmon A. Shomade, *Case Disposition in the Drug Court: Who Is the Most Central Actor?*, 31 *JUST. SYS. J.* 74, 74–75, 78–79 (2010); Pamela L. Simmons, Comment, *Solving the Nation’s Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 *GONZ. L. REV.* 237, 258 (1999–2000). The extent to which many drug courts actually do incorporate TJ principles is not at all clear. See Michael S. King, *Therapeutic Jurisprudence’s Challenge to the Judiciary*, 1 *ALASKA J. DISP. RESOL.* 1, 2 (2011) [hereinafter King, *Therapeutic Jurisprudence’s Challenge to the Judiciary*] (critiquing some drug courts as not fulfilling TJ values); PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 216–17.

54. See, e.g., King, *Therapeutic Jurisprudence’s Challenge to the Judiciary*, *supra* note 53, at 3.

55. See, e.g., Paul Holland, *Lawyering and Learning in Problem-Solving Courts*, 34 *WASH. U. J.L. & POL’Y* 185, 187 (2010); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 *ST. THOMAS L. REV.* 743, 750 (2005).

56. But see Evan R. Seamone, *The Veterans’ Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 *MIL. L. REV.* 185, 188 (2009) [hereinafter Seamone, *The Veterans’ Lawyer as Counselor*]; Samantha Walls, *The Need for Special Veteran Courts*, 39 *DENV. J. INT’L L. & POL’Y* 695, 716 (2011). Professor David Wexler, one of the creators of TJ, has noted that TJ principles are now being employed in veterans courts. See David B. Wexler, *That’s What Friends Are For: Mentors, LAP Lawyers, Therapeutic Jurisprudence, and Clients with Mental Illness* 3 (Mar. 2012) (unpublished manuscript) [hereinafter Wexler, *That’s What Friends Are For*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1962725](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962725).

57. Berenson, *supra* note 16, at 39.

58. Marta Hoes, Comment, *Invisible Wounds: What Texas Should Be Doing for the Mental Health of Its Veterans*, 13 *TEX. TECH ADMIN. L.J.* 369, 378 (2012).

punishment, and on getting [to] the root cause of anti-social behavior.”<sup>59</sup> Importantly, the courts “are premised on the assumption that, when possible, veterans should receive treatment for PTSD.”<sup>60</sup> Many of the veterans courts consciously “utilize the therapeutic jurisprudence ideology in creating the treatment-rehabilitate model.”<sup>61</sup>

Although the first veterans court was started in Anchorage, Alaska, in 2004,<sup>62</sup> most commentators pinpoint the start of the veterans court movement to the creation of the Buffalo Veterans Treatment Court in 2008.<sup>63</sup> As described by that court’s founding judge:

The mission driving the Veterans Treatment Court is to successfully habilitate veterans by diverting them from the traditional criminal justice system and providing them with the tools they need in order to lead a productive and law-abiding lifestyle. In hopes of achieving this goal, the program provides veterans suffering from substance abuse issues, alcoholism, mental health issues, and emotional disabilities with treatment, academic and vocational training, job skills, and placement services. The program provides further ancillary services to meet the distinctive needs of each individual participant, such as housing, transportation, medical, dental, and other supportive services.<sup>64</sup>

At this point in time, there are at least eighty such courts,<sup>65</sup> and hundreds are in the planning process.<sup>66</sup> Potential participants are screened to weed out any individual who does not “show a willingness to undergo treat-

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59. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 570 (2010).

60. Adam Caine, Comment, *Fallen from Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering from Post Traumatic Stress Disorder*, 78 UMKC L. REV. 215, 239 (2009).

61. Walls, *supra* note 56, at 716.

62. Hawkins, *supra* note 59, at 565.

63. Berenson, *supra* note 16, at 39; Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 364 (2009).

64. Russell, *supra* note 63, at 357 n.†, 364.

65. William H. McMichael, *The Battle on the Home Front*, A.B.A. J., Nov. 2011, at 42, 44. For descriptions of other courts, see Stuart Ditzen, *Supreme Court, Veterans Administration Host First Veterans’ Task Force Mtg.*, LAW. J. (Allegheny Cnty. Bar Ass’n), Mar. 12, 2010, at 5, 5; Hawkins, *supra* note 59, at 565; Art Heinz, *Nation’s First Online Training for Veterans Courts Mentors Launched by Supreme Court of Pennsylvania*, LAW. J. (Allegheny Cnty. Bar Ass’n), Dec. 16, 2011, at 5, 5; Judy L. Marchman, *Veterans Courts in Texas*, 75 TEX. B.J. 616, 616 (2012); Smith, *supra* note 18, at 93.

66. *The History*, JUST. FOR VETS, <http://www.justiceforvets.org/vtc-history> (last visited Apr. 21, 2013).



ment for his PTSD.”<sup>67</sup> Most such courts accept only defendants charged with misdemeanors or non-violent felonies,<sup>68</sup> although some allow defendants charged with violent felonies to participate.<sup>69</sup> While there has been pointed criticism at the inclusion of some offenses (specifically, domestic violence) in the *eligibility column*,<sup>70</sup> others take the position that precluding violent offenders in these courts is like having “a Veterans Court without veterans.”<sup>71</sup> In some veterans courts, “violent cases are not precluded from diversion [specifically] because ‘combat veterans’ PTSD issues often manifest in aggressive behavior.”<sup>72</sup> Often, however, “[w]hen [veterans courts] do enroll violent offenders, many programs can, and do, require victim input prior to the admittance decision.”<sup>73</sup>

These courts are often staffed with “a Veterans Service Representative (VSR), a fellow veteran whose role is similar to that of a caseworker,” and who “works as a counselor, develop[ing] a treatment plan, and refer[ring] . . . defendant[s] to alcohol, drug dependency, or mental health treatment centers

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67. Walls, *supra* note 56, at 718. See *infra* Part III.A. for a discussion of the significance of PTSD diagnoses in the creation and implementation of these courts.

68. See Berenson, *supra* note 16, at 39.

69. Pamela Kravetz, Note, *Way off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 183 & n.109 (2012); Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42, 49.

70. See Kravetz, *supra* note 69, at 186; see also *infra* Part V.E.

71. John Baker, *John Baker: We Need Veterans Courts in Minnesota. Here's Why.*, TWINCITIES.COM (Aug. 29, 2010, 12:01 AM), [http://www.twincities.com/opinion/ci\\_15916530](http://www.twincities.com/opinion/ci_15916530) (observing that “domestic-abuse case[s], bar fights, assault and battery, hit and run cases that result in injury, and DWI cases that result in injury[.]” are largely “the types of cases that bring veterans into the criminal justice system in the first place”); see also Dahlia Lithwick, *Specialized Courts for War Veterans Work Wonders. But Why Stop at Veterans?*, SLATE (Feb. 11, 2010, 1:33 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/02/a\\_separate\\_peace.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/a_separate_peace.html):

Robert Alvarez, a psychotherapist with the Wounded Warrior program at Fort Carson, recently told a Denver newspaper that it’s a mistake to carve the most violent offenders out of the proposed veterans court in Colorado: “The violent offenders need help more than anybody. . . . [T]he very skills these people are taught to follow in combat are the skills that are a risk at home. They’re trained to react instantly to a threat, because if not, people die.” So as we continue to create specialized courts for our war veterans, one question worth probing is how it makes sense to give special services to those with the least to lose while withholding special services from those with the worst problems.

*Id.* (alteration in original).

72. Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 7 n.9 (2011) [hereinafter Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*].

73. *Id.* at 8 n.9.

[where] necessary.”<sup>74</sup> David Wexler has underscored that having such a mentor is an *essential feature* of such courts.<sup>75</sup>

#### A. *Issues Related to PTSD*

The story of General George Patton slapping a soldier in World War II is legendary.

During the action in Sicily, General Patton visited an evacuation hospital. He was conducted to the receiving tent, where [fifteen] casualties had just come in from the front.

“Where Were You Hurt?” The General went down the line, asking each patient where he had been hurt. On the edge of the fourth bed sat a soldier with no visible wounds. He had been sent back by his divisional medical officer, tentatively diagnosed as a severe case of psychoneurosis. He was still in battle dress.

The General asked him the routine question. The soldier answered: “It’s my nerves. I can hear the shells come over but I can’t hear them burst.”

Patton turned to the medical officer and asked, “What’s this man talking about? What’s wrong with him--if anything?” Patton began to shout at the man. His high voice rose to a scream, in such language as: “You dirty no-good-----! You cowardly--! You’re a disgrace to the Army and you’re going right back to the front to fight, although that’s too good for you. . . .” Patton reached for his white-handled single-action Colt.

The man sat quivering on his cot. Patton slapped him sharply across the face, turned to the commanding medical officer who had come in when he heard Patton’s high-pitched imprecations. “I want you to get that man out of here right away. I won’t have these other brave boys seeing such a bastard babied.”<sup>76</sup>

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74. Hartsfield, *supra* note 18, at 859; *see also* Hawkins, *supra* note 59, at 565.

75. Wexler, *That’s What Friends Are For*, *supra* note 56, at 3. On the value of the use of psychological techniques in such court settings, *see* Seamone, *The Veterans’ Lawyer as Counselor*, *supra* note 56, at 198.

76. Michael E. McCarthy, Essay, *Diversionsary Tactics: Alternative Procedures for the Prosecution of Military Veterans*, 50 DUQ. L. REV. 475, 477–78 (2012).

One of the first law review articles to discuss PTSD characterized this—“the slap heard round the world”<sup>77</sup>—as “[a]n extreme example of military intolerance for warrior weakness.”<sup>78</sup> There is little question that, “[b]efore Vietnam, no single event contributed more to public awareness of PTSD”<sup>79</sup> than this incident.

PTSD is “a condition under which a person ‘experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or that a threat to the physical integrity of self or others’ and, ‘the person’s response involved intense fear, helplessness, or horror.’”<sup>80</sup> “Symptoms of PTSD may include recurrent nightmares, difficulty falling asleep, hyper-vigilance . . . outbursts of anger,” exaggerated startle response, and memory impairment.<sup>81</sup> “Individuals who suffer from this syndrome often show increased irritability, impulsive behavior and unpredictable explosions of aggression with little or no provocation.”<sup>82</sup> Persons with PTSD often also have “panic disorders, obsessive-compulsive disorders, social phobias, and major depressive disorders.”<sup>83</sup> “Combat is one of the most severe [PTSD] stressors.”<sup>84</sup> Although it has been suggested that PTSD symptoms are relatively easy to feign,<sup>85</sup> the use of new neuroscience tech-

77. Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and “Off-the-Record Wars,”* 73 GEO. L.J. 931, 972 n.284 (1985).

78. Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 434 n.151 (1988).

79. John Lockman, *The Thousand Yard Stare: Post Traumatic Stress Disorder, the Invisible Casualty of War*, ERNESTBECKERFOUND. (Apr. 7, 2011, 6:59 PM), [http://www.ernestbecker.org/index.php?option=com\\_content&view=article&id=452:the-thousand-yard-stare-post-traumatic-stress-disorder-the-invisible-casualty-of-war-&catid=7:news-archives&Itemid=33](http://www.ernestbecker.org/index.php?option=com_content&view=article&id=452:the-thousand-yard-stare-post-traumatic-stress-disorder-the-invisible-casualty-of-war-&catid=7:news-archives&Itemid=33).

80. 4 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 9A-9.3b, at 271 (2d ed. 2002) [hereinafter 4 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL]; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR]; Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. MED. & ETHICS 745, 746 (2010) (“[T]he recent movement to establish specialized ‘mental health courts’ for mentally ill defendants whose psychiatric conditions contributed in some measure to the conduct leading to arrest reflects the infusion of psychiatry into the criminal justice system.”).

81. DSM-IV-TR, *supra* note 80, at 464; Olympia Duhart, *Soldier Suicides and Out-Crit Jurisprudence: An Anti-Subordination Analysis*, 44 CREIGHTON L. REV. 883, 887 (2011) [hereinafter Duhart, *Soldier Suicides*].

82. 4 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 80, § 9A-9.3b, at 272; see also DSM-IV-TR, *supra* note 80, at 464.

83. Duhart, *Soldier Suicides*, *supra* note 81, at 887.

84. *Id.*

85. See, e.g., Erin M. Gover, Comment, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 581 (2008).

niques in the development of external measures of assessment should obviate most of these concerns.<sup>86</sup>

Through the post-Vietnam era, fact finders were “generally reluctant to accept the validity” of PTSD both in insanity defense cases and in sentencing mitigation cases.<sup>87</sup> Thus, while at least one court characterized the evidence of PTSD in the case of a Vietnam war veteran as highly persuasive,<sup>88</sup> in the course of an opinion affirming a jury’s rejection of the defendant’s insanity defense based largely on the defendant’s own testimony,<sup>89</sup> other courts have narrowly ruled on the scope of expert witnesses who may permissibly testify as to the syndrome’s effects.<sup>90</sup> “Similarly, defendants [were] mostly . . . ‘surprisingly unsuccessful’<sup>91</sup> in their attempts to use Vietnam stress syndrome or PTSD as a ground for the granting of a new trial in cases where the original convictions predated the formal recognition of the existence of Vietnam stress syndrome.”<sup>92</sup> Some defendants have been successful in their

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86. Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 104 (2012). On the new uses of neuroscience in criminal law in general, see Michael L. Perlin, “*And I See Through Your Brain*”: *Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process*, STAN. TECH. L. REV. (2009), <http://stlr.stanford.edu/pdf/perlin-and-i-see.pdf>, and see also Perlin, “*There Are No Trials Inside the Gates of Eden*,” *supra* note 14; Michael L. Perlin & Valerie R. McClain, *Unmasked (and Unanswered) Questions About the Role of Neuroimaging in the Criminal Trial Process*, 28 AM. J. FORENSIC PSYCHOL. 4 (2010).

87. 4 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 80, § 9A-9.3b, at 273–74. For a recent reconsideration, see Caine, *supra* note 60. In one of the most poignant examples, a jury explained to a trial judge why it rejected an insanity defense plea in the case of a Vietnam veteran charged with murder:

We, the Jury, recognize the contribution of our Viet Nam [sic] veterans and those who lost their lives in Viet Nam [sic]. We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans.

.....

Through long and careful deliberation, through exposure to all the evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thompkins’ life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans.

State v. Felde, 422 So. 2d 370, 380 n.9 (La. 1982).

88. Felde, 422 So. 2d at 380.

89. *Id.* at 380, 398; *see also* State v. Sharp, 418 So. 2d 1344, 1348 (La. 1982) (testimony admissible, but jury rejected insanity defense); State v. Cone, 665 S.W.2d 87, 92 (Tenn. 1984) (defendant’s pattern of conduct raised “serious doubts” about expert witness’ opinions), *cert. granted sub nom.*, Bell v. Cone, 534 U.S. 1064 (2001), *and rev’d*, 535 U.S. 685 (2002).

90. *See, e.g.*, United States v. Crosby, 713 F.2d 1066, 1076–77 (5th Cir. 1983).

91. Elizabeth J. Delgado, Note, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 495 (1985).

92. 4 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 80, § 9A-9.3b, at 273.

arguments that evidence of PTSD should be admissible at sentencing;<sup>93</sup> however, a student author has concluded that the courts' decisions in admitting the evidence appear "to be based on the nature of the crime and the defendant's success in rehabilitation," rather than the underlying syndrome.<sup>94</sup> Interestingly, the Supreme Court of the United States has relatively recently ruled, in a death penalty case, that attorneys are required to present evidence of PTSD when it is available.<sup>95</sup> There, although the defendant had been a decorated Korean War veteran, his court-appointed counsel presented no evidence whatsoever of his military service to the jury.<sup>96</sup> The court noted that had such evidence been presented, "the jury might [have found] mitigating the intense stress and mental and emotional toll that combat took on Porter."<sup>97</sup> The Court added language especially relevant to the inquiry we are focusing upon today: "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did."<sup>98</sup>

One of the clearly articulated reasons for the surge in popularity in veterans courts has been the number of veterans diagnosed with PTSD who have become involved with the criminal justice system.<sup>99</sup> A startling 30% of all male soldiers who served in Vietnam "experienced PTSD at some point in their lives,"<sup>100</sup> and it is estimated that, already, between 10-20% of all veterans returning from the wars in Iraq and Afghanistan exhibit characteristics of PTSD.<sup>101</sup> Estimates of the percentage of those who have sought treatment for this condition range from 23-40%.<sup>102</sup>

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93. *E.g.*, *State v. Spawr*, 653 S.W.2d 404, 406 (Tenn. 1983); Geraldine L. Brotherton, Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91, 91 n.1 (1981–1982) (listing early unreported cases in which PTSD was asserted as a sentence-mitigation factor). *But see* *United States v. Krutschewski*, 541 F. Supp. 142, 142–43 (D. Mass. 1982); *State v. Pettit*, 661 P.2d 767, 769 (Idaho Ct. App. 1983); *State v. Watson*, 316 S.E.2d 293, 296 (N.C. 1984).

94. Delgado, *supra* note 91, at 500.

95. *Porter v. McCollum*, 558 U.S. 30, 43–44 (2009) (per curiam).

96. *Id.* at 40.

97. *Id.* at 43–44.

98. *Id.* at 43.

99. Grey, *supra* note 86, at 72.

One final aspect of the increasing acceptance of mitigation for veterans who suffer from PTSD can be found in the recent popularity of veterans' courts. These courts are designed to keep veterans with mental health issues, including PTSD, who are charged with criminal behavior out of the traditional justice system and place them into treatment programs instead.

*Id.*

100. F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 11 (2010).

101. *Id.* at 12; *see also* Hartsfield, *supra* note 18, at 851; Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG.

“Veterans who suffer from PTSD may face criminal charges because the symptoms that they suffer from can consequently lead them to commit criminal offenses.”<sup>103</sup> “The relationship between PTSD and criminal offending is considered to be so significant that the president of the National Veterans Federation . . . warns that the criminal justice system is facing an epidemic of veterans with PTSD being charged with crimes.”<sup>104</sup> This relationship is “well-recognized by researchers and psychologists,” and increasingly, by the courts.<sup>105</sup> Of course, so many of the clients of veterans courts have been diagnosed with PTSD.<sup>106</sup>

#### IV. SOCIETAL AMBIVALENCE

The scar left on the national psyche by the war in Vietnam has never healed; it likely never will.<sup>107</sup> We know that the societal ambivalence that followed the end of the war—ambivalence reflected in areas as disparate as decision-making with regard to returning all the American war dead to the U.S.,<sup>108</sup> Supreme Court cases about draft card burning,<sup>109</sup> the relationship

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J. MED. 13, 13 (2004), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMoa040603>; McCarthy, *supra* note 76, at 479; *One in Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORP. (Apr. 17, 2008), <http://www.rand.org/news/press/2008/04/17.html>.

102. Hartsfield, *supra* note 18, at 851.

103. Jillian M. Cavanaugh, Note, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 468 (2011).

104. Melissa Hamilton, *Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 BERKELEY J. CRIM. L. 340, 341 (2011).

105. Walls, *supra* note 56, at 712.

106. Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 MIL. L. REV. 144, 155 (2009); Seamone, *The Veterans’ Lawyer as Counselor*, *supra* note 56, at 186; Wexler, *That’s What Friends Are For*, *supra* note 56, at 13.

107. For a comprehensive account, see MELVIN SMALL, *AT THE WATER’S EDGE: AMERICAN POLITICS AND THE VIETNAM WAR* (2005), and see *id.* at 217–24 for a comprehensive bibliography of sources.

108. G. KURT PIEHLER, *REMEMBERING WAR THE AMERICAN WAY* 168 (1995); see also Mary L. Clark, *Keep Your Hands off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45, 58–59 (2005).

109. See Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 814 (2004) (discussing how the Court’s decision in *United States v. O’Brien* “reveals an ambivalence that may reflect the divisiveness of the Vietnam War”).

between American colleges and the military,<sup>110</sup> the designs of war memorials,<sup>111</sup> social attitudes toward “obedience to established authority, duty, subordination, and [drug-related] criminal activity,”<sup>112</sup> and in the military’s pursuit of the war itself<sup>113</sup>—has played out in many ways, including, specifically, how we treat Vietnam veterans in the criminal justice system. The ambivalence of the jurors in *State v. Felde*<sup>114</sup> is a perfect reflection of the ambivalence of the general public,<sup>115</sup> and it is a factor we cannot ignore in our analysis of the underlying issues being discussed.<sup>116</sup>

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110. See Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL RTS. J. 205, 236–38 (2004).

111. See Robin Wagner-Pacifici & Barry Schwartz, *The Vietnam Veterans Memorial: Commemorating a Difficult Past*, 97 AM. J. SOC. 376, 377–78, 381 (1991).

112. See James B. Thwing, *Service Connection: A Bridge Over Troubled Waters* (pt. 2), ARMY LAW., June 1986, at 26, 26.

113. See, e.g., Francis Dymond, Book Note, *Choosing War: The Lost Chance for Peace and the Escalation of War in Vietnam*, 168 MIL. L. REV. 220, 220 (2001).

114. 422 So. 2d 370 (La. 1982); see also *supra* note 88.

115. *Id.* at 380 & n.9.

116. Such ambivalence on the part of general public is also clear regarding the legitimacy of the wars in Iraq and Afghanistan. See Olympia Duhart, *PTSD and Women Warriors: Causes, Controls and a Congressional Cure*, 18 CARDOZO J.L. & GENDER 327, 336–37 (2012). On the ambivalence of the “United States and other occupying forces in Iraq ‘toward human rights and humanitarian law concerns,’” see Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT’L L. & POL’Y 171, 217–18 (2004), and Joe Stork & Fred Abrahams, *Sidelined: Human Rights in Postwar Iraq*, in HUMAN RIGHTS WATCH WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 93, 93–94 (2004).

V. CRITICISMS OF VETERANS COURTS<sup>117</sup>

As noted earlier, there has been a series of criticisms leveled at the creation of veterans courts.<sup>118</sup> In this section, I will discuss these criticisms and explain why I find them wanting.

A. *The “Free Pass” Argument*

“The American Civil Liberties Union (ACLU) has opposed [v]eterans [c]ourts, arguing that veterans are provided ‘an automatic free pass based on military status to certain criminal-defense rights that others don’t have.’”<sup>119</sup> This argument tracks a statement attributed to “Judge Charles B. Kornmann of the U.S. District Court for South Dakota [who] ‘cautioned [a] jury that nobody got “a free pass to shoot somebody” because they “went to Iraq or Afghanistan or the moon.”’”<sup>120</sup>

I believe this argument is misguided, for the reasons stated by Jillian Cavanaugh:

[T]here is no “free pass” when it comes to admitting veterans into a veterans treatment court; their eligibility is based *not* upon their status as a military veteran, but rather upon the notion that their

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117. There is some irony here that for years there have been veterans administrative courts to adjudicate questions of benefits payments, *see, e.g.*, Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The “New Paternalism,”* 1 VETERANS L. REV. 2, 2 (2009), and that the existence of these courts has never, to the best of my knowledge, been raised in the debate about the courts under discussion here. Such courts—the United States Court of Appeals for Veterans Claims—are Article I courts; they may “(1) decide any relevant questions of law that arise in a benefits proceeding, (2) compel VA action unlawfully withheld or unreasonably delayed, (3) hold unlawful or set aside actions or regulations adopted by the VA, and (4) reverse the VA’s fact-finding if it is clearly erroneous.” Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 AM. U. L. REV. 1201, 1209 (2011); *see also* 38 U.S.C. § 7261(a)(1)–(4) (2006). An interesting parallel can be made to the mental health courts debate. We discuss extensively the pros and cons of such courts, while ignoring the reality that there are other *mental health courts* in which individuals are regularly committed to psychiatric hospitals with virtually no due process protections. *See* PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 193–195, 212 (comparing problem-solving based mental health courts to “non-specialized [courts that] I have observed across the nation, in which persons with mental disabilities are regularly treated as third-class citizens by (at the best) bored or (at the worst) malevolent trial judges”).

118. *See supra* Parts I, III.

119. Hartsfield, *supra* note 18, at 860.

120. Anthony E. Giardino, Essay, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2962 n.38 (2009).



criminal conduct was caused by an underlying physical or psychological injury that was incurred during military service in a combat zone.<sup>121</sup>

### B. *The Disparity Argument*

“Other concerns are that [v]eterans [c]ourts exclude non-veterans who suffer from PTSD but are not eligible for special provisions through these problem-solving courts,”<sup>122</sup> resulting in “disparity in treatment between,” for example, “non-violent drug offenders who are not veterans and those who are.”<sup>123</sup> I am in partial agreement with Samantha Walls’s response to this—that non-veteran drug offenders, in most jurisdictions, “can take advantage of . . . drug-court programs”<sup>124</sup>—but my concern about the quality of many drug programs<sup>125</sup> makes me uneasy to endorse it without qualification. My position here is rather the same one that I have used in support of mental health courts when parallel arguments have been raised: By increasing the likelihood of a person with mental disability being diverted out of the criminal justice system—where he is likely to be treated as a third or fourth class citizen if those terms have any meaningful content or context—such courts

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121. Cavanaugh, *supra* note 103, at 479.

It is important to understand that veterans in veterans treatment courts do not enjoy a privilege based upon their status as a military service member. “The [veterans treatment court] won’t be a free pass for men and women accused of crimes just because they happen to have a military background.”

*Id.* at 479–80 n.123 (quoting “Mitch Lyles, director of adult probation for Denton County”); see also B.J. Lewis, *Denton Program Allows Alternate Court Sentencing for Veterans*, DALLASNEWS.COM (Dec. 22, 2009, 2:36 AM), <http://www.dallasnews.com/news/community-news/denton/headlines/20091222-Denton-program-allows-alternate-court-sentencing-8915.ece>.

Consider one concern expressed by an American Civil Liberties Union spokesman comparing a proposed veterans treatment court in Nevada with the veterans treatment court established in Cook County, Illinois: “The concern expressed in Nevada was that individuals who served in the military were sort of automatically transferred into this special court and were provided some options for lower-level sentences. It was based on the [military] status rather than the crime.”

Cavanaugh, *supra* note 103, at 480 n.123 (emphasis omitted).

122. Hartsfield, *supra* note 18, at 860.

123. Hawkins, *supra* note 59, at 571; see also Walls, *supra* note 56, at 721 (“The government is arguably creating a first-class and second-class criminal-justice system, based upon determining who is more deserving of treatment: [N]on-veterans who suffer from PTSD or veterans who suffer from PTSD.”).

124. Walls, *supra* note 56, at 721.

125. See PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 207, 216; see also Holland, *supra* note 55, at 187 (discussing the position of the National Association of Criminal Defense Lawyers as being “[r]elatively sanguine about mental health courts, [but] . . . thoroughly repudiat[ing] drug courts, calling for their abolition”).

make it less likely that the person with mental disabilities will suffer at the hands of others because of that status.<sup>126</sup> As Steven Berenson noted, “veterans receive not a ‘special treatment’ through veterans courts but the appropriate treatment that all defendants would receive through our criminal justice system in an ideal system.”<sup>127</sup>

### C. *The Stereotype Perpetuation Argument*

“Critics also say that [v]eterans [c]ourts perpetuate the stereotype that veterans are returning ‘war-crazy.’”<sup>128</sup> In responding to this argument, Professor Steven Berenson concludes that “the burden should seem to be on veterans’ advocates better to publicize the successes of returning veterans than to deny necessary assistance to veterans who have not enjoyed any such successes.”<sup>129</sup> While I agree that such publicity would be helpful, it seems to me that the issue here is much deeper, and reflects the malignancy of sanism—“an irrational prejudice . . . of the same quality and character of other [irrational prejudices that cause and are reflected in] prevailing [social attitudes of] racism, sexism, [homophobia], and ethnic bigotry”<sup>130</sup>—and its impact on all of society.<sup>131</sup> General Patton’s famous *slap*<sup>132</sup> was a perfect exemplar of the ravages of sanism.<sup>133</sup> If anything, the existence of veterans courts—premised on the acknowledged reality that persons with mental disabilities are victimized by prejudice and discrimination—will serve as a way of, eventually, remediating some of the stereotypes that exist about *crazy* soldiers returning home from war.<sup>134</sup> Almost thirty years ago, this issue was raised in the specific context of Vietnam veterans charged with crimes that appeared related to diagnoses of PTSD: “[L]awyers on both sides do fear

126. See PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 202–06. On issues of fairness and procedural justice in hearings before such courts, see Terry Carney et al., *Mental Health Tribunals: “TJ” Implications of Weighing Fairness, Freedom, Protection and Treatment*, 17 J. JUD. ADMIN. 46, 53–54 (2007); Risdon N. Slate, *From the Jailhouse to Capitol Hill: Impacting Mental Health Court Legislation and Defining What Constitutes a Mental Health Court*, 49 CRIME & DELINQ. 6, 12, 15–16 (2003).

127. Berenson, *supra* note 16, at 40.

128. Hartsfield, *supra* note 18, at 860.

129. Berenson, *supra* note 16, at 41.

130. See Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 374 (1992).

131. See Perlin, “*And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got,*” *supra* note 32, at 750; Perlin, “*Everybody Is Making Love/or Else Expecting Rain,*” *supra* note 32, at 502; Perlin, “*You Have Discussed Lepers and Crooks,*” *supra* note 32, at 688.

132. See McCarthy, *supra* note 76, at 477–78.

133. See *id.*; see also Peter Blanck, “*The Right to Live in the World*”: *Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367, 377 (2008).

134. See Blanck, *supra* note 133, at 377; Hartsfield, *supra* note 18, at 860–61.

that P-TDS [sic] cases could become litmus tests of attitudes about the war and the warriors. Veterans often assume civilians will not understand their experiences, and jurors may worry that a guilty verdict proves they are ungrateful to the soldiers.”<sup>135</sup> Professor Peter Blanck has noted that “veterans with [PTSD] and mental conditions are among those with the highest war-related injuries and most stigmatized impairments.”<sup>136</sup> Elsewhere, I have described the roots of stigma facing persons with mental disabilities as being based on sanism, through which “able-bodied society feels existential anxiety towards people with [mental] disabilities, and that anxiety’s at the core of . . . irrational prejudices that cause and are reflected in prevailing social attitudes.”<sup>137</sup> If anything, veterans courts will diminish the stigma faced by such veterans and will help reduce the sanism prevalent in our treatment of them.

#### D. *The Costs Argument*

“Veterans [c]ourts have been criticized for being more costly than traditional courts.”<sup>138</sup> My response here is a demurrer. So what? Like all problem-solving courts, these “courts offer a much wider range of services than their traditional counterparts, [and thus] tend to be more expensive than traditional courts” in terms of court operations.<sup>139</sup> “However, the financial cost of problem-solving courts is still [significantly] less than the financial costs of incarceration and recidivism.”<sup>140</sup> I think that Cathy Ho Hartsfield is precisely right when she concludes, on this point, “[p]roblem-solving courts, such as [v]eterans [c]ourts, should be viewed as a long-term solution, and thus, the long-term cost-efficient benefits are well worth the initial investment.”<sup>141</sup>

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135. Samuel Pyeatt Meneff, *The “Vietnam Syndrome” Defense: A “G.I. Bill of Criminal Rights?”*, ARMY LAW., Feb. 1985, at 1, 26 & n.171.

136. Blanck, *supra* note 133, at 377.

137. *Id.* (alteration in original); see also Michael L. Perlin, “Through the Wild Cathedral Evening”: *Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities*, 13 TEX. J. C.L. & C.R. 413, 416 (2008) (discussing Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, INDEP. LIVING INST., para. 24 (1985), <http://www.independentliving.org/docs4/hahn2.html>); Michael Ashley Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607, 631–32 (2002) (book review); Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda*, in IMAGES OF THE DISABLED, DISABLING IMAGES 181, 182 (Alan Gartner & Tom Joe eds., 1987).

138. Hartsfield, *supra* note 18, at 860.

139. Berenson, *supra* note 16, at 40.

140. *Id.*

141. Hartsfield, *supra* note 18, at 862.

E. *The Domestic Violence Critique*

Advocates for victims of domestic violence have opposed including such offenses within the ambit of veterans courts at all, “noting the escalating nature of those offenses.”<sup>142</sup> Pamela Kravetz has argued that all such cases should be excluded from the courts’ jurisdictional ambit, arguing that their inclusion “makes difficult and highly volatile situations even worse due to mixed messages about criminal responsibility, emphasis on treatment, and the risk of victim coercion.”<sup>143</sup> Although this is an argument with surface appeal, I believe it fails as well. In a discussion of problem-solving courts, Professor David Wexler and Judge Michael King have noted how, “for reasons of political acceptability,” those charged with serious offenses are typically excluded from newly-created drug and mental health courts,<sup>144</sup> but that, as time goes on, offenders charged with violent offenses are more likely to be accepted into these courts, and that offenders charged with domestic violence are now being included in some mental health courts, as long as the victim consents.<sup>145</sup>

If the purpose of these courts is to “help struggling veterans [more] than the traditional criminal justice alternatives of conviction and incarceration,”<sup>146</sup> then it makes no logical sense to exclude certain crimes from their jurisdictional ambit, especially crimes that, logically, may often be a manifestation of the PTSD with which eligible veterans have been diagnosed.<sup>147</sup> And of course, there are currently domestic violence problem-solving courts in many jurisdictions, many of which were begun in recognition of the reality that “traditional approaches have failed in addressing the underlying problems in areas such as . . . domestic violence.”<sup>148</sup>

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142. Hawkins, *supra* note 59, at 570.

143. Kravetz, *supra* note 69, at 201.

144. David B. Wexler & Michael S. King, *Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence*, in COURT SUPERVISED TREATMENT ALTERNATIVES TO INCARCERATION FOR DRUG-DEPENDENT OFFENDERS: THE DRUG POLICY AGENDA (forthcoming) (manuscript at 1, 5), available at <http://ssrn.com/abstract=1722278>. I discuss this phenomenon in PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 206.

145. Wexler & King, *supra* note 144 (manuscript at 5 n.17).

146. Berenson, *supra* note 16, at 39.

147. See Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 72, at 6, 7 & n.9.

148. Erin McGrath, Note, *Reentry Courts: Providing a Second Chance for Incarcerated Mothers and Their Children*, 50 FAM. CT. REV. 113, 118 (2012).

#### F. *The “Cherry Picking” Argument*

Other opponents accuse such courts of “cherry picking” low-risk candidates, leaving potentially higher-risk offenders behind to be sentenced through the traditional criminal justice system.<sup>149</sup> Other critics argue that the creation of such courts would disproportionately divert resources from other criminal courts “because judges already have the ability to take service-connected disabilities like PTSD into consideration in all aspects of the criminal justice system, including sentencing.”<sup>150</sup>

The literature that raises these arguments, however, does not point out any evidence that this has actually happened.<sup>151</sup> And while this certainly *may* happen in cases where courts have the discretion to accept violent offenders, it does not seem to be an appropriate concern with regard to the vast majority of courts that jurisdictionally only serve nonviolent offenders. Also, in some jurisdictions, *any* individual charged with a statutorily-listed offense who is a veteran under federal law may opt in.<sup>152</sup> And, I have an additional response here: Our correctional system is broken, badly broken, and perhaps beyond repair, especially in cases of persons with serious mental disabilities who have been convicted of crime.<sup>153</sup> Any alternative to the system that diverts *anyone* out (and into potentially redemptive treatment programs) is a good alternative. This point has been made most effectively by legal journalist Dahlia Lithwick:

But the fact that veterans courts seem to work as well as they do suggests a more fundamental lesson about correcting what’s broken in the criminal justice system. Whether we really want to go down the road of creating first- and second-class criminal court systems and whether we can truly draw any principled line between special judicial treatment for nonviolent veterans but not the violent ones are not easy political questions. They are thorny legal

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149. Caine, *supra* note 60, at 235–36.

150. Hawkins, *supra* note 59, at 571.

151. *See* Caine, *supra* note 60, at 236; Hawkins, *supra* note 59, at 571.

152. Smith, *supra* note 18, at 99 & n.32 (discussing court in Anchorage, Alaska).

153. *See* MICHAEL L. PERLIN & HENRY A. DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS: CASES AND MATERIALS 3–4 (2008) [hereinafter PERLIN & DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS]; John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in America’s Prisons*, 22 WASH. U. J.L. & POL’Y 385, 402 (2006) (“[M]ost correctional systems are set up to fail.”). John J. Gibbons is a retired Third Circuit Court of Appeals Judge; . Nicholas de B. Katzenbach was the former Attorney General of the United States.

ones. You don't have to oppose veterans' court to want that type of justice for all.<sup>154</sup>

### G. *The "We Have Other Courts" Argument*

"Because drug and mental health treatment courts already exist in many jurisdictions, a common suggestion is to simply divert veterans into those programs rather than create a new category of treatment courts entirely."<sup>155</sup> Tiffany Cartwright responds ably to this critique:

[F]or combat veterans, their underlying problem is not their substance abuse, or even their PTSD—it is their combat trauma, and that is something that cannot be addressed as effectively in a traditional drug or mental health court. Many veterans have experienced things that are uncommon or unheard of among civilian defendants.<sup>156</sup>

### H. *The "Already Lenient" Argument*

Some "believe that veteran courts are unnecessary due to the already present leniency towards veterans in the court process."<sup>157</sup> There is little hard non-anecdotal evidence, however, that this actually happens, notwithstanding the Supreme Court's dicta in *Porter v. McCollum*,<sup>158</sup> discussed earlier in this paper.<sup>159</sup> An amendment to the Federal Sentencing Guidelines has made federal sentencing more hospitable to PTSD claims by military veterans, noting that military service may be an appropriate mitigating factor "in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines,"<sup>160</sup> yet a recent search has revealed that there are few re-

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154. Lithwick, *supra* note 71.

155. Tiffany Cartwright, "To Care for Him Who Shall Have Borne the Battle": *The Recent Development of Veterans Treatment Courts in America*, 22 STAN. L. & POL'Y REV. 295, 302–03 (2011).

156. *Id.* at 303 (footnotes omitted).

157. Walls, *supra* note 56, at 721.

158. 558 U.S. 30 (2009) (per curiam).

159. *See supra* text accompanying notes 95–98. "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did." *Porter*, 558 U.S. at 43.

160. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2011); *see also* Grey, *supra* note 86, at 70.

ported cases interpreting this provision.<sup>161</sup> And, of course, not all states use guidelines modeled on the federal law.<sup>162</sup>

Mental health defenses based upon PTSD are typically unsuccessful, and even where mitigation is deemed warranted, the veteran-defendant will still face incarceration—often lengthy incarceration.<sup>163</sup> And, if incarcerated, it is likely that this cohort will not receive the necessary psychological treatment.<sup>164</sup> The leniency argument is not reality-based.

In short, none of the arguments offered in opposition to the creation of these courts is persuasive.

## VI. COUNSEL AND JUDICIARY ISSUES

There has been little commentary on the question of the quality of counsel made available to defendants in veterans court proceedings. I believe, though, that consideration of counsel effectiveness in other problem-solving court venues may be relevant to this discussion. We know that the quality of counsel made available to criminal defendants with mental disabilities is often tragically substandard.<sup>165</sup> At least one court has ruled, by way of example, that failure of counsel to pursue a PTSD defense did not deny effective assistance of counsel, characterizing Vietnam stress syndrome as a *novel defense* which need not be explored by counsel.<sup>166</sup> Others have rejected *Strickland v. Washington*<sup>167</sup> based arguments<sup>168</sup> where PTSD was not raised

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161. Grey, *supra* note 86, at 70 & n.80.

162. See, e.g., Caine, *supra* note 60, at 230–31; see also Grey, *supra* note 86, at 69, 70.

163. See *supra* text accompanying notes 87–98; see also Michael L. Perlin & Henry A. Dlugacz, “It’s Doom Alone That Counts”: *Can International Human Rights Law Be an Effective Source of Rights in Correctional Conditions Litigation?*, 27 BEHAV. SCI. & L. 675, 676, 680–81 (2009) [hereinafter Perlin & Dlugacz, “It’s Doom Alone That Counts”]; PERLIN & DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS, *supra* note 153, at 3.

164. Perlin & Dlugacz, “It’s Doom Alone That Counts,” *supra* note 163, at 681.

165. See MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW (2013); see also Michael L. Perlin, “The Executioner’s Face Is Always Well-Hidden”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 202–05, 207 (1996-1997); MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 126 (2013) [hereinafter PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY].

166. See *Miller v. State*, 338 N.W.2d 673, 678 (S.D. 1983). *But see id.* at 682 (Henderson, J., dissenting).

167. 466 U.S. 668 (1984).

168. *Id.* at 686 (test for adequacy is “whether counsel’s conduct so undermined the proper function[] of the adversarial process that the trial [court] cannot be relied on as having produced a just result”). I discuss *Strickland* extensively in PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 165, at 129–31.

at the sentencing phase of death penalty trials.<sup>169</sup> Although there is some evidence that, at the current time, more defendants have successfully used PTSD defenses in sentence mitigation efforts,<sup>170</sup> there is no evidence that the criminal defense bar, in the aggregate, *gets* the full meaning and potential range of PTSD defenses.<sup>171</sup> At the very least, such lawyers must begin to “apprise themselves of their clients’ military experience and mental health background so as to protect and best advocate for the best interests of their clients.”<sup>172</sup>

How can we be confident that counsel will be adequate in cases involving similar issues before veterans courts when much less is at stake (than in the death penalty context)? Dr. Steven Erickson and his colleagues have expressed “concern[] as to whether defendants in mental health courts receive adequate representation by their attorneys.”<sup>173</sup> Terry Carney characterizes the assumption that adequate counsel will be present at hearings to guarantee liberty values as a “false hope.”<sup>174</sup>

Henry Dlugacz and Christopher Wimmer summarize the salient issues:

It is not reasonable to expect a client to repose trust in an attorney unless she is confident that he is acting in accordance with her wishes. The client with mental illness may already doubt the

169. *See, e.g.,* Vasquez v. Thaler, 389 F. App’x 419, 421, 425, 429, 432 (5th Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 2445 (2011) (holding that defense counsel’s failures to investigate and present evidence of petitioner’s PTSD, attention deficit disorder, drug addiction, fetal alcohol syndrome, learning disabilities, and borderline I.Q. did not prejudice him); Jordan v. Epps, 740 F. Supp. 2d 802, 814, 853–56 (S.D. Miss. 2010) (finding that determination that petitioner was not prejudiced by trial counsel’s failure to obtain mental health examiner in capital murder prosecution was not contrary to, nor unreasonable application of, clearly established federal law; there was no connection between petitioner’s alleged PTSD from his military service and his criminal behavior that would have required evaluation by mental health examiner).

170. Nidiffer & Leach, *supra* note 100, at 16.

171. *See* Daniel Burgess et al., *Reviving the “Vietnam Defense”: Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, DEV. MENTAL HEALTH L., Jan. 2010, at 59, 77–78 (discussing the Supreme Court’s decision in Porter v. McCollum, 558 U.S. 30, 43 (2009) (per curiam), stating that “such a ruling places a burden on the defense bar to ascertain clients’ military background and subsequent related issues when defending them in capital cases.”).

172. *Id.* at 79.

173. Steven K. Erickson et al., *Variations in Mental Health Courts: Challenges, Opportunities, and a Call for Caution*, 42 COMMUNITY MENTAL HEALTH J. 335, 340 (2006).

174. Terry Carney, *The Mental Health Service Crisis of Neoliberalism—An Antipodean Perspective*, 31 INT’L J. L. & PSYCHIATRY 101, 105 (2008); *see also* Terry Carney, *Best Interests or Legal Rectitude?: Australian Mental Health Tribunal Stakeholder & Case-Flow Implications* 33 (Nov. 2009) (unpublished manuscript), *available at* [http://www.mhcirl.ie/Training\\_Development/Professor\\_Terry\\_Carney\\_Best\\_Interests\\_or\\_Legal\\_Rectitude\\_Paper.pdf](http://www.mhcirl.ie/Training_Development/Professor_Terry_Carney_Best_Interests_or_Legal_Rectitude_Paper.pdf) (“The issue of legal advocacy before [mental health tribunals] . . . is a vexed one.”).



attorney's loyalty. This risk is exacerbated when the attorney is appointed by the court. The client may wonder whether the attorney has been assigned in order to zealously represent her, or instead to facilitate her processing through the legal system. . . . There are . . . strong personal disincentives to thorough preparation, even for the committed attorney. . . . There are also institutional pressures: The attorney who depends on the goodwill of others in the system (e.g., judges, state attorneys, or prosecutors) may pull his punches, even unwittingly, in order to retain credibility for future interactions (which he would put to use for his future clients). Judges want cases resolved.<sup>175</sup>

Some solutions—largely drawing upon TJ imperatives<sup>176</sup>—have been offered. Bruce Winick has argued that “lawyers should adequately counsel their clients about the advantages and disadvantages of accepting diversion to mental health court.”<sup>177</sup> “As a result, judges and defense counsel in mental health courts should ensure that defendants receive dignity and respect, [and] are given a sense of voice and validation.”<sup>178</sup> Further, it is essential that counsel has “a background in mental health issues and in communicating with individuals who may be in crisis.”<sup>179</sup> Tiffany Cartwright has even recommended that “the prosecutor and defense counsel should work together using a non-adversarial approach to protect both public safety and the veteran’s rights.”<sup>180</sup>

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175. Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 331, 353–54 (2011). On the need for lawyers taking a TJ approach to view their clients *holistically*, see Wexler & King, *supra* note 144.

176. See Deen Potter, *Lawyer, Social Worker, Psychologist and More: The Role of the Defence Lawyer in Therapeutic Jurisprudence*, AM. U. SCH. PUB. AFF., 96–97 (Jan. 2005), [www1.spa.american.edu/justice/documents/105/pdf](http://www1.spa.american.edu/justice/documents/105/pdf). (on the challenges inherent in a therapeutic jurisprudence practice). On how the use of TJ can improve public defender practices in general, see Clarke & Neuhard, *supra* note 51, at 786–800, 803–04.

177. Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL’Y & L. 507, 523 (2005).

178. *Id.* at 516.

179. Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System’s Unfair Treatment of People with Mental Illnesses*, 11 PSYCHOL. PUB. POL’Y & L. 570, 576 (2005); see also M. Carmela Epright, *Coercing Future Freedom: Consent and Capacities for Autonomous Choice*, 38 J.L. MED. & ETHICS 799, 801 (2010) (“Ideally, in mental health courts all courtroom personnel—i.e., judge, prosecutor, defense counsel and other relevant professionals—have experience and training in mental health issues and available community resources.”).

180. Cartwright, *supra* note 155, at 307. Her suggestion appears to track, *sub silentio*, much of the restorative justice literature that urges solutions by which to “restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.”

What about the role of judges? Judge Michael King has written eloquently about the need for judges to become experts in the interpersonal aspects of judging, noting that, depending on the circumstances, judging may require “particular listening and communication skills, the expression of empathy, the use of techniques of persuasion or motivational interviewing, the use of techniques to settle child witnesses and collaborative problem-solving techniques.”<sup>181</sup> Certainly, the need for these skills is intensified in problem-solving courts, such as veterans courts.<sup>182</sup>

## VII. CONCLUSION

I began by quoting Judge Ackerman’s decision in the *Falter* case that the litigation there was about how the plaintiffs—VA residents—“are treated as human beings.”<sup>183</sup> Writing recently about the role of the judiciary in problem-solving courts in general, Australian Judge Michael S. King quoted a judge involved in the creation of the first drug court in Miami, Florida, as referring to his work as “a statement of our belief in the redemption of human beings.”<sup>184</sup> I believe this is where we must start.

David Wexler and Judge King set out an important list of key TJ strategies that all problem-solving courts should incorporate:<sup>185</sup>

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*Id.*; John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999); see also JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11 (2002) (“Restorative justice is a process whereby all the parties with a stake in [the] . . . offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”).

181. Michael King, *Realising the Potential of Judging*, 37 MONASH U. L. REV. 171, 171–72 (2011) [hereinafter King, *Realising the Potential of Judging*].

182. See *id.* at 176; Michael S. King, *New Directions in the Courts’ Response to Drug and Alcohol Related Legal Problems: Interdisciplinary Collaboration 2* (2012) (unpublished manuscript) [hereinafter King, *New Directions*], available at <http://ssrn.com/abstract=2130343>; see also Astrid Birgden & Michael L. Perlin, ‘Tolling for the Luckless, the Abandoned and Forsaked’: *Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 231, 234 (2008); Astrid Birgden & Michael L. Perlin, “Where the Home in the Valley Meets the Damp Dirty Prison”: *A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings*, 14 AGGRESSION & VIOLENT BEHAV. 256, 257 (2009); Perlin, “Baby, Look Inside Your Mirror,” *supra* note 32, at 606; Perlin, “Striking for the Guardians and Protectors of the Mind,” *supra* note 29, at 1184; PERLIN, UNDERSTANDING THE INTERSECTION, *supra* note 29, at 200–02.

183. *Falter I*, 502 F. Supp. 1178, 1185 (D.N.J. 1980).

184. King, *New Directions*, *supra* note 182, at 17–18.

185. Wexler & King, *supra* note 144 (manuscript at 12–15). Judge King prefers “solution-focused courts” to “problem-solving courts” as the proper descriptor. *Id.* at 12; see also King, *New Directions*, *supra* note 182, at 17.

- ✓ Promoting participant choice wherever possible.
- ✓ Asking participants to formulate rehabilitation plans setting out their goals for their time in the program and beyond and the strategies they intend to pursue in order to achieve these goals.
- ✓ Including participants' rehabilitation plans as part of behavioral contracts.
- ✓ Having positive (but realistic) expectations concerning participant achievement.
- ✓ Promoting self-efficacy. Self-efficacy refers to a person's belief in his or her ability to function competently.
- ✓ As far as possible avoiding a coercive and/or paternalistic approach to addressing problems with participants' performance while engaging in the DTC program.
- ✓ The use of non-confrontational methods of engagement with participants in order to promote behavioral change—such as motivational interviewing techniques and persuasion.<sup>186</sup>

These prescriptions strike me as a perfect starting place at which veterans court judges should begin. In a recent article on the potential of judging, Judge King concludes by noting:

The interpersonal dimension of judging has received particular note through the exercise of facilitative, change-oriented and inclusive judging practices in problem-solving courts and in the use of therapeutic jurisprudence in other contexts. It has also been exemplified in the acknowledgment within the judiciary of the necessity to be more aware of and sensitive to the needs of individuals from diverse backgrounds, who come before the court in various capacities.<sup>187</sup>

This sort of *awareness* is absolutely crucial if veterans courts are, in fact, going to succeed and if they can ameliorate the transition of returning veterans into civil society.<sup>188</sup> And it is an awareness that needs to be undertaken,

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186. Wexler & King, *supra* note 144 (manuscript at 12–15).

187. King, *Realising the Potential of Judging*, *supra* note 181, at 186.

188. *See* Hawkins, *supra* note 59, at 570–72.

in the words of Judge Michael Daly Hawkins, a Ninth Circuit federal judge, “with an understanding heart, a firm hand, and a watchful eye.”<sup>189</sup>

In Dylan’s song *John Brown*, upon return from the war, the eponymous narrator tells his mother:

“And I couldn’t help but think, through the thunder rolling and  
stink. That I was just a puppet in a play  
And through the roar and smoke, this string is finally broke  
And a cannonball blew my eyes away.”<sup>190</sup>

The extent to which our returning servicemen and servicewomen have been *puppets in a play* is a question that will be debated for decades, at least. As Dahlia Lithwick has perceptively noted, “[v]eterans return from war having seen and survived unspeakable things, then try to adjust to civilian life with inadequate resources and support.”<sup>191</sup> The very least we can do is to acknowledge what they have faced, the impact that their experiences at war have had, and restructure the judicial system to provide at least some of the needed *resources and support*.

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189. *Id.* at 563 n.\*, 572.

190. DYLAN, *supra* note 23.

191. Lithwick, *supra* note 71.



**DISMANTLING AMERICA’S LARGEST SLEEPER CELL: THE IMPERATIVE TO TREAT, RATHER THAN MERELY PUNISH, ACTIVE DUTY OFFENDERS WITH PTSD PRIOR TO DISCHARGE FROM THE ARMED FORCES**

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EVAN R. SEAMONE<sup>†</sup>

*By separating combat veterans with uniquely military discharges that make many ineligible for effective PTSD treatment, the active duty armed forces are creating a class of future offenders, specially trained to be lethal, whose violent acts against themselves, their families, and the public collectively amass more casualties, incur more costs, and drain more resources in the homeland than the underlying traumatic episode in the war zone. The obligation to treat these offenders and help them successfully transition to civilian society with preserved VA benefits before discharge is not merely a laudatory goal of therapeutic jurisprudence, but a mandate under the precautionary principle which guides the laws of public health and safety. To meet this obligation, the military must work collaboratively with civilian agencies while offenders are still under military control. Mutual self-preservation demands this.*

I. INTRODUCTION

On the heels of various publications observing the high number of American inmates with mental illness,<sup>1</sup> advocates and academicians have spoken against the *criminalization of mental illness*.<sup>2</sup> Many courts have re-

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1. See, e.g., HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 1 (2003), available at <http://www.hrw.org/sites/default/files/reports/usa1003.pdf>.

2. See, e.g., MARY BETH PFEIFFER, *CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL*, at ix-x (2007); E. FULLER TORREY, *THE INSANITY OFFENSE: HOW AMERICA’S FAILURE TO TREAT THE SERIOUSLY MENTALLY ILL ENDANGERS ITS CITIZENS* (2008).

sponded to this problem with a therapeutic jurisprudence (TJ) model that seeks to improve the outcomes of the criminal justice process by enhancing the well-being of all parties and society in litigation.<sup>3</sup> Specifically, with the implementation of diversionary programs at arrest, probationary programs at sentencing, and specialized courts that monitor treatment progress, lawmakers and judges have modified the criminal justice system to target the underlying psychiatric causes of the misconduct rather than the *criminal* symptoms of their mental illness.<sup>4</sup> Although critics may complain about the possibility of true criminals getting off easy, for the most part, these deviations in punishment exist in the recognition that the status quo results in a “‘revolving door’” of criminality, endangering society and creating a public health concern of terrible magnitude.<sup>5</sup> I fashion this policy as the therapeutic imperative in cases involving mental illness, especially when the offender has not been properly diagnosed or treated prior to the criminal offense(s) and interaction with the justice system.

After more than eleven years of sustained combat operations, civilian criminal justice systems have embraced veterans—especially combat veterans, particularly those with posttraumatic stress disorder (PTSD) and mild traumatic brain injury<sup>6</sup> sustained from their faithful service to the nation—as

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3. Evan R. Seamone, *The Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 188–90 (2009) (applying the concept of TJ to combat veterans).

4. See, e.g., David Loveland & Michael Boyle, *Intensive Case Management as a Jail Diversion Program for People with a Serious Mental Illness: A Review of the Literature*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 130, 132–33 (2007) (surveying five widely adopted methods of diverting offenders with mental illness from the criminal justice system and repeat offenses).

5. See Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 28–29 (2011) [hereinafter Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*] (describing the historical evolution of mental health courts to effectively reduce recidivism under extremely complicated circumstances).

6. See BARRY R. SCHALLER, VETERANS ON TRIAL: THE COMING COURT BATTLES OVER PTSD 9, 41, 205–09 (2012). PTSD and traumatic brain injury (TBI) are two injuries that have separate diagnoses and symptoms. See *id.* at 32–36, 41 (discussing the development of PTSD's seventeen diagnostic criteria, as well as TBI); Jennifer J. Vasterling et al., *Posttraumatic Stress Reactions over Time: The Battlefield, Homecoming, and Long-Term Course*, in CARING FOR VETERANS WITH DEPLOYMENT-RELATED STRESS DISORDERS: IRAQ, AFGHANISTAN, AND BEYOND 35, 46–47 (Josef I. Ruzek et al. eds., 2011) (discussing causes of PTSD in the war zone that create overwhelming sensations of hopelessness and later symptoms that lead to difficulties in families and communities); Jozsef Meszaros, *Achieving Peace of Mind: The Benefits of Neurobiological Evidence for Battered Women Defendants*, 23 YALE J.L. & FEMINISM 117, 150–52 (2011) (discussing symptoms of TBI, which results from physical trauma to the brain and often influences judgment and decision-making). Conservative estimates project approximately 300,000 veterans of Iraq and Afghanistan will sustain PTSD.



a population deserving of the therapeutic imperative.<sup>7</sup> Because the worst symptoms of this disorder are often delayed until the veteran returns after combat when the body and mind have *physically* left the chaotic environment of the war zone,<sup>8</sup> legislators, law enforcement officers, and court personnel have recognized that the civil violation often represents the first opportunity the offender has to address remnants of their overseas combat experience.<sup>9</sup>

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*Summary of INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY*, at xx–xxi (Terri Tanielian & Lisa H. Jaycox eds., 2008), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND\\_MG720.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf) (“[A]pproximately 300,000 individuals [returning from Iraq and Afghanistan] currently suffer from PTSD or major depression.”). Additionally, estimates regarding TBI project that Iraq and Afghanistan veterans who have survived attacks by improvised explosive devices are at high risk of suffering both TBI and PTSD as co-occurring disorders. David L. Butler et al., *Assessment and Treatment in Polytrauma Contexts: Traumatic Brain Injury and Posttraumatic Stress Disorder*, in *CARING FOR VETERANS WITH DEPLOYMENT-RELATED STRESS DISORDERS: IRAQ, AFGHANISTAN, AND BEYOND* 87, 88–90 (Josef I. Ruzek et al. eds., 2011) (discussing instances of comorbid PTSD and TBI).

7. See Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 26–27 & nn.69–70 (surveying veteran-specific interventions, including drivers’ license notations in Georgia and Utah for those diagnosed with PTSD); see also Sean Clark et al., Practice Commentary, *Development of Veterans Treatment Courts: Local and Legislative Initiatives*, 7 *DRUG CT. REV.* 171, 189–94 tbl.2 (2010) (comparing national statutory frameworks tailored to veterans in the criminal justice system); Debra A. Pinals, *Veterans and the Justice System: The Next Forensic Frontier*, 38 *J. AM. ACAD. PSYCHIATRY L.* 163, 164 (2010) (noting the “expanding national agenda” for veteran-specific diversionary programs).

8. See Bernice Andrews et al., *Delayed-Onset Posttraumatic Stress Disorder: A Systematic Review of the Evidence*, 164 *AM. J. PSYCHIATRY* 1319, 1319 (2007). Delayed-onset PTSD is recognized as a manifestation of the disorder in which symptoms do not emerge for months or even years following a servicemember’s combat trauma. *Id.* at 1319 (observing how this variation was developed as a diagnosis in recognition that “many soldiers do not develop symptoms [of PTSD] until they return home, as stress reactions are not adaptive in combat”). As an example, see JOANNA BOURKE, *AN INTIMATE HISTORY OF KILLING: FACE-TO-FACE KILLING IN TWENTIETH-CENTURY WARFARE* 212 (Basic Books 1999) [hereinafter BOURKE, *AN INTIMATE HISTORY OF KILLING*] (sharing the experience of John Garcia, a WWII combat veteran, who is haunted daily by combat experiences in which he “inadvertently killed a woman and her infant” 40 years after the event).

9. See, e.g., MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, *BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISON*, 2004, at 4 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vsfp04.pdf> (reporting that incarcerated veterans, as a whole, are more likely than nonveterans to be first-time offenders). Attorneys in the criminal justice system, specifically defense attorneys, are often the “first responders” to untreated PTSD. Evan R. Seamone, *Attorneys as First Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 *MIL. L. REV.* 144, 145–46 (2009) [hereinafter Seamone, *Attorneys as First-Responders*]. Further, veterans treatment courts, which feature treatment alternatives and diversionary programs for veteran offenders specifically operate on the “unspoken assump-

In light of growing reports of active duty suicide,<sup>10</sup> failures to diagnose servicemembers, inadequacy of PTSD screening, and some indication of incentives for mental health professionals to conserve budgets by labeling PTSD as something less serious,<sup>11</sup> the civilian criminal justice system often functions as a surrogate for active duty mental health triage and treatment when it inherits a military offender.<sup>12</sup> Arguably, this embrace of veterans represents a tacit agreement between civil society and the active armed forces; the criminal justice system has begun to pick up the pieces for veterans who are in the greatest need—as evidenced by the sheer destructiveness of their offenses—in recognition that the primary mission of the armed forces is combat, that the services must always be ready to fight, and that rehabilitation by the active armed forces may often serve to impair the military mission.<sup>13</sup>

Veterans raise special public health concerns because of their training. Combat veterans who have perfected the art of using their hands and weapons to take lives in the quickest and most devastating manner, and who have developed a mental mindset that has allowed them to rationalize this behavior in practice over time,<sup>14</sup> are as lethal to bystanders, law enforcement offic-

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tion” that the military has failed to meet their treatment needs. SCHALLER, *supra* note 6, at 208, 211.

10. See, e.g., RAJEEV RAMCHAND ET AL., THE WAR WITHIN: PREVENTING SUICIDE IN THE U.S. MILITARY, at iii (2011), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND\\_MG953.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG953.pdf) (discussing notable and recent trends).

11. See Keegan Hamilton, *Mind Field: PTSD & the Military*, SEATTLE NEWS (Aug. 8, 2012), <http://www.seattleweekly.com/2012-08-08/news/mind-field-ptsd-the-military/> (reporting on internal memoranda at Madigan Army Medical Center in which administrators encouraged Army psychiatrists to downgrade PTSD to adjustment disorder because a diagnosis could “burden [taxpayers] as much as \$1.5 million for a single soldier over the course of his or her lifetime”).

12. SCHALLER, *supra* note 6, at 208 (“The failure of current [military] support systems has left it to the states and cities to fill in the gaps . . . .”); see also Todd Brewster, *Foreword* to BARRY R. SCHALLER, VETERANS ON TRIAL: THE COMING COURT BATTLES OVER PTSD, at ix, xiii (2012) (“Courts, after all, don’t see the evidence of such trauma until a crime is committed, when it may already be too late.”).

13. U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) (“[I]t is the primary business of [all] armies and navies to fight or be ready to fight wars should the occasion arise.”); see also discussion *infra* Part II (describing rationales for this abdication of rehabilitative responsibility).

14. See *Preface* to RICHARD A. GABRIEL, NO MORE HEROES: MADNESS & PSYCHIATRY IN WAR, at prefatory note (1987) (quoting WWII Marine Corps veteran William Manchester: “You’re dealing here with complicated psychological states. No man in battle is really sane. The mind-set of the soldier on the battlefield is a highly disturbed mind, and this is an epidemic of insanity which affects everybody there, and those not afflicted by it die very quickly.”); see also BOURKE, AN INTIMATE HISTORY OF KILLING, *supra* note 8, at 102 (describing the positions of military psychiatrists who banked on the effect of stress-induced madness, reason-

ers, and victims as they are to foreign enemies when the symptoms of their mental illness result in or contribute to loss of impulse control or violence.<sup>15</sup> Yet, public safety, alone, is not the only motivator for the therapeutic imperative.<sup>16</sup> A review of the enabling legislation for the growing number of veterans treatment courts throughout the nation—currently 180,<sup>17</sup> with many more in the planning stages, highlights the unifying determining factor; as it relates to the treatment of veterans in the civilian criminal justice system, the therapeutic imperative derives more than anything from a *moral obligation* to repay the country's wounded warriors for their debts.<sup>18</sup>

The pivotal question raised by civil society's willingness (or *de facto* role) to catch the stray servicemembers who slip through the cracks is whether this tacit agreement acts as an *incentive* for the military to bypass the legitimate mental health care needs of servicemembers.<sup>19</sup> With an eye toward the prevention of PTSD and traumatic brain injury (TBI) related mis-

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ing “that combat soldiers who began fearing that they would ‘crack’ under the strain would attempt to destroy the threat as [soon] as possible and, in a fit of ‘desperate aggression,’ often acted heroically.”).

15. See, e.g., JERRY LAVELY ET AL., COMBAT VETERAN DOMESTIC CRISIS RESPONSE: LAW ENFORCEMENT DE-ESCALATION OPTIONS 3 (McCormick Foundation 2009) (observing how symptomatic veterans present a “unique threat to law enforcement”); Christopher Weaver et al., *Enhancing Services Response to Crisis Incidents Involving Veterans: A Role for Law Enforcement and Mental Health Collaboration*, 10 Psychological Servs. 66, 68 (2013) (“Veterans are often trained in combat, weapons, and policing tactics, and may have wartime practice using these skills. In fact, veterans’ skills in these areas may be equal or superior to those of responding officers.”). See also discussion *infra* Part IV.

16. See discussion *infra* Part IV.; see also *Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans’ Affairs*, 103d Cong. 15 (1994) (testimony of Jonathan Shay, M.D., Ph.D.) [hereinafter Shay Testimony].

17. Comments of Hon. Eric Shinseki, Sec. Dep’t of Veterans Affairs, Keynote Address to the General Session of the 143rd Congress of Corrections, Am. Correctional Ass’n., National Harbor, Md (Aug. 12, 2013). See also *The History*, JUST. FOR VETS, <http://www.justiceforvets.org/vtc-history> (last visited Apr. 21, 2013).

18. See, e.g., Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 18 n.41 (describing how the many veterans’ initiatives developed in state judicial systems “exist to address issues related exclusively to [wounds incurred during] the offender’s active duty military service”). Psychiatrist Jonathan Shay, a Department of Veterans Affairs (VA) expert in combat PTSD, explains that combat veterans “have an absolute moral claim” on society that “goes right back to the War of Independence” for the simple reason that they were wounded by the enemy in service of their nation. Shay Testimony, *supra* note 16, at 15.

19. In his recent book, retired Connecticut Supreme Court Justice Barry Schaller argues that responsibility for adequate treatment prior to discharge rests solely with the military and not the civilian courts, which have been transformed into responders of last-resort by the military’s hasty and inadequate efforts to discharge wounded warriors. SCHALLER, *supra* note 6, at 200, 263 (“The goal must be to prevent problems of readjustment rather than expect civilian society to deal with them after they occur.”).

conduct, this article answers the question in the affirmative; active duty offenders with PTSD are routinely neglected for effective treatment with the expectation that civil society will address the problem following discharge and that discipline is the primary ideology to be served.<sup>20</sup> This is troubling, foremost, because many of the underlying assumptions in the military disciplinary framework are terribly flawed and the end result is a soldier, sailor, airman, marine, or coastie (collectively “troop”) so crippled by the indelible brand of the military’s discharge process that even civil society may find it impossible to provide necessary help once his or her separation from the military is complete.

This article applies the principles of TJ to the punishment of active duty military offenders with PTSD and TBI who exist in a disciplinary structure that is distinct from the civilian justice system and serves very different ends.<sup>21</sup> I argue that TJ, in this atypical military realm, is mandated not simply by the ideological goal to treat rather than punish offenders with legitimate mental health care needs for the betterment of society at large, but more importantly, that TJ embodies a precautionary principle in public health and public safety that overrides simply the moral imperative never to leave a fallen comrade behind.<sup>22</sup> Through the recognition of why it is absolutely necessary for military commanders to adapt the disciplinary structure to incorporate TJ, civil society can properly distinguish its responsibilities from the military’s, with more optimal results for both entities and all concerned parties. To better understand the nature of this important and obscured problem, Part II begins by identifying the crux of the active duty problem: How discipline now trumps treatment and the various statutory and regulatory *escape hatches* that have allowed such prioritization, even when a military offender has a diagnosed service-connected mental health disorder.<sup>23</sup> This is problematic because it not only delays the ability to effectively treat symptoms, but also *aggravates* existing ones in the process.

Part III describes the crippling *less-than-honorable* military discharge characterizations linked to misconduct and their effect in terminating health care benefits and generating societal stigmas, as well as handicaps that are unique to ex-servicemembers, but universal in their devastation.<sup>24</sup> This *Military Misconduct Catch-22* becomes an impetus for recidivism in civil society, translating commanders’ well-meaning intentions to enforce good order

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20. See discussion *infra* Part IV.

21. See discussion *infra* Part IV.

22. Important as it may be, the moral obligation alone may not be enough to motivate military action because it clashes with other conflicting obligations, explored below in Part V.

23. See discussion *infra* Part II.A–D.

24. See discussion *infra* Part III.

and discipline into the basis for undermining the safety of the very society they are sworn to protect. Normally, deference to the military's unique attributes or the invocation of other competing interests might permit it to deflect concerns about compassion, sympathy, and mercy.<sup>25</sup> Part IV, however, borrows a page from international law and homeland security to highlight why TJ is necessary under the precautionary principle in public health—despite many questions that simply cannot be answered at the present time.<sup>26</sup> By highlighting the interrelationship between TJ and the precautionary principle in a military disciplinary framework, this article further reveals the adaptability of TJ to other fields where it might, at first, seem facially incompatible, such as regulation of human behavior in the mitigation of infectious disease transmission, transboundary disasters, counterterrorism, and other public health crises.<sup>27</sup>

## II. THE UNCOMPROMISING MANTRA OF “GOOD ORDER AND DISCIPLINE” IN THE ARMED FORCES

Ground forces have an objective to obliterate the enemy face-to-face and hand-to-hand when mortars, rifles, and bayonets fail, while advancing on enemy positions.<sup>28</sup> In the profession of arms, dangerous duty requires a different, harsher type of leadership than civilian occupations, aptly defined by President Truman to the Cadet Corps of the United States Military Academy as “that quality which can make other men do what they do not want to do, and like it.”<sup>29</sup> Similar to a basic training ideology, which uses coercion to break (mostly) teenagers out of an independent mindset and replace their prior values with a singular ideology of “unquestion[ed] obedience,” continued service in the ground forces necessarily involves threats and frequent public use of discipline to remind all team members that they *must* work to-

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25. See discussion *infra* Part III (describing common justifications for ambivalence to wounded warrior offenders, including lack of ability to prove causation between PTSD and criminal acts, assumption of risk for invisible wounds in a volunteer military, and the ease of malingering PTSD for secondary gain).

26. See discussion *infra* Part IV.

27. See discussion *infra* Part III.

28. See, e.g., BOURKE, AN INTIMATE HISTORY OF KILLING, *supra* note 8, at xiv.

29. President Harry S. Truman, Remarks to the Cadet Corps at West Point (Sept. 28, 1946), <http://www.trumanlibrary.org/publicpapers/index.php?pid=1760&st=&st1=>; see also U.S. DEP'T OF THE ARMY, FIELD MANUAL 22-100, MILITARY LEADERSHIP 7 (1958), available at [www.cgsc.edu/CARL/docrepository/FM22\\_100\\_1958.pdf](http://www.cgsc.edu/CARL/docrepository/FM22_100_1958.pdf) (“*Military leadership*. The art of influencing and directing men in such a way as to obtain their willing obedience, confidence, respect, and loyal cooperation in order to accomplish the mission.”).

gether and obey orders.<sup>30</sup> There is a reason why commanders often display the results of administrative punishment under the *Uniform Code of Military Justice (UCMJ)* within the hallways of their platoon and company orderly rooms:<sup>31</sup> Discipline must happen harshly and swiftly because lives may be on the line if and when it is questioned.<sup>32</sup> This is an outgrowth of the guiding historical military leadership principle that, to win wars, “men must fear their officers more than death from the enemy.”<sup>33</sup>

A. *The Armed Forces Are More Likely to Criminalize Mental Illness With Uniquely-Military Offenses Tied to Work Performance*

Life in the military is dominated by an endless set of rules, schedules, and suspense dates, each of which is conveyed through verbal or written orders from a superior of one type or another. Violations of these orders, no matter how trivial they might seem, make any subordinate service-member liable for punishment, which can include a federal criminal conviction, time in jail, and a punitive discharge. For example, if an officer directs a junior enlisted soldier to stand at the position of attention while being addressed, and she willingly fails to do so, her criminal act, “[w]illfully disobeying a . . . superior commissioned officer,” under Article 90 of the *UCMJ*, could technically earn her up to a “[d]ishonorable discharge, forfeiture of all pay and allowances, . . . confinement for [five] years,” and reduction to the lowest enlisted grade.<sup>34</sup> Even more unforgiving, if a general officer has developed a policy that requires or prohibits certain behavior, the service-member can be convicted of violating a lawful general order, even if she had never had no-

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30. ANNI BAKER, LIFE IN THE U.S. ARMED FORCES: (NOT) JUST ANOTHER JOB 25 (2008); see generally Robert J. Stevenson, *The Officer-Enlisted Distinction and Patterns of Organizational Reaction to Social Deviance in the U.S. Military*, 68 SOC. FORCES 1191, 1191, 1193 (1990) (examining trends in military discipline during WWII, the Korean War, and Vietnam, and concluding that military superiors exert control through punishment, which occurs at increasing frequencies the more the leadership is called into question).

31. This is based on personal experience of the author, who has served primarily as a military prosecutor over the last eleven years.

32. See, e.g., *Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893) (“The power to command depends upon discipline, and discipline depends upon the power to punish . . .”); Richard C. Harding, *A Revival in Military Justice: An Introduction by the Judge Advocate General*, REPORTER, Summer 2010, at 4, 5 (discussing the indispensability of “military discipline” and “good order and discipline” in achieving the objectives of the profession of arms).

33. GABRIEL, *supra* note 14, at 103.

34. MANUAL FOR COURTS-MARTIAL UNITED STATES, at IV-21, A2-17 (2012) [hereinafter MCM], available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf); see 10 U.S.C. § 890(2) (2006).

tice of its contents, thus exposing her to up to a “[d]ishonorable discharge, forfeiture of all pay and allowances, . . . confinement for [two] years,” and reduction to the lowest enlisted grade, pursuant to Article 92 of the *UCMJ*.<sup>35</sup>

Commanders, of course, are not required to press charges and pursue the full extent of punishment for all offenses.<sup>36</sup> Furthermore, one cannot receive a Bad-Conduct Discharge (BCD) unless the issue has been elevated through higher channels from the recommending commander to a military judge or panel.<sup>37</sup> Problematically, because individual commanders have such wide discretion to initiate different levels of punishment, no one knows for sure what to expect. Today might just happen to be the day when the commander and the military panel desire to set an example for other impressionable troops and obtain a necessary deterrent. The fact that commanders and military panels have equally been criticized for being too lenient *and* too harsh on offenders reveals a lack of consistent standards in punishment and the possibility for abuse of discretion.<sup>38</sup> Likewise, the lack of any known minimum punishments for all but a handful of egregious offenses often pressures servicemembers to waive their rights to full-blown courts-martial in favor of lesser administrative action, including the ominous administrative

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35. MCM, *supra* note 34, at IV-25; 10 U.S.C. § 892(1). The *Manual* specifically states, “knowledge of a general order or regulation need not be alleged or proved, as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.” MCM, *supra* note 34, at IV-24. In the military case of *United States v. Webster*, the court observed that the effect of this punitive article was to “creat[e] . . . what amounts to ‘strict liability’ for the unwary.” 37 M.J. 670, 677 (C.G.C.M.R. 1993).

36. Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F. L. REV. 115, 129 (2007). While the military articulates maximum punishments, there are few minimums and commanders always have the option to pursue nonpunitive means, such as corrective training to address infractions. *See id.* (describing broad commander discretion on punishment and few rules about how to exercise it). Even at a court-martial, “there’s no minimum sentence. So for example, if someone were convicted of rape, they could get a sentence from no punishment all the way up to life imprisonment.” *United States v. Schlamer*, 52 M.J. 80, 88 (C.A.A.F. 1999) (quoting a military judge’s comment to panel member). For further discussion, see Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions*, 67 A.F. L. REV. 245 (2011).

37. *See* MCM, *supra* note 34, at II-128.

38. *See generally* PATRICK CALLHAN, *MILITARY INJUSTICE* 97-109 (2013) (describing the prevailing biases that influence commanders to pursue overly-punitive consequences for military offenders). As just one example, military records demonstrate that African-Americans and servicemembers of other minority groups received disproportionately higher numbers of stigmatizing discharges during Vietnam than white offenders punished for the same offenses. LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, *CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION* 139 (1978) (describing evidence of racial bias in the discharge system).

discharge under Other Than Honorable Conditions (OTH) (which existed before 1976 as the Undesirable Discharge (UD)).<sup>39</sup>

*B. Disciplinary Standards Lack Consistency Based on Individual Commanders' Preferences and Philosophies*

With this very brief snapshot of military justice in mind, commentators have rightfully raised concerns that the military is far more likely to criminalize mental illness than the civilian justice system.<sup>40</sup> As one attorney who works with wounded warriors has cautioned: "Consider all the hoopla about the [Department of Defense] increasing the disability rating for PTSD. . . . Odds are, if you have PTSD, they are probably going to kick you out for a pattern of misconduct so you won't be getting paid disability anyway."<sup>41</sup> Putting aside the common symptom of self-medication with controlled substances or alcohol, and related offenses,<sup>42</sup> PTSD symptoms tied to irritability and hyper-alertness often result in decreased work performance (i.e., the inability to maintain concentration working on monotonous or complicated tasks, outbursts in frustration, lateness for assigned duties).<sup>43</sup> Unlike the civilian environment, each of these manifestations is a crime in the military.<sup>44</sup> And, with the armed forces being the occupation with the greatest levels of

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39. See, e.g., Vanessa Baehr-Jones, *A "Catch-22" for Mentally-Ill Military Defendants: Plea-Bargaining Away Mental Health Benefits*, 204 MIL. L. REV. 51, 51–52, 54 (2010) (describing incentives for offenders with PTSD to plea-bargain away their benefits in exchange for lesser administrative punishment once commanders have instituted court-martial charges).

40. See Amanda Carpenter, *Navy Doctor Warns: Misconduct May Be Symptom of Stress Disorder*, WASH. TIMES, Jan. 12, 2010, at A1. According to a senior ranking Navy psychiatrist, "[t]he service may be discharging soldiers for misconduct when in fact they are merely displaying symptoms of post-traumatic stress disorder." *Id.* (citing a widely-distributed 2007 memorandum).

41. Carissa Picard, *Military Misconduct*, MYSPACE (Jan. 18, 2009, 4:29 AM), <http://www.myspace.com/looking4ladybugs/blog/464671591>.

42. See, e.g., Pinals, *supra* note 7, at 164 (discussing common co-occurring conditions that accompany most PTSD diagnoses); Greg Barnes, *When War Comes Home: Crime Surge Among Veterans Suggest Some Didn't Leave Horrors Behind*, FAYOBSERVER.COM (Feb. 5, 2012, 1:49 AM), <http://www.fayobserver.com/articles/2012/02/05/1151825> (noting an Army statistic that "25 . . . to 35 percent of wounded soldiers are addicted to prescription or illegal drugs while they await medical discharge").

43. Gregg Zoroya, *Battle Stress May Lead to Misconduct*, USA TODAY, July 2, 2007, at A5 [hereinafter Zoroya, *Battle Stress*] (citing Captain William Nash for the proposition that, due to PTSD, "[i]t can be very, very hard for [marines] to really care even about obeying the rules"); Picard, *supra* note 41 ("[S]ymptoms of PTSD . . . make it difficult for affected servicemembers to comply with and conform to the military's strict code of conduct.").

44. See Carpenter, *supra* note 40; Picard, *supra* note 41.



stress,<sup>45</sup> and thus PTSD risk, the signature injuries of the Iraq and Afghanistan wars have unwittingly transformed many patients in need of legitimate medical care into offenders in need of discipline in the eyes of their military superiors. Commonly, any of the following phenomenon related to Operational Stress Injuries (OSIs)<sup>46</sup> can result in behavior that is simultaneously symptomatic *and* criminal:

- “dissociative episode[s]”;
- “shattered assumptions of moral order”;
- “thrill or sensation-seeking behavior”;
- “self-punishment”;
- “moral injury”;
- “violent behavior occurring in a sleep-state in response to vivid nightmares”; or
- “adverse reactions to psychotropic medications during the course of treatment for mental conditions.”<sup>47</sup>

While the military has officially recognized the connection between service-connected stress conditions and misconduct<sup>48</sup>—both on the battle-

45. See Victoria Brienza, *The 10 Most Stressful Jobs of 2012*, CAREERCAST, <http://www.careercast.com/jobs-rated/10-most-stressful-jobs-2012> (last visited April 21, 2013) (identifying the “enlisted soldier” as the most stressful occupation above firefighters, police, and even airline pilots).

46. While PTSD garners the bulk of attention, it is not the only combat-related condition that results in criminal offending. Often, those who do not qualify for a full-blown diagnosis of PTSD suffer symptoms more acutely than those with the PTSD diagnosis. ShirleyMcPherson-Sexton & Brandon Hostetler, *How to Respond to the Crisis Victim with PTSD Symptoms: An Intervener’s Guide*, 9 J. POLICE CRISIS NEGOTIATIONS 61, 62 (2009). For this reason, the military and civilian criminal justice systems must be cognizant of the problems facingservicemembers and veterans with other disorders too. This surely includes “acute anxiety disorders,” “adjustment disorders,” “family violence,” and even “hostility.” Peter J. Cosgrove, *Forward to MILITARY STRESS AND PERFORMANCE: THE AUSTRALIAN DEFENSE FORCE*, at xv (George E. Kearney et al. eds., 2003). It is important, therefore, to consider all Operational Stress Injuries, which are simply defined as “any persistent psychological difficulty resulting from operational duties performed by a [military] member.” Operational Stress Injury Social Support, *The Invisible Wounds, The Official Definition of an OSI*, [http://www.osiss.ca/engraph/def\\_e.asp?sidecat=1](http://www.osiss.ca/engraph/def_e.asp?sidecat=1) (last visited Oct. 26, 2013).

47. John W. Brooker et al., *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 Mil. L. Rev. 1, 253-55 (2012).

48. See, e.g., Letter from Peter W. Chiarelli, General, United States Army, to Leaders, in U.S. DEP’T OF THE ARMY, *ARMY 2020: GENERATING HEALTH & DISCIPLINE IN THE FORCE AHEAD OF THE STRATEGIC RESET* (2012), available at <http://www.armyg1.army>.

field<sup>49</sup> and in manifestations after troops have returned home<sup>50</sup>—and has urged commanders to at least *consider* mental conditions before taking disciplinary action,<sup>51</sup> the need for deterrence, group examples, and unquestioned obedience still allows commanders to disregard the current and future treat-

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mil/hr/suicide/docs/army\_2020\_generating\_health\_and\_discipline\_in\_the\_force\_report\_2012\_GOLD\_BOOK.pdf.

One of the most important lessons learned in recent years is that we cannot simply deal with health *or* discipline in isolation; these issues are interrelated and will require interdisciplinary solutions. For example, a Soldier committing domestic violence may be suffering from undiagnosed post-traumatic stress. He may also be abusing alcohol in an attempt to self-medicate to relieve his symptoms. The reality is there are a significant number of Soldiers with a foot in both camps—health and discipline—who will require appropriate health referrals and disciplinary accountability.

*Id.*

49. See U.S. DEP'T OF THE ARMY, FIELD MANUAL 22-51, LEADERS' MANUAL FOR COMBAT STRESS CONTROL, at 4-1 to 4-20 (1994) [hereinafter FM 22-51], available at <http://www.enlisted.info/field-manuals/fm-22-51-leaders-manual-for-combat-stress-control.shtml>. The term most commonly used is “combat stress,” and an Army field manual devotes an entire chapter to it. See *id.* The chapter identifies a number of criminal behaviors linked to combat stress and the manual goes on to distinguish how the same forces might generate positive and misconduct stress:

Positive combat stress behaviors and misconduct stress behaviors are to some extent a double-edged sword or two sides of the same coin. The same physiological and psychological processes that result in heroic bravery in one situation can produce criminal acts such as atrocities against enemy prisoners and civilians in another. Stress may drag the sword down in the direction of the misconduct edge, while sound, moral leadership and military training and discipline must direct it upward toward positive behaviors.

*Id.* at 3-12 & fig.3-1.

50. See TASK FORCE ON MENTAL HEALTH, DEP'T OF DEF., AN ACHIEVABLE VISION: REPORT OF THE DEPARTMENT OF DEFENSE TASK FORCE ON MENTAL HEALTH 22 (2007), available at <http://dtf.defense.gov/rwtf/dodtfmentalhealth2007.pdf>. A recent Task Force report observed various PTSD-linked “complex disinhibitory behaviors” likely to result in criminal offenses following the return from combat. See *id.* (citing “[d]ifficulty controlling one’s emotions, including irritability and anger . . . , [s]elf-medication with . . . illicit drugs in an attempt to return to ‘normalcy,’ [and] reckless/high risk behaviors” which might occur “months after the battlefield injury or trauma”).

51. See, e.g., ARMY BD. FOR CORR. OF MILITARY RECORDS, RECORD OF PROCEEDINGS AR20120022346 (2013), available at <http://boards.law.af.mil/ARMY/BCMR/CY2012/20120022346.txt> (requiring the commanding general to “address whether the Soldier’s medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation, and/or whether other circumstances of the individual case warrant disability processing instead of further processing for administrative separation” in all cases where a Medical Evaluation Board has determined that an official disability rating for medical conditions is warranted). Sadly, the requirement neither explains how to determine the link between the misconduct and the medical condition and the misconduct, nor requires the commander to take favorable action even when the link is present. See *id.* Additionally, the requirement only applies to those cases that have completed the initial Medical Evaluation Board process, which could take over a year, and only those cases that have been favorably recommended by the Board for further processing. See *id.*

ment needs of their offending subordinates. Not only has the military failed to institute recommendations that would assist them in providing treatment rather than punishment,<sup>52</sup> various *escape clauses* provide commanders with ways to evade existing mandates designed to provide needed treatment.<sup>53</sup>

Publicly, the premium on punishing offenders with known mental health conditions is the greatest proof that misconduct trumps care, even when that misconduct arose from “good, even heroic, soldiers.”<sup>54</sup> Consider, for example, the representative response of the United States Army’s Special Operations Command when its commander was criticized for prosecuting a soldier with PTSD: “Nowhere in our four major criteria for PTSD does it allow for breaking the law.”<sup>55</sup> Ponder the Army and the Marine Corps cases in which an officer and an enlisted servicemember had charges brought against them—one case resulting in a punitive BCD and 180 days confinement—for failed attempts at suicide while suffering from a diagnosed mental health condition.<sup>56</sup> Although the military’s highest court ultimately invali-

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52. See, e.g., Carpenter, *supra* note 40 (reporting the Marine Corps’ rejection of the recommendation for all post-deployment offenders to be screened for PTSD prior to the determination to pursue adverse action).

53. Kelly Kennedy, *PTSD Victim Booted for ‘Misconduct,’* ARMY TIMES, (Jan. 7, 2009, 12:55 PM), [http://www.armytimes.com/news/2009/01/military\\_ptsd\\_discharge\\_010709w/](http://www.armytimes.com/news/2009/01/military_ptsd_discharge_010709w/) (copy on file with *Nova Law Review*) (statement of retired Army Lieutenant Colonel Mike Parker: “Even though they have this new regulation saying they can’t kick [a troop] out for personality disorders, they can still kick [PTSD-afflicted servicemembers] out for misconduct . . . ‘Everything they say, they have an escape clause.’”).

54. FM 22-51, *supra* note 49, at 2-9(c); see also *id.* at 2-10 (“Excellent combat soldiers may commit misconduct stress behaviors in reaction to the stressors of combat before, during, or after their otherwise exemplary performance. Combat stress, even with good combat behavior, does not excuse criminal acts.”). For example, a recent military report “considers the misconduct discharges ‘good news’ because they lead to better discipline within the ranks” but essentially ignores “what happens to those soldiers after they leave the Army, often with other-than-honorable discharges that bar them from receiving military benefits.” Barnes, *supra* note 42.

55. Carpenter, *supra* note 40 (citing the comments of the United States Army’s Special Operations Command’s chief of media and community relations Carol Darby).

56. *Marine Fights Military Conviction for Suicide Attempt*, FOX NEWS (Feb. 2, 2012), <http://www.foxnews.com/us/2012/02/02/marine-fights-military-conviction-for-suicide-attempt/>; *The Case of Lt. Whiteside: When It Comes to the Psychological Wounds a War Inflicts, the Army Still Doesn’t Get It*, WASH. POST, Dec. 6, 2007, at A28. Former Marine Lazzaric T. Caldwell was convicted for his self-harm and sentenced to a BCD and 180 days confinement. *Marine Fights Military Conviction for Suicide Attempt*, *supra*. As he awaits the results of his appeal, he is not receiving mental health treatment for his diagnosed PTSD because of his discharge. *Id.* He reasons, “[s]eeing the kind of state I was in, there should have been a way of getting help instead of just punishment.” *Id.* Army Lieutenant Elizabeth Whiteside fared a bit better in her case. See *The Case of Lt. Whiteside*, *supra*. Whiteside’s command criminally charged her for shooting herself in the stomach after a series of stressful

dated this outcome, the practices that led to this initial punishment provide an important window into a larger disciplinary philosophy.<sup>57</sup>

Society, legislators, military courts, and commanders have often explained these “absurd,”<sup>58</sup> “unjust and irrational,”<sup>59</sup> byproducts of the military justice system—replete with its purely military offenses—on four policy grounds.<sup>60</sup>

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events in Baghdad and “[d]espite the unequivocal judgment of psychiatrists that she suffers from significant mental illness.” *Id.* Although charges were eventually dropped after media publicity and she received a General Discharge, Whiteside again attempted suicide following her charges. *Events Surrounding the Case of 1st Lt. Elizabeth Whiteside*, WASH. POST (Jan. 30, 2008 2:19 PM), [http://www.washingtonpost.com/wp-dyn/content/article/2008/01/30/AR2008013002250\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/01/30/AR2008013002250_pf.html). She provides a personal account of her psychotic break on *The Washington Post*'s website. *Id.* The offense supporting such charges is codified in Article 134 of the *UCMJ* as “[s]elf-injury without intent to avoid service” and bears a punishment that includes up to five years confinement and a Dishonorable Discharge (DD). 10 U.S.C. § 934 (2006); MCM, *supra* note 34, at IV-129. Upon considering Private Caldwell's appeal, a majority of the Navy and Marine Corps Court of Criminal Appeals upheld the conviction, finding that bloodletting from his two slashed wrists caused a substantial mess and required a response that was prejudicial to good order and discipline. *United States v. Caldwell*, 70 M.J. 630, 632 (N-M. Ct. Crim. App. 2011), *aff'd in part and reversed in part*, 72 M.J. 137 (C.A.A.F. 2013).. They continued:

As to the public policy argument, we are not persuaded that criminal prosecution of genuine suicide attempts should be prohibited under military law. . . . If a [commander] feels it necessary to resort to court-martial to address this type of leadership challenge, he or she should be allowed to do so . . . .

*Id.* at 633.

57. *United States v. Caldwell*, 72 M.J. 137, 141-42 (C.A.A.F. 2013) (finding insufficient evidence to show that this particular Marine's acts of cutting his wrists had a palpable negative effect on good order and discipline within the unit or was service-discrediting, but confirming the viability of the charge in other circumstances).

58. Kennedy, *supra* note 53.

59. Shay Testimony, *supra* note 16, at 117.

I . . . find the situation of veterans with “bad paper”[—being denied mental health treatment—]to be as unjust and irrational as if they had been drummed out for failure to stand at attention after their feet had been blown off. Most of these men committed offenses *because* of their combat PTSD.

*Id.*

60. *See infra* Part II.

C. *The Four Bases for Ambivalence to the Mental Health Treatment Needs of Military Offenders*

1. *There Is Not Enough Research to Demonstrate an Absolute Causal Link Between PTSD and Misconduct. Hence, It Would Be Counterproductive to Assume the Connection in All Cases.*

Even the leading psychiatrists in the nation agree that knowledge about PTSD is still in its infantile stages.<sup>61</sup> The recently-revised diagnostic criteria in the *Diagnostic and Statistical Manual for Mental Disorders* (DSM-5), therefore provide poor guidance to the criminal courts and the legal profession, which require objective and reliable diagnostic standards.<sup>62</sup> As the mental health profession learns more, standards necessarily change. A consequence of this is the lack of studies providing definitive answers, the need for more studies to eliminate inconsistencies and contradictions based on the populations studied, and an abundance of tentative and qualified suggestions about causation.<sup>63</sup> It is no wonder that, in this environment of uncertainty and *soft science*, there are similar problems linking PTSD to misconduct.<sup>64</sup>

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61. See, e.g., Josef I. Ruzek et al., *Introduction: Addressing the Mental Health Needs of Active-Duty Personnel and Veterans*, in *CARING FOR VETERANS WITH DEPLOYMENT-RELATED STRESS DISORDERS: IRAQ, AFGHANISTAN, AND BEYOND* 3, 5 (Josef I. Ruzek et al. eds., 2011) (recognizing that the “accelerating rate of change in the mental health support mission, will challenge all of us to move toward continually learning better ways to serve those who return from these wars [with PTSD]”).

62. See SCHALLER, *supra* note 6, at 9 (“The [*Diagnostic and Statistical Manual’s* (“*DSM*”) definition of PTSD remains a moving target, with the disorder undergoing changes in each revision of the manual.”). Justice Schaller defines five common concerns with the present criterion in the 2000 Text Revision of the *DSM*: “(1) trauma concept; (2) assumption of a specific trauma factor; (3) lack of specificity of the criteria, namely, that they overlap with too many other disorders; (4) criterion creep or spread into too many diverse situations; and (5) excessive malingering encouraged by the formulation, which corrupts legitimate use of the diagnosis.” *Id.* at 201. For the current edition of the *DSM*, see AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5*, at 271-80, Criterion 309.81 (5th ed. 2013).

63. In the Institute of Medicine’s analysis, a panel of subject matter experts in PTSD could, at best, only conclude that “there is limited but suggestive evidence of an association between deployment to a war zone and later incarceration.” 6 INST. OF MED., *GULF WAR AND HEALTH: PHYSIOLOGIC, PSYCHOLOGIC, AND PSYCHOSOCIAL EFFECTS OF DEPLOYMENT-RELATED STRESS* 306 (2008), available at <http://www.iom.edu/reports/2007/gulf-war-health-vol-6-physiologic-psychologic-psychosocial-effects-deployment-related-stress>.

64. See John Hoellwarth, *Linking Misconduct with PTSD*, MARINE CORPS TIMES, July 2, 2007, at 13 (reporting the conclusions of a senior psychiatrist researcher at the Marine “Corps’ first Combat Operational Stress Control Conference” in 2007 regarding the possible correlation between PTSD and crime: “[W]e do not yet have the good data to discern how big the problem is, what contributes to it and how we can deal with it”). As recently as 2012, a team

Even where a troop unquestionably suffers from PTSD, his or her offense may not have a connection to the disorder. Prosecutors scoff at the defendant who argues that PTSD caused him to “get in a boat, sail it across the [A]tlantic and then try to take back ten thousand poun[d]s of hashish,” echoing scholars’ conclusions that the causation requirement is the biggest obstacle to succeeding on the PTSD defense.<sup>65</sup> In a court of law, as well as the court of public opinion, the defense must demonstrate that the PTSD reaction occurred at the time of the criminal behavior and was the motivating force responsible for it.<sup>66</sup>

Inevitably, PTSD affects individuals differently, making general statements about causation useless in a given case.<sup>67</sup> The flip-side of this conclusion is the fact that PTSD reactions can and certainly do occur in discernible patterns<sup>68</sup> of “particularly uncharacteristic misconduct following deployment”.<sup>69</sup> “Typical offenses [which can often be traced] directly from combat PTSD” among veterans of Vietnam, Iraq, and Afghanistan wars include “AWOL or desertion after return to [the] U.S., [u]se of illicit drugs to self-medicate symptoms of PTSD, [and] [i]mpulsive assaults during explosive

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of international researchers highlighted continuing difficulties establishing the simplest connections between mental illness and military members’ criminality James Taylor et al., *Military Veterans with Mental Health Problems: A Protocol for a Systematic Review to Identify Whether They Have an Additional Risk of Contact with the Criminal Justice Systems Compared With Other Veteran Groups*, 53 SYSTEMATIC REVS. 1 (2012).

65. See Michael D’Antonio, *The War They Can’t Escape: They Returned from the Unpopular War in Vietnam to a Hostile Welcome; Often Very Young, Lacking Training in Jobs, and Haunted by the Traumas of Faraway War, Many Veterans Have Replaced the Jungles of Asia with New Ones—The Jungles of American Prisons*, BOS. GLOBE, May 10, 1981, at 1.

66. See Daniel Burgess et al., *Reviving the “Vietnam Defense”: Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 79 (2010). But see *United States v. Perry*, No. 4:CR94–3035, 1995 WL 137294, at \*8 (D. Neb. Mar. 27, 1995) (finding a causal relationship between PTSD and “distribution of cocaine to fund the purchase of cocaine so as to be able to continue to self-medicate”).

67. See TASK FORCE ON MENTAL HEALTH, DEP’T OF DEF., *supra* note 50, at 22 (“The time of onset, severity and duration of [PTSD-related] behaviors vary significantly from patient to patient.”).

68. Carpenter, *supra* note 40. Most recently, Dr. Eric Elbogen and his colleagues have concluded that “combat trauma in the form of PTSD, combined with the high irritability that PTSD can cause, does ‘significantly’ raise the risk of criminal arrest.” David Wood, *Combat Veterans with PTSD, Anger Issues More Likely to Commit Crimes: New Report*, HUFFPOST WORLD (Oct. 10, 2012 1:18 PM), [http://www.huffingtonpost.com/2012/10/09/veterans-ptsd-crim-report\\_n\\_1951338.html](http://www.huffingtonpost.com/2012/10/09/veterans-ptsd-crim-report_n_1951338.html); see also Eric B. Elbogen et al., *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, 80 J. CONSULTING & CLINICAL PSYCHOL. 1097, 1099 (2012) (the link between combat exposure and arrest was mediated by PTSD with high irritability).

69. Zoroya, *Battle Stress*, *supra* note 43.

rages on officers or NCOs after return to the U.S.”<sup>70</sup> Additionally, even where the offense was not directly caused by PTSD, the condition *indirectly* led to the offense; that is, had the disorder never been caused by combat trauma, the veteran would not find herself in the perfect storm of handicaps that preceded the offending behavior.<sup>71</sup> This is why courts distinguish between PTSD on the merits as a substantive defense and PTSD as a mitigating or extenuating factor at sentencing, which might help to explain the misconduct by putting it in the proper context.<sup>72</sup> In addressing this justification for the Military Misconduct Catch-22, we must be careful not to rule out the value and propriety of treatment as a sentencing consideration in courts and boards, even where the misconduct is not directly attributable to the mental condition.

2. In an All-Volunteer Military, the Servicemember Has Assumed the Risk That He or She May Be Traumatized by Combat. Accordingly, He or She Should Ask for Help When Needed Rather than Acting Irresponsibly or Engaging in Behavior That Has Criminal Consequences.

As Department of Veterans Affairs (VA) psychiatrist Jonathan Shay observes, “[t]he usual perception is that . . . these groups have only themselves to blame—it is their misconduct or criminal behavior that has deprived them of their benefits.”<sup>73</sup> I have often heard this *assumption of risk* argument from

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70. Shay Testimony, *supra* note 16, at 115.

71. See Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 21.

72. See, e.g., Burgess et al., *supra* note 66, at 79; Pinals, *supra* note 7, at 165 (noting psychiatrists’ position that “the impact of [PTSD] is sufficiently mitigating to avoid a potential death penalty sentence”); Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 144–47 (discussing courts’ consideration of PTSD symptoms as a mitigating factor at sentencing).

73. Shay Testimony, *supra* note 16, at 112. Consider the prosecutor’s representative argument to the military panel in *United States Air Force Court of Military Review v. Winchester*:

You should discharge the accused. You can do that by sentencing him to a bad-conduct discharge. As to the accused’s statement that a bad-conduct discharge will mark him for life, well, if that’s true, he’s the one who set the stage to be so marked. Furthermore, ask yourself, if he doesn’t get the bad-conduct discharge from you, does he deserve to get the same discharge you will get after serving your country honorably? No.

U.S. Air Force Court of Military Review v. Winchester, No. ACM S28735, 1994 WL 481709, at \*1 (A.F.C.M.R. Aug. 12, 1994) (emphasis omitted). Military prosecutors have used similar arguments to target VA benefits, specifically during the punishment phase. See, e.g., Supplement to Petition for Grant of Review at 9, *United States v. Connolly*, No. 07-0184 (C.A.A.F. Jan. 26, 2007) (“How many soldiers deployed to Iraq, went to war, came back, and they didn’t drink and drive? They didn’t run over two security guards. These are the soldiers that deserve VA benefits, not the accused.”); Seamone, *Reclaiming the Rehabilitative Ethic in Mili-*

fellow military attorneys. However, the position fails to explain or account for all of the conscripted Vietnam veterans with PTSD who were punished instead of treated when the military was not an all-volunteer institution.<sup>74</sup>

Likewise, it presumes that individuals who are prone to suffering from distorted and irrational thoughts are still able to determine what is in their best interests, despite the disorder.<sup>75</sup> That is quite a tall order, considering how PTSD shatters the important assumption that “a moral order exists in the universe that discriminates right from wrong.”<sup>76</sup> Senior Navy psychiatrist, Captain William Nash, for example, highlighted “combat stress’ potential to damage beliefs in right and wrong, self-identity and moral code. Combat stress can damage brain centers that control emotions, impair rational thought circuits and inhibit a Marine’s ability to think before acting, putting leathernecks with combat experience at ‘increased risk’ of misconduct.”<sup>77</sup> Doctor Shay observes a related, widespread *dubious* belief among even psychiatrists that good character, shaped over years of one’s upbringing, will endure through the worst trauma: “[I]f bad experience leads someone who was good to do terrible things, it must be because he was secretly flawed from the beginning. He deserves no respect for any previously honorable conduct—all possibility of respect or consideration has been obliterated by

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*tary Justice*, *supra* note 5, at 130–31 (discussing the prosecutor’s sentencing argument for a punitive discharge for Staff Sergeant Ryan Miller, who suffered from diagnosed service-connected PTSD). During Vietnam, the Army showed recruits a film titled *The Smart Way Out*, contrasting the military service and future experiences of “Good Joe” and “AWOL Johnny.” BASKIR & STRAUSS, *supra* note 38, at 121. While Good Joe’s obedient service ended with “years of happiness” based on his Honorable Discharge, Johnny’s future was filled with “bitterness, loneliness, and poverty” as a result of Johnny’s absence from his unit. *Id.* The film concluded with Johnny’s arrest for vagrancy after he received an UD and turned to substance abuse. *Id.* The film, in addition to the prosecutors’ positions, reveals how the military has relished in the creation of future societal offenders for the sake of punishment and deterrence.

74. See RAYMOND MONSOUR SCURFIELD, *A VIETNAM TRILOGY: VETERANS AND POST TRAUMATIC STRESS: 1968, 1989, 2000*, at 34 (2004) (observing how, during Vietnam, commanders deemed “almost all soldiers with emotional and psychiatric symptoms to be behavioral problems” and subsequently responded with discipline).

75. Seamone, *Attorneys as First-Responders*, *supra* note 9, at 174 fig.2, 175 (identifying “eight forms of distorted thinking” that affect troops with PTSD).

76. William P. Nash, *Combat/Operational Stress Adaptations and Injuries*, in *COMBAT STRESS INJURY: THEORY, RESEARCH, AND MANAGEMENT* 33, 53 (Charles R. Figley & William P. Nash eds., 2007). Too often in combat, troops “are constantly confronted with stark evidence that none of the basic assumptions upon which their mental stability is premised are valid.” GABRIEL, *supra* note 14, at 83.

77. Hoellwarth, *supra* note 64.



his criminal act.”<sup>78</sup> Shay argues that this notion of immutable character is flawed because “[p]rolonged combat can produce not only psychiatric symptoms, it can damage good character. . . . When bereavement, betrayal of what’s right, and horror have been sufficiently severe, even the noblest character may crack.”<sup>79</sup>

In one respect, however, troops do have some control over their symptoms.<sup>80</sup> Many servicemembers, due to stigmas against reporting mental health troubles,<sup>81</sup> engage in the phenomenon of “reverse malingering” or “dissimulation,” in which they *fake good*, perhaps minimizing their responses to routine post-deployment assessments in order to stay in service, thereby inviting aggravated conditions.<sup>82</sup> With a steady campaign to make servicemembers aware of counseling options, and very public efforts to destigmatize requests for help,<sup>83</sup> some may claim that the servicemember is not totally absolved of the responsibility to seek treatment when she or he detects that something is just not right. It still seems counterproductive, however, to deny them effective treatment on the basis of their symptoms, even in this instance.

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78. Shay Testimony, *supra* note 16, at 113. See also Jeremy Schwartz, ‘Bad Paper’ Discharges Can Stymie Veterans’ Health Care, STATESMAN.COM (Oct. 2, 2010, 10:48 PM), <http://www.statesman.com/news/news/state-regional-govt-politics/bad-paper-discharges-can-stymie-veterans-health--1/nRyPr/> (citing veterans’ advocate and attorney Teresa Panepinto for the proposition that single incidents of misconduct by combat-traumatized servicemembers often lead to stigmatizing discharges under zero tolerance policies, as if “[a]ll of a sudden, all the prior honorable service is negated”).

79. Shay Testimony, *supra* note 16, at 112–13.

80. See Stephanie Hodson et al., *Postdeployment Predictors of Traumatic Stress: Rwanda, a Case Study*, in MILITARY STRESS AND PERFORMANCE: THE AUSTRALIAN DEFENCE FORCE EXPERIENCE 151, 159 (George E. Kearney et al. eds., 2003) (“[M]ilitary personnel expect to be exposed to potentially traumatic events, making these experiences more predictable and potentially more manageable.”).

81. Tracy Stecker & John Fortney, *Barriers to Mental Health Treatment Engagement Among Veterans*, in CARING FOR VETERANS WITH DEPLOYMENT-RELATED STRESS DISORDERS: IRAQ, AFGHANISTAN, AND BEYOND 243, 245–46 (Josef I. Ruzek et al. eds., 2011) (describing various “barriers to mental health treatment”).

82. See Frank C. Budd & Sally Harvey, *Military Fitness-for-Duty Evaluations*, in MILITARY PSYCHOLOGY: CLINICAL AND OPERATIONAL APPLICATIONS 35, 49 (Carrie H. Kennedy & Erica A. Zillmer eds., 2006). The authors are keen to point out how, “[i]n such cases, the individual should not receive a diagnosis of malingering but instead should receive the appropriate diagnosis (e.g., depression or substance abuse).” *Id.*

83. Stecker & Fortney, *supra* note 81, at 251–53.

3. The Diagnosis of PTSD Is the Easiest to Fake and There Is Really No Way to Tell Whether It Is Legitimate in a Given Case. The Military Must Therefore Take a Hardline Approach to Misconduct Without Exception Because Alternatives to Punishment Would Reward Offenders Who Pretend to Be Afflicted by the Disorder for Secondary Gain.

An experienced VA psychiatrist “almost always” encounters two positions most frequently when discussing veterans with mental health conditions who are barred from receiving benefits: “‘The Biggest Liar I Ever Met’ story or ‘Doc, you been had by a scammer.’”<sup>84</sup> In both the civilian and military context, we can expect concern over a diagnosis that depends entirely on the self-reported symptoms of a patient.<sup>85</sup> When anyone can read up on the Internet and memorize a script to increase their chances of a PTSD diagnosis, and that diagnosis can maximize his or her potential for unique forms of secondary gain in the military—whether it is to evade deployment, combat, or a work detail in general—military psychiatrists agree that they must necessarily be cautious in their evaluations.<sup>86</sup>

Here too, however, generalization ignores the legitimate experiences of PTSD sufferers. While healthy skepticism may help identify cases of falsification, an accusing eye can exacerbate the symptoms and worsen the condition of those who legitimately suffer from the disorder.<sup>87</sup> This lesson is most clear in facilitating the mental health treatment of alleged rape victims. Although it is quite possible that some rape accusers have motives to falsify their allegations,<sup>88</sup> the criminal justice system rightfully rejects the antiquated, discriminatory model that would cast doubt on *all* accusers before treat-

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84. Shay Testimony, *supra* note 16, at 113.

85. See Robert H. Aronson et al., *Attorney-Client Confidentiality and the Assessment of Claimants Who Allege Posttraumatic Stress Disorder*, 76 WASH. L. REV. 313, 335 (2001) (“Individuals can malingering PTSD symptoms on their own, with the assistance of relevant reading materials, or with the benefit of coaching by relatives, friends, or counsel.”).

86. See Budd & Harvey, *supra* note 82, at 35, 48–49.

87. See *id.* at 48–49.

88. See, e.g., Robert R. Hazelwood & Ann Wolbert Burgess, *False Rape Allegations*, in PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH 181, 193–94 (Robert R. Hazelwood & Ann Wolbert Burgess eds., 4th ed. 2009) (providing other specific examples of motive in falsely reported rapes); JOHN M. MACDONALD, RAPE: CONTROVERSIAL ISSUES: CRIMINAL PROFILES, DATE RAPE, FALSE REPORTS AND FALSE MEMORIES 87 (1995) (discussing “many motives for false reports of rape,” which usually fall within the distinct categories of alibi, revenge or payback, financial or other gain, and attention or sympathy); Aviva Orenstein, *Presuming Guilt or Protecting Victims?: Analyzing the Special Treatment of Those Accused of Rape*, in RACE TO INJUSTICE: LESSONS LEARNED FROM THE DUKE LACROSSE RAPE CASE 351, 351 (Michael L. Seigel ed., 2009) (“No one can or should claim that women never lie or are never mistaken about rape.”).

ing their complaints as legitimate.<sup>89</sup> Even if there is potential that the allegation is fabricated, it does too much damage to victims that have actually experienced sexual violation to support such a skeptical model; most rapes go unreported due to the stigma of skepticism.<sup>90</sup> For public health reasons, the well-being of legitimate sexual assault victims rightfully requires suspension of such skepticism in favor of prompt intervention that maximizes the well-being of society at large.<sup>91</sup> The resulting investigatory and prosecutorial policies seeking restraint in the rush to invalidate represent a necessary “delicate balance” in which “[t]he rules and procedures must be formulated with both the sexually brutalized victim and the absolutely innocent accused in mind.”<sup>92</sup>

We can learn much from the policy lessons surrounding allegations of sexual assault, which often result in PTSD. Recognizing the fact that many civilian abuses of the PTSD diagnosis have unfairly caused critics to doubt the complaints of military members,<sup>93</sup> the desire to eradicate common obstacles to PTSD treatment counters this prevalent justification for the Military Misconduct Catch-22.<sup>94</sup> No one who legitimately cares about the effective treatment of PTSD victims, whether they are criminals or the greatest of Sa-

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89. See MARIA BEVACQUA, RAPE ON THE PUBLIC AGENDA: FEMINISM AND THE POLITICS OF SEXUAL ASSAULT 58–59 fig.1.1, 100–01 (2000) (challenging well-worn “rape myths” that all complaining “[w]omen make false allegations of rape out of revenge or spite”). The myth, which represents a “cognitive distortion[,]” has actually dominated the criminal justice system until very recent times, when legislators began to develop evidentiary rules that would limit the humiliation suffered by rape victims. JOANNA BOURKE, RAPE: SEX, VIOLENCE, HISTORY 23 (2007); Betsy Wright Kreisel, *Police and Victims of Sexual Assault*, in SEXUAL ASSAULT: THE VICTIMS, THE PERPETRATORS, AND THE CRIMINAL JUSTICE SYSTEM 337, 346, 376–78 (Frances P. Reddington & Betsy Wright Kreisel eds., 2d ed. 2009); see also Hazelwood & Burgess, *supra* note 88, at 194. In early days of the legal system, and whenever invoked by the defense in the current one, the myth has the effect of contributing to an attack on victims that can rightfully be labeled a “second rape.” LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM 3 (1991); Jeffrey W. Spears, *Prosecution of Sex Crimes*, in SEXUAL ASSAULT: THE VICTIMS, THE PERPETRATORS, AND THE CRIMINAL JUSTICE SYSTEM 365, 376 (Frances P. Reddington & Betsy Wright Kreisel eds., 2d ed. 2009).

90. See MADIGAN & GAMBLE, *supra* note 86, at 3; Hazelwood & Burgess, *supra* note 85, at 181.

91. Kreisel, *supra* note 89, at 346 (“For the benefit of the victim’s emotional state and the betterment of case processing, law enforcement should be advised to approach every allegation of sexual assault as truthful until there is *solid evidence* to prove otherwise.”) (emphasis added). Some adopt an even stricter standard than *solid evidence*: ““Only when your doubts *overwhelm* the evidence supporting the complaint should you begin to consider the possibility of a false allegation.”” Hazelwood & Burgess, *supra* note 89, at 193–94.

92. Orenstein, *supra* note 88, at 352.

93. SCHALLER, *supra* note 6, at 204.

94. See discussion *infra* Part III.

maritans, should automatically challenge the troops who seek PTSD treatment following misconduct. Just as it is possible to pursue a false accuser with perjury charges, the legal system has the ability to incorporate sanctions into treatment programs for offenders who do not comply with treatment plans in the criminal context, eliminating the idea that a malingerer might *get off too easy* if the system responded by according automatic legitimacy to reported symptoms.<sup>95</sup> In any probationary/diversionary arrangement, the sentencing or prosecuting authority retains the ability to institute the suspended punishment or institute the deferred charges based on material breaches of the underlying agreement.<sup>96</sup>

4. The Military Simply is Not the Type of Organization That Can or Does Invest in the Intensive Rehabilitation of Offenders. If It Did, This Might Prioritize Efforts to Assist Lawbreakers Who Have Dishonored Themselves Ahead, or in Lieu, of Those Combat-Traumatized Warriors who Served Honorably.

I include this position because I have heard it so often from fellow attorneys. Normally, it arises in the context of clemency when troops request that commanders depart from the sentence handed down by a military judge or military panel as an act of mercy.<sup>97</sup> Based on reported figures, there is a perception that military commanders do not often exercise any type of clemency, despite their practically unlimited discretion to disapprove or modify any aspect of an adjudged sentence.<sup>98</sup> If, say the commentators, clemency was once exercised for the purpose of rehabilitating offenders, advances in modern warfare have made the individual less important to military success, and hence, less important to salvage for the service.<sup>99</sup> As it relates to offenders with mental illness, this position relies as much on the notion that rehabilitation is dead in the military as it does on the belief that rehabilitation is

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95. See James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1555 (2003) (describing how noncompliance with treatment plans in a veterans or mental health treatment court “may result in more serious sanctions than would be experienced in a traditional . . . court”).

96. See Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 170 (“[T]he ability to vacate a suspension for failure to meet the terms of a suspended sentence preserves the option of executing the adjudged punishment.”).

97. See, e.g., Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief?*, 54 NAVAL L. REV. 169, 169 (2007) (describing the commander's discretion to modify a sentence to the accused's benefit for nearly any reason).

98. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 14–15 n.35.

99. See *id.* at 14, 43 n.145.

valued only to the extent that it can repair the warrior for a return to the front lines, benefitting the institution over the individual.<sup>100</sup>

While commanders and attorneys have the freedom to adopt these views, it is vital to recognize that they do not represent the actual state of rehabilitative efforts in the military justice system. Not only do various provisions of military law explicitly direct that military judges and juries consider rehabilitative potential to a greater degree than civilian courts,<sup>101</sup> but panel members, judges, and commanders often attempt to suspend sentences specifically when the offender suffers from a mental health condition.<sup>102</sup> Elsewhere, I have pointed to a line of historical and continued precedents, which collectively demonstrate a viable rehabilitative ethic imprinted “in the very DNA of the military justice system,” if only commanders and attorneys are willing to look for and appreciate proof of this ethic’s existence.<sup>103</sup> Throughout major wars, this ethic further offered *second chances* to offenders,<sup>104</sup> even when they were not capable of rejoining the force due to their condition.<sup>105</sup> In such cases, the military recognized society’s need for a productive citizen rather than a socially-stigmatized castaway with few opportunities for social advancement.<sup>106</sup>

Almost all of the above rationales for the Military Misconduct Catch-22<sup>107</sup> are tied in some way to the special mission of the military and the danger of losing the ability to react with superior force anywhere and anytime.<sup>108</sup> The unifying thread is clearly the need to protect society, which routinely justifies troops’ loss of privileges enjoyed by civilians who rely on the military to protect their sacred way of life.<sup>109</sup> However, the important and distin-

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100. See *id.* at 43 n.145; see also SCHALLER, *supra* note 6, at 47. Justice Schaller suggests that military psychiatry is slanted to support this view: “Preparing soldiers to return to the battlefield is one of the controversial purposes of military psychiatry in the case of traumatic stress disorders.” SCHALLER, *supra* note 6, at 47.

101. MCM, *supra* note 34, at II-123.

102. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 125, 127, 131–32.

103. *Id.* at 15, 123, 184.

104. See, e.g., *id.* at 47, 59–61, 73.

105. *Id.* at 62.

106. See *id.* at 78 & n.284 (discussing principal objectives to avoid future damage to society as a result of military discharges).

107. Picard, *supra* note 41.

108. See Marinello, *supra* note 97, at 171–73.

109. See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“The fundamental necessity [of] obedience and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”); *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953) (“[T]he very essence of [military] service is the subordination of the desires and interests of the individual to the needs of the service”); *In re Grimley*,

guishing question answered in this article is: What happens when, by virtue of untreated mental conditions, the military's disciplinary system is breeding recidivism and placing society at a far greater cumulative risk? In other words, can the military's insistence on just deserts punishments and willful ignorance of legitimate and continuing mental health care needs justify its creation of a class of future offenders who will return to their own communities—well within the boundaries of our cities, towns, and neighborhoods—and wreak havoc on innocent bystanders and their own families, as they advance toward their demise? *No* must be the only acceptable answer.<sup>110</sup>

### III. CONTOURS OF “THE MILITARY MISCONDUCT CATCH-22”

Although the premium on military discipline creates many terrible ironies,<sup>111</sup> the Military Misconduct Catch-22 concerns a very specific dilemma.<sup>112</sup> Concisely stated by Attorney Carissa Picard:

What's the point of DoD recognizing that PTSD/TBI causes misconduct when it doesn't do anything to stop [the] “pattern of misconduct” discharges for soldiers with PTSD/TBI? How can it say [that] this is evidence of a service-related disability only to use this evidence to deny servicemembers access to benefits for that disability?<sup>113</sup>

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137 U.S. 147, 152 (1890) (“By enlistment the citizen becomes a soldier. His relations to the [s]tate and the public are changed.”); James Finn, *The Two Societies*, in CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY 3, 5 (James Finn ed., 1979) (“Support for the military institution and its ability to defend society must take priority even if it requires some restrictions on those rights normally possessed by the citizens.”).

110. See SCHALLER, *supra* note 6, at 209 (“It is unconscionable when . . . military leaders fail to take measures that prevent veterans with PTSD from lapsing into criminal behavior in the first place.”).

111. *Stopping Suicides: Mental Health Challenges Within the U.S. Department of Veterans Affairs: Hearing Before the H. Comm. on Veterans' Affairs*, 110th Cong. 93, 96–98 (2007) (statement of Joy J. Ilem, Assistant National Legislative Director, Disabled American Veterans) [hereinafter Ilem Testimony]. As only one example, individuals who have fought in distant lands “to restore the freedoms of the Iraqi and Afghani peoples” often return to lose not only their sanity, but also “their own personal freedom after returning home,” confined for the criminal symptoms of their mental conditions. *Id.* at 97.

112. Picard, *supra* note 41.

113. *Id.*; see also Gregg Zoroya, *Troubled Troops in No-Win Plight; Marines Kicked Out for Conduct Linked to Stress Disorder Are Often Denied Treatment by the V.A.*, USA TODAY, Nov. 2, 2006, at A1 [hereinafter Zoroya, *Troubled Troops*] (discussing Marine Lieutenant Colonel Colby Vokey's description of an identical *Catch-22*).

This dilemma deals not only with the military's insulated activities in administering discipline, but, more importantly, the military's act of passing on its discarded troops to civilian society with severe handicaps related to their discharge characterizations that prevent successful reintegration.<sup>114</sup>

While military discharges come in many forms, four types often totally preclude the veteran from receiving practically all pension, health care, and other benefits from governmental organizations: The UD, the OTH, the BCD, and the DD.<sup>115</sup> This article is not concerned with the DD because it is reserved for the most egregious offenses and automatically precludes benefits from the VA.<sup>116</sup> Nor is this article concerned with the General Under Honorable Conditions Discharge. While many consider a General Under Honorable Conditions Discharge to be stigmatizing because it is not fully Honorable, it precludes educational benefits under the GI Bill, and it suggests substandard performance,<sup>117</sup> this general characterization still permits a veteran to maintain veteran status and obtain the most vital benefits from the VA.<sup>118</sup> Undoubtedly, the ability to retain VA health care benefits is critical to the PTSD- and OSI-afflicted combat veterans' reintegration, because the VA is "[t]he only reservoir of combat PTSD expertise," completely unmatched by the "overburdened state mental hospitals and municipal general hospitals" to which most veterans with crippling discharges must turn.<sup>119</sup>

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114. See, e.g., BASKIR & STRAUSS, *supra* note 38, at 160 (observing how "the [UD] has led many a veteran into a hopeless downward spiral").

115. See VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 90-92 (2007), available at <http://veterans.senate.gov/upload/VetDisBenefitComm9-27.pdf>.

116. See *id.* at 90; see also 38 U.S.C. § 101(2) (2006). Not only does a DD bar benefits under 38 U.S.C. § 101(2), but any punitive discharge from a general court-martial, including a BCD, also bars benefits. *Id.* § 5303(a).

117. See, e.g., Christopher H. Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33, 34-35 (1973) ("Courts have found the General Discharge to constitute 'a stigma of tremendous impact which [has] a lifelong effect.'") (alteration in original) (citing, as an example, *Unglesby v. Zimny*, 250 F. Supp. 714, 717 (N.D. Cal. 1965)); Charles P. Sandel, Comment, *Other-than-Honorable Military Administrative Discharges: Time for Confrontation*, 21 SAN DIEGO L. REV. 839, 849 (1984) ("[E]arly separation itself stigmatizes a servicemember. Derogatory characterization is an added stigma.").

118. Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F. L. REV. 115, 139 (2007) ("A discharge with a general service characterization permits the servicemember to retain most of his VA benefits . . ."); see Douglass L. Custis, *Due Process and Military Discharges*, 57 A.B.A. J. 875, 875 n.4 (1971) (finding "a distinction without a difference" between the Honorable Discharge and the General Under Honorable Conditions Discharge).

119. *Health Care, Economic Opportunities and Social Services for Veterans and Their Dependents—A Community Perspective: Hearing Before the Subcomm. on Oversight & In-*

Many servicemembers believe that they are automatically ineligible for VA benefits upon discharge with a BCD, OTH, or UD characterization.<sup>120</sup> While some may, in fact, be barred, VA adjudicators must make an independent determination on a case-by-case basis regarding whether a particular troop's service was honorable enough to receive benefits.<sup>121</sup> The major problem with this character of service process is, as judges of the Court of Appeals for Veterans' Claims have recognized, the "murky statutory and regulatory framework" guiding these determinations.<sup>122</sup> Within this framework, the VA uses its own definitions related to military misconduct rather than the military's definitions.<sup>123</sup> Hence, VA adjudicators use standards like crimes of "moral turpitude" and "willful and persistent misconduct" to determine whether a servicemember's conduct was other than dishonorable.<sup>124</sup>

Problematically, VA adjudicators have little guidance on the meanings of their own terms and consequently apply subjective determinations to justify their decisions.<sup>125</sup> Simplification of these provisions is more difficult be-

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*vestigations of the H. Comm. on Veterans' Affairs*, 103d Cong. 105 (1993) (testimony of Warren Quinlan) [hereinafter Quinlan Testimony].

120. See PAUL STARR WITH RAYMOND P. BONNER, *THE DISCARDED ARMY: VETERANS AFTER VIETNAM* 179–80 (1974).

121. See *To Amend Title 10, United States Code, to Limit the Separation of Members of the Armed Forces Under Conditions Other than Honorable, and for Other Purposes: Hearings on H.R. 523 Before the Subcomm. No. 3 of the H. Comm. on Armed Servs.*, 92d Cong. 6008 (1971) [hereinafter *Hearings on H.R. 523*] (observing that it would be "illegal" for the VA to grant benefits to the recipient of a UD, OTH, or BCD without conducting a case-by-case analysis).

122. *Trilles v. West*, 13 Vet. App. 314, 330 (2000) (Kramer, J., & Steinberg, J., concurring) (citing 38 U.S.C. § 5303(a)–(b) (2006); *Butler v. West*, 12 Vet. App. 7, 8 (1998) (per curiam) (Kramer, J., concurring); 38 C.F.R. § 3.12(b)–(c) (2012)).

123. See, e.g., Samuel W. Morris, *A Survey of Military Retirement Benefits*, 177 MIL. L. REV. 133, 139–40 (2003) ("The term 'under conditions other than dishonorable' poses a problem for [military attorneys] because this statutory definition is different from the language the military uses to characterize its discharges.").

124. 38 C.F.R. § 3.12(d)(3) (2012) (barring benefits for crimes of "moral turpitude," which generally include felonies); *id.* § 3.12(d)(4) (barring benefits for "willful and persistent misconduct," unless the offense was minor in nature and the offender's "service was otherwise honest, faithful, and meritorious"). Even in the 1950s, attorneys who studied these terms found problems with their application by the VA that resulted in the inability "to lay down any hard and fast rules" about how the circumstances of a given discharge would be interpreted by adjudicators under these guidelines. See W.C. Blake, *Punishment Aspects of a Bad Conduct Discharge*, JAG J., Dec. 1952, at 5, 22. For an expansive discussion of these standards, see Brooker et al., *supra* note 47, at 160–201.

125. See, e.g., *Hearings on H.R. 523*, *supra* note 121, at 5862 (statement of Representative Richard C. White raising concerns that VA adjudicators could realistically label "persistent jaywalking" as a basis to deny benefits under the VA's standard for willful and persistent misconduct); *id.* at 6009 (statement of Philip V. Warman, Associate General Counsel, VA



cause lawyers, military commanders, judges, and even policymakers at the highest levels of the discharge characterization process have little understanding of the administrative rules that guide the VA in conducting the case-by-case analysis.<sup>126</sup> These problems are quite significant because a servicemember is not considered a “veteran” under all of the benefits statutes if the VA determines that his or her UD, OTH, or BCD—crippling discharges—was issued for service “under conditions other than dishonorable.”<sup>127</sup> The consequence of this threshold determination means that a veteran suffering from PTSD will have to wait until the VA adjudicator makes the character of service determination, if that determination is favorable, before obtaining VA benefits and comprehensive mental health treatment.<sup>128</sup>

It is impossible to estimate how many veterans are denied benefits through the VA’s Character of Service process because even the VA does not track these figures.<sup>129</sup> Notably, discarded veterans with crippling dis-

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confirming the subjective and non-uniform analyses of VA adjudicators in different offices); Donald J. Brown, *The Results of the Punitive Discharge*, 15 JAG J. 13, 14 (1961) (“The phrase ‘moral turpitude or willful and persistent misconduct’ is sufficiently indefinite that its application may vary among the different [VA] field activities and adjudication units.”).

126. See, e.g., U.S. Air Force Court of Military Review v. Winchester, No. ACM 528735, 1994 WL 481709, at \*3 (A.F.C.M.R. Aug. 12, 1994) (finding that the trial court provided erroneous instructions about the VA’s standards for evaluating BCDs); United States v. Ballinger, 13 C.M.R. 465, 467 (A.B.R. 1953) (finding error in the trial judge’s misstatements to the panel members about the VA’s character of service determination process); Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 16 (1973) (“Much of the commentary regarding the effect of the administrative discharge is based on sheer speculation.”). “The consequences of the general and *undesirable discharges* are . . . little understood by the JAG officers asked to ‘counsel’ the recipients.” Jones, *supra*, at 1. At a congressional hearing in 1971, Major General Leo Benade, a senior policymaker charged with the establishment of adverse discharge procedures, explained he “couldn’t describe . . . what the internal procedures of the VA are,” and reasoned, “[h]opefully the [VA] would utilize the same standards in evaluating [different cases involving UDs] and reach the same decision if the pattern of conduct is the same.” *Hearings on H.R. 523, supra* note 121, at 5861 (statement of Major General Leo E. Benade, Deputy Assistant Secretary of Defense for Military Personnel Policy, Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs). He explained that his lack of knowledge about their process resulted from the fact that “[t]he [DoD] is not consulted [by the VA] in these cases.” *Id.*

127. See 38 U.S.C. § 101(2) (2006).

128. Brooker et al., *supra* note 47, at 40-41 (providing an example of how a former servicemember can be denied benefits pending review of his status at the moment he sought outpatient medical care from a VA facility).

129. *Id.* at 157-58; see also Hal Bernton, *Troubled Veterans Left Without Health-Care Benefits*, SEATTLE TIMES (Aug. 11, 2012, 8:03PM), [http://seattletimes.com/html/localnews/2018894574\\_vets12m.html](http://seattletimes.com/html/localnews/2018894574_vets12m.html) [hereinafter Bernton, *Troubled Veterans Left Without Health-Care Benefits*] (“[T]he [VA] has no way to track how many [Character of Service] reviews are conducted, how long they take, or their outcomes.”).

charges have many disincentives to even apply for benefits after the labeling experience following their other punishments.<sup>130</sup> As one such two-time Iraq veteran with PTSD and an OTH separation for “‘pattern[s] of misconduct’” explained, “‘I have nothing . . . . After all I did for the Army, they took my money and kicked me to the curb and said, “Don’t let the door hit you in the ass.”’”<sup>131</sup> Months, often years, without care before a final decision is rendered on a former troop’s status is the greatest of all impediments.<sup>132</sup> All too often, this “lost legion of ‘bad-paper vet[erans]’” evaporates into an invisible status with no mandates for any agency to care for their existence and great shame whenever they reveal the manner in which they left the military.<sup>133</sup>

Sadly, the greatest effort to assist ex-servicemembers in upgrading their discharges came—and went—in the early 1980s, as Vietnam veterans approached the delimiting date in which they would no longer be eligible for educational benefits unless they obtained fully honorable discharges.<sup>134</sup> Once that delimiting date passed, the impetus to assist *bad paper* veterans fizzled, replaced by a preference to prioritize services for honorably discharged veterans who never committed misconduct in the first place.<sup>135</sup> Of

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130. See Bernton, *Troubled Veterans Left Without Health-Care Benefits*, *supra* note 129; Kennedy, *supra* note 53.

131. Kennedy, *supra* note 53.

132. See, e.g., Letter from Manuel Duran, Exec. Dir., & Sean W. Mullaney, President, Shelter Legal Servs. Found., Inc., to President William J. Clinton (Apr. 30, 1993), in *Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents—A Community Perspective: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans’ Affairs*, 103d Cong. 106, 106 (1993) (observing how “[t]ime in effect discriminates” against the veteran who applies for benefits, especially when she or he is homeless and transient); see also STARR WITH BONNER, *supra* note 120, at 175 (“Men are discouraged from appealing because the process usually takes years and requires legal assistance beyond their means.”).

133. Lee May, *Finally Is Given Honorable Status but Can’t Collect Damages: WWII GI Still Battling over ‘Bad’ Discharge*, L.A. TIMES, Nov. 17, 1986, at 13 (describing the plight of a “lost legion of ‘bad-paper vets’”). On the topic of shame, see, for example, Edgar May, *Inmate Veterans: Hidden Casualties of a Lost War*, CORRECTIONS MAG., Mar. 1979, at 3, 4 (“‘A guy who has got a ‘bad paper’ discharge is probably not going to volunteer that for you . . . .”).

134. See *Oversight on Issues Related to Incarcerated Veterans: Hearing Before the S. Comm. on Veterans’ Affairs*, 96th Cong. 26 (1979) (testimony of James J. Cox, Director, Veterans Assistance Service, Veterans Administration) (“Each day, thousands of veterans reach their delimiting date . . . . [W]e are in a race against time, because . . . time is running out rapidly for Vietnam-era veterans to use their educational benefits.”).

135. See, e.g., Letter from Edward J. Derwinski, Sec’y of Veterans Affairs, to Honorable G.V. (Sonny) Montgomery, Chairman, Comm. on Veterans’ Affairs, House of Representatives (Apr. 27, 1990), in *Incarcerated Veterans Rehabilitation and Readjustment Act of 1989: Hearing on H.R. 3453 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 88, 91 (1990), available at

course, the notion of these discarded troops' invisibility is illusory, as their numbers are revealed daily in homeless shelters, prisons, jails, and—very sadly—morgues throughout the nation.<sup>136</sup>

The veterans' service organizations that represent the small portion of ex-troops who do apply for Character of Discharge determinations have estimated general rates of success for such claims.<sup>137</sup> The National Veterans Legal Services Project reports the VA's approval rate at ten percent.<sup>138</sup> A former supervisory benefits adjudicator and subject matter expert who worked in the Los Angeles VA Regional Office from 2002 to 2008 provides a more generous approval estimate of slightly under half of the applications.<sup>139</sup> Anecdotally, we can also turn to the observations of one of the VA's foremost PTSD experts who shared his experience with Congress: "[a]s a VA physician, I have never treated a veteran with a Bad-Conduct, Undesirable, or Dishonorable Discharge, because they cannot get through the front door—they are ineligible for any VA services."<sup>140</sup>

No matter the precise disapproval rate, it is clear that a substantial population of veterans with crippling discharges remain closed-off to meaningful care.<sup>141</sup> These statistics are quite important because they translate to a growing population of tens of thousands of traumatized combat veterans whose symptoms contributed to their jettison from the military and their inability to obtain quality medical care in civilian society. For an idea of the size of this

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<https://www.ncjrs.gov/pdffiles1/Digitization/153232NCJRS.pdf> (explaining that providing services for veterans who commit misconduct "presents a question of priorities" for "diverting staff" from activities designated for veterans who need resources and did not commit misconduct).

136. Consider that "38% of veterans in [s]tate prison" "failed to receive an honorable discharge." NOONAN & MUMOLA, *supra* note 9, at 6. Additionally, studies in more recent times have found that approximately 20% of veterans in state prisons and local jails are disqualified from receiving VA benefits based on the nature of their crippling discharges. James McGuire, *Closing a Front Door to Homelessness Among Veterans*, 28 J. PRIMARY PREVENTION 389, 390 (2007). Within one New England homeless shelter for veterans, the director found 50% of the inhabitants had crippling discharges—when he looked for this variable specifically. Quinlan Testimony, *supra* note 119, at 104 ("[O]n any given day, an average of about 50% of the men coming through the [shelter] doors . . . have . . . 'bad paper.' Half, or 25% of these are combat veterans.").

137. See, e.g., MICHAEL ETLINGER & DAVID F. ADDLESTONE, *MILITARY DISCHARGE UPGRADING AND INTRODUCTION TO VETERANS ADMINISTRATION LAW* 26/2, 26/9 (1990 Supp.).

138. *Id.* ("The VA favorably adjudicates only about ten percent of these cases.").

139. Brooker et al., *supra* note 47, at 157.

140. Shay Testimony, *supra* note 16, at 116.

141. See STARR WITH BONNER, *supra* note 120, at 179–80. It would be a valuable task for scholars and VA employees to determine a general rate of success for initial applications and appeals; any established success rate might motivate applications from those many veterans who believe they are automatically ineligible.

population, through Vietnam, the military discharged 224,000 servicemembers with UD characterizations and 31,800 with BCDs.<sup>142</sup> Between October 2000 and September 2005 alone, 55,111 active duty servicemembers were separated with OTH discharges and 8,190 were separated with BCDs.<sup>143</sup> An investigative reporter for the *Seattle Times* confirmed that the military discarded over 20,000 more troops with OTH discharges between 2008 and 2012.<sup>144</sup> The collective number is likely to increase, given the military's objective to draw-down the forces by many more tens of thousands using involuntary separation as a major vehicle.<sup>145</sup>

A commander of a large unit once lectured on the topic of command discretion. He explained that many commanders liken the process of receiving—and then eliminating—a soldier to playing a hand of poker. If a soldier turns out to be a deuce, then the commander can merely discard him and pull another card from an endless supply of recruits. With no accountability for their discards, the process can go on indefinitely, and even well-intentioned commanders can remain blissfully ignorant regarding the outcome of their disciplinary decisions.<sup>146</sup> As Chuck Luther, an attorney for Military Spouses for Change, observes, “[t]he military is creating a societal issue’ . . . . ‘These guys come out with no resources, and they’re angry and feeling betrayed. But commanders are thinking, “Do I rehabilitate him or do I get rid of him expeditiously so I can replace him with someone who can deploy?””<sup>147</sup>

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142. BASKIR & STRAUSS, *supra* note 38, at 155 fig.6 (Military Punishments between August 4, 1964 and March 28, 1973).

143. VETERANS' DISABILITY BENEFITS COMM'N, *supra* note 115, at 93 tbl.5.1.

144. Bernton, *Troubled Veterans Left Without Health-Care Benefits*, *supra* note 129; *see also* Carpenter, *supra* note 40 (reporting statistics that the Army discharged 27,973 soldiers with stigmatizing discharge characterizations between October 2002 and May 2009, with 12,700 alone, discharged in fiscal year 2003).

145. DAVID F. BURRELLI ET AL., CONG. RESEARCH SERV., R41874, FY2012 NATIONAL DEFENSE AUTHORIZATION ACT: SELECTED MILITARY PERSONNEL POLICY ISSUES 3, 7 (2012) (“[T]he Secretary of Defense announced on January 6, 2011 that the Active Army would begin a reduction in its end strength by 22,000 in 2012. This reduction would be followed by an additional reduction of 27,000 to begin in FY2015 and be completed in FY2016.”).

146. *See* Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 33 (describing how the military is oblivious to the fact that it has inflicted a “double wound” on military offenders with punitive discharges by placing them in the combat conditions that caused their injuries and then shutting them out of future treatment).

147. Kennedy, *supra* note 53; *see also* Sandel, *supra* note 117, at 855 (noting how commanders face *unintentional* incentives to quickly eliminate offending subordinates as to appear devoted to accomplishing the military mission and as not to “discredit [the] command”); TASK FORCE ON MENTAL HEALTH, DEP'T OF DEF., *supra* note 48, at 22 (describing “instances in which returning [wounded warrior] service members were pressured by commanders and peers to accept . . . administrative discharge so they could be expeditiously cleared from the unit and replaced with a fully functional person”).

Although, for more than a generation, military lawyers,<sup>148</sup> veterans' advocates,<sup>149</sup> legislators,<sup>150</sup> VA psychiatry experts in PTSD,<sup>151</sup> and senior mental health professionals within the military<sup>152</sup> have consistently raised concerns over the Military Misconduct Catch-22, there has been no successful corrective action.<sup>153</sup> In fact, the Marine Corps recently learned that 326 of the 1,019 Marines it had dismissed with less-than-honorable characterizations (in the first four years following the war in Iraq) had legitimate mental health care needs.<sup>154</sup> Despite this knowledge, the Marine Corps made no effort to determine whether that population eventually obtained benefits.<sup>155</sup>

To put this issue in proper perspective, it is vital to remember that many of the recent "invisible injuries" among troops originated from insurgent attacks on U.S. forces serving overseas. When the injuries continue to manifest in later, unexpected, violent, and often deadly episodes, untreated PTSD spurs recruits to al Qaeda's cause; the violence, disruption, and dread that results from PTSD has created a growing sleeper cell of veterans with unprecedented access to our homeland.<sup>156</sup> Sadly, despite the military's best

148. See, e.g., Zoroya, *Battle Stress*, *supra* note 43; Zoroya, *Troubled Troops*, *supra* note 113 (discussing Marine Lieutenant Colonel Colby Vokey's criticism of the "no-win situation" that results from the Military Misconduct Catch-22).

149. See, e.g., Ilem Testimony, *supra* note 111, at 93, 98 (discussing Joy J. Ilem's concerns).

150. See, e.g., *Hearings on H.R. 523*, *supra* note 121, at 5825 (statement of Rep. Charles E. Bennett) (questioning the accuracy, consistency, reliability, and fairness of the VA's character of service process and recommending determinations of benefits prior to the servicemember's discharge to avoid the Military Misconduct Catch-22 throughout the hearings).

151. See, e.g., Maxine Waters & Jonathan Shay, *Heal the "Bad Paper" Veterans*, N.Y. TIMES, July 30, 1994, at 1–19 ("Whatever the circumstances surrounding combat veterans' bad-paper discharges, it is self-defeating to deny them benefits. We don't save money by shutting them out; it costs . . . much more [in various social and law enforcement services later in time].").

152. See, e.g., TASK FORCE ON MENTAL HEALTH, DEP'T OF DEF., *supra* note 48, at 22 (recommending assessment of and treatment for PTSD prior to the discharge of servicemembers facing administrative discharge for misconduct). In 2007, a Navy psychiatrist and combat stress expert warned, "[i]f a Marine who was previously a good, solid Marine—never got in trouble—commits misconduct after deployment and [it] turns out they have PTSD, and because of justice they lose their benefits, that may not be justice." Zoroya, *Battle Stress*, *supra* note 43 (citing Captain William Nash).

153. Zoroya, *Troubled Troops*, *supra* note 113.

154. Zoroya, *Battle Stress*, *supra* note 43.

155. *Id.* ("The Marine Corps had no information about whether the 326 Marines who received less-than-honorable discharges and suffered mental health [benefits] were denied VA health care services.").

156. See ROBERT JAY LIFTON, HOME FROM THE WAR: LEARNING FROM VIETNAM VETERANS 137–38, 156–57 (1992); Alyson Sincavage, Note, *The War Comes Home: How Congress'*

intentions, it empowers this sleeper cell and increases the chance of unexpected violent or costly behaviors within our own borders the more it promotes the Military Misconduct Catch-22.<sup>157</sup> This result is not only *shameful*,<sup>158</sup> but runs contrary to the major premise for justifying the military's myopic focus on good order and discipline: The very protection of our American society.<sup>159</sup>

#### IV. THE PRECAUTIONARY PRINCIPLE AND THE THERAPEUTIC IMPERATIVE

The discussion above highlighted how principles of morality and justice fail to address the Military Misconduct Catch-22, and oftentimes contribute to it by invoking competing concepts of obligation, such as conservation of scarce resources (e.g., waiting for statistical assurances before committing resources to hypotheses that do not apply uniformly to individuals).<sup>160</sup> The interdisciplinary experts who have addressed this problem recognize that certain principles of *self-interest* necessitate policies of prompt and widespread intervention, even when these policies fall short of the harshest justice.<sup>161</sup> Self-interest here is the objective of limiting the known potential for a host of negative societal outcomes that assuredly harm public health and safety.<sup>162</sup> The solution they propose is not necessarily to ignore or *exculpate* misconduct, but to ensure the *effective treatment* of a dangerous disorder<sup>163</sup>

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*Failure to Address Veterans' Mental Health Has Led to Violence in America*, 33 NOVA L. REV. 481, 482, 484, 486–87, 507 (2009).

157. See LIFTON, *supra* note 156, at 157–58. Psychiatrist Robert J. Lifton, who treated many Vietnam veterans with PTSD, observed that many are “inundated by imagery of violence,” and how their pent-up rage is often released unexpectedly through explosive episodes. *Id.* at 138–39, 151–57 (describing three manners in which PTSD-afflicted veterans direct such violence). Reasoning that it is not the experience of rage but how one channels it, Lifton concluded that the only way to prevent vicious cycles of violence is by “examining, channeling, and transmuting their rage” through intensive therapy. *Id.* at 156.

158. Shay Testimony, *supra* note 16, at 15.

159. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 33 (explaining that treatment, rather than punishment, of military offenders with PTSD is directly related to “the well-being of the Nation that all active duty military members are sworn to protect and defend”).

160. See discussion *supra* Part III.

161. Shay Testimony, *supra* note 16, at 15, 117 (“Pure self-interest should lead us to take this step [to ensure that combat veterans remain eligible for VA benefits despite misconduct], even if a sense of justice does not.”).

162. See Waters & Shay, *supra* note 151; see also Picard, *supra* note 41 (“[U]ndiagnosed or untreated PTSD and/or TBI puts veterans at an increased risk of suicide, unemployment, drug and alcohol abuse, partner violence, and homelessness.”).

163. Shay Testimony, *supra* note 16, at 113 (“I am [not] attempting to exculpate criminals who also happen to be combat veterans of their crimes.”).

that only grows worse the more combat veterans are shut out from the VA, which is the single best avenue of treatment that exists. The treatment solution is therefore rooted in TJ, not just for the sake of the individual, but more for the sake of public health and public safety.<sup>164</sup> As retired Connecticut Supreme Court Justice Barry Schaller observes:

The psychiatric profession must promote consideration of PTSD as a public health issue rather than simply as an individual mental health problem. The broad reach of combat PTSD within American society, in terms of the number of veterans who develop the disorder and the number of people whose lives are directly affected thereby, qualifies it as a public health issue, meaning one that involves the health of communities or populations.<sup>165</sup>

Because this mandate for treatment is to prevent known but unquantifiable future harm, this therapeutic imperative rests in the related principle of precaution.

Elsewhere, I have explored the precautionary principle in domestic and international law,<sup>166</sup> which derives from a government's self-interest in protecting its populace and which mandates intervention and the devotion of resources to preventive and mitigating efforts, particularly for "low probability, high consequence" events.<sup>167</sup> Classic examples of such events are

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164. See *id.* at 115; see also Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 28–29.

165. SCHALLER, *supra* note 6, at 202–03; see also Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 28–29 (describing how the lethality of the veteran's training makes untreated PTSD a matter of public safety).

166. See, e.g., Evan R. Seamone, *The Precautionary Principle as the Law of Planetary Defense: Achieving the Mandate to Defend the Earth Against Asteroid and Comet Impacts While There is Still Time*, 17 GEO. INT'L ENVTL. L. REV. 1, 1–2, 22 (2004) [hereinafter Seamone, *The Precautionary Principle as the Law of Planetary Defense*]; Evan R. Seamone, *The Duty to "Expect the Unexpected": Mitigating Extreme Natural Threats to the Global Commons Such as Asteroid and Comet Impacts with the Earth*, 41 COLUM. J. TRANSNAT'L L. 735, 766–73 (2003) [hereinafter Seamone, *The Duty to "Expect the Unexpected"*]; see generally Evan R. Seamone, Note, *When Wishing on a Star Just Won't Do: The Legal Basis for International Cooperation in the Mitigation of Asteroid Impacts and Similar Transboundary Disasters*, 87 IOWA L. REV. 1091 (2002) [hereinafter Seamone, *When Wishing on a Star Just Won't Do*].

167. Seamone, *When Wishing on a Star Just Won't Do*, *supra* note 166, at 1095. This term means that "while there is only a small possibility that damage could occur, the damage that could occur is great." *Id.* at 1095 n.17; see also STAFF OF SUBCOMM. ON INVESTIGATIONS & OVERSIGHT OF THE H. COMM. ON SCI. & TECH., 98TH CONG., REP. ON THE ENVIRONMENTAL IMPLICATIONS OF GENETIC ENGINEERING 9 (Comm. Print. 1984). In response, "[p]lanning for threats that have not yet occurred is one aspect of the duty of self-preservation." Seamone, *The Duty to "Expect the Unexpected," supra* note 166, at 748.

natural disasters, communicable crises, and manmade terrorist attacks.<sup>168</sup> In each instance, although it is difficult—sometimes impossible—to predict precisely when the harmful event will occur, when it does, if the government and the populace have not taken effective measures to mitigate it, the consequences are most assuredly devastating.<sup>169</sup> The vernacular of disease prevention and the governments' preemptive responsibilities that stem from it is particularly appropriate for combat PTSD: Disaster psychologists, for example, have analogized PTSD to a "pathogen," in the respect that, if untreated, it will result in the "loss of life through suicide, substance abuse, and domestic violence."<sup>170</sup> The veteran sleeper cell analogy raises the related concerns of counterterrorism.<sup>171</sup>

Continuing the application of the precautionary principle, we can rightfully label service connected PTSD-based offending as a low probability event for three reasons.<sup>172</sup> First, the probability is low because not all veterans who experience combat sustain PTSD.<sup>173</sup> Second, and relatedly, not all veterans who sustain PTSD act in violent or aggressive ways.<sup>174</sup> Third, PTSD may not be a cause or contributing factor in all criminal offenses committed by veterans who have the diagnosis.<sup>175</sup> Despite the defense bar's common assertion that all crimes committed by veterans are caused by PTSD and that veterans who engage in violent behavior have done so only because

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168. See Seamone, *The Precautionary Principle as the Law of Planetary Defense*, *supra* note 166, at 9 (addressing "the spread of infectious disease, trans-border forest fires, nuclear and radiological emergencies, and terrorist attacks.").

169. *Id.* at 6–7.

[G]overnments must be capable of responding to threats of the greatest magnitude at all times. Planning for a "worst case scenario" is common in disaster relief circles. Whether the harm is an earthquake, flood, or other natural disaster, the government's goal must be to withstand maximum harm; not only harm that is considered "normal." The logic underlying this practice recognizes that there may only be one chance to avert significant harm.

*Id.* at 7.

170. George S. Everly, Jr. & Cherie Castellano, *Fostering Resilience in the Military: The Search for Psychological Body Armor*, J. COUNTERTERRORISM & HOMELAND SECURITY INT'L, Winter 2009, at 12, 13.

171. See LIFTON, *supra* note 156, 156–57; see also *supra* note 157 and accompanying text.

172. See Justin Holbrook & Sara Anderson, *Veterans Courts: Early Outcomes and Key Indicators for Success* 9–10 (Widener Law Sch. Legal Studies Research Paper Series No. 11-25), available at <http://ssrn.com/abstract=1912655>.

173. See *id.* at 9.

174. See *id.*

175. See *id.* at 9–10. Many argue that these generalizations are harmful to veterans because they promote a fear-mongering, untrue, "wacko-vet myth." *Id.* at 3, 6–7 (reviewing exaggerated concerns that too many veterans are presumed to be violent and dangerous).



they were trained to be destructive, this “brutalization” hypothesis<sup>176</sup> is hardly a universal truth.<sup>177</sup> Neither possibility can be quantified with any precision and existing studies lead to *confused* and *contradictory* results based largely on research methodology, self-reports, and populations that cannot be generalized.<sup>178</sup>

However, *low* probability in this case does not equate to *no* probability.<sup>179</sup> Untreated combat trauma is a low probability, high consequence event because, “[f]or a small number of veterans, these stressors are having devastating consequences, including increased risk of suicide. Taking action now—before their problems become more complicated and severe, is in their best interests and in the best interest of the [n]ation.”<sup>180</sup> Consequences are high particularly because of the training that has rendered the veteran lethal in combat.<sup>181</sup> Many of these war-traumatized troops “often become adamant . . . about having loaded guns ready at hand for the purposes of self-defense, though there is usually no plausible threat anywhere near their typically suburban neighborhoods.”<sup>182</sup> When PTSD is untreated it can be triggered by any number of events in a no-notice situation, much like a lone wolf terrorist attack.<sup>183</sup> As long as combat PTSD and other OSIs result in violent and crim-

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176. See BOURKE, AN INTIMATE HISTORY OF KILLING, *supra* note 8, at 344–45. This hypothesis states that “[t]he process of emotional numbing lead[s] combatants to long-term brutalization.” *Id.* at 344.

177. *Id.* at 345 (“Though statistical evidence neither proved nor disproved the brutalization thesis, the weight of the evidence found veterans ‘innocent.’”).

178. *Id.*

179. William B. Brown, *War, Veterans, and Crime*, in 1 TRANSNATIONAL CRIMINOLOGY MANUAL 599, 601 (M. Herzog-Evans ed. 2010) (“[T]he reintegration process, for many veterans, includes their entanglement in the criminal justice system.”).

180. Item Testimony, *supra* note 111, at 98.

181. See, e.g., BOURKE, AN INTIMATE HISTORY OF KILLING, *supra* note 8, at 341 (observing how lethal skills acquired in training and in combat “disequipped men for life outside war zones”) (emphasis added). In many cases, once they have returned to civilian society, combat veterans with PTSD are “dominated by a fear of their own violence” or potential for violence. LIFTON, *supra* note 156, at 138. One Vietnam veteran used the term “the beast in me” to address his “inclination to attack other people suddenly while in a dreamlike state in which he was hardly aware of what he was doing.” *Id.* at 139. In 1971, Congressional Medal of Honor recipient Sergeant Dwight W. Johnson was killed by a grocery store manager at the age of twenty-four while attempting a robbery. *Id.* at 39 n.\*. This Vietnam veteran and hero in the truest sense who suffered from depression and post-Vietnam syndrome (moniker at the time) had voiced the concern to his mental health providers, “What would happen if I lost control of myself in Detroit and behaved like I did in Vietnam?” *Id.* at 39 n.\*, 420 n.\*.

182. Laurie Calhoun, *The Silencing of Soldiers*, 16 INDEP. REV. 247, 247 (2011); see also THE GROUND TRUTH (Focus Features 2006) (depicting an actual example).

183. See, e.g., Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 7 n.8 (discussing triggers for PTSD-related stress reactions, including “being cut-off by a vehicle on the road, perceiving that someone is staring-down the veteran, or even seeing

inal acts, suicide, and other behavior which harms society and families for generations to come in some proportion of cases,<sup>184</sup> the precautionary principle mandates that governments, elected officials, and bureaucracies take effective preventive action, rather than absolving themselves from responsibility on the basis that these offenders have somehow lost their rights to mental health care as a result of military misconduct. In fact, by placing servicemember-specific risks of criminality into the standard hazard profile that disaster mitigation specialists commonly use to assess the need for preventive intervention, military offender risks score among the highest categories.<sup>185</sup>

Evident in the response to Sudden Acute Respiratory Syndrome (SARS), infectious disease prevention in that unplanned scenario required a proactive approach that eschewed standard—researched and heavily supported—crisis response scripts and demanded practical interventions coupled with observations that led to self-correction after observed results.<sup>186</sup> A similar precautionary principle relating to combat veteran offenders is most evi-

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a Middle-Eastern person”); LIFTON, *supra* note 156, at 138 (describing a particularly high risk of “random violence” from Vietnam veterans who suffered combat trauma); Burgess et al., *supra* note 66, at 66 (reporting the facts of *People v. Wood*, an Illinois case in which a Vietnam combat veteran was found to be not guilty by reason of insanity for a killing that occurred as a result of noise in a factory that triggered a stress reaction and accompanying dissociative episode); D’Antonio, *supra* note 65 (citing the findings of the Forgotten Warrior Project that “a new shock or stress such as divorce, . . . death in the family, or unemployment can trigger antisocial, even criminal, behavior” in combat-traumatized veterans).

184. SCHALLER, *supra* note 6, at 50 (“[S]tudies are not necessary to predict that some types of criminal problems will result from the disorder.”). Consider the prominence of secondary trauma suffered by family members, especially children. Hedley Peach, *Australia’s Vietnam Veterans: A Review*, 35 AUSTRALIAN FAM. PHYSICIAN 619, 620 (2006). Studies in this phenomenon have begun to show that the children of combat veterans with PTSD are several times more likely themselves to develop psychological maladjustments and even commit suicide. *Id.* at 621 tbl.2. Just as PTSD and TBI are the signature injuries of the Iraq and Afghanistan wars, *secondary trauma* is the signature injury of PTSD veterans’ family members. Joseph R. Herzog & R. Blaine Everson, *Secondary Traumatic Stress, Deployment Phase, and Military Families: Systemic Approaches to Treatment*, in FAMILIES UNDER FIRE: SYSTEMIC THERAPY WITH MILITARY FAMILIES 191, 209 (R. Blaine Everson & Charles R. Figley eds., 2011).

185. See, e.g., LUCIEN G. CATON, EMERGENCY MANAGEMENT STRATEGIES FOR EFFECTIVE PROGRAMS 141 fig.5.7 (2007) (discussing use of the Hazard Profile to rate potential threats to public safety and health).

186. Herman B. “Dutch” Leonard & Arnold M. Howitt, *Against Desperate Peril: High Performance in Emergency Preparation and Response*, in COMMUNICABLE CRISES: PREVENTION, RESPONSE, AND RECOVERY IN THE GLOBAL ARENA 1, 7–8 (Deborah E. Gibbons ed., 2007) (distinguishing “crisis emergencies” from planned emergencies for which there is an “executable script or routine that is known or identifiable and that provides a comprehensive, reliable, and fully adequate response”).

dent in a recent movement among correctional mental health professionals.<sup>187</sup> In 2009, a series of articles by prominent psychiatrists and psychologists urged the corrections community to take immediate action to prevent veteran suicide in America's jails and prisons.<sup>188</sup> Recognizing that there were scarce data on the prevalence of veterans with PTSD in confinement who later committed suicide, they rebuked the prevailing opinion that more research was necessary to justify remedial intervention.<sup>189</sup> Instead, as reflected in Figure 1 below, they looked to the convergence of risk factors that exist within the separate populations of prisoners who are at an increased risk of suicide and veterans who are at an increased rate of suicide and reasoned that the cumulative effect of this mixture is reason enough to prompt action.<sup>190</sup>

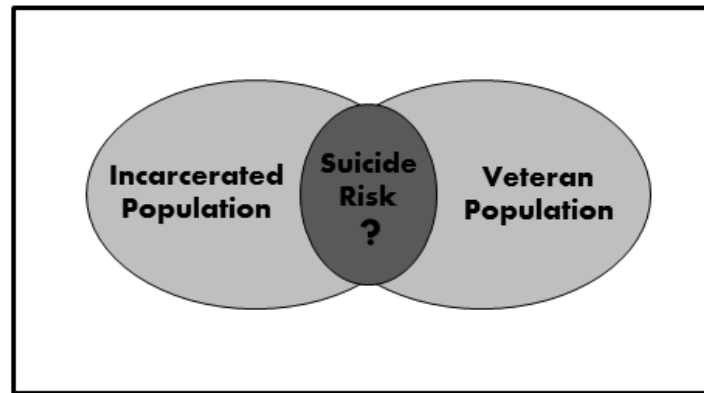


Fig. 1<sup>191</sup>

Even without certainty in studies and the status of PTSD as a soft and developing science, *reasonable inferences* are justified and immediate preventive action is necessary because “[w]hat clearly emerges is that incarcerated veterans are at the intersection between two populations with well-established elevations in suicide rate.”<sup>192</sup> Alternatively stated, the *emerging picture* of the serious risk posed is sufficient to create a *moral obligation* to act even in

187. See Hal S. Wortzel et al., *Suicide Among Incarcerated Veterans*, 37 J. AM. ACAD. PSYCHIATRY & LAW 82, 82, 88–89 (2009).

188. See Linda K. Frisman & Felicia Griffin-Fennell, *Commentary: Suicide and Incarcerated Veterans—Don’t Wait for the Numbers*, 37 J. AM. ACAD. PSYCHIATRY & L. 92, 92 (2009); Wortzel et al., *supra* note 187, at 82.

189. Wortzel et al., *supra* note 187, at 87 (“[O]ffering a meaningful estimation of suicide rate for [incarcerated veterans] remains impossible, and the . . . hypothesis that incarcerated veterans face a high suicide risk can, at present, be neither confirmed nor safely rejected.”).

190. *Id.* & fig.1.

191. *Id.* at 87 fig.1.

192. *Id.* at 87.

the absence of many studies serious scientists might desire for comfort in policymaking.<sup>193</sup>

Common sense dictates the application of the precautionary principle in that corrections context, as it does in addressing the Military Misconduct Catch-22. Following identical logic, for example, Warren Quinlan of the New England Shelter for Homeless Veterans, urged Congress to create additional options for securing VA benefits by drawing the following distinction, represented in Figure 2, below: “Separately, combat PTSD is a social and legal problem, and veterans with ‘bad paper’ are a social and legal problem. The two together produce a dangerous and intractable morass of criminal, civil, and domestic dreadfulness.”<sup>194</sup>

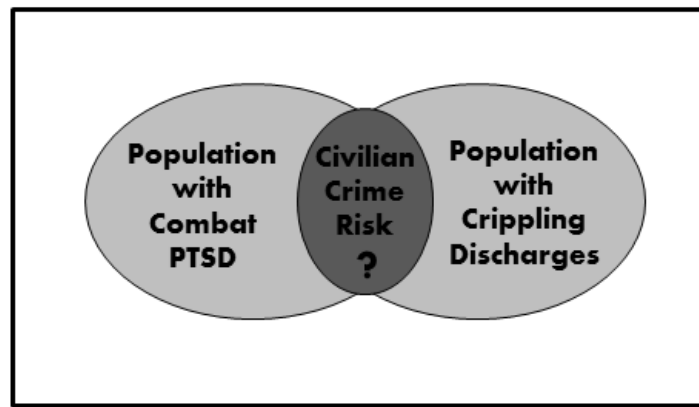


Fig. 2<sup>195</sup>

In the same manner as the correctional psychiatrists and psychologists, Quinlan's rationale avoids the types of illogical and absurd justifications proffered by opponents of arguments rooted only in subjective notions of morality or justice.<sup>196</sup> Similarly, an actuarial perspective that factors the known and certain costs of avoided harm supports intervention rooted in the precautionary principle. This known harm, for which the threat is real, extends far beyond merely the annual costs of incarceration to “unemployment compensation, . . . homeless shelters, substance abuse treatment and emergency health care programs.”<sup>197</sup>

193. Frisman & Griffin-Fennell, *supra* note 188, at 92.

194. Quinlan Testimony, *supra* note 119, at 104.

195. *Id.*

196. See *supra* discussion accompanying notes 55–56.

197. Waters & Shay, *supra* note 162.

## V. CONCLUSION

Contemporary commentators, like Professor William Brown, who often testifies at criminal trials involving PTSD-afflicted veterans,<sup>198</sup> are very concerned that the military and society have failed to learn the lessons from Vietnam, particularly regarding those *forgotten warriors* who subsequently committed crimes as a result of their untreated combat PTSD.<sup>199</sup> The Military Misconduct Catch-22 obviously engenders the same eventual incarceration, suicide, and societal maladaptation that occurred for far too many Vietnam veterans.<sup>200</sup> While the question of what precautions to take may seem perplexing, they really are not when we consider many of the historical and recurring proposals.<sup>201</sup>

The chances of blanket discharge upgrades for all types of military offenders—including sexual predators, child molesters, and murderers—seems unlikely and undeserved. Congress has not changed the VA’s character of discharge standards since 1944, even though standards for discharge have monumentally changed since then.<sup>202</sup> It further blunted President Carter’s efforts to upgrade discharges for combat veterans in the aftermath of Vietnam,<sup>203</sup> and other more recent requests such as Representative Maxine Wa-

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198. *Criminal Justice Degree Programs: William Brown, PhD*, W. OR. U., [https://www.wou.edu/provost/extprogram/cj\\_online/faculty/brown.php](https://www.wou.edu/provost/extprogram/cj_online/faculty/brown.php) (last visited Apr. 21, 2013).

199. William B. Brown, *Another Emerging “Storm”: Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System*, JUST. POL’Y J., Fall 2008, at 2, 5–6, 11, [http://www.cjcj.org/files/another\\_emerging.pdf](http://www.cjcj.org/files/another_emerging.pdf); see also, e.g., Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42, 46–47; *A Groundbreaking Court Decision for Vets with PTSD*, REUTERS (Oct. 28, 2009, 9:02 AM), <http://www.reuters.com/article/2009/10/28/idUS147712+28-Oct-2009+PRN20091028>.

200. See LIFTON, *supra* note 156, at 157; RICHARD A. KULKA ET AL., *TRAUMA AND THE VIETNAM WAR GENERATION: REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY 187* (1990); INST. OF MED., *supra* note 63, at 304.

201. See discussion *supra* Part IV.

202. See *Hearings on H.R. 523, supra* note 121, at 6006–08 (statement of Hon. Philip V. Warman, Associate General Counsel of the Veterans’ Administration). As VA policy analysts noted, “the discharge provision . . . and . . . implementing administrative regulations have been in effect for in excess of one-quarter of a century, with no indication on the part of . . . Congress [or anyone] of any difference of opinion as to the validity of the Veterans Administration’s interpretation.” *Id.* at 6008.

203. See, e.g., *Nelson v. Shinseki*, No. 09-3266, 2011 WL 1897329, at \*1 & n.1 (Vet. App. May 19, 2011) (discussing how Congress muted President Carter’s Defense Special Discharge Review Program, which “generally entitled” bad paper veterans to “an automatic upgrade [of their discharge] to either an honorable discharge or a discharge under honorable conditions”).

ters' efforts in the early '90s to do the same.<sup>204</sup> The legislative intent behind the statutes related to veterans' benefits has been, and continues to be, that some veterans should be denied medical care and hospitalization based on the nature of their misconduct while in the service.<sup>205</sup> The VA, on the other hand, could improve the quality of its character of service determinations through its own administrative regulatory process. Yet, it too is unlikely to adopt a blanket approach. Unlike the Social Security Administration's abolition of a similar character of service process in 1956,<sup>206</sup> the VA's standards for willful and persistent misconduct and crimes of moral turpitude derive largely from Congress's explicit concerns when it passed the *Servicemens' Readjustment Act* of 1944.<sup>207</sup>

The optimal choice is confronting the problem while the servicemember is still in the force, prior to the time he or she is discharged with bad paper.<sup>208</sup> This is naturally the best opportunity to mitigate societal harm because it prevents a waiting game in which time is the enemy of recovery as the veteran appeals his or her discharge through a military board, the VA, or both; when the need for treatment is unquestionable, it should no longer take half a year for an initial determination, and then years for appeals in the VA alone.<sup>209</sup> Practically, the armed services can conduct more *aggressive* screening and search for opportunities to treat instead of punish in situations recommended by health professionals.<sup>210</sup>

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204. Waters & Shay, *supra* note 162.

205. *Hearings on H.R. 523*, *supra* note 121, at 6004–05 (statement of Hon. Philip V. Warman, Associate General Counsel of the Veterans' Administration, citing various statements of legislative intent).

206. *Id.* at 6010–11 (letter of Hon. Robert M. Ball, Commissioner of Social Security, describing how the Social Security Administration used to conduct a nearly identical character of service determination until December of 1956, when benefits were "provided without regard to the character of the discharge the serviceman received for service after that date").

207. *See id.* at 6005 (discussion paper submitted for the record by Hon. Philip V. Warman, Associate General Counsel of the Veterans' Administration).

208. *See, e.g.*, SCHALLER, *supra* note 6, at 210 ("[A]ny suggestion that it is acceptable to wait until veterans have been charged with crimes before the executive and legislative branches intervene to assist in making them whole is far off the mark."); Ilem Testimony, *supra* note 111, at 98 ("DoD and VA share a responsibility to ensure that war-traumatized service personnel . . . should not be criminalized before an effort is made to intervene with therapeutic remedies.").

209. *See, e.g.*, Hal Bernton, *Bronze Star Vet Discharged Without Benefits Gets Good News*, SEATTLE TIMES (Sept. 8, 2012, 6:01 PM), [http://seattletimes.com/html/localnews/2019103510\\_starks09m.html](http://seattletimes.com/html/localnews/2019103510_starks09m.html) (reporting "an average of five to six months" time to conduct an initial character of service determination for an OTH recipient at the Portland, Oregon, VA Regional Office).

210. Hoellwarth, *supra* note 64.

Additionally, commanders can borrow a page from civilian justice agencies and courts by implementing diversionary programs to preserve VA benefit eligibility if the veteran succeeds in a course of intensive and supervised treatment, whether implemented by military agencies or through civilian problem-solving courts (e.g., drug, domestic violence, mental health treatment, or veterans treatment courts).<sup>211</sup> Because the option still exists for commanders to suspend *all forms* of crippling administrative and punitive discharges based on successful treatment outcomes, military leaders must endorse this approach and make it known throughout military mental health and legal channels.<sup>212</sup> This has been done to address concerns over discharging servicemembers for personality disorders, which would deprive them of benefits for PTSD.<sup>213</sup> In such cases, the Army Surgeon General must review cases prior to the involuntary separation.<sup>214</sup> The military can certainly develop similar protocols for handling of its misconduct cases.<sup>215</sup> In a court-martial, a federal conviction, reduction in rank, and forfeitures in pay can surely still meet the goals of deterrence in a case involving PTSD without requiring a crippling discharge as well.

Even in those cases where the offender or the offense is deplorable enough to warrant eventual denial of benefits that would potentially displace the interests of honorably discharged veterans, the military can liaise with the VA and veterans service organizations to provide immediate and transition counseling services and effectuate some type of treatment in the months prior to discharge after the offender has been designated for the crippling discharge pathway.<sup>216</sup> Such efforts can include a preliminary disability evaluation, therapy involving evidence-based PTSD treatments (including family members), preparation of one's own file for discharge upgrade, and occupational counseling with those few organizations that still render services to

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211. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 28–34.

212. *See id.* at 13–14.

213. Kennedy, *supra* note 53 (describing the Surgeon General's involvement reviewing personality disorder discharges in the Army).

214. *Id.*

215. *See id.*

216. It takes months to prepare a case for trial or a separation board and even after the announcement of a punitive discharge at court-martial, the offender is not separated from the military until appellate review has been completed months later. *See MCM, supra* note 34, at II-169 (requiring appellate review of all approved court-martial sentences that include “dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for 1 year or longer”). During all of this time, the servicemember is still in the active military and recent developments permit the VA to devote its treatment resources toward active military members. *See Seamone, Attorneys as First Responders, supra* note 9, at 169, 178–80 (discussing new VA directives).

veterans despite the brand of a crippling discharge. For those overburdened military installations located near functioning problem-solving mental health or veterans' treatment courts, program administrators and private clinicians can and should conduct outreach efforts and develop memoranda of understanding to expand the options available to commanders contemplating discharge for misconduct.<sup>217</sup> One notable example is the network of volunteer mental health providers assembled by Ray Parrish and Social Worker Johanna (Hans) Buwalda, which offers free mental health evaluations to former servicemembers across the nation who desire to apply for "Character of Service" determinations by the VA.<sup>218</sup>

On a final note, rather than abandoning over sixty years of regulatory standards within the VA, interdisciplinary experts can and should recommend significant improvements to standardize the vague and undefined concepts like "willful and persistent misconduct" and "moral turpitude" with objectively defined and methodological steps using the notice and comment provisions of the *Administrative Procedure Act*.<sup>219</sup> Such reform does not require protracted congressional action and can be completed in far less time with lasting modifications to the *Code of Federal Regulations*, while preserving Congress's original intent in the statutes.<sup>220</sup> A recent testament to such revision is the Department of Justice's monumental shift in 2008 away from nearly a century's worth of precedent<sup>221</sup> in redefining the standards for evalu-

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217. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 5, at 13–14, 34.

218. Johanna (Hans) Buwalda, *Spreading the Wealth: Training Mental Health Providers Nationwide to Work with Veterans*, VETERAN (Vietnam Veterans Against the War), Spring 2012, at 8, 8 (describing the efforts of Vietnam Veterans Against the War to "develop[] a network of providers across the country that is willing to provide free, quality mental health services"). Disabled American Veterans is another organization that provides services to PTSD-afflicted veterans and has attempted to address this concern with Congress. *See* Ilem Testimony, *supra* note 111, at 93–94, 96.

219. *See, e.g.*, William A. Moorman & William F. Russo, *Serving Our Veterans Through Clearer Rules*, 56 ADMIN. L. REV. 207, 208–11, 213, 217 (2004) (describing how the administrative rulemaking process could more quickly and effectively eliminate ambiguity in VA regulations than the legislative process).

220. Administrative agencies often fill in the gaps where statutes may be ambiguous and courts accord great deference when they do so. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 322–23 (2d ed. 2006) (describing the Supreme Court's longstanding deferential position on agency rulemaking and related interpretations).

221. Cate McGuire, Note, *An Unrealistic Burden: Crimes Involving Moral Turpitude and Silva-Trevino's Realistic Probability Test*, 30 REV. LITIG. 607, 615 (2011) (describing how the Attorney General "upset almost 100 years of jurisprudence" within the Board of Immigration Appeals in creating a new method to define moral turpitude offenses).



ating whether an alien has been convicted of a crime of “moral turpitude” under the Immigration and Nationality Act.<sup>222</sup>

While none of the above recommendations will end all veteran criminality, catch all cases of PTSD, or guarantee the success of all treatment plans or collaborative efforts between the military and society, no single intervention could ever realistically accomplish all of these goals. Instead, the efforts would reach a population that is treated as invisible for generations. By addressing the Military Misconduct Catch-22 head on, we might finally “bring home” these lost divisions of combat-traumatized veterans who continue to wage wars in our neighborhoods, our hospitals, our psychiatric wards, and our prisons and jails each day. Recognizing society’s dire interest in the servicemember’s un-crippled transition, the precautionary principle demands no less than TJ in action. Otherwise, through the failure to treat this particularly devastating and lethal form of mental illness in the most dangerous offenders, the military and society will only contribute to the ranks of America’s largest sleeper cell, defeating itself from the inside out with each discarded troop’s preventable clash with the law.

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222. See *Matter of Cristoval Silva-Trevino*, 24 I. & N. Dec. 687, 688, 691 (2008) (addressing the provisions of the Immigration and Nationality Act).

## MAKING POSTTRAUMATIC STRESS DISORDER A PRIORITY: SAVING VETERANS FROM SUICIDE

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### I. INTRODUCTION

When young Americans volunteer their lives to go and serve in the armed services, they often fail to realize that they are making a commitment that will last for the rest of their lives. Rarely do they consider that it may even shorten their lives. Inadequate treatment for veterans who have post-traumatic stress disorder (PTSD) leads to the symptoms progressing, and for

some, consequently results in suicide.<sup>1</sup> Today, “more active duty soldiers commit suicide than are killed in combat,” which reflects negatively on the United States Military.<sup>2</sup> The lack of proper care and attention awarded to veterans and military personnel is apparent in Specialist Kirkland’s story.<sup>3</sup> Kirkland, a soldier who had been deployed to Iraq twice, was sent home because the symptoms of PTSD were hindering his ability to live.<sup>4</sup> When he returned to the barracks, he was publicly ridiculed for having PTSD and assigned to a room by himself.<sup>5</sup> Forty-eight hours later he was found dead.<sup>6</sup> While it may have been his hands that physically took his life, “Kirkland did not kill himself. He was killed by the Army” as a result of the inadequate treatment.<sup>7</sup>

PTSD, which occurs in a high number of veterans, when left untreated, often leads to suicide.<sup>8</sup> Preventing suicide among veterans with PTSD is directly linked to the legal system, because the law determines whether a veteran can qualify for disability benefits to receive treatment for disabilities incurred during service.<sup>9</sup> Providing adequate care to veterans is dependent on specific laws set forth by the United States, which enable the Department of Veteran Affairs (VA) and the Department of Defense (DoD) to provide adequate and efficient services to veterans.<sup>10</sup> Additionally, the actions taken by the United States in decreasing the stigma attached with mental illnesses will help reduce suicide rates among veterans.<sup>11</sup>

PTSD has been linked to a heightened risk of suicide among veterans, due to untreated symptoms of PTSD, which include: “[D]epression, anxiety, sleep deprivation, substance abuse, and difficulties with anger management.”<sup>12</sup> Unfortunately, suicide rates in the military are at an all-time high,

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1. See Seth Manzel, *Let’s Not Forget PTSD and Suicide This Veterans Day*, RSN (Nov. 11, 2010), <http://readersupportednews.org/opinion2/266-32/3911-lets-not-forget-ptsd-and-suicide-this-veterans-day>.

2. *Id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. Manzel, *supra* note 1.

7. *Id.*

8. *See id.*

9. *See, e.g.*, 38 C.F.R. §§ 3.304, 3.12, 4.125 (2012).

10. *See* Exec. Order No. 13,625, 77 Fed. Reg. 54,783, 54,784–85 (Aug. 31, 2012).

11. *See id.* at 54,786.

12. MARGARET C. HARRELL & NANCY BERGLASS, CTR. FOR A NEW AM. SEC., *LOSING THE BATTLE: THE CHALLENGE OF MILITARY SUICIDE 2* (2011), [http://www.cnas.org/files/documents/publications/CNAS\\_LosingTheBattle\\_HarrellBerglass\\_0.pdf](http://www.cnas.org/files/documents/publications/CNAS_LosingTheBattle_HarrellBerglass_0.pdf).

and the number of psychiatric illnesses, namely PTSD, are on the rise.<sup>13</sup> “PTSD is the only [mental] illness [that has] a clear etiologic[al] relationship to military service . . .” and it has been demonstrated that being exposed to war-zone stress can lead to life-lasting impairment.<sup>14</sup> In 2012, a study revealed that veterans who attempted suicide did not do so because they wanted to harm themselves; rather, they did so because they wanted the pain they were experiencing to end.<sup>15</sup> Despite the prevalence of PTSD among veterans,<sup>16</sup> few studies have been conducted and little is known about how to help them. The issue of rendering aid to returning veterans and preventing them from committing suicide has been placed under a spotlight of national scrutiny, which is evidenced by recent actions by President Barack Obama and the members of the Congress.<sup>17</sup>

As veterans return and are not properly cared for, the reputation of the military as well as individuals’ desires to volunteer for the military will decrease, which is manifested in George Washington’s declaration, “[t]he willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive the [v]eterans of earlier wars were treated and appreciated by their nation.”<sup>18</sup> It is crucial that this topic be addressed with urgency because in the next five years a million soldiers are expected to return from combat,<sup>19</sup> and in order to prevent suicide, it is integral that equal importance is given to mental wounds as is to physical wounds.<sup>20</sup> Part two of this article defines PTSD and suicide both generally and in the military.<sup>21</sup> Then, part three discusses the problem of the increasing rates of suicide amongst veterans with PTSD.<sup>22</sup> Specifically, after explaining the general issues, the article discusses the legal obstacles that arise among veterans with PTSD.<sup>23</sup> Part four illustrates the current ef-

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13. Deborah Brauser, *Military Suicide: US Takes Aim at Its ‘Toughest Enemy,’* MEDSCAPE NEWS (Sept. 26, 2012), <http://www.medscape.com/viewarticle/771603>.

14. Robert Rosenheck & Alan Fontana, *Changing Patterns of Care for War-Related Post-Traumatic Stress Disorder at Department of Veterans Affairs Medical Centers: The Use of Performance Data to Guide Program Development*, 164 MILITARY MED. 795, 795 (1999).

15. Gregg Zoroya, *Study Reveals Top Reason Behind Soldiers’ Suicides*, USA TODAY, <http://usatoday30.usatoday.com/news/military/story/2012-07-10/army-study-soldiers-suicides/56136192/1> (last updated July 11, 2012).

16. See Rosenheck & Fontana, *supra* note 14, at 795–96.

17. See Brauser, *supra* note 13.

18. HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 10.

19. Brauser, *supra* note 13.

20. See HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 5–6.

21. See *infra* Part II.

22. See *infra* Part III.

23. See *infra* Part III.B.

forts that are being taken to address the problem.<sup>24</sup> Next, part five makes suggestions of what should be done to curtail the detrimental effects that PTSD has on veterans to prevent suicide.<sup>25</sup> Finally, part six concludes that there is an increasing rate of suicide among returning veterans with PTSD and that rectifying the issue of suicide by veterans with PTSD is necessary.<sup>26</sup>

## II. DEFINING PTSD AND SUICIDE

A history of PTSD has been linked to an increased risk of suicide attempts among veterans.<sup>27</sup> Individuals with PTSD are at a higher risk for suicidal behavior, which has been illustrated by two studies.<sup>28</sup> In the first study, a community sample showed that a veteran with PTSD was “14.9 times more likely to attempt suicide than [a veteran] without PTSD.”<sup>29</sup> In the second study, an Operation Enduring Freedom/Operation Iraqi Freedom (OEF/OIF) screened sample demonstrated that a veteran with PTSD is “over four times more likely to endorse suicidal ideation than [a veteran] without PTSD.”<sup>30</sup> Veterans with PTSD possess an increased desire to engage in self-harm as a means of dealing with their overwhelming internal experiences, often because they have survivor guilt, have taken lives before, and have sustained combat injuries.<sup>31</sup>

### A. PTSD Generally and in the Military

PTSD is a “trauma-related emotional disturbance” that has been a challenge for the mental health community “since its inception in 1980.”<sup>32</sup> PTSD has been defined as “[a]n anxiety disorder resulting from exposure to an

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24. See *infra* Part IV.

25. See *infra* Part V.

26. See *infra* Part VI.

27. Bridget E. Bulman, PTSD and Suicide in Veterans and Military Personnel, Powerpoint Presentation at Suicide Prevention Week, slide 22 (Sept. 6, 2011), [http://www.mirecc.va.gov/visn19/presentations/docs/bulman\\_ptsd\\_suicide\\_northern\\_ca\\_spw\\_9-6-11.pdf](http://www.mirecc.va.gov/visn19/presentations/docs/bulman_ptsd_suicide_northern_ca_spw_9-6-11.pdf).

28. *Id.*; see also Jonathan R. T. Davidson et al., *Post-traumatic Stress Disorder in the Community: An Epidemiological Study*, 21 PSYCHOL. MED. 713, 713 (1991); Matthew Jakupcak et al., *Posttraumatic Stress Disorder as a Risk Factor for Suicidal Ideation in Iraq and Afghanistan War Veterans*, 22 J. TRAUMATIC STRESS 303, 305 (2009).

29. Bulman, *supra* note 27, at slide 22; see also Davidson et al., *supra* note 28, at 718.

30. Jakupcak et al., *supra* note 28, at 305; see also Bulman, *supra* note 27, at slide 22.

31. Bulman, *supra* note 27, at slide 22–24.

32. E. B. Foa & E. A. Meadows, *Psychosocial Treatments for Posttraumatic Stress Disorder: A Critical Review*, 48 ANN. REV. PSYCHOL. 449, 449–50 (1997).

experience involving direct or indirect threat of serious harm or death.”<sup>33</sup> The term PTSD “was first introduced [by the American Psychiatric Association] in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III).”<sup>34</sup> Currently, the text revision of the fourth edition (DSM-IV-TR), which was published in 2000, is followed, and is limited to mostly descriptive changes to the DSM-IV.<sup>35</sup> The fifth revision of the Diagnostic and Statistical Manual of Mental Disorders is expected to be released in 2013.<sup>36</sup>

Pursuant to title 38, section 4.125 of the *Code of Federal Regulations*, the VA has adopted the DSM-IV for rating psychiatric conditions.<sup>37</sup> The DSM-IV explicitly lists military combat as a type of traumatic event which gives rise to PTSD.<sup>38</sup> According to the DSM-IV, an individual must satisfy six criteria in order to be diagnosed with PTSD.<sup>39</sup> First, there must have been a stressor, which means that the individual must have been introduced to a traumatic event “that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others,” and the response to that threat must have “involved intense fear, helplessness, or horror.”<sup>40</sup> Once the first factor is satisfied, the second through fourth criteria explain that the symptoms include: Persistent re-experiencing of the traumatic event (Criterion B), “[p]ersistent avoidance of stimuli associated with the trauma and numbing of general responsiveness” (Criterion C), and “[p]ersistent symptoms of increased arousal” (Criterion D).<sup>41</sup> The fifth criterion mandates that the duration of the symptoms experienced must be present for more than one month.<sup>42</sup> The sixth factor assesses functional significance of the individual and further requires a physician to specify whether the PTSD is acute—symptoms last less than three months—or chronic—symptoms last three or more months.<sup>43</sup> The second requirement of persistent reexperiencing consists of:

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33. Bulman, *supra* note 27, at slide 6.

34. Foa & Meadows, *supra* note 32, at 450.

35. See *DSM-IV-TR*, AM. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/practice/dsm/dsm-iv-tr> (last visited Apr. 21, 2013).

36. *Id.*

37. See 38 C.F.R. § 4.125 (2012).

38. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 463 (4th ed., text rev. 2000) [hereinafter *DSM-IV-TR*].

39. See *id.* at 467–68.

40. *Id.* at 467.

41. *Id.* at 468.

42. *Id.*

43. *DSM-IV-TR*, *supra* note 38, at 468.

(1) [R]ecurrent and intrusive distressing recollections of the event, . . . (2) recurrent distressing dreams of the event, . . . (3) acting or feeling as if the traumatic event were recurring, . . . (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event, [or] (5) physiological reactivity [up]on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.<sup>44</sup>

The avoidant/numbing factor includes:

(1) [E]fforts to avoid thoughts, feelings, or conversations associated with the trauma; (2) efforts to avoid activities, places, or people that arouse recollections of the trauma; (3) inability to recall an important aspect of the trauma; (4) markedly diminished interest or participation in significant activities; (5) feeling of detachment or estrangement from others; (6) restricted range of affect; [and] (7) [a] sense of . . . foreshortened future.<sup>45</sup>

The element of hyper-arousal involves “(1) difficulty falling or staying asleep, (2) irritability or outbursts of anger, (3) difficulty concentrating, (4) hypervigilance, [and an] (5) exaggerated startle response.”<sup>46</sup>

PTSD is caused by stress factors and it has been found that when the stress is caused by human design, PTSD “is more severe and lasts longer.”<sup>47</sup> Individuals experiencing PTSD exhibit self-destructive and dangerous behavior, including “[s]ubstance use, [s]uicidal attempts, [r]isky sexual behavior, [r]eckless driving, [and] [s]elf-injury.”<sup>48</sup> Treatment for PTSD includes hypnotherapy; psychodynamic treatments; cognitive-behavioral treatments such as exposure procedures, systematic desensitization, prolonged imaginal and in vivo exposure; anxiety management programs; and combined treatment programs.<sup>49</sup>

PTSD has been utilized in courts as a basis for the insanity defense, as well as a mitigating factor at sentencing for veterans who were involved in combat.<sup>50</sup> Approximately “30% of combat veterans experience PTSD,”<sup>51</sup>

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44. *Id.* (stating that the traumatic event is reexperienced, persistently, in at least one of the ways mentioned).

45. *Id.*

46. *Id.*

47. Bulman, *supra* note 27, at slide 15.

48. *Id.* at slide 16.

49. Foa & Meadows, *supra* note 32, at 457–58, 461–62, 470, 472.

50. Jim McGuire & Sean Clark, *PTSD and the Law: An Update*, PTSD RES. Q., Apr. 21, 2011, at 1, 1, available at <http://www.ptsd.va.gov/professional/newsletters/research-quarterly/v22n1.pdf>.

which has been associated with being deployed multiple times, and a lack of time available to spend at home to lead a normal, healthy life, inevitably resulting in emotional problems and then the commission of suicide.<sup>52</sup> The most common reason why army personnel are being hospitalized is due to psychiatric illnesses such as PTSD.<sup>53</sup>

While PTSD is often not given as much importance because it is perceived as a mental illness, a recent study showed that individuals experiencing PTSD do exhibit physical alterations in their brain.<sup>54</sup> In November 2012, a study indicated that combat veterans with PTSD had a smaller volume in the amygdala, the primary area of the brain that regulates responses to stress, fear, and anxiety, which is significant because it indicated that a physical alteration is associated with PTSD, “regardless of the severity of trauma.”<sup>55</sup> The study analyzed magnetic resonance imaging (MRI) scans of “200 combat veterans who served in Iraq and Afghanistan,” half who had PTSD, and the other half who had not been diagnosed with PTSD.<sup>56</sup>

#### B. *Suicide Generally and in the Military*

According to the Centers for Disease Control and Prevention, “[s]uicide was the tenth leading cause of death [in the United States] in 2010.”<sup>57</sup> “Suicide is the third leading cause of death” for youth between the ages of fifteen and twenty-four years old,<sup>58</sup> which is problematic because many of the soldiers serving the country fall within this age range.<sup>59</sup> Challenges at work, financial and legal troubles, physical or medical illnesses, struggles in social life, substance abuse, psychological injury, emotional distress, and mental disorders including depression, schizophrenia, anxiety disorders, and PTSD,

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51. Bulman, *supra* note 27, at slide 7.

52. Brauser, *supra* note 13.

53. *See id.*

54. *PTSD Linked to Smaller Brain Area Regulating Fear Response*, SCI. DAILY (Nov. 5, 2012), <http://www.sciencedaily.com/releases/2012/11/121105161355.htm>.

55. *Id.* However, this study fails to indicate whether a smaller amygdala volume is a result of trauma, or whether the smaller amygdala volume is what makes soldiers more vulnerable to developing PTSD. *Id.*

56. *Id.*

57. CDC, SUICIDE: FACTS AT A GLANCE (2012), [http://www.cdc.gov/ViolencePrevention/pdf/Suicide\\_DataSheet-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/Suicide_DataSheet-a.pdf).

58. *Id.*

59. David R. Segal & Mady Wechsler Segal, *America's Military Population*, POPULATION BULL., Dec. 2004, at 1, 23, 24 fig.9, available at <http://www.prb.org/Source/ACF1396.pdf>.



are all correlated with suicide attempts, suicide ideation, and deaths by suicide,<sup>60</sup> and occur among all age groups and demographic variables.<sup>61</sup>

General Lloyd J. Austin stated, “[s]uicide is the toughest enemy I have faced in my 37 years in the Army. That said, I do believe suicide is preventable,”<sup>62</sup> representing a belief that if proper precautions are taken, the number of deaths caused by suicide may decrease.<sup>63</sup> Making suicide prevention a priority is necessary because a policy brief indicated that approximately eighteen veterans take their own lives daily, and between the years of 2005 and 2010, at a rate of about one every thirty-six hours.<sup>64</sup>

The Veterans Health Administration (VHA) has been working to ensure access to mental health services and has created programs tailored to prevent suicides.<sup>65</sup> The suicide of the Chief of Naval Operations, Admiral Jeremy Boorda, served as a “wakeup call” for the military, leading to widespread media attention.<sup>66</sup> This began the development of formal suicide prevention programs in the military.<sup>67</sup> Suicide prevention programs in the Army focus on: “Developing life-coping skills, [e]ncouraging help-seeking behaviors, [r]aising awareness and vigilance to suicide prevention, [i]ntegrating suicide prevention programs, [and] [c]onducting suicide surveillance and analysis.”<sup>68</sup> In 2007, the VA implemented a suicide prevention program at the order of the Congress.<sup>69</sup> While the problem is identified, it is hard to prevent because it is difficult to predict which individuals are actually thinking about committing suicide due to the low base rate of suicide.<sup>70</sup> Additionally, the low number of comprehensive assessments of suicide mortality among veterans

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60. DEP’T OF DEF. TASK FORCE ON THE PREVENTION OF SUICIDE BY MEMBERS OF THE ARMED FORCES, THE CHALLENGE AND THE PROMISE: STRENGTHENING THE FORCE, PREVENTING SUICIDE AND SAVING LIVES, 7, 8 diagram 2-1 (2010), available at [http://www.health.mil/dhb/downloads/suicide\\_prevention\\_task\\_force\\_report\\_08-21-10\\_v4\\_rln.pdf](http://www.health.mil/dhb/downloads/suicide_prevention_task_force_report_08-21-10_v4_rln.pdf).

61. See CDC, *supra* note 57.

62. Brauser, *supra* note 13.

63. See *id.*

64. *Id.*

65. John F. McCarthy et al., *Suicide Mortality Among Patients Receiving Care in the Veterans Health Administration Health System*, 169 AM. J. EPIDEMIOLOGY 1033, 1033–34 (2009).

66. DEP’T OF DEF. TASK FORCE ON THE PREVENTION OF SUICIDE BY MEMBERS OF THE ARMED FORCES, *supra* note 60, at 11.

67. *Id.*

68. *Id.* at 16.

69. McCarthy et al., *supra* note 65, at 1033.

70. Ella C. Nye et al., *Specific Symptoms Predict Suicidal Ideation in Vietnam Combat Veterans with Chronic Post-Traumatic Stress Disorder*, 172 MILITARY MED. 1144, 1144 (2007).

makes it harder to solve the problem.<sup>71</sup> There has also been no assessment of suicide rates among veterans who are receiving aid from the VHA health system.<sup>72</sup>

### III. THE PROBLEM

#### A. *Generally*

During the month of July 2012, “26 active-duty soldiers and 12 reserve soldiers [committed suicide], which is the highest number ever recorded in 1 month.”<sup>73</sup> The United States Army confirmed an overall rise in the number of suicides, evidenced by 116 active-duty suicides and 71 reservist suicides in just the first seven months of 2012, as compared to 165 active duty and 118 reservist suicides in all of 2011.<sup>74</sup> One of the greatest challenges that both the mental health community and the VHA healthcare system face is that of veterans with PTSD experiencing suicidal ideation.<sup>75</sup> Veterans with PTSD who chronically exhibit suicidal ideation consume a disproportionate amount of the limited resources available at hospitals or clinics, which in turn “introduce[s] resource allocation stress into [the] system[], [inevitably leading] to wide-ranging consequences for the entire . . . veteran population” that is seeking treatment.<sup>76</sup>

There are only two medications, sertraline and paroxetine, approved by the Food and Drug Administration for treating PTSD.<sup>77</sup> It has been indicated that even the two medications are only effective in a limited capacity.<sup>78</sup> Often times, in addition to the medicine, the individual seeking recovery might also need psychotherapy, which makes it even harder for an individual to overcome the hurdle.<sup>79</sup> As a result, many veterans do not attend therapy regularly, and between 20% and 50% of soldiers walk away from PTSD treatment before it is completed.<sup>80</sup> This has led scientists to look for other medications such as D-cycloserine and ketamine, as well as other promising ther-

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71. McCarthy et al., *supra* note 65, at 1033.

72. *Id.*

73. Brauser, *supra* note 13.

74. *Id.*

75. Nye et al., *supra* note 70, at 1144.

76. *Id.*

77. Michael Dieperink et al., *Comparison of Treatment for Post-Traumatic Stress Disorder Among Three Department of Veterans Affairs Medical Centers*, 170 MILITARY MED. 305, 305 (2005).

78. *Id.*

79. *See* Brauser, *supra* note 13.

80. *Id.*

apies such as “eye movement desensitization, hypnosis, and other talking therapies.”<sup>81</sup>

Instead of praising veterans with PTSD for living through traumatic experiences that were experienced during combat, society, including military personnel, looks down upon individuals with PTSD, perceiving them as weak and pitying them.<sup>82</sup> The stigma associated with having a mental disorder is the greatest challenge preventing soldiers from seeking help.<sup>83</sup> Combatting the stigma will be close to impossible because many people do not regard PTSD as a *real injury*.<sup>84</sup> A study conducted in 2008 revealed that the reported rates of PTSD and suicidal thoughts were “two to four times higher” in anonymous surveys as compared to those in post-deployment health assessment (PDHA) surveys.<sup>85</sup> Returning soldiers fabricate their answers attempting to conceal any PTSD related symptoms since their unit leaders advise them to.<sup>86</sup> Soldiers have been told by their unit leaders, “[i]f you answer yes to any of those questions, you are not going home to your family tomorrow,” resulting in soldiers falsifying responses.<sup>87</sup> As an effort to remedy this problem and encourage honesty, the 2010 National Defense Authorization Act (NDAA) necessitates that “PDHA evaluations [be conducted] individually and face-to-face” by “trained medical or behavioral . . . professionals.”<sup>88</sup>

Additionally, a major problem is the lack of healthcare providers to help veterans who are seeking treatment for PTSD.<sup>89</sup> The national shortage of mental health and behavioral healthcare providers has been linked to an increase in suicide rates.<sup>90</sup> Even when military hospital commanders have the authority to hire healthcare personnel on an as-needed basis, they cannot do so due to a national shortage of care providers.<sup>91</sup> It was found that where the healthcare professionals increased to the number recommended in the Veterans Health Administration Handbook, suicide rates decreased by 3.6 deaths per one hundred thousand.<sup>92</sup>

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81. *Id.*

82. See HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 5.

83. *Id.* “[Forty-three] percent of soldiers . . . who took their own lives in 2010 did not seek help from military treatment facilities in the month before their deaths.” *Id.*

84. *Id.* at 5–6.

85. *Id.* at 5.

86. See HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 5.

87. *Id.*

88. *Id.*

89. *Id.* at 6.

90. *Id.*

91. HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 6.

92. *Id.*

Another factor that adds to the problem of veterans not getting adequate treatment is the time delay between the onset of PTSD and the treatment for it.<sup>93</sup> Approximately one million veterans are currently waiting on claims for disability from the VA, a number which is only expected to rise in the next several months by 1.2 million.<sup>94</sup> It takes the VA, on average, just over eight months to respond to a disability claim, and in the case that a veteran desires to appeal a denied claim, it takes an average of three and a half years.<sup>95</sup> The time delay poses a problem because if a veteran with PTSD commits suicide while he or she is not receiving treatment, it is impossible to say that the death could not have been prevented.<sup>96</sup>

#### B. *Obstacles Presented by the Legal System*

The four main legal issues addressed in this article associated with PTSD and suicide among veterans are: (1) The United States judicial system's ability to take action on the VA's treatment of veterans;<sup>97</sup> (2) the law regarding veterans' ability to establish a service connection;<sup>98</sup> (3) untreated PTSD causing veteran dismissal without disability benefits;<sup>99</sup> and (4) laws regarding certain personnel from inquiring when a soldier or veteran owns a personal firearm.<sup>100</sup>

##### 1. Limited Authority of Federal Courts over the VA

The VA adjudicates the majority of the claims involving veterans because the United States federal courts have limited authority to render decisions over an agency.<sup>101</sup> While the Court of Appeals for Veteran Claims has final jurisdiction to review the decisions of the VA, pursuant to section 706(1) of the Administrative Procedure Act, federal courts can only command an agency to act if the agency failed to act in a way it was required to

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93. See Leila Levinson, *Time to Pay the Price of War*, HUFFPOST (Sept. 21, 2012, 5:51 PM), [http://www.huffingtonpost.com/leila-levinson/veterans-mental-health\\_b\\_1898771.html](http://www.huffingtonpost.com/leila-levinson/veterans-mental-health_b_1898771.html).

94. *Id.*

95. Ruben Rosario, *We're Quick to Send Them off to War, but Slow to Help*, TWIN CITIES.COM (Sept. 22, 2012, 10:27 PM), [http://www.twincities.com/localnews/ci\\_21603734/ruben-rosario-were-quick-sand-them-off-war](http://www.twincities.com/localnews/ci_21603734/ruben-rosario-were-quick-sand-them-off-war).

96. See Levinson, *supra* note 93; Rosario, *supra* note 95.

97. See discussion *infra* Part III.B.1.

98. See discussion *infra* Part III.B.2.

99. See discussion *infra* Part III.B.3.

100. See discussion *infra* Part III.B.4.

101. See Case Law Developments, *Expert Evidence and Testimony*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 547, 567 (2011).

do so.<sup>102</sup> The Veterans' Judicial Review Act of 1988 (VJRA) dictates which federal courts do and do not have jurisdiction in cases involving veteran benefits.<sup>103</sup> The VJRA confers exclusive jurisdiction upon veteran courts to review “all questions involving benefits under laws administered by the VA . . . includ[ing] factual, legal, and constitutional questions.”<sup>104</sup> By codifying section 511, Congress intended to permanently “broaden the scope of section 211<sup>105</sup> and limit outside court intervention in the VA decisionmaking process.”<sup>106</sup> As a result, federal courts are disqualified from hearing cases regarding veterans' benefits.<sup>107</sup> For instance, because sections 1705 and 1710 of the United States Code delegate the “[m]anagement of health care [consisting of the] patient enrollment system” and “[e]ligibility for hospital, nursing home, and domiciliary care” to the Secretary of the VA, federal courts lack jurisdiction to judge the agency's exercise of judgment.<sup>108</sup> This means that federal courts have no say in, or control over, whether the VA is providing timely or effective mental healthcare to veterans.<sup>109</sup> This is extremely problematic because if the VA does not provide timely care, or if it renders ineffective treatment, the federal courts lack the authority to improve the procedure or guidelines utilized by the VA.<sup>110</sup>

## 2. Service Connections

The VA has a compensation system for veterans with PTSD, allowing veterans to file claims in order to receive disability compensation benefits.<sup>111</sup> Even though the VA was not created until 1930, the custom of providing

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102. *Id.*; see also 5 U.S.C. § 706(1) (2006); 38 U.S.C. § 7252(a).

103. See *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1021–22 (9th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 840 (2013). For a detailed explanation of the history of judicial review, and the VJRA, see *id.* at 1020–23.

104. *Id.* at 1021 (quoting H.R. REP. NO. 100-963, pt. 1, at 5 (1988)).

105. 38 U.S.C. § 511. Section 211 (involving the preclusion of judicial review by other courts), originally appeared in the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 2(a), 105 Stat. 388 (1991), but is now covered by 38 U.S.C. § 511. 38 U.S.C. § 511.

106. *Shinseki*, 678 F.3d at 1022 (quotations omitted); see also H.R. REP. NO. 100-963, pt. 1, at 27. Title 38 of the United States Code Annotated section 511 is subject to four exceptions, one of which allows “[t]he Veterans Court and . . . Federal Circuit [to] review the Secretary's decisions regarding veterans' benefits.” *Shinseki*, 678 F.3d at 1022.

107. *Id.* at 1022–23.

108. See 38 U.S.C. §§ 1705, 1710.

109. See Case Law Developments, *supra* note 101, at 567.

110. See *id.*

111. Nathaniel J. Doan & Barbara C. Morton, Comment, *A New Era for Establishing Service Connection for Posttraumatic Stress Disorder (PTSD): A Proposed Amendment to the Stressor Verification Requirement*, 2 VETERANS L. REV. 249, 249–50 (2010).

disability benefits for individuals who served for the United States has been evident since the Revolutionary War.<sup>112</sup> A veteran looking to receive a certain amount of disability benefits due to an injury caused by a service incurred condition must show that the injury caused by the condition was related to service to the country.<sup>113</sup> A “[s]ervice connection connotes . . . that the facts . . . establish that a particular injury or disease resulting in disability was incurred coincident with service in the [a]rmed [f]orces, or if preexisting such service, was aggravated therein.”<sup>114</sup> The United States Code mandates that when adjudicating a claim for service connection for PTSD, “the places, types, and circumstances of” service are considered by examining service records, the official history of any organization in which the veteran served, military records, as well as any other pertinent evidence.<sup>115</sup>

In order to receive a service connection for PTSD, the claimant must show that a claim is well grounded<sup>116</sup> through: (1) Medical evidence establishing a clear diagnosis of the condition; (2) “credible supporting evidence that the claimed in-service stressor [actually] occurred;” and (3) “a link, established by medical evidence, between current symptoms and an in-service stressor.”<sup>117</sup>

Pursuant to an amendment by President Obama in July 2010, when there is no evidence to corroborate that an alleged injury occurred during combat, the Secretary of Veteran Affairs may accept satisfactory lay evidence as long as it is consistent with the conditions of the service.<sup>118</sup> Before the amendment in 2010, a soldier serving as a physician for wounded soldiers would not be able to receive disability benefits even if he witnessed his fellow soldiers in an explosion, and as a result, during the explosion, utilized a firearm to protect himself.<sup>119</sup> Because the soldier was acting as a physician, it would be close to impossible for the soldier to prove that the in-service stressor actually occurred.<sup>120</sup> However, as a result of the 2010 amendment, the sole lay testimony of a veteran may be sufficient to establish the existence of an in-service stressor where evidence indicates that PTSD was diag-

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112. Katherine Dubyak, *Close, but No Cigar: Recent Changes to the Stressor Verification Process for Veterans with Post-Traumatic Stress Disorder and Why the System Remains Insufficient*, 21 FED. CIR. B.J. 655, 665 (2012).

113. Doan & Morton, *supra* note 111, at 250.

114. 38 C.F.R. § 3.303(a) (2012).

115. 38 U.S.C. § 1154(a)(1) (2006).

116. *See id.* § 5107(a).

117. 38 C.F.R. § 3.304(f). The second requirement has commonly been known as the “documentation requirement.” Dubyak, *supra* note 112, at 656.

118. 38 C.F.R. § 3.304(f)(1)–(4); Dubyak, *supra* note 112, at 656.

119. Dubyak, *supra* note 112, at 655–56.

120. *See id.* at 655.

nosed during service in the armed forces and that the claimed stressor was associated to the service as long as there is no clear and convincing evidence to the contrary.<sup>121</sup> The lay testimony may also be sufficient to show the existence of an in-service stressor where it is shown that the veteran was involved with combat and that the claimed stressor was associated with the combat.<sup>122</sup>

However, it has been held that the mere presence in a combat zone does not constitute a valid stressor to support a PTSD diagnosis; instead, a showing of an event “such as experiencing an immediate threat to one’s life or [observing] another person being . . . killed” is necessary.<sup>123</sup> This is evidenced in *Gray v. West*,<sup>124</sup> where a veteran, with the military occupational specialty of general warehouseman, was diagnosed with PTSD yet denied entitlement to service connection because he was not able “to verify [the] alleged stressors.”<sup>125</sup> The court held that it was not enough that the medical diagnosis stated, “this man had stressors when he went out on patrol and faced death for the first time,” and that corroboration of the stressor by “specific dates, places, or names of people killed” was necessary in order to establish a sufficient service connection.<sup>126</sup> However, a court held that pain or suffering is relevant for a showing of a disability for which service connection can be granted as it is considered in assessing the extent of a condition.<sup>127</sup> Additionally, there is a presumption of soundness stating that a veteran is presumed to be in “sound condition when examined” for obtaining benefits with the exception of the conditions noted during initial examination.<sup>128</sup>

Moreover, a service connection can be granted if it is shown that symptoms of a condition were chronic or continuous.<sup>129</sup> Showing that the symptoms qualify under “service connection” requires the veteran to be diagnosed with the condition during service and at the time of the claim for the service connection.<sup>130</sup>

While the law regarding service connection was recently amended in 2010, the language of the law is narrowly worded, making it difficult for

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121. 38 C.F.R. § 3.304(f)(1); *Dubyak*, *supra* note 112, at 656.

122. 38 C.F.R. § 3.304(f)(2); *Dubyak*, *supra* note 112, at 656.

123. *Zarycki v. Brown*, 6 Vet. App. 91, 99 (1993).

124. No. 97-752, 1998 WL 551797 (Vet. App. Aug. 19, 1998).

125. *Id.* at \*1.

126. *Id.*

127. *Sanchez-Benitez v. Principi*, 259 F.3d 1356, 1361 (Fed. Cir. 2001).

128. 38 C.F.R. § 3.304(b) (2012).

129. *Id.* § 3.303(b).

130. *Id.*

many veterans to obtain disability benefits.<sup>131</sup> With regard to establishing service connection, the requirement of “credible supporting evidence that the claimed in-service stressor actually occurred” should be eliminated, and, instead, lay testimony coupled with confirmations by two or more mental health experts should be sufficient for establishing an in-service stressor.<sup>132</sup> Although this would increase the cost for mental healthcare professionals, a change in this direction would be ultimately beneficial by evading both the pecuniary and societal costs of PTSD left untreated.<sup>133</sup> Making it easier for returning veterans with PTSD to establish service connection is a necessary step to reduce suicide rates because establishing service connection will result in access to treatment for PTSD.

### 3. The Plight of a Military Defendant Who Is Not Declared Incompetent

Another major legal obstacle that stands in the way of a veteran with PTSD is if the veteran received an Other Than Honorable (OTH) discharge.<sup>134</sup> Pursuant to Title 38 of the United States Code section 1131, the United States will compensate a veteran who incurred a disability during duty, so long as the veteran was “discharged or released under conditions other than dishonorable;” however, if a veteran incurred the disability due to the “veteran’s own willful misconduct or [by substance] abuse,” no compensation will be made.<sup>135</sup> The adjudication regulations followed by the VA are detailed in the Code of Federal Regulations section 3.12, titled “[c]haracter of discharge.”<sup>136</sup> Veterans who receive OTH discharges are generally not eligible to receive disability benefits from the VA, “unless it is found that the person was insane at the time of committing the offense causing such discharge.”<sup>137</sup>

In cases where the defense counsel suspects that the defendant is suffering from PTSD, a sanity board is requested.<sup>138</sup> When the sanity board does not find the defendant insane at the time of the offense, the defendant is faced with an option.<sup>139</sup> The defendant can request a discharge instead of court-martial, which will likely result in an OTH discharge, barring qualifi-

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131. See Dubyak, *supra* note 112, at 656, 675.

132. *Id.* at 655–56, 678.

133. *Id.* at 678.

134. See 38 U.S.C. § 1131 (2006).

135. *Id.*

136. 38 C.F.R. § 3.12 (2012).

137. *Id.*; see also Vanessa Baehr-Jones, A “Catch-22” for Mentally-Ill Military Defendants: Plea-Bargaining Away Mental Health Benefits, 204 MIL. L. REV. 51, 51–52 (2010).

138. Baehr-Jones, *supra* note 137, at 53.

139. *Id.* at 53–54.



cation for disability benefits.<sup>140</sup> The only exception listed in the Veteran's Benefit Code (VBC) that permits treatment for veterans with an OTH discharge is when the veteran is declared incompetent.<sup>141</sup> A veteran will hardly ever fall under the exception because the whole reason the defendant was even faced with the option to receive an OTH discharge was because the sanity board did not declare the defendant incompetent in the first place.<sup>142</sup> Unfortunately, the language of the VBC forces military defendants to face this *Catch-22*: A veteran who is not declared incompetent can opt for an OTH discharge instead of a court-martial, barring disability benefits; but if a veteran has an OTH discharge, he or she can only obtain benefits if declared incompetent.<sup>143</sup> If veterans do not get disability benefits, PTSD symptoms often go untreated, which also often ultimately results in an increase in suicides.<sup>144</sup>

This poses a problem because in the last five years, more than twenty thousand soldiers left the Army with OTH discharges, restricting their access to healthcare and disability benefits.<sup>145</sup> Where a veteran produced medical records detailing PTSD among other injuries, the VA did not qualify him for healthcare because he left the military with an OTH discharge.<sup>146</sup> Unfortunately, so many soldiers are forced to leave the military with OTH discharges because their PTSD is not adequately treated; and when PTSD is left untreated, it leads to the soldiers misbehaving, ultimately and inevitably resulting in an OTH discharge.<sup>147</sup> This is evidenced by a survey conducted in 2010, which indicated that soldiers who served in combat zones and were suffering from PTSD "were more than [eleven] times [as] likely to receive a misconduct discharge" than soldiers without PTSD.<sup>148</sup>

The VBC should be amended to include a provision allowing benefits for disability for veterans regardless of the fact that they have an OTH discharge if the disability is service-connected.<sup>149</sup> Additionally, the standards utilized by the sanity board should be broader, including a full evaluation as

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140. *Id.* at 54.

141. *Id.*

142. *See id.*

143. Baehr-Jones, *supra* note 137, at 53–54.

144. *See* Hal Bernton, *Troubled Veterans Left Without Health-Care Benefits*, SEATTLETIMES, Aug. 13, 2012, [www.seattletimes.com/html/localnews/2018894574\\_vets12m.html](http://www.seattletimes.com/html/localnews/2018894574_vets12m.html).

145. *See id.*

146. *Id.*

147. *See id.*

148. *Id.*

149. *See* Baehr-Jones, *supra* note 137, at 60.

well as treatment options for the judge to consider when sentencing.<sup>150</sup> Moreover, the VBC should also be amended to explicitly include PTSD within the insanity exception as a basis for being declared incompetent.<sup>151</sup>

#### 4. Laws Preventing Inquiry of the Possession of Firearms

On January 2, 2013, the United States Congress passed the National Defense Authorization Act (NDAA) for Fiscal Year 2013, amending section 1062(c) of the NDAA for Fiscal Year 2011.<sup>152</sup> Before this amendment, it was extremely difficult for military personnel to take preventative measures in terms of high-risk individuals that might possess firearms.<sup>153</sup> The legal restrictions set forth in the NDAA for Fiscal Year 2011 forbade anyone in the DoD from collecting any information regarding the legal possession of any firearms.<sup>154</sup> The only exceptions permitted were 1) records of the use or possession of firearms “by a member of the Armed Forces or civilian employee of the [DoD]” engaged in official DoD duties or wearing an Armed Forces uniform; or 2) records of an alleged violation, including whether a member of the Armed Forces poses a threat to others.<sup>155</sup> Military leaders were permitted to discuss personal firearms with soldiers who appeared to have the potential to hurt themselves.<sup>156</sup> The provisions of the NDAA for fiscal year 2011 were problematic because “forty-eight percent of the military suicides in 2010 [were committed] with privately-owned [firearms].”<sup>157</sup> However, the amendment in the NDAA for fiscal year 2013

authorize[s] a health professional that is a member of the Armed Forces or a civilian employee of the [DoD] or a commanding officer to inquire if a member of the Armed Forces plans to acquire, or already possesses or owns, a privately-owned firearm, ammunition, or other weapon, if such health professional or such com-

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150. *Id.* at 63.

151. *See id.* at 60.

152. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, sec. 1057, § 1057, 126 Stat. 1938, 1938; *see also* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, sec. 1062, § 1062(c), 124 Stat. 4363, 4363.

153. *Compare* § 1057, 126 Stat. at 1938, *with* § 1062, 124 Stat. at 4363.

154. HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 6.

155. § 1062, 124 Stat. at 4363; HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 6–7.

156. HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 6–7; *see also* § 1062, 124 Stat. at 4363.

157. HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 6.

manding officer has reasonable grounds to believe such member is at risk for suicide or causing harm to others.<sup>158</sup>

Inhibiting access to weapons has been indicated to serve as a successful means to prevent suicide;<sup>159</sup> however, the 2013 provision only allows inquiry regarding whether the veteran owns or plans on purchasing a firearm where the healthcare professional has reasonable grounds to believe that the individual is suicidal.<sup>160</sup> The 2013 provision still poses problems because: (1) healthcare professionals often do not know that an individual is suicidal; (2) even where a healthcare professional has a hunch that an individual is suicidal, it might be hard for a healthcare professional to prove that hunch based on reasonable grounds; and (3) the potentially suicidal veteran could commit suicide in the time it takes a healthcare professional to properly follow the procedural guidelines to prove reasonable grounds. To fully combat the problem of veterans committing suicide by privately-owned firearms, all military personnel and veterans should be required to report to the DoD and VA whether personal firearms are owned and whether they plan on purchasing any firearms. Implementing such a policy would allow healthcare professionals to monitor veterans with PTSD who own or plan on owning a firearm to be monitored more closely.

#### IV. CURRENT EFFORTS TO ADDRESS SUICIDE AMONG VETERANS WITH PTSD

##### A. *Government Action to Reduce Suicide Among Veterans Resulting from PTSD*

###### 1. Executive Order

On August 31, 2012, President Obama signed an executive order instructing the VA to “hire 1600 new mental health professionals and 800 peer-support counselors” to ensure that an individual in crisis can be helped within twenty-four hours.<sup>161</sup> As an effort to prevent suicide, any veteran who calls the Veterans Crisis Line in crisis will be ensured that he or she will be connected with a mental healthcare professional within twenty-four hours.<sup>162</sup> The executive order mandates a 50% expansion of the Veterans Crisis Line,

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158. § 1057, 126 Stat. at 1938.

159. HARRELL & BERGLASS, *CTR. FOR A NEW AM. SEC.*, *supra* note 12, at 6.

160. *See* § 1057, 126 Stat. at 1938.

161. Brauser, *supra* note 13.

162. Exec. Order No. 13,625, 77 Fed. Reg. 54,783, 54,783 (Aug. 31, 2012).

as well as the expansion of the number of mental health professionals available beyond the traditional business hours.<sup>163</sup> To better understand the underlying mechanisms of PTSD and to better the coordination between the DoD, VA, and the Health and Human Services (HHS), the executive order required the establishment of a National Research Action Plan within eight months of the execution of the order.<sup>164</sup> Additionally, President Obama established an interagency task force, “co-chaired by the Secretaries” of the DoD, VA, and HHS,<sup>165</sup> to formulate policies to improve diagnosis and treatment for PTSD.<sup>166</sup> To further offer support to veterans in crisis, the DoD created a “Real Warriors” campaign and website.<sup>167</sup>

## 2. Veteran Treatment Courts

Generally, veterans who have PTSD have the tendency to exhibit behavior leading to their involvement in the criminal justice system.<sup>168</sup> Since 2008, veterans treatment courts (VTCs)—an alternative “justice system [that] incorporates advanced ‘problem-solving’ strategies in its sentencing practices,” allowing veterans to escape a conviction by giving them a second chance—are being formed to deal with veterans’ mental health issues.<sup>169</sup> The number of problem-solving courts has been increasing rapidly; “[a]s of 2012, there are over 3648 problem-solving courts in the United States.”<sup>170</sup> Currently, 104 VTCs exist in the United States,<sup>171</sup> which were modeled after the first one formed in New York.<sup>172</sup> States, such as Alaska and California, have created their own courts just for veterans, with the purpose of providing veterans proper healthcare treatment instead of just incarcerating them.<sup>173</sup> VTCs are created because it has been found that “there is a direct link between PTSD and the commission of crimes” due to the symptoms of PTSD leading

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163. *Id.*

164. *See id.* at 54,784–85.

165. *Id.* at 54,785.

166. Brauser, *supra* note 13.

167. *Id.*

168. *What Is a Veterans Treatment Court?*, JUST. FOR VETS, <http://www.justiceforvets.org/what-is-a-veterans-treatment-court> (last visited Apr. 21, 2013).

169. McGuire & Clark, *supra* note 50, at 2; Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 2 (2011).

170. Seamone, *supra* note 169, at 34–35.

171. *The History*, JUST. FOR VETS, <http://www.justiceforvets.org/vtc-history> (last visited Apr. 21, 2013).

172. McGuire & Clark, *supra* note 50, at 2.

173. Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42, 49.

to violent or criminal behavior,<sup>174</sup> and formation is motivated by the occurrence of PTSD among veterans seeking justice.<sup>175</sup> Problem-solving courts, such as VTCs, are extremely beneficial for veterans, as they shift the focus from the victim's interest to the defendant's interest, allowing for therapeutic justice instead of retributive justice.<sup>176</sup> Additionally, a VTC judge, who only hears cases involving veterans, is in a better position to exercise discretion and provide more effective relief than a normal judge who adjudicates a case involving a veteran only periodically.<sup>177</sup> A VTC judge may also better understand the effect of PTSD on veterans.<sup>178</sup> The creation of VTCs are likely to reduce the negative effects of PTSD, such as suicide rates, by ensuring that veterans are placed in programs where they can receive treatment for PTSD, ultimately preventing veterans from committing suicide.<sup>179</sup> A treatment program through the VTC includes a bi-weekly appearance in court at a minimum during the early phases of a treatment program, required attendance at treatment sessions, and frequent testing for substance use.<sup>180</sup>

#### B. *Public Awareness Campaigns & Efforts to Reduce Stigma*

Veterans are put in a very difficult situation when they return home and realize that they may need help. Veterans likely shy away from mental healthcare options due to the stigmas associated with having PTSD, often in the form of negative reactions and criticism from potential employers, and frequently exacerbated when the veteran is located in geographical areas with sparse resources.<sup>181</sup> As an effort to reduce the stigma, briefings for legislative staff in Washington D.C. were hosted during mental health awareness month.<sup>182</sup> The Comprehensive Soldier Fitness program was also created "to reduce PTSD . . . by promoting mental resilience."<sup>183</sup>

The Re-Engineering Systems of Primary Care Treatment in the Military ("RESPECT-Mil"), a program that screens and treats members with PTSD,

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174. *PTSD, Criminal Defendants, and Veteran's Courts in Wisconsin*, GRIESSMEYER L., <http://www.griessmeyerlaw.com/Legal-Articles/PTSD%20and%20Veteran's%20Courts%20in%20Wisconsin.htm> (last visited Apr. 21, 2013).

175. McGuire & Clark, *supra* note 50, at 2.

176. *Id.*

177. *What Is a Veterans Treatment Court?*, *supra* note 168.

178. *Id.*

179. See Brauser, *supra* note 13; *What Is a Veterans Treatment Court?*, *supra* note 168.

180. *What Is a Veterans Treatment Court?*, *supra* note 168.

181. See Brauser, *supra* note 13. Veterans "living in rural communities had significantly fewer visits [to physicians] than those living in urban areas. . . ." *Id.*

182. *Id.*

183. *Id.*

has been instituted into approximately ninety clinics worldwide.<sup>184</sup> RESPECT-Mil allows for veterans to receive treatment and be screened for mental illnesses in a primary care setting.<sup>185</sup> Enabling veterans to receive such treatment in a primary care setting helps reduce stigmas by “[m]aking behavioral health screening as standard as a blood pressure check.”<sup>186</sup> Furthermore, RESPECT-Mil has an automatic web-based setting that will flag patients who have not shown any improvement in eight weeks, which in turn signals the physician to change the course of treatment to one that might prove more effective.<sup>187</sup>

Additionally, as an effort to end stigmatization, President Obama changed a firmly-rooted policy by announcing that condolence letters would be sent to the families of the veterans who committed suicide during service to the United States.<sup>188</sup>

### C. *Intervention*

Another service designed to assist soldiers and veterans is the National Suicide Prevention Lifeline (NSPL).<sup>189</sup> The NSPL provides twenty-four hour emotional support to veterans in crisis.<sup>190</sup> Additionally, chat services such as the Veterans Crisis Line connect veterans in crisis or their family members with responders who are both caring and qualified to help; aid is available via text message, online chat, or a confidential hotline.<sup>191</sup> Veterans and their loved ones can receive free support, resources, referrals, assessments, information, and, if necessary, rescue services can be implemented to prevent an individual from committing suicide.<sup>192</sup> Furthermore, suicide hotlines set up by the federal government have designated a special extension number for veterans.<sup>193</sup>

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184. *Id.*

185. Brauser, *supra* note 13.

186. *Id.*

187. *See id.*

188. Lucy Madison, *Obama: PTSD Stigmatization Must End*, CBSNEWS (Aug. 30, 2011, 2:21 PM), [http://www.cbsnews.com/8301-503544\\_162-20099337-503544.html](http://www.cbsnews.com/8301-503544_162-20099337-503544.html).

189. *Lifeline Overview*, NAT'L SUICIDE PREVENTION LIFELINE, <http://www.suicidepreventionlifeline.org/About/Overview> (last visited Apr. 21, 2013).

190. *Id.*

191. *Veterans Crisis Line*, U.S. DEPARTMENT OF VETERANS AFF., [http://www.mentalhealth.va.gov/suicide\\_prevention/](http://www.mentalhealth.va.gov/suicide_prevention/) (last updated Mar. 5, 2013).

192. *See id.*

193. Susan Blumenthal, *Stopping the Surge of Military Suicides: How to Win This Preventable War*, HUFFPOST (Sept. 14, 2012, 3:19 PM), [http://www.huffingtonpost.com/susan-blumenthal/military-suicide\\_b\\_1884083.html?view=screen](http://www.huffingtonpost.com/susan-blumenthal/military-suicide_b_1884083.html?view=screen).

Additionally, as an effort to treat suicidal ideation, the Army granted three million dollars to Michael J. Kubek, Ph.D, a research expert on thyrotropin-releasing hormone (TRH), to research the effects of a nasal spray containing TRH.<sup>194</sup> Once the spray is sprayed into the nasal cavity, it is dispersed into the brain where it can control suicidal ideation.<sup>195</sup>

## V. OPINION

In order to actually understand and address the issue of suicide among veterans that have PTSD, cooperation across many jurisdictions and organizations is integral.<sup>196</sup> The United States DoD, VA, HHS, and Congress must coordinate with one another to share data and find a way to promote uniformity in terms of healthcare administration and recording data for veterans.<sup>197</sup> While President Obama is taking steps to make such unity possible, it must be done promptly.<sup>198</sup>

Access to adequate mental healthcare should be a guaranteed right for veterans because of the job they are made to do.<sup>199</sup> To ensure that returning veterans have access to the proper healthcare they need, proper measures must be taken to increase resources and healthcare providers.<sup>200</sup>

Since many veterans will not seek specialized care for mental needs, more systems like RESPECT-Mil that ““frontload[] the healthcare system and enable[] [primary care doctors] to identify the people who are in the greatest need”” should be implemented.<sup>201</sup> This will also help alleviate issues associated with the lack of resources and healthcare providers, since more responsibility is placed on primary care physicians.<sup>202</sup> Furthermore, emphasis should be placed on rendering outpatient services and behavioral therapy.<sup>203</sup> Additionally, attempting to retain the veterans who are receiving treatment should be prioritized in order to learn how to improve outcomes.<sup>204</sup> Preventing veterans from discontinuing treatment for PTSD can start with

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194. Brauser, *supra* note 13.

195. *Id.*

196. HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 9.

197. *Id.*

198. *See* Exec. Order No. 13,625, 77 Fed. Reg. 54,783, 54,783 (Aug. 31, 2012) (delegating tasks in order to improve access to health care for returning veterans).

199. Manzel, *supra* note 1.

200. HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 6.

201. Brauser, *supra* note 13.

202. *See id.*

203. *See id.*

204. *Id.*

the elimination of the negative stigma associated with PTSD.<sup>205</sup> Outcomes and management of veterans can improve by obtaining “[s]pecific knowledge of the best predictors of suicidal ideation,”<sup>206</sup> which will be facilitated if veterans continue to attend treatment.<sup>207</sup> Moreover, suicide amongst veterans with PTSD can be reduced if more focus is placed on research on PTSD and suicide.<sup>208</sup>

To better help a veteran with PTSD treat symptoms, the approach taken by mental healthcare professionals should be specifically altered for veterans with PTSD, distinct from the treatment taken for a civilian with PTSD.<sup>209</sup> One of the main differences between veterans and other trauma survivors is the victimization exhibited by the individual.<sup>210</sup> For example, while a rape victim might feel like they could have done more to prevent their rape, veterans often feel guilty and shameful about more rational things that are harder to justify, such as killing an innocent person.<sup>211</sup> Therefore, the methods utilized to aid a civilian through victimization might not be appropriate for a veteran.<sup>212</sup> Because challenging the feelings of shame and guilt a veteran feels are rightly resisted, justifying those feelings might not be the most effective way to treat a veteran.<sup>213</sup> Instead, the root of the problem that the veteran is facing, such as the trigger for guilt, should be identified, and ways to make reparations for that guilt should be recommended.<sup>214</sup>

## VI. CONCLUSION

Unfortunately, PTSD is a real illness affecting returning veterans and is connected to an increase in suicide rates.<sup>215</sup> This problem cannot be rectified without public awareness campaigns, reducing stigma for those going into the armed services and returning home with PTSD, more education and training for all levels of command in the military as well as mental healthcare professionals, and research leading to more treatment options as well as de-

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205. See HARRELL & BERGLASS, CTR. FOR A NEW AM. SEC., *supra* note 12, at 5; see also Blumenthal, *supra* note 193.

206. Nye et al., *supra* note 70, at 1144.

207. See Brauser, *supra* note 13.

208. See Blumenthal, *supra* note 193.

209. See Foa & Meadows, *supra* note 32, at 475–76.

210. *Id.* at 475.

211. *Id.*

212. *See id.*

213. *Id.*

214. See Foa & Meadows, *supra* note 32, at 453–54, 475.

215. See Madison, *supra* note 188.



protecting the problem earlier.<sup>216</sup> Representative Grace Napolitano summed it up best: “We put these people in harm’s way . . . [s]o I think it’s up to us in this country to at least ensure that they get all the assistance needed to bring them back to society in a workable fashion.”<sup>217</sup> It is the duty of the United States Government to take care of the individuals that volunteered their lives to serve the country; failure to do so will turn young Americans away from voluntarily enlisting.<sup>218</sup> If we were as quick to help veterans as we are to send them off to war, suicide rates among veterans with PTSD would not be as high.

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216. See HARRELL & BERGLASS, *CTR. FOR A NEW AM. SEC.*, *supra* note 12, at 8–9; *see also* Brauser, *supra* note 13.

217. Brauser, *supra* note 13.

218. See HARRELL & BERGLASS, *CTR. FOR A NEW AM. SEC.*, *supra* note 12, at 10.

**THE MORAL TRAUMA OF AMERICA’S WARRIORS: WHY WE MUST TREAT COMBAT POSTTRAUMATIC STRESS DISORDER AS A BIO-PSYCHO-SOCIAL-SPIRITUAL PHENOMENON**

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E. ANN JESCHKE\*

I. INTRODUCTION

The United States military<sup>1</sup> has been in a state of sustained conflict for over a decade. More than 2.6 million American warriors<sup>2</sup> have been de-

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ployed to Afghanistan or Iraq at least once.<sup>3</sup> Both military medicine, as a function of the Department of Defense (DoD), and the Department of Veteran's Affairs (VA) are charged with the complex duty of providing for the physical and psychological health of our warriors.<sup>4</sup> Medical experts from both communities have begun to realize that, in addition to physical and psychological symptoms, combat injuries have a social and spiritual component.<sup>5</sup> As such, practitioners and researchers have been encouraged to explore more holistic and interdisciplinary treatment methods to accommodate a new vision of health care for warriors returning from combat.<sup>6</sup>

One of the signature injuries of the Global War on Terror (GWOT) is posttraumatic stress disorder (PTSD).<sup>7</sup> Nearly 20% of returning warriors have been diagnosed with combat-related PTSD,<sup>8</sup> while approximately 40%

1. Hereafter, the term "military" will be used to refer specifically to the United States military.

2. Hereafter, the term "warrior" refers equally to men and women who have served or are currently serving in the Army, Navy, Marines, Air Force, or Coast Guard. I have specifically chosen the term warrior because it is common military parlance for anyone who has served in the United States Armed Forces and is not gender specific. Additionally, this paper will use the masculine form throughout to refer to either a male or female warrior.

3. COMM. ON THE ASSESSMENT OF ONGOING EFFORTS IN THE TREATMENT OF POSTTRAUMATIC STRESS DISORDER, INST. OF MED., TREATMENT FOR POSTTRAUMATIC STRESS DISORDER IN MILITARY AND VETERAN POPULATIONS: INITIAL ASSESSMENT, at xiii (2012) [hereinafter COMM. INITIAL ASSESSMENT], available at [http://www.nap.edu/catalog.php?record\\_id=13364](http://www.nap.edu/catalog.php?record_id=13364).

4. *Id.* The treatment for any injury determined to be combat related begins in the DoD system of military medical care and is eventually transferred, either in part or in full, to the VA. *See id.* at 111. Military medicine and the VA work together to provide a continuum of care. *See id.* For this reason, not only is there enormous overlap in the patient population, but also in research and treatment methodologies employed by the two systems of care. *See id.* Furthermore, both systems maintain a common appreciation of the military culture from which a warrior derives his identity. *See* COMM. INITIAL ASSESSMENT, *supra* note 3, at 111. In this paper, I will be exploring combat PTSD as a common challenge for both systems as a complete entity. Unless otherwise noted, when referencing to either DoD or VA research and treatment methodologies, the reader can assume that the information equally applies to both systems.

5. *See* Wayne B. Jonas et al., *Why Total Force Fitness?*, 175 MILITARY MED. 6, 6 (Aug. Supp. 2010); Nina A. Sayer et al., *Reintegration Problems and Treatment Interests Among Iraq and Afghanistan Combat Veterans Receiving VA Medical Care*, 61 PSYCHIATRIC SERVICES 589, 589, 591 (2010).

6. *See* Jonas et al., *supra* note 5, at 6; Terence M. Keane, Guest Editorial, *Posttraumatic Stress Disorder: Future Directions in Science and Practice*, 45 J. REHABILITATION RES. & DEV., at vii, vii (2008), available at [http://www.research.va.gov/programs/JRRD/45\\_3/keane.pdf](http://www.research.va.gov/programs/JRRD/45_3/keane.pdf).

7. *See* Jonas et al., *supra* note 5, at 6.

8. While individuals in the military may be experiencing PTSD for other traumatic life events, the reader should assume that I am specifically addressing PTSD as a combat injury.

have reported stress-related symptoms that impede reintegration into daily life.<sup>9</sup> The challenges of accurately assessing, diagnosing, and treating combat related PTSD amongst the warrior population are unquestionably immense.<sup>10</sup>

In this paper, I intend to explore issues relevant to the proper treatment of PTSD within the VA and DoD health care systems.<sup>11</sup> Since the warrior's medical community has asserted a need for holistic and interdisciplinary treatment methods in effectively treating combat injuries, I am going to argue that PTSD must be treated as a bio-psycho-social-spiritual<sup>12</sup> phenomenon in order to properly address the moral injuries brought about by combat trauma. My analysis will develop two main themes: 1) The spiritual aspects of combat dismantle a warrior's moral identity and must be addressed in order for holistic healing of the warrior to occur; and 2) treatment methods common to VA/DoD fail to address the spiritual component of combat trauma and, therefore, cannot fully heal a warrior's PTSD. Consequently, a two-fold response is required: 1) Clinicians must creatively explore alternative methods for sanctifying<sup>13</sup> moral trauma when treating warriors with PTSD; and 2) research must explore the spiritual elements of a warrior's combat

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9. *Id.*

10. *See id.* In *Why Total Force Fitness?*, the authors argue that the current military paradigm of fitness does not adequately address the returning warrior's full spectrum of needs. *Id.* Current military health care predominantly focuses on "prevention of disease through physical examinations, vaccinations, health risk screening, enhanced exercise, and the reduction of unhealthy habits." *Id.* While this model supports the health of the fighting force pre-deployment by enabling warriors to be fit and ready to fight, it does little to mitigate the overwhelming burdens of post-deployment health care. *See* Jonas et al., *supra* note 5, at 6. The authors contend that if a new model of military medicine does not equally focus on resilience enhancement the entire system will collapse due to the psychological strains placed on warriors and their families amidst the current military operations tempo. *See id.*

11. An important issue to treating PTSD in military communities is the stigma of seeking mental health care. Robert H. Pietrzak et al., *Perceived Stigma and Barriers to Mental Health Care Utilization Among OEF-OIF Veterans*, 60 *PSYCHIATRIC SERVICES* 1118, 1118, 1121 (2009); Nina A. Sayer et al., *A Qualitative Study of Determinants of PTSD Treatment Initiation in Veterans*, 72 *PSYCHIATRY* 238, 239, 245 (2009); *see also* Karen H. Seal et al., *Bringing the War Back Home*, 167 *ARCHIVES INTERNAL MED.* 476, 476 (2007). While this is a critical aspect of proper diagnosis and treatment, this paper will not address this as a part of my central thesis or inquiry.

12. By spiritual experience I do not mean religious experience. I have no wish to import a meaning particular to any religion or practice of faith tradition. This will be further described in the first section of my paper. *See infra* Part II. *See* note 24 for further clarification.

13. I have chosen the word sanctification because it is a more fulsome synonym for healing to include: Absolution, cleansing, and consecrated. All warriors take an oath of office and as such are consecrated to the mission of the United States Armed Forces. 10 U.S.C. § 502(a) (2006). I do not intend to use this word in an exclusively religious sense.

experience in order to promote effective evidence-based treatment methods that address the moral trauma of our returning warriors.

In developing the first theme I must answer the following three interconnected questions: 1) How is war a spiritual experience?; 2) Why does the spiritual quality of warfare make combat trauma unique?; and 3) What is needed to properly treat the spiritual dimension of combat trauma? A descriptive analysis using combat narratives<sup>14</sup> will illustrate that the spirituality of war is defined by the legitimate participation in destruction, which initiates a disintegration of the warrior's moral identity.<sup>15</sup> In turn, the warrior's moral identity requires sanctification.<sup>16</sup> I will proceed to develop the second theme by answering the following three questions: 1) How is PTSD currently diagnosed and treated within the VA/DoD systems?; 2) Why is treating PTSD as a bio-psycho-social phenomenon insufficient?; and 3) What is required to address this challenge? A descriptive analysis of current treatment for PTSD will reveal that there is little, if any, emphasis on the moral consequences of actions performed during combat.<sup>17</sup> As such, the bio-psycho-social model of treatment cannot properly address the moral guilt associated with combat trauma. My final section will briefly explore alternative methods that could potentially address the spiritual aspect of the moral trauma of war when attempting to develop a holistic model of care for PTSD.<sup>18</sup>

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14. I do not intend to use narrative solely from GWOT, but from various different wars to show that combat trauma involves a moral dimension. Likewise, these narratives are not limited to those officially diagnosed with PTSD, as the diagnosis did not become a medical reality until 1980. COMM. INITIAL ASSESSMENT, *supra* note 3, at 25–26. Furthermore, the implications of combat trauma having a moral dimension are not limited to those with PTSD diagnosis. *See id.* at 44. However, for the purposes of this paper I am focusing solely on the implications for PTSD and its concomitant treatment.

15. *See* KARL MARLANTES, WHAT IT IS LIKE TO GO TO WAR, at xi (2011).

16. *See id.* at 8–9.

17. *See id.* at 7.

18. PTSD was not officially recognized as a medical disorder until 1980 with the introduction of the DSM-III. CHRIS R. BREWIN, POSTTRAUMATIC STRESS DISORDER: MALADY OR MYTH? 44 (2003); KIRTLAND C. PETERSON ET AL., POST-TRAUMATIC STRESS DISORDER: A CLINICIAN'S GUIDE 3–4 (1991). Reasons for development of a diagnostic category were dependent on both cultural and political issues surrounding the Vietnam War, which I cannot fully address in this paper; however, the emotional-moral trauma of war has been recorded throughout history, and while one cannot say that historical modes of managing the emotional-moral trauma of warfare were dealing specifically with the diagnosis of PTSD, they proffer rich insight into some of the challenges to a warrior's reintegration into society after combat. *See* PETERSON ET AL., *supra* note 18, at 5; *see also* BREWIN, *supra* note 18, at 45–50. My claim will be that some of these experiences are being overlooked in our current medical standards of PTSD. I do not wish to put the two concepts in competition, but to show how forfeiting the spiritual aspect of trauma is deficient for treating PTSD and the need to augment current treatment modes with alternative methods. For further reading, *see* BREWIN, *supra*

## II. THE SPIRITUAL CONSCIOUSNESS OF WAR<sup>19</sup>

### A. *Question One: How Is War Spiritual?*

To readers unfamiliar with war, at first blush, it may seem odd to suggest that war takes place in a spiritual domain. However, war is not simply a participation in material destruction. The all-consuming power and violence of combat leaves many warriors with the sense that they have participated in something godlike; namely, that they have been given total authority to inflict death upon others—a role normally assigned to deities.<sup>20</sup> The art of warriors is the art of killing, which approaches “the sacred in its terror and contact with the infinite.”<sup>21</sup> Dr. Edward Tick, a clinical psychologist specializing in warriors with PTSD, explains that “war is an archetypal force that creates a larger-than-life arena . . . . In war we embody and wrestle with god powers.”<sup>22</sup> Karl Marlantes, writing about his experiences as a marine in Vietnam, refers to combat as a spiritual initiation that occurs in the “[T]emple of Mars.”<sup>23</sup>

Marlantes argues that there are four components of spiritual<sup>24</sup> experiences, which are: “[T]otal focus on the present moment,” “constant aware-

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note 18; ERIN P. FINLEY, *FIELDS OF COMBAT: UNDERSTANDING PTSD AMONG VETERANS OF IRAQ AND AFGHANISTAN* (2011); PETERSON ET AL., *supra* note 18.

19. Throughout this paper, I will use the terms war and combat interchangeably. While different levels of combat do exist amidst war, in order to receive a diagnosis of PTSD the warrior must have had a traumatic combat experience, whether it was in the rear or forward areas. See *Post Traumatic Stress Disorder Treatment and Research: Moving Ahead Toward Recovery: Hearing Before the Subcomm. on Health of the H. Comm. on Veterans' Affairs*, 110th Cong. 7 (2008) (statement of Colonel Charles W. Hoge, M.D., U.S.A., Dir., Div. of Psychiatry & Neuroscience, Walter Reed Army Inst. of Research, Dep't of the Army, U.S. Dep't of Def.). Without proof that an injury occurred in combat, the warrior is unable to receive the status of service related injury. See *id.* at 3–4 (statement of Hon. Phil Hare). So for the purposes of this paper, the distinction between war and combat is not critical to my argument as anyone, regardless of where he is stationed, can experience a traumatic event while deployed to a warzone.

20. See MARLANTES, *supra* note 15, at 1.

21. *Id.* at 7.

22. EDWARD TICK, *WAR AND THE SOUL: HEALING OUR NATION'S VETERANS FROM POST-TRAUMATIC STRESS DISORDER* 1–3, 41 (First Quest ed. 2005).

23. MARLANTES, *supra* note 15, at xi–xii, 3.

24. Marlantes uses the word spiritual and mystical interchangeably in his book *What It Is Like to Go to War*. See *id.* 7–8. However, he is not pointing to a particular experience embedded in a religious or cultural tradition, but a quality of experience. See *id.* at xi. In this paper, I will use the word *mystic* to describe the spiritual experience of a person engaging in a religious or faith-based quest for communion with the transcendent. I will use *spiritual* to refer to an overarching phenomenon of mystical experiences, which are not particular to any

ness of one's own . . . death," placing "other[s]' . . . lives above one's own," and participation in a larger community.<sup>25</sup> These same conditions hold true in combat; however, upon entering the Temple of Mars, transcendent brutality and sacrifice "assaults psyches, confuses ethics, and tests souls."<sup>26</sup> Although the spiritual mystic and the spiritual warrior enter their journey in different ways, they are both sacred—set apart for a particular mission.<sup>27</sup> In contrast to a mystic who embraces *nothingness* through the annihilation of the rational will in the practice of meditation, the warrior embraces *nothingness* through an attempt to annihilate physical life by killing the enemy.<sup>28</sup> Marlantes suggests that combat may, in fact, be the dark side of the mystical vision of heaven.<sup>29</sup>

If combat only parallels the dark side of a spiritual experience, what is the attraction of entering the Temple of Mars? Is there something more to combat than soul-shattering death and darkness? Dr. Tick claims humanity is aroused by and in love with war because its godlike character allows the warrior to reach an altered level of consciousness.<sup>30</sup> Looking at Marlantes's conditions for a spiritual experience in the context of war narratives will illuminate how combat is not only the dark side of spiritual experience, but war also enables warriors to reach an addictive state of consciousness. Unfortunately, these encounters have an altogether different outcome for the warrior than for the mystic.<sup>31</sup> First, let us turn to a number of warrior's nar-

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specific religion. What I take as common to all spiritual experiences is the phenomenon of being united with a source of transcendental consciousness.

25. *Id.* at 7.

26. *Id.* at xi, 7–8.

27. See MARLANTES, *supra* note 15, at 7–9. As an all-volunteer force, we can say that warriors in the military have chosen to set themselves apart from the normal duties of an American civilian in order to serve their country. Therefore, the warrior is similar to the mystic in that he has chosen a specific path in life that will demand he serve something beyond the self.

28. Compare ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 72–73 (1985), with EVELYN UNDERHILL, *MYSTICISM: A STUDY IN THE NATURE AND DEVELOPMENT OF MAN'S SPIRITUAL CONSCIOUSNESS* 23–24 (1974). Evelyn Underhill's general book on mysticism explains the process by which mystics evacuate the will to reach the truth of existence. UNDERHILL, *supra* note 28, at 23–24. In contrast, Elaine Scarry articulately argues that the goal in war is to empty the body of its very contents. SCARRY, *supra* note 28, at 72–73. Placing the arguments of these two texts together, I must concur with Marlantes's astute observation that the combat experience in many ways harkens to the dark side of mysticism. See MARLANTES, *supra* note 15, at 7–8.

29. *Id.*

30. See TICK, *supra* note 22, at 41.

31. MARLANTES, *supra* note 15, at 7–8. As Underhill explains, the mystic must undergo a purification experience that could be metaphorically described as hell; the final union with transcendence is described as supreme peace. See UNDERHILL, *supra* note 28, at 199–201. In

ratives to see if Marlantes's conditions for a spiritual experience hold true to combat.

We can examine the first condition for a spiritual experience—total focus on the present moment—by turning to Homer's character, Achilles.<sup>32</sup> In Achilles's exultant campaign against the Trojans after the death of his friend Patroclus, he was singularly focused on the present moment of killing.<sup>33</sup> Achilles "fell in among the Trojans, his heart clothed with strength, crying his terrible cry . . . [Iphition,] fell with a crash, and goodly Achilles exulted over him . . . Achilles went on godlike" relentlessly slaying.<sup>34</sup> Even after destroying Hector and defiling the dead body, Achilles's implacable thirst for killing could be quashed only by the interference of the gods.<sup>35</sup> Although mythic in its origins, Achilles has been heralded as the prototypical example of a warrior consumed by his own boundless strength, ability, and fervor for battle.<sup>36</sup> He has been claimed as both the *sine qua non* of military competitive virtue and history's greatest warrior,<sup>37</sup> but Achilles also illustrates the additive quality of battle.<sup>38</sup> J. Glenn Gray, writing a philosophical reflection on his experiences from World War II, calls this obsession common to all men in battle "the tyranny of the present."<sup>39</sup> Everything in combat happens in the intensity of a split-second where the human senses become a vehicle for heightened awareness.<sup>40</sup>

The second condition for a spiritual experience—constant awareness of one's own death—is well illustrated in Philip Caputo's personal Vietnam War narrative.<sup>41</sup> Caputo offers his readers an earnest confession concerning the delights of combat.<sup>42</sup> For Caputo, combat affords a singular type of

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the next section, I will argue that engaging in the transcendent aspect of war creates the example opposite outcome; namely, emotional, physical, and moral dissonance.

32. See generally HOMER, *THE ILIAD* (George Chapman trans., Wordsworth Classics 2003).

33. *Id.* at 277, 301

34. *Id.* at 334.

35. See *id.* at 371, 393.

36. See T.S. Westhusing, *The Competitive and Cooperative Aretai Within the American Warfighting Ethos 124–26* (2003) (unpublished Ph.D. dissertation, Emory University) (on file with *Nova Law Review*).

37. See *id.* at 124. In the second section of Colonel Westhusing's dissertation, he claims Achilles as the apogee of the competitive virtues required for a warrior to thrive. *Id.* at 124–25. He, however, notes that the bloodlust of this character also runs contra to the cooperative virtues of the consummate honorable warrior. *Id.* at 126.

38. *Id.* at 124.

39. J. GLENN GRAY, *THE WARRIORS: REFLECTIONS ON MEN IN BATTLE*, at xv, 28 (1970).

40. PHILIP CAPUTO, *A RUMOR OF WAR*, at xvii (First Owl Books 1996) (1977).

41. See generally *id.* at xvi–xvii.

42. See *id.* at xvii.



pleasure that mixes utter euphoria with extreme pain brought about when one realizes that death is present at any moment.<sup>43</sup> As he explains:

Under fire, a man's powers of life heightened in proportion to the proximity of death, so that he felt an elation as extreme as his dread. His senses quickened, he attained an acuity of consciousness at once pleasurable and excruciating. It was something like the elevated state of awareness induced by drugs. And it could be just as addictive, for it made whatever else life offered in the way of delights or torments seem pedestrian.<sup>44</sup>

The ability to be hyper-stimulated in combat is not only a survival skill, but also allows warriors to experience richness in life that is not present in daily civilian life.<sup>45</sup> Often warriors are shy to admit to this particular attribute of their combat experience because it courses against the common understanding of warfare as simply extreme brutality.<sup>46</sup> Nonetheless, Caputo claims that all warriors, if honest, must admit they not only enjoy combat, but are also compelled by its unique attractiveness.<sup>47</sup>

The third condition for a spiritual experience—putting others' lives above one's own—is powerfully demonstrated by the bravery of combat medics.<sup>48</sup> Sebastian Junger describes the absolute commitment Juan Restrepo, a combat medic serving the second platoon in the Korengal Valley, had to his men.<sup>49</sup> Restrepo's dedication enabled him to run through a heavy firefight in order to treat his wounded men, while everyone else was taking cover.<sup>50</sup> The impetus to perform acts of sublime bravery without concern for self was Restrepo's unwavering need to save the lives of his injured comrades.<sup>51</sup>

The final condition for a spiritual experience—participation in a larger community—is eloquently depicted in Tim O'Brien's reminiscences on Vietnam.<sup>52</sup> He details a wistful longing to return to the adventure of combat because the intensity of combat has a way of making life vivid<sup>53</sup> and forging

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43. *Id.*

44. *Id.*

45. CAPUTO, *supra* note 40, at xvii.

46. *See id.* at xvi–xvii.

47. *Id.* at xvi–xvii.

48. SEBASTIAN JUNGER, WAR 58 (2010); *see, e.g.*, CAPUTO, *supra* note 40, at xvii.

49. JUNGER, *supra* note 48, at 58–59.

50. *Id.* at 58.

51. *See id.* at 58–59.

52. *See generally* TIM O'BRIEN, THE THINGS THEY CARRIED (Houghton Mifflin Harcourt Publ'g Co. 2011) (1987).

53. *See id.* at 77–78.

a community of love that is unlike any other.<sup>54</sup> As he says, “[y]ou make close friends. You become part of a tribe and you share the same blood—you give it together, you take it together.”<sup>55</sup> Such affection, tenderness, and intense bonds of loyalty, as O’Brien explains, are impossible to understand when someone has not felt the exhaustive and solidifying force of combat, which calls such love into being.<sup>56</sup>

Clearly, Marlantes’s conditions for spiritual experience are undoubtedly present in the preceding combat narratives.<sup>57</sup> We can therefore say that combat is a spiritual experience that opens the warrior to a superhuman state of consciousness and physical ability. The common idiom that war is *hell* has different implications if warriors, who are asked to violate commonly held religious and moral norms for the good of the country, actually admit to taking any pleasure from the benefits of participating in the act of killing. When “euphoric expectancy” brought on by combat increases “to the point of omnipotence,” it can have seriously negative consequences for the warrior who is asked to participate in the power of hell instead of heaven.<sup>58</sup> Not only does the reality of combat lust<sup>59</sup> run contrary to commonly held impressions that war is infinitely abhorrent, but it also makes a claim on the identity of warriors.<sup>60</sup> Such spiritual awakenings run contrary to the idealized courageous warrior who engages the horror of war for a higher good.<sup>61</sup> Next, I will address some of the implications of spiritual consciousness and combat trauma.

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54. CAPUTO, *supra* note 40, at xvi.

55. O’BRIEN, *supra* note 52, at 178.

56. CAPUTO, *supra* note 40, at xvi–xvii.

57. I cannot argue that every warrior will have a spiritual encounter that traces the same pattern as the one outlined by Marlantes. However, these conditions are coursed through the narratives I read. In illustrating the point that war is a spiritual experience, these for examples should be sufficient.

58. See JUNGER, *supra* note 48, at 34–35.

59. By combat lust I am not intending to imply that everyone in war takes pleasure in killing for the sake of killing alone. I am trying to forward the point that combat ignites certain unspeakable experiences that do not have to do with destruction, but with a pleasure acquired from the experience of transcendent power with which warriors are allowed to participate when charged with the duty to kill the enemy. This spiritual experience is a taboo subject, but has profound implications for those warriors who must wrestle with its effects.

60. See CAPUTO, *supra* note 40, at xvi.

61. I am not attempting to make any claims about just war, the politics of war, or why a nation might go to war. I am merely concerned with how the phenomenon of war can potentially affect warriors.

B. *Question Two: Why Does the Spiritual Quality of War Make Combat Trauma Unique?*

If war is a spiritual experience that engages the moral identity of a warrior, as I have shown it is, how are we to understand combat trauma as a result of this unique experience?<sup>62</sup> Samuel Hynes explains that the trauma illustrated in war narratives has two particular themes—namely, what warriors do in war and what war does to warriors.<sup>63</sup> My previous section was concerned with the former concept.<sup>64</sup> We will now move on to discuss the latter. Jonathan Shay, also a clinical psychiatrist, wrote a landmark book analyzing PTSD in Vietnam veterans seeking care in the Boston VA hospital.<sup>65</sup> In his book, *Achilles in Vietnam: Combat Trauma and the Undoing of Character*, Shay contends that combat trauma is unique—and in turn PTSD is difficult to treat—because at its core it is a moral trauma.<sup>66</sup> While I agree with Shay's general thesis that combat trauma is deeply embedded in moral trauma, contrary to Shay, I intend to argue that the moral trauma of combat is bound to experiencing the spiritual consciousness of war, not the betrayal of loyalties.<sup>67</sup> As such, a warrior's moral trauma needs to be sanctified in order for a restoration of his moral identity to occur.

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62. Typical combat stresses are not common and rarely amalgamated in civilian life. See William P. Nash, *The Stressors of War*, in *COMBAT STRESS INJURY: THEORY, RESEARCH, AND MANAGEMENT* 11, 11–12, 15, 18 (Charles R. Figley & William P. Nash eds., 2007). These stresses make combat, by its very nature, a traumatic experience, but these stresses are not sufficient to qualify as a traumatic event that lead to a diagnosis of PTSD. See *id.* at 18. I will be narrowing in on a more specific quality of combat trauma that I believe is intimately related to the bio-psycho-social-spiritual nature of PTSD. However, these traumatic-qualifying events occur amidst modern military operations that include constant exposure to the following physical conditions: Extreme temperatures, lack of hygiene, sleep deprivation, constant exposure to malevolent noises and blasts from explosions nearby, fumes and noxious smells, blinding light or darkness, malnutrition, and the constant threat of injury, illness, or death. *Id.* at 19–21. Additionally, mental conditions include: Lack or abundance of information, ambiguous and changing rules of engagement, loyalty conflicts, experiences that do not make sense, isolation, loss of friends to injury or death, fear, shame and guilt, helplessness as well as the horror of carnage. *Id.* at 22–27. For further information, see *id.* at 19–27.

63. SAMUEL HYNES, *THE SOLDIERS' TALE: BEARING WITNESS TO MODERN WAR* 3 (1997).

64. See *supra* Part II.A.

65. David Berreby, *Exploring Combat and the Psyche, Beginning with Homer*, N.Y. TIMES, Mar. 11, 2003, at F4; see also JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* 4 (1994).

66. SHAY, *supra* note 65, at 5–6, 184–86.

67. I disagree with where Shay locates the moral breakdown. Shay sees the moral damage occurring due to the breakdown of a warrior's concept of what is right in terms of his relationship to his peers and his superiors. *Id.* at 3, 6, 15, 17. In other words, it is a breakdown of loyalty, and thus the warrior can no longer cement a sense of trust in his circumstances. As a result, Shay suggests that the path to treating PTSD must include both a communaliz-

Again, warriors' narratives will explain the aftermath of experiencing the four conditions of a spiritual experience in combat.<sup>68</sup> My central claim is that actions, such as killing, may be licit in combat, but are incompatible with commonly held notions of morality. Being ensconced in the transcendent spirituality of combat has the potential not only to allow a warrior to touch brief moments of the glory, but also to leave his moral identity sullied by the horror of carnage in which he has participated. The schismatic experience of combat runs deeper than mere emotional thoughts and physical reactions. It destroys a warrior's ability to locate his place in the moral order of humanity after participating in mass destruction.

What does an assaulted psyche, confused ethics, and a tested soul look like after experiencing even moments of godlike bliss in combat? To further explore this question, let us turn to the first condition: Total focus on the present moment. Dr. Tick states that the raw brutal sensuality of war causes the warrior to be completely absorbed in combat's brutality, such that it overwhelms the imagination causing the survivor to see little other than destruction in all his thoughts.<sup>69</sup> After many exhilarating moments in combat, O'Brien describes the constant image of faceless dead bodies with which he was left after Vietnam:

I watched a man die on a trail near . . . My Khe. I did not kill him. But I was present, you see, and my presence was guilt enough. I remember his face . . . and I remember feeling the burden of responsibility and grief. I blamed myself . . . I was once a soldier. There were many bodies, real bodies with real faces, but I was young then and I was afraid to look. And now, twenty years later, I'm left with faceless responsibility and faceless grief.<sup>70</sup>

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ing and re-narrating of the warrior's story of what is possible in the present and the future. *Id.* at 187–88. I do not disagree with the importance of what Shay has proposed both in terms of the nature of combat trauma or integrating new means of treating PTSD. *See id.* However, Shay has failed to recognize the moral effects of experiencing war's spiritual consciousness. In fact, he at one point misunderstands Christian theology and maligns it as part of the moral trauma warriors incur, when they think that playing a savior role will redeem a comrade. The outcome is that he fails to address a deeper moral tension that I see present in warriors' combat narratives—namely, how the warrior should understand his moral identity when he has participated in legal forms of killing and has been consumed by that process. Although Shay is unique in calling combat trauma moral, he, like many others, fails to address the fact that killing in war may be licit, but is always a rupture with deeply-ingrained human morality. *See id.* at 3, 5–6.

68. MARLANTES, *supra* note 15, at 7–8.

69. TICK, *supra* note 22, at 21.

70. O'BRIEN, *supra* note 52, at 166.

When asked by his daughter if he had ever killed someone, O'Brien could not explain the *truth*.<sup>71</sup> All that could be said was, "[i]t's a mystery, I guess. I don't know."<sup>72</sup> Years after leaving Vietnam, O'Brien was still haunted by irremediable guilt with no means through which to integrate his paradoxical experience.<sup>73</sup>

The second condition: Constant awareness of one's own death also menaces the minds and spirits of returning warriors.<sup>74</sup> Erin Finley, a medical anthropologist working for the VA, interviewed warriors who had been diagnosed with PTSD after returning home from Iraq and Afghanistan.<sup>75</sup> One warrior had the following to say about constantly realizing he could die:

"Afghanistan [was a] mind-fuck . . . . Being deployed is easy. You just have to stay alive.

. . . .

. . . '[T]he thing you have to realize is that you're already dead. Once you realize that, then you can function as a soldier.' . . . Once you grasp the fact that you're already dead . . . [i]t makes the job easier over there. It makes [life] a real bitch coming home. Because you're used to being dead and now you got to be alive again. . . . Whenever I look at people, I know what they're going to look like dead. I know what they look like with their brains blown out or jaws blown off or eyes pulled out. When I look at somebody I see that, to this day."<sup>76</sup>

This warrior goes on to describe an interior rage that can be sparked at the slightest provocation.<sup>77</sup> Knowing what human beings can do to each other, left him with a malignant *private grief*.<sup>78</sup> Feelings of disappointment in himself and the world could not be shared without moral reproof or misunderstanding from friends.<sup>79</sup>

The third condition—dedication to others' well-being above one's own—is unquestionably manifested in the story of Colonel Theodore Scott

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71. *See id.* at 167.

72. *See id.* at 169.

73. *See id.* at 166–67.

74. *See* CAPUTO, *supra* note 40, at xvi.

75. FINLEY, *supra* note 18, at 22–23.

76. *Id.* at 51–52, 54.

77. *See id.* at 56.

78. *See id.* at 57.

79. *See id.*

Westhusing.<sup>80</sup> Colonel Westhusing graduated third in his class from West Point, trained as an elite Army Ranger, and wrote his doctoral dissertation at Emory on virtues necessary for excellence in the American war-fighting ethos.<sup>81</sup> A man of total commitment to others, he was also known to be unwaveringly committed to excellence, virtue, and honor in war, especially during his deployment in Iraq.<sup>82</sup> After receiving an anonymous letter alleging he had become too close to contractors who were involved in egregious corruption and human rights violations—to include the killing of two innocent Iraqi civilians—Colonel Westhusing proclaimed himself a failure.<sup>83</sup> His moral identity torn asunder caused Colonel Westhusing to take his life on June 4, 2005.<sup>84</sup> The suicide note read: “I cannot support a msn [mission] that leads to corruption, human rights abuse, and liars. I am sullied. . . . I came to serve honorably and [I] feel dishonored. . . . Death before being dishonored anymore.”<sup>85</sup> A man praised by his superiors, beloved by his family, and revered by students and friends alike was struggling with an internal war as set in motion by the collective evil that he felt polluted his attempts to be a man of duty, service, courage, loyalty, and mostly honor.<sup>86</sup>

Finally, what happens to a warrior when he is no longer able to participate in the larger community that had constructed an entirely new family structure? A story told by a Navy chaplain about a gung-ho marine sergeant brings into stark relief the horror of being disowned by the warrior community when aspects of war cause a warrior to lose his sense of *fight*.<sup>87</sup> While on patrol, a marine spotted a suspicious woman.<sup>88</sup> Shouting for her to stop, the woman paid no attention.<sup>89</sup> The sergeant decided she was an enemy and took two shots causing his fellow marines to open fire.<sup>90</sup> When the shooting subsided the woman was “nearly cut in half.”<sup>91</sup> When the marine approached the dead body he found a white flag and screamed, “What the fuck did I just do? I killed an innocent person.”<sup>92</sup> A few days later, “the sergeant [said] . .

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80. See NANCY SHERMAN, *THE UNTOLD WAR: INSIDE THE HEARTS, MINDS, AND SOULS OF OUR SOLDIERS* 39–41, 237 (2010).

81. *Id.* at 6, 67, 237.

82. *Id.* at 237.

83. See *id.* at 238–39.

84. *Id.* at 239.

85. SHERMAN, *supra* note 80, at 240 (alterations in original).

86. See *id.* at 237–40.

87. PETER A. FRENCH, *WAR AND MORAL DISSONANCE* 34–35 (2011).

88. *Id.* at 34.

89. *Id.*

90. *Id.*

91. *Id.*

92. FRENCH, *supra* note 87, at 34.

. he could [not] . . . fight and refused to go on another mission.”<sup>93</sup> The chaplain tried to assuage the marine’s conscience by stating that such events were part of war and that the marine had not violated any military rules of engagement.<sup>94</sup> Next, “[t]he chaplain reminded the [marine] that refusing to fight was . . . [an] offense” that could end in a court-martial.<sup>95</sup> The sergeant was recalcitrant in his stance that he could not fight.<sup>96</sup> The platoon ostracized this marine for being a coward.<sup>97</sup> After returning to the United States with a diagnosis of PTSD, he was denied reenlistment in the Marines on the grounds that he was weak and refused to prove he was fit for combat.<sup>98</sup> The death of an Iraqi woman was the first act in the moral disintegration of this marine’s identity, and at best, he was offered the consolation that what he had done was ethical according to the laws of war.<sup>99</sup>

Let me briefly synthesize how the spirituality of war leads to a disintegration of the warrior’s moral identity.<sup>100</sup> First, total focus on the present moment not only enables a warrior to identify with, and at times relish, the immense destructive power of combat, but it can also cause disruptive hyper-vigilant memories.<sup>101</sup> Moreover, as Marlantes honestly admits, “[k]nowing I loved it and hated it, I concluded I was mildly psychotic, just another little something to hide from everyone, sort of like shell shock.”<sup>102</sup> The paradox of war’s spirituality caused a sense of shame that could not readily be shared.<sup>103</sup> Second, the constant awareness of one’s own death can quicken the senses to a state of euphoria, but it can also turn the warrior into a dead man walking.<sup>104</sup> As Hynes declares, “[s]trangest of all is the presence of death, and the ways it is present.”<sup>105</sup> Warriors “go to war, where death is the whole point, the truest truth, the realest reality.”<sup>106</sup> “[A]stonishing[ly], death [becomes a

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93. *Id.* at 35.

94. *Id.* at 34–35.

95. *Id.* at 35.

96. *Id.*

97. FRENCH, *supra* note 87, at 35.

98. *Id.*

99. *See id.* at 34–35.

100. My purpose in this section is not to cast moral judgment on the warrior or the cultural dynamics that occur in times of war. My point is to understand, not to shame, because without understanding there can be no true healing.

101. *See, e.g.*, ROGER BENIMOFF WITH EVE CONANT, FAITH UNDER FIRE: AN ARMY CHAPLAIN’S MEMOIR 161 (2009); CAPUTO, *supra* note 40, at xvi.

102. MARLANTES, *supra* note 15, at 68 (emphasis omitted).

103. *See id.* at 68–69.

104. *See* CAPUTO, *supra* note 40, at xv–xviii.

105. HYNES, *supra* note 63, at 19.

106. *Id.*

warrior's recurrent] tale."<sup>107</sup> Left to identify more with the dead than the living, the warrior finds himself a complete stranger once he is home, having little in common with civilian life.<sup>108</sup> Third, placing others' lives above one's own inspires acts of superhuman bravery in combat, but when the bonds of sacrifice are betrayed the warrior is left with a sense that his valor is purposeless.<sup>109</sup> Roger Benimoff, an Army chaplain who endured everything for his troops, noted the following after coming home: "I am not motivated to work, I am not doing my readings and I don't care. . . . I[']ve] lost [my] sense of . . . perfectionism in the process. I've been ruined. . . . Nothing else seems to measure up to what we were able to accomplish in Iraq."<sup>110</sup> Thus, a warrior is left believing both his moral quest and his life are failures because his ability to give of himself has ultimately been thwarted outside of combat.<sup>111</sup> Finally, participation in the larger community of a combat unit or platoon bonds men in unimaginable ways, but it also leaves a warrior emptied of self when he is no longer identified with his comrades in arms.<sup>112</sup> Caputo elegantly describes the intimacy of combat as more profound than the intimacy between any two lovers.<sup>113</sup> It was "the sentiment of belonging to each other."<sup>114</sup> Failing to show courage is a violation of the love that binds comrades in arms. If branded a coward by fellow warriors, banishment from the *community* is a *coup de grace* to a warrior's identity. As such, the warrior now belongs to no one, as even his warrior identity is stripped from him.<sup>115</sup> Having discussed what combat does to warriors, we begin to see why combat trauma is unique.

C. *Question Three: What is Needed to Properly Treat the Spiritual Dimension of Combat Trauma?*

Understanding how combat opens the door to a particular spiritual experience allows us to understand what participation in that experience means for the warrior's moral identity. In turn, appreciation of the spiritual quality of war has serious implications for how we effectively heal the moral disintegration of a warrior's character. Any treatment method used for warriors struggling with the effects of combat trauma must appreciate that war de-

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107. *Id.*

108. CAPUTO, *supra* note 40, at xvi.

109. *See* SHAY, *supra* note 65, at 6.

110. BENIMOFF WITH CONANT, *supra* note 101, at 161.

111. *See id.*

112. *See* CAPUTO, *supra* note 40, at xvi.

113. *Id.* at xvii.

114. *Id.*

115. *See* HYNES, *supra* note 63, at 21–22.



stroys character and strips human dignity. What was once understood as decent human goodness has been replaced with a sense of profound guilt and identification with evil. The following warrior well describes how combat annihilated his soul:

I was eighteen years old. . . . A virgin. I had strong religious beliefs. For the longest time I wanted to be a priest . . . . [E]vil didn't enter [my world] 'till Vietnam.

I mean real evil. . . .

Why I became like that? . . . All evil. Where before, I wasn't.  
...

War . . . strips you of all your beliefs, your religion, takes your dignity away, you become an animal. . . .

....

I carried this home with me. I lost all my friends, beat up my sister, went after my father. . . . So it wasn't just over there.<sup>116</sup>

Not only was this warrior's moral identity radically altered by the experience of combat, but so too was his human identity.<sup>117</sup> In helping warriors heal from the serious wounds of combat trauma, treatment methods must address more than sadness, psychological scars, and broken communities. They must also alleviate profound guilt, re-humanize the warrior, and help him reclaim his dignity as well as sanctify and reintegrate his moral character.

If Marlantes is correct in thinking that "combat is the dark side of the [mystic's] vision [of heaven and] equivalent in intensity,"<sup>118</sup> then perhaps a good place to look for ways to heal wounds to the soul would be the mystical tradition. St. Ignatius of Loyola, affectionately known within Roman Catholic circles as the soldier saint, was both a soldier and a mystic.<sup>119</sup> After being severely wounded in combat he began a process of profound conversion, such that he would eventually become the founder of the Jesuit religious

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116. SHAY, *supra* note 65, at 32–33.

117. *See id.*

118. *See* MARLANTES, *supra* note 15, at 8.

119. *See* Avery Dulles, *Preface to the Vintage Spiritual Classics Edition of IGNATIUS OF LOYOLA, THE SPIRITUAL EXERCISES OF ST. IGNATIUS*, at xiii, xiii–xv (John F. Thornton & Susan B. Varenne eds., Louis J. Puhl trans., Random House, Inc. 2000) (1951).

order.<sup>120</sup> Having spent the first thirty years of his life as a warrior, the imagery, structure, and tenor of St. Ignatius's Spiritual Exercises reflect his military formation and identity.<sup>121</sup> St. Ignatius serves as a good starting point for inquiry concerning ways to heal warriors' moral identity because he has experienced both combat and mystic visions of God.

In many ways St. Ignatius of Loyola is akin to Achilles.<sup>122</sup> He had "[s]tubbornly resist[ed] the assault against Pamplona in the face of hopeless odds . . . was struck by enemy fire," and won honor for his valor.<sup>123</sup> Likewise, once home from combat he described his former actions as going from one evil to another.<sup>124</sup> My point is not to recommend that all warriors participate in the Spiritual Exercises. In fact, I want to attempt to avoid all doctrinaire impositions of religion. As we have already noted warriors' *god-concepts* can be profoundly distorted in the aftermath of combat. Many warriors express the idea that *God* is punishing them for their indecent behavior in combat or that they are not worthy of being identified with holiness, sanctity, or goodness.<sup>125</sup> Others warriors have been known to hate all things religious or faith based because combat has swallowed their entire appreciation of goodness in humanity.<sup>126</sup> In contrast, Daryl Paulson and Stanley Krippner, also clinical psychologists specializing in warriors with PTSD, encourage a wide range of treatment methods drawn from cross-cultural literature that pay close attention to a warrior's spiritual emergencies and dark night of the soul experiences.<sup>127</sup> As such, St. Ignatius provides an excellent resource and will reveal that there is a way to have the spiritual experience of war, sanctify a mortally wounded moral identity, and go on to have a spiritual experience opposite that of war.<sup>128</sup> Turning now to the Spiritual Exercises will reveal how St. Ignatius journeyed from a vision of hell to a vision of heaven.

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120. *See id.* at xiv–xvi.

121. *See Chronology of the Life of St. Ignatius of Loyola*, in *THE SPIRITUAL EXERCISES OF ST. IGNATIUS*, at xxv, xxx (John F. Thornton & Susan B. Varenne eds., Louis J. Puhl trans., Random House, Inc. 2000) (1951); *see generally* *IGNATIUS OF LOYOLA, THE SPIRITUAL EXERCISES OF ST. IGNATIUS* (John F. Thornton & Susan B. Varenne eds., Louis J. Puhl trans., Random House, Inc. 2000) (1951).

122. *See* Dulles, *supra* note 119, at xiv; HOMER, *supra* note 32, at xi; SHAY, *supra* note 65, at 6.

123. Dulles, *supra* note 119, at xiv.

124. *See id.* at xiv–xv.

125. *See* DARYL S. PAULSON & STANLEY KRIPPNER, *HAUNTED BY COMBAT: UNDERSTANDING PTSD IN WAR VETERANS INCLUDING WOMEN, RESERVISTS, AND THOSE COMING BACK FROM IRAQ 81* (2007).

126. *See id.*

127. *See generally id.*

128. *See* *IGNATIUS OF LOYOLA*, *supra* note 121, at 5.

The first phase of the Spiritual Exercises requires the participant to spend a week in silence purifying the soul through the purgation of sins in order to turn away from evil and advance towards holiness.<sup>129</sup> During this week an individual must spend time in meditation examining his conscience by asking the following questions: “What have I done . . . ? What am I doing . . . ? What ought I . . . do . . . ?”<sup>130</sup> Before entering into meditation the participant asks God for what he needs and desires, then commences a set of meditations that allows the participant to recollect all his thoughts, words, and deeds that were contrary to holiness, no matter how small.<sup>131</sup> After these meditations have been completed, the participant makes a general confession of all his sins and is given a set of penitential acts that will atone for the violations against God’s goodness.<sup>132</sup> During the first week, the participant meditates on all the good God has done for the world and expresses gratitude for the benefits bestowed upon him.<sup>133</sup> The second phase allows the participant to decide what type of man he would like to be in the service of holiness.<sup>134</sup> There are three forms of service: To serve oneself, to serve the Lord, or to serve the enemy of human nature.<sup>135</sup> Once a participant has dedicated himself to the service of the Lord, the third phase allows him to meditate on the community of the Lord he serves and ways to eliminate inordinate desires.<sup>136</sup> The final phase is a week of meditations requesting for the grace to experience the love of God, which allows the participant to embody the way God cares for him in his personal life.<sup>137</sup>

In evaluating the Spiritual Exercises, we notice four important elements that allow a warrior to acknowledge, accept, repair, and let go of self-blame fomenting in his moral consciousness.<sup>138</sup> Those elements are: Purification through purgation<sup>139</sup>—which allows the warrior to focus on the death of his soul, admit his participation in evil, confess his actions to another human being, and experience the gift of forgiveness; gratitude for blessings bestowed<sup>140</sup>—which allows the warrior to focus his thoughts on the abundance of goodness in the world and the benefits he presently possesses; atonement

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129. *Id.* at 5–6, 17.

130. *Id.* at 23.

131. *Id.* at 15, 17–20.

132. *Id.* at 20–21.

133. See IGNATIUS OF LOYOLA, *supra* note 121, at 41–42.

134. See *id.* at 50–51.

135. See *id.* at 17, 47–51.

136. See *id.* at 68–70.

137. See *id.* at 80.

138. IGNATIUS OF LOYOLA, *supra* note 121, at 17, 20–21, 24–26, 80.

139. See *id.* at 17.

140. See *id.* at 80.

for malevolent conduct<sup>141</sup>—which allows the warrior to put others before himself by making up for malignant actions through beneficent actions; and choosing to be a person of holiness in a community of love<sup>142</sup>—which allows the warrior to personally redefine his identity and be accepted for who he is without denying his past or forfeiting his future. Noticeably, these four elements well correspond to Marlantes's conditions for a spiritual experience.<sup>143</sup>

Since the mystic and the warrior are both sacred vocations, following the mystic's journey should allow the warrior to experience the *heavenly* side of the spiritual vision and receive the concomitant benefits of sanctification; namely, acceptance of past sins, redemption from the false self, a transformed moral identity, and acceptance in a community.<sup>144</sup> In the next section of my paper, I am going to argue effective treatment methods for PTSD must include the four elements of purgation, gratitude, atonement, and communalization that have been drawn from the Ignatian Spiritual Exercises. Any treatment method that forfeits these four elements will be unable to fully restore a warrior's broken humanity, dignity, moral identity, and community because it does not fully appreciate the spiritual aspect of combat trauma.

### III. VA/DoD BIO-PSYCHO-SOCIAL APPROACH TO PTSD: LIMITATIONS AND WAYS FORWARD

#### A. *Question One: How Is PTSD Diagnosed and Treated?*

Now that we understand the unique effects that combat trauma has on the warrior's moral identity and have established a framework for understanding what is needed to heal this particular wound, let us look at how PTSD is diagnosed and treated within the VA/DoD. The diagnostic criteria for PTSD given in the Diagnostic and Statistical Manual of Mental Disorders IV Text Revision (DSM-IV-TR) as appropriate by the VA/DoD guidelines<sup>145</sup> requires the following:

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141. *See id.* at 20–21, 24–26.

142. *See id.* at 55.

143. MARLANTES, *supra* note 15, at 7.

144. *Id.* at 7–9.

145. Hereafter, I will refer to VA/DoD guidelines simply as “guidelines.” The guidelines are “[r]ecommendations for the performance or exclusion of specific procedures or services derived through a rigorous methodological approach that includes: Determination of appropriate criteria, such as effectiveness, efficacy, population benefit, or patient satisfaction and a literature review to determine the strength of the evidence in relation to these criteria.” THE MGMT. OF POST-TRAUMATIC STRESS WORKING GRP., DEP’T OF VETERANS AFFAIRS & DEP’T OF DEF., VA/DoD CLINICAL PRACTICE GUIDELINE FOR MANAGEMENT OF POST-TRAUMATIC STRESS 3 (2010) [hereinafter VA/DoD CLINICAL PRACTICE GUIDELINES], *available at*

- A. [That] [a] person has been exposed to a traumatic event in which both of the following were present.<sup>146</sup>
1. The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
  2. The person's response involved intense fear, helplessness, or horror. . . .
- B. The traumatic event [be] persistently re-experienced in one (or more) of the following ways:
1. Recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. . . .
  2. Recurrent distressing dreams of the event. . . .
  3. Acting or feeling as if the traumatic event were recurring . . .
  4. Intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
  5. Physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
- C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness . . . as indicated by three (or more) of the following:
1. Efforts to avoid thoughts, feelings, or conversations associated with the trauma
  2. Efforts to avoid activities, places, or people that arouse recollections of the trauma
  3. Inability to recall an important aspect of the trauma
  4. Markedly diminished interest or participation in significant activities
  5. Feeling of detachment or estrangement from others
  6. Restricted range of affect. . . .
  7. Sense of a foreshortened future. . . .
- D. Persistent symptoms of increased arousal (not present before . . . trauma), as indicated by two (or more) of the following:
1. Difficulty falling or staying asleep

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<http://www.healthquality.va.gov/PTSD-FULL-2010c.pdf> (emphasis omitted). As such they cull evidence-based information so that a care provider can draw concrete conclusions about therapeutic methods when making specific recommendations concerning the treatment of PTSD. *Id.* The strength of an intervention is rated from A through I, with A being the strongest rating and I the weakest. *Id.* at 7 tbl.Evidence Rating System.

146. The traumatic experience that undergirds a diagnosis of PTSD might not be a morally traumatic event. The indications of moral trauma are more likely to occur in criteria 2, 3, or 4.

2. Irritability or outbursts of anger
3. Difficulty concentrating
4. Hypervigilance
5. Exaggerated startle response
- E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month
- F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>147</sup>

The most crucial aspect of diagnosing PTSD is establishing that a severe traumatic stressor has occurred.<sup>148</sup> In order to qualify as a triggering traumatic event, the stressor must be: Psychologically distressing to the individual who experienced the event, something that would distress almost anyone, and “outside the range of ‘usual human experience.’”<sup>149</sup>

The guidelines state that when a warrior presents with qualifying symptoms of PTSD he should be given a screening to include: A medical and psychiatric history, physical examination, mental health status check, and a psychosocial, functional assessment.<sup>150</sup> If it is determined that the warrior has experienced a qualifying traumatic event and meets the DSM-IV-TR criteria for PTSD, then the severity of his PTSD is subsequently determined.<sup>151</sup> Upon completion of the screening and diagnostic assessment, the warrior is educated about: The diagnosis of PTSD, treatment options, and resources for care.<sup>152</sup> Working collaboratively with a treatment team, the

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147. *Id.* at 79 tbl.B.

148. PETERSON ET AL., *supra* note 18, at 15; *see also* N. Breslau et al., *The Uniqueness of the DSM Definition of Post-Traumatic Stress Disorder: Implications for Research*, 32 PSYCHOL. MED. 573, 573–75 (2002). One of the challenges of treating PTSD is that the clinical diagnosis must be in reference to a specific event. *See id.* at 573. Researchers have criticized this model since many people possess symptoms related to the other criteria without reference to a specific determining stress event. *Id.* at 574. This is a particularly large struggle for the VA/DoD system of determining PTSD in warriors because often combat stressors that induce trauma are left undocumented because of the nature of tracking information in a warzone. If there is no written evidence corroborating a traumatic event, it becomes difficult to receive a diagnosis and care for PTSD. Although the topic of my paper does not pertain to this specific difficulty in treating PTSD, it is of particular importance to returning warriors. For further information see the following: *Post Traumatic Stress Disorder Treatment and Research*, *supra* note 19.

149. PETERSON ET AL., *supra* note 18, at 15.

150. VA/DoD CLINICAL PRACTICE GUIDELINES, *supra* note 145, at 65–68.

151. *Id.* at 56 fig.B-1.

152. *Id.*

warrior develops goals and expectations concerning a treatment plan and determines an optimal setting for care.<sup>153</sup>

Realizing that PTSD often requires complex and intensive intervention, the guidelines stress the benefits of using an interdisciplinary biopsychosocial mode of treating the warrior's symptoms.<sup>154</sup> Trauma-focused psychotherapy combined with pharmacological interventions are considered most effective.<sup>155</sup> Therapeutic techniques receiving the highest evidence rating are strongly recommended by the guidelines.<sup>156</sup> Those three treatment options are: Cognitive processing (CPT), prolonged exposure (ET), and eye movement desensitization and reprocessing (EMDR).<sup>157</sup> Consequently, it is these three modes of therapy that I will evaluate for their ability to effectively address a warrior's moral trauma.<sup>158</sup> Before moving on, we must first understand how the VA/DoD defines these three therapeutic techniques. Thus, my description of each therapy will be drawn from the most recent research commission by the VA/DoD and contained in the Institute for Medicine's (IOM) report on PTSD in the warrior population.

CPT protocols help a warrior "to identify and modify . . . negative thoughts and beliefs . . . considered" to be the emotional and behavioral triggers of the traumatic event underlying his PTSD.<sup>159</sup> The goal is for the warrior to recognize negative thinking and learn to exchange destructive thoughts with constructive thoughts in order to reduce PTSD.<sup>160</sup> CPT consists of: Education about specific symptoms and how treatment can help reduce these symptoms; increasing the warrior's awareness of his own thoughts and feelings; teaching new skills that enable the warrior question

153. *Id.*

154. *See id.* at 51–52; Elaine S. LeVine & Elaine Orabona Mantell, *The Integration of Psychopharmacology and Psychotherapy in PTSD Treatment: A Biopsychosocial Model of Care*, in 1 TRAUMA PSYCHOLOGY: ISSUES IN VIOLENCE, DISASTER, HEALTH, AND ILLNESS 283, 283 (Elizabeth K. Carll ed., 2007).

155. LeVine & Mantell, *supra* note 154, at 283–84.

156. VA/DoD CLINICAL PRACTICE GUIDELINES, *supra* note 145, at 7.

157. *See id.* at 116–17.

158. Much research is being done concerning the neurobiological aspects of PTSD and concomitant ways of treating the symptoms with various pharmacological treatment methods. COMM. INITIAL ASSESSMENT, *supra* note 3, at 59–60. In a similar way, the guidelines based their recommendations on randomly controlled clinical trials that produce evidence of their effectiveness in helping to reduce a warrior's symptoms. VA/DoD CLINICAL PRACTICE GUIDELINES, *supra* note 145, at 116. For the purposes of this paper, I will assume that pharmacological treatments relate to the biological aspect in the bio-psycho-social method of treatment. As such, I will set aside further discussion on this topic so as to focus on the effectiveness of psychological treatment methods in connection with moral trauma.

159. COMM. INITIAL ASSESSMENT, *supra* note 3, at 237.

160. *Id.*

his maladaptive thoughts; and instilling the notion that it is normal for trauma to change the way a person understands the world and other people.<sup>161</sup> Modification of negative thoughts surrounding the trauma event and its consequences reduces dysfunctional behaviors sparked by re-experiencing the event.<sup>162</sup> Ultimately, CPT is aimed at helping warriors integrate “the beliefs they had before and after their trauma.”<sup>163</sup> The therapeutic process occurs in twelve hour-long sessions over a six-week period.<sup>164</sup>

ET protocols are aimed at helping the warrior confront his “trauma-related [event], memories, and feelings” through repeatedly revisiting the traumatic memory.<sup>165</sup> ET uses in vivo exposure and imaginal exposure, which allows the warrior to embody his traumatic memory in a controlled and objectively safe environment.<sup>166</sup> “In vivo exposure consists of having the [warrior] gradually and systematically approach situations, places, and people that” trigger a dysfunctional response.<sup>167</sup> After repeated exposure to triggering stimuli proves to be harmless, the warrior’s unrealistic expectations are disconfirmed.<sup>168</sup> In contrast to in vivo, imaginal exposure uses the imagination to set up an environment in which a warrior revisits his trauma setting.<sup>169</sup> Thereafter, psychoeducation teaches a warrior to understand what causes PTSD and attempts to normalize his previous response by imparting awareness that certain reactions are common after a traumatic event.<sup>170</sup> In attempting to reduce anxiety brought on by disruptive memories, ET also teaches controlled-breathing techniques.<sup>171</sup> Such processing allows the warrior to experience his trauma from a new perspective, reorganize his thoughts concerning traumatic memories, and learn to redirect his physical responses to anxiety triggering events.<sup>172</sup> The therapeutic process for ET typically “consists of [eight] to [twelve] sessions of [sixty to ninety] minutes each.”<sup>173</sup>

EMDR protocols ask a warrior to take account of disturbing images connected with his traumatic event.<sup>174</sup> A record of these images is taken.<sup>175</sup>

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161. *Id.*

162. *Id.*

163. *Id.*

164. COMM. INITIAL ASSESSMENT, *supra* note 3, at 237.

165. *Id.* at 233.

166. *Id.*

167. *Id.* at 233–34.

168. *Id.* at 234.

169. COMM. INITIAL ASSESSMENT, *supra* note 3, at 233–34.

170. *Id.* at 234.

171. *Id.*

172. *Id.*

173. *Id.*

174. COMM. INITIAL ASSESSMENT, *supra* note 3, at 238.

175. *Id.*



Thereafter, in a safe place, the warrior is asked to bring to mind one of the disturbing images while allowing physical sensations associated with the image to enter his body.<sup>176</sup> At this point, the warrior attempts to identify “a negative self-referring belief” connecting him to the image and sensations.<sup>177</sup> Once the negative belief is located, the warrior attempts to replace it with a positive thought while tracking a clinician’s finger movement for twenty seconds.<sup>178</sup> The process is repeated for each negative association related to a particular image until all beliefs associated with the image have been removed.<sup>179</sup> The same process occurs for each item in the catalogued list of images.<sup>180</sup> The goal of EMDR is to isolate dysfunctional memories and create a new memory route in the brain in order to reduce the influence of noxious memories and develop better coping mechanisms to intrusive stimuli related to the traumatic event.<sup>181</sup> Now that we understand how the VA/DoD diagnoses PTSD as well as its preferred treatment methods, we can progress to an evaluation of the VA/DoD’s ability to effectively acknowledge the warrior’s spiritual experience in combat and address his corresponding moral trauma.

*B. Question Two: Why Is Treating PTSD as a Bio-psycho-social Phenomenon Insufficient?*

As previously determined, to properly heal a warrior’s moral trauma, effective treatment methods must include the four elements of purgation, gratitude, atonement, and communalization.<sup>182</sup> Purgation should provide an avenue for the warrior to embrace the consequences of his actions in combat, have them acknowledged by a fellow human being as immoral, but replace moral condemnation with forgiveness. Gratitude should provide an avenue for the warrior to replace old negative thoughts with new positive thoughts about the goodness that still exists, the safety in which he now resides, and hope for the future. Atonement should provide an avenue for the warrior to replace actions, for which he feels most grievous guilt or fault, with acts of charity that can redress past offenses.<sup>183</sup> Communalization should provide a

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176. *Id.*

177. *Id.*

178. *Id.*

179. COMM. INITIAL ASSESSMENT, *supra* note 3, at 238.

180. *Id.*

181. *Id.*

182. *See* discussion *supra* Part II.C.

183. Many of the experiences of moral guilt and trauma are related to people who have been killed. I am not proposing an exact correlate action. The goal is to behaviorally make

safe space in which the warrior can honestly discuss and grieve the trauma of war, both from the perspective of what war has done to him and what he had done in war.<sup>184</sup>

Now I will explore how each method encouraged by the VA/DoD compares to the task at hand starting with CPT. The primary thrust of this treatment modality is rearranging the warrior's thought process—the main goal being to replace destructive thoughts with constructive thoughts.<sup>185</sup> As such, it succeeds at achieving the second element of gratitude. In some respects it might also be possible to achieve a portion of the first element of purgation in that it attempts to provide skills that would allow the warrior to rid himself of maladaptive thinking. However, this ultimately falls short because suggesting that a warrior's recurring thoughts of guilt surrounding combat trauma are maladaptive inherently negates the moral valence of the thought. The purgative element should allow a warrior to first acknowledge his responsibility, embrace it, and then let it go. CPT also fails to provide an avenue through which the warrior can experience an act of forgiveness once his culpability has been accepted and confessed. Finally, CPT fails to achieve any aspect of the elements of atonement or communalizing.

Next let us turn to ET. The central defining feature of ET is the attempt to recreate the trauma situation underpinning a warrior's PTSD so that he can approach his feelings, memories, fear, anxiety, and distrust in a safe situation.<sup>186</sup> The goal is that after multiple exposures the warrior will learn that he is no longer exposed to harm and that the anxiety, harmful elaboration on

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amends so that the warrior can experience the reality that kindness, compassion, and generosity are still a part of his human identity.

184. Shay provides an excellent description of the importance of communalizing grief in the warrior community and the necessity to include this function as part of treating PTSD. Shay argues that a warrior's grief often goes unattended. SHAY, *supra* note 65, at 55. I am also proposing that guilt be addressed and acknowledged to the fullest extent. The idea is not to shame the warrior, but instead to provide a space where the truth can emerge and the warrior is allowed to integrate the dark side of war into his identity without it completely defining his self-concept. Warrior narratives describe the exploits of combat with a sense of fear and urgency—fear of being socially shamed as an untenable human being, and urgency that betrays a need not to ignore the brutal truth of war. *See id.* at 188–89, 192–93. In order for the warrior to be truly accepted into society, he has to be provided a place where his whole identity can be revealed and be understood without moral judgments. *See id.* at 188–189. Silencing or ignoring the extent to which guilt can pervade a warrior's identity is only to the detriment of his holistic health. *See id.* at 194. Marlantes confirms this by sharing that he was dogged by a feeling of being “unclean, insecure, strange, and awkward. I didn't feel right—with anyone. . . . [W]e came home alone . . . . [and] I needed desperately to be accepted back in.” MARLANTES, *supra* note 15, at 182, 184.

185. *See* COMM. INITIAL ASSESSMENT, *supra* note 3, at 237; *see also* VA/DoD CLINICAL PRACTICE GUIDELINES, *supra* note 145, at 117.

186. *See* VA/DoD CLINICAL PRACTICE GUIDELINES, *supra* note 145, at 116.

memories, and concomitant responses will subside.<sup>187</sup> ET accomplishes some of the purgative element in that it brings the warrior back to the state of his combat trauma and allows him to address the surrounding issues. A warrior can accept and confront the experiences giving rise to his malevolent feelings of guilt and responsibility. Clinicians can readily provide an appropriate forum for the warrior to confess his true feelings, have the feelings be acknowledged by an authority figure who can, in turn, express an understanding that though these actions are reprehensible, they are also an element of war and that the warrior has the right to be forgiven. Though in a less explicit way, ET also upholds the element of gratitude by creating a safe space and teaching controlled breathing techniques that allow a warrior to slowly replace old negative thoughts with new positive ones about life and his future. By allowing the warrior to recreate and reenter the traumatizing events of combat, ET could potentially also achieve the element of communalizing if performed in a safe group therapy setting.<sup>188</sup> However, ET fails to provide any means to fulfill the element of atonement.

Finally, let us turn to EMDR. Similar to CPT, EMDR has the potential to fulfill the purgative element. Unfortunately, the therapy brings the warrior to disturbing images in order to rid him of dysfunctional thoughts and memories.<sup>189</sup> As such, it cannot pass the test on the purgative element because it does not properly address the warrior's guilt and free him of the negative sense of being responsible for committing grave atrocities. EMDR does successfully achieve the element of gratitude by attempting to use focus techniques to replace old negative thoughts with new positive ones.<sup>190</sup> However, it also fails on the elements of atonement and communalizing.

Having now compared all three VA/DoD recommended treatment methods against the four necessary elements to heal a warrior's moral trauma, we clearly see that all three methods fail to properly address a warrior's moral trauma. ET has the most potential to holistically heal the warrior of his PTSD since it has the ability to achieve three out of the four elements required to heal moral trauma. However, CPT and EMDR fare poorly in achieving only one of the four required elements. The primary focus of all three of these methods is changing the warrior's thoughts, not accepting deeds, and integrating them into his identity.<sup>191</sup> While redirecting a warrior's thoughts is essential to treating PTSD and can help a warrior more meaning-

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187. *See id.* at 124.

188. Unfortunately, the guidelines rank group therapy as having a fair-poor strength rating. *Id.* at 139. As such, it is not recommended for treating PTSD. *See id.* at 139 tbl.Evidence.

189. COMM. INITIAL ASSESSMENT, *supra* note 3, at 238.

190. *See id.*

191. *See id.* at 233, 237–38.

fully respond to harmful stimuli, it is not sufficient to holistically heal the wounds of combat trauma that course deeper than thoughts. All three VA/DoD methods ignore the profound emotions and memories related to the guilt a warrior incurs when he is initiated into the Temple of Mars and how that guilt rips his moral identity asunder. Ironically, these three methods also do little to explicitly help with the social aspect of the bio-psycho-social model. While the goal of all three methods is to make the warrior more comfortable in responding to normal social settings and relationships, we must note that all three methods are highly individualized therapeutic models.<sup>192</sup> The sole focus is on the warrior, not his community, family, or friends.<sup>193</sup>

Since the current guidelines fail to properly address the spiritual aspect of a warrior's trauma, clinicians must willingly engage in non-traditional methods of treating a warrior's PTSD and research must explore potential strategies to effectively integrate the "spiritual" into current modes of treatment.

### C. *Question Three: What Is Required to Address this Challenge?*

In order for VA/DoD to adequately address the challenge of sanctifying the moral wounds of combat trauma a twofold approach is needed. This twofold approach is crucial because the guidelines promote the use of evidence-based medicine.<sup>194</sup> While they do not exclude alternative therapies, they *strongly* encourage those modalities that have been proven successful through random control trials.<sup>195</sup> Consequently, clinicians in the VA/DoD systems are in a good position to explore new concepts and ideas because they are not bound to standard treatment methods.<sup>196</sup> However, other methods are only briefly mentioned and receive low, fair, or poor strength ratings.<sup>197</sup> Thus, the guidelines leave an impression that treatments beyond

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192. *See id.* at 233–34, 237–38.

193. *See id.* at 233–34, 237–39.

194. *See* VA/DoD CLINICAL PRACTICE GUIDELINES, *supra* note 145, at 4.

195. *See id.* at 3.

196. *See id.*

197. *See, e.g., id.* at 7 tbl.Evidence Rating System, 113 tbl.I–3. Ironically, the guidelines make a passing reference to spiritual support as an option for aiding acute stress disorder. *Id.* at 51–52, 172–73. It is suggested that religious warriors might benefit from seeking advice from a spiritual leader. VA/DoD CLINICAL PRACTICE GUIDELINES, *supra* note 145, at 172. However, during the first month after exposure, spiritual support is given the lowest strength of recommendation, has unknown benefit, and is rated lower than pharmacological interventions. *See id.* at 46 tbl.A-4. Furthermore, there is no reference to spiritual support in the guideline goals for PTSD, and the notion of spiritual support is directly linked to a warrior's potential religion of faith. *Id.* at 6, 172. It is not in reference to the spirituality of war that I have tried to develop in this paper.

CPT, ET, and EMDR are ineffective at treating PTSD, when in fact, the listed options may simply have not been widely tested forms of treatment.<sup>198</sup> Even though the front page of the guidelines says, “[t]hey are not intended to define a standard of care and should not be construed as one,” the implication of their ranking system and structure predisposes clinicians to be biased toward the strongly recommended methods of treatment.<sup>199</sup>

More importantly, nowhere in the guidelines is there an appreciation for the concept of a warrior’s moral trauma. The challenge then is not that the VA/DoD is totally dismissive of using non-traditional treatments for PTSD, but that they have not yet fully appreciated the importance of treating moral trauma as ancillary to the psychological trauma of PTSD. For those clinicians who have discovered effective alternative modes for addressing moral trauma, such methods will not be captured and successfully implemented if they remain untested in random control trials. Therefore, clinicians need to be strongly encouraged to look to alternative methods for treating PTSD and researchers need to take seriously the importance of investigating new avenues for treating a warrior’s moral trauma that work in conjunction with CPT, ET, and EMDR.

I will now briefly investigate potential avenues for thinking about how to develop treatments that address a warrior’s moral trauma without resorting to a particular faith tradition. In contrast to other employers, the military encourages religious practice and spiritual belief.<sup>200</sup> In fact, it has recently been suggested that maintaining military readiness includes commanders developing “policies that will promote a coherent and effective approach to the spiritual needs of service members.”<sup>201</sup> The difficulty in stressing the importance of spirituality is finding a way to avoid the reduction of all spirituality to one particular faith based system.<sup>202</sup> As an equal opportunity employer, “[m]ilitary commanders are responsible to provide for the free exercise of religion of those under their authority.”<sup>203</sup> Consequently, addressing the moral trauma of war must always bear in mind that the VA/DoD promote and espouse religious diversity.

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198. *See id.* at 109, 116–17.

199. *Id.* at Qualifying Statements.

200. Compare David J. Hufford et al., *Spiritual Fitness*, 175 *MILITARY MED.* 73, 73 (Aug. Supp. 2010), with Louise Fenner, *Religion in the Workplace Is Diversity Issue for U.S. Companies*, AMERICA.GOV ARCHIVE (Nov. 28, 2007), <http://www.america.gov/st/diversity-english/2007/November/20071128173019xlrennef0.1781427.html?cp.rss=true>.

201. Hufford et al., *supra* note 200, at 73.

202. *See id.* at 75.

203. JOINT CHIEFS OF STAFF, JOINT PUB. 1-05, RELIGIOUS AFFAIRS IN JOINT OPERATIONS, at viii (2009).

It is not the goal of this paper to fully develop proper treatment options; however, it is important to point out potential avenues for further research. Since much research is needed to provide consistent evidence of proper methods, my remarks will remain preliminary. In discussing treatment alternatives to the guidelines, it will be helpful to keep in mind the definition of spiritual given in Total Force Fitness: “Of, pertaining to or affecting the spirit or soul, esp[ecially] from a religious aspect.”<sup>204</sup> In turn, psycho-spiritual aspects of the warrior’s health relate to the realm of spirituality that intersects with other domains and increase his mindfulness and mental resilience.<sup>205</sup> The religiously neutral aspects of a warrior’s psycho-spiritual health are: Purpose and meaning; reflection and introspection; relationships beyond the self; and exceptional spiritual experiences.<sup>206</sup>

The IOM committee’s initial assessment provides an excellent resource in a section concerning emerging therapies.<sup>207</sup> The report encourages VA/DoD clinicians and researchers to take their lead from integrative-collaborative approaches to treating PTSD that have been shown successful in civilian trauma care.<sup>208</sup> Such approaches dismantle elements of established evidence based medicine—CPT, ET, and EMDR—and combine them with other options such as: Yoga, couples therapy, family therapy, transcendental meditation, acupuncture, t’ai chi, animal assisted therapy, and art therapy.<sup>209</sup> Combining different elements from various traditions, both medical and non-medical, allows a treatment modality to remain religion neutral, yet address all four aspects of a warrior’s psycho-spiritual health. In order to integrate various treatment methods, a clinician would need to either become interdisciplinary in approach—use other experts from each corresponding tradition to care for various portions of the warrior’s treatment plan—or, research in each separate area would need to prove the effectiveness at treating the moral trauma of PTSD.

An interdisciplinary orientation allows clinicians and various healers to tailor their treatment method to specific needs of a warrior.<sup>210</sup> Moreover, it

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204. Hufford et al., *supra* note 200, at 74 tbl.I.

205. *Id.* at 75.

206. *Id.* at 76–77. These four aspects correspond nicely to those aforementioned categories presented both by Marlantes and St. Ignatius. *See supra* Parts II.A, II.C. Without re-explicating the previous section, I take this parallel to further affirm what has already been proven about the spiritual nature of war and what is needed to heal moral trauma. At this juncture it is important to maintain religiously neutral appreciation for spirituality in discussing VA/DoD options for future research and implementation.

207. *See* COMM. INITIAL ASSESSMENT, *supra* note 3, at 255–64.

208. *Id.* at 254.

209. *Id.* at 254–61.

210. *See id.* at 233–34, 254.

extends the therapy beyond the individual warrior to his community.<sup>211</sup> Marlantes suggests that one of the grievous mistakes in attempting to sanctify a warrior's soul is eliminating his extended family and community.<sup>212</sup> As such, Marlantes and Tick both encourage elaborate processes of ritual healing akin to the Native American sweat lodges.<sup>213</sup> While these methods are likely to be effective modes of purification and sanctification, the remaining challenge is to effectively standardize such processes in random control trial so that they can be made available for general use and appropriation into the guidelines.

In order to present one potential for random control trial, I will return to the medieval warrior.<sup>214</sup> Verkamp provides a historical analysis of medieval penitential rites of warriors returning from battle.<sup>215</sup> The elements of these penitential rites could be more easily isolated for future random control trials and could easily be used in combination with current methods of treating PTSD. The central aspect of medieval penitential rites is that they allowed a returning warrior to accept that his “‘sacred moral norms’ and ‘deeply held convictions’” had been violated through his participation in the violence of combat and perform a heartfelt contrition.<sup>216</sup>

Verkamp argues that modern therapeutic approaches attempting to simply eliminate “self-criticism” deny the returning warrior's personal self-accusation.<sup>217</sup> Moreover, these methods tend to curb a warrior's remorse leaving him enslaved to the feeling that his moral identity was lost on the battlefield as a result of his own wartime behavior.<sup>218</sup> Similar to the Spiritual Exercises,<sup>219</sup> Verkamp suggests that medieval penitential rites provide the

211. *See id.* at 233–34.

212. *See* MARLANTES, *supra* note 15, at 179.

213. *See id.* at 8; TICK, *supra* note 22, at 211, 214.

214. In attempting to look beyond a Judeo-Christian model for moral healing, I explored the Code of the Samurai. However, I found little information concerning the warrior returning from battle. The focus was more on how to prepare for death. Corresponding avenues for meditation were located in the monk-warrior, which is a separate class of citizen that practices Zen meditation so the spiritual-combat connection was not readily apparent. For that reason, I will limit my focus to Western rituals that provide a framework for warriors returning from combat to address their moral identity. For further information concerning the samurai code see YŪZAN DAIDŌJI, CODE OF SAMURAI: A MODERN TRANSLATION OF THE BUSHIDO SHOSHINSU OF THE TAIRA SHIGESUKE (Thomas Cleary trans., 1999).

215. *See* BERNARD J. VERKAMP, THE MORAL TREATMENT OF RETURNING WARRIORS IN EARLY MEDIEVAL AND MODERN TIMES 17–23 (1993).

216. *Id.* at 104–05.

217. *Id.* at 105.

218. *See id.*

219. The use of the Spiritual Exercises, as discussed previously, was to point out the common links between the mystic and the warrior's spirituality. *See supra* Part II.C.

crucial elements of: “[E]xamination of conscience,” a confession of sin, and contrite reparation, all of which restore the breach with community and God.<sup>220</sup> The importance of these penitential rites need not be understood in their religious context. However, they acknowledge a warrior’s deeper alienation from his own moral identity, correspond to the aspects of psycho-spiritual health previously mentioned, and could easily be researched.

While these ideas are inchoate, they provide general ways of thinking more broadly about PTSD treatment methods and a warrior’s psycho-spiritual health. If clinicians and researchers can move forward in proving and implementing any of these methods, we will be one step closer to addressing the moral trauma of war and holistically healing our returning warriors.

#### IV. CONCLUSION

In this paper, I have argued that combat often, if not always, includes traumatic experiences that have serious consequences for a warrior’s moral identity if left untreated. In order to treat the entire person, treatment methods must address the moral injuries of war as a spiritual phenomenon. Current VA/DoD guidelines that omit the spiritual aspect of combat trauma cannot fully heal a warrior’s PTSD because they cannot sanctify his moral identity. In contrast to a bio-psycho-social model of treating PTSD, I suggested that a twofold response is needed to integrate the spiritual into treatment methods within the VA/DoD health care systems.<sup>221</sup> First, clinicians need to creatively explore non-traditional forms of sanctifying moral trauma that are tailored to a warrior’s spiritual needs when treating PTSD. Second, research must explore the spiritual aspects of a warrior’s combat experience in order to promote effective evidence-based treatment methods that understand moral trauma as an inherent element of PTSD. Finally, I suggested potential avenues for integrating alternative therapies into the current bio-psycho-social model of treating PTSD so that the guidelines can develop into a more holistic, interdisciplinary, bio-psycho-social-*spiritual* model.<sup>222</sup>

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Verkamp’s book is helpful because it develops a common pattern of wounds between medieval warriors and modern warriors. His suggestion that prior modes of dealing with war moral trauma should be brought forward into our modern treatment methods not only underscores the point that combat trauma is of deeper moral nature, but also provides a more streamlined means of integrating penitential rites into modern therapy for returning warriors.

220. VERKAMP, *supra* note 215, at 104–05.

221. *See supra* Part III.C.

222. *See id.*



All pain reveals deep anxieties about life, but war has the ability to ravish the mind, body, and soul. Sometimes such pain leaves no visible sign on the body. If silence stifles the spiritual pain of our warriors it will, at best, turn into terrible despair. Our warriors deserve more than despair. They deserve to be sanctified in order to restore a sense of personal dignity, but more importantly, to be cherished as a blessing and national treasure in the hearts of the American people. We ought not appreciate and laud our warriors in ignorance of their combat mission, or in spite of it, but because of their physical, mental, and spiritual display of: Loyalty, duty, courage, respect, selfless honor, integrity, and personal courage.

## **APPLAUDING THE ENTREPRENEURIAL SPIRIT: FLORIDA WELCOMES VETERAN-OWNED SMALL BUSINESSES**

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TASHA M. DE MIGUEL\*\*

I. INTRODUCTION

Perhaps the most fiscally and politically complex challenge facing our nation is the state of our economy. The problem of unemployment has been of particular concern to our nation’s leaders and to families from every corner of the country. The long-term unemployed, in particular, have faced the question of how they are supposed to move forward when finding gainful employment seems so daunting. This problem is particularly acute among the men and women who have served our country in the various branches of the armed services. Those servicemembers who have been disabled as a result of their time in the military face additional hurdles that may seem insurmountable. Disabilities extend far beyond the physical wounds of war. A trend towards wider recognition of the disabling psychological effects of war and military service has developed. Outreach efforts concerning Posttraumatic Stress Disorder (PTSD) in particular have encouraged those dealing with the illness to get help and have provided education for the public at large about the condition. While the problems facing our economy, and veterans in particular, are significant, a great deal of effort and ingenuity has been expended towards developing innovative solutions. Much is known about the benefits available to veterans in terms of health care, pensions, etc. However, benefits available to veterans who undertake entrepreneurial endeavors are lesser known. Those very benefits allow veteran-owned small

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\* Nova Southeastern University, Shepard Broad Law Center, J.D., magna cum laude, 2012; University of Phoenix, B.S., magna cum laude, 2009. This article is dedicated to the soldiers of the United States Armed Forces and their supporting friends and families. Their spirit is as strong as the love, support, and faith observed by their families both in times of war, and in peace. Let us never forget just how much it means to serve this country, the duties we owe to those that rise to the challenge, and the honor displayed by the men and women who defend freedom with their lives.

\*\* Nova Southeastern University, Shepard Broad Law Center, J.D. Candidate, 2014; Florida International University, M.S., 2005; Florida International University, B.S., 2003. This article is dedicated to my mother, Pura, for her love and patience and for teaching me the importance of never giving up; to my father, Angel, for his selflessness and valuable advice; and to Raul, for his unconditional love and support and for reminding me to laugh a little bit every day and to always keep fighting.

businesses (VOSB) and service-disabled veteran-owned small businesses (SDVOSB) to offer yet another contribution to the country they have long served. Now out of uniform, and in the role of entrepreneurs, veterans can become job creators and improve their circumstances, that of others, and their communities. The federal government and the State of Florida have offered assistance to small businesses which qualify as VOSB and SDVOSB.<sup>1</sup>

On October 20, 2004, President George W. Bush signed Executive Order 13,360.<sup>2</sup> The Order was entitled “Providing Opportunities for Service-Disabled Veteran Businesses To Increase Their Federal Contracting and Subcontracting.”<sup>3</sup> A clear policy statement and directive were contained in the order:

America honors the extraordinary service rendered to the United States by veterans with disabilities incurred or aggravated in the line of duty during active service with the armed forces. Heads of agencies shall provide the opportunity for service-disabled veteran businesses to significantly increase the Federal contracting and subcontracting of such businesses.<sup>4</sup>

The Order charges agency heads with developing strategic plans which include, among other things, “encouraging and facilitating participation by service-disabled veteran businesses in competitions for award of agency contracts.”<sup>5</sup>

President Obama and his Administration have continued the work of aiding veterans and linking that assistance with entrepreneurial efforts that benefit local communities and the economy as a whole.<sup>6</sup> The Administration notes that they “have been committed to upholding [the] sacred trust with America’s veterans and wounded warriors. Putting Americans, especially our veterans, back to work is job one.”<sup>7</sup> President Obama has integrated entrepreneurship training and established the “National Veterans Entrepre-

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1. *See infra* Part III for a discussion of VOSB and SDVOSB.

2. Exec. Order No. 13,360, 69 Fed. Reg. 62,549, 62,549, 62,551 (Oct. 26, 2004).

3. *Id.* at 62,549.

4. *Id.*

5. *Id.*

6. THE WHITE HOUSE, OBAMA ADMINISTRATION RECORD FOR VETERANS AND WOUNDED WARRIORS, [http://www.whitehouse.gov/sites/default/files/docs/veterans\\_and\\_wounded\\_warriors\\_record\\_0.pdf](http://www.whitehouse.gov/sites/default/files/docs/veterans_and_wounded_warriors_record_0.pdf).

7. *Id.*

neurship Training program within the Small Business Administration [(SBA)].”<sup>8</sup> The SBA has highlighted that:

In Fiscal Year 2011, over 190,000 veterans received small business counseling or training through SBA and its resource partners. In addition, since 2009, SBA has doubled the number of SBA Veteran Business Outreach Centers nationwide. Over the past three years, SBA has also expanded the Entrepreneurship Bootcamp for Veterans with Disabilities to eight top U.S. business schools nationwide.<sup>9</sup>

Additionally, President Obama has increased veterans’ “access to capital and government contracts.”<sup>10</sup> Of particular significance is that fact that “[b]etween 2009 and 2011, over \$3 billion through over 12,000 [SBA] loans went to small businesses owned by veterans and service-disabled veterans.”<sup>11</sup> The SBA has “worked with both contracting officers and veteran-owned businesses to deliver the highest-ever percentage of federal contracts to service-disabled veteran-owned . . . businesses in 2010, totaling \$10.4 billion.”<sup>12</sup>

In 2008, the Florida Legislature passed House Bill 687, entitled the “Florida Service-Disabled Veteran Business Enterprise Opportunity Act.”<sup>13</sup> Similar to President Bush’s Executive order, the Act was intended to provide a “selection preference in state contracting for certified service-disabled veteran business enterprises.”<sup>14</sup> The Legislature made it clear that their intent was to

rectify the economic disadvantage of service-disabled veterans, who are statistically the least likely to be self-employed when compared to the veteran population as a whole and who have made extraordinary sacrifices on behalf of the nation, the state, and the

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8. *Id.*

9. *Id.*

10. *Id.*

11. THE WHITE HOUSE, *supra* note 6.

12. Marie Johns, *More Resources for America’s Veteran-Entrepreneurs and Small Business Owners*, THE WHITE HOUSE BLOG (Nov. 8, 2011, 11:29 AM), <http://www.whitehouse.gov/blog/2011/11/08/more-resources-america-s-veteran-entrepreneurs-and-small-business-owners-0>.

13. Florida Service-Disabled Veteran Business Enterprise Opportunity Act, Ch. 2008-155, § 1, 2008 Fla. Laws 1932, 1933 (codified at FLA. STAT. § 295.187 (2008)).

14. *Compare id.*, with Exec. Order No. 13,360, 69 Fed. Reg. 62,549, 62,549 (Oct. 26, 2004).

public, by providing opportunities for service-disabled veteran business enterprises.<sup>15</sup>

The federal government and the State of Florida are both making strides at encouraging our veterans to transition to the role of entrepreneur and it is not surprising to see why. The numbers are staggering. President Obama's Interagency Task Force on Veterans Small Business Development explained that

over one million service men and women are returning over the next five years . . . . Providing this growing number of veterans with the tools to transition back to civilian life—including assistance to start and grow a small business—is a moral responsibility. . . . [Additionally,] unemployment rates are as high as 11.1% for returning male veterans and 14.7% for returning women veterans.<sup>16</sup>

The Task Force succinctly and insightfully makes the connection between honoring the service of veterans and working towards addressing our economic woes.<sup>17</sup> The report notes “veterans own about 2.4 million businesses or 9% of all of America's businesses. These businesses generate about \$1.2 trillion in receipts and employ nearly 6 million Americans.”<sup>18</sup> Additionally, Ret. Army Colonel Jill Chambers who is the chairman and CEO of This Able Vet, notes that “[v]eteran-owned business[es] are twice as likely to succeed as businesses owned by non-veterans, according to studies . . . . ‘It's indicative of solid military training that can transition into the civilian workforce and be successful and productive.’”<sup>19</sup>

The goal of this article is to explore the benefits available to veterans in support of their entrepreneurial efforts. In order to provide veterans with enough information to get them started on the road to classification as a VOSB or SDVOSB with the goal of preference in government contracting in mind, we will begin with a discussion of the definition of disability and the

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15. Ch. 2008-155, § 1, 2008 Fla. Laws at 1933.

16. INTERAGENCY TASK FORCE ON VETERANS SMALL BUSINESS DEVELOPMENT, REPORT TO THE PRESIDENT: EMPOWERING VETERANS THROUGH ENTREPRENEURSHIP 1 (2011), available at [http://www.sba.gov/sites/default/files/FY2012-Final\\_Veterans\\_TF\\_Report\\_to\\_President.pdf](http://www.sba.gov/sites/default/files/FY2012-Final_Veterans_TF_Report_to_President.pdf).

17. See *id.* “America has both an unquestioned responsibility and a compelling incentive to empower veterans through entrepreneurship, enabling them to become successful small business owners.” *Id.*

18. *Id.*

19. Michelle Lodge, *SBA Helps Veteran-Owned Businesses*, CNBC (Nov. 11, 2010, 12:17 PM), [http://www.cnbc.com/id/40131100?SBA\\_Helps\\_VeteranOwned\\_Businesses](http://www.cnbc.com/id/40131100?SBA_Helps_VeteranOwned_Businesses).

role of PTSD.<sup>20</sup> Then, we will discuss the requirements for classification as a VOSB or SDVOSB and the benefits available for each.<sup>21</sup> We then explore the verification process and the potential pitfalls throughout that very critical phase.<sup>22</sup> Next, we discuss the benefits that the State of Florida offers to veterans and the requirements for creating a business entity in Florida.<sup>23</sup> Additionally, we address the definition of a “small business concern” and engage in an analysis of the critical components of that definition.<sup>24</sup> Lastly, another issue for veterans to consider is the voluntary and involuntary transfer of shares once their enterprise is up and running, and how those transfers can impact their status as a VOSB or SDVOSB.<sup>25</sup>

## II. DEFINING DISABILITY AND THE POST-TRAUMATIC STRESS DISORDER CONNECTION

The focus of this article is on the benefits available to VOSB and SDVOSB in support of their entrepreneurial efforts. A logical starting point is a discussion of the myriad of ways that disability is defined. Additionally, the link between disability and PTSD merits exploration.

Title 38, section 101 of the United States Code defines “veteran” as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”<sup>26</sup> A “disabled veteran” is defined as “a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) . . . or . . . a person who was discharged or released from active duty because of a service-connected disability.”<sup>27</sup> A “special disabled veteran” is defined as:

(A) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) . . . for a disability (i) rated at 30% or more, or (ii) rated at 10 or 20% in the case of a veteran who has been determined under section 3106 of this title to have a serious employment handicap; or

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20. See discussion *infra* Part II.  
 21. See discussion *infra* Part III.  
 22. See discussion *infra* Part IV.  
 23. See discussion *infra* Parts V.–VI.  
 24. See discussion *infra* Part VII.  
 25. See discussion *infra* Part VIII.  
 26. 38 U.S.C. § 101(2) (2006).  
 27. *Id.* § 4211(3).

(B) a person who was discharged or released from active duty because of service-connected disability.<sup>28</sup>

Another important distinction is between what is *service-connected* and what is *non-service-connected*. “[S]ervice-connected’ means, with respect to disability or death, that such disability was incurred or aggravated . . . in line of duty in the active military, naval, or air service.”<sup>29</sup> “[N]on-service-connected’ means . . . that such disability was *not* incurred or aggravated . . . in line of duty in the active military, naval, or air service.”<sup>30</sup>

The Diagnostic and Statistical Manual of Mental Disorders explains that:

[t]he essential feature of [PTSD] is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.<sup>31</sup>

Additionally, “[t]he person’s response . . . must involve intense fear, helplessness, or horror.”<sup>32</sup> Also, “[t]he full symptom picture . . . must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>33</sup> It does not require a stretch of the imagination to arrive at the conclusion that many of our men and women in uniform are engaged in yet another battle with PTSD on the home front. The National Center for PTSD is under the auspices of the Department of Veterans Affairs (VA).<sup>34</sup> The Center offers the following statistics regarding the prevalence of PTSD in the military:

Experts think PTSD occurs:

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28. *Id.* § 4211(1). An explanation of disability ratings is a complex endeavor and outside the scope of this article.

29. *Id.* § 101(16).

30. *Id.* § 101(17) (emphasis added).

31. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed., text rev. 2000).

32. *Id.*

33. *Id.*

34. See *How Common Is PTSD?*, U.S. DEPARTMENT VETERANS AFFS. (July 5, 2007), <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp>.



- In about 11–20% of Veterans of the Iraq and Afghanistan wars . . . or in 11–20 Veterans out of 100.
- In as many as 10% of Gulf War (Desert Storm) Veterans, or in 10 Veterans out of 100.
- In about 30% of Vietnam Veterans, or about 30 out of 100 Vietnam Veterans.<sup>35</sup>

The way in which the VA is addressing the epidemic of returning veterans with PTSD was illustrated in a recent case decided by the United States Court of Appeals for the Federal Circuit.<sup>36</sup> In *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*,<sup>37</sup> the issue involved an amendment to the rule governing “claims for service-connected disability benefits for [PTSD].”<sup>38</sup> The Secretary proposed a rule, which the court upheld, that “creat[ed] an additional situation where a veteran could establish PTSD service-connection without supporting evidence regarding the claimed in-service stressor.”<sup>39</sup> Prior to this rule being proposed, “a finding of PTSD service-connection require[d] three components: ‘medical evidence diagnosing the condition in accordance with [38 U.S.C. § 501(a)]; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred.’”<sup>40</sup> The proposed rule that was codified and upheld by this court states:

If a stressor claimed by a veteran is related to the veteran’s fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of [PTSD] and that the veteran’s symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veter-

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35. *Id.*

36. *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 669 F.3d 1341, 1343 (Fed. Cir. 2012).

37. 669 F.3d 1341 (Fed. Cir. 2012).

38. *Id.* at 1343.

39. *Id.* at 1343–44.

40. *Id.* at 1343 (quoting 38 C.F.R. § 3.304(f) (2012)).

an's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.<sup>41</sup>

### III. BENEFITS AVAILABLE TO VETERAN-OWNED SMALL BUSINESSES AND SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESSES

In addition to the benefits that most people are aware of, such as health care, veterans who decide to venture out as entrepreneurs may do so with the help of the VA. "Public Law (P.L.) 109-461 entitled 'Veterans Benefits, Health Care, and Information Technology Act of 2006' provides VA with unique authority for contracting with SDVOSB and VOSB."<sup>42</sup> The goal of the legislation was to increase the contracting opportunities for VOSBs and SDVOSBs.<sup>43</sup> Title 38, Section 8127 of the United States Code states that a "small business concern may be awarded a contract . . . only if the small business concern and the veteran owner . . . are listed in the database of veteran-owned businesses maintained by the Secretary."<sup>44</sup> Additionally, "[i]n maintaining the database, the Secretary shall . . . [verify] that each small business concern listed in the database is owned and controlled by veterans [and] [i]n the case of a veteran who indicates a service-connected disability, verifi[y] . . . the service-disabled status of [each] veteran."<sup>45</sup> Now that we know that VOSBs and SDVOSBs have increased contracting opportunities with the federal government, it is important to define exactly what constitutes a VOSB and SDVOSB. Making sure that a business qualifies under either definition is the first step in a long road to benefiting from the assistance.

The first key definition is that of a *veteran-owned small business concern*. A VOSB concern is

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41. *Id.* at 1344 (quoting 38 C.F.R. § 3.304(f)(3)). The National Organization of Veterans' Advocates asserted that

the new VA rule: (1) conflicts with statutes and regulations that require the VA to consider all medical evidence on a case-by-case basis, including evidence from private physicians, and that require the VA to give the veteran the benefit of the doubt when considering all evidence in the record; (2) improperly includes language that is not required in the DSM-IV; and (3) should be set aside as arbitrary and capricious on grounds that none of the VA's proffered explanations provides a rational basis for excluding private doctors' opinions.

*Nat'l Org. of Veterans' Advocates, Inc.*, 669 F.3d at 1345.

42. *Veteran-Owned Small Business Verification Program*, U.S. DEPARTMENT OF VETERANS AFF., <http://www.va.gov/osdbu/veteran/verification.asp> (last updated Dec. 19, 2012); *see* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, §1, 120 Stat. 3403, 3403.

43. 38 U.S.C. § 8127(a)(1) (2006 & Supp. IV).

44. *Id.* § 8127(e).

45. *Id.* § 8127(f)(4).

a small business concern that is not less than 51% owned by one or more veterans, or in the case of any publicly owned business, not less than 51% of the stock of which is owned by one or more veterans; the management and daily business operations of which are controlled by one or more veterans and qualifies as “small” for Federal business size standard purposes.<sup>46</sup>

The second key definition is that of a *service-disabled veteran-owned small business concern*. A SDVOSB concern is

a business not less than 51% of which is owned by one or more service-disabled veterans, or in the case of any publicly owned business, not less than 51% of the stock of which is owned by one or more service-disabled veterans; the management and daily business operations of which are controlled by one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, a spouse or permanent caregiver of such veteran. In addition, some businesses may be owned and operated by an eligible surviving spouse. Reservists or members of the National Guard disabled from a disease or injury incurred or aggravated in line of duty or while in training status also qualify.<sup>47</sup>

It is interesting to note the role of surviving spouses in this context. A *surviving spouse* is

any individual identified as such by VA’s Veterans Benefits Administration and listed in its database of veterans and family members. . . . [T]he following conditions must apply: (1) If the death of the veteran causes the small business concern to be less than 51% owned by one or more veterans, the surviving spouse of such veteran who acquires ownership rights in such small business shall . . . be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a service-disabled veteran-owned small business.<sup>48</sup>

In essence, the surviving spouse steps into the shoes of the service-disabled veteran.<sup>49</sup> Now that we have set out the definitions of VOSB and SDVOSB,

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46. 38 C.F.R. § 74.1 (2012).

47. *Id.*

48. *Id.*

49. See 48 C.F.R. § 802.101(1). But in order to qualify as an eligible surviving spouse, the veteran to whom the spouse is married must meet certain conditions. See *id.* § 802.101(3). “The veteran must have had a 100% service-connected disability rating or the veteran died as

the next step is to explore the complex verification process required in order for the business to be listed in the database maintained by the VA.

#### IV. THE VERIFICATION PROCESS

Before any contracts may be awarded, the VOSB or SDVOSB must complete the verification process.<sup>50</sup> The first step is that “[r]egistered businesses, or businesses wishing to register in the Vendor Information Pages (VIP) database for the purpose of securing opportunities in the Veterans First Contracting Program, must fill out an electronic Verification application . . . .”<sup>51</sup> There are several core requirements in order for a VOSB or SDVOSB to become verified.<sup>52</sup> The requirements are:

- (1) The Veteran owner(s) have direct and unconditional ownership of at least 51% of the small business (38 C.F.R. § 74.3) and have total unconditional control (full decision making authority) (38 C.F.R. § 74.4(g));
- (2) The Veteran manages the company on both a strategic policy and a day-to-day basis (38 C.F.R. § 74.4);
- (3) The Veteran holds the highest officer position (38 C.F.R. § 74.4(c)(2));
- (4) The Veteran should be the highest compensated employee unless there is a logical explanation otherwise, submitted by the Veteran as to how taking a lower salary than other employee(s) helps the business (38 C.F.R. § 74.4(g)(3)); and
- (5) The Veteran has the managerial experience of the extent and complexity needed to manage the company.<sup>53</sup>

Veterans are not alone in this process. Help is available in the form of the “Verification Counseling Program,” which “was developed to provide

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a direct result of a service-connected disability.” *Id.* Without these requirements, the spouse does not qualify and cannot step into the shoes of her decedent spouse. *See id.*

50. *Veteran-Owned Small Business Verification Program*, *supra* note 42.

51. *Veteran Business Status Verification Instructions*, U.S. DEPARTMENT OF VETERANS AFF., <http://www.va.gov/osdbu/veteran/verificationInstructions.asp> (last updated Dec. 19, 2012).

52. *See Verification Self Assessment Tool*, U.S. DEPARTMENT OF VETERANS AFF., [https://www.research.net/s/Verification\\_Assessment\\_Tool](https://www.research.net/s/Verification_Assessment_Tool) (last visited Apr. 21, 2013).

53. *Id.*

training and assistance to Verification Assistance partners, who in turn provide Verification counseling to applicants.”<sup>54</sup> Among the services provided by the Verification Counseling Program are: One-on-one verification assistance to the applicant in helping to understand regulation 38 C.F.R. § 74, “[r]eview of a firm’s business model,” providing insight “to applicants regarding the interpretation of [the] regulation,” and helping and “[a]ssist[ing] the [v]eteran with questions on how to use the Self Assessment Tool.”<sup>55</sup>

The VA notes that the “[a]pplicant bears the burden of proof of adequately establishing its claimed status.”<sup>56</sup> There are several steps in the verification process.<sup>57</sup> The most essential are as follows:

(1) The Veteran applies to have a company verified by entering ownership information into VIP and sign[ing] VA Form 0877 electronically in the VIP registration section. . . . (2) Once all the owners have completed their electronic signatures, VA confirms the Veteran status of each Veteran owner . . . . (3) After an Applicant’s Veteran status is confirmed, the documents that were submitted are reviewed to ascertain if they are correct and viable for examination. When that has been determined, the examination begins and the 90 day clock for Verification begins. . . . (4) The Evaluation stage is completed by a Federal employee. . . . (5) The final stage of the process is the Determination stage. In this stage, the Federal employee determines if the application is approved or denied and the appropriate letter is issued. This letter is scanned and sent via VIP profile . . . . If the application is approved, the logo is turned on and the company will then appear in VIP.<sup>58</sup>

The VA has also identified common pitfalls during the verification process in an effort to help future applicants avoid the same issues.<sup>59</sup> Among those pitfalls are that “100% of [o]wners have not completed the VA Form 0877 electronic signature.”<sup>60</sup> Also, applicants sometimes fail to “upload all required documents to their VIP profile” and do not provide all the necessary

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54. *Verification Assistance Program*, U.S. DEPARTMENT OF VETERANS AFF., <http://www.va.gov/osdbu/veteran/vap.asp> (last updated Mar. 8, 2013).

55. *Verification Counseling Program*, U.S. DEPARTMENT OF VETERANS AFF., <http://www.va.gov/osdbu/veteran/vapVCP.asp> (last updated Mar. 26, 2013).

56. U.S. DEP’T OF VETERANS AFFAIRS, VA VETERAN-OWNED VERIFICATION PROGRAM—INITIAL APPLICATION GUIDE 1 (2012), *available at* [www.va.gov/osdbu/docs/vapInitialVerificationApplicationGuide.pdf](http://www.va.gov/osdbu/docs/vapInitialVerificationApplicationGuide.pdf).

57. *Id.* at 2.

58. *Id.* at 2–3.

59. *Id.* at 7.

60. *Id.*

documentation.<sup>61</sup> Additionally, it is sometimes determined that “[n]on-[v]eterans appear to control the company.”<sup>62</sup> Problems involving “unusual ownership or management structure” and “affiliation issues” may also be present.<sup>63</sup> As described, despite the complex nature of the process, the VA has several mechanisms in place to assist veterans in navigating the process and reaching a successful outcome.<sup>64</sup> It appears clear that those veterans who choose to avail themselves of the assistance are far more likely to be successful than those who might elect not to do so.

#### V. HOW DOES FLORIDA HELP VETERANS WITH THEIR ENTREPRENEURIAL EFFORTS?

Florida provides benefits to VOSBs and SDVOSBs.<sup>65</sup> Former Governor Charlie Crist signed the Florida Service-Disabled Veteran Business Enterprise Opportunity Act into law in June 2008.<sup>66</sup> The Act created “a preference in state contracting for businesses owned by service-disabled veterans. [The Department of Management Services Office of Supplier Diversity] provides business development and certification for minority- and women-owned businesses.”<sup>67</sup> The first service-disabled veteran-owned business was certified the same week the legislation was signed.<sup>68</sup> American Building Inspectors Corporation is owned by a veteran of Operation Desert Storm/Desert Shield and the wars in Afghanistan and Iraq.<sup>69</sup> The program has been a great success and Florida now ranks third for greatest number of veteran-owned businesses.<sup>70</sup> Additionally, the “[United States Small Business Administration] Office of Advocacy report[s] that Florida has 176,727 veteran-owned businesses which produce revenue of \$61.9 billion. These veteran-owned employers provide jobs for 310,154 people with an annual payroll of \$10.6

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61. U.S. DEP’T OF VETERANS AFFAIRS, *supra* note 56, at 7.

62. *Id.* at 8.

63. *Id.*

64. *See id.*

65. *See* Florida Service-Disabled Veteran Business Enterprise Opportunity Act, Ch. 2008-155, § 1, 2008 Fla. Laws 1932, 1933, 1935 (codified at FLA. STAT. § 295.187 (2008)).

66. *Id.* at 1936.

67. Press Release, Fla. Dep’t of Mgmt. Servs. Office of Supplier Diversity, First Certified Service-Disabled Veteran-Owned Business (Nov. 17, 2008) (on file with *Nova Law Review*).

68. *Id.*

69. *Id.*

70. Press Release, Fla. Dep’t of Econ. Opportunity, Florida Ranks Third for Greatest Number of Veteran-Owned Businesses (Nov. 11, 2012), <http://www.floridajobs.org/news-center/news-feed/2012/11/12/florida-ranks-third-for-greatest-number-of-veteran-owned-businesses>.

billion.”<sup>71</sup> While the first Florida business to be certified was a building inspection company, a recent service-disabled veteran-owned small business to be certified in Florida is CLI Solutions which is a “national defense intelligence company” that plans to create “up to 40 jobs and \$3.4 million in capital investment” in Florida.<sup>72</sup> CLI Solutions “specializ[es] in linguistic services, human terrain analysis, cultural awareness and language training, strategic communications, intelligence analytical support, operations, and program management.”<sup>73</sup>

With the passage of the Florida Veteran Business Enterprise Opportunity Act, the Florida Legislature set out

to rectify the economic disadvantage of service-disabled veterans, who are statistically the least likely to be self-employed when compared to the veteran population as a whole and who have made extraordinary sacrifices on behalf of the nation, the state, and the public, by providing opportunities for service-disabled veteran business enterprises.<sup>74</sup>

Section 295.187 of the *Florida Statutes* defines a “[v]eteran business enterprise” as an enterprise that:

1. Employs 200 or fewer permanent full-time employees; 2. [t]ogether with its affiliates has a net worth of \$5 million or less or, if a sole proprietorship, has a net worth of \$5 million or less including both personal and business investments; 3. [i]s organized to engage in commercial transactions; 4. [i]s domiciled in this state; 5. [i]s at least 51% owned by one or more wartime veterans or service-disabled veterans; and 6. [t]he management and daily business operations of which are controlled by one or more wartime veterans or service-disabled veterans or, for a service-disabled veteran having a permanent and total disability, by the spouse or permanent caregiver of the veteran.<sup>75</sup>

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71. *Id.*

72. Press Release, Fla. Dep’t of Mgmt. Servs. Office of Supplier Diversity, *supra* note 67; Press Release, Governor of Fla., Gov. Scott Announces CLI Solutions to Expand Operations at Tampa Headquarters (Dec. 14, 2012), <http://www.flgov.com/2012/12/14/gov-scott-announces-cli-solutions-to-expand-operations-at-tampa-headquarters/>.

73. Press Release, Governor of Fla., *supra* note 72.

74. FLA. STAT. § 295.187(2) (2012).

75. *Id.* § 295.187(3)(c).

Although there are differences between the federal and state definitions, they are largely the same.<sup>76</sup> However, the requirements for certification are different.<sup>77</sup> The state statute requires that the application for certification,

at a minimum, include: 1. The name of the business enterprise applying for certification and the name of the veteran submitting the application on behalf of the business enterprise. 2. The names of all owners of the business enterprise, including owners who are wartime veterans, service-disabled veterans, and owners who are not a wartime veteran or a service-disabled veteran, and the percentage of ownership interest held by each owner. 3. The names of all persons involved in both the management and daily operations of the business, including the spouse or permanent caregiver of a veteran who has a permanent and total disability. 4. The service-connected disability rating of all persons listed [above] . . . with supporting documentation from the [VA] or the . . . Department of Defense. 5. Documentation of the wartime service of all persons listed [above] . . . 6. The number of permanent full-time employees. 7. The location of the business headquarters. 8. The total net worth of the business enterprise and its affiliates. In the case of a sole proprietorship, the net worth includes personal and business investments.<sup>78</sup>

## VI. THE BASICS OF STARTING A BUSINESS IN FLORIDA

Starting a business typically begins with a good idea and a plan. Once that stage in the process is over, the hard work begins and several complex legal issues may present themselves. While all of the legal complexities involved in the formation of a business entity are outside the scope of this article, a brief discussion of the various forms of business entities available in Florida, and the basic requirements for each, is important for veterans who are considering starting a business and are hoping to avail themselves of the assistance that is offered by both the federal government and the State of Florida.

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76. Compare 38 C.F.R. § 74.1 (2012), with FLA. STAT. § 295.187(3)(c).

77. Compare FLA. STAT. § 295.187(5)(a), with *Veteran Business Status Verification Instructions*, *supra* note 51.

78. FLA. STAT. § 295.187(5)(a).



### A. Corporations

Chapter 607 of the *Florida Statutes* governs corporations.<sup>79</sup> It is important to set out a few definitions before delving into the requirements for incorporation and similar concepts. Section 607.01401 of the *Florida Statutes* defines numerous terms that are involved in the formation of a corporation.<sup>80</sup> A *corporation* is defined as “a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this act.”<sup>81</sup> An *employee* “includes an officer but not a director. A *director* may accept duties that make him or her also an employee.”<sup>82</sup> *Principal office* “means the office (in or out of this state) where the principal executive offices of a domestic or foreign corporation are located as designated in the articles of incorporation or other initial filing until an annual report has been filed, and thereafter as designated in the annual report.”<sup>83</sup> *Secretary* is defined as “the corporate officer to whom the board of directors has delegated responsibility under [section] 607.08401 for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.”<sup>84</sup> A *shareholder* or *stockholder* “means one who is a holder of record of shares in a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.”<sup>85</sup> *Shares* are defined as “the units into which the proprietary interests in a corporation are divided.”<sup>86</sup> Finally, a *voting group*

means all shares of one or more classes or series that under the articles of incorporation or this act are entitled to vote and be counted together collectively on a matter at the meeting of shareholders. All shares entitled by the articles of incorporation or this act to vote generally on the matter are for that purpose a single voting group.<sup>87</sup>

A corporation is born “when the articles of incorporation are filed or on a date specified in the articles of incorporation, if such date is within 5 busi-

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79. See generally *id.* ch. 607.

80. See *id.* § 607.01401.

81. *Id.* § 607.01401(5).

82. *Id.* § 607.01401(10) (emphasis added).

83. FLA. STAT. § 607.01401(20).

84. *Id.* § 607.01401(23).

85. *Id.* § 607.01401(24).

86. *Id.* § 607.01401(25).

87. *Id.* § 607.01401(31).

ness days prior to the date of filing.”<sup>88</sup> Additionally, “[t]he Department of State’s filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation.”<sup>89</sup> The articles of incorporation must include certain basic information such as:

(a) A corporate name for the corporation . . . ; (b) [t]he street address of the initial principal office and, if different, the mailing address of the corporation; (c) [t]he number of shares the corporation is authorized to issue; (d) [i]f any preemptive rights are to be granted to shareholders, the provision therefor; (e) [t]he street address of the corporation’s initial registered office and the name of its initial registered agent at that office together with a written acceptance . . . ; and (f) [t]he name and address of each incorporator.<sup>90</sup>

In addition to articles of incorporation, the other fundamental document required for a corporation is the bylaws. Section 607.0206 of the *Florida Statutes* addresses bylaws and states that “[t]he incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation unless that power is reserved to the shareholders by the articles of incorporation.”<sup>91</sup> Additionally, “[t]he bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.”<sup>92</sup> The fundamentals that no corporation in Florida can do without are articles of incorporation and bylaws. Another form of business entity that a veteran may wish to consider is the limited liability company (LLC).

#### B. *Limited Liability Companies*

The terminology used in, and requirements of, an LLC are slightly different.<sup>93</sup> Definitions are also important in the context of LLCs. An *authorized representative*

means one or more persons acting to form a limited liability company by executing and filing the articles of organization of such limited liability company . . . and authorized by a member of such

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88. FLA. STAT. § 607.0203(1).

89. *Id.* § 607.0203(2).

90. *Id.* § 607.0202(1).

91. *Id.* § 607.0206(1).

92. *Id.* § 607.0206(2).

93. *Compare* FLA. STAT. § 607.01401(10), (23)–(24), (31), *with id.* § 608.402(3), (18).

limited liability company, which authorized representative may, but need not be, a member of the limited liability company that the authorized representative forms.<sup>94</sup>

A *manager* is defined as “a person who is appointed or elected to manage a manager-managed company and, unless otherwise provided in the articles of organization or operating agreement, a manager may be, but need not be, a member of the limited liability company.”<sup>95</sup> There are two types of LLCs.<sup>96</sup> Some LLCs are manager-managed.<sup>97</sup> Others are member-managed.<sup>98</sup> A *manager-managed* LLC is “a limited liability company that is designated to be managed by one or more managers.”<sup>99</sup> A *member-managed* LLC is an LLC that is managed by members.<sup>100</sup> The operating agreement is one of the fundamental documents for an LLC.<sup>101</sup> An *operating agreement* is defined as “written or oral provisions that are adopted for the management and regulation of the affairs of the [LLC] and that set forth the relationships of the members, managers, or managing members and the [LLC]. The term includes amendments to the operating agreement.”<sup>102</sup> Finally, a *membership interest* is defined as “a member’s share of the profits and the losses of the [LLC], the right to receive distributions of the [LLC’s] assets, voting rights, management rights, or any other rights under this chapter or the articles of organization.”<sup>103</sup>

Akin to the articles of incorporation in the LLC context are the articles of organization.<sup>104</sup> Section 608.407 of the *Florida Statutes* requires that the articles of organization include:

(a) The name of the [LLC] . . . . (b) The mailing address and the street address of the principal office of the [LLC]. (c) The name and street address of its initial registered agent for service of process in the state. . . . (d) Any other matters that the members elect to include in the articles of organization.<sup>105</sup>

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94. FLA. STAT. § 608.402(3).

95. *Id.* § 608.402(18).

96. *See id.* § 608.402(19), (22).

97. *Id.* § 608.402(19).

98. *Id.* § 608.402(22).

99. FLA. STAT. § 608.402(19).

100. *See id.* § 608.402(22).

101. *See id.* § 608.402(24).

102. *Id.*

103. *Id.* § 608.402(23).

104. *Compare* FLA. STAT. § 607.01401(1), *with id.* § 608.402(2).

105. FLA. STAT. § 608.407(1).

Finally, “[t]he articles of organization may also, but need not, identify one or more persons authorized to serve as a manager or managing member and may describe any limitations upon the authority of a manager or managing member.”<sup>106</sup> Next, a veteran may wish to form a general partnership or a limited partnership.

### C. *Limited Partnerships and General Partnerships*

Chapter 620 of the *Florida Statutes* governs partnerships in Florida.<sup>107</sup> The decision to organize as a general partnership or a limited partnership involves many complex considerations that are unique to each business entity. Limited partnerships are comprised of general partners and limited partners.<sup>108</sup> Section 620.1104 of the *Florida Statutes* describes the “[n]ature, purpose, and duration” of a limited partnership.<sup>109</sup> Specifically, “[a] limited partnership is an entity distinct from its partners.”<sup>110</sup> This fact is one of the reasons that a business owner may find the partnership form to be appealing.

Section 620.8202 of the *Florida Statutes* addresses the formation of a partnership.<sup>111</sup> A partnership is formed by the “association of two or more persons to carry on as coowners a business for profit . . . whether or not the persons intend to form a partnership.”<sup>112</sup> Deciding whether a partnership is formed is often a source of debate.<sup>113</sup> Among the factors to be considered are:

- (a) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not, by itself, establish a partnership, even if the coowners share profits made by the use of the property.
- (b) The sharing of gross returns does not, by itself, establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.
- (c) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment: 1. Of a debt by installments or otherwise; 2. [f]or services as an independent contractor or of wages or other compensation to an employee; 3. [o]f

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106. *Id.* § 608.407(6).

107. *Id.* ch. 620.

108. *Id.* § 620.1102(12).

109. *Id.* § 620.1104.

110. FLA. STAT. § 620.1104(1).

111. *Id.* § 620.8202.

112. *Id.* § 620.8202(1).

113. See Elizabeth R. Darby, *Relations Between Attorneys: When Does a Partnership Exist?*, 18 J. LEGAL PROF. 319, 319 (1993).

rent; 4. [o]f an annuity or other retirement benefit to a beneficiary, representative, or designee of a deceased or retired partner; 5. [o]f interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or 6. [f]or the sale of the goodwill of a business or other property by installments or otherwise.<sup>114</sup>

The *partnership agreement* is the central document in this form of business entity and “governs relations among the partners and between the partners and the partnership.”<sup>115</sup> Interestingly, “[t]o the extent the partnership agreement does not otherwise provide, this act governs relations among the partners and between the partners and the partnership.”<sup>116</sup> There are limits upon a partnership agreement.<sup>117</sup>

A partnership agreement may not: (a) Vary a limited partnership’s power . . . to sue, be sued, and defend in its own name; (b) Vary the law applicable to a limited partnership . . . ; (c) Eliminate the duty of loyalty of a general partner . . . ; (d) Unreasonably reduce the duty of care of a general partner . . . ; (e) Eliminate the obligation of good faith and fair dealing . . . .<sup>118</sup>

As mentioned previously, the decision to organize as a particular form of business entity is a very complex decision that involves considerations of day-to-day operations, management, control, taxation, etc.<sup>119</sup>

## VII. DEFINING SMALL BUSINESS CONCERN

According to 48 C.F.R. § 2.101, a “[s]mall business concern means a concern . . . that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 C.F.R. part 121.”<sup>120</sup> In order to help understand what this means, we will break the sentence down into four parts. The first portion will deal with defining *small*

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114. FLA. STAT. § 620.8202(3)(a)–(c).

115. *Id.* § 620.1110(1).

116. *Id.*

117. *See id.* § 620.1110(2).

118. *Id.* § 620.1110(2)(a), (b), (e), (f), (g).

119. A veteran may be well-advised to seek the assistance of counsel when deciding how to organize their business in Florida.

120. 48 C.F.R. § 2.101(b) (2012) (emphasis added).

*business concern*. The second portion will explain what it means to be *independently owned and operated*. The third portion will explain the concept of *dominance*. And lastly, we will explain the size qualifications for a small business.

#### A. Defining “Concern”

Title 48 offers very little insight as to what is meant by a *small business concern*.<sup>121</sup> Although defining *small business concern* as a “concern,” the VA does offer some guidance by cross referencing 13 C.F.R. § 121 to help us in gaining an understanding of what is meant by “concern.”<sup>122</sup> There, the SBA defines a concern as “a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.”<sup>123</sup> Additionally, the SBA explains that “[a] business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust, or cooperative.”<sup>124</sup> Special rules apply to joint ventures, limiting participation by foreign business entities to a maximum interest of 49%.<sup>125</sup>

Although each state has its own rules and regulations for creating the entities described above, for this article, we are only discussing those business concerns as they are defined by Florida law. Business entity is a term of art that is used in Florida law.<sup>126</sup>

#### B. Defining “Independently Owned and Operated”

As noted earlier, a veteran or service-disabled veteran must own 51% of the small business concern in order for the business entity to be considered a VOSB or SDVOSB.<sup>127</sup> If at any time after being verified, a transfer of an interest results in the majority ownership becoming anything less than 51%, then the business loses its veteran-owned status.<sup>128</sup> For corporations, veterans must independently own 51% of all issued stocks in order to qualify for

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121. *See id.*

122. *See id.*; *see also* 13 C.F.R. § 121.105(a)(1) (2013).

123. 13 C.F.R. § 121.105(a)(1) (2013).

124. *Id.* § 121.105(b).

125. *Id.*

126. *See* FLA. STAT. § 607.1108(1) (2012).

127. 38 C.F.R. § 74.1 (2012); *see supra* notes 46–47 and accompanying text.

128. *See* 38 C.F.R. § 74.3(e)(1), (4).

the benefits extended to a VOSB.<sup>129</sup> A complete listing of issued stocks of Florida corporations can be found on either the articles of incorporation or the latest annual report, made available as a public record by the State of Florida.<sup>130</sup>

The Center for Veterans Enterprise (CVE) has incorporated the 51% ownership requirements and included it as part of the meaning of *independently owned and operated*.<sup>131</sup> As mentioned earlier, the CVE requires veterans to “have direct and unconditional ownership of at least 51% of the small business” concern.<sup>132</sup> The veteran must manage the company, having sole control of its decision-making, “hold[ing] the highest officer position,” and, with but a few exceptions, have the highest compensation.<sup>133</sup> Lastly, the manager must have the “managerial experience [to] the extent . . . [necessary] to manage the company.”<sup>134</sup>

“Ownership must be direct.”<sup>135</sup> In other words, the veteran must own the share, not a business entity that is a VOSB or a SDVOSB.<sup>136</sup> Nor can a trust own the share, generally speaking.<sup>137</sup>

[O]wnership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a veteran or service-disabled veteran where the trust is revocable, and the veteran or service-disabled veteran is the grantor, a trustee, and the sole current beneficiary of the trust.

....

. . . Ownership by one or more veterans or service-disabled veterans must be *unconditional* ownership. Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing owner-

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129. *See id.* §§ 74.1, 74.3(b)(3). The same applies to SDVOSB concerns. *See id.* § 74.1 (defining SDVOSB).

130. FLA. DEP’T OF STATE, DIV. OF CORPS., <http://www.sunbiz.org> (last visited Apr. 21, 2013).

131. 48 C.F.R. § 2.101 (2012); *Verification Self Assessment Tool*, *supra* note 52.

132. *Verification Self Assessment Tool*, *supra* note 52.

133. *Id.*

134. *Id.*

135. 38 C.F.R. § 74.3(a) (2012).

136. *See id.*

137. *Id.*

ship benefits to go to another—other than after death or incapacity.<sup>138</sup>

Therefore any “arrangements causing or potentially causing ownership benefits to go to another—other than after death or incapacity” may disqualify the share.<sup>139</sup> The CVE has made it clear that the benefit of the share should go to the veteran or service-disabled veteran.<sup>140</sup> Restrictions on alienation may harm the price of the share, but a stock option or agreement between veteran and/or service-disabled veteran shareholders may protect the VOSB and SDVOSB.<sup>141</sup> But, any unexercised stock options or agreements held by non-veteran shareholders shall be considered as having already been exercised.<sup>142</sup>

Dividend distribution requires very strict guidelines such that 51% of the benefit belongs to the veteran or service-disabled veteran shareholders.<sup>143</sup>

One or more veterans or service-disabled veterans must be entitled to receive:

- (1) At least 51% of the annual distribution of profits paid to the owners of a corporate, partnership, or LLC applicant or participant;
- (2) At least 51% of the net profits earned by a joint venture in which the applicant or participant is the lead concern;
- (3) 100% of the value of each share of stock owned by them in the event that the stock is sold; and
- (4) At least 51% of the retained earnings of the concern and 100% of the unencumbered value of each share of stock owned in the event of dissolution of the corporation, partnership, or LLC.

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138. *Id.* § 74.3(a)–(b) (emphasis added).

139. *Id.* § 74.3(b).

140. *See* 38 C.F.R. § 74.3(b).

141. *See id.* § 74.3(c).

142. *Id.* “[A]ny unexercised stock options or similar agreements—including rights to convert non-voting stock or debentures into voting stock—held by non-veterans will be treated as exercised.” *Id.*

143. *Id.* § 74.3(d).



(5) An eligible individual's ability to share in the profits of the concern should be commensurate with the extent of his/her ownership interest in that concern.<sup>144</sup>

The CVE has indicated that change of ownership restrictions exist in all cases except death or incapacity agreement options.<sup>145</sup> Every time a change of ownership in any of the existing shares occurs, a new application must be submitted to the CVE to determine if the VOSB or SDVOSB retains its status.<sup>146</sup> If a shareholder agreement, marital agreement—premarital, divorce decree, or postnuptial agreements included—or other contract such as a buy-sell agreement is created such that the contract “substitute[s] one veteran owner for another [such veterans] shall submit a proposed novation agreement and supporting documentation . . . to the contracting officer<sup>147</sup> prior to the substitution or change of ownership for approval” is permitted.<sup>148</sup> In the event of a “death or incapacity due to a serious, long-term illness or injury of an eligible [shareholder], prior approval is not required, but the concern must file a new application with contracting officer and CVE within 60 days of the change.”<sup>149</sup> CVE verification is required each and every time a concern's shareholder transfers ownership to a new owner and before the award of any new contracts.<sup>150</sup>

Mere ownership is not enough.<sup>151</sup> Control must be retained by the owner of the share.<sup>152</sup> Such control does not simply mean the right to legally own or take profits derived from dividends of a stock.<sup>153</sup>

(a) Control means both the day-to-day management and long-term decision-making authority for the VOSB. Many persons share control of a concern, including each of those occupying the following positions: Officer, director, general partner, managing partner, managing member, and manager. In addition, key em-

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144. 38 C.F.R. § 74.3(d).

145. *Id.* § 74.3(e)(1)–(3).

146. *Id.* § 74.3(e)(1).

147. Contracting officer is the person responsible for determining which business entity is to be awarded a government contract. *See id.* § 74.3(e). Because verification is required before each time a contract is applied for by a VOSB and/or SDVOSB, the contracting officer needs to be aware of the “[c]ontinued eligibility” of the VOSB and/or SDVOSB. *See id.* § 74.3(e)(4).

148. 38 C.F.R. § 74.3(e)(2).

149. *Id.* § 74.3(e)(3).

150. *Id.* § 74.3(e)(4).

151. *See id.* § 74.4(b).

152. *Id.*

153. *See* 38 C.F.R. § 74.4(b).

employees who possess expertise or responsibilities related to the concern's primary economic activity may share significant control of the concern. CVE will consider the control potential of such key employees on a case-by-case basis.

(b) Control is not the same as ownership, although both may reside in the same person. CVE regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or participant's management and daily business operations must be conducted by one or more veterans or service-disabled veterans. Individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A veteran need not have the technical expertise or possess a required license to be found to control an applicant or participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, where a critical license is held by a non-veteran having an equity interest in the applicant or participant firm, the non-veteran may be found to control the firm.<sup>154</sup>

### C. *Understanding the Concept of "Dominance" and "Qualified Small Business"*

Eligibility is limited to "small businesses" and the VA has defined the test for determining if a business concern is a small business based on its dominance over the marketplace.<sup>155</sup> The VA explains that

[s]uch a concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration must be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.<sup>156</sup>

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154. *Id.* § 74.4(a)–(b).

155. 48 C.F.R. § 2.101.

156. *Id.*; *see also* 15 U.S.C. § 632 (2006 & Supp. IV); 48 C.F.R. § 19.102.

And although the VA provides this definition, it cross references 15 U.S.C. § 632 for purposes of defining dominance, allowing the SBA to determine what constitutes a small business concern based on each industry.<sup>157</sup> Once the SBA does this, it *qualifies* those small business concerns once it has cross-referenced the business's application with the standards it has created for each industry.<sup>158</sup>

But the SBA cannot arbitrarily or capriciously assign numbers and figures to decide what constitutes a small business concern; it must carefully consider all the appropriate factors including those enumerated.<sup>159</sup> This is especially true if what might constitute as small in one region is not necessarily small in another due to both geographical and financial considerations.<sup>160</sup> The esteemed Judge Gesell explains:

The Act does not specify that dominance is to be measured on a national scale and SBA may not limit its inquiry to promulgation of uniform national standards merely for convenience or because this approach may appear appropriate in the vast majority of cases. When most of the firms in an industry are regarded as being confined to a regional market by geographical and financial considerations, the small-business size standard cannot be one that gives a dominant firm in a regional market the preferred status of a small business.<sup>161</sup>

Even though the SBA may be required to evaluate a rational argument for a regional variation on its size standard when *qualifying* a business on a case-by-case basis, it still provides standards that essentially create a presumption of a small business.<sup>162</sup> Appealing an SBA determination of one's business as not being a *small business concern* in reliance on the "alternative

157. 48 C.F.R. § 2.101; *see* 15 U.S.C. § 632.

158. *See* 15 U.S.C. § 632; 48 C.F.R. § 2.101.

159. *See* Cal. Dredging Co. v. Sanders, 657 F. Supp. 38, 41 (D.D.C. 1986).

160. *Id.*

161. *Id.* (holding that a "size standard on a regional basis" should be considered as a "viable alternative to a nationwide size standard" and that "failure to do so . . . without rational explanation is arbitrary and an error of law").

162. *See* 13 C.F.R. § 121.201 (2013). The SBA appears unfazed by *California Dredging Co.*, describing its size standards by industry in absolute terms. *Compare* Cal. Dredging Co., 657 F. Supp. at 41, *with* 13 C.F.R. § 121.201.

The size standards described in this section apply to all SBA programs unless otherwise specified in this part. The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small.

13 C.F.R. § 121.201.

to . . . nationwide size standard” defined in *California Dredging Co. v. Sanders*,<sup>163</sup> should not be taken to the administrative courts.<sup>164</sup> There, the administrative court made it clear that it lacks jurisdiction to determine the constitutionality of SBA standards as the proper venue for such a case is the federal district courts.<sup>165</sup> Therefore, if a VOSB or a SDVOSB wishes to show that it should be qualified as a small business concern when the applicant concern/business entity is larger than the SBA allows, then the burden falls on them to disprove the SBA in federal district court by applying either the regional standard test or providing other factors that may persuade the federal district court judge of its small business concern status.<sup>166</sup>

#### VIII. VOLUNTARY AND INVOLUNTARY TRANSFERS OF SHARES

In the event that a veteran shareholder voluntarily transfers stocks by any means to a non-veteran, the business may lose its VOSB status unless after the transfer, veteran shareholders still own 51% of the issued stocks and the transfer of ownership was done in accordance to CVE and contract officer requirements.<sup>167</sup> Any number of veterans may own these shares, so long as at least 51% is owned by veterans or service-disabled veterans.<sup>168</sup> The right of a voluntary transfer of shares may be limited by a contract such as a shareholder agreement, a premarital agreement, or a postnuptial agreement, but it may not affect the veteran’s or service-disabled veteran’s benefits of owning shares.<sup>169</sup>

Involuntary transfers become slightly more complicated. Involuntary transfers occur when a shareholder must relinquish control of the shares in a corporation due to certain events.<sup>170</sup> Events such as death or divorce may require that the shareholder relinquish control, even if he or she does not want to.<sup>171</sup> The intestate death of a veteran shareholder—which means with-

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163. 657 F. Supp 38, 41 (D.D.C. 1986).

164. Terra Excavating, Inc., SBA No. SIZ-4785, 2006 WL 1668353, at \*3 (May 19, 2006).

165. *Id.* (noting that although the federal district courts hold jurisdiction, a proper showing of facts must be demonstrated as to why an alternative to the SBA’s guidelines must properly demonstrate a dilemma not dissimilar to that in *California Dredging Co.*).

166. *See id.* at \*3–4.

167. *See* 38 C.F.R. § 74.1(3) (2012).

168. *Id.*

169. *See id.* § 74.3(b).

170. *See, e.g., id.* § 74.3(e)(3).

171. *Id.*

out a valid and enforceable will—may result in such a transfer.<sup>172</sup> Also, the divorce of a veteran shareholder, where the divorce decree requires transfer of the shares to a non-veteran divorcee spouse, can also cause potential conflicts.<sup>173</sup> Both of these scenarios are the most likely to lead to litigation. To properly protect the VOSB and SDVOSB, agreements that limit transfers of shares should strongly be considered when forming the business entity.

#### A. *Documents Limiting Transfers of Shares*

There are several documents that can limit the transfer of shares. For the purposes of this article, we shall only discuss three. The shareholder agreement, the premarital and postnuptial agreements, and lastly, the will, are documents that will likely be used commonly among veterans that own shares in a VOSB or SDVOSB. The importance of 51% ownership cannot be stressed enough. Less than 51% ownership is always fatal to the VOSB and SDVOSB, and may terminate any and all chances of gaining the contractual benefit.<sup>174</sup> Therefore, each shall be discussed in detail for the purpose of clarifying issues that may arise either in business formation or in the everyday lives of veteran shareholders.

##### 1. Shareholder Agreements Between Shareholders of Corporations

Florida law specifically recognizes a shareholder's right to enter into a shareholders agreement with any other shareholder(s) of the same corporation.<sup>175</sup>

A shareholders agreement typically grants rights to those shareholders who are party to the agreement that are above and beyond the rights that are inherent in the shares that they own, and is intended to ensure that those shareholders obtain the benefits of the

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172. See, e.g., *Panzirer v. Deco Purchasing & Distrib. Co.*, 448 So. 2d 1197, 1199–1201 (Fla. 5th Dist. Ct. App. 1984) (showing how the absence of a will can result in a personal representative filing suit against a surviving spouse over ownership of shares, even if the shares were given as a gift inter vivos or delivered as part of a joint account).

173. See, e.g., *Steritech Grp., Inc., v. MacKenzie*, 970 So. 2d 895, 897 (Fla. 5th Dist. Ct. App. 2007) (showing how a divorce can result in an involuntary transfer of shares and how a shareholder agreement that is referenced on the face of a stock so transferred can bind both spouses to the shareholder agreement).

174. 38 C.F.R. § 74.3.

175. FLA. STAT. §§ 607.0731(1), .0732(1) (2012).

additional rights that they bargained for when making their investments.<sup>176</sup>

And although the language of one of the two Florida statutes that reference a shareholders agreement says “[t]wo or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose,” the use of the word “may” indicates that the agreement can, and often does, include specifically enforceable additional terms.<sup>177</sup> Such additional terms can restrict alienation,<sup>178</sup> putting subsequent purchasers on notice if the stock certificates indicate conspicuously either on their face or on the back of the certificate that the stockholder is bound to an existing shareholder agreement.<sup>179</sup> Customarily, such stocks merely mention that the bearer is bound by a shareholder agreement with the actual agreement being recorded in the corporation’s articles of incorporation or bylaws by the secretary.<sup>180</sup>

For these reasons, it is strongly recommended that the incorporators or subscribers for shares,<sup>181</sup> or all of the shareholders of a VOSB or SDVOSB, come together and create, approve, and record in the bylaws or articles of incorporation a binding shareholder agreement offering the right of first refusal<sup>182</sup> to other qualified veterans. Several measures can be taken. For ex-

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176. Corp. Law Comm. of the Ass’n of the Bar of the City of N.Y., *The Enforceability and Effectiveness of Typical Shareholders Agreement Provisions*, 65 BUS. LAW. 1153, 1155 (2009).

177. FLA. STAT. § 607.0731(1)–(2); *see id.* § 607.0732(1).

178. *See* FLA. STAT. §§ 607.0731(3), .0732(1)(h) (“An agreement among the shareholders of a corporation . . . is effective among the shareholders and the corporation . . . if it . . . [o]therwise governs . . . the relationship between the shareholders . . . and is not contrary to public policy.”). Like New York and Delaware, general restrictions against alienation will likely be seen by Florida’s courts as contrary to public policy. Corp. Law Comm. of the Ass’n of the Bar of the City of N.Y., *supra* note 176, at 1174.

179. FLA. STAT. §§ 607.0731(3), .0732(1)(h).

180. *See id.* §§ 607.01401(23), .0732(2)(a)1; *see also id.* § 607.0732(2)(a)1 (“An agreement [set forth] by this section shall be . . . approved by all persons who are shareholders at the time [of] the agreement . . .”). It is important to note that if more than 100 shareholders exist at the time the shareholder agreement is made, the agreement cannot restrict anything besides voting rights. *See id.* §§ 607.0731(1), .0732(1). *Compare id.* § 607.0732 (applying restrictions only to “this section”), *with* FLA. STAT. § 607.0731 (applying no such restriction). Also, if the “shares of the corporation are listed on a national securities exchange or regularly quoted in a market maintained by one or more members of a national or affiliated securities association,” then the “agreement [shall] cease[] to be effective” and the “board of directors may . . . adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.” *Id.* § 607.0732(4).

181. *Id.* § 607.0732(7).

182. *See id.* § 607.0732(2)(a)1. The right of first refusal is often used in property law to indicate the right of a named person to purchase property before it is offered for sale by its

ample, a right of first refusal where the corporation has the right to acquire the shares based on whatever good faith offer is presented to the veteran would allow the corporation to buy back its interests.<sup>183</sup> Another way, a better way, is for a current shareholder to offer a right of first refusal to all existing qualifying veteran shareholders of the corporation, thereby allowing the corporation to retain its VOSB or SDVOSB status.<sup>184</sup> Remember, a restriction on alienation requiring the selling shareholder to sell or transfer the share only to a known and verified qualified veteran shareholder will not be

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current owner to a willing buyer. *See* Corp. Law Comm. of the Ass'n of the Bar of the City of N.Y., *supra* note 176, at 1178. For securities law, the New York Bar provides us with a clear definition. *See id.*

A *right of first refusal* (a "ROFR") requires a shareholder that desires to sell its shares to present an offer made by a potential purchaser that it proposes to accept to the other shareholders and/or the corporation, who then have an opportunity to purchase the shares at the same price and terms. In contrast, a *right of first offer* (a "ROFO") requires the selling shareholder to first solicit offers from the other shareholders and/or the corporation, and if the selling shareholder prefers to seek higher offers from third parties, it may do so, but it may not sell the shares to a third party at a lower price or on other terms that are less favorable to the selling shareholder than those offered by the other shareholders and/or the corporation.

*Id.* A ROFR is more likely to be allowed by the CVE when getting verified because it is beneficial to the veteran as it puts the onus of pricing on the third party purchaser.

183. *See, e.g.,* Steinberg v. Sachs, 837 So. 2d 503, 505 (Fla. 3d Dist. Ct. App. 2003) ("[A] right of first refusal is a right to elect to take specified property at the same price and on the same terms and conditions as those continued in good faith offer by a third person if the owner manifests a willingness to accept the offer." (quoting Coastal Bay Golf Club, Inc. v. Holbein, 231 So. 2d 854, 857 (Fla. 3d Dist. Ct. App. 1970))).

That right is clearly an executory right. By its very nature then, a right of first refusal would never contain specific terms such as price because the terms are always dictated by the third party whose offer the holder of the right of first refusal is bound to match in all essential details.

*Id.* (citing *Holbein*, 231 So. 2d at 857). But beware the percentage. If a corporation buys back its shares, existing shareholders run the risk of losing their VOSB and SDVOSB status if the final percentage of veteran or service-disabled veteran ownership falls below 51% of the outstanding shares. 38 C.F.R. § 74.1 (2012).

184. *See id.* (defining ownership interest in a SDVOSB as "a business not less than 51% of which is owned by one or more service-disabled veterans" and the ownership interest in a VOSB as "a small business concern that is not less than 51% owned by one or more veterans."). It is strongly urged that when drafting the shareholder agreement, all interested parties consult an attorney as failure to properly word a shareholder agreement can lead to the unenforceability of notice requirements and possibly a flawed right of first refusal. *See* Burns v. Barfield, 732 So. 2d 1202, 1204-05 (Fla. 4th Dist. Ct. App. 1999). Also, keep in mind that stock options held by another veteran or service-disabled veteran are protected so long as they are agreements between qualifying shareholders. "In determining unconditional ownership, CVE will disregard any unexercised stock options or similar agreements held by veterans or service-disabled veterans." 38 C.F.R. § 74.3(c).

allowed.<sup>185</sup> The veteran and service-disabled veteran should feel comfortable in knowing that he or she has the right to sell her shares too.<sup>186</sup>

If a corporation would like to buy back its shares under a right of first refusal, Florida law does allow the intended and named VOSB or SDVOSB third-party beneficiary the right to file a claim for breach of contract against the selling shareholder, the buying shareholder, or both.<sup>187</sup> The fact that the buyer takes the stock certificate subject to the agreement puts the buyer on notice of the specifically enforceable agreement.<sup>188</sup> And because preparing such an agreement in this way would designate the VOSB or SDVOSB as a named and intended third party beneficiary, both the *contract breaching buyer* and the *noticed seller* may be required to either rescind or pay damages as defined in the shareholder agreement.<sup>189</sup> Inconsistencies between the shareholder agreement and the bargained for exchange between the seller and the buyer will likely be controlled by the shareholder agreement because the buyer takes in the stock's purchase agreement *subject to* the noticed shareholder agreement.<sup>190</sup>

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185. See Corp. Law Comm. of the Ass'n of the Bar of the City of N.Y., *supra* note 176, at 1176; see also 38 C.F.R. § 74.3(b).

186. See 38 C.F.R. § 74.3(b).

187. See *Harrington v. Batchelor*, 781 So. 2d 1133, 1135 (Fla. 3d Dist. Ct. App. 2001) (holding that where no shareholder agreement exists, a shareholder lacks standing and damages sustained may only be claimed by the corporation, but where there is "a contractual duty, between the wrongdoer and the shareholder," a "party to a contract may sue for its breach"). When we combine the idea that a contractual duty allows one shareholder to sue another shareholder where both are bound by an existing shareholder agreement, *id.*, with the principle that a named intended third party beneficiary may file a claim to specifically enforce the terms of an agreement, *Fla. Power & Light Co. v. Road Rock, Inc.*, 920 So. 2d 201, 203 (Fla. 4th Dist. Ct. App. 2006), both a named and intended third party beneficiary corporation and a shareholder bearing a stock certificate which conspicuously display the existence of a shareholder agreement, may specifically enforce that shareholder agreement against the bearer of any other stock certificate which also conspicuously displays the existence of the same shareholder agreement, as long as the shareholder agreement itself meets the requirements of sections 607.0731 and .0732 of the *Florida Statutes*.

"A third party is an intended beneficiary, and thus able to sue on a contract, only if the parties to the contract intended to primarily and directly benefit the third party." "[I]n order to find the requisite intent, it must be shown that *both* contracting parties intended to benefit the third party. It is insufficient to show that only one party unilaterally intended to benefit the third party." "Florida law looks to the 'nature or terms of the contract' to find the parties' clear or manifest intent that it 'be for the benefit of a third party.'" Furthermore, Florida law holds that "the language used in a contract is the best evidence of the intent and meaning of the parties."

*Road Rock, Inc.*, 920 So. 2d at 203 (alteration in original) (citations omitted).

188. FLA. STAT. §§ 607.0731(2)–(3), .0732(3) (2012).

189. See *id.*

190. See *id.* § 607.0731(3); *Baker v. Maytag*, 207 So. 2d 300, 303 (Fla. 3d Dist. Ct. App. 1968).



## 2. Premarital and Postmarital Agreements

Marriage and the dissolution of the marriage may cause a conflict with the VOSB and SDVOSB status of a small business concern.<sup>191</sup> Therefore, in order to protect the contractual rights of these entities, a brief discussion on pre-nuptial and post-nuptial agreements is in order. After all, the last thing a shareholder wants is to have his or her shares devalued because the small business concern no longer qualifies to receive a preference on government contracts due to the termination of its VOSB and SDVOSB status. Additionally, because Florida is an equitable distribution state, absent an agreement, the courts may decide to divide shares in the corporation, transferring shares owned by a qualifying veteran or service-disabled veteran to a non-qualifying veteran or non-veteran spouse in the event of a marital dissolution. Prudence dictates that the right to contract be executed by a veteran or service-disabled veteran spouse upon the creation, or the receipt of, shares in a VOSB or SDVOSB.

Although Florida now recognizes the right of a wife to enter into a binding contract with her husband, this was not always the case.<sup>192</sup> In 1903, Justice Hocker explained, “[a]t the common law a man and wife could make no contract with each other, and their contracts are nullities.”<sup>193</sup> Post-nuptial agreements were recognized only in rare circumstances, and only to the extent that equity demanded.<sup>194</sup> But Florida’s legislature grew to understand the importance of a woman’s right to contract with her husband and, as of 1970, a wife has every enforceable right to contract with her husband as a husband has to enter into a binding contract with his wife.<sup>195</sup>

In order for a post-nuptial agreement to be enforceable, “there must be an agreement that shows there was a meeting of the minds that is supported

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“When an agreement is evidenced by two or more writings, the writings must be construed together. This rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days, but concerning the same subject matter, may under some circumstances be regarded as one contract and interpreted together. Where a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other. But where a variety of instruments form one transaction, the law will not give effect to any one instrument unless the whole transaction is completed.”

*Baker*, 207 So. 2d at 303 (quoting 7 FLA. JUR. *Contracts* § 78, at 144–45 (1956)).

191. See 38 C.F.R. § 74.1.

192. Compare *Fritz v. Fernandez*, 34 So. 315, 319 (Fla. 1903), with FLA. STAT. § 708.09.

193. *Fritz*, 34 So. at 319.

194. *Id.*

195. See FLA. STAT. § 708.09; Act effective Oct. 1, 1970, ch. 70-4, § 3, 1970 Fla. Laws 66, 68 (codified at FLA. STAT. § 708.09 (1970)).

by consideration.”<sup>196</sup> And unless the agreement is read into the record officially before the court, the agreement should be evidenced by a writing or it may run afoul of the writing requirements created at common law.<sup>197</sup> Also, “a spouse may set aside or modify an agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching.”<sup>198</sup> Florida’s courts further explain that

agreements entered into between the parties, acting without counsel and without full and fair disclosure of the parties’ assets, should be viewed with skepticism. This is all the more true when the parties enter[ed] into an oral settlement agreement years before the divorce, and later reconcile[d] after agreeing to its terms.<sup>199</sup>

Therefore, if any of these mental states exist by the challenging spouse, a presumption exists that the agreement was not entered into voluntarily and is therefore voidable by the challenging spouse.<sup>200</sup> In order to defeat this presumption, a showing of “either (a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement . . . or (b) a general and approximate knowledge by the challenging spouse of the character and [the] extent of the marital property sufficient to obtain a value by reasonable means.”<sup>201</sup>

Many of these same terms and conditions are thoroughly detailed and codified for premarital agreements.<sup>202</sup> “A premarital agreement must be in

196. 25A FLA. JUR. 2D *Family Law* § 612, at 148 (2010) (citing *Morange v. Morange*, 722 So. 2d 918, 920 (Fla. 2d Dist. Ct. App. 1998); *Loss v. Loss*, 608 So. 2d 39, 41–42 (Fla. 4th Dist. Ct. App. 1992) (per curiam); *Hieber v. Hieber*, 151 So. 2d 646, 649 (Fla. 3d Dist. Ct. App. 1963)); see also *Morange*, 722 So. 2d at 920 (“[T]o be judicially enforceable, a [post-nuptial] settlement agreement must be sufficiently specific and mutually agreeable regarding every essential element. The party seeking enforcement of the settlement has the burden of establishing a meeting of the minds or mutual reciprocal assent to a certain proposition by competent substantial evidence.”).

197. See *Morange*, 722 So. 2d at 920 (citing *Long Term Mgmt., Inc. v. Univ. Nursing Care Ctr., Inc.*, 704 So. 2d 669, 673 (Fla. 1st Dist. Ct. App. 1997)); see also *Loss*, 608 So. 2d at 41–42.

198. *Matos v. Matos*, 932 So. 2d 316, 320 (Fla. 4th Dist. Ct. App. 2006) (citing *Casto v. Casto*, 508 So. 2d 330, 333 (Fla. 1987)) (“[T]he challenging spouse may have the agreement set aside by establishing ‘that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties.’”).

199. *Id.*

200. See *Macar v. Macar*, 803 So. 2d 707, 710–11 (Fla. 2001) (quoting *Casto*, 508 So. 2d at 333).

201. *Id.* at 711 (quoting *Casto*, 508 So. 2d at 333).

202. Compare, e.g., FLA. STAT. § 61.079(7)(a)2 (2012), with *Matos*, 932 So. 2d at 320 (citing *Casto*, 508 So. 2d at 333).

writing and signed by both parties. It is enforceable without consideration other than the marriage itself.”<sup>203</sup>

(a) Parties to a premarital agreement may contract with respect to:  
 1. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located; 2. The right to buy, sell, use, transfer, exchange, . . . assign . . . property; [and] 3. The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event . . . .<sup>204</sup>

Additional consideration beyond the marriage itself is not necessary and “[a] premarital agreement becomes effective upon marriage of the parties.”<sup>205</sup> Lastly,

[a] premarital agreement is not enforceable . . . if the party against whom enforcement is sought proves that: 1. The party did not execute the agreement voluntarily; 2. The agreement was the product of fraud, duress, coercion, or overreaching; or 3. The agreement was unconscionable when it was executed and, before execution of the agreement, that party: a. Was not provided a fair and reasonable disclosure of the property . . . of the other party; b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property . . . of the other party beyond the disclosure provided; and c. Did not have, or reasonably could not have had, an adequate knowledge of the property . . . of the other party.<sup>206</sup>

For the above reasons, a spousal agreement—whether signed before or during the marriage—should be drafted by attorneys representing both parties after all parties offer full and fair disclosure regarding not only the VOSB and the SDVOSB share value, but all other assets held at the time by both spouses. A full and accurate statement on the financial health of the VOSB/SDVOSB as of the date of the agreement should be provided to both parties, and, in the event that either spouse does not understand the financial statements, their attorneys should take the time to explain these statements to their respective spousal clients. Each spouse should sign the document in the presence of their respective attorneys, and not in the presence of the other, to avoid even the appearance of fraud, deceit, duress, coercion, misrepresenta-

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203. FLA. STAT. § 61.079(3).

204. *Id.* § 61.079(4)(a)1–3.

205. *Id.* § 61.079(5).

206. *Id.* § 61.079(7)(a).

tion, or overreaching. Both parties should also agree upon a right of first refusal being offered to existing veteran or service-disabled shareholders in order to protect the VOSB and SDVOSB status of the business. Normally, valuation of the shares is important and should be as close to fair market value at the time of the transfer of the shares as possible, thereby avoiding the appearance of unconscionability. Failure to have a valuation agreement that both spouses can agree to at the time of the marital agreement, where the purchaser is the veteran spouse and/or existing veteran/service-disabled veteran, may lead to further litigation during a divorce. The goal should be to keep the veteran's benefits as protected as possible. The benefits of the VOSB and SDVOSB are intended for the veteran, not the divorced spouse.<sup>207</sup>

An important note, although Florida has not directly decided this issue: If the shareholder agreement and a premarital/postnuptial agreement are to be drafted together as one in the same—an idea the authors strongly discourage—the parties should take great care to ensure that all the elements of both (a) the premarital/postnuptial agreement, and (b) the shareholder agreement are met as defined at common law and in sections 61.079 and 607.0732 of the *Florida Statutes* respectively.<sup>208</sup>

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207. See 38 C.F.R. § 74.1 (2012) (including the definition of surviving spouse but not including the definition of divorced spouse); 48 C.F.R. § 802.101 (including the definition of surviving spouse but not including the definition of divorced spouse).

208. FLA. STAT. §§ 61.079, 607.0732; *Morange v. Morange*, 722 So. 2d 918, 920 (Fla. 2d Dist. Ct. App. 1998) (citing *Long Term Mgmt., Inc. v. Univ. Nursing Care Ctr., Inc.*, 704 So. 2d 669, 673 (Fla. 1st Dist. Ct. App. 1997)); see, e.g., *Darr v. Marine Elecs. Solutions, Inc.*, 96 So. 3d 527, 533–34 (La. Ct. App.), *cert denied*, 98 So. 3d 860 (La. 2012) (holding by a Louisiana appellate court with roots in civilian law interpreting a matter of Florida law by claimants within Louisiana's jurisdiction); see also *supra* Parts III, IV, and accompanying text.

Under Florida law, a shareholders' agreement is "a written agreement that is signed by all persons who are shareholders at the time of the agreement and such written agreement is made known to the corporation." Implicit in this statute is the requirement that the persons signing the agreement are signing the agreement "as shareholders" of the corporation. . . . [P]laintiff [has the] burden of proving that plaintiff and [the defendant spouse] signed the [marriage settlement agreement (MSA)] "as shareholders" of the corporations. . . . [If] they signed the MSA in their individual capacities as part of settling various matters involved in their divorce proceeding, . . . mere knowledge of the existence of the MSA by plaintiff and [the defendant spouse], without more, does not transform the MSA into a shareholders' agreement.

*Darr*, 96 So. 3d at 533–34 (citation omitted). Although two separate agreements should be drafted in order to ensure that each element is met, the agreements should reference the other and incorporate the content of the other in order to protect the integrity of both agreements. Great care should be taken to ensure that neither agreement contradicts the other and that the language is clear and unambiguous.

### 3. Wills, Intestacy, and Share Transfers upon Death

Both VOSB and SDVOSB security interests may be transferred upon death to either named beneficiaries in a will—known as devisees—or heirs to inherit through Florida’s intestacy laws if the estate is resolved in Florida.<sup>209</sup> If the decedent veteran owned a security interest in a VOSB, then the qualification of the VOSB may terminate if a subsequent titleholder is *not* a qualifying veteran.<sup>210</sup> This includes unqualified non-veteran personal representatives, devisees, and/or any heirs at law, including some spouses.<sup>211</sup>

In Florida, as with many states, when a person dies intestate—that is without a valid will—their property is delivered to the decedent’s heirs by the personal representative as required by state law.<sup>212</sup> A personal representative is a middle man who administers the estate of the decedent.<sup>213</sup> In essence, he or she takes possession in trust of the decedent’s real or personal property only to transfer legal title of the decedent’s property to the heirs of the deceased.<sup>214</sup> Intestate personal property to be so distributed includes any security ownership interest of business entities registered in Florida.<sup>215</sup> When a person dies testate, that is, with a valid will, the personal representative must deliver the ownership interest to the named beneficiary, or, if no beneficiary is named, to the testator’s heirs, unless a beneficiary of the residuary is named in the will.<sup>216</sup>

We choose to reference the personal representative because when he or she takes possession of the stock from the decedent, he or she becomes the legal owner of the stock until it is delivered to the beneficiary heir or devisee.<sup>217</sup> When this happens, ownership may fall beneath 51%, and therefore, result in the failure of the business entity to qualify as a VOSB.<sup>218</sup> One way to avoid this problem is to have the personal representative be a *qualifying*

209. FLA. STAT. § 731.201(11), (20); *id.* §§ 732.101, .605.

210. *See* 38 C.F.R. § 74.3(e)(1), (4).

211. *See id.* § 74.1.

212. FLA. STAT. §§ 731.201(28), 732.101–.103, 733.602.

213. *Id.* § 731.201(28) (referring to personal representatives as having alternative names in case law such as “an administrator, administrator cum testamento annexo, administrator de bonis non, ancillary administrator, ancillary executor, or executor”); *see also id.* § 733.301.

214. *Campbell v. Owen*, 132 So. 2d 212, 215 (Fla. 2d Dist. Ct. App. 1961) (quoting *Whitfield v. Whitfield*, 172 So. 711, 712 (Fla. 1937) (per curiam)); *see also* FLA. STAT. § 731.201(28).

215. FLA. STAT. §§ 731.201(32), 732.605(1).

216. *See id.* §§ 731.201(2), (11), (28), 732.101(1).

217. *Campbell*, 132 So. 2d at 215 (quoting *Whitfield*, 172 So. at 712) (“[A]n administrator stands in the position of a trustee holding the estate in trust for the heirs, distributees and creditors . . .”).

218. *See* 38 C.F.R. § 74.3(b)(1)–(3) (2012).

*veteran* by either expressly naming a personal representative that qualifies or by directing the court, through the will, to appoint a qualifying veteran as the personal representative.<sup>219</sup> And although “the probate court has the inherent authority to consider a person’s character, ability, and experience to serve as personal representative,”<sup>220</sup> naming a qualified veteran or directing the court to choose a qualified veteran may be the best and most prudent advice we can give.

In Florida, a validly executed will requires a testator—the person whose property is being devised in the will—or a person directed by the testator in the presence of the testator, to sign at the end of the writing—Florida interprets this to mean the logical end, not necessarily the bottom of the document—before two witnesses who must sign in the presence of the testator and the presence of each other.<sup>221</sup> For a will to be valid, the testator must be of sound mind and must be either 18 years old or an emancipated minor.<sup>222</sup>

#### IX. CONCLUSION

In closing, becoming a VOSB or SDVOSB can become rather complicated. To ensure that your business is protected, it is strongly advised that those interested in creating a business concern with these benefits seek out the assistance of counsel to aid in the formation of their business and the verification process of the VOSB and SDVOSB. After honorably serving our country, our nation owes veterans and their families a great deal. Congress has decided to create laws that give preference in contracts to veterans.<sup>223</sup> These contractual benefits can make for excellent business opportunities for shareholders. Our hope is that veterans will avail themselves of these benefits in Florida, as there can be few things more appealing to Floridians than welcoming veterans with an entrepreneurial spirit.

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219. *See id.* § 74.3(e)(1).

220. *DeVaughn v. DeVaughn*, 840 So. 2d 1128, 1133 (Fla. 5th Dist. Ct. App. 2003).

221. FLA. STAT. § 732.502; *Bradley ex rel. Bradley v. Bradley*, 371 So. 2d 168, 170 (Fla. 3d Dist. Ct. App. 1979).

222. FLA. STAT. § 732.501.

223. *See, e.g.*, 38 U.S.C. § 8127 (2006 & Supp. IV).



## AN OVERVIEW OF COMBAT-RELATED POSTTRAUMATIC STRESS DISORDER (PTSD)

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### ABSTRACT

The wars in Afghanistan and Iraq have posed unique challenges to U.S. military personnel and their families. Among them are concerns about the adverse psychological effects of combat and military-related trauma on our returning service men and women, their families, and their communities. In this article, we provide an overview of combat-related posttraumatic stress disorder (PTSD). The learning objectives are to: 1) Gain an understanding of the diagnostic criteria for PTSD; 2) gain knowledge regarding the prevalence of war trauma and combat-related PTSD; and 3) increase awareness of co-morbid psychiatric disorders and common impairments in functioning and quality of life among active duty military personnel and veterans with PTSD. The discussion will also focus on increasing knowledge about the risk and resilience factors associated with the development and course of PTSD, factors that promote recovery from PTSD, and available treatment options.

### I. INTRODUCTION

The Global War on Terror (GWOT) was the umbrella term used by the U.S. government for counterterrorism military actions that began on or after the September 11, 2001 attacks on the United States.<sup>1</sup> The official name for

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the war in Afghanistan is Operation Enduring Freedom (OEF), and the war in Iraq is officially termed Operation Iraqi Freedom (OIF).<sup>2</sup> These terms also included a number of smaller military conflicts, including supportive counterterrorism operations in other areas of the world.<sup>3</sup> On September 1, 2010, the war in Iraq acquired a new moniker, Operation New Dawn (OND), designed to coincide with the change of mission in Iraq from an active counterinsurgency role to one of active support of the Iraqi military.<sup>4</sup> On December 15, 2011, the Iraq War was officially declared over by U.S. Defense Secretary Leon Panetta.<sup>5</sup> The war in Afghanistan continues to the present day. In January 2013, “President Barack Obama, after meeting with President Hamid Karzai of Afghanistan, [released a joint statement] that the [U.S.] would be able to accelerate the withdrawal of troops from Afghanistan in [the] coming months because of gains made by Afghan security forces.”<sup>6</sup>

For many returning service members and their families, surviving war represents but one of the myriad of challenges associated with deployment. Military personnel involved in operations associated with the GWOT may have confronted difficulties associated with the current structure of U.S. military forces and defense needs of the country. Recent changes include the decreasing size of the U.S. Armed Forces.<sup>7</sup> For example, “[d]uring the period of Operation Desert Storm . . . approximately 750,000 [active] service members” comprised the U.S. Army.<sup>8</sup> “This number decreased to its current number of just fewer than 500,000 [active] personnel by the mid 1990s, its

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1. See Rod Powers, *Global War on Terrorism Medals*, ABOUT.COM, <http://www.usmilitary.about.com/od/medalsanddecs/1/blwotmedals.htm?p=1> (last visited Apr. 21, 2013).

2. See Jarod Perkioniemi, *Army NCO History (Part 9): OEF, OIF and the Future of the NCO*, WWW.ARMY.MIL (Mar. 11, 2009), <http://www.army.mil/article/18051/army-nco-history-part-9-oef-oif-and-the-future-of-the-nco/>.

3. See *id.*

4. *New Name for Iraq War: Operation New Dawn*, ARMYTIMES (Feb. 19, 2010, 7:19 PM), [http://www.armytimes.com/news/2010/02/military\\_new\\_dawn\\_gates\\_021810w](http://www.armytimes.com/news/2010/02/military_new_dawn_gates_021810w) (copy on file with *Nova Law Review*).

5. Thom Shanker et al., *In Baghdad, Panetta Leads Uneasy Moment of Closure to a Long Conflict*, N.Y. TIMES, Dec. 16, 2011, at A19; Tom Vanden Brook, *U.S. Formally Declares End of Iraq War*, USA TODAY, <http://usatoday30.usatoday.com/news/world/iraq/story/2011-12-15/Iraq-war/51945028/1> (last updated Dec. 15, 2011).

6. Mark Landler, *Obama: Troops' Exit Can Rev Up*, COLUMBUS DISPATCH (Jan. 12, 2013, 9:33 AM), [http://www.dispatch.com/content/stories/national\\_world/2013/01/12/obama-troops-exit-can-rev-up.html](http://www.dispatch.com/content/stories/national_world/2013/01/12/obama-troops-exit-can-rev-up.html).

7. NAT'L CTR. FOR POST-TRAUMATIC STRESS DISORDER, DEPT. OF VETERANS AFFAIRS, *IRAQ WAR CLINICIAN GUIDE 4–5* (2d ed. 2004), available at [http://www.ptsd.va.gov/professional/manuals/manual-pdf/iwcf/iraq\\_clinician\\_guide\\_v2.pdf](http://www.ptsd.va.gov/professional/manuals/manual-pdf/iwcf/iraq_clinician_guide_v2.pdf).

8. *Id.*

smallest size since the beginning of World War II.”<sup>9</sup> With the number of military personnel significantly reduced, “the tempo of operations (OPTEMPO)” or frequency and intensity of assigned missions—both war and operations other than war—has increased, leading many service members to “deploy to unaccompanied overseas assignments repeatedly during their careers.”<sup>10</sup>

The challenges inherent in repeated deployments may be exacerbated by the large Guard and Reservists composition of the U.S. Armed Forces.<sup>11</sup> Whereas active duty personnel generally “deploy with the units with whom they train and . . . [their] families . . . [reside in] established military communities (bases and posts),” Guard and Reserve members may be assigned to unfamiliar units and leave their families behind without the resources and support afforded by a military base.<sup>12</sup> Compounding these challenges, Guard and Reserve members may face “loss of civilian employment” and financial repercussions as a result of multiple deployments.<sup>13</sup>

For all military personnel, deployment may be associated with “different forms or expressions of stress” depending on how well they adjust to the various stressors that occur during the different phases of deployment (i.e., prior, during, and after) and the types of conflict encountered overseas.<sup>14</sup> For example, prior to deployment, military personnel may face worry concerning planning for a prolonged absence and uncertainty concerning their departure date as deployment orders often change.<sup>15</sup> During this phase of pre-deployment, the reality of having to leave family and transition to a combat environment may set in, and mental health practitioners may have difficulty differentiating a normal stress reaction from “the development or recurrence of [a] psychiatric” disorder.<sup>16</sup> During the deployment phase, the stressors associated with pre-deployment can be compounded by the types of conflict encountered during deployment.<sup>17</sup> Types of conflict can range from low intensity combat, in which combat occurs intermittently—as in peace keeping missions—to high intensity combat, where other strains are more pervasive such as extremes of “family separation, . . . harsh living conditions, ex-

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9. *Id.* at 5.

10. *Id.* at 7.

11. *See id.* at 6.

12. NAT’L CTR. FOR POST-TRAUMATIC STRESS DISORDER, DEP’T OF VETERANS AFFAIRS, *supra* note 7, at 7.

13. *Id.*

14. *Id.* at 7–8.

15. *Id.* at 7.

16. *Id.* at 7–8.

17. *See* NAT’L CTR. FOR POST-TRAUMATIC STRESS DISORDER, DEP’T OF VETERANS AFFAIRS, *supra* note 7, at 8.

tremely long duty hours with little [opportunity for rest, . . . reduced] communication with the outside world, and boredom.”<sup>18</sup> Moreover, many of the challenges encountered in operations in Iraq and Afghanistan have been unprecedented.<sup>19</sup>

Unlike previous conflicts where [noncommissioned officers (NCOs)] were leading [individuals] against another nation’s Army, they now found themselves fighting against individuals, who were not wearing a distinctive uniform, but blended themselves into the crowd, making it harder to distinguish who was a threat. Urban guerilla warfare also became a prominent means of combat as raids and attacks were carried out placing NCOs in the midst of heavily populated areas, surrounded by noncombatants.<sup>20</sup>

The uncertainty of distinguishing enemy forces from companions and civilians may exacerbate the inherent fear and intensity of warfare and is highly conducive to the development of acute stress reactions and the development of PTSD.<sup>21</sup> Whereas experiencing a stress response in combat is adaptive in that it prepares the individual to face threat,<sup>22</sup> the development of a psychiatric disorder ensues, in part, when the body’s stress response persists long after the stressor or life threatening situation has ended.<sup>23</sup>

The stress response is a coordinated set of interactions among multiple organ systems in the body—including the brain, gut, heart, liver, immune system, thyroid, adrenals, pituitary, gonads, bone, and skin—that prepares the body for action, i.e., “fight or flight” in response to an acute stressor.<sup>24</sup> Typically, the acute stress response subsides after the stressor has ended and the body returns to its normal state.<sup>25</sup> However, a chronic stress response can develop, as in the diagnosis of PTSD, in which the individual lives in a chronic state of heightened arousal that can result in subjective feelings of anxiety and diminished control.<sup>26</sup> Research supports that “PTSD may be associated with stable neurobiological alterations in both the central and au-

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18. *Id.*

19. *See* Perkioniemi, *supra* note 2.

20. *Id.*

21. *See* NAT’L CTR. FOR POST-TRAUMATIC STRESS DISORDER, DEP’T OF VETERANS AFFAIRS, *supra* note 7, at 8.

22. *See id.* at 23.

23. *Id.* at 11–12.

24. *See id.*; Terry Hurley, *Physiological Responses to Stress*, LOVE TO KNOW, [http://stress.lovetoknow.com/physiological\\_responses\\_to\\_stress](http://stress.lovetoknow.com/physiological_responses_to_stress) (last visited Apr. 21, 2013).

25. NAT’L CTR. FOR POST-TRAUMATIC STRESS DISORDER, DEP’T OF VETERANS AFFAIRS, *supra* note 7, at 23.

26. *See id.* at 12.

tonomic nervous systems” including most brain mechanisms related to the survival response.<sup>27</sup>

## II. DIAGNOSIS OF PTSD

PTSD first appeared in the Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM-III) in 1980.<sup>28</sup> However, observations concerning chronic stress reactions in response to war have occurred early in the history of human conflict. For example, in *Achilles in Vietnam*, author Jonathon Shay, M.D., examines the psychological effects of war by comparing the experiences of Vietnam veterans diagnosed with PTSD to Homer’s account of Achilles’ experiences in the *Iliad*, a literary work “composed . . . twenty-seven centuries ago.”<sup>29</sup> More recent descriptions of PTSD reactions were also noted during the Civil War (Soldier’s Heart) and described by the event that caused them, such as World Wars I and II (e.g., Railroad Syndrome, Shell Shock and Traumatic Neurosis, Survivor Syndrome).<sup>30</sup> In the current Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, PTSD is diagnosed based on several criteria.<sup>31</sup> Unlike other psychiatric disorders that appear in the DSM-5, PTSD is unique—with the exception of Acute Stress Disorder<sup>32</sup>—in that a severe and identifiable environmental stressor must precipitate the onset of symptoms.<sup>33</sup> Criterion A stipulates the following: Exposure to actual or threatened death, serious injury, or sexual violence” through direct experience, witnessing in-person, learning of the violent or accidental death of family or a close friend, or experiencing repeated or extreme exposure to aversive details of the traumatic events.<sup>34</sup>

The second criterion, B, concerns the experience of reliving the traumatic event.<sup>35</sup> The DSM-IV-TR stipulates the presence of one (or more) of the following intrusion symptoms:

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27. *PTSD Frequently Asked Questions*, MILITARY.COM, <http://www.military.com/benefits/veterans-health-care/ptsd-frequently-asked-questions.html> (last visited Apr. 21, 2013).

28. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236–39 (3d ed. 1980).

29. JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER*, at xiii (1994).

30. See I.S. PARRISH, *MILITARY VETERANS PTSD REFERENCE MANUAL* § II (rev. ed. 2008), <http://www.ptsdmanual.com/chap1.htm>.

31. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 143–49 (5th ed.) [hereinafter DSM-V].

32. *Id.*

33. *See id.*

34. *Id.* at 143.

35. *Id.* at 144.

1) Recurrent, involuntary, and intrusive distressing memories of the traumatic event(s); 2) recurrent distressing dreams in which the content and/or affect of the dream are related to the traumatic event(s); 3) Dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event(s) were recurring; 4) Intense prolonged psychological distress at exposure to internal or external cues that symbolize or resemble aspects of the traumatic event(s); marked physiological reactions to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).<sup>36</sup>

Individuals with PTSD often experience multiple manifestations of the symptoms described in Criterion B.<sup>37</sup> These symptoms depict the experience of being tormented by vivid and unwelcome internal experiences surrounding the traumatic event with the concomitant physiological (e.g., racing heart) and psychological distress (e.g., feelings of horror, or guilt) aroused by traumatic cues.<sup>38</sup> For some individuals with PTSD, intrusion symptoms can extend to psychotic episodes (flashbacks) in which the person loses grip on current reality and misperceives and acts as if he/she is literally re-living the traumatic experience.<sup>39</sup>

The third criterion, C—persistent avoidance—concerns the pervasive efforts that people with PTSD engage in to cope with the significant distress and disruption caused by re-experiencing symptoms.<sup>40</sup> To be diagnosed with PTSD, the individual must endorse one or both of the symptoms of “[p]ersistent avoidance of stimuli associated with the traumatic event(s), beginning after the traumatic event(s) occurred” as indicated by:

1) Avoidance of or efforts to avoid distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s);  
2) Avoidance of or external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).<sup>41</sup>

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36. DSM-V, *supra* note 31, at 144.

37. *See id.*

38. *See id.* at 143–149.

39. *See id.* at 144. For example, the individual is no longer at a family picnic, but suddenly finds himself thrust back to the battlefield in Afghanistan. Family members may observe him acting out past combat experiences at the picnic.

40. *Id.*

41. DSM-V *supra* note 31, at 144.

Whereas the strategy of avoiding traumatic cues may seem like a viable way for an individual with PTSD to reduce their exposure to painful internal experiences (e.g., thoughts, emotions, memories), avoidance as a general coping strategy is ineffective because cognitive suppression has the opposite of the intended effect.<sup>42</sup> A large body of research demonstrates that the more one tries to stop thinking (or feeling) something, the more it occurs.<sup>43</sup> Moreover, persistent avoidance inhibits the process of integrating the traumatic experience into the person's life narrative in a way that would enable the individual to move on from the psychological crisis.<sup>44</sup> Avoidance of people, places, conversations, and activities that arouse recollections of the trauma can also interfere with engaging in routine activities of daily living that can promote healing (e.g., career, recreation, family life), including accessing the person's own natural supports through meaningful relationships (e.g., family, clergy, friends).

Criterion D stipulates that the person experiences "negative alterations in cognitions and mood associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following":

- 1) Inability to remember an important aspect of the traumatic event(s) (typically due to dissociative amnesia and not to other factors such as head injury, alcohol, or drugs)
- 2) Persistent and exaggerated negative beliefs or expectations about oneself, others, or the world (e.g., "I am bad," "No one can be trusted," "The world is completely dangerous," "My whole nervous system is completely ruined";
- 3) Persistent, distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame himself/herself or others.
- 4) Persistent negative emotional state (e.g., fear, horror, anger, guilt, or shame);
- 5) Markedly diminished interest or participation in significant activities;
- 6) Feelings of detachment or estrangement from others; and
- 7) Persistent inability to experience positive emotions (e.g., inability to experience happiness, satisfaction, or loving feelings).<sup>45</sup>

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42. See Richard M. Wenzlaff & Daniel M. Wegner, *Thought Suppression*, 51 ANN. REV. PSYCHOL., 59, 64, 83 (2000).

43. See *id.* at 83.

44. See *id.* at 59, 64, 83.

45. DSM-V, *supra* note 31, at 145.

Whereas the symptoms in this criterion are no longer included in the avoidance cluster of symptoms as in previous editions of the DSM, persistent changes in thoughts and mood can represent a form of psychological avoidance in which the person becomes unable to experience their emotions, particularly emotional connection in human relationships. For example, a combat veteran with PTSD might relay that he or she does not *feel anything anymore*. He or she may perceive a sense of estrangement from others, even when in the presence of individuals with whom he or she was emotionally close before the traumatic event, such as family and friends.<sup>46</sup> Whereas psychological avoidance may at times successfully distract the individual from unwelcome painful thoughts and emotions, such as thoughts about personal culpability and feelings of guilt, when implemented as a pervasive coping strategy, psychic avoidance also has the unintended effect of inhibiting the experience of positive emotions, such as joy and love. The individual may be able to cognitively discern that a strong emotional response is in order (e.g., sadness at a funeral; joy when playing with children), but has difficulty overcoming his or her own emotional numbing. Also included in this criterion is the experience of psychogenic amnesia, or an inability to remember significant aspects of the traumatic event, which is another form of emotional disconnection that is a less commonly observed PTSD symptom.<sup>47</sup>

The fourth PTSD criterion, E, is as follows: “Marked alterations in arousal and reactivity associated with the traumatic event(s), beginning or worsening after the traumatic events(s) occurred, as evidenced by two (or more) of the following: 1) Irritable behavior and angry outbursts (with little or no provocation) typically expressed as verbal or physical aggression toward people or objects; 2) Reckless or self-destructive behavior; 3) Hypervigilance; and 4) Exaggerated startle response; 5) Problems with concentration; and 6) Sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep).”<sup>48</sup> As in other anxiety disorders, insomnia, irritability, and concentration difficulty are symptomatic of PTSD.<sup>49</sup> In contrast, hypervigilance and startle are more pathognomonic of PTSD, with the “startle response ha[ving] a unique neurobiological substrate.”<sup>50</sup> Hypervigilance and startle can resemble frank paranoia, as individuals tend to misinterpret their

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46. *See id.* at 144–45.

47. *See id.* at 145.

48. *Id.* at 145.

49. *Id.* at 464; Matthew J. Friedman, *PTSD History and Overview*, U.S. DEPARTMENT OF VETERANS AFF. (Jan. 31, 2007), <http://www.ptsd.va.gov/professional/pages/ptsd-overview.asp>.

50. Friedman, *supra* note 49.

environment and perceive danger where it does not exist.<sup>51</sup> For example, an individual with combat PTSD may repeatedly patrol the perimeter of his or her home armed with a weapon to ensure that the family remains secure even though no credible threat is present.<sup>52</sup>

The duration criterion, F, specifies that the symptoms delineated in criteria B through E must last at least one month.<sup>53</sup> Finally, as in all psychiatric disorders, the functional significance criterion specifies that the symptoms “must cause clinically significant . . . impairment in social, occupational, or other important areas of functioning.”<sup>54</sup>

### III. PREVALENCE AND COMORBIDITIES OF PTSD

Much of what is currently known about the prevalence of PTSD is derived from two large population-based epidemiological studies that represent benchmark studies for all psychiatric disorders: The U.S. National Comorbidity Survey (NCS), conducted between 1990 and 1992, and The U.S. National Comorbidity Survey Replication (NCS-R), conducted between 2001 and 2003.<sup>55</sup> The prevalence of PTSD was similar across both samples,<sup>56</sup> so only prevalence in the more recent NCS-R is presented here. Information on the original NCS is discussed at length elsewhere.<sup>57</sup> The NCS-R assessed the prevalence rates of PTSD in a nationally representative subsample of 5,692 adult Americans using DSM-IV criteria.<sup>58</sup> “[E]stimated . . . lifetime prevalence of PTSD among adult Americans [was] 6.8%.”<sup>59</sup> “The lifetime prevalence of PTSD among men was 3.6% and among women was [over twice

51. *Id.*

52. John Zemler, *What Is PTSD Hypervigilance or Hyper Alertness?*, HUBPAGES, <http://drzemler.hubpages.com/hub/What-is-PTSD-Hypervigilance-or-Hyper-Alertness> (last updated Feb. 20, 2010).

53. DSM-V, *supra* note 31, at 143–49; *see also* Friedman, *supra* note 49.

54. DSM-V, *supra* note 31, at 143–49.

55. *See* Ronald C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES GEN. PSYCHIATRY 1048, 1049 (1995) [hereinafter Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*]; Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 617, 618, 624 (2005) [hereinafter Kessler et al., *Prevalence, Severity, and Comorbidity*].

56. Kessler et al., *Prevalence, Severity, and Comorbidity*, *supra* note 55, at 624.

57. *See* Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, *supra* note 55, at 1051–57.

58. Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 593, 593–94 (2005).

59. Jamie L. Gradus, *Epidemiology of PTSD*, U.S. DEPARTMENT OF VETERANS AFF. (Jan. 31, 2007), <http://www.ptsd.va.gov/professional/pages/epidemiological-facts-ptsd.asp>.



that at] 9.7%.”<sup>60</sup> The twelve-month prevalence was estimated at 3.5%<sup>61</sup>—1.8% among men and 5.2% among women.<sup>62</sup> Currently, research has not determined what accounts for the higher prevalence rates of PTSD among women, but increased likelihood of exposure (more trauma) and type of traumatic exposure (the kind of event) do not appear to explain these differences.<sup>63</sup> The differences may be attributable to severity of the trauma, gender differences in appraisal of threats, other physiological sex-linked differences, or due to other factors yet to be uncovered.<sup>64</sup>

Whereas the lifetime prevalence rate of PTSD in the general population is fairly low, at about 7.8%, the NCS-R study found estimated lifetime prevalence of PTSD among combat veterans to be significantly higher, at about 38.8%.<sup>65</sup> Similarly, The National Vietnam Veterans Readjustment Study (NVVRS) is a large-scale study of about 3,000 individuals, including veterans that served in the military during the Vietnam era.<sup>66</sup> Researchers reported high estimated lifetime prevalence of PTSD in active duty Vietnam veterans for both men (30.9%) and women (26.9%).<sup>67</sup> When the data was examined according to percentage of active duty Vietnam veterans diagnosed with PTSD at the time of the survey, 15.2% of males and 8.5% of females were diagnosed with PTSD.<sup>68</sup> Taken together, these data demonstrate that exposure to combat is a particularly brutal stressor that appears to impact both men and women similarly in terms of the development of PTSD:<sup>69</sup> “Exposure to combat has been described as one of the most intense stressors that a person can experience, and for many people . . . combat . . . is the most

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60. *Id.*

61. Kessler et al., *Prevalence, Severity, and Comorbidity*, *supra* note 55, at 620 tbl.1.

62. NAT’L INST. OF MENTAL HEALTH, NATIONAL COMORBIDITY SURVEY: 12-MONTH PREVALENCE OF DSM-IV/WMH-CIDI DISORDERS BY SEX AND COHORT, at tbl.2 (2007), *available at* [http://www.hcp.med.harvard.edu/ncs/ftpd/NCS-R\\_12-month\\_Prevalence\\_Estimates.pdf](http://www.hcp.med.harvard.edu/ncs/ftpd/NCS-R_12-month_Prevalence_Estimates.pdf).

63. See David F. Tolin & Edna B. Foa, *Sex Differences in Trauma and Posttraumatic Stress Disorder: A Quantitative Review of 25 Years of Research*, 132 *PSYCHOL. BULL.* 959, 977 (2006).

64. *Id.* at 978–79.

65. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, *supra* note 55, at 1052–53.

66. RICHARD A. KULKA ET AL., *TRAUMA AND THE VIETNAM WAR GENERATION: REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY* 13 (1990).

67. *Id.* at 53.

68. *Id.* at 52.

69. *Id.* at 52–53.

traumatic [event] of their life.”<sup>70</sup> In fact, some research has shown a dose-response relationship between combat and PTSD; the prevalence of PTSD in veterans increases as combat exposure increases.<sup>71</sup>

PTSD is also comorbid (occurs together) with other psychiatric disorders and psychosocial problems.<sup>72</sup> Common psychiatric comorbidities include major depression, general anxiety, and substance-use disorders.<sup>73</sup> Veterans with PTSD have clinically significant impairment in other important areas of functioning.<sup>74</sup> Research indicates that veterans with PTSD experience significantly higher rates of unemployment and of being fired from employment, marital distress—both divorce and separation—or spousal abuse, poorer health and increased limitations to physical functioning, and increased likelihood of perpetuating violence.<sup>75</sup>

#### IV. RISK & RESILIENCE FACTORS

PTSD can have devastating impacts on individuals, families, and communities.<sup>76</sup> At the same time, surviving war can be transformative in ways that stimulate growth, maturation, and renewal. Many combat personnel acquire an enhanced sense of purpose, camaraderie, pride, and meaning. For others, the transformative effects stimulate a crisis that can manifest at any point across the lifespan. A number of pre-deployment, deployment (warzone), and post-deployment factors have been identified as directly or indirectly increasing one’s risk for developing PTSD—risk factors—or offering protection against it—resilience factors—following exposure to combat trauma.<sup>77</sup> Evidence points to deployment (warzone) factors as most significantly related to whether an individual will develop PTSD, followed by post-deployment and pre-deployment factors, respectfully.<sup>78</sup>

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70. 6 COMM. ON GULF WAR & HEALTH, INST. OF MED., PHYSIOLOGIC, PSYCHOLOGIC, AND PSYCHOSOCIAL EFFECTS OF DEPLOYMENT-RELATED STRESS 32 (2008), available at <http://books.nap.edu/catalog/11922.html> (citations omitted).

71. Barbara A. Hermann et al., *Epidemiology and Prevention of Combat-Related Post-Traumatic Stress in OEF/OIF/OND Service Members*, MILITARY MED., Aug. Supp. 2012, at 1, 3.

72. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, *supra* note 55, at 1051, 1054–55.

73. *Id.* at 1055, 1056 tbl.7.

74. *See id.*

75. KULKA ET AL., *supra* note 66, at 141–42, 247–48.

76. *See* Hermann et al., *supra* note 72, at 1–3.

77. *Id.* at 1–4; Dawne S. Vogt & Lynlee R. Tanner, *Risk and Resilience Factors for Post-traumatic Stress Symptomatology in Gulf War I Veterans*, 20 J. TRAUMATIC STRESS 27, 28–29 (2007).

78. Vogt & Tanner, *supra* note 77, at 27, 34.

At pre-deployment, risk of developing PTSD is greater if the individual is female, if the individual had experienced significant stressors—such as “divorce, . . . family psychiatric illness, domestic violence, abuse, or violence”—or had mental or physical health problems prior to entering combat.<sup>79</sup> At deployment, risk of developing PTSD is heightened if the individual experienced greater severity of combat exposure, greater frequency or duration of deployments, “or perceived threat of personal [harm]” or death, as well as if the individual had relationship or family concerns, sustained a physical injury during deployment, reacted to combat exposure with high levels of arousal, or experienced peritraumatic dissociation.<sup>80</sup> Post-deployment risk factors include experiencing additional life stressors (e.g., unemployment, familial discord, financial difficulty) and having poor social support.<sup>81</sup>

A pre-deployment protective factor also includes growing up in “positive childhood family environments.”<sup>82</sup> Individuals reared in such environments experience fewer stressors later in life and have easier access to post-deployment supportive relationships.<sup>83</sup> Believing that one is prepared for combat and having supportive relationships, particularly in the form of unit member cohesion during deployment and greater social support at post-deployment, also protects against the development of PTSD.<sup>84</sup>

## V. TREATMENT

A range of treatments is available to treat PTSD, although they have not all received the same amount of research attention.<sup>85</sup> Among the pharmacological treatments, paroxetine, sertraline, and venlafaxine show the most promise.<sup>86</sup> Psychological treatments have been shown to be more effective than pharmacotherapies, with cognitive-behavioral therapies combined with

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79. Hermann et al., *supra* note 71, at 2.

80. *Id.* at 3; Dawne Vogt et al., *Predeployment, Deployment, and Postdeployment Risk Factors for Posttraumatic Stress Symptomatology in Female and Male OEF/OIF Veterans*, 120 J. ABNORMAL PSYCHOL. 819, 828 (2011).

81. Hermann et al., *supra* note 71, at 3; Vogt & Tanner, *supra* note 76, at 29.

82. Vogt & Tanner, *supra* note 77, at 28.

83. *Id.*

84. Hermann et al., *supra* note 71, at 3; see Faith Ozbay et al., *Social Support and Resilience to Stress: From Neurobiology to Clinical Practice*, PSYCHIATRY, May 2007, at 35, 37–38; Vogt & Tanner, *supra* note 77, at 28–31.

85. Alan L. Peterson et al., *Assessment and Treatment of Combat-Related PTSD in Returning War Veterans*, 18 J. CLINICAL PSYCHOL. MED. SETTINGS, 164, 168 (2011).

86. Brian A. Sharpless & Jacques P. Barber, *A Clinician’s Guide to PTSD Treatments for Returning Veterans*, 3 PMC (Feb. 1, 2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3070301/pdf/nihms278539.pdf>.

pharmacological treatment having the best empirical support.<sup>87</sup> These interventions incorporate some degree of 1) processing and restructuring maladaptive beliefs and assumptions related to the trauma; 2) direct exposure—either through the imagination or in vivo—to traumatic memories or feared situations associated with the trauma; or 3) the teaching of skills to help individuals cope with or manage their PTSD symptoms and co-morbid problems such as substance addiction.<sup>88</sup> While treatments with an exposure-based component (i.e., Prolonged Exposure and Cognitive Processing Therapy) have the greatest empirical support, certain individuals may not be able to tolerate these types of treatments because of the difficulty of discussing the traumatic stressors and tolerating traumatic cues, and for them, alternatives may need to be considered.<sup>89</sup>

## VI. CONCLUSION

During the past decade, the frequency of deployment of military service personnel has increased.<sup>90</sup> More frequent deployments are related to “increased involvement in [o]perations [o]ther than [w]ar, as well as actual combat scenarios.”<sup>91</sup> “Servicemen and women may be deployed from active duty, as well as the large Reserve or National Guard positions” that represent a large portion of the modern U.S. Armed Services.<sup>92</sup> The challenges inherent to the deployment of servicemen and women differ across individuals and families.<sup>93</sup> “In families [with preexisting] medical or emotional/behavioral problems . . . the deployment of a military [spouse or] parent can destabilize [an already] tenuous situation, creating significant” difficulties for both the individual and his or her family.<sup>94</sup>

The development of PTSD is impacted by individual factors as well as pre-deployment, peritraumatic, and post-deployment risk and protective factors.<sup>95</sup> Whereas some individual and war-zone stressors are inevitable, one

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87. *See id.* at 1.

88. *See* Lisa M. Najavits, *Seeking Safety: An Evidence-Based Model for Substance Abuse and Trauma/PTSD*, in *THERAPIST’S GUIDE TO EVIDENCE-BASED RELAPSE PREVENTION* 141, 145, 147, 151–53 (Katie Witkiewitz & G. Alan Marlatt eds., 2007); Sharpless & Barber, *supra* note 86, at 4–5.

89. *See* Peterson et al., *supra* note 85, at 168–69.

90. NAT’L CTR. FOR POST-TRAUMATIC STRESS DISORDER, DEP’T OF VETERANS AFFAIRS, *supra* note 7, at 83.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Hermann et al., *supra* note 71, at 2–3; Vogt et al., *supra* note 80, at 820.

of the most modifiable and important risk/protective factors relates to the support afforded to military personnel during the various phases of deployment and re-integration into their community.<sup>96</sup> A range of treatments are available to assist with PTSD symptoms and a large body of evidence indicates their effectiveness.

Combat is a particularly severe form of trauma that can give rise to PTSD.<sup>97</sup> At the same time, PTSD is a preventable and treatable mental health condition. A wealth of information concerning resources for the treatment of PTSD can be found on the National Center for PTSD website.<sup>98</sup>

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96. NAT'L CTR. FOR POST-TRAUMATIC STRESS DISORDER, DEP'T OF VETERANS AFFAIRS, *supra* note 7, at 83–84.

97. *Id.* at 11–12.

98. National Center for PTSD, U.S. DEP'T OF VETERANS AFF., <http://www.ptsd.va.gov> (last updated Apr. 21, 2013).

## THE AFTERMATH OF INTERNATIONAL CONFLICTS: VETERANS DOMESTIC VIOLENCE CASES AND VETERANS TREATMENT COURTS

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## I. INTRODUCTION

“If you don’t hear from me in the next 24 hours, call the police,” whispered Kristi to Stacy—veterans’ wives—when she called her at 2:12 A.M. and then hung up.<sup>1</sup> They had become friends while their husbands were deployed overseas in 2004.<sup>2</sup> Kristi’s husband had served in three deployments and had recently come back from the last one.<sup>3</sup> The day after the call, Kristi said to Stacy, “Mark tried to strangle me last night.”<sup>4</sup> “Kristi’s husband adored her. He had no history of domestic violence, no pattern of abuse. He had made no attempts to isolate her from friends, family, or finances.”<sup>5</sup> Kristi sought help, but to no avail.<sup>6</sup>

As if the experiences acquired during deployments were not enough, veterans often return home to struggle with family issues caused by the trauma suffered during combat.<sup>7</sup> The impact of military service can manifest itself in “the lives of veterans and their families in [various] ways.”<sup>8</sup> “[F]amily functioning is [unavoidably] affected” after a deployment.<sup>9</sup> Upon

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1. Stacy Bannerman, *Husbands Who Bring the War Home*, THE DAILY BEAST (Sept. 25, 2010), <http://www.thedailybeast.com/articles/2010/09/25/ptsd-and-domestic-abuse-husbands-who-bring-the-war-home.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Bannerman, *supra* note 1.

7. Press Release, Witness Justice, Family Safety: A Significant Concern for Returning Veterans and Their Families (Oct. 24, 2008), *available at* <http://www.witnessjustice.org/news/natlssurveyresults.pdf>.

8. Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 357 (2009) [hereinafter Russell, *A Proactive Approach*].

9. AM. PSYCHOLOGICAL ASS’N, THE PSYCHOLOGICAL NEEDS OF U.S. MILITARY SERVICE MEMBERS AND THEIR FAMILIES: A PRELIMINARY REPORT 9 (2007).

return, service members find themselves battling another war at home.<sup>10</sup> Significant rates of domestic violence in returning war veterans have caused a rising concern.<sup>11</sup> Most of them feel terrible that they cause all this trouble and do not want to hurt anyone.<sup>12</sup> Now more than ever, it is crucial that we recognize the effects that trauma is having on the relationships of military veterans, because compared to military conflicts of the past, the majority of currently returning veterans are married or are in a committed intimate relationship.<sup>13</sup>

This increase in crimes committed by veterans gave rise to veterans treatment courts.<sup>14</sup> Judges across the country started to notice that veterans who came back from deployments and appeared in court, brought back similar personal issues.<sup>15</sup> They began to suspect that these issues might have been related to their military service.<sup>16</sup> Veterans treatment courts are modeled after other types of special courts that have proven to be successful in the past such as special drug and mental health courts.<sup>17</sup> The program aims at “rehabilitation rather than incarceration” for eligible veterans<sup>18</sup> by using treatment programs.<sup>19</sup> Today, more than ninety veterans treatment courts exist in the United States.<sup>20</sup> Upon completion of the program, veterans could potentially have charges dropped or reduced.<sup>21</sup>

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10. Lizette Alvarez & Deborah Sontag, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, at A1 [hereinafter Alvarez & Sontag, *Across America*].

11. Press Release, Witness Justice, *supra* note 7.

12. Alvarez & Sontag, *Across America*, *supra* note 10.

13. Candice M. Monson & Casey E. Taft, *PTSD and Intimate Relationships*, PTSD RES. Q., Fall 2005, at 1, 1.

14. Jillian M. Cavanaugh, Note, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 463 (2011); Jim Spellman & Wayne Drash, *Soldier's Invisible War: Iraq Vet Charged with Attempted Murder*, CNN (Aug. 6, 2009), <http://www.cnn.com/2009/CRIME/08/06/accused.soldier.ptsd/index.html>.

15. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., FLORIDA SENATE INTERIM REPORT 2011-131, at 1 (2010).

16. *Id.*

17. *Id.*

18. Kathleen Haughney, *Senate Report Suggests Veterans Court*, ST. AUGUSTINE REC., Oct. 20, 2010, <http://www.staugustine.com/news/local-news/2010-10-20/Senate-report-suggests-veterans-court>.

19. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 1.

20. Duncan MacVicar, Cal. Veterans Legal Task Force, Swords to Plowshares Seminar: Veterans Treatment Courts: Dignified Handling of Traumatized Veterans, slide 3 (Mar. 6, 2012), <http://www.swords-to-plowshares.org/wp-content/uploads/2012/03/Veteran-court-presentation.pdf?df6bfc>.

21. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 4.



A controversy arises in deciding whether domestic violence cases should be allowed in veterans treatment courts due to the nature of the offense.<sup>22</sup> “Only a few courts have [truly] addressed th[e] issue . . . .”<sup>23</sup> Critics note that in a domestic violence case, it could be dangerous to continue to have the victim in contact with the offender, that courts must have access to offender’s records, and that specialized training is needed for those providing services.<sup>24</sup> Due to these criticisms, the majority of cases involving violent crimes are being left to make their way through the traditional criminal justice system.<sup>25</sup>

Abuse, when perpetrated by a veteran, has a unique distinctive pattern, which does not follow the cycle of abuse that is often found in books.<sup>26</sup> This article argues—through the integration of psychological studies which link domestic violence with the experiences that military personnel are exposed to while deployed—that domestic violence cases should be allowed in veterans treatment courts across the country as a form of restorative justice. The majority of studies find that at least 50% of veterans seeking treatment for posttraumatic stress disorder (PTSD) or mental disturbances related to combat, batter their wives.<sup>27</sup>

As a matter of public policy, we owe our veterans much more than a *lock them up and throw away the key* approach. They should be offered further intervention, considering that the domestic violence is a result of their stay overseas.<sup>28</sup> Furthermore, restorative justice has proven effective in the past in repairing the harm done and reducing the rate of recidivism.<sup>29</sup>

Part II of the article gives an overview of domestic violence as a global issue and mentions recent cases of domestic violence in the military that have added to the controversy.<sup>30</sup> It also outlines unique issues faced by victims of domestic violence of a military veteran.<sup>31</sup> Part III of the article focuses on the many issues faced by veterans of different wars upon return

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22. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 570 (2010).

23. Amy Fairweather et al., *Veterans in the Justice System: Treatment of Violent Offenders*, L.A. DAILY J., Aug. 17, 2010, at 7.

24. *Id.*

25. Hawkins, *supra* note 22, at 571.

26. Bannerman, *supra* note 1.

27. *Id.*

28. See Lizette Alvarez & Deborah Sontag, *When Strains on Military Families Turn Deadly*, N.Y. TIMES, Feb. 15, 2008, at A1 [hereinafter Alvarez & Sontag, *When Strains on Military Families Turn Deadly*].

29. *Restorative Justice Works*, RESTORATIVE JUST. COUNCIL (Jan. 7, 2011), [http://www.restorativejustice.org.uk/restorative\\_justice\\_works](http://www.restorativejustice.org.uk/restorative_justice_works).

30. See *infra* Part II.

31. See *infra* Part II.B.

from combat and the experiences lived while in combat.<sup>32</sup> This section employs psychological studies to emphasize the link that these recurring issues have in causing domestic violence.<sup>33</sup> Part IV part of the article introduces veterans' treatment courts and their purpose.<sup>34</sup> It explores the controversies raised by cases of domestic violence in this type of court, and briefly discusses Florida, with special emphasis on the newly created Broward County's Veterans Treatment Court.<sup>35</sup> Part V and last part of the article argues that domestic violence cases should be allowed in veterans treatment courts in all jurisdictions as a form of restorative justice to repair the harm done by the veterans and the overseas deployment itself.<sup>36</sup> It also brings to light some public policy considerations and provides some recommendations to alleviate the criticisms that surround the issue of hearing domestic violence cases in this kind of court.<sup>37</sup>

## II. DOMESTIC VIOLENCE: AN OVERVIEW

Domestic violence—or, as some call it, intimate partner violence—is a pattern of behavior that someone uses to overpower and control another person.<sup>38</sup> “[D]omestic violence encompass[es] a . . . range of behaviors . . . .”<sup>39</sup> It can take the form of physical, sexual, emotional, psychological, and verbal acts.<sup>40</sup> Physical violence includes “[p]ushing, shoving, grabbing, slapping, [and] punching,” among other acts of physical contact and intimidation.<sup>41</sup> Emotional domestic violence can range from coercive tactics to name calling and yelling.<sup>42</sup> It knows no barriers and affects people anywhere in the world: Any age, religion, economic status, and nationality.<sup>43</sup> Most of the time, the

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32. See *infra* Part III.

33. See *infra* Part III.B.

34. See *infra* Part IV.A.

35. See *infra* Part IV.B–C.

36. See *infra* Part V.

37. See *infra* Part V.A.1–2.

38. *The Facts About Domestic Violence*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES (2010), <http://www.vaw.umn.edu/documents/inbriefs/domesticviolence/domesticviolence.html>.

39. Simeon Stamm, Note, *Intimate Partner Violence in the Military: Securing our Country, Starting with the Home*, 47 FAM. CT. REV. 321, 323 (2009).

40. *The Facts About Domestic Violence*, *supra* note 38.

41. *Id.*

42. *Id.*

43. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS (2007), [www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf) [hereinafter NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS].

result is a trauma that can last a lifetime.<sup>44</sup> Statistics show that one in four women will be faced with a domestic violence experience at least once in her lifetime.<sup>45</sup>

Around the world, one in three women have been a victim of physical or sexual abuse and at least “half of the world’s women [suffer from] violence in intimate relationships.”<sup>46</sup> “Domestic violence is . . . most common . . . against women and [represents a] major international health risk[] . . .”<sup>47</sup> Unfortunately, countless domestic violence incidents are never reported to the authorities, because of fear or hope that the person will change, among others.<sup>48</sup> In addition to causing emotional issues, domestic violence affects the economy by impeding the victims from attending work.<sup>49</sup> Domestic violence causes increased health care spending, clogged courts, and losses in educational achievement in countries around the world.<sup>50</sup> In fact, domestic violence was one of the first types of violence that gave rise to action at an international level.<sup>51</sup>

#### A. *Domestic Violence and War Veterans*

Domestic violence is an issue that affects all branches of the military in the United States.<sup>52</sup> In a study performed among returning military from Operation Iraqi Freedom and Operation Enduring Freedom (OIF/OEF), an alarming 60% of families referred for mental health evaluations have had an episode of domestic abuse.<sup>53</sup> Out of that 60%, 53.7% said that there had been shouting, pushing, or shoving.<sup>54</sup> In 2006, a study revealed that among

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44. *Id.*

45. *Id.*

46. Bonita Meyersfeld, *Domestic Violence, Health, and International Law*, 22 EMORY INT’L L. REV. 61, 61–62 (2008).

47. *Id.* at 62.

48. *The Facts About Domestic Violence*, *supra* note 38.

49. See NAT’L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS, *supra* note 43.

50. Meyersfeld, *supra* note 46, at 61.

51. *Id.* at 77.

52. Pamela Kravetz, Note, *Way off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 169 (2012).

53. Star Lara, Women Veterans Coordinator, Inst. for Veteran Policy, Swords to Plowshares Seminar: New Approaches for Addressing Domestic Violence in the Veteran Community, slide 4, 9 (Mar. 6, 2012), [http://www.swords-to-plowshares.org/wp-content/uploads/2012/03/DV-Intervention-Presentation\\_Swords-to-Plowshares.pdf?df6bfc](http://www.swords-to-plowshares.org/wp-content/uploads/2012/03/DV-Intervention-Presentation_Swords-to-Plowshares.pdf?df6bfc); see also Steven L. Sayers et al., *Family Problems Among Recently Returned Military Veterans Referred for a Mental Health Evaluation*, J. CLINICAL PSYCHIATRY, Feb. 2009, at e1, e6, tbl.3, available at <http://www.psychiatrist.com/privatepdf/2009/v70n02/v70n0202.pdf>.

54. Lara, *supra* note 53, at slide 9; Sayers et al., *supra* note 53, at e6 tbl.3.

returning veterans with current or recently separated partners, 27.6% of partners were afraid of the veteran.<sup>55</sup> The following cases are recent examples of domestic violence in returning veterans.

A few years after returning from Iraq in 2005, soldier and combat medic Thomas Delgado attempted to kill his wife, broke her nose, and tried to choke her.<sup>56</sup> Delgado was charged with one count of first-degree attempted murder.<sup>57</sup> Medical records revealed that Delgado had only limited memories of what happened that night.<sup>58</sup> The records also showed that while in service in Iraq, he lost fellow soldiers twice and he had been “feeling numb and disconnected since” the deployment.<sup>59</sup> Prior to this incident with his wife, Delgado’s only record was a minor traffic violation.<sup>60</sup> His wife, Shayla Delgado, insisted that her husband is a good person and deserves special treatment despite what happened.<sup>61</sup> In “2010, Delgado accepted a plea bargain for second-degree assault involving domestic violence, a felony, and misdemeanor criminal mischief. He was given a four-year deferred sentence, four years probation, a . . . fine . . . and . . . a mandatory restraining order.”<sup>62</sup> Since his conviction, Delgado has been charged with four other offenses, probably due to lack of treatment and following the traditional criminal justice approach.<sup>63</sup>

In 2002, within only a six-week range, three sergeants who had just returned from Afghanistan murdered their wives and then killed themselves.<sup>64</sup> A more local example took place recently.<sup>65</sup> In April 2011, a former marine Paul Gonzalez, while in the chambers of Broward Judge Ronald Rothchild,<sup>66</sup> went into rage after being ordered to pay child support by the judge.<sup>67</sup>

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55. Sayers et al., *supra* note 53, at e6.

56. Spellman & Drash, *supra* note 14.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Spellman & Drash, *supra* note 14.

62. CHARLES E. CORRY, EQUAL JUSTICE FOUND., VIOLENCE AND VETERAN COURTS 3, [http://ejfi.org/PDF/Violence\\_and\\_veteran\\_court\\_flyer.pdf](http://ejfi.org/PDF/Violence_and_veteran_court_flyer.pdf).

63. *Id.* (stating that the traditional criminal justice system is not prepared to deal with the symptoms associated with military problems).

64. Alvarez & Sontag, *When Strains on Military Families Turn Deadly*, *supra* note 28.

65. See Rafael A. Olmeda, *Sentencing Postponed for Man Who Beat Wife*, S. FLA. SUN SENTINEL, Feb. 23, 2012, at 6B.

66. *Id.*

67. Lydia Warren, *Marine Who Beat Wife Unconscious in Front of Judge After Being Ordered to Pay Child Support at Divorce Proceeding Gets 15 Years Behind Bars*, MAIL ONLINE (Mar. 3, 2012, 8:10 PM), <http://www.dailymail.co.uk/news/article-2109858/marine-gets-15-years-bars-viciously-beating-wife-unconscious-judge.html>.

Gonzalez left his former wife with a fractured jaw and broken nose.<sup>68</sup> The former marine says that he does not recall what happened.<sup>69</sup>

Paul Gonzalez was sentenced to fifteen years behind bars.<sup>70</sup> Perhaps if his PTSD was treated in time, this case could have been avoided. Gonzalez apologized to his ex-wife and admitted that he had failed her.<sup>71</sup> In court, there is a certain expectation of safety.<sup>72</sup> Common sense tells us that a rational person would not beat anyone in court—certainly not in the presence of a judge—if there was not something wrong with him or her. In fact, a psychiatric expert testified that the former marine was suffering from bipolar disorder and PTSD.<sup>73</sup> His attorney expressed his concern that he might not be able to get the kind of help he needs to overcome his issues in prison.<sup>74</sup>

Overall, violent victimization rates among spouses of United States military personnel have “increased from 18.6 to 25.5 per 1000” spouses.<sup>75</sup> Some local observations corroborate that “intimate partner violence and related offenses [could be] up to one quarter of” the issues with which veterans enter the criminal justice system.<sup>76</sup>

#### B. *Unique Issues for Victims of Domestic Violence by a Veteran*

Deployment to war often includes long separations that in turn, place a tremendous amount of pressure on military families, no matter how healthy the relationship is.<sup>77</sup> When these factors are added to the stress experienced in combat, and the injuries received, sometimes the *perfect storm* is created.<sup>78</sup> When there has been a deployment, the spouse who stays home—the wife most of the time—is likely to assume responsibility for the family and adapt

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68. Olmeda, *supra* note 65.

69. Tonya Alanez, *No Bond for Man Accused of Beating Wife at Divorce Hearing*, S. FLA. SUN SENTINEL, June 6, 2011, [http://articles.sun-sentinel.com/2011-06-06/news/fl-divorce-beating-bond-reduced-20110606\\_1\\_divorce-hearing-stun-gun-domestic-violence-cases](http://articles.sun-sentinel.com/2011-06-06/news/fl-divorce-beating-bond-reduced-20110606_1_divorce-hearing-stun-gun-domestic-violence-cases).

70. Warren, *supra* note 67.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Facts and Statistics, DOMESTIC VIOLENCE IN THE MILITARY*, <http://userpages.aug.com/captbarb/violence.html> (last visited Apr. 21, 2013).

76. Fairweather et al., *supra* note 23.

77. Alvarez & Sontag, *When Strains on Military Families Turn Deadly*, *supra* note 28.

78. *See id.*

to new roles as head of the household.<sup>79</sup> When the soldier returns, role reversals might become a struggle for power.<sup>80</sup> When veterans return and see the autonomy of their partner, they might try to coerce them in order to regain control.<sup>81</sup>

Military spouses are also faced with the usual issues that civilian victims of domestic violence experience, such as fear, isolation, and economic concerns.<sup>82</sup> However, in addition to these fears, there are other factors which are unique to military spouses, causing them not to report the abuse.<sup>83</sup> For example, there is a chance that the information military spouses share will not be kept confidential.<sup>84</sup> This adds to the unwillingness to report the violence because of the effect that it might have on the abusive veteran's career.<sup>85</sup> Economic dependency on the veteran's benefits, and the fear of losing them, could also be a cause of the lack of reports.<sup>86</sup> Also, the military becomes some families' identity, making spouses less likely to report domestic violence to preserve their honor.<sup>87</sup>

### III. COMING BACK HOME: THE EFFECT OF EXPOSURE TO VIOLENCE DURING OVERSEAS SERVICE

Many returning "veterans have [been] witness[es to] violence while deployed."<sup>88</sup> The training they receive, and combat itself animates aggressive behavior.<sup>89</sup> Military personnel are trained to attack enemies frivolously and fast.<sup>90</sup> A majority report that after deployment their family dynamics have

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79. JUDITH E. BEALS, BATTERED WOMEN'S JUSTICE PROJECT, UNDERSTANDING THE MILITARY RESPONSE TO DOMESTIC VIOLENCE: TOOLS FOR CIVILIAN ADVOCATES 8 (Patricia Erwin ed., 2007), [http://www.bwjp.org/files/bwjp/articles/BWJP\\_Military\\_Part1.pdf](http://www.bwjp.org/files/bwjp/articles/BWJP_Military_Part1.pdf); Stamm, *supra* note 39, at 325.

80. Stamm, *supra* note 39, at 325.

81. Michelle D. Sherman et al., *Domestic Violence in Veterans with Posttraumatic Stress Disorder Who Seek Couples Therapy*, 32 J. MARITAL & FAM. THERAPY 479, 487 (2006).

82. Stamm, *supra* note 39, at 325.

83. *Id.*

84. *Id.*

85. *Id.*; see also Lizette Alvarez, *Despite Assurances from Army, an Assault Case Founders*, N.Y. TIMES, Nov. 23, 2008, at A24.

86. See Claire McCullough, *Swords to Plowshares Seminar: La Casa de las Madres*, slide 4 (Mar. 6, 2012), <http://www.swords-to-plowshares.org/wp-content/uploads/2012/03/La-Casa-DV-Presentation.pdf?df6bfc>.

87. See Stamm, *supra* note 39, at 325.

88. Press Release, Witness Justice, *supra* note 7.

89. Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 103 (2010).

90. *Id.*

changed.<sup>91</sup> They report issues communicating and more frequent conflicts with their families.<sup>92</sup> Wars are extremely intense and cause great damage not only to bodies, but also to minds.<sup>93</sup> Deployment causes changes that lead to mood swings, hostile attitudes, and emotional numbness.<sup>94</sup> Returning veterans who were deployed to Afghanistan and Iraq for recent conflicts—such as Operations Enduring Freedom and Iraqi Freedom—present higher rates of psychological injuries.<sup>95</sup> Soldiers returning home bring with them a constant sense of danger.<sup>96</sup>

#### A. *What Military Personnel Are Exposed to While Deployed*

Recent years have seen the largest mobilization of troops to foreign soils since the Vietnam War.<sup>97</sup> Since the tragic events of September 11, 2001, troops' deployment time to foreign countries has become more extensive.<sup>98</sup> Some troops were even deployed more than once.<sup>99</sup> During their stay on foreign soil, military personnel are exposed to intensive combat.<sup>100</sup> The military live in fear of possible ambushes or bombs that kill or injure their fellow soldiers and cause destruction.<sup>101</sup> Killing civilians and other enemy

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91. Press Release, Witness Justice, *supra* note 7.

92. *Id.*

93. *See id.*

94. *Id.*

95. Terri Tanielian et al., *Introduction*, in *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* 3, 3–4 (Terri Tanielian & Lisa H. Jaycox eds., 2008), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND\\_MG720.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf); Kravetz, *supra* note 52, at 177.

96. Matthew J. Friedman, *Posttraumatic Stress Disorder Among Military Returnees from Afghanistan and Iraq*, 163 *AM. J. PSYCHIATRY* 586, 587 (2006).

97. John Driscoll, *Traumatic Brain Injury Among 'Citizen Soldiers,'* 5 *BRAIN INJ.*, no. 2, 2009, at 18, 18; *see also* Lorri Hill, *Traumatic Brain Injuries in US Soldiers—The Cognitive and Psychological Effects* 2 (Fall 2011) (unpublished student paper, University of North Texas), [https://classes.lt.unt.edu/Summer\\_10W\\_2012/CECS\\_5420\\_020/lah0228/final-project/school-projects/documents/Hill-Paper-Revised.pdf](https://classes.lt.unt.edu/Summer_10W_2012/CECS_5420_020/lah0228/final-project/school-projects/documents/Hill-Paper-Revised.pdf).

98. VANESSA WILLIAMSON & ERIN MULHALL, *IRAQ & AFG. VETERANS OF AM., INVISIBLE WOUNDS: PSYCHOLOGICAL AND NEUROLOGICAL INJURIES CONFRONT A NEW GENERATION OF VETERANS* 6 (2009), available at [http://iava.org/files/IAVA\\_invisible\\_wounds\\_0.pdf](http://iava.org/files/IAVA_invisible_wounds_0.pdf); *see also* LAWRENCE KORB ET AL., *CTR. FOR AM. PROGRESS, BEYOND THE CALL OF DUTY: A COMPREHENSIVE REVIEW OF THE OVERUSE OF THE ARMY IN THE ADMINISTRATION'S WAR OF CHOICE IN IRAQ* 10 (2007).

99. WILLIAMSON & MULHALL, *IRAQ & AFG. VETERANS OF AM.*, *supra* note 98, at 6; *see also* KORB ET AL., *supra* note 98, at 9.

100. *See* Friedman, *supra* note 96, at 586.

101. *Id.* at 586–87.

combatants is also a strong experience.<sup>102</sup> Soldiers come to feel helpless and fear these unpredictable attacks.<sup>103</sup> While in combat, they also have to deal with the aftermath such as having to handle dead bodies, being the witnesses of destroyed communities and homes.<sup>104</sup> The exposure to sounds and devastating sights of people dying around them creates anxiety.<sup>105</sup>

B. *Problems Faced by Returning Veterans and the Link to Domestic Violence*

Upon return from war, and after being exposed to all of the stressors discussed above,<sup>106</sup> the transition from an environment requiring hypervigilance<sup>107</sup> can be a tough one. ““One minute you are in Baghdad waiting for a bomb to go off and the next minute you are in Burger King . . . . There is a lot of disorientation.””<sup>108</sup> Combat trauma has a long-term impact in the proper functioning of a family.<sup>109</sup> Some military returnees are just not able to leave all of these experiences behind and adapt to their home environment.<sup>110</sup>

The witnessing of violence and death increases the likelihood of aggressive behavior.<sup>111</sup> Some studies show that frequent deployment makes it more likely that combat trauma will occur, which increases the risk of domestic violence.<sup>112</sup> In other words, the more they have witnessed in combat the more likely the domestic violence is.<sup>113</sup> Veterans who displayed more fear in the war zone tend to be more violent toward their partners.<sup>114</sup> Also, a comprehensive study by the National Vietnam Veterans reveals that veterans

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102. *Id.* at 586.

103. *Id.* at 586–87.

104. *Id.*

105. Friedman, *supra* note 96, at 587.

106. *Id.* at 586–87.

107. *Id.* at 587.

108. Alvarez & Sontag, *When Strains on Military Families Turn Deadly*, *supra* note 28 (quoting Judge Pamela Iles, a superior court judge).

109. Sayers et al., *supra* note 53, at e1.

110. Friedman, *supra* note 96, at 587.

111. Thomas E. Church, *Returning Veterans on Campus with War Related Injuries and the Long Road Back Home*, 22 J. POSTSECONDARY EDUC. & DISABILITY 43, 44 (2009).

112. Alvarez & Sontag, *When Strains on Military Families Turn Deadly*, *supra* note 28.

113. *Id.* (quoting Dr. Jacquelyn Campbell, a professor of nursing who was a member of the Pentagon task force).

114. LYNDA A. KING & DANIEL W. KING, MALE-PERPETRATED DOMESTIC VIOLENCE: TESTING A SERIES OF MULTIFACTORIAL FAMILY MODELS, at II–7–10 (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/199712.pdf>.



who participated in the Vietnam War “with high levels of war-related trauma” had a greater risk of engaging in domestic violence.<sup>115</sup>

The truth is, the same type of behavior that in a war zone can allow the veteran to survive is the same behavior that causes them trouble reintegrating upon return.<sup>116</sup> The complex issue of reintegration brings with it psychological and clinical complications such as depression, anger, blame, shame, substance abuse, or psychiatric disorders.<sup>117</sup> Along with these disorders other factors that might cause difficulty and conflict at home could be: Coolness and detachment as a result of controlling emotions in combat, inability to accept that some situations are out of his control, overreactions, and aggressiveness.<sup>118</sup>

By the year 2014, at least “some 1.5 million members of the United States Armed Forces will have served in . . . active combat.”<sup>119</sup> As many as one in five of them will suffer from traumatic brain injury (TBI), PTSD, severe depression, or substance abuse.<sup>120</sup> Studies have found that combat exposure quadruples the risk of domestic violence.<sup>121</sup>

### 1. PTSD in Different International Conflicts

PTSD occurs when a person has experienced an event that involved death, injury to themselves and others, and the person reacts with horror and fear.<sup>122</sup> As a result the affected individual will experience trauma over feelings, dreams, detachment, and avoidance.<sup>123</sup> As much as 30% of military personnel exposed to war zones show signs of PTSD.<sup>124</sup>

Some studies show that there is a relationship between PTSD and the increase of domestic violence.<sup>125</sup> One research study analyzed veterans who sought help with marital relationships and determined that those who had

115. Sayers et al., *supra* note 53, at e1–2.

116. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 2.

117. Friedman, *supra* note 96, at 588.

118. Lara, *supra* note 53, at slide 17, 20, 22.

119. Hawkins, *supra* note 22, at 563.

120. *Id.*

121. Eric B. Elbogen et al., *Improving Risk Assessment of Violence Among Military Veterans: An Evidence-Based Approach for Clinical Decision-Making*, 30 CLINICAL PSYCHOL. REV. 595, 598 (2010); Holly G. Prigerson et al., *Population Attributable Fractions of Psychiatric Disorders and Behavioral Outcomes Associated with Combat Exposure Among US Men*, 92 AM. J. PUB. HEALTH 59, 60 (2002).

122. Church, *supra* note 111, at 47.

123. *Id.*

124. *What Is PTSD?*, NEB. DEPARTMENT OF VETERAN’S AFF., <http://www.ptsd.ne.gov/what-is-ptsd.html> (last visited April 21, 2013).

125. Alvarez & Sontag, *When Strains on Military Families Turn Deadly*, *supra* note 28.

been diagnosed with PTSD “were significantly more likely to perpetrate violence toward their partners.”<sup>126</sup> In fact, combat veterans with PTSD have a higher level of anger than those who have not been diagnosed.<sup>127</sup> This anger, in turn, is reflected in acts of domestic violence.<sup>128</sup> Another study shows that around 63% of veterans with “PTSD had been aggressive to their partners in the last year.”<sup>129</sup> When combined with other issues that returning military have to face—such as depression, substance abuse, and relationships distress—the risk of violence heightens.<sup>130</sup> The veteran’s ability to see that what he is doing is wrong is impaired by PTSD.<sup>131</sup> It has even been recognized in some criminal cases that PTSD is linked to diminished culpability.<sup>132</sup>

a. *World War II*

It is estimated that one in every twenty veterans who participated in World War II experienced symptoms of PTSD.<sup>133</sup> Some of the symptoms include nightmares, irritability, and memories from the incidents.<sup>134</sup>

b. *Korea*

A study shows that “as many as 30 percent” of veterans of the Korean War that are still alive are suffering from PTSD.<sup>135</sup>

c. *Vietnam*

Thirty-one percent of Vietnam veterans were diagnosed with PTSD upon return from deployment, and almost half of male Vietnam veterans with PTSD had been arrested at least once after their return.<sup>136</sup>

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126. Sherman et al., *supra* note 81, at 484.

127. *Id.* at 480.

128. *Id.*

129. *Id.*

130. *Id.* at 484.

131. Hafemeister & Stockey, *supra* note 89, at 105.

132. *Id.* at 126.

133. Jack Epstein & Johnny Miller, *U.S. Wars and Post-Traumatic Stress Disorder*, S.F. GATE, June 22, 2005, <http://www.sfgate.com/health/article/U-S-wars-and-post-traumatic-stress-disorder-2627010.php>.

134. *Id.*

135. *Id.*

136. *Id.*

d. *Afghanistan*

Veterans returning from deployments to Afghanistan have high rates of psychological disorders, including some presenting with PTSD.<sup>137</sup>

e. *Iraq*

In a study of 168,528 Iraqi Veterans, a total of 20% had some sort of psychological disorder, including PTSD.<sup>138</sup> The Marines and Army had higher chances of developing PTSD because of their enhanced exposure to combat while deployed.<sup>139</sup>

2. Traumatic Brain Injury (TBI)

TBI is a trauma to the head—such as one that military personnel receive while in combat—that could be temporary or permanent, and interferes with the proper functioning of the brain.<sup>140</sup> Often, while in the combat field, veterans receive injuries from bullets, hits to the head, or bomb blasts.<sup>141</sup> When an explosion detonates, the blast could cause an invisible wound, which has the ability to damage the brain with no visible marks.<sup>142</sup> This is important because the severity of TBI is determined by what occurred when the injury was received.<sup>143</sup> Symptoms of TBI can be very similar to those of PTSD: Irritability, impatience, anger, and inability to control impulses.<sup>144</sup> Other symptoms include increased verbal and/or physical aggression.<sup>145</sup> TBI has the ability to make PTSD symptoms worse and vice versa.<sup>146</sup> TBI has recently become the “signature injury” that veterans returning from their deployment in Iraq face.<sup>147</sup> Some special issues faced by the soldiers in Iraq are

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137. *Id.*

138. Epstein & Miller, *supra* note 133.

139. *Id.*

140. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 1–2.

141. WILLIAMSON & MULHALL, IRAQ & AFG. VETERANS OF AM., *supra* note 98, at 3.

142. *Id.*

143. Katherine H. Taber & Robin A. Hurley, *OEF/OIF Deployment-Related Traumatic Brain Injury*, PTSD RES. Q., Winter 2010, at 1, 1.

144. BATTERED WOMEN’S JUSTICE PROJECT, VICTIM ADVOCATE GUIDE: INTIMATE PARTNER VIOLENCE (IPV) AND COMBAT EXPERIENCE 2 (2011).

145. *Id.*

146. *Id.*

147. WILLIAMSON & MULHALL, IRAQ & AFG. VETERAN OF AM., *supra* note 98, at 1; Emily Singer, *Brain Trauma in Iraq*, MIT TECH. REV. (Apr. 22, 2008), <http://www.technologyreview.com/featuredstory/409938/brain-trauma-in-iraq/>.

the electromagnetic pulse of explosions, in addition to the sound and light of the blast.<sup>148</sup>

### 3. Depression and Substance Abuse

Although there is no major cause of depression, environmental factors such as the ones that veterans are exposed to while present in the combat zone serve as an aggravating factor.<sup>149</sup> War experiences can lead veterans to a great state of depression and increased suicidal thoughts.<sup>150</sup> These high levels of depression in veterans are correlated with violence.<sup>151</sup> A study shows that approximately 81% of veterans who suffered from depression had “engaged in at least one [violent] act toward their partner[] in the last year.”<sup>152</sup> Thoughts of suicide seem to also play as a risk factor that increases partner violence.<sup>153</sup>

In order to deal with the difficult experiences of combat, some veterans drink or abuse drugs.<sup>154</sup> Although alcohol “abuse does not cause domestic violence, there is [certainly] a . . . correlation between” them.<sup>155</sup> Domestic violence studies often show that there is an increase in the risk of becoming violent when the person is using drugs and alcohol.<sup>156</sup> Also, drug and alcohol use is correlated with violence among intimate partners.<sup>157</sup> A study in 2003 “found that 56.6% of veterans had used alcohol and 7.5% reported heavy alcohol use.”<sup>158</sup> In addition, there were indicators of “higher use of marijuana by veterans.”<sup>159</sup> The use of substances represents an increased risk of lethal violence.<sup>160</sup>

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148. WILLIAMSON & MULHALL, IRAQ & AFG. VETERANS OF AM., *supra* note 98, at 3.

149. See NAT’L ALLIANCE ON MENTAL ILLNESS, DEPRESSION AND VETERANS FACT SHEET (2009), [http://www.nami.org/Template.cfm?Section=Depression&Template=/Content\\_Management/ContentDisplay.cfm&contentID=88939](http://www.nami.org/Template.cfm?Section=Depression&Template=/Content_Management/ContentDisplay.cfm&contentID=88939).

150. BATTERED WOMEN’S JUSTICE PROJECT, *supra* note 144, at 3.

151. Sherman et al., *supra* note 81, at 486.

152. *Id.*

153. BATTERED WOMEN’S JUSTICE PROJECT, *supra* note 144, at 3.

154. *Id.* at 2.

155. NAT’L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE AND SUBSTANCE ABUSE, <http://ncadv.org/files/SubstanceAbuse.pdf>.

156. *Id.*

157. *Id.*

158. Russell, *A Proactive Approach*, *supra* note 8, at 358; see also *Alcohol Use and Alcohol-Related Risk Behaviors Among Veterans*, NSDUH REP. (Substance Abuse and Mental Health Services Administration), Nov. 10, 2005, at 1, 2.

159. Russell, *A Proactive Approach*, *supra* note 8, at 358.

160. See BATTERED WOMEN’S JUSTICE PROJECT, *supra* note 144, at 3.

## IV. A DIFFERENT APPROACH: VETERANS TREATMENT COURTS

A. *Creation and Purpose*

Veterans treatment courts arose in response to an alarming increase in veterans who upon return home from combat would commit crimes.<sup>161</sup> When judges across the country started to notice that veterans who appeared in court brought similar personal issues, they began to suspect that these issues might have been related to the time they spent in service in foreign nations.<sup>162</sup> The inability to cope with problems on their own has sparked initiatives in some jurisdictions to promote and establish veterans treatment courts.<sup>163</sup> Veterans treatment courts are modeled “after other [types of] special[] courts [that have proven successful so far], such as drug courts and mental health courts.”<sup>164</sup> The program aims at “rehabilitation rather than incarceration,”<sup>165</sup> employing treatment programs.<sup>166</sup>

“The first veterans’ court was established in Buffalo.”<sup>167</sup> Veterans eligible for the program were “identified using . . . assessments and . . . then given the [choice] to participate in the program.”<sup>168</sup> Using a “combin[ation] [of] rigorous treatment and personal accountability”<sup>169</sup> these courts give veterans the sources to manage their issues and convert them into productive and law abiding citizens.<sup>170</sup> Eligible veterans are identified and referred to the program by Veterans Justice Outreach Specialists (VJOSs).<sup>171</sup> Since 2008, California, Colorado, Texas, Nevada, Illinois, Connecticut, New Mexico, New York, Minnesota, and Oklahoma “have either adopted or considered [adopting] legislation” to bring these courts into existence.<sup>172</sup>

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161. Spellman & Drash, *supra* note 14.

162. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 1.

163. *Id.*

164. *Id.*

165. Haughney, *supra* note 18.

166. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 1.

167. Haughney, *supra* note 18.

168. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 3.

169. OFFICE OF NAT’L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, FACT SHEET: VETERANS TREATMENT COURTS 1 (2010), available at [http://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/veterans\\_treatment\\_courts\\_fact\\_sheet\\_12-13-10.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/veterans_treatment_courts_fact_sheet_12-13-10.pdf).

170. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 3.

171. See Rachel M. Guerra & Elizabeth Brett, Swords to Plowshares Seminar: Veterans Justice Outreach, slide 7 (Mar. 6, 2012), [http://www.swords-to-plowshares.org/wp-content/uploads/2012/03/VJO-Presentation\\_Rachael-and-Liz.pdf](http://www.swords-to-plowshares.org/wp-content/uploads/2012/03/VJO-Presentation_Rachael-and-Liz.pdf).

172. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 1.

Today, there are over ninety veterans treatment courts in the United States.<sup>173</sup> Although, courts in all jurisdictions have slight variations, all of them follow a similar program.<sup>174</sup> Veterans in the program have access to fellow veterans who serve as mentors.<sup>175</sup> “The way veterans interact with each other is helpful. They respond better and are more receptive when they feel understood.”<sup>176</sup> “There have been reports [from] other [v]eterans [t]reatment [c]ourts that veterans adapt faster to these types of courts . . . .”<sup>177</sup> Upon completion of the program veterans could have charges dropped or lessened.<sup>178</sup>

#### B. *Controversies and Criticisms Regarding Domestic Violence Cases and Veterans Treatment Courts*

Veterans treatment courts encourage the family of the veteran to get involved in the treatment as a way of support and motivation.<sup>179</sup> Although it is generally accepted that our veterans should receive special treatment—including “medical care, educational support, and employment” opportunities—that same special treatment seems to be causing the controversy.<sup>180</sup>

For example, “[a]dvocates for victims of domestic [violence] in Nevada” like the idea of veteran courts, however feel like the “escalating nature of [domestic violence] offenses” should not be within the reach of those courts.<sup>181</sup> In 2009, a teleconference was held that included forty-nine organizations and professionals to discuss in-depth the possibility of admission of violent offenders in veterans treatment courts.<sup>182</sup> The following categories of cases were discussed: Domestic violence, illegal possession of firearms, aggravated substance abuse and offenses, and cases of simple assaults.<sup>183</sup> Even though national advocates and justice professionals countrywide feel like domestic violence is an important problem among veterans, “only a few

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173. MacVicar, *supra* note 20, at slide 3.

174. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 3.

175. *Id.* at 4.

176. Telephone Interview with Dr. Giovanna Delgado, Veterans Justice Outreach Coordinator, Miami VA Healthcare Sys. (July 27, 2012) (on file with *Nova Law Review*).

177. *Id.*

178. See COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 4; Hawkins, *supra* note 22, at 568.

179. Russell, *A Proactive Approach*, *supra* note 8, at 369.

180. Hawkins, *supra* note 22, at 569–71.

181. *Id.* at 570.

182. Fairweather et al., *supra* note 23.

183. *Id.*

courts have [truly] addressed th[e] issue.”<sup>184</sup> Some courts, like the one in Orange County, California, have started to take on a case-by-case approach for offenders of intimate partner violence with the requirement that they demonstrate a clear relationship between the deployment and the violence.<sup>185</sup>

Perhaps the most troubling fact of allowing domestic violence cases in veterans treatment courts seems to be the fact that the victim often continues to have some sort of contact with the offender and people fear they might be in additional danger.<sup>186</sup> Critics also note that the court must have access to all of the previous information from the offender and deployment, and that specialized training will be needed.<sup>187</sup>

All of these criticisms have had an effect on the type of cases accepted into these courts.<sup>188</sup> The cases accepted have generally been limited to non-violent offenses, leaving the violent ones to the traditional criminal justice system.<sup>189</sup> In fact, to get an idea as to which courts do allow domestic violence cases to be heard is a challenge because programs are reluctant to reveal that information due to the controversial nature of the topic.<sup>190</sup> Other programs are full of contradictions when it comes to defining whether they accept them or not.<sup>191</sup>

### C. *Florida’s Veterans Treatment Courts and Domestic Violence*

Florida has past experience with special courts: The drug courts and the mental health courts.<sup>192</sup> Okaloosa County’s veterans cases primarily involve domestic violence and substance abuse.<sup>193</sup> Palm Beach County is not currently taking domestic violence misdemeanors to be heard in their courts, and those cases are referred to another division.<sup>194</sup>

The most recent addition to Florida’s veterans treatment courts has been in Broward County—opened April 30, 2012—presided by Judge Edward H.

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184. *Id.*

185. *Id.*

186. *See id.*

187. Fairweather et al., *supra* note 23.

188. Hawkins, *supra* note 22, at 571.

189. *Id.*

190. Kravetz, *supra* note 52, at 184.

191. *Id.* at 184–85.

192. COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 4.

193. *Id.* at 6.

194. Robin I. Bresky, *New Veteran’s Court Division*, PALM BEACH COUNTY B. ASS’N BULL., Jan. 2011, at 5, 5.

Merrigan, a veteran himself.<sup>195</sup> Broward County's Veterans Treatment Court aims to provide returning veterans that enter the system through another division, opportunities for rehabilitation.<sup>196</sup> It consists of a twelve to eighteen month program to help veterans with "behavioral, mental health, or substance abuse disorders."<sup>197</sup>

Dr. Giovanna Delgado, a psychologist, is the Veteran Justice Outreach Coordinator (VJOC) for the counties of Miami-Dade, Broward, and Monroe.<sup>198</sup> As a VJOC, Dr. Delgado works with community partners such as judges, police departments, and other agencies to give them training and a better understanding of the issues affecting veterans.<sup>199</sup> "We are part of the courtroom and we link veterans to services."<sup>200</sup> Regarding domestic violence cases Dr. Delgado said:

I have not really dealt with any domestic violence cases. I would say that they should be considered in a case-by-case basis. If someone has a history of domestic violence pre-deployment, it is not the same case as someone who does not. The court should determine the criteria.<sup>201</sup>

Broward County's Veterans Treatment Court is currently willing to handle domestic violence cases; however, no case of this type has been presented yet.<sup>202</sup> When asked his opinion about having domestic violence cases heard in veterans treatment courts, Judge Merrigan said:

I think having domestic violence cases in Veterans Treatment Courts is a good idea because it will benefit them in a way that traditional courts cannot. . . . It does not matter how understanding the family is, there is some friction and they need professional help. Whether or not they are successful is a different story, but we have to give them access to the program.

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195. *Veterans Court Begins in Broward County*, 17TH JUD. CIRCUIT. CT. FLA., <http://www.17th.flcourts.org/index.php/announcements/186-veterans-court-begins-in-broward-county> (last updated May 4, 2012).

196. *Id.*

197. *Id.*

198. Telephone Interview with Dr. Giovanna Delgado, *supra* note 176.

199. *Id.*

200. *Id.*

201. *Id.*

202. Interview with Edward H. Merrigan, Jr., Broward Cnty. Judge, Veterans' Treatment Court, Lieutenant Colonel, U.S. Army Reserves (July 26, 2012) (on file with *Nova Law Review*).



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I think that even if they have a history previous to deployment, we should accept them. I think it would still benefit them.<sup>203</sup>

## V. FIXING AT HOME WHAT WAS BROKEN ABROAD: A RESTORATIVE APPROACH

“Restorative justice is a [relatively] new [idea] in the fields of victimology and criminology [that] [a]cknowledg[es] that crime[s] cause[] injury to people and communities.”<sup>204</sup> It follows the idea that the harm done should be repaired and the parties involved should be allowed to participate in the process.<sup>205</sup> This initiative allows the victims and the offenders to be “involved in responding to the crime.”<sup>206</sup> It takes a social, rather than isolated approach to criminal justice issues.<sup>207</sup> The program encourages face-to-face meetings that address the injuries and what should be done to repair them.<sup>208</sup> There is some evidence that the willingness of individuals to participate in restorative justice programs is high.<sup>209</sup> It is likely that a victim of domestic violence whose partner was never violent pre-deployment, but has now become so, will be willing to give one last attempt to fix the issue. This is particularly true if the victims become aware that the program involves trained experts.

### A. *Veterans Treatment Courts as a Restorative Type of Justice in Domestic Violence Cases*

“Social support is a [very] powerful protective factor”<sup>210</sup> and could help the returning military to feel accepted. Veterans treatment courts seem promising when compared with much older therapeutic courts, such as drug

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203. *Id.*

204. CTR. FOR JUSTICE & RECONCILIATION, PRISON FELLOWSHIP INT’L, WHAT IS RESTORATIVE JUSTICE? 1 (2008), available at <http://www.pfi.org/cjr/restorative-justice/introduction-to-restorative-justice-practice-and-outcomes/briefings/what-is-restorative-justice/view>.

205. *Id.*

206. *Id.*

207. TONY F. MARSHALL, HOME OFFICE RESEARCH DEV. & STATISTICS DIRECTORATE, RESTORATIVE JUSTICE: AN OVERVIEW 5 (1999), available at <http://tna.europarchive.org/20100413151441/http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf>.

208. CTR. FOR JUSTICE & RECONCILIATION, PRISON FELLOWSHIP INT’L, *supra* note 204, at 1.

209. MARSHALL, HOME OFFICE RESEARCH DEV. & STATISTICS DIRECTORATE, *supra* note 207, at 8.

210. Friedman, *supra* note 96, at 589.

courts.<sup>211</sup> Intervening early can serve to stop a cycle of violence.<sup>212</sup> Furthermore, restorative justice allows the family and victim of the offender to receive emotional and spiritual support.<sup>213</sup> Allowing meetings between the veteran with his or her spouse or partner on a regular basis can permit the offender to take responsibility for his or her actions and develop a plan to cope with the issue.<sup>214</sup> Victims also receive a much needed apology and see the regret in the veteran, which can be healing.<sup>215</sup>

Using veterans treatment courts as a restorative approach will allow offenders to repair the harm done and reintegrate to society.<sup>216</sup> Intimate partners represent a great role in the maintenance of one's health and could encourage the veteran to finish the treatment.<sup>217</sup> So far the courts have proven effective and have even made positive changes in veterans lives.<sup>218</sup> Some have also been able to fix their relationships and get "their lives back on track."<sup>219</sup>

Since veterans are a unique group of individuals and their needs are even more unique<sup>220</sup>—as with domestic violence—then it follows that special treatment of these individuals' needs is required.<sup>221</sup> Traditional courts do not consider the great interaction between the issues presented by veterans and domestic violence.<sup>222</sup> "And to have the police catch these veterans, often at great danger, beat them with a conviction for some crime of which they may or may not be guilty, and then turn them out on the street without testing or treatment, as is common practice now, is insane."<sup>223</sup> Traditional courts also

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211. See COMM. ON MILITARY AFFAIRS & DOMESTIC SEC., *supra* note 15, at 6.

212. Spellman & Drash, *supra* note 14.

213. CTR. FOR JUSTICE & RECONCILIATION, PRISON FELLOWSHIP INT'L, *supra* note 204, at 1–2.

214. See *id.*

215. *Id.* at 2.

216. See *id.* at 1–2.

217. See Monson & Taft, *supra* note 13, at 2.

218. Russell, *A Proactive Approach*, *supra* note 8, at 370.

219. *Id.*

220. Robert T. Russell, *Veterans Treatment Courts Developing Throughout the Nation*, NAT'L CENTER FOR ST. COURTS, 130 (2009), <http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/spcts/id/204/rec/13>.

221. See Lily Casura, *Combat Veterans, PTSD and Domestic Violence—A Sometimes Deadly Combination*, HEALING COMBAT TRAUMA (Dec. 18, 2008), <http://www.healingcombattrama.com/2008/12/combat-veterans-ptsd-and-domestic-violence-a-sometimes-deadly-combination.html>.

222. See Lara, *supra* note 53, at slide 9; Russell, *A Productive Approach*, *supra* note 8, at 366.

223. CORRY, *supra* note 62, at 1.

do not consider the fact that these veterans are trained to be violent before their deployment.<sup>224</sup>

Initial data on the effectiveness of these courts suggest that there is a decrease in re-offense for misdemeanors from 15% in veteran courts to 40-50% in regular courts.<sup>225</sup> For felonies the numbers also seem promising: 15% in veteran courts versus 70% in regular courts.<sup>226</sup>

Since military personnel have been disciplined and have had to follow orders before, they are likely to follow the program, even if domestic violence is included.<sup>227</sup> Receiving help from other veterans with similar experiences could be a motivating factor.<sup>228</sup> The concern that the victim is in constant contact with the offender and could be in further peril<sup>229</sup> is one without merit.<sup>230</sup> When presented with this issue, Judge Merrigan said: “We still keep in place restraining orders and the no weapon policy. Safety and protection of the victims should not be a concern, because it is the same as in traditional programs.”<sup>231</sup>

It is likely that a veteran’s partner who has not had an issue of violence with the veteran before—but has an incident after deployment—will be willing to be proactive and try to fix it. Veterans that commit violent offenses whose conduct is a consequence of issues acquired during their stay overseas will be more suitable to be treated in veterans treatment courts.<sup>232</sup> Also, they should be eligible because they are suffering from the same underlying conditions that have led veterans that have committed non-violent offenses to do so.<sup>233</sup> The mental illnesses presented by the returning veterans are a direct effect from the combat environment they were exposed to while on foreign soil, and treatment is likely to break the cycle.<sup>234</sup> Fairness requires that the same system of rewards and sanctions be offered to domestic violence offenders and non-violent offenders.<sup>235</sup> “The violent offenders need help more than anybody . . . .’ If you are going to create special judicial programs to

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224. See Lara, *supra* note 53, at slide 27.

225. MacVicar, *supra* note 20, at slide 13.

226. *Id.*

227. See Cavanaugh, *supra* note 14, at 981.

228. *Id.* at 483–84.

229. See Fairweather et al., *supra* note 23 (discussing the concern that in domestic violence cases contact between the victim and the offender could be dangerous).

230. See Interview with Edward H. Merrigan Jr., *supra* note 202.

231. *Id.*

232. Cavanaugh, *supra* note 14, at 486. The current article only focuses on domestic violence cases. Although still controversial, other violent offenses are beyond the scope of this article.

233. *Id.*

234. *Id.* at 487.

235. *Id.*

help veterans, does it make sense to give special services only to those who need help the least?"<sup>236</sup>

Using veterans treatment courts as a restorative justice approach seems promising because of previous results of restorative justice programs.<sup>237</sup> There is evidence that restorative justice can satisfy the needs of the victim and has the power to reduce the frequency that the offender will reoffend up to 27%.<sup>238</sup> Instead of feeling that everyone wants to punish him, the veteran will be motivated to reform and have the feeling that society will reaccept him.<sup>239</sup>

Some think that a restorative justice approach is "soft" or lenient.<sup>240</sup> However, many aspects of restorative justice programs are tougher than regular programs because they require the offender to take full responsibility for his actions and repair the harm done.<sup>241</sup> The imposition of "[e]xcessive [punishment] does not equate with being tougher on crime."<sup>242</sup> Punishment has a tendency to work better when all of the parties involved accept it, and when it is carefully calculated to address the issue.<sup>243</sup> This flexible approach could prove beneficial to veteran families in distress as a result of domestic violence. It will heal them, instead of imposing a severe prison sentence on the veteran and placing an economic burden on the criminal justice system.

### 1. Public Policy Considerations

Americans all over the nation must be aware that we are indebted to our military veterans who have gone overseas to protect us.<sup>244</sup> Even though there is imminent danger in combat, serious challenges await our veterans when they return home.<sup>245</sup> If anyone in this country deserves to be treated in a special manner—particularly when it comes to issues related to their families—it is our veterans. What we do for them is a reflection of who we are as a country. Hearing domestic violence cases in veteran treatment courts will

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236. *Id.* at 486.

237. *See Restorative Justice Works*, *supra* note 29.

238. *Id.*

239. *See* MARSHALL, HOME OFFICE RESEARCH DEV. & STATISTICS DIRECTORATE, *supra* note 207, at 11.

240. *Id.* at 26.

241. *Id.*

242. *Id.*

243. *Id.*

244. OFFICE OF NAT'L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, *supra* note 169, at 1.

245. *Id.*

not only make them productive citizens,<sup>246</sup> but also return the peace of mind to their partners, who had to be strong through deployment and now have their relationships destroyed by domestic violence.<sup>247</sup> Even if the task is challenging, it is no excuse to ignore the issue altogether. Individuals who are involved with these types of courts agree that incarceration is not really the way to go in trying to solve the veterans issues.<sup>248</sup> “I do not think they are being treated different, I think they are being given the benefits they have earned,” said Judge Merrigan.<sup>249</sup>

## 2. Program Recommendations

The traditional criminal justice system is not prepared to handle the symptoms associated with some of the issues the military face as a consequence of deployment.<sup>250</sup> This is why the veterans treatment courts specializing in these kinds of issues are able to more adequately solve them. It is important for therapists and professionals to recognize the higher risk of domestic violence presented by veterans suffering from depression and PTSD.<sup>251</sup> Targeting the symptoms that have triggered the domestic violence<sup>252</sup> instead of trying to convict veterans could be a more effective way to deal with the problem.<sup>253</sup> Since treatments for domestic violence are different from those to cure some mental health issues such as PTSD there should be a combination of those with specialized domestic interventions.<sup>254</sup>

The assistance and collaboration of professionals is required, not only in regular cases, but also in domestic violence cases. Family counselors should be used along with other trained personnel, like psychologists. In an effort to avoid the problem before it arises, the courts should also offer military personnel and their partners pre-deployment “preparatory [and] educational materials,”<sup>255</sup> which would help them cope with the distance while on international soil and prepare them to face post-deployment issues. The critics complain that there is no protocol to follow;<sup>256</sup> however, a lot of methods can

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246. See Russell, *A Proactive Approach*, *supra* note 8, at 366, 370–71.

247. See *id.* at 359; see also Bannerman, *supra* note 1.

248. Cavanaugh, *supra* note 14, at 480.

249. Interview with Edward H. Merrigan, Jr., *supra* note 202.

250. See CORRY, *supra* note 62, at 2.

251. Sherman et al., *supra* note 81, at 487.

252. See KING & KING, *supra* note 114, at II-7-10 to II-7-11.

253. See CORRY, *supra* note 62, at 3.

254. Casura, *supra* note 221.

255. See Monson & Taft, *supra* note 13, at 2.

256. Kravetz, *supra* note 52, at 165–66.

be integrated into the program that are already in existence.<sup>257</sup> For example, Critical Interaction Therapy exists, which “focuses on . . . resolving [the] ‘critical interaction’ that develop[] between spouses” as a result of trauma experiences.<sup>258</sup> Also, Emotion Focused Therapy can be adapted to fit marital distressed couples.<sup>259</sup> Some of these treatments have showed promising results<sup>260</sup> and should be integrated to veterans treatment courts when dealing with domestic violence.

As long as ongoing risk assessments and safety planning are done<sup>261</sup> admitting domestic violence cases to veteran treatment courts would do more good than harm. Of course, limits should be placed. Veterans who have no history of domestic violence, but upon return become violent towards their partner should be given priority to enter the program. Veterans with a prior history of domestic violence should be considered on a case-by-case basis. Furthermore, currently efforts are being made by various organizations to solve these types of challenges by using studies, funds, and increasing community based-partnerships.<sup>262</sup>

Domestic violence is a serious issue nationwide and the response should be as serious, while protecting the needs and the well-being of veterans and their families.<sup>263</sup> Even if training and preparation is expensive, there is also a serious cost when nothing is done.<sup>264</sup> Healthy and formerly functional families are being torn apart by this unfortunate reality.

Perhaps another consideration for the program would be to offer them mental treatment when returning home regardless of the likeliness of committing an offense.<sup>265</sup> When approaching a domestic violence incident, the source of the conduct should be considered when deciding the appropriate way to intervene.<sup>266</sup> It would be pointless to put the veteran through a veteran program without first addressing the underlying issue.<sup>267</sup> The interven-

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257. See Monson & Taft, *supra* note 13, at 2–3.

258. *Id.* at 3.

259. *Id.*

260. *Id.*

261. See Fairweather et al., *supra* note 23.

262. *Id.*

263. See *id.*

264. Hawkins, *supra* note 22, at 570.

265. Cavanaugh, *supra* note 14, at 485.

266. 1 DEBORAH D. TUCKER, DOMESTIC VIOLENCE, PTSD AND BRAIN INJURY: MILITARY AND CIVILIAN CHALLENGES 5 (2009), [http://www.ncdsv.org/images/MFLJ\\_Domestic%20Violence%20and%20PTSD\\_Tucker\\_Pt%201\\_4-2009.pdf](http://www.ncdsv.org/images/MFLJ_Domestic%20Violence%20and%20PTSD_Tucker_Pt%201_4-2009.pdf).

267. *Id.*

tion should be aimed at fitting not only the offense, but also the circumstances under which it occurred.<sup>268</sup>

## VI. CONCLUSION

For a veteran, it is unfortunate to lose a friend in combat; but perhaps the most devastating part is returning home and losing his or her family as well. Our veterans and their loved ones, who are often surrounded with uncertainty in a deployment, should be able to at least rest assured that their family life upon their return will be safeguarded.<sup>269</sup> It is an irony to train soldiers to survive in such a hostile environment, to kill and trust no one, and then expect them to come home and be peaceful without any type of intervention. The current aversion in some jurisdictions against cases of domestic violence involving veterans being admitted to veterans treatment courts should not continue. The support for our troops should not be limited to sending them letters and food when they are away; it should continue when they come back and are on the verge of losing their families, facing time in jail, or both. Allowing domestic violence cases in veterans treatment courts will serve one of the main purposes of restorative justice<sup>270</sup> and contribute to the long-term commitment in this country to healing the internal wounds of war.<sup>271</sup>

—“Freedom is not free.”<sup>272</sup>

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268. *Id.*

269. See THE WHITE HOUSE, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA’S COMMITMENT 8–22 (2011), available at [http://www.defense.gov/home/features/2011/0111\\_initiative/strengthening\\_our\\_military\\_january\\_2011.pdf](http://www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf) (detailing nearly 50 commitments by Federal agencies to supporting military families).

270. See MARSHALL, HOME OFFICE RESEARCH DEV. & STATISTICS DIRECTORATE, *supra* note 207, at 20.

271. See THE WHITE HOUSE, *supra* note 269, at 1.

272. *Korean War Veterans Memorial*, NAT’L PARK SERVICE, <http://www.nps.gov/kowa/index.htm> (last visited Apr. 21, 2013). These words are engraved in the Washington D.C.’s Korean War Memorial. See *id.* This phrase is an idiom usually used to express gratitude to our troops. See *id.* It implicitly says that the benefits we enjoy today are owed to the sacrifices taken by our military by going to foreign nations and fighting for our freedom. See *id.*