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## 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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**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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*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.army1.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>

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>

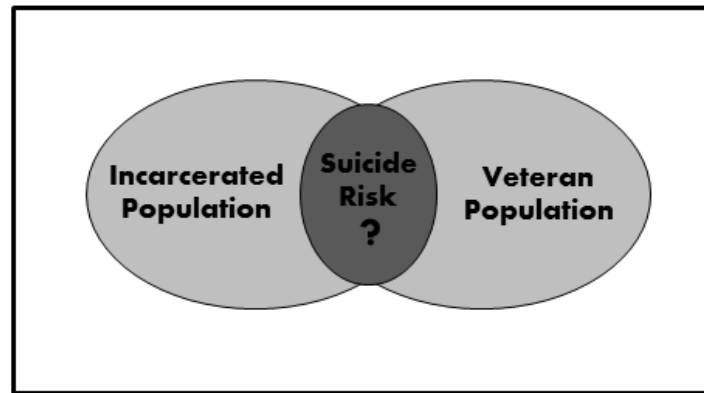


Fig. 1<sup>191</sup>

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>

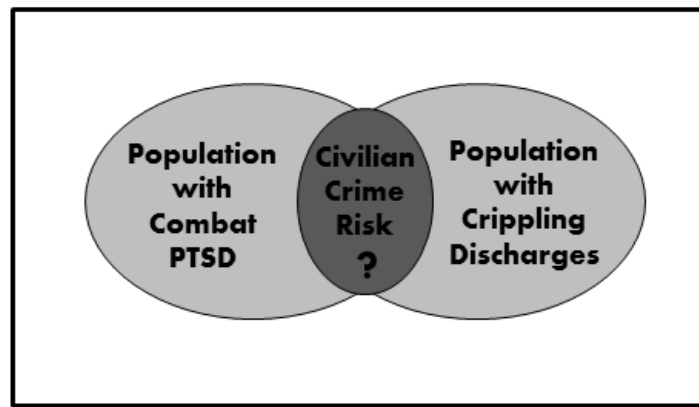


Fig. 2<sup>195</sup>

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).