
PTSD AND BAD PAPER DISCHARGES: WHY THE FAIRNESS
TO SOLDIERS ACT IS TOO LITTLE, TOO LATE

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INTRODUCTION

Good soldiers must possess courage and fearlessness to trudge forward when faced with danger.¹ Good soldiers must also be assertive, have nerves of steel, be focused, tenacious, fierce, brutal when needed, ferocious, relentless, and even austere.² While helpful and almost required in combat theaters, these same characteristics and behaviors may also be manifestations of Post-Traumatic Stress Disorder (PTSD) and Mild Traumatic Brain Injury (MTBI). When exhibited by a member of a combat unit outside of the battlefield, these characteristics and behaviors may lead a soldier down a speedy path to a “bad paper”³ discharge, as evidenced by more than one hundred thousand service members⁴ being separated from the military within the last ten years with “bad paper” discharge characterizations.⁵

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¹ *What are the Qualities of a Good Soldier?*, REFERENCE, <https://www.reference.com/government-politics/qualities-good-soldier-5cf0a28e19648f9d> (last visited Sept. 3, 2017).

² See generally Ram Charan, *Six Personality Traits of a Leader*, MILITARY.COM (Jan. 2007), <http://www.military.com/veteran-jobs/career-advice/on-the-job/6-traits-for-improved-leadership-skills.html> (describing ambition, drive and tenacity, self-confidence, psychological openness, and realism as the most common personal traits affecting leadership); Tabatha Turman, *Qualities the Army Instilled in Me That Helped Me Launch a Business*, ENTREPRENEUR (Nov. 11, 2014), <https://www.entrepreneur.com/article/239596> (describing focus, relationships, leadership, team building, accountability, strategic thinking, and loyalty as military-learned skills that were crucial when starting a business).

³ Any discharge for a military service unit that is less than an Honorable discharge can be considered a “bad paper” discharge. “Bad paper” discharges, for the purposes of this article, are “Other Than Honorable Discharges;” not “Bad Conduct” discharges or “Dishonorable Discharges” for which both require elevation through higher channels from the recommending commander to a military judge or panel.

⁴ Service member is defined as a member of the uniformed services. A service member is not automatically deemed to be a Veteran. See 10 U.S.C. § 101(a)(5) (2012).

⁵ Most people who serve in the military receive one of five types of discharges: (1) Honorable; (2) General Under Honorable Conditions; (3) Other than Honorable, which includes Bad Paper; (4) Bad Conduct; or (5) Dishonorable. Ryan Guina, *Types of Military Discharges*, THE MIL. WALLET (Jan. 19, 2011), <http://themilitarywallet.com/types-of-military-discharges/>.

With an increasing number of service members⁶ being discharged with “bad paper,” the crisis of this situation lies in the increased number of service members having either delayed or no access to veterans’ benefits as a result of their discharge characterizations; this includes, but is not limited to, the mental health care needed to treat PTSD and MTBI.⁷ Furthermore, this delay in treatment, or complete lack of treatment, results in a schism between the service member and one of the best qualified, well-resourced “reservoir of combat PTSD [and MTBI] expertise, the V[eteran’s] A[dministration].”⁸

While there is an administrative process that service members with “bad paper” discharges may use to challenge the characterization of their discharge and thereby seek benefits that were denied because of their discharge characterization, and while President Obama signed into law the Fairness for Veterans Act of 2016⁹ to help facilitate these administrative processes, these administrative processes are still very lengthy and difficult to navigate, especially for services members who are already burdened by PTSD and MTBI.¹⁰

Without the ability to use veteran health benefits to access needed mental health treatment, service members with “bad paper” discharges find that as their mental health worsens, they may become criminalized,

⁶ The term “service member” is used in this article because the Department of Defense (DoD) and the Veteran’s Administration (VA) distinguish between those soldiers who separated from the military in good standing, by referring to them as veterans; and those who have separated from the military with “Other than Honorable” or “Bad Paper” discharges, by not referring to them as veterans. See *infra* Section III.

⁷ This article does not intend to minimize the occurrence of PTSD in service members who have non-combat military occupational specialty codes. The author understands that PTSD, especially, can result from observing a traumatic event just as easily as it can occur if you are a victim or an active participant in the traumatic event. And while this author is of the belief that all service members should be afforded access to mental health services post separation, no matter the discharge characterization, this article is focused on combat service members.

⁸ *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. 105 (1993) [hereinafter *Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents*] (statement of Warren Quinlan, Director of Operations, New England Shelter for Homeless Veterans).

⁹ See generally *The Fairness for Veterans Act of 2016*, H.R. 4683, 114th Cong. (2d Sess. 2016) (amending Title 10 of the United States Code and providing for a review of the characterization or terms of discharge from the Armed Forces of individuals with mental health disorders alleged to affect terms of Discharge).

¹⁰ Kasey Cordell, *Breach of Honor*, 5280 (Aug. 2017), <http://www.5280.com/2017/07/breach-of-honor/#>.

may be rendered homeless, may become estranged from their families, may turn to substance abuse and addiction, may result in suicide, and may result in the death of innocent members of our communities.¹¹ It is the contention of this author that if left unaddressed, the consequences that result from the behavior and actions of untreated service members who suffer from PTSD and MTBI on the civilian community will quickly progress from an individual in need of treatment to an overwhelming public health concern.

This Article suggests that the United States Government, via the Department of Defense and the Department of Veteran Affairs, owes a duty to its service members.¹² This duty includes the provision of mental health services to all service members who develop PTSD or MTBI during their tour of duty, regardless of their discharge characterization.¹³

Section I of this Article introduces the public health crisis that is created when combat unit service members who have been active participants in war theaters are separated from the military with untreated PTSD or TBI and as a result of the “bad paper” discharge have no ready access to mental health treatment once they have returned to civilian life.

Section II of this Article provides a brief history of the origins of the duty that the United States Government has to care for its service members and a review of how the government provided this care.

Section III of this Article explains how difficult it is for service members who are discharged with “bad-paper” to access mental health services.

Section IV of this Article suggests that there be a 6th discharge characterization of “General-Pending.” This “General-Pending” discharge characterization should be assigned to all service members that are eligible for separation under an “Other Than Honorable” discharge characterization, if there is reason to believe that the character and behavior of the service member that makes them eligible for an “Other Than Honorable” discharge can be the result of PTSD or MTBI. During this pending period, the service member is ordered to seek evaluation and treatment, and after a specified period of time, no less than 12 months, the service member is

¹¹ See *Stopping Suicides: Mental Health Challenges within the U.S. Department of Veterans Affairs: Hearing Before the H. Comm. on Veteran's Affairs*, 110th Cong. 97 (2007) (statement of Joy J. Ilem, Assistant National Legislative Director, Disabled American Veterans).

¹² See *infra* Section II.

¹³ See *infra* Section IV.

then eligible for a “General” discharge, provided they are cooperative in their mental health treatment.

Ultimately, this Article provides that all service members are deserving of at least minimum health care benefits that include mental health wellness. Allow this discourse to serve as a call to arms and to transformative realizations that yield preventative and prescriptive actions for the benefit of service members that go beyond what is provided in the Fairness for Veterans Act.¹⁴ And while on December 29, 2016, the Defense Department announced that it is reviewing and potentially upgrading the discharge status of veterans who might have been improperly discharged for reasons related to post-traumatic stress disorder,¹⁵ this too is too late for so many.

This Article is intended to remind the United States Government that, above all, it has a duty to care for those who have borne the burdens of

¹⁴ Bryan McMahon, *Fairness for Veterans Act of 2016 (HR 4683, 114th Congress)* DUKE SCIPOL (June 20, 2016), <http://sciencepolicy.duke.edu/content/fairness-veterans-act-2016-hr-4683-114th-congress>. [T]he “Fairness for Veterans Act of 2016” revises the current discharge review process—which reevaluates the initial conditions of discharge for a former armed forces member—to mandate a board’s review of medical evidence concerning a TBI or PTSD. Changing an armed service member’s discharge conditions can affect veteran benefits and often provide compensation for treatment of disease. Specifically, H.R. 4683 amends Section 1553(d) of Title 10 of the United States Code to additionally require the discharge review board to: review medical evidence for a veteran (1) who was diagnosed with PTSD or TBI as a result of a deployment and (2) whose application for relief from the terms of military discharge include a PTSD or TBI related to combat or military sexual trauma; Evaluate the case with a presumption in favor of the fact that PTSD or TBI resulted in a lesser discharge for a veteran than is appropriate. *Id.*

¹⁵ See Wyatt Olson, *Pentagon Review Could Help Veterans Shed ‘Bad Paper’ Discharges*, MILITARY.COM (Dec. 31, 2016), <http://www.military.com/daily-news/2016/12/31/pentagon-review-could-help-veterans-shed-bad-paper-discharges.html>.

war.¹⁶ From this duty, the United States Government has a moral obligation to analyze, reflect and implement the best methods to serve service members in need.¹⁷

I. THE PUBLIC HEALTH CRISIS

A. *The Mental Health Tragedy that is the Result of War*

“No man in battle is really sane. The mindset 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.”¹⁸

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.¹⁹ In the profession of arms, dangerous duty requires a different, harsher type of leadership from 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, and like it.”²⁰

Joshua Bunn was a rifleman in one of the bloodiest valleys in Afghanistan, where his infantry unit killed hundreds of enemy fighters and lost more comrades than any other battalion in the Marine Corp in 2009. After deployment, Mr. Bunn, suicidal and haunted by nightmares, went absent without leave. The

¹⁶ On March 4, 1865, as the nation braced itself for the final throes of the Civil War, thousands of spectators gathered near the U.S. Capitol to hear President Lincoln’s second inaugural address. President Lincoln framed his speech on the moral and religious implications of the Civil War, rhetorically questioning how a just God could unleash such a terrible war upon the nation:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow, and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

The Origin of the VA Motto: Lincoln’s Second Inaugural Address, U.S. DEP’T VETERANS AFFAIRS, <https://www.va.gov/opa/publications/celebrate/vamotto.pdf> (last visited Sept. 8, 2017).

¹⁷ See Christopher C. Burkett, *Remaking the World: Progressivism and American Foreign Policy*, 47 FIRST PRINCIPLES 1, 7 (2013).

¹⁸ RICHARD A. GABRIEL, *NO MORE HEROES: MADNESS & PSYCHIATRY IN WAR*, at prefatory note (1987).

¹⁹ See JOANNA BOURKE, *AN INTIMATE HISTORY OF KILLING: FACE-TO-FACE KILLING IN TWENTIETH-CENTURY WARFARE* 210 (1999).

²⁰ Remarks to the Cadet Corps at West Point, 224 PUB. PAPERS 437, 437–38 (Sept. 28, 1946).

Marine Corp charged him with misconduct and gave him an “other-than-honorable” discharge.²¹

No matter how the business of war is adorned by parades, uniforms, and literary glorification of the warrior’s courage, the combat soldier has a mission to accomplish,²² and many times, for combat soldiers, this mission may result in the death of other human beings.²³ The soldier who kills is permanently changed, fixed to the death he has made.²⁴ Studies conducted since World War II have shown that only 2% of those serving in the military have a “natural-born killer” predisposition.²⁵ The remaining 98% must be trained and taught how to pull a trigger to kill.²⁶ While the military training tactics used to teach American soldiers how to kill are extremely effective,²⁷ the military does not prepare soldiers who have killed or who have seen others killed for the long-term psychological trauma they may experience as a result.²⁸ “The horrific violence is taking its toll . . . ,”²⁹ not only on service members from past wars, but on service members who are currently serving.³⁰

War, I believe, dare not be commented on by those who has [sic] yet to experience it. Until you kill other human beings for survival, what could you possible say about it? It assaults all your scences [sic], the smell of death and the machines that cause it. Noises so loud you feel like an ant under a lawnmower. It is incompressible.³¹

²¹ Dave Philipps, *Report Finds Sharp Increase in Veterans Denied V.A. Benefits*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com/2016/03/30/us/report-finds-sharp-increase-in-veterans-denied-va-benefits.html>.

²² ILONA MEAGHER, *MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA’S RETURNING TROOPS* 83 (2007) (citing THEODORE NADELSON, *TRAINED TO KILL: SOLDIERS AT WAR* 37 (2005)).

²³ *Id.* at 84–85.

²⁴ *Id.* at 83.

²⁵ *Id.* at 84.

²⁶ *Id.*

²⁷ *Id.* at 85.

²⁸ *Id.* at 85–86.

²⁹ Olympia Duhart, *Soldier Suicides and Outcrit Jurisprudence: An Anti-Subordination Analysis*, 44 CREIGHTON L. REV. 883, 886 (2011).

³⁰ *Id.*

³¹ Hamilton Nolan, *PTSD and Me: True Stories From Military Veterans*, GAWKER (Aug. 19, 2013, 2:53 PM), <http://gawker.com/ptsd-and-me-true-stories-from-military-veterans-1167107848>.

“As the end of America’s longest wartime chapter nears, questions about how the nation will support and empower its newest generation of military veterans have ascended in the national political discourse.”³² One thing is for certain: service members who served in combat theaters who suffer from untreated Post-Traumatic Stress Disorder (PTSD) or Mild Traumatic Stress Brain Injury (MTBI), and have been discharged back to civilian life without the benefit of mental health treatment, raise special public health concerns.³³

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.³⁴

B. The Historical Manifestations of Post-Traumatic Stress Disorder

Since the time of the ancient Greeks, soldiers have encountered significant psychological trauma as a result of experiencing shocking³⁵ events during war.³⁶ The Greek historian Herodotus described an Athenian warrior who, after witnessing the slaughter of a fellow soldier, became “blind” during the Battle of Marathon in 490 B.C. although the soldier was “wounded in no part of his body.”³⁷ Hundreds of years later, a Swiss physician, Johannes Hofer, would name the illness “nostalgia,” symptoms of which included “melancholy, incessant thinking of home, disturbed sleep or insomnia, weakness, loss of appetite, anxiety, cardiac palpitations, stupor and fever.”³⁸ The disorder has been given names such as “soldier’s

³² NICHOLAS J. ARMSTRONG & J. MICHAEL HAYNE, A NATIONAL VETERANS STRATEGY: THE ECONOMIC, SOCIAL AND SECURITY IMPERATIVE 5 (2013).

³³ See Evan R. Seamone, *Dismantling America’s Largest Sleeper Cell: The Imperative to Treat, Rather Than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479, 481–84 (2013).

³⁴ *Id.* at 480.

³⁵ See, e.g., Madeleine Baran, *Timeline: Mental Illness and War Through History*, MINN. PUB. RADIO NEWS (Feb. 2010), <http://minnesota.publicradio.org/projects/2010/02/beyond-deployment/ptsd-timeline/index.shtml>.

³⁶ *Id.*

³⁷ MEAGHER, *supra* note 22, at 13.

³⁸ *Id.* at 13–14.

heart,” “battle fatigue,” and “shell shock.”³⁹ Today, however, we call this disease Post-Traumatic Stress Disorder, or PTSD.⁴⁰

From its first remnants in Ancient Greece, up through the initial wave of ‘shell shocked’⁴¹ American soldiers in World War I, all the way to its present day status in the midst of the Middle East conflict, PTSD is a disease that has continued to evolve, both in its treatments as well as in the societal stigma attached to it.⁴²

PTSD shatters the important assumption that “a moral order exists in the universe that discriminates right from wrong.”⁴³ Combat stress can damage beliefs in right and wrong, self-identity and moral code.⁴⁴ “Combat stress can damage brain centers that control emotions, impair rational thought circuits and inhibit a [soldier’s] ability to think before acting, putting [service members] with combat experience at ‘increased risk’ of misconduct.”⁴⁵

Cultures have attempted to treat and rehabilitate veterans suffering from psychological wounds of war for centuries.⁴⁶ “[I]nsurance coverage in the form of military benefits from the government has become the main source of financial, psychological, and medical support for [service members] and veterans.”⁴⁷ This support, however, is severely limited, espe-

³⁹ Baran, *supra* note 35.

⁴⁰ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–68 (4th ed. 2000) [hereinafter DSM-IV-TR].

⁴¹ The World War I name for what is known today as post-traumatic stress, this is a psychological disorder that develops in some individuals who have had major traumatic experiences (and, for example, have been in a serious accident or through a war). The person is typically numb at first but later has symptoms including depression, excessive irritability, guilt (for having survived while others died), recurrent nightmares, flashbacks to the traumatic scene, and over-reactions to sudden noises. Post-traumatic stress became known as such in the 1970s due to the adjustment problems of some Vietnam veterans. See *Medical Definition of Shell Shock*, MEDICINENET.COM (May 13, 2016), <http://www.medicinenet.com/script/main/art.asp?articlekey=5474>.

⁴² Andrea Gomes, *Coverage for Veterans with Post-Traumatic Stress Disorder: A Survey Through the Wars*, 19 CONN. INS. L.J. 325, 325 (2012).

⁴³ COMBAT STRESS INJURY: THEORY, RESEARCH, AND MANAGEMENT 53 (Charles R. Figley & William P. Nash eds., 2007).

⁴⁴ Seamone, *supra* note 33, at 497.

⁴⁵ See John Hoellwarth, *Medical officer links misconduct and PTSD*, LEATHERNECK.COM (June 23, 2007, 11:07 AM), <http://www.leatherneck.com/forums/showthread.php?48851-Medical-officer-links-misconduct-and-PTSD>.

⁴⁶ MEAGHER, *supra* note 22, at 122.

⁴⁷ Gomes, *supra* note 42, at 327.

cially for ex-service members who have been discharged with “bad paper”.⁴⁸ “Thousands of soldiers have been unable to secure assistance for their mental health and today, thousands of veterans are still fighting for health care.”⁴⁹ As a result of this insufficient healthcare coverage, inadequate access to resources, barriers to healthcare, and the stigma that is still associated with mental health illnesses like PTSD, veterans and ex-service members with “bad paper” resort to drugs, are unable to secure employment, become homeless, and, at times, even resort to violence.⁵⁰

C. *The Public Health Crisis: Truth in Numbers*

Currently, there are approximately 22 million⁵¹ living veterans in the United States.⁵² 1.3 million served in World War II (1939-1945, 6 years); 2.1 million served in the Korean War (1950-1957, 3 years); 7 million served during the Vietnam-era (1959-1975, 16 years); and 5.2 million served during the Gulf War era (representing service from August 1990 to the present, 14 years).⁵³

“Since 2001, 2.4 million active duty and reserve military personnel were deployed to the wars in Iraq and Afghanistan,”⁵⁴ Operation Iraqi Freedom (OIF), and Operation Enduring Freedom (OEF), respectfully.⁵⁵

⁴⁸ INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 28 (Terri Tanielian & Lisa H. Jaycox eds., 2008) [hereinafter INVISIBLE WOUNDS OF WAR].

⁴⁹ Gomes, *supra* note 42, at 327.

⁵⁰ See OFF. OF PUB. & INTERGOVERNMENTAL AFF., *VA History in Brief*, U.S. DEP’T VETERANS AFF 3, http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf (last visited Nov. 14, 2017). See generally RISDON N. SLATE & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS & OPPORTUNITY FOR THE JUSTICE SYSTEM* (2008) (explaining the anti-psychiatry movement, the inadequate community support regarding mental health issues, and the lack of support for health care in regards to mental health); INVISIBLE WOUNDS OF WAR, *supra* note 48, at 276.

⁵¹ DEP’T OF VETERANS AFF. (VA) 2012 PERFORMANCE AND ACCOUNTABILITY REPORT, at I-32 (U.S. DEP’T OF VETERANS AFF., OFFICE OF MGMT., OFFICE OF PERFORMANCE MGMT. 2012).

⁵² *Id.*

⁵³ *American Veterans By the Numbers*, INFOPLEASE, <https://www.infoplease.com/american-veterans-numbers> (last visited Nov. 13, 2017).

⁵⁴ NAT’L COUNCIL FOR BEHAV. HEALTH, *MEETING THE BEHAVIORAL HEALTH NEEDS OF VETERANS: OPERATION ENDURING FREEDOM AND OPERATION IRAQI FREEDOM 2* (2012), <https://www.thenationalcouncil.org/wp-content/uploads/2013/02/Veterans-BH-Needs-Report.pdf>.

⁵⁵ *Id.*

“Of this group, 30%, nearly 730,000 men and women, will have a mental health condition requiring treatment.”⁵⁶ “Studies have shown that 18.5% of all OEF/OIF veterans have post-traumatic stress disorder, Major Depression, or both PTSD and Major Depression.”⁵⁷ “Over the course of 2003, 87% of the Marines serving in Iraq saw dead bodies, were shot at, were attacked/ambushed, received rocket or mortar fire, and/or knew someone who was killed/ seriously injured.”⁵⁸ Of this 87%, only 15% of these soldiers have reported symptoms of PTSD.⁵⁹

PTSD statistics are a moving target: do you look only at PTSD diagnosed within one year of return from battle,⁶⁰ two years from return from battle, ten years of return from battle, or thirty years of return from battle?⁶¹ For instance, the National Vietnam Veterans’ Readjustment Study, “commissioned by the government in the 1980s initially found that for ‘Vietnam theater veterans’ 15% of men had PTSD . . . at some point in their life.”⁶² But a 2003 re-analysis of the data showed that four out of five Vietnam Veterans suffered from chronic PTSD symptoms, even after twenty-five years’ post return.⁶³ Nonetheless, as of September 2014, there are roughly 2.7 million American veterans of the Iraq and Afghanistan wars; at least 20% of whom have been diagnosed with PTSD.⁶⁴

19% of veterans from Operation Iraqi Freedom and Operation Enduring Freedom have been diagnosed with traumatic brain injury (TBI), which equals roughly 260,000 veterans.⁶⁵ As a result of these rising numbers, researchers and military leaders warn civilian psychiatric care providers of a “gathering storm” headed their way.⁶⁶

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

⁵⁹ *Id.*

⁶⁰ See *Veterans Statistics: PTSD, Depression, TBI, Suicide, VETERANS & PTSD* (Sept. 20, 2015) [hereinafter *Veterans Statistics*], <http://www.veteransandptsd.com/PTSD-statistics.html>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Michael Smith, *APA: Suicide Among Vets Could “Trump” Combat Deaths*, MEDPAGE TODAY (May 5, 2008), <http://www.medpagetoday.com/MeetingCoverage/APA/tb/9345>.

As large as these numbers are, these numbers are deceiving because service members discharged “under conditions other than honorable,” including “bad paper” discharges and “dishonorable discharges,” do not automatically qualify as “veterans” under federal law,⁶⁷ and as such, are not counted in any veteran statistics.⁶⁸ “Some three percent (roughly 260,000) of the 8.7 million who served during the Vietnam War were discharged on less than honorable terms.”⁶⁹ Between October 2000 and September 2005, at least another 55,111 recipients of “other than honorable” discharges and 13,549 recipients of “bad conduct discharges” joined the swelling ranks.⁷⁰ More recently, according to documents separately obtained by the Colorado Springs Gazette and Stars and Stripes, respectively, the Army alone discharged 76,165 personnel from 2006 to 2012 on a variety of grounds for misconduct, a figure that represents approximately 16% of all Army discharges during that period.⁷¹ Only 13% of recent Army misconduct discharges resulted from courts-martial for serious crimes.⁷² The remainder arose out of lesser offenses or failures to perform, including many cases in which the misconduct at issue bore some relation to the stresses of war.⁷³ One investigation, at Fort Carson, Colorado, found scores of cases in which discharges over incidents like driving while intoxicated or barracks misconduct ultimately resulted from post-traumatic stress disorder.⁷⁴ More than 125,000 Iraq and Afghanistan veterans have what are known as “bad paper” discharges that preclude them from receiving care.⁷⁵

⁶⁷ See 38 U.S.C. § 101(2) (2012) (“The term ‘veteran’ means a person who served in the active military, naval or air service, and who was discharged or released therefrom under conditions other than dishonorable.”).

⁶⁸ See Phillip Carter, *The Vets We Reject and Ignore*, N.Y. TIMES (Nov. 10, 2013), <http://www.nytimes.com/2013/11/11/opinion/the-vets-we-reject-and-ignore.html?mcubz=0>.

⁶⁹ Phillip Carter & Katherine Kidder, *Needs Assessment: Veterans in the Western United States*, CTR. FOR A NEW AM. SEC. 15 (Dec. 2013), http://www.federalnewsradio.com/pdfs/CNAS_NeedsAssessment_CarterKidder.pdf.

⁷⁰ *Honoring the Call to Duty: Veterans' Disability Benefits in the 21st Century*, VETERANS' DISABILITY BENEFITS COMM'N 93 tbl.5.1 (Oct. 2007), <https://www.stlawco.org/data/files/Departments/Veterans/VetDisBenefitComm9-27.pdf>.

⁷¹ David Phillips, *Disposable, in Other Than Honorable*, COLO. SPRINGS GAZETTE (Oct. 27, 2013), <http://cdn.csgazette.biz/soldiers/day1.html>.

⁷² David Phillips, *Locked Away, in Other Than Honorable*, COLO. SPRINGS GAZETTE (May. 21, 2013), <http://cdn.csgazette.biz/soldiers/day3.html>.

⁷³ See Phillips, *supra* note 71.

⁷⁴ For more on this issue, see Carter, *supra* note 68; David Phillips, *Pattern of Misconduct, in Other Than Honorable*, COLO. SPRINGS GAZETTE (Oct. 27, 2013), <http://cdn.csgazette.biz/soldiers/day4.html>.

⁷⁵ Carter, *supra* note 68.

“The rising proportion of ineligible veterans is largely due to the military’s increasing reliance on ‘other-than-honorable’ discharges, which have been used as a quick way to dismiss troubled men and women who might otherwise qualify for time-consuming and expensive medical discharges.”⁷⁶ For instance, the Servicemen’s Readjustment Act of 1944,⁷⁷ also known as the G.I. Bill, instructed the veterans agency to care for veterans if their service was “other than dishonorable;”⁷⁸ however, the agencies have interpreted this to exclude everything “other than honorable” says Harry W. Colmery, a World War I veteran who wrote most of the G.I. Bill.⁷⁹

In 2009, there were reports of thousands of veterans with PTSD getting bad discharges based on abuse of alcohol, which they used to self-medicate.⁸⁰ Around the same time, Salon published an article revealing that an Army psychologist had been recorded saying to a sergeant who came in for an evaluation, “[n]ot only myself, but all the clinicians up here are being pressured to not diagnose PTSD and diagnose [A]nxiety [D]isorder [Not Otherwise Specified]” instead.⁸¹ Similarly, a recently retired Army psychiatrist told Salon that “commanders at another Army hospital instructed him to misdiagnose soldiers suffering from war-related PTSD, recommending instead that he diagnose them with other disorders that would reduce their benefits.”⁸² Additionally, there have been numerous recent reports of the military wrongly diagnosing veterans with Personality Disorder, rather than PTSD, which prevents them from receiving benefits.⁸³

⁷⁶ David Phillips, *Report Finds Sharp Increase in Veterans Denied V.A. Benefits*, N.Y. TIMES (Mar. 30, 2016), <https://www.nytimes.com/2016/03/30/us/report-finds-sharp-increase-in-veterans-denied-va-benefits.html?mcubz=0>.

⁷⁷ Servicemen’s Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944).

⁷⁸ Phillips, *supra* note 76.

⁷⁹ *Id.*

⁸⁰ See Gordon Duff, *Army Gives Bad Discharges to Thousands of PTSD Vets*, SALEM-NEWS.COM (Sept. 19, 2009, 5:50 PM), http://www.salem-news.com/articles/september192009/ptsd_discharges_gd_9-19-09.php.

⁸¹ Mark Benjamin & Michael de Yoanna, “*I am Under a Lot of Pressure to Not Diagnose PTSD*”, SALON (Apr. 8, 2009, 9:38 AM), <http://www.salon.com/2009/04/08/tape/>.

⁸² *Id.* Note that even if a veteran gets an Honorable Discharge, he or she still cannot get retirement disability benefits for PTSD without a diagnosis at the time of discharge.

⁸³ See, e.g., James Dao, *Branding a soldier with ‘Personality Disorder’*, N.Y. TIMES (Feb. 24, 2012), <http://www.nytimes.com/2012/02/25/us/a-military-diagnosis-personality-disorder-is-challenged.html>; Joshua Kors, *Disposable Soldiers: How the Pentagon Is Cheating Wounded Vets*, THE NATION (Apr. 26, 2010), <http://www.thenation.com/article/disposable-soldiers>.

An unfavorable discharge can result in no treatment for the wound that caused the bad conduct.⁸⁴

While neither the Department of Defense (DoD), nor the Department of Veterans Affairs (DVA), publishes an authoritative count for the sub-population of service members with “bad paper” discharges,⁸⁵ research suggests that there are hundreds of thousands of service members with “bad paper.”⁸⁶ Given its substantial size, one author has labeled this population of ex-combat duty service members who have been given “bad paper” discharges as the result of untreated PTSD as “America’s largest sleeper cell.”⁸⁷

As a direct result of “bad paper” discharges, the number of service members with undiagnosed and untreated psychological wounds of war increase with each passing day.⁸⁸ And while the VA may state that it is committed to identifying and reaching all veterans who may be at risk for suicide, and that it continues to enhance programs designed to reduce risk among those who receive services from the Veterans Health Administration (VHA),⁸⁹ the whole truth is that hundreds of thousands of services members who are stripped of the status of “veteran” as a result of their bad paper discharges are not getting the suicide prevention or other mental health care that they need.⁹⁰

⁸⁴ Carter, *supra* note 68.

⁸⁵ *See id.* (“No federal agency publishes the numbers of bad paper discharges.”).

⁸⁶ *See id.* (“Approximately 260,000 of the 8.7 million Vietnam-era veterans were pushed out of service with bad paper [A]ccording to documents separately obtained by the Colorado Springs Gazette, the Army discharged 76,165 soldiers between 2006 and 2012 with bad paper.”).

⁸⁷ *See generally* Seamone, *supra* note 33, at 478 (discussing the emerging class of lethal and well-trained future offenders due to “bad paper” discharges, which prevent many veterans from obtaining PTSD treatment).

⁸⁸ A RAND study estimates that the rate of “probable” post-traumatic stress disorder (PTSD) or depression for service members who had served in Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF) was nearly 20%, and that more than 30% of OIF and OEF service members had probable PTSD, depression or Traumatic Brain injury, or some combination thereof. *See* INVISIBLE WOUNDS OF WAR, *supra* note 48, at 96–97.

⁸⁹ *See* U.S. DEP’T OF VETERANS AFF., SUICIDE AMONG VETERANS AND OTHER AMERICANS 2001–2014, at 3 (2016) (“[Veterans Affairs] is committed to providing timely access to high-quality, recovery-oriented mental health care that anticipates and responds to Veterans’ needs, such as treatment for PTSD, substance use disorders, depression, and suicidal ideation.”).

⁹⁰ *See* INVISIBLE WOUNDS OF WAR, *supra* note 48, at 96.

D. Post-Traumatic Stress Disorder: Signs and Symptoms

PTSD is “a condition under which a person ‘experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or that a threat to the physical integrity of self or others’ and, ‘the person’s response involved intense fear, helplessness, or horror.’”⁹¹ “Though the acronym has secured its place in contemporary culture, most people are not able to articulate the serious, complex symptoms associated with PTSD.”⁹² PTSD can occur after experiencing, seeing, or hearing about a traumatic event, such as combat, sexual or physical abuse/assault, terrorist attacks, serious accidents, or natural disasters.⁹³

In 1980, PTSD was recognized for the first time by the *Diagnostic & Statistical Manual of Mental Disorders*.⁹⁴ Initially PTSD was described as an anxiety disorder, but with the new edition of the *Diagnostic & Statistical Manual of Mental Disorders-V*, PTSD is now included in the new chapter on Trauma-and Stress-or Related Disorders.⁹⁵

“Symptoms of PTSD may include recurrent nightmares, difficulty falling asleep, hyper-vigilance . . . outbursts of anger, exaggerated startle response, and memory impairment.”⁹⁶ “Individuals who suffer from this syndrome often show increased irritability, impulsive behavior and unpredictable explosions of aggression with little or no provocation.”⁹⁷ Persons with PTSD often also have “panic disorders, obsessive-compulsive disorders, social phobias, and major depressive disorders.”⁹⁸ “Combat is one

⁹¹ 4 MICHAEL PERLIN, MENTAL DISABILITY LAW: CIVIL & CRIMINAL § 9A-9.3b (2d ed. 2002); see also DSM-IV-TR, *supra* note 40, at 467 (“In [PTSD], the stressor must be of an extreme (i.e., life-threatening) nature.”); Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. MED. & ETHICS 745, 746 (2010) (“[T]he recent movement to establish specialized ‘mental health courts’ for mentally ill defendants whose psychiatric conditions contributed in some measure to the conduct leading to arrest reflects the infusion of psychiatry into the criminal justice system.”).

⁹² Duhart, *supra* note 29, at 887.

⁹³ NAT’L COUNCIL FOR BEH. HEALTH, *supra* note 54, at 7.

⁹⁴ JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 27–28 (1992) (explaining how the Vietnam antiwar movement resulted in increased recognition and legitimization of psychological trauma).

⁹⁵ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at xix (5th ed. 2013) [hereinafter DSM-V-TR].

⁹⁶ See Duhart, *supra* note 29, at 887; see also DSM-IV-TR, *supra* note 40, at 464 (describing various manifestations of PTSD symptoms).

⁹⁷ 4 PERLIN, *supra* note 91, at 272.

⁹⁸ See DSM-IV-TR, *supra* note 40 (describing disorders commonly associated with PTSD).

of the most severe [PTSD] stressors.”⁹⁹ “Seeing or handling human remains also dramatically increases the severity of any PTSD the service member may experience.”¹⁰⁰

The identified trigger for PTSD according to the DSM-V for PTSD is exposure to actual or threatened death, serious injury or sexual violation.¹⁰¹ The exposure must result from one or more of the following scenarios, in which the individual: (1) directly experiences the traumatic event; (2) witnesses the traumatic event in person; (3) learns that the traumatic event occurred to a close family member or close friend (with the actual or threatened death being either violent or accident); or (4) experiences first-hand repeated or extreme exposure to aversive details of the traumatic event (not through media, pictures, television or movies, unless work-related).¹⁰² The disturbance, regardless of its trigger, causes clinically significant distress or impairment in the individual’s social interactions, capacity to work, or other important areas of functioning.¹⁰³ DSM-V pays more attention to the behavioral symptoms that accompany PTSD and proposes four distinct diagnostic clusters: (1) re-experiencing; (2) avoidance; (3) negative cognitions and mood; and (4) arousal.¹⁰⁴

Although many veterans may have experienced traumatic events while on duty, not all of those faced with trauma develop PTSD.¹⁰⁵ However, often times, the worst symptoms of PTSD are delayed until the veteran returns after combat when the body and mind have physically left the chaotic environment of the war zone.¹⁰⁶ Factors that help determine who may develop the disorder and when the disorder manifests include how long the trauma lasted, if the person lost someone close to them because of the

⁹⁹ Duhart, *supra* note 29, at 887.

¹⁰⁰ Peyton Cooke, *Post-Traumatic Stress Disorder & the Military Justice System*, 79 MISS. L.J. 485, 489 (2010).

¹⁰¹ DSM-V-TR, *supra* note 95, at 271.

¹⁰² *Id.*

¹⁰³ See Cooke, *supra* note 100, at 489 (explaining that PTSD correlates highly with Social Phobia).

¹⁰⁴ See DSM-V-TR, *supra* note 95, at 271.

¹⁰⁵ See NAT’L CTR. FOR PTSD, *What is PTSD?*, U.S. DEP’T VETERANS AFF. (Sept. 15, 2017), <https://www.ptsd.va.gov/public/PTSD-overview/basics/what-is-ptsd.asp>.

¹⁰⁶ See generally Bernice Andrews et al., *Delayed-Onset Posttraumatic Stress Disorder: A Systematic Review of the Evidence*, 164 AM. J. PSYCHIATRY 1319, 1319 (2007) (describing delayed-onset PTSD as a type of PTSD in which symptoms do not emerge for months, or even years, following a service member’s combat trauma).

trauma, and how much help and support the person received after the event.¹⁰⁷

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),¹⁰⁸ self-medication with controlled substances or alcohol, and related offenses.¹⁰⁹ Unlike the civilian environment, each of these manifestations is a crime in the military.¹¹⁰ The armed forces is an occupation with great levels of stress¹¹¹ and PTSD risk, and 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.¹¹² “A comprehensive analysis, published in 2014 found that for PTSD, ‘[a]mong male and female soldiers aged 18 years or older returning from Iraq and Afghanistan, rates range from 9% shortly after returning from deployment to 31% a year after deployment.’”¹¹³ “PTSD is the third most prevalent psychiatric diagnosis among veterans using the VA hospitals,”¹¹⁴ however,

¹⁰⁷ See NAT’L CTR. FOR PTSD, *supra* note 105 (discussing factors that can increase the chances of developing PTSD).

¹⁰⁸ See, e.g., Gregg Zoroya, *Battle Stress May Lead to Misconduct*, USA TODAY (July 1, 2007, 7:16 PM), http://usatoday30.usatoday.com/news/washington/2007-07-01-marine-stress_N.htm (providing an example of a Marine receiving a demotion due to misconduct connected to PTSD).

¹⁰⁹ See Debra A. Pinals, *Veterans and the Justice System: The Next Forensic Frontier*, 38 J. AM. ACAD. PSYCHIATRY L. 163, 164 (2010) (discussing how PTSD symptoms may lead to further substance abuse issues).

¹¹⁰ See Amanda Carpenter, *Military misconduct may be a sign of PTSD*, WASH. TIMES (Jan. 12, 2010), http://www.washingtontimes.com/news/2010/jan/12/misconduct-may-be-symptom-of-stress-disorder/?feat=home_headlines (discussing how PTSD symptoms such as violent outbursts and substance abuse have resulted in general discharges for misconduct and even legal charges).

¹¹¹ See Zoroya, *supra* note 108 (explaining how combat stress can damage certain areas of soldiers’ brains leading to potential misconduct).

¹¹² Seamone, *supra* note 33, at 489 (discussing concerns that the military is much more likely to criminalize mental illnesses compared to the civilian justice system).

¹¹³ *Veterans Statistics*, *supra* note 60.

¹¹⁴ Elizabeth Ralevski et al., *PTSD and comorbid AUD: a review of pharmacological and alternative treatment options*, 5 SUBSTANCE ABUSE & REHAB. 25, 26 (2014) (citing Tracy Stecker et al., *Co-Occurring Medical, Psychiatric, and Alcohol-Related Disorders Among Veterans Returning from Iraq and Afghanistan*, 51 PSYCHOSOMATICS 503, 505 tbl.2 (2010)).

50% of those with PTSD do not seek treatment.¹¹⁵ Out of the half that seeks treatment, only half of them get ‘minimally adequate’ treatment.¹¹⁶

This contradiction highlights the military’s failure to meet its obligation to soldiers by passing on its discarded troops to civilian society with severe disabilities related to their service to this country, and due to their discharge characterizations they are prevented from successful reintegration.¹¹⁷ Ponder the Army and the Marine Corps cases in which an officer and an enlisted service member had charges brought against them, one case resulting in a punitive Bad Conduct discharge and 180 days confinement for failed attempts at suicide while suffering from a diagnosed mental health condition.¹¹⁸

Military health and mental health benefits are crucial to the PTSD and MTBI afflicted combat service members’ reintegration, specifically 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.”¹¹⁹

E. Mild Traumatic Brain Injury

Mild traumatic brain injury (MTBI)¹²⁰ is a physical injury to the brain caused by blows or jolts to the head¹²¹ that result in damage to the brain

¹¹⁵ INVISIBLE WOUNDS OF WAR, *supra* note 48, at 103 tbl. 4.8.

¹¹⁶ *Id.* at 108.

¹¹⁷ See ASSOCIATED PRESS, *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/>.

¹¹⁸ *Id.*

¹¹⁹ *Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents*, *supra* note 8, at 105.

¹²⁰ “MTBI—often described as ‘shell shock’ or ‘getting your bell rung’—is the most common type of TBI, making up 75% of all brain injuries.” Karyn Dayle Jones et al., *Mild Traumatic Brain Injury and Posttraumatic Stress Disorder in Returning Iraq and Afghanistan War Veterans: Implications for Assessment and Diagnosis*, 88 J. COUNSELING & DEV. 372, 372 (2010) (citing CTNS. FOR DISEASE CONTROL & PREVENTION, REPORT TO CONGRESS ON MILD TRAUMATIC BRAIN INJURY IN THE UNITED STATES: STEPS TO PREVENT A SERIOUS PUBLIC HEALTH PROBLEM 9 (2003)).

¹²¹ *Id.*

from an external force.¹²² MTBI is usually defined as: (i) an external injury to the brain; (ii) confusion, disorientation, or loss of consciousness for thirty-minutes or less; (iii) a Glasgow Coma Scale score of thirteen to fifteen; and (iv) post-traumatic amnesia for less than 24 hours.¹²³ MTBI is a common battlefield injury for U.S. service members involved in the Iraq and Afghanistan wars,¹²⁴ with as many as 20% of soldiers¹²⁵ having had MTBI.¹²⁶

“The brain is not a hard, fixed substance; . . . [i]t is soft and jello-like in consistency, composed of millions of fine nerve fibers, and ‘floats’ in cerebral-spinal fluid within the hard, bony skull.”¹²⁷ “When the head is struck suddenly, strikes a stationary object, or is shaken violently, the mechanical force of this motion is transmitted to the brain.”¹²⁸

Any time the brain suffers a violent force or movement, the soft, floating brain is slammed against the skull’s uneven and rough interior. The internal lower surface of the skull . . . is a rough, bony structure that often damages the fragile tissues within the brain as it moves across the bone surface. The brain may even rotate during this process. This friction can also stretch and strain the brain’s threadlike nerve cells called axons. Although the stretching and swelling of the axons may seem relatively minor or microscopic, the impact on the brain’s neurological circuits can be significant. Even a “mild” injury can result in significant physiological damage and cognitive deficits.¹²⁹

The majority of MTBIs acquired during combat in the current wars are closed brain injuries caused by exposure to a blast from improvised explosive devices (IED’s).¹³⁰ “Brain injuries may be ‘open’ involving

¹²² Richard Bryant, *Post-traumatic stress disorder vs traumatic brain injury*, 13 DIALOGUES CLINICAL NEUROSCIENCE 251, 251 (2011).

¹²³ *Id.* (citing Am. Cong. Rehab. Med., *Definition of Mild Traumatic Brain Injury*, 8 J. HEAD TRAUMA REHAB., 86, 86 (1993) (citations omitted)).

¹²⁴ Jones et al., *supra* note 120, at 372 (citing TRAUMATIC BRAIN INJURY TASK FORCE, REPORT TO THE SURGEON GEN. 17–18 (2007)).

¹²⁵ *Id.* (citing TRAUMATIC BRAIN INJURY TASK FORCE, REPORT TO THE SURGEON GEN., 17–18 (2007)). “In previous wars, soldiers were less likely to survive blast injuries; however, in the current conflicts, advances in body armor have resulted in more soldiers surviving injuries from explosions and blasts.” *Id.* (citing Susan Okie, *Traumatic Brain Injury in the War Zone*, 352 NEW ENG. J. MED. 2043, 2045 (2005); Deborah Warden, *Military TBI During the Iraq and Afghanistan Wars*, 21 J. HEAD TRAUMA REHAB. 398, 398 (2006)).

¹²⁶ *Id.* (citing TRAUMATIC BRAIN INJURY TASK FORCE, REPORT TO THE SURGEON GEN., 17–18 (2007)).

¹²⁷ NAT’L BRAIN INJURY INFO. CTR., *Mild Brain Injury and Concussion*, BRAIN INJURY ASS’N OF AM. (2015), <http://www.biausa.org/mild-brain-injury.htm>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Okie, *supra* note 125, at 2045.

penetration of the brain, or ‘closed,’ without a penetrating wound.”¹³¹ MTBI is more frequently caused by closed head wounds¹³² and is considered the least serious form of TBI.¹³³ “Brain injuries can involve contusion, brain laceration, intracranial hematoma, contrecoup injury, shearing of nerve fibers, intracranial hypertension, hypoxia, anemia, metabolic anomalies, hydrocephalus, and subarachnoid hemorrhage.”¹³⁴

The primary criterion of all TBIs, regardless of severity, is trauma preceding injury.¹³⁵ Kevlar helmets, specifically, have reduced the frequency of penetrating, head injuries; however, the helmets and armor cannot completely protect the face, head, and neck, nor do they prevent closed brain injuries often times produced by blasts.¹³⁶

Many health care professionals may not recognize the symptoms that can be associated with MTBI.¹³⁷ “MTBI symptoms are not unique to brain injury; they are common to a variety of other medical conditions and mental health problems and can be . . . attributed to something other than MTBI.”¹³⁸ “In addition, because MTBI is considered a mild form of brain injury, some professionals may underestimate the persistent and disabling problems associated with the disorder.”¹³⁹ MTBI is also virtually impossible to visualize on magnetic resonance imaging or computerized tomography.¹⁴⁰ Nonetheless, MTBI is severe enough of an injury that it can permanently alter connections between brain cells.¹⁴¹

¹³¹ Jones et al., *supra* note 120, at 372.

¹³² Damage to the brain can occur from the impact of the blast waves themselves, the force of an object from the blast, or the impact of the brain striking the inner walls of the skull.

¹³³ See generally CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 120, at 7 (distinguishing MTBIs from more severe TBIs).

¹³⁴ Bryant, *supra* note 122, at 251–52.

¹³⁵ See Nutthita Petchprapai & Chris Winkelman, *Mild Traumatic Brain Injury: Determinants and Subsequent Quality of Life. A Review of the Literature*, 39 J. NEUROSCIENCE NURSING, 260, 262 (2007).

¹³⁶ Henry L. Lew et al., *Soldiers with Occult Traumatic Brain Injury*, 84 AM. J. PHYSICAL MED. & REHAB. 393, 393 (2005); Okie, *supra* note 125, at 2045.

¹³⁷ See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 120, at 12.

¹³⁸ Jones et al., *supra* note 120, at 373.

¹³⁹ *Id.*

¹⁴⁰ Magdalena A. Mateo & Carol A. Glod, *Mild Traumatic Brain Injury and Psychiatric Disorders*, 9 J. AM. PSYCHIATRIC NURSES ASS’N 129, 129 (2003).

¹⁴¹ Dale Maharidge, ‘Something Happened to My Head. I Couldn’t Get Focused’, DAILY BEAST (May 26, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/2013/05/26/something-happened-to-my-head-i-couldn-t-get-focused.html?source=dictionary>.

After my father died in 2000, I spent 12 years locating surviving men from his Marine unit. I found 29 of them. From them and their military records, I learned Dad suffered at least two blast concussions. TBI can permanently alter connections between brain cells. One symptom can be occasional explosive rage. Dad's temper made ours a house of turmoil. But our family never tied his condition to the war. Not only was TBI an unknown affliction in mid-century America, we pretended that the war was in the distant past. It wasn't discussed.¹⁴²

“When left unchecked, MTBI can disrupt the basic functions of everyday life; . . . many people have difficulty returning to routine or daily activities and may be unable to return to work for weeks or months.”¹⁴³

i. Post-Traumatic Stress Disorder and its Co-Existence with MTBI

PTSD and MTBI “often coexist because brain injuries are often sustained in traumatic experiences.”¹⁴⁴ “PTSD commonly coexists with MTBI because of the violent and life-threatening circumstances often associated with brain trauma.”¹⁴⁵ PTSD frequently co-occurs with MTBI in combat soldiers returning from Iraq and Afghanistan, so much so that together they have been referred to as “signature injuries,”¹⁴⁶ and “both independently and additively, are regarded as being responsible for much impairment following deployments.”¹⁴⁷

Many bad-paper veterans are among ex-combat soldiers who suffer from PTSD. They have a higher incidence of unemployment, violent behavior, alcohol and drug abuse, family problems and homelessness. Yet we won't give them treatment that could help them heal. They served their country and deserve treatment for their war wounds, physical and mental. . . . These ex-soldiers fill prisons and homeless shelters in disproportionate numbers around the country.¹⁴⁸

¹⁴² *Id.*

¹⁴³ Jones et al., *supra* note 120, at 373.

¹⁴⁴ Bryant, *supra* note 122, at 251.

¹⁴⁵ Jones et al., *supra* note 120, at 373.

¹⁴⁶ DEF. HEALTH BD. TASK FORCE ON MENTAL HEALTH, *An Achievable Vision: Report of the Department of Defense Task Force on Mental Health*, U.S. DEP'T OF DEFENSE, at ES-1 (June 2007), <http://justiceforvets.org/sites/default/files/files/Dept%20of%20Defense,%20mental%20health%20report.pdf>.

¹⁴⁷ Bryant, *supra* note 122, at 251.

¹⁴⁸ Maxine Waters & Jonathan Shay, *Heal the 'Bad Paper' Veterans*, N.Y. TIMES (July 30, 1994), <http://www.nytimes.com/1994/07/30/opinion/heal-the-bad-paper-veterans.html>. For a comprehensive study of the challenges facing veterans with PTSD upon returning to society, see JONATHAN SHAY, *ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING* (2002).

“The intersection between MTBI and PTSD has become a major focus of attention in recent years.”¹⁴⁹

While the symptoms of MTBI and PTSD may not be immediately apparent, behavioral manifestations of these disorders are common in returning combat soldiers: (a) difficulty controlling one’s emotions, including irritability and anger; (b) limited attention span and difficulty in completing complex tasks because of either cognitive deficits or intrusive thoughts; (c) self-medicating with alcohol, other medications, or illicit drugs in an attempt to return to “normalcy;” (d) thrill-seeking behavior, such as driving too fast or other reckless/high-risk behaviors; and (e) disruption of the sleep cycle, in the case of PTSD, aggravated by nightmares.¹⁵⁰

F. Mental Health Services for Post-Traumatic Stress Disorder and Traumatic Brain Injury

Headlines have been awash in warnings about suicide, substance abuse, PTSD, depression and anxiety that faces veterans from our most recent wars.¹⁵¹ “[T]he idea that veterans have significant mental health needs has reached the point where the response is often, ‘[w]ell, of course – they’ve been to war.’”¹⁵²

The obligation to help these service members 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.¹⁵³

When PTSD is untreated it can be triggered by any number of events in a no-notice situation.¹⁵⁴ Untreated PTSD in those trained specifically to kill (combat soldiers) raises concerns fundamental to our self-interest as

¹⁴⁹ Bryant, *supra* note 122, at 251.

¹⁵⁰ DEF. HEALTH BD. TASK FORCE ON MENTAL HEALTH, *supra* note 146, at 22.

¹⁵¹ NAT’L COUNCIL FOR BEHAV. HEALTH, *supra* note 54, at 1.

¹⁵² *Id.*

¹⁵³ 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, 3 (2011).

¹⁵⁴ See *id.* at 7 n.8.

a nation.¹⁵⁵ The broad reach of combat PTSD within American society in terms of the number of service members who developed the disorder during their military service and the number of people whose lives are directly affected qualifies it as a public health issue, in that it involves the health of communities and populations.¹⁵⁶ We can watch the public health dominoes fall in succession as untreated PTSD affects the service member, their family members, and innocent bystanders alike.¹⁵⁷ “Community and charity groups are scrambling to provide care where the VA is failing¹⁵⁸ service members who left the military with less-than-honorable discharges,” because if the government refuses to honor the social contract of caring for those who bore the battle, then society will be forced to bear this burden.¹⁵⁹

G. *Post-Traumatic Stress Disorder and Suicide Rates*

I started going to the VA for counseling after getting tired of drinking, breaking down, fighting, and generally feeling like I wanted to strangle someone at all times. . . . After two years, I finally got a response on my disability application. It said that my PTSD/“Adjustment Disorder” was not connected to my military service. I was furious. I have never been shot at in my civilian life. I have never been blown up in my civilian life. I haven’t lost an “adopted” child to a suicide bomber in my civilian life. And I haven’t had to listen to a man’s death over the Med-Evac frequency in my civilian life. All those things happened during my year in Iraq, but my PTSD is probably just related to my years working at UPS or something?¹⁶⁰

The U.S. has engaged in conflicts around the globe for decades.¹⁶¹ The conflicts in Iraq and Afghanistan are not only the most recent, they

¹⁵⁵ See, e.g., *Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. On Oversight & Investigations of the Comm. On Veterans’ Affairs*, 103d Cong. 118 (1994) [hereinafter *Viewpoints on Veterans Affairs*] (statement of Jonathan Shay, M.D., Cambridge, Massachusetts).

¹⁵⁶ BARRY R. SCHALLER, *VETERANS ON TRIAL: THE COMING COURT BATTLES OVER PTSD* 202–03 (2012).

¹⁵⁷ Evan R. Seamone, *Improved Assessment of Child Custody Involving Combat Veterans with Posttraumatic Stress Disorder*, 50 *FAM. CT. REV.* 310, 314, 326–27 (2012) (describing the harmful and lasting effects of some military parents’ PTSD, including “Secondary traumatic stress,” on family members, particularly children).

¹⁵⁸ Marisa Peñalosa & Quil Lawrence, *Filling the Gaps for Veterans with Bad Discharges*, NPR (Dec. 12, 2013, 5:08 AM), <http://www.npr.org/2013/12/12/250289588/filling-the-gaps-for-veterans-with-bad-discharges>.

¹⁵⁹ *Id.*

¹⁶⁰ Nolan, *supra* note 31.

¹⁶¹ This history includes but is not limited to the Franco-American Naval War of 1798; the Barbary Wars of 1801 and 1815; the War of 1812; the War of Texas Independence in 1836; the

are the most notable in terms of soldier casualty.¹⁶² The toll exacted on service members by the U.S. involvement in Iraq and Afghanistan is exemplified by repetitive deployments, deadlier warfare,¹⁶³ and better medical care, which has led to longer lives, but greater physical and emotional damage.¹⁶⁴ A 2008 study by the United States Army Surgeon General confirmed the correlation between multiple deployments and mental health issues.¹⁶⁵ The study found an 11.9% incidence of mental health problems among soldiers with one deployment, 18.5% among those with two deployments, and 27.2% among those with three or four deployments.¹⁶⁶ This stress has manifested “itself in different ways—increased divorce rates, spouse and child abuse, mental distress, substance abuse—but one of the most troubling manifestations is suicides, which are increasing across the U.S. Department of Defense (DoD).”¹⁶⁷

“Even if they survive the war, the soldiers who make it home are struggling to stay alive.”¹⁶⁸ “Many . . . survivors wake up each day only to be reminded of their traumatic injuries or debilitating mental disorders.”¹⁶⁹

Mexican-American War in 1846; the U.S. Civil War in 1861; the Spanish American War in 1898; World War I in 1914; World War II in 1939; the Korean War in 1953; and the Vietnam War in 1960. OFFICE OF PUB. AFF., *America's Wars*, U.S. DEP'T OF VETERANS AFF., https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited Sept. 19, 2017).

¹⁶² Tessa Stuart, *Some 2,500 Americans Have Died in Afghanistan and Iraq Under Obama*, ROLLING STONE (May 30, 2016), <http://www.rollingstone.com/politics/news/some-2-500-americans-have-died-in-afghanistan-and-iraq-under-obama-20160530>.

¹⁶³ Improvised explosive devices (IED), have changed the face of warfare. As of 2013 more than 3,100 have died and more than 33,000 have been wounded, losing limbs to IED's used in Iraq and Afghanistan. Gregg Zoroya, *How the IED changed the U.S. military*, USA TODAY (Dec. 19, 2013, 10:29 AM), <https://www.usatoday.com/story/news/nation/2013/12/18/ied-10-years-blast-wounds-amputations/3803017/>.

¹⁶⁴ See generally *id.* (discussing how IEDs have increased the damage to troops).

¹⁶⁵ Devon Haynie, *Deployments take heavy toll: Stress symptoms rise with multiple tours*, J. GAZETTE (Jan. 17, 2010, 3:00 AM), <http://www.devonhaynie.com/clips/Deployments%20take%20heavy%20toll%20-%20Stress%20symptoms%20rise%20with%20multiple%20tours%20-%20Journal%20Gazette%20-%202017-1-2010.pdf>.

¹⁶⁶ *Id.*

¹⁶⁷ RAJEEV RAMCHAND ET AL., *THE WAR WITHIN: PREVENTING SUICIDE IN THE US MILITARY*, at iii (2011).

¹⁶⁸ Duhart, *supra* note 29, at 883.

¹⁶⁹ *Id.* at 886 (quoting Alyson Sincavage, *The War Comes Home: How Congress' Failure to Address Veterans' Mental Health Has Led to Violence in America*, 33 NOVA L. REV. 481, 482 (2009)).

“Soldier suicides which have reached staggering numbers since the onset of the wars in Iraq and Afghanistan, reflect the pervasive mental health issues that plague veterans.”¹⁷⁰ In fact, Army suicides are up to their highest level in twenty-six years.¹⁷¹ “Since 2001, U.S. adult civilian suicides increased 23% while Veteran suicides increased 32% in the same time period.”¹⁷² “Suicide rates in 2007 among soldiers in both Iraq and Afghanistan . . . remained higher than historic Army rates.”¹⁷³ “Since 2001, the rate of suicide among US Veterans who use VA services increased by 8.8%, while the rate of suicide among Veterans who do not use VA services increased by 38.6%.”¹⁷⁴ Ultimately, these numbers translate to an average of twenty Veterans who died from suicide each day in 2014.¹⁷⁵ Remember that these numbers do not include those who are not designated as veterans due to their “bad-paper” discharge characterization, because again, they are not counted in Veteran statistics.¹⁷⁶

H. Post-Traumatic Stress Disorder and Criminal Activity

In light of growing reports of active duty suicide,¹⁷⁷ failures to diagnose service members, inadequacy of PTSD screening, and some indication of incentives for mental health professionals to conserve budgets by labeling PTSD as something less serious,¹⁷⁸ the civilian criminal justice

¹⁷⁰ *Id.* at 883.

¹⁷¹ Pauline Jelinek, *Army Suicides Highest in 26 Years*, WASH. POST (Aug. 16, 2007, 2:54 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/15/AR2007081502027.html>.

¹⁷² OFF. OF PUB. & INTERGOVERNMENTAL AFF., *VA Conducts Nation’s Largest Analysis of Veteran Suicide*, U.S. DEP’T VETERANS AFF. (July 7, 2016, 9:56 AM), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2801>.

¹⁷³ Arline Kaplan, *Untreated Vets: A “Gathering Storm” of PTSD/Depression*, PSYCHIATRIC TIMES (Oct. 1, 2008), <http://www.psychiatrictimes.com/articles/untreated-vets-%E2%80%9Cgathering-storm%E2%80%9D-ptsddepression>.

¹⁷⁴ OFF. OF PUB. & INTERGOVERNMENTAL AFF., *supra* note 172.

¹⁷⁵ VA SUICIDE PREVENTION PROGRAM, *Facts about Veteran Suicide*, U.S. DEP’T VETERANS AFF. (July 2016), https://www.va.gov/opa/publications/factsheets/Suicide_Prevention_FactSheet_New_VA_Stats_070616_1400.pdf.

¹⁷⁶ *See* INVISIBLE WOUNDS OF WAR, *supra* note 48, at 28 (explaining that dishonorable discharges do not receive veteran benefits).

¹⁷⁷ *See, e.g.*, RAJEEV RAMCHAND ET AL., *supra* note 167, at iii (discussing notable and recent trends).

¹⁷⁸ *See* Keegan Hamilton, *Mind Field: PTSD & the Military*, SEATTLE NEWS WKLY. (Aug. 7, 2012, 12:00 AM), <http://www.seattleweekly.com/2012-08-08/news/mind-field-ptsd-the-military/> (reporting on internal memoranda at Madigan Army Medical Center in which administra-

system often functions as a surrogate for active duty mental health triage and treatment when it inherits a military offender.¹⁷⁹ Arguably, this embrace of veterans represents a tactical agreement between civil society and the active armed forces; the criminal justice system has begun picking up the pieces for veterans who are in the greatest need, 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.¹⁸⁰

As long as combat PTSD or MTBI result in violent and criminal acts, suicide, and other behavior that harms society and families, the obligation to care for those who have borne the battle, to honor them and to preserve the nation, rests with society at large.¹⁸¹ Other violent activities among soldiers have also increased recently.¹⁸² For instance, homicide rates among war veterans has risen.¹⁸³ A recent example of this increased homicidal activity is the death of Chris Kyle,¹⁸⁴ a former Navy Seal, also known as the American Sniper, and the subsequent conviction of Eddie Ray Routh, a troubled Iraq War veteran who was found guilty of the capital murder of Chris Kyle and Chad Littlefield. This homicide occurred during the trio's trip to an outdoor shooting range on February 2, 2013,¹⁸⁵ as Kyle and Littlefield "tried to help Routh assimilate to civilian life."¹⁸⁶

tors encouraged Army psychiatrist 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").

¹⁷⁹ See SCHALLER, *supra* note 156, at 205–09.

¹⁸⁰ United States 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.").

¹⁸¹ Peñaloza & Lawrence, *supra* note 158.

¹⁸² Duhart, *supra* note 29, at 889.

¹⁸³ *Id.* (citing Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES (Jan. 13, 2008), <http://www.ny-times.com/2008/01/13/us/13vets.html?mcubz=0>).

¹⁸⁴ Hal Espen, *The Day Chris Kyle Died: Text Messages and Terror in the 'American Sniper's' Final Hours With Killer Eddie Ray Routh*, HOLLYWOOD REP. (Feb. 25, 2015, 12:00 AM), <http://www.hollywoodreporter.com/news/day-chris-kyle-died-text-777380>.

¹⁸⁵ Molly Hennessy-Fiske, *Troubled ex-Marine sentenced to life in 'American Sniper' murder case*, L.A. TIMES (Feb. 24, 2015, 9:30 PM), www.latimes.com/nationnow/la-na-nn-american-sniper-trial-20150224-story.html.

¹⁸⁶ Laura Collins, *EXCLUSIVE: 'He'd rather take the death penalty than sit behind those bars forever.' Father of veteran who killed American Sniper Chris Kyle tells how he is already mourning the loss of his son*, DAILY MAIL ONLINE (Mar. 13, 2015), <http://www.dailymail.co.uk/news/article-2892777/He-d-death-penalty-sit-bars-forever-Father-veteran-killed-American-Sniper-Chris-Kyle-tells-mourning-loss-son.html>.

Eddie Ray Routh did not separate with a “bad paper” discharge, but he was diagnosed with PTSD and did not receive treatment prior to his separation from the military.¹⁸⁷ While some may view treatment as an individual choice,¹⁸⁸ this author submits that within the confines of military service, much of a service member’s life is ordered. If a service member has been diagnosed, or is even suspected of having PTSD or MTBI, who better than the military to demand that the service member undergo treatment, prior to or even as a condition of separation?

II. ORIGIN OF DUTY TO CARE: THE CONTRACT BETWEEN THE FEDERAL GOVERNMENT AND EACH INDIVIDUAL SERVICE MEMBER

*“To care for him who shall have borne the battle and for his widow, and his orphan”*¹⁸⁹

A. *The Contract*

With these words, President Lincoln affirmed the government’s obligation to care for those injured during the war and to provide for the families of those who perished on the battlefield.¹⁹⁰ While not exclusive, our duty to care for our service members should be grounded in a set of

¹⁸⁷ *Id.*

¹⁸⁸ See Bethany C. Wangelin & Peter W. Tuerk, *PTSD in Active Combat Soldiers: To Treat or Not to Treat*, 42 J. LAW, MED. & ETHICS 161, 164 (2014) (describing seeking PTSD treatment and it is an individual’s choice).

¹⁸⁹ On March 4, 1865, as the nation braced itself for the final throes of the Civil War, thousands of spectators gathered near the U.S. Capitol to hear President Lincoln’s second inaugural address. President Lincoln framed his speech on the moral and religious implications of the Civil War, rhetorically questioning how a just God could unleash such a terrible war upon the nation:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow, and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

The Origin of the VA Motto: Lincoln’s Second Inaugural Address, *supra* note 16.

¹⁹⁰ *Id.* (“Today, a pair of metal plaques bearing those words flank the entrance to the Washington, D.C. headquarters of the Department of Veterans Affairs. [The Department of Veterans Affairs] is the federal agency responsible for serving the needs of veterans by providing health care, disability compensation and rehabilitation, education assistance, home loans, burial in a national cemetery, and other benefits and services.”).

closely-held assumptions and attitudes about American citizenship, fairness, military service and civil-military relations.¹⁹¹

President Lincoln's immortal words can be deemed contractual in that the basics of a contract exist between the enlisting service member and the United States Government. The basics of contracts are: (1) **consideration** – each party has to promise or provide something of value to the other; (2) **offer and acceptance** – there must be a clear or definite offer to contract and an unqualified acceptance; (3) **legal purpose** – the purpose of the agreement must not violate the law; (4) **capable parties** – to be “capable” of making a contract, the parties must understand what they're doing; and (5) **Mutual assent** – this is also sometimes referred to as a “meeting of the minds.”¹⁹² The contracting parties must intend to be bound by their agreement and must agree on the essential terms.¹⁹³

Each service member executes a DD 4/1 enlistment contract promising to obey all lawful orders, perform all assigned duties, and to serve in combat or other hazardous situations.¹⁹⁴ Section B(8)(c) of said enlistment contract explicitly states that, “[t]he agreement in this section and in the attached annex(es) are all the promises made to me by the Government.”¹⁹⁵ “Anything else that anyone has promised me is not valid and will not be honored,” and while there is no explicit statement in the DD 4/1 enlistment agreement that promises that the Government will provide any benefit to the service member post separation, Sections 9(a)(2) and (3) of the same enlistment agreement infers that upon separation, benefits will be made available to the service member.¹⁹⁶

The concept of “social contract” was first defined in *Lochner v. New York*,¹⁹⁷ a theory originating during the Age of Enlightenment that addressed the questions of the origin of society and the legitimacy of the

¹⁹¹ See *id.* (explaining that in his address, Lincoln stated that the VA made a commitment to those injured and the families of those that died).

¹⁹² MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 1, 12, 33 (Foundation Press, 5th ed. 2006) (emphasis added).

¹⁹³ See *id.* at 1 (discussing the elements of a contract).

¹⁹⁴ ARMED FORCES OF THE U.S. ENLISTMENT/REENLISTMENT DOCUMENT Form DD4/1 (2001), <http://www.rotc.pitt.edu/forms/dd0004.pdf>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See generally *Lochner v. New York*, 198 U.S. 45 (1905) (discussing freedom to contract and states' powers).

authority of the state over the individual.¹⁹⁸ The social contract posits that individuals have consented, either explicitly or tacitly, to surrender some of their freedoms and submit to the authority of the ruler or magistrate (or to the decision of a majority), in exchange for protection of their remaining rights.¹⁹⁹ More simply stated, a social contract is “an actual or hypothetical agreement among the members of an organized society or between a community and its ruler that defines and limits the rights and duties of each.”²⁰⁰

B. *A History of Caring for Those Who Served*

From the beginning of American society, the English colonies in North America provided pensions for disabled veterans.²⁰¹ “The first law in the colonies on pensions, enacted in 1636 by Plymouth, provided money to those disabled in the colony’s defense against Indians.”²⁰² “It granted half pay for life in cases of loss of limb or other serious disability.”²⁰³

In 1789, with the ratification of the U.S. Constitution, the first Congress assumed from the individual states the burden of paying veterans benefits²⁰⁴ to disabled veterans. Subsequent laws included survivors of veterans and their dependents.²⁰⁵

“When the Civil War broke out in 1861, the nation had about 80,000 war veterans.”²⁰⁶ “By the end of the Civil War in 1865, another 1.9 million veterans had been added to the rolls.”²⁰⁷ “The General Pension Act of 1862²⁰⁸ provided disability payments based on rank and degree of

¹⁹⁸ See generally *id.* (discussing freedom to contract and states’ powers).

¹⁹⁹ See generally *id.* (discussing freedom to contract and states’ powers).

²⁰⁰ *Social Contract*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20contract> (last visited Sept. 12, 2017).

²⁰¹ *VA History in Brief*, *supra* note 50, at 3.

²⁰² *Id.*

²⁰³ *Id.* (“At most, only 3,000 Revolutionary War veterans ever drew any pension. Later, grants of public land were made to those who served to the end of the war.”).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 4.

²⁰⁷ *Id.* (“This included only veterans of Union forces. Confederate soldiers received no federal veterans benefits until 1958, when Congress pardoned Confederate servicemembers and extended benefits to the single remaining survivor.”).

²⁰⁸ General Pension Act of 1862, 12 Stat. 566, 37 Cong. Ch. 166 (1862).

disability, and liberalized benefits for widows, children and dependent relatives.²⁰⁹

“The first national effort to provide medical care for disabled veterans in the United States was the Naval Home, established in Philadelphia in 1812.”²¹⁰ “This was followed by two facilities in Washington, D.C., the Soldiers’ Home in 1853 and St. Elizabeth’s Hospital in 1855.”²¹¹

World War I “marked ‘the first use of chemical weapons, the first mass bombardment of civilians from the sky, and the century’s first genocide.’”²¹² This new method of warfare, like the use of chemical poison gas, heavy artillery, and trenches, subjected American soldiers to unexpected traumatic events, which contributed to what was then called “Shell Shock” or “Combat Fatigue.”²¹³ Initially, medical professionals believed that the symptoms associated with shell shock were actually attributable to a physical “shock” to the nervous system, also termed as “shelling.”²¹⁴ Symptoms of shell shock included staring eyes, violent tremors, blue and cold extremities, and unexplained deafness, blindness, or paralysis.²¹⁵ As medical professionals began to notice that the symptoms of shell shock were present in soldiers who had never experienced “shelling,” classification of the illness as a psychiatric disorder become more common.²¹⁶ At the time, treatment for shell shock was primarily concerned with treating the soldier as close to the traumatic event as possible.²¹⁷ Soldiers who returned home to the United States with shell shock confused the American people with the new and unheard of disorder.²¹⁸

²⁰⁹ *VA History in Brief*, *supra* note 50, at 4 (“The act included, for the first time, compensation for diseases such as tuberculosis incurred while in service. 1862 also marked the establishment of the National Cemetery System, to provide burial for the many Union dead of the Civil War.”).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Judith Michaelson, *On the Front With PBS*, L.A. TIMES (Nov. 10, 1996), http://articles.latimes.com/1996-11-10/entertainment/ca-63080_1_great-war/3.

²¹³ Baran, *supra* note 35.

²¹⁴ *Id.*

²¹⁵ See MEAGHER, *supra* note 22, at 16; Mylea Charvat, *History of Post-Traumatic Stress Disorder in Combat*, U.S. DEP’T VETERANS AFF. 11 (Sept. 14, 2010), http://www.war-relatedillness.va.gov/WARRELATEDILLNESS/education/confere-nces/2010-sept/slides/2010_09_14_CharvatM-History-of-PTSD-in-Combat.ppt.

²¹⁶ Erica Goode, *When Soldiers Snap*, N.Y. TIMES (Nov. 7, 2009), <http://www.ny-times.com/2009/11/08/weekinreview/08goode.html>.

²¹⁷ MEAGHER, *supra* note 22, at 16–17; Charvat, *supra* note 215, at 12.

²¹⁸ Baran, *supra* note 35 (“I wish you could be here in this orgie of neuroses and psychoses and gaits and paralyses I cannot imagine what has got into the central nervous symptom of

By 1917, the Surgeon General, Rupert Blue,²¹⁹ recognized the seriousness of shell shock and, as a result, created a comprehensive treatment program for those soldiers who exhibited shell shock symptoms.²²⁰

In 1939, during World War II, the new VA was accountable for medical services and coverage for veterans, allowances and disability compensation for World War I veterans, life insurance, and other benefits such as pensions and retirement payments.²²¹ Just as the United States had experienced new chemical and trench warfare in World War I, advances in technology and the creation of innovative atrocities in World War II took a very devastating psychological toll on American troops and led to the development of a “new shell shock.”²²² In addition to the horror of the atomic bomb, the atrocities that American soldiers viewed when liberating German concentration camps traumatized much of the United States’ military force for many years.²²³ The “new shell shock” of World War II manifested itself in symptoms such as nightmares, anxiety, and startled reactions.²²⁴ Other symptoms included headaches, dizziness, fatigue, memory loss, and poor concentration.²²⁵ The new disorder, which no longer included trembling or paralysis as it did during World War I, was renamed “combat fatigue,”²²⁶ or “war neurosis.”²²⁷ Flight Surgeon Jack McKittrick found that distributing alcohol before a flight mission best

the men . . . Hysterical dumbness, deafness, blindness, anesthesia galore. I suppose it was the shock and the strain, but I wonder if it was ever thus in previous wars? . . . The soldier, having passed into this state of lessened control, becomes a prey to his primitive instincts . . . He may be so affected that changes occur in his sense perceptions; he may become blind or deaf or lose the sense of smell or taste. He is cut off from his normal self and the associations that go to make up that self. Like a carriage which has lost its driver, he is liable to all manner of accidents. At night insomnia troubles him, and such sleep as he gets is full of visions; past experiences on the battlefield are recalled vividly; that will that can brace a man against fear is lacking.”)

²¹⁹ U.S. DEP’T OF HEALTH & HUMAN SERVS., *Previous Surgeons General*, SURGEONGENERAL.GOV, <http://www.surgeongeneral.gov/about/previous/index.html> (last visited Sept. 12, 2017).

²²⁰ MEAGHER, *supra* note 22, at 16; Charvat, *supra* note 215, at 12.

²²¹ *VA History in Brief*, *supra* note 50.

²²² Baran, *supra* note 35.

²²³ *The Atomic Option, in The Perilous Fight: America’s World War II in Color*, PBS, http://www.pbs.org/perilousfight/psychology/the_atomic_option/ (last visited Sept. 12, 2017).

²²⁴ Goode, *supra* note 216, at 3.

²²⁵ Edgar Jones et al., *Shell Shock and Mild Traumatic Brain Injury: A Historical Review*, 164 AM. J. PSYCHIATRY 1641, 1643 (2007).

²²⁶ Charvat, *supra* note 215, at 14.

²²⁷ Goode, *supra* note 216, at 3.

calmed the men when they most needed it.²²⁸ One in four casualties during World War II was attributable to combat fatigue, and for soldiers involved in long-term, intense fighting, the ratio was one in two.²²⁹ Combat fatigue was more common in certain combat zones and in the Pacific where, for example, 40% of combat evacuations were “mental” in nature, and over 26,000 psychiatric cases were reported in Okinawa alone.²³⁰ To keep soldiers from going mad and losing their composure in anticipation of kamikaze attacks,²³¹ soldiers were not informed that an attack was mounting until they absolutely needed to know.²³² During World War II, 1,393,000 soldiers were treated for battle fatigue, and of all ground combat troops, 37% were discharged for psychiatric reasons.²³³

In 1944, due in part to the United States’ growing concern with helping veterans in their transition back to civilian life, and in the hopes of decreasing the possibility of a post-war depression, Congress passed the Servicemen’s Readjustment Act of 1944,²³⁴ or the “GI Bill of Rights.”²³⁵ Although Congress, the VA and the United States were certainly becoming more involved in veterans’ benefits, there was an apparent gap in coverage for health care and more specifically, mental health care.²³⁶ The lack of evidence of any mental health care coverage is itself, indicative of how society viewed mental illness: not at all.²³⁷

²²⁸ *The Mental Toll*, in *The Perilous Fight: America’s World War II in Color*, PBS http://www.pbs.org/perilousfight/psychology/the_mental_toll/ (last visited Sept. 14, 2017) [hereinafter *America’s World War II in Color*].

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Kamikaze*, DICTIONARY.COM, <http://www.dictionary.com/browse/kamikaze> (last visited Sept. 19, 2017) (defining “kamikaze” as “a member of a special corps in the Japanese airforce charged with the suicidal mission of crashing an aircraft laden with explosives into an enemy target, especially a warship”).

²³² *America’s World War II in Color*, *supra* note 228.

²³³ *Id.*

²³⁴ Servicemen’s Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944).

²³⁵ The GI Bill had three benefits: (1) up to four years of education or training; (2) federally guaranteed farm, business or home loans without a requisite down payment; and (3) unemployment compensation. *See generally Federal Benefits for Veterans, Dependents, and Survivors: 2011 Edition*, U.S. DEP’T VETERANS AFF. (2011), https://www.va.gov/opa/publications/benefits_book/federal_benefits.pdf (describing the federal benefits for veterans, dependents, and survivors).

²³⁶ Gomes, *supra* note 42, at 344.

²³⁷ *Id.*

“It would not be until years later that American veterans would begin to see the government-sponsored mental health coverage and treatment that they” needed.²³⁸ “Until then . . . public conceptions of mental illness and mental health treatment would directly affect the VA’s coverage for such services—or lack thereof.”²³⁹ In 1999, the Surgeon General issued a Report on mental illness that included an overview of public attitudes and understanding of mental illness in the 1950s, the era immediately succeeding the end of World War II.²⁴⁰ The Report came to the conclusion that in the 1950s, the public had a very unscientific understanding of mental illness, which, in turn, resulted in a highly-stigmatized view of mental illnesses as a whole.²⁴¹

In the forthcoming years, the United States was confronted with a mental epidemic of sorts that could not be ignored.²⁴² “Symptoms of mental illnesses such as shell shock, battle fatigue, and postconcussional syndrome [continued] to persist in those who had served.”²⁴³ “With the United States’ involvement in the Vietnam War, the American people [were] forced to face mental illnesses on a scale that had never been seen before.”²⁴⁴

While this duty to a service member’s mental health was not accepted by the U.S. Government until the Vietnam War,²⁴⁵ it is time for the acceptance to now be transitioned from offering such care to only those services members with honorable discharges. It must be expanded to include those service members who are discharged with “bad-paper” discharges as well. This Article establishes that the duty to care for those who have borne the battle does not just include assistance with housing, vocational placements, etc., but must also necessarily include mental health assistance.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ U.S. DEP’T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GEN. 7 (1999), http://www.drjohncervantes.com/PDF/Mental_Health_-_A_Report_Of_The_Surgeon_General.pdf.

²⁴¹ *Id.*

²⁴² Gomes, *supra* note 42, at 345.

²⁴³ *Id.* at 345.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 350–51.

III. “BAD PAPER”—THE OBSTACLE TO MENTAL HEALTH TREATMENT: TENS OF THOUSANDS OF AMERICANS WHO BORE THE BATTLE ARE BARRED FROM THE CARE THAT WAS PROMISED TO THEM

Service members who are discharged for misconduct often receive service characterizations that make them ineligible for Veteran Administration (VA)²⁴⁶ benefits “despite pressing treatment needs and, often prior valorous service in combat theaters.”²⁴⁷ “The military, through its discharge process, is creating huge handicaps to readjustment and reintegration into society by limiting the possibility of care and failing to at the least stabilize these warriors before their” ejection²⁴⁸ from the military. The VA compounds these handicaps by: (1) targeting detailed transition counseling only to those being discharged under honorable conditions; (2) not monitoring the number of claims seeking benefits that are tendered by service members who are discharged with “bad paper”; and (3) allowing great subjectivity in the review of Character of Service (COS) evaluations.²⁴⁹ Hence, tens of thousands of American service members who bore the battle are barred from the care that they need, the care that was promised to them. As one such two-time Iraq veteran with PTSD and a “bad paper” discharge 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.’”²⁵⁰

²⁴⁶ “In 1930, Congress created the Veterans Administration (‘VA’) by consolidating the Veterans’ Bureau, the Bureau of Pensions, and the National Homes for Disabled Volunteer Soldiers.” *VA History in Brief*, *supra* note 50, at 12; 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. 8, 11 (2012).

²⁴⁷ Brooker et al., *supra* note 246, at 11.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 11–12.

²⁵⁰ Kelly Kennedy, *PTSD Victim Booted for ‘Misconduct’*, MIL. CONNECTION (Jan. 7, 2009), <http://www.militaryconnection.com/articles/health/ptsd-victim-booted-misconduct> (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 service members] out for misconduct’ . . . ‘Everything they say, they have an escape clause.’”).

Access to VA health care, as opposed to medical care provided by general hospitals or emergency rooms, is vital to the successful reintegration of combat-traumatized service members because it provides “the only reservoir of combat PTSD expertise.”²⁵¹

A. The Making of the “Badge of Infamy”: The Constitutional Legacy of the “Bad Paper” Discharge

“A certificate of discharge is issued to all members of the armed forces upon termination of service.”²⁵² “The requirement that a soldier receive a certificate separating him from the military dates at least from the British Articles of War,”²⁵³ which the American Articles of War of 1776 are patterned after, almost verbatim.²⁵⁴ According to William Winthrop, the foremost authority on the development of American military law, it was necessary that soldiers receive a discharge in writing²⁵⁵ “as the legal evidence that they have been discharged in fact.”²⁵⁶ While the discharge certificate²⁵⁷ “does not state the specific reason for separation,”²⁵⁸ it does “broadly judge[] the individual’s character.”²⁵⁹

Since 1892, the military has had a system for administratively separating members of the armed forces.²⁶⁰ While, “stigmatizing punishments—such as branding, newspaper publicity, and discharge with ignominy—represent[s] a longstanding feature of military justice, such penalties were traditionally reserved for courts-martial operating within express

²⁵¹ *Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents: A Community Perspective, Hearing Before the Subcomm. On Oversight and Investigation of the Comm. On Veterans’ Affairs*, *supra* note 8, at 105.

²⁵² Andrew S. Effron, Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L. L. REV. 227, 227 (1974) (citing 10 U.S.C. § 1168 (1970)).

²⁵³ *Id.* at 243 (citing British Articles of War of 1769, Section III, Art II).

²⁵⁴ *Id.* (citing American Articles of War of 1776, Section III, Article II).

²⁵⁵ “The requirement of a discharge in writing derived from the unique nature of the military profession.” Effron, *supra* note 252, at 243.

²⁵⁶ 1 WILLIAM WINTHROP, *MILITARY LAW* 775 (W. H. Morrison, D.C. 1886). Winthrop observed that the issuance of a formal discharge was a matter of utmost importance to the soldier as well as his superiors: “Such discharge is also *final* in detaching the recipient absolutely from the army under the enlistment to which it relates” *Id.* at 780.

²⁵⁷ See Effron, *supra* note 252, at 227 (discussing what is included in the Military Discharge Certificate).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ See generally *id.* (discussing the evolution of the military discharge).

statutory provisions.”²⁶¹ A less than honorable discharge certificate was strictly reserved for sentencing by a formal court-martial.²⁶²

Although the discharge certificate of Winthrop’s day had a section for “Character,” it was not used to punish the recipient with a badge of infamy.²⁶³ “Discharge certificates issued through administrative procedures [that] officially labeled the veteran as ‘without honor’ did not appear in the United States until very late in the nineteenth century.”²⁶⁴ “In 1913, the less than honorable discharge certificate became known as the ‘unclassified discharge.’”²⁶⁵ “Three years later this certificate was issued on blue paper, [(the Blue Discharge)], further to contrast it with the white Honorable Discharge.”²⁶⁶ The “Blue Discharge” lasted through World War II.²⁶⁷

In 1947 the Department of Defense (DoD) authorized the “issuance of General and Undesirable Discharge certificates for all services, again without any change in the discharge statute that would have authorized this practice.”²⁶⁸ In revising the Articles of War in 1948, Congress provided for two classes of derogatory separations – Bad Conduct and Dishonorable Discharges – both to be imposed through courts-martial; the authority for these punishments was continued when the Uniform Code of Military Justice (UCMJ),²⁶⁹ was enacted in 1950.²⁷⁰ For the first time in history, inferior courts in the Army were granted the authority, under the 1948 revision, to issue punitive discharges; but, it was also provided that such judgments would be subject to post-conviction appellate review.²⁷¹

While the revised Articles of War and the UCMJ both authorized a detailed program of non-judicial punishments for military personnel, nei-

²⁶¹ *Id.* at 242.

²⁶² 1 WINTHROP, *supra* note 256, at 777.

²⁶³ *Id.* at 781.

²⁶⁴ Effron, *supra* note 252, at 242.

²⁶⁵ *Id.* at 247 n.73.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Act of May 5, 1950, ch. 169, Pub. L. No. 81-506, § 1, 64 Stat. 107, 107–108 (Uniform Code of Military Justice).

²⁷⁰ *Id.*

²⁷¹ See H.R. REP. NO. 80-1034, at 7 (1947), *accompanying* the Elston Act, Pub. L. No. 80-759, 62 Stat. 604 (1948). The Navy had been authorized to issue Bad-Conduct Discharge certificates through inferior courts-martial since 1855.

ther mentioned non-judicial discharges under other than honorable conditions.²⁷² Now, for some, it may seem “reasonable in the normal course of events, that leaving the military in dishonor should result in unique hardships greater than those encountered in leaving a civilian occupation.”²⁷³ “The culpable offender who deprived the military of his or her faithful service . . . or detracted from the military mission in some palpable way should [arguably] sacrifice the [benefits] of social mobility.”²⁷⁴ This is known as the “just deserts” thesis of military misconduct.²⁷⁵ “It targets the individual and reasons that he or she deserves to have a hard transition back to civilian life in a nation that values the sacrifices of men and women in uniform.”²⁷⁶ “This thesis is often communicated as honoring those who loyally served by preserving the distinction from those who did not.”²⁷⁷ Dr. Jonathan Shay, a Department of Veterans Affairs psychiatrist, states that he has observed a related, widespread, dubious belief among 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.”²⁷⁸ “He deserves no respect for any previously hon-

²⁷² In the revised American Articles of War, 62 Stat. 629, 641, there were detailed provisions for administrative punishments:

Sec. 238. Article 104 is amended to read as follows: “Art. 104 DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command, may, for minor offenses, impose disciplinary punishments upon person of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.” The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges, or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishments for not exceeding one week from the date imposed; but shall not include forfeiture of pay or confinement under guard; except that any officer exercising general court-martial jurisdiction may, under the provisions of this article, also impose upon a warrant officer or officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay per month for three months.

Act of June 24, 1948, ch. 624, Pub. L. No. 80-759, § 1, 62 Stat. 640, 641–42.

²⁷³ Brooker et al., *supra* note 246, at 12–13.

²⁷⁴ *Id.* at 13.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Viewpoints on Veterans Affairs*, *supra* note 155.

orable conduct—all possibility of respect or consideration has been obliterated by his criminal act.”²⁷⁹ Dr. Shay goes on to state that he has heard that service members “have only themselves to blame – it is their misconduct or criminal behavior that has deprived them their benefits”²⁸⁰

“There is, however, an exceptional circumstance that turns the ‘just deserts’ thesis on its head and that shifts concerns away from the offender and back to society.”²⁸¹ “It is the ‘public health’ thesis of military misconduct, which recognizes that not all offenders are similarly situated.”²⁸² “It considers one main discriminating characteristic[,] the offender’s mental state at the time of the misconduct.”²⁸³ The “public health” thesis focuses on two factors: “1) that so many service members are exposed to combat trauma and its resulting stress conditions and 2) that the military is an occupation in which one is expected to encounter such stress on a regular basis.”²⁸⁴

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,²⁸⁵ are as lethal to bystanders, law enforcement officers, 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.²⁸⁶

Governmental actions that impose a badge of infamy or otherwise stigmatize a citizen may deprive him of liberty and property and therefore must meet the requirements of due process.²⁸⁷ Since a derogatory discharge certificate²⁸⁸ severely stigmatizes the service member and inter-

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 112.

²⁸¹ Brooker et al., *supra* note 246, at 13.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ GABRIEL, *supra* note 18 (quoting WWII Marine Corps veteran William Manchester: “You’re dealing here with complicated psychological states . . .”).

²⁸⁶ See *Viewpoints on Veterans Affairs*, *supra* note 155, at 113–14.

²⁸⁷ See *Wisconsin v. Constantineau*, 400 U.S. 433, 436–40 (1971) (stating a badge or stigma given to a person is such a disgrace as to require due process to be met).

²⁸⁸ A derogatory discharge certificate, for the purpose of this article, is anything other than an “Honorable Discharge.”

feres with his ability to obtain employment, many courts have found liberty and property rights violated when service personnel are deprived of Honorable Discharge certificates.²⁸⁹

B. *An End Road Around Due Process*

The public often believes there are but two kinds of discharges – honorable and dishonorable – however, there are five. Three of these five discharges may completely preclude the service member from receiving some, or even all benefits, from governmental organizations.²⁹⁰ The five discharges are: (1) Honorable Discharge; (2) General Discharge; (3) Other than Honorable Discharge (OTH); (4) Bad Conduct Discharge (BCD);²⁹¹ and (5) Dishonorable Discharge (DD).²⁹²

“As far back as 1958, the military has admitted, commanders commonly circumvented . . . the constitutional protections guaranteed service members” by utilizing the highly questionable shortcut of an administrative, non-judicial discharge to drop unwanted and or unneeded personnel.²⁹³ However, “[a]fter steadily declining in the first years of the Vietnam War, the number of administrative discharges dispensed by the armed forces shot upward beginning 1969”²⁹⁴ (“1969–1972 were the years when the armed force were cut[ting] back as the United States withdrew its troops from Vietnam”).²⁹⁵ “[T]he Defense Department has admitted the reduction in forces in Vietnam help[ed] explain why so many GI’s were administratively separated before their enlistment ended.”²⁹⁶

²⁸⁹ See generally James M. Hirschhorn, *Due Process in Undesirable Discharge Proceedings*, 41 U. CHI. L. REV. 164 (1973) (quoting “[t]he serviceman given an undesirable discharge is denied several of the protections recognized as necessary for imposition of [other types of discharge].”).

²⁹⁰ Seamone, *supra* note 33, at 504.

²⁹¹ See Captain Richard J. Bednar, *Discharge and Dismissal as Punishments in the Armed Forces*, 16 MIL. L. REV. 1, 6 (1962) (stating the Bad Conduct Discharge was adopted by the Army in 1948; the BCD existed in the Navy since 1885).

²⁹² *Id.*

²⁹³ Peter Slavin, *The Cruellest Discrimination: Vets With Bad Paper Discharges*, 14 BUS. & SOC. REV. 25, 29 (1975).

²⁹⁴ *Id.* (“[w]hile in the previous five years the number of undesirables had averaged 11,500 annually, in fiscal year 1970 undesirables doubled, to 22,537. And by fiscal 1972 they had almost doubled again, to 40,018.”).

²⁹⁵ *Id.*

²⁹⁶ *Id.*

The injustices of the administrative discharge system are compounded by: (1) the subjectivity of the discharges (service members may be punished harshly with an OTH or BCD in battalion for the same misconduct that garners a counseling statement or corrective training 50 yards away in a different battalion for the same installation);²⁹⁷ and (2) the odds facing those service members who try to upgrade their discharges.²⁹⁸ For those service members who do pursue a discharge review, the process is protracted and cumbersome, resulting in so few upgraded discharges that it can hardly be considered a remedy for most service members.²⁹⁹

“Because an Honorable Discharge will normally not preclude a former servicemember from receiving the full range of benefits” available to the Veteran, “this too often leads recipients of lesser discharges to believe that their entitlements are far fewer.”³⁰⁰ Some have characterized “bad paper” discharges as a “life sentence” for people who are often “nineteen or twenty years old;”³⁰¹ others label it as “a ticket to America’s underclass [and] a bar to leaving it.”³⁰²

C. *The Path to Seeking Veteran Health Benefits*

The benefits that the VA administers are broadly encompassed by three separate administrations: the Veterans Benefits Administration (VBA); the Veterans Health Administration (VHA); and the National Cemetery Administration (NCA).³⁰³ The collective mission of the three administrations is to “provide benefits and services to Veterans and their families in a responsive, timely, and compassionate manner in recognition of their service to the Nation.”³⁰⁴

²⁹⁷ See, e.g., LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 121 (1978).

²⁹⁸ See PAUL STARR ET AL., THE DISCARDED ARMY: VETERANS AFTER VIETNAM: THE NADER REPORT ON VIETNAM VETERANS AND THE VETERANS ADMINISTRATION 175 (1973) (“[m]en are discouraged from appealing because the process usually takes years and requires legal assistance beyond their means.”).

²⁹⁹ *Id.*

³⁰⁰ Brooker et al., *supra* note 246, at 18, 19.

³⁰¹ STARR ET AL., *supra* note 298, at 175.

³⁰² Slavin, *supra* note 293, at 26.

³⁰³ VETERAN’S BENEFITS ADMIN., *Annual Benefits Report: Fiscal Year 2011*, U.S. DEP’T VETERANS AFF. 5 (2011), https://www.benefits.va.gov/REPORTS/abr/2011_abr.pdf.

³⁰⁴ *Id.*

In order to be eligible for any of these benefits generally, and VA health care benefits specifically, a recipient must be a Veteran who was discharged under other than dishonorable conditions.³⁰⁵ Congress has defined a Veteran as a “person who served in active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”³⁰⁶ In addition to defining certain circumstances of dishonorable service in its own right, Congress has delegated to the Secretary of Veterans Affairs the authority to promulgate regulations.³⁰⁷ Hence, the foundation for all VA benefits is veteran status.³⁰⁸ If veteran status is withheld or challenged, it can take “years to fully appeal an adverse VA determination regarding whether a former servicemember’s circumstances of discharge are a bar to benefits.”³⁰⁹

A service member begins the process of establishing veteran status and seeking entitlement to any VA benefit by filing a claim.³¹⁰ “Ordinarily, and for the great majority of former servicemembers, establishing veteran status is as simple as submitting a DD Form 214 (Certificate of Release or Discharge from Active Duty) with one’s claim to a VA regional office.”³¹¹ The DD Form 214 indicates, in pertinent part, the length of service and provides a characterization of that service, such as Honorable, General, or Other than Honorable (OTH).³¹² If the characterization of discharge is Honorable or General under Honorable conditions, and no statutory bars to benefits apply, that characterization is binding on the VA.³¹³

A former service member discharged under a less than honorable characterization may meet the definition of “veteran” who is eligible for benefits, but only after they have undergone the VA’s Character of Service

³⁰⁵ 38 U.S.C. §§ 101(2), 503A(b)(1) (2012) (held unconstitutional by *Cooper-Harris v. U.S.*, 965 F. Supp. 2d 1139 (2013)).

³⁰⁶ *Id.* § 101(2) (2006) (held unconstitutional by *Cooper-Harris v. U.S.*, 965 F. Supp.2d 1139 (2013)).

³⁰⁷ *Id.* § 501(a) (2000).

³⁰⁸ *See id.*

³⁰⁹ Brooker et al., *supra* note 246, at 26.

³¹⁰ *See id.*

³¹¹ *Id.*

³¹² *See* U.S. DEP’T OF DEF., *Instruction No. 1336.01*, at 8–14 (Aug. 20, 2009), <http://www.dtic.mil/whs/directives/corres/pdf/133601p.pdf>.

³¹³ *See* 38 C.F.R. § 3.12(a) (2012).

(COS)³¹⁴ process to determine such status.³¹⁵ However, under VA regulation 38 CFR § 3.12(d), an individual's character of discharge is considered to have been issued "under dishonorable conditions" if they were released under any of the following circumstances:

(1) Acceptance of an undesirable discharge to escape trial by general court-martial[;] (2) Mutiny or spying[;] (3) An offense involving moral turpitude . . . [which] includes, generally, conviction of a felony[;] (4) Willful and persistent misconduct . . . [;] or (5) Homosexual acts involving aggravating circumstances or factors affecting the performance of duty . . . [which include] child molestation, homosexual prostitution, homosexual acts or conduct accompanied by [coercion or assault], and homosexual acts or conduct . . . when a service member has taken advantage of his or her superior rank, grade, or status.³¹⁶

Additionally, if a veteran received an OTH discharge that is determined to be a bar under the regulatory bars³¹⁷ to benefits listed in 38 C.F.R. Sections 3.12(d), he or she will be entitled to VA health care benefits, limited to treatment of any disability incurred or aggravated during active service.³¹⁸ However, a veteran with an OTH that is based on one of the statutory bars referenced in 38 C.F.R. Section 3.12(c) is barred from eligibility for any VA health care benefits.³¹⁹

³¹⁴ See Brooker et al., *supra*, note 246, at 150–51 (In 1944 discharges were either white (Honorable Discharge), blue (Without Honor and Uncharacterized Discharges), or yellow (Dishonorable Discharge). The Blue Discharge originated in 1916 and drew criticism from even the VA for its failure to distinguish the nature and severity of one's service related behavior). Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1, 2 (1973).

³¹⁵ See Christopher H. Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33, 35 (1973).

³¹⁶ 38 C.F.R. § 3.12(d) (1997).

³¹⁷ See *id.* (Chapter 38 of the *Code of Federal Regulations* contains five regulatory bars to VA benefits under the COS review process: 1) Acceptance of an undesirable discharge to escape trial by general court-martial; 2) Mutiny or spying; 3) An offense involving moral turpitude. This includes, generally, conviction of a felony; 4) Willful and persistent misconduct. This includes a discharge under [OTH] conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious; and 5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty These regulatory bars collectively enable adjudicators to determine the threshold question of whether the ex-service member is an eligible "veteran" in the sense that he or she performed service "under conditions other than dishonorable.").

³¹⁸ *Id.* § 3.360(a) (2012).

³¹⁹ *Id.*

Service members who choose to not seek a COS review but instead choose to seek access to VA health care benefits may apply for them directly, but they must note on their application that they have received an OTH.³²⁰ Eligibility staff may then register the service member and place the application in a Pending Verification Status.³²¹ However, this holding status was addressed in the 2011 opinion in the case of *Veterans for Common Sense v. Shinseki*, with the U.S. Court of Appeals for the Ninth Circuit, explaining:

Veterans who return home from war suffering from psychological maladies are entitled by law to disability benefits to sustain themselves and their families as they regain their health. Yet it takes an average of more than four years for a veteran to fully adjudicate a claim for benefits. During that time[,] many claims are mooted by deaths. The delays have worsened in recent years, as the influx of injured troops returning from deployment in Iraq and Afghanistan has placed an unprecedented strain on the VA, and has overwhelmed the system that it employs to provide medical care to veterans and to process their disability benefits claims. For veterans and their families, such delays cause unnecessary grief and privation. And for some veterans, most notably those suffering from combat-derived mental illnesses such as PTSD, these delays may make the difference between life and death.³²²

IV. THE SOLUTION

A. *Too Little, Too Late*

The VA states that it is “aggressively undertaking a number of new measures to prevent suicide, including:” (1) “same-day access for Veterans with urgent mental health needs at over 1,000 points of care by the end of calendar year 2016;” (2) expanded telemental health care; (3) “hiring over 60 new crisis intervention responders for Veterans Crisis Line[s];” and (4) the creation of “stronger inter-agency . . . and new public-private partnerships (e.g., Johnson & Johnson Healthcare System and Bristol Myers Squibb Foundation),”³²³ all of which is great news if you are a Veteran in crisis and are entitled to receive medical care and mental health benefits. But, if you have been given a “bad-paper discharge,” where do you go?

³²⁰ See Brooker et al., *supra* note 246, at 26.

³²¹ VETERANS HEALTH ADMIN., *Other than Honorable Discharges: Impact on Eligibility for VA Health Care Benefits*, U.S. DEP’T VETERANS AFF. 1 (Dec. 2011), <https://www.va.gov/healthbenefits/assets/documents/publications/IB10-448.pdf>.

³²² *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 850 (9th Cir. 2011), *vacated*, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc), *and cert. denied*, 133 S. Ct. 840 (U.S. 2012).

³²³ *VA Conducts Nation’s Largest Analysis of Veteran Suicide*, *supra* note 172.

The U.S. Department of Defense (DoD), states there “are five cross-service suicide-prevention initiatives sponsored by DoD.”³²⁴ “First, the DoD Suicide Prevention and Risk Reduction Committee is a committee of key stakeholders, including each service’s suicide-prevention program manager (SPPM), that meets monthly to provide input on policy, develop joint products, and share information.”³²⁵ “Second, in 2008, the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury (DCoE) began funding the Real Warriors Campaign, a public education initiative to address the stigma of seeking psychological care and treatment.”³²⁶ “Third, in 2009, DoD established a congressionally directed DoD Task Force on the Prevention of Suicide by Members of the Armed Forces, which is expected to release its findings in the summer or fall of 2010.”³²⁷ “Fourth, in 2008, all services began conducting surveillance on suicide events (suicides and attempts or ideation that results in hospitalization or evacuation) using the same surveillance tool: the Department of Defense Suicide Event Report (DoDSER).”³²⁸ “Finally, since 2002, DoD has sponsored an annual suicide-prevention conference; in 2009 and 2010, the conference was jointly sponsored by DoD and the U.S. Department of Veterans Affairs (VA).”³²⁹ But, if you have been given a “bad-paper discharge,” where do you go?

To go one step further, in a call to better meet the mental health needs of our Veterans, on December 23, 2016, President Obama signed the National Defense Authorization Act, which included the Fairness to Veterans Act of 2016.³³⁰ The Fairness for Veterans Act amends Title 10 of the United States Code to provide for a review of characterization or terms of discharge from the Armed Forces of individuals with mental health disorders alleged to affect terms of discharge.³³¹ Currently, veterans with less-than-honorable discharges, or “bad paper” discharges, may not be eligible for a broad range of healthcare and benefits including critical mental

³²⁴ RAMCHAND ET AL., *supra* note 167, at xix–xx.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ Press Release, Vietnam Veterans of America, VVA Celebrates Passage of Fairness for Veterans Act; Calls for Investigation into “Bad-paper” Discharges (Dec. 13, 2016), <https://vva.org/wp-content/uploads/2016/12/VVA-Press-Release-16-35.pdf>.

³³¹ Fairness for Veterans Act of 2016, H.R. 4683, 114th Cong. (2nd Sess. 2016).

healthcare services.³³² The Fairness for Veterans Act of 2016 (the Act) revises the current discharge review process—which reevaluates the initial conditions of discharge for a former armed forces member—to mandate a board’s review of medical evidence concerning a TBI or PTSD.³³³ “Changing an armed service member’s discharge conditions can affect veteran benefits and often provide compensation for treatment of disease.”³³⁴ The Act specifically amends the discharge review process to include the reviewing of any medical evidence of the Department of Veterans Affairs or civilian health care provider presented by the former service member, and requires a rebuttable presumption in favor of the former member that posttraumatic stress disorder or traumatic brain injury materially contributed to the discharge of a lesser characterization.³³⁵ The Act seeks to ensure the most vulnerable veteran population receives the care and benefits they have earned.³³⁶ However, the Act is not preventative. A Service member has to be discharged and then they must administratively seek to change the characterization of that discharge.³³⁷ But, if you have been given a “bad-paper discharge,” where do you go?

B. An Ounce of Prevention is Worth a Pound of Cure

“[I]n 2007, the President’s Commission on Care for America’s Returning Wounded Soldiers strongly recommended that the DoD and the Department of Veterans Affairs rapidly improve prevention, diagnosis, and treatment of both PTSD and MTBI.”³³⁸ “To meet this obligation, the military must work collaboratively with civilian agencies while [service members] are still under military control.”³³⁹ “Mutual self-preservation demands this.”³⁴⁰ However, there must be action before the discharge.³⁴¹ Compassion, morality and logic would require that the service member be given the benefit of the doubt; don’t they deserve it? The sacrifice on their

³³² Carter, *supra* note 68.

³³³ H.R. 4683.

³³⁴ McMahon, *supra* note 14, at 1.

³³⁵ H.R. 4683.

³³⁶ See Nicole Garguilo, *A Call for Passage of the Fairness for Veterans Act*, SMITHTOWN TODAY (Mar. 9, 2016), <http://www.smithtowntodaynews.com/a-call-for-passage-of-the-fairness-for-veterans-act/>.

³³⁷ See H.R. 4683.

³³⁸ Jones et al., *supra* note 120, at 372.

³³⁹ Seamone, *supra* note 33, at 480.

³⁴⁰ *Id.*

³⁴¹ See *id.* at 506–07.

hearts, their minds, their families, their children, their parents, their spouses, their souls? They are deserving of restorative care, treatment for invisible wounds of war, and caring for those who have borne the battle.

Today, before being given a discharge that is not Honorable, “[a] Service member must receive a medical examination to assess whether the effects of PTSD or MTBI constitute matters in extenuation that relate to the basis for administrative separation” if he or she “reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation during the previous 24 months.”³⁴² However, “[o]dds 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.”³⁴³

What is the point of the Department of Defense recognizing that PTSD and MTBI causes misconduct when it chooses not to treat the service member, but instead discharge the service member in such a way that they will forever handicap that service member? Remember, the VA maintains this country’s largest health care system,³⁴⁴ and “the only reservoir of combat PTSD expertise.”³⁴⁵ To cut service members off as the result of a discharge characterization of “bad-paper” from their most logical lifeline, seems not only punitive, but cruel.

“Increasingly, military [health professionals,] . . . VA mental health professionals and legislators have called for serious intervention to prevent” the deluge of service members reentering civilian life with untreated mental health issues, especially when those mental health issues are created and or exacerbated by their military service.³⁴⁶

Congresswoman Maxine Waters was the sponsor of a bill to “establish a procedure for combat veterans to automatically upgrade their bad-paper discharges,” which she argued would be “a major step toward insuring that those who risked their lives in battle are not abandoned to the

³⁴² U.S. DEP’T OF DEF., *Instruction Number 1332.14: Enlisted Administrative Separations*, 49, ¶¶ 8–9 (Jan. 27, 2014), http://sapr.mil/public/docs/instructions/DoDI_133214_20140127.pdf.

³⁴³ See Hoellwarth, *supra* note 45, 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).

³⁴⁴ 2012 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 51, at I-32.

³⁴⁵ *Health Care, Economic Opportunities, and Social Services for Veterans and Their Dependents*, *supra* note 8, at 105.

³⁴⁶ See Brooker et al., *supra* note 246, at 12–14.

streets, prisons and margins of our society.”³⁴⁷ The efforts of Congresswoman Waters failed.³⁴⁸ But even this effort, as valiant as it was, was too little too late. The “bad-paper” discharge characterization would have already been issued, and the door to help would have already been closed, leaving the service member the burden of trying to pry that door back open.

“PTSD and MTBI create several special challenges for prompt and accurate diagnosis among combat veterans.”³⁴⁹ First, many service members, due to stigmas against reporting mental health troubles,³⁵⁰ engage in the phenomenon of “reverse malingering” or “dissimulation,” in which they fake good behavior, perhaps minimizing their responses to routine post-deployment assessments in order to stay in service, thereby inviting aggravated conditions.³⁵¹

In addition, behavioral and emotional manifestations of both PTSD and MTBI are subtle and often not immediately apparent, and soldiers with either or both of these disorders frequently go unrecognized in the military health care system.³⁵² Furthermore, symptoms of MTBI are similar to those of PTSD, making diagnosis difficult; it is difficult to know if the amnesia is an organic symptom related to the brain injury or a psychological symptom associated with PTSD.³⁵³ For these reasons there should be a sixth discharge designation of “General-Pending.”

³⁴⁷ Waters & Shay, *supra* note 148.

³⁴⁸ See Rebecca Izzo, Comment, *In Need of Correction: How the Army Board for Correction of Military Records is Failing Veterans with PTSD*, 123 YALE L.J. 1587, 1589–90 (2014).

³⁴⁹ Jones et al., *supra* note 120, at 373.

³⁵⁰ 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 “barriers to mental health treatment”).

³⁵¹ 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. Zilmer eds., 2006).

³⁵² See NAT’L CTR. FOR INJURY PREVENTION & CONTROL, *Report to Congress on Mild Traumatic Brain Injury in the United States: Steps to Prevent a Serious Public Health Problem*, CTRS. FOR DISEASE CONTROL & PREVENTION 2, 8, 16, 20 (Sept. 2003), <https://www.cdc.gov/traumaticbraininjury/pdf/mtbireport-a.pdf>.

³⁵³ See Richard A. Bryant, *Posttraumatic Stress Disorder and Traumatic Brain Injury: Can They Co-Exist?*, 21 CLINICAL PSYCHOL. REV. 931, 932–33, 941–42 (2001).

C. The “General-Pending” Discharge: A New Discharge Designation

For a service member who has been traumatized by war, and who is exhibiting signs and symptoms of PTSD or MTBI, and as a result, has begun a campaign of behavior unbecoming a soldier, a “General-Pending” discharge characterization would allow the service member the opportunity to leave active duty for the benefit of treatment, without the dubious distinction of a court-martial, and without the stigmatization of a “bad-paper” discharge, which is characteristic of the “other-than honorable” discharge. The “general-pending” designation would allow the military to remove the potentially dangerous soldier, but not dismiss him. The soldier would have to undergo all necessary physical and mental health examinations required upon separation (this is not new), in addition to following all orders for post-separation treatment (this is new).

However, with the “general-pending” characterization, the service member would be given the distinction of “veteran” status and would be eligible for health care benefits, including but not limited to mental health care benefits. The service member would secure treatment and follow recommendations from the treatment provider,³⁵⁴ including but not limited to evidence based treatment options.³⁵⁵ The service member would have to report at regular intervals, with an update from their mental health service provider, commenting only on attendance and progress of the service member. At the 12-month, 24-month, and maybe even 36-month interval, the service member will stand ready for service discharge re-evaluation, maintaining the “general-pending” discharge characterization, until mental health treatment is complete. Upon completion, the service member is re-evaluated anew. If the service member has completed their mental health treatment and feels whole, then his separation from the military is

³⁵⁴ See generally NAT’L COUNCIL FOR BEHAV. HEALTH, *supra* note 54 (discussing how these treatment providers may be the Department of Veteran Affairs or Community Behavioral Health Centers).

³⁵⁵ EBPs are treatments that are based directly on scientific evidence suggesting that strongest contributors and risk factors for psychological symptoms. Most EBPs have been studied in several large-scale clinical trials, involving thousands of patients and careful comparison of the effects of EBPs versus other types of psychological treatments. Dozens of multi-year studies have shown that EBPs can reduce symptoms significantly for many years following the end of psychological treatment - similar evidence for other types of therapies is not available to date. The most commonly used evidence-based practice approaches for the treatment of psychological symptoms involve cognitive and behavior therapies (CBT). *About Psychological Treatment*, ASSOC. FOR BEHAV. & COGNITIVE THERAPIES, <http://www.abct.org/Help/?m=mFindHelp&fa=WhatIsEBPpublic> (last visited Sept. 27, 2017).

complete and his discharge can remain as General or upgraded to Honorable. If the service member has not completed their mental health treatment and more time is needed, then the service member's designation of "general-pending" should continue.

While skeptics may say that PTSD symptoms are relatively easy to feign,³⁵⁶ the use of new neuroscience techniques in the development of external measures of assessment should obviate most of these concerns.³⁵⁷ Even if one service member finds a way to "game the system," is it not worth all the other lives that are saved? To serve those who have borne the battle requires care before the harm is done. Service members sacrifice so much to protect our individual and collective rights; we as a nation owe them all, at the very least, effective, available, caring, and evidenced-based mental health care.

³⁵⁶ See, e.g., Erin M. Gover, Comment, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 581–82 (2008).

³⁵⁷ Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 104 (2012). On the new uses of neuroscience in criminal law in general, see Michael L. Perlin, "And I See Through Your Brain": *Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process*, 2009 STAN. TECH. L. REV. 4 (2009); see also Michael L. Perlin, "There Are No Trials Inside the Gates of Eden": *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence* (July 2009) (unpublished paper, New York Law School) (on file with the International Academy of Law and Mental Health); Michael L. Perlin & Valerie R. McClain, *Unmasked (and Unanswered) Questions About the Role of Neuroimaging in the Criminal Trial Process*, 28 AM. J. FORENSIC PSYCHOL. 4 (2010).