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Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder

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Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder

THOMAS L. HAFEMEISTER* & NICOLE A. STOCKEY**

INTRODUCTION.....	88
I. OVERVIEW OF PTSD AND PREVALENCE IN WAR VETERANS	94
A. PTSD DIAGNOSIS GENERALLY.....	94
B. PTSD AND THE VIETNAM WAR VETERAN.....	99
C. PTSD AND MILITARY TRAINING	103
D. PTSD AND THE IRAQ AND AFGHANISTAN WAR VETERAN	105
II. THE INSANITY DEFENSE AND PTSD WAR VETERANS.....	107
A. THE INSANITY DEFENSE IN GENERAL.....	107
B. PTSD AND THE INSANITY DEFENSE	112
C. CASE LAW ON PTSD AS THE BASIS FOR AN INSANITY DEFENSE FOR VIETNAM WAR VETERANS	119
III. BEYOND THE INSANITY DEFENSE	123
A. PTSD AND OTHER BASES FOR AVOIDING OR REDUCING CULPABILITY	123
B. CASES WHERE PTSD HAS BEEN USED TO NEGATE THE CULPABILITY OF A WAR VETERAN	126
C. BATTERED SPOUSE SYNDROME.....	128
D. IMPLICATIONS OF BSS FOR PTSD-BASED DEFENSES	131
E. URBAN SURVIVAL SYNDROME	132
IV. IMPLICATIONS FOR “PTSD DEFENSES” RAISED ON BEHALF OF IRAQ AND AFGHANISTAN WAR VETERANS	134
CONCLUSION	141

As more psychologically scarred troops return from combat in Iraq and Afghanistan, society’s focus on and concern for these troops and their psychological disorders has increased. With this increase and with associated studies confirming the validity of the Posttraumatic Stress Disorder (PTSD) diagnosis and the genuine impact of PTSD on the behavior of war veterans, greater weight may be given to the premise that PTSD is a mental disorder that provides grounds for a “mental status defense,” such as insanity, a lack of mens rea, or self-defense. Although considerable impediments remain, given the current political climate, Iraq and Afghanistan War veterans are in a better position to succeed in these defenses than Vietnam War veterans were a generation ago. This Article explores the prevalence and impact of PTSD, particularly in war veterans, the relevance of this disorder to the criminal justice system, and the likely evolution of related mental status defenses as Iraq and Afghanistan War veterans return from combat.

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The occurrence of PTSD among these war veterans has potential legal implications. Because such veterans may be especially susceptible to PTSD symptoms—such as dissociation, exaggerated startle response, irritability, and impulsive behavior²²—that may be linked to violent acts and related criminal behavior, a diagnosis of PTSD may be the foundation for efforts to negate criminal culpability by asserting a related “mental status defense.”²³

When PTSD was first used as a basis for insanity defenses, in the wake of the relatively unpopular Vietnam War, these defenses enjoyed little success.²⁴ However, following the more broadly supported recent conflicts in Iraq and Afghanistan, along with society’s increased understanding of this disorder’s impact on an individual’s thoughts and behavior, PTSD may now be enjoying a warmer welcome in judicial arenas.

This Article will explore the use of PTSD as part of an insanity defense or when raised in conjunction with other arguments made by a defendant to avoid or reduce criminal culpability. In addition, amenability to the “PTSD defense” will be compared to the reception received by two other “defenses” that focus on the effects of traumatic experiences, namely, Battered Spouse Syndrome (BSS) and Urban Survival Syndrome (USS). Finally, the implications of using PTSD as a defense for Iraq and Afghanistan War veterans will be discussed.

Because modern medicine has increased the likelihood that seriously wounded armed forces personnel will survive their injuries,²⁵ and because of a greater recognition of and concern about PTSD, there are more opportunities and increased calls to study the prevalence of PTSD in combat veterans, the psychological and behavioral impact of PTSD on them, and the relevance of PTSD as the basis for a criminal defense in the legal system.

stigma and finally get our heroes the services and support they desperately need.” (emphasis in original)).

22. See DSM-IV-TR, *supra* note 18, at 463–68.

23. “Defense” is a term that is utilized in a relatively generic sense throughout this Article to encompass both affirmative defenses (e.g., the insanity defense) and rebuttals to evidentiary showings that must be made by the prosecution (e.g., the defendant lacked the requisite *mens rea* for the crime).

24. See *infra* Part II.C.

25. Manav Tanneer, *Advances Helping More Soldiers Survive Attacks*, CNN.COM, Nov. 13, 2006, <http://www.cnn.com/2006/US/11/13/war.wounded/index.html>.

26. CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISNER, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 20 (5th ed. 2008).

It is, however, the propensity of combat veterans with PTSD to commit crimes that makes this diagnosis particularly germane in the legal arena. Surveys conducted in the early 1980s indicated that Vietnam War veterans in the United States suffering from PTSD displayed a high rate of criminal behavior compared to that of the general population.⁷⁷ Approximately 10,000 of the 71,000 inmates in the Federal Bureau of

had developed posttraumatic stress disorder (PTSD) during their lifetimes and that 15.2% were currently suffering from PTSD. . . . We used military records to construct a new exposure measure and to cross-check exposure reports in diagnoses of 260 NVVRS veterans. . . . According to our fully adjusted PTSD rates, 18.7% of the veterans had developed war-related PTSD during their lifetimes and 9.1% were currently suffering from PTSD 11 to 12 years after the war”); Donna M. Shaw, Cynthia M. Churchill, Russell Noyes, Jr. & Paul L. Loeffelholz, *Criminal Behavior and Post-Traumatic Stress Disorder in Vietnam Veterans*, 28 *COMPREHENSIVE PSYCHIATRY* 403, 403 (1987) (“The combat environment of Vietnam was overwhelming Nearly half of the veterans who saw combat were found to have some difficulty with unresolved war experiences and 20% to 43% were diagnosed as having post-traumatic disorder.”); *id.* at 408 (“[V]eterans who developed PTSD reported higher risk assignments, higher levels of subjective stress, more frequent thoughts of death, lower unit morale, and more involvement in violence.”); Daniel S. Weiss, Charles R. Marmar, William E. Schlenger, John A. Fairbank, B. Kathleen Jordan, Richard L. Hough & Richard A. Kulka, *The Prevalence of Lifetime and Partial Post-Traumatic Stress Disorder in Vietnam Theater Veterans*, 5 *J. TRAUMATIC STRESS* 365, 365, 372 (1992) (finding that an additional 22.5% of the males and 21.2% of the females that were Vietnam theater veterans have experienced partial PTSD in their lifetimes, and “that of the 1.7 million veterans who ever experienced significant symptoms of PTSD after the Vietnam war, approximately 830,000 (49%) still experience clinically significant distress and disability from symptoms of PTSD[, with t]he contribution of partial PTSD represent[ing] an estimated additional 350,000 veterans”). Another account asserts that 480,000 of those returning from Vietnam (15.2% of men and 8.1% of women) had PTSD, with 168,000 Vietnam veterans still having it. Posting of Bob Krause to Iowa Veterans Blog, <http://iowavetsblog.blogspot.com/search?q=168%2C000+Vietnam+veterans> (Oct. 20, 2008, 21:08 EST).

75. KULKA ET AL., *supra* note 74, at 267 (“These findings mean that over the course of their lives, more than half of male [Vietnam] theater veterans and nearly half of female [Vietnam] theater veterans have experienced clinically significant stress reaction symptoms. This represents about 1.7 million veterans of the Vietnam war.”); *see also* Ronald C. Kessler, Amanda Sonnega, Evelyn Bromet, Michael Hughes & Christopher B. Nelson, *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 *ARCHIVES GEN. PSYCHIATRY* 1048 (1995).

76. Sigafos, *supra* note 67, at 117.

77. *See* Wilson & Zigelbaum, *supra* note 70, at 82 (“[T]he results of this study have extended growing research literature on PTSD among Vietnam veterans by exploring the relationship between combat role factors, exposure to stressors in Vietnam, and pre-morbid personality traits to criminal behavior. . . . [O]ur results . . . indicated that there was a significant relationship between combat role factors, exposure to stressors in Vietnam, and criminal behavior after returning home from the war. . . . [A]mong Vietnam veterans with PTSD what predisposes the onset of a criminal act is a changed psychological state of being that we have termed the survivor mode of functioning which operates as a behavioral defense mechanism. In

Prisons in 1992 were military service veterans, and approximately 10% of these incarcerated veterans likely suffered from combat-induced PTSD.⁷⁸ Similarly, in 2004, state prisons held 127,500 veterans,⁷⁹ accounting for approximately 10% of the entire prison population.⁸⁰

Thus, incarceration may be a particularly likely occurrence for veterans suffering from psychological disorders such as PTSD. The National Vietnam Veterans Readjustment Study of 1988 found that 480,000 of the veterans returning from Vietnam had developed PTSD by the time the study was conducted, with almost half (around 240,000) arrested or jailed at least once, 35% more than once, and 11.5% convicted of a felony.⁸¹ Other studies confirmed that higher crime rates existed for Vietnam War veterans suffering from PTSD.⁸²

this psychological state the veteran responds to conscious or unconscious manifestations of the anxiety disorder by reverting to the class of behaviors learned in combat which were connected with survival. In this altered state of being, the individual may then commit a violent or non-violent crime depending on predominant symptom dynamics of PTSD *and* the idiosyncratic nature of his experiences in the war.” (emphasis in original)). For a typology of what led veterans of the war in Vietnam with PTSD to engage in criminal behavior, see Bruce Pentland & James Dwyer, *Incarcerated Viet Nam Veterans*, in *THE TRAUMA OF WAR: STRESS AND RECOVERY IN VIET NAM VETERANS* 403, 407–10 (Stephen M. Sonnenberg et al. eds., 1985) (“We have conceptualized three categories of behavior which lead to the incarceration of most veterans: 1) conscious flashback behavior, 2) unconscious flashback behavior (or the ‘blind flashback’), and 3) action junkie behavior.”).

78. Sigafos, *supra* note 67, at 118.

79. MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISON, 2004, at 9 tbl.1 (2007).

80. *Id.* at 1.

81. See KULKA ET AL., *supra* note 74, at 186–87 (“[Male Vietnam theater veterans] with PTSD were . . . especially prone to active forms of expressing their hostility (over 40 percent scoring in the highest category) and to violent behavior (averaging 13.31 violent acts in the past year compared with only 3.54 among those without PTSD). Almost half of these (45.7 percent) had been arrested or jailed more than once—one-fourth of these (11.5 percent) convicted of a felony—compared with only 11.6 percent of those without a stress disorder.”); see also Posting of Bob Krause, *supra* note 74.

82. Wilson & Zigelbaum, *supra* note 70, at 77 (survey of Vietnam combat veterans that included a measure to assess the presence and severity of PTSD and their post-Vietnam legal problems, including whether they had been arrested, acquitted, or convicted of any of nineteen criminal offenses); Gover, *supra* note 59, at 570 (citing Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 415 (1988)); see also C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 306 (1984) (“[M]any attorneys may fail to recognize that various client problems ranging from criminal charges and substance abuse, to family problems and employment disputes may be related to PTSD and to service in Vietnam.”); *id.* at 311 (“Some authorities have suggested, that twenty-five to thirty percent of Vietnam veterans who saw heavy combat have been arrested on criminal charges.” (citing Schultz, *Trauma, Crime and the Affirmative Defense*, 11 COLO. LAW. 2401, 2401 (1982))); Pentland & Dwyer, *supra* note 77, at 406 (“[C]urrent data indicate that Viet Nam veterans (those who actually saw service in Viet Nam) constitute five to 10 percent of the population of state prisons.” (citations omitted)); *id.* (“We hypothesize that . . . many Viet Nam veterans in prison are there, at least in part, because of stressors related to the Viet Nam combat and homecoming experience. It is our observation that many of these veterans have not

C. PTSD and Military Training

Military training and combat, of course, encourage violent and aggressive behavior.⁸³ However, such behavior off the battlefield, if unjustified, can result in the individual running afoul of the criminal justice system and lead to the imposition of criminal sanctions.⁸⁴ At least some of this criminal behavior can be attributed to the impact of PTSD.⁸⁵

Indeed, the training used to prepare soldiers for combat may account in part for this scenario. To enhance their combat performance, military training imbues soldiers with a unique mind-set to almost instinctively confront and react to combat situations.⁸⁶ Further, soldiers are conditioned to survive harsh, threatening, and violent environments.⁸⁷ They are taught to attack an enemy target dispassionately, quickly, and without hesitation. To function effectively within a military unit, a soldier must learn to suppress various normal instincts, such as flight in the face of a threat.⁸⁸

In fact, after World War II, a prominent military historian, S.L.A. Marshall, studied military veterans and, specifically, how ready they had been to fight.⁸⁹ Marshall determined that as few as 15% of them would consciously fire their weapon at the enemy during combat.⁹⁰ After this study, Marshall recommended to the Army that its training programs needed to seek “any and all means by which we can increase the ratio of effective fire when we have to go to war” and to break down the typical “inner and usually unrealized resistance toward killing a fellow man.”⁹¹ Marshall’s

worked through these experiences, and until they do we believe that they will remain the ‘outlaw casualties’ of that war.”); Thomas Yager, Robert Laufer & Mark Gallops, *Some Problems Associated with War Experience in Men of the Vietnam Generation*, 41 ARCHIVES GEN. PSYCHIATRY 327, 331 (1984) (“[A]rests were . . . more than four times more prevalent among heavy combat veterans than among men who were exposed only to light combat or none at all.”); H. Dondershine, *The Veteran and the Criminal Process: Three Subtypes of Post-Traumatic Stress Disorder Associated with Criminal Behavior* 4 (1983) (unpublished manuscript, on file with the Department of Psychiatry, Stanford University Medical School). *But see* Shaw et al., *supra* note 74, at 408 (“[C]riminal behavior leading to imprisonment in [Vietnam] veterans did not appear to be a consequence of PTSD. PTSD was no more prevalent among incarcerated veterans than it was among a control group of unincarcerated veterans.”).

83. See William E. Calvert & Roger L. Hutchinson, *Vietnam Veteran Levels of Combat: Related to Later Violence?*, 3 J. TRAUMATIC STRESS 103, 104 (1990) (stating that in military performance, the more aggression a soldier shows, the more the soldier is rewarded).

84. *Id.*

85. See Barry L. Levin, *Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder*, 46 AM. JUR. TRIALS 441, § 5 (1993); Lizette Alvarez & Dan Frosch, *A Focus on Violence by G.I.’s Back from War*, N.Y. TIMES, Jan. 2, 2009, at A1 (“For the past several years . . . the number of servicemen implicated in violent crimes has raised alarm.”).

86. See Levin, *supra* note 85.

87. *Id.*

88. *Id.*

89. DAVE GROSSMAN, ON KILLING 3–4 (1995); Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2963 (2009).

90. S.L.A. MARSHALL, MEN AGAINST FIRE 36–43, 64–84 (1964); Giardino, *supra* note 89, at 2963; see also GROSSMAN, *supra* note 89, at 4.

91. MARSHALL, *supra* note 90, at 23, 79; Giardino, *supra* note 89, at 2963.

suggestions were not only implemented, but also extremely effective. By the Vietnam War, 90% or more of soldiers would consciously fire their weapon at the enemy.⁹²

The goal of getting American soldiers to more readily kill other human beings was achieved by combining stimulus response training and psychological inoculation.⁹³ Modern military training involves, among other things, operant conditioning to break down soldiers' innate psychological resistance to killing, to desensitize them to the act of killing, and to reflexively take another's life when a given set of circumstances exist.⁹⁴ The objective is to develop instant, unhesitating obedience to a superior's orders to ensure that commands and responsibilities are carried out in combat without question.⁹⁵ Positive and negative reinforcement techniques, such as rewards and punishments, are utilized to condition (i.e., make automatic) these behaviors.⁹⁶

This training can also result in the soldier becoming less focused on human suffering and more attuned to accomplishing an assigned military objective (e.g., repelling an enemy's attack).⁹⁷ Moreover, to survive in battle, a soldier must remain hypervigilant and be ready to immediately spring into action.⁹⁸

This mindset, however, can be dangerous to society once a soldier's tour of duty is over.⁹⁹ A body of evidence demonstrates that while the military successfully trains soldiers in how to survive in combat and complete a mission, the conditioning associated with this training often remains intact even after the soldier's tour of service is completed.¹⁰⁰

Not only does combat training involve psychological conditioning, but almost all soldiers learn a skill set that includes hand-to-hand combat and how to use weapons. For example, veterans may receive specialized training in explosives, infiltration, and detecting enemy activity.¹⁰¹ Although these skills can be essential to fulfill military objectives, they may also be inappropriate once the veteran returns to civilian life.¹⁰² Civilians do not operate in a combat environment and rarely need to be wary of life-threatening situations on a daily basis. Indeed, when veterans return home they may have trouble adjusting to the absence of constant threats.¹⁰³

92. GROSSMAN, *supra* note 89, at 251; Giardino, *supra* note 89, at 2963.

93. GROSSMAN, *supra* note 89, at 81–82, 252–55; Giardino, *supra* note 89, at 2964. *See generally* BRUCE K. SIDDLE, *SHARPENING THE WARRIOR'S EDGE* (1995) (discussing modern combat training methods); Mark S. Martins, *Deadly Force Is Authorized, but Also Trained*, *ARMY LAW.*, Sept.–Oct. 2001, at 1, 3–5, 8–9, 15.

94. *See* GROSSMAN, *supra* note 89, at 81–82, 177–78, 251–64; MARSHALL, *supra* note 90, at 36–43; 50–84; Giardino, *supra* note 89, at 2964; *see also* Levin, *supra* note 85.

95. Levin, *supra* note 85; *see also* GROSSMAN, *supra* note 89, at 81–82, 251–64.

96. GROSSMAN, *supra* note 89, at 82, 177–78, 253.

97. Levin, *supra* note 85.

98. *Id.*

99. *Id.*

100. *Id.* It is beyond the scope of this Article to address why, if soldiers are required to undergo psychological change to withstand the horrors of war and accomplish military objectives, soldiers are not similarly conditioned by the military to transition them back to civilian life.

101. Sigafos, *supra* note 67, at 117.

102. *Id.*

103. *See* Levin, *supra* note 85; *see also* Sigafos, *supra* note 67, at 118.

It is not surprising that when soldiers return home from combat, they may experience psychological problems, not only from past combat exposure, but also from trying to reintegrate into civilian life. Soldiers are trained to think and act in a manner necessary for survival on the battlefield, but they may not be well prepared for their return to life beyond the military. Furthermore, returning veterans may have become accustomed to the emotional highs and lows that accompany a combative environment.¹⁰⁴ In light of their training and psychological orientation, as well as the horrors of war and the threat of death or injury they experienced, it is no wonder that some veterans undergo significant psychological problems when they return home.¹⁰⁵

The impact of modern military training may be particularly apparent when a combat veteran suffering from PTSD commits an act of violence.¹⁰⁶ This act may have involved a reflexive response due to the veteran's PTSD, with the PTSD altering the judgment and decision making of the veteran.¹⁰⁷ The veteran's ability to fully appreciate the nature or wrongfulness of the violent act or, in certain cases, to conform his or her conduct to the requirements of the law, may as a result have been impaired.¹⁰⁸ Thus, veterans who have been through modern military training and who are suffering from combat-related PTSD may be less culpable than other individuals committing similar crimes.¹⁰⁹

D. PTSD and the Iraq and Afghanistan War Veteran

PTSD continues to be a problem for many veterans returning home from war. Iraq and Afghanistan War veterans returning home have exhibited PTSD symptoms, with some having engaged in related dangerous coping mechanisms.¹¹⁰

As during the Vietnam War, soldiers in Iraq and Afghanistan have faced surprise attacks and constant threats of bodily harm. But these wartime theaters also present some added novel threats that stem from changes in warfare technology. Military officers, among others, have commented on how the terrorist warfare being employed by the Iraqi insurgents is relatively unique.¹¹¹ These reports indicate that the nature of the enemy's action evolved: enemy forces moved away from small-unit infantry engagements toward more hit-and-run attacks that used improvised explosive devices, mortars, or rocket-propelled grenades.¹¹²

104. See Levin, *supra* note 85; see also Sigafos, *supra* note 67, at 118.

105. See Levin, *supra* note 85; see also Sigafos, *supra* note 67, at 117–18.

106. See Levin, *supra* note 85; see also Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 424–29 (1988).

107. See Levin, *supra* note 85; Davidson, *supra* note 106, at 424–29.

108. See Levin, *supra* note 85; Davidson, *supra* note 106, at 424–29.

109. See Levin, *supra* note 85; Davidson, *supra* note 106, at 424–29.

110. See *supra* notes 1–25 and accompanying text.

111. Jim Garamone, *Number of Attacks in Iraq Constant, Enemy Tactics Change*, AM. FORCES PRESS SERV., Oct. 6, 2003, <http://www.defenselink.mil/news/newsarticle.aspx?id=28370>; see also Friedman, *supra* note 12, at 76 (noting, in 2004, concern that rates of PTSD among veterans of Iraq and Afghanistan “will increase now that the conduct of war has shifted from a campaign for liberation to an ongoing armed conflict with dissident combatants”).

112. Garamone, *supra* note 111.

During a press briefing, Army Lieutenant General Ricardo Sanchez stated that “what we all need to understand is that (with) some of these improvised explosive devices, all that is required is someone with a paper bag or a plastic bag to drop it as a walk-by. . . . I think what it requires is for us to remain vigilant constantly”¹¹³ Another commanding general, Army Lieutenant General Raymond Odierno, distinguished this warfare and its impact from that faced in World War II, in which troops spent a lot of time in contact with the enemy but were pulled out of the fighting periodically for rest and relaxation.¹¹⁴ He noted: “Here, we don’t do that. [Troops] are out there consistently every single day. So you have to be mentally and physically tough . . . [a]nd different things affect you.”¹¹⁵

Compounding the stress stemming from the nature of the warfare in Iraq and Afghanistan has been the psychological toll associated with the “long and repeat deployments” of troops in these prolonged conflicts.¹¹⁶ General George W. Casey Jr., the Army’s Chief of Staff, recently stated that “the mental effects of repeated deployments—rising suicide rates in the Army, mild traumatic brain injuries, post-traumatic stress—had convinced commanders ‘that we need a program that gives soldiers . . . better ways to cope.’”¹¹⁷

Like Vietnam, soldiers in Iraq and Afghanistan found themselves in a foreign country engaged in, at least for Iraq, a fairly controversial war.¹¹⁸ However, unlike their Vietnam War counterparts, returning Iraq and Afghanistan War veterans have generally enjoyed the support and admiration of the country upon their return.¹¹⁹

113. *Id.*

114. Jim Garamone, *Troops Continue to Adapt to Enemy Tactics in Iraq*, AM. FORCES PRESS SERV., May 31, 2007, <http://www.globalsecurity.org/military/library/news/2007/05/mil-070531-afps02.htm>.

115. *Id.*

116. Dao, *supra* note 12 (“[There is] a growing body of research showing that the prolonged conflicts, where many troops experience long and repeat deployments, are taking an accumulating psychological toll.”); *see also* Bob Herbert, Op-Ed., *War’s Psychic Toll*, N.Y. TIMES, May 19, 2009, at A25 (asserting that multiple tours, longer deployments, common redeployment to combat, and infrequent breaks between deployments have “sacrific[ed] the psychological well-being of these [soldiers]”).

The Iraq War may have triggered an increase in mental health problems for several reasons. First, waning public support and lower morale among troops may predispose returning veterans to mental health problems, as occurred during the Vietnam era. Second, the insurgency in Iraq has had no definable “front-line,” characterized by unexpected threats to life such as roadside bombs and improvised explosive devices. Finally, multiple and more-lengthy deployments and heightened media attention may contribute to a steady increase in new mental health disorders. Seal et al., *supra* note 11, at 1656 (citations omitted).

117. Benedict Carey, *Army Will Train Soldiers to Cope with Emotions*, N.Y. TIMES, Aug. 18, 2009, at A1.

118. *See* S. Anthony Higgins, *Post-Traumatic Stress Disorder and Its Role in the Defense of Vietnam Veterans*, 15 LAW & PSYCHOL. REV. 259, 262 (1991); Dana Milbank & Claudia Deane, *Poll Finds Dimmer View of Iraq War: 52% Say U.S. Has Not Become Safer*, WASH. POST, June 8, 2005, at A1.

119. Friedman, *supra* note 12, at 76 (“There are obviously important distinctions between the period after the Vietnam War and the present. Americans no longer confuse war with the

Surveys indicate that although the Iraq and Afghanistan Wars have increasingly been compared to the Vietnam experience, there still appears to be support at home for these returning veterans. For example, although one poll found that nearly six in ten Americans said the war in Iraq was not worth fighting,¹²⁰ and more than four in ten believed the United States' presence in Iraq was becoming analogous to Vietnam,¹²¹ the troops nevertheless continue to be viewed positively and have the support of Americans.¹²²

As will be discussed, the different perceptions of this war and the increased understanding of PTSD may enable Iraq and Afghanistan veteran defendants suffering from PTSD to better employ this diagnosis as a basis for reducing or avoiding criminal culpability.

II. THE INSANITY DEFENSE AND PTSD WAR VETERANS

A. The Insanity Defense in General

Black's Law Dictionary defines the insanity defense as "an affirmative defense alleging that a mental disorder caused the accused to commit the crime."¹²³ The first recorded insanity defense acquittal occurred in 1505.¹²⁴

While the insanity defense is by no means a new concept, it has evolved over time. Today, different jurisdictions recognize different insanity tests.¹²⁵ Moreover,

warrior; those returning from Iraq or Afghanistan enjoy national support, despite sharp political disagreement about the war itself."); *see also* Anna Badkhen, *Some Vets View Day With Pride, Resentment*, BOSTON GLOBE, Nov. 12, 2007, at B1 ("As troops who have served in Iraq and Afghanistan observe Veterans Day today, they will be cheered by a supportive nation and a government that has developed an elaborate network of benefits and services to ease their transition to civilian life. Celebrating also, Vietnam War veterans like Charles S. Brown, 57, will look on with a mix of pride and resentment."); Paul Harris, *Bush: Our Shame Over Army Hospitals—As the Row Over Filthy Conditions at a Top US Military Ward Costs Two Army Chiefs Their Jobs, The President Vows to Help Veterans*, THE OBSERVER (England), Mar. 4, 2007, at 34 ("In contrast to some reactions during the Vietnam war, veterans of Iraq and Afghanistan are almost universally regarded as returning heroes, even by staunch critics of the conflicts.").

120. Milbank & Deane, *supra* note 118.

121. *Id.*

122. Friedman, *supra* note 12, at 76.

123. BLACK'S LAW DICTIONARY 865 (9th ed. 2009).

124. PETER W. LOW, JOHN CALVIN JEFFRIES, JR. & RICHARD J. BONNIE, *THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY OF THE INSANITY DEFENSE* 8 (1986). Although this may reflect the first recorded instance, it has been asserted that reference to the insanity defense can be found in the Talmud. *See* DONALD H. J. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* 18–19 (1983) ("It is an ill thing to knock against a deaf mute, an imbecile or a minor; he that wounds them is culpable, but if they wound others they are not culpable." (citing THE MISHNAH 342–43 (Herbert Danby trans., Oxford Univ. Press 1967))). It has also been contended that the defense is consistent with the writings of Plato and Aristotle. *Id.* at 19–20. Finally, it has been stated that explicit recognition of the insanity defense is found in Justinian's codification of Roman law in the sixth century A.D. *Id.* at 20.

125. *See* Clark v. Arizona, 548 U.S. 735, 749 (2006) ("Even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them, with four traditional strains variously combined to yield a diversity of American standards.").

jurisdictions often have different views regarding which mental disorders make a defendant eligible for the defense.¹²⁶

Dramatically different opinions exist as to whether the insanity defense should be read broadly to include a wide range of mental disorders or whether its availability should be limited or abolished from the legal system. Proponents of the defense argue that a relatively wide range of mental disorders should be able to provide a basis for this defense.¹²⁷ Abolitionists, on the other hand, generally believe that individuals, regardless of their mental condition, should be held accountable for their wrongful behavior.¹²⁸

Modern formulations of the insanity defense are generally derived from the House of Lords' formulation in *M'Naghten's Case*.¹²⁹ The *M'Naghten* Rule (sometimes

126. See RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, *CRIMINAL LAW* 531 (2d ed. 2004); see also CHARLES PATRICK EWING, *INSANITY: MURDER, MADNESS, AND THE LAW*, at xxi (2008) ("Ironically, mental disease and mental defect are terms that often have not been defined by the law."); WAYNE R. LAFAVE, *CRIMINAL LAW* 377 (4th ed. 2003) ("There has never been a clear and comprehensive determination of what type of mental disease or defect is required to satisfy the *M'Naghten* test."); LOW ET AL., *supra* note 124, at 20 ("There has been over the years considerable debate about what kinds of mental conditions should qualify as a 'mental disease or defect' for this purpose. Some have contended that the concept should be limited to the kinds of gross disturbance of mental functioning commonly referred to as psychoses. Others have taken the position that the requirement of a 'mental disease or defect' should not operate as an independent limitation on the availability of the insanity defense. Most views, however, fall somewhere in between these two extremes.").

127. See BONNIE ET AL., *supra* note 126, at 532; see also LAFAVE, *supra* note 126, at 377 ("[I]t would seem that any mental abnormality, be it psychosis, neurosis, organic brain disorder, or congenital intellectual deficiency (low IQ or feeble-mindedness), will suffice if it has caused the consequences described in the second part of the test." (italics in original)); cf. LOW ET AL., *supra* note 124, at 3 ("Proposals to broaden the [insanity] defense compete with calls for its abolition."). For additional articles supporting the insanity defense, see Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985); Daniel J. Nusbaum, Note, *The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509 (2002); Jenny Williams, Comment, *Reduction in the Protection for Mentally Ill Criminal Defendants: Kansas Upholds the Replacement of the M'Naughten Approach with the Mens Rea Approach, Effectively Eliminating the Insanity Defense* [State v. Bethel, 66 P.3d 840 (Kan. 2003)], 44 WASHBURN L.J. 213 (2004). Other commentators have critiqued efforts to abolish the insanity defense. See Rita D. Buitendorp, Note, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 VAL. U. L. REV. 965 (1996).

128. BONNIE ET AL., *supra* note 126, at 532; 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 251 (1970) ("A number of informed observers believe that it is therapeutically desirable to treat behavioral deviants as responsible for their conduct rather than as involuntary victims playing a sick role."). Among the articles that have criticized the insanity defense, see Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense" — Why Not?*, 72 YALE L.J. 853, 853 (1963).

129. *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.); see also BONNIE ET AL., *supra* note 126, at 535; EWING, *supra* note 126, at xviii ("Modern insanity law . . . dates most directly to *M'Naghten's Case* . . ."); LAFAVE, *supra* note 126, at 376 ("The *M'Naghten* test (sometimes with slight variations) has become the predominant rule in the United States.").

referred to as a “cognitive test” because of its emphasis on assessing the defendant’s cognitive capacity)¹³⁰ states that, to establish an insanity defense:

[I]t must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.¹³¹

Like all American iterations of the insanity test, this standard requires, as a foundational prerequisite for the defense to succeed, that a mental disorder existed at the time of the offense.¹³² Whether this requirement is articulated as a “disease of the mind,” “defect in reasoning,” “mental disease,” or “mental disease or defect,” most American jurisdictions recognizing the insanity defense employ it.¹³³ Consequently, for a PTSD-afflicted veteran to successfully raise an insanity defense, the court must first recognize PTSD as constituting the requisite mental disorder.¹³⁴

Although some variation of the original *M’Naghten* Test is employed in about half of the states,¹³⁵ other insanity test formulations exist. For example, under the “Product Test,” no one shall be held criminally accountable for an act that was the “offspring or product of mental disease.”¹³⁶ Alternatively, under the “Control Test,” a defendant may be exculpated if the defendant was unable to control his or her behavior as the result of a mental disorder, even if the defendant was aware that such an act was wrong.¹³⁷ The “Control Test” is also called the “Irresistible Impulse Test” in some jurisdictions.¹³⁸

130. See LAFAVE, *supra* note 126, at 376 (“Taken literally, the *M’Naghten* rule appears to refer to a certain mental disability which must produce one of two conditions, both of which are defined in terms of lack of cognition.”). Note, however, that the United States Supreme Court recently distinguished the two prongs of the *M’Naghten* test by describing the prong that addresses whether the defendant was able to understand what he or she was doing as an assessment of the defendant’s “cognitive capacity,” while the prong that addresses whether the defendant was able to understand that his or her action was wrong is characterized as an assessment of the defendant’s “moral capacity.” *Clark v. Arizona*, 548 U.S. 735, 747 (2006). Not surprisingly, this terminology is increasingly being employed. See EWING, *supra* note 126, at xviii (“The two ‘prongs’ of the *M’Naghten* standard—(1) inability to know the nature and quality of the act and (2) inability to know that the act was wrong—respectively deal with what have been referred to as cognitive incapacity and moral incapacity.”).

131. *M’Naghten’s Case*, 8 Eng. Rep. at 722.

132. See LOW ET AL., *supra* note 124, at 20 (“[A]ll formulations of the insanity defense require as a threshold condition that the defendant be suffering from a ‘mental disease or defect.’”).

133. Gover, *supra* note 59, at 570–75.

134. See *infra* Part II.B.

135. See BONNIE ET AL., *supra* note 126, at 540–41; see also LAFAVE, *supra* note 126, at 376–77 (“The *M’Naghten* test . . . remains the rule in more than thirty of the states, occasionally supplemented with a test for loss of volitional control” (footnotes omitted)). Jurisdictions vary on whether the defendant must be unable to “know” or “appreciate” the nature or wrongfulness of his or her conduct. BONNIE ET AL., *supra* note 126, at 540–41.

136. *State v. Jones*, 50 N.H. 369, 398 (1871).

137. EWING, *supra* note 126, at xviii (“[U]nder the ‘irresistible impulse’ standard an accused was insane if found, by reason of mental illness, ‘unable to adhere to the right even though he knew the act was wrong.’”); LAFAVE, *supra* note 126, at 389 (“Broadly stated, [the commonly

Finally, the Model Penal Code (MPC) combines aspects of the *M'Naghten* and Control Tests, providing that a person is not responsible for criminal conduct if, “[a]t the time of [the] conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality . . . of his conduct or to conform his conduct to the requirements of [the] law.”¹³⁹ This test thus permits a defendant to establish insanity either via a cognitive element (the defendant “lacks substantial capacity . . . to appreciate the criminality . . . of his conduct”) or a volitional element (the defendant “lacks substantial capacity . . . to conform his conduct to the requirements of [the] law”).¹⁴⁰

Although at one time quite popular, the MPC test suffered extensive criticism in the late 1970s and early 1980s.¹⁴¹ After the acquittal of John Hinckley, the MPC approach was viewed as making the insanity defense too available, and many jurisdictions altered their insanity test.¹⁴² As a result, the MPC no longer represents the majority

(but unfortunately) termed ‘irresistible impulse’ test] requires a verdict of not guilty by reason of insanity if it is found that the defendant had a mental disease which kept him from controlling his conduct. Such a verdict is called for even if the defendant knew what he was doing and that it was wrong . . .”).

138. See, e.g., Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 360 (1998); see also *Bennett v. Commonwealth*, 511 S.E.2d 439, 447 (Va. Ct. App. 1999) (“The irresistible impulse defense is available when ‘the accused’s mind has become “so impaired by disease that he is totally deprived of the mental power to control or restrain his act”’ (citation omitted)). But see LAFAVE, *supra* note 126, at 389 (criticizing the use of the phrase “irresistible impulse” when what more precisely is being determined is whether the defendant “had a mental disease which kept him from controlling his conduct”).

139. MODEL PENAL CODE § 4.01(1) (2001).

140. *Id.*

141. RICHARD J. BONNIE, JOHN C. JEFFRIES, JR. & PETER W. LOW, *A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR.* 18 (3d ed. 2008) (“The Model Penal Code has had an enormous impact on the development of American criminal law in many areas, and its insanity test was especially influential. By 1980, the Model Code insanity defense had been adopted . . . in more than half the states. . . . [In addition, it] had been adopted by all of the federal courts of appeal.”); *id.* at 21 (“Signs of dissatisfaction with the prevailing approach to the insanity defense began to emerge in the late 1970’s. . . . The simmering debate about the insanity defense took on national proportions in reaction to the *Hinckley* trial [in 1982].); *id.* at 127 (“Because the Model Penal Code insanity defense was employed in the *Hinckley* trial [and its highly controversial and much criticized acquittal of John Hinckley by reason of insanity]—and was then the governing criterion in a majority of states and in the federal courts—subsequent proposals to modify the defense have focused on the Model Code.”).

142. See BONNIE ET AL., *supra* note 126, at 540. In 1981, John W. Hinckley shot and wounded President Regan, along with three others. Applying the MPC test, the jury returned a verdict of not guilty by reason of insanity. This acquittal upset the American public, and the insanity defense, especially the volitional component of the test, underwent harsh scrutiny. See *id.*; see also BONNIE ET AL., *supra* note 141, at 121–30; EWING, *supra* note 126, at xix (“In the wake of the Hinckley verdict, Congress narrowed the substantive federal insanity defense by deleting reference to volitional incapacity . . .”); Christian Breheny, Jennifer Groscup & Michele Galiotta, *Gender Matters in the Insanity Defense*, 31 LAW & PSYCHOL. REV. 93, 95–96 (2007). But cf. LAFAVE, *supra* note 126, at 400 (“The Model Penal Code formulation has rightly been praised as achieving the two important objectives of a test of responsibility: (1) giving expression to an intelligible principle; and (2) fully disclosing that principle to the jury.”).

approach; many states no longer allow volitional impairment to be an independent basis for an insanity acquittal.¹⁴³ However, approximately twenty states retain the MPC insanity test and one state, New Hampshire, employs the Product Test.¹⁴⁴

The fact that different jurisdictions employ different versions of the insanity test has important implications for defendants with PTSD who become embroiled in the criminal justice system as a result of their psychiatric disorder. When individuals psychologically relive a traumatic situation, they may be cognitively aware of their actions but unable to control their behavior.¹⁴⁵ Hence, such individuals may be eligible for acquittal in a jurisdiction that has retained the volitional component of the insanity defense, but face conviction in a state that does not recognize this basis for an insanity defense.

Another key variable associated with whether a PTSD-based insanity defense is likely to be successful—and that also varies across jurisdictions—is the assignment of related evidentiary burdens at trial (generically referred to as the “burden of proof”). All states place a “burden of production” on the defendant to show that sufficient evidence exists to permit the defendant to initially raise an insanity defense.¹⁴⁶ Two-

143. BONNIE ET AL., *supra* note 126, at 540. Similarly, Congress, in response to the Hinckley verdict, eliminated the volitional element of the insanity defense under federal law and made the insanity defense available to a defendant charged with a federal crime only if “the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.” Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (2006); *see also* BONNIE ET AL., *supra* note 126, at 541. In addition, four states have abolished the insanity defense altogether. *Clark v. Arizona*, 548 U.S. 735, 752 (2006).

144. *Clark*, 548 U.S. at 751 (“Fourteen jurisdictions, inspired by the Model Penal Code, have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either . . . being enough to excuse. Three States combine a full *M’Naghten* test with a volitional incapacity formula. And New Hampshire alone stands by the product-of-mental-illness test.” (footnotes omitted)); BONNIE ET AL., *supra* note 126, at 540–41 (“About 20 states retain the Model Code formula, and a few states use *M’Naghten* together with some variation of the ‘irresistible impulse’ test. Only New Hampshire uses the ‘product’ test.”).

145. *See, e.g.*, KINCHIN, *supra* note 35, at 24; Gover, *supra* note 59, at 566–67 (explaining how people with PTSD often believe they are in combat and react with violence as in a combat situation).

146. The “burden of proof” is the obligation to prove the assertions presented in a legal action. It can be broken into two components: the burden of production and the burden of persuasion. BLACK’S LAW DICTIONARY 223 (9th ed. 2009).

The “burden of production” usually lies with the party who initiated the proceedings and must be met to enable the case to go forward. The failure to do so will result in a legal action being summarily dismissed by the judge and thus will not reach the fact finder (the jury or judge if there is no jury) for a verdict. For example, the government in a criminal case will typically have to show probable cause that the defendant committed the charged criminal act at an arraignment or before a grand jury before the case can be brought to trial. Similarly, the defendant may have to show some evidence supporting an affirmative defense, such as insanity, before it can be pursued at trial. *See* 21B CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5142 (2d ed. 2005).

In contrast, the “burden of persuasion” focuses on who has the ultimate obligation to convince the fact finder that the facts as stated are true and support a given outcome. *Id.* Thus, for example, the prosecution must prove each and every element of a charged offense beyond a reasonable doubt before a criminal conviction can be obtained. *See* BLACK’S LAW DICTIONARY

thirds of the states, however, also place on the defendant the burden of persuasion (i.e., what must be shown to obtain the desired outcome).¹⁴⁷ The associated evidentiary standard for the burden of persuasion is usually a preponderance-of-the-evidence standard.¹⁴⁸ This means that supporting evidence, when weighed against evidence to the contrary, must be found to be more probably true than not. Hence, even if a diagnosis of PTSD is recognized as a valid foundation for the insanity defense under a state's test and some evidence exists regarding the requisite linkage of the mental disorder to a cognitive or volitional impairment, states vary as to whether the prosecution or the defendant bears the burden of persuasion, a difference that can lead to dramatically different trial outcomes.¹⁴⁹

As a result of these variations, the likelihood of PTSD constituting the requisite foundation for an insanity defense will differ from jurisdiction to jurisdiction. Theoretically, however, at least in those states with a broadly formulated insanity standard, it should be possible for a defendant to use a PTSD finding as a basis for an insanity defense. Nevertheless, PTSD has only received limited acceptance as a valid foundation for such a defense.

B. PTSD and the Insanity Defense

When individuals suffering from PTSD commit crimes, there is uncertainty and controversy over whether they should be held criminally responsible for their actions. Criminal culpability will vary depending on the jurisdiction's applicable insanity test and the nature and severity of the individual's PTSD.¹⁵⁰

223 (9th ed. 2009); 21B CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5142 (2d. ed. 2005).

147. BONNIE ET AL., *supra* note 141, at 133 ("Today, in two-thirds of the states recognizing the [insanity] defense, the defendant bears the burden of persuading the jury that she or he was in fact insane . . ."); BONNIE ET AL., *supra* note 126, at 541 ("All states place the burden of producing sufficient evidence to raise the defense on the defendant. In two-thirds of the states, the defendant also bears the burden of persuasion . . ."); LAFAVE, *supra* note 126, at 414 ("There is a general presumption of sanity, and thus the initial burden (called the burden of going forward) is on the defendant to introduce evidence creating a reasonable doubt of his sanity. As to the burden of convincing the jury (called the burden of persuasion), some states require the defendant to prove insanity by a preponderance of the evidence, while others require the prosecution to prove sanity beyond a reasonable doubt."); *see also supra* note 130. Like the majority of states, when a defendant is being prosecuted under federal law, the burden lies with the defendant to prove the affirmative defense of insanity. Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (2006).

148. 1 BARBARA E. BERGMAN & NANCY HOLLANDER, WHARTON'S CRIMINAL EVIDENCE § 2:15 (15th ed. 1997); BONNIE ET AL., *supra* note 141, at 133. *But see id.* ("Under the new federal statute, the defendant bears a more demanding burden. As that statute states: 'The defendant has the burden of proving the defense of insanity by clear and convincing evidence.'" (footnote omitted)).

149. *See generally* BONNIE ET AL., *supra* note 141, at 133; LAFAVE, *supra* note 126, at 414.

150. Alternatively, in extreme cases, if an individual can establish an absence of control over his or her actions, the PTSD defendant may be able to employ an automatism defense. *See Gover, supra* note 59, at 577–78. Although not technically the equivalent of an insanity defense, it can be employed when the individual had no conscious perception of what was occurring. *See id.* In general, it may be invoked when a defendant has committed a crime while sleepwalking or while experiencing an uncontrollable physical reaction, such as a seizure. *See id.* at 577–79. The

As discussed, one hurdle that a defendant who asserts he or she suffered from PTSD must overcome is establishing that the PTSD constitutes the requisite mental disorder. All four accepted variations of the insanity test require a prerequisite showing that the defendant's actions were the result of a "mental disease."¹⁵¹ Hence, this is a threshold requirement under all insanity tests, and criminal behavior is excused only if it can be attributed to a mental disorder.¹⁵²

It is generally agreed that this requirement will typically be met only by a psychotic disorder.¹⁵³ Limiting the insanity defense to psychotic disorders is intended to prevent defendants with a relatively minor psychological impairment from employing the defense to avoid being held accountable for criminal behavior.¹⁵⁴

As a "psychotic disorder" generally refers to mental conditions that involve a "gross impairment in reality testing,"¹⁵⁵ the majority of PTSD diagnoses will be ineligible for an insanity defense as not meeting the "mental disease" threshold requirement.¹⁵⁶ The mental impairment associated with PTSD may be relatively mild¹⁵⁷ and not involve

automatism defense may be appropriate when an individual suffers PTSD symptoms that include a physiological reaction to external or internal cues or after experiencing dissociative flashback episodes and reenactments. *See id.*

151. The *M'Naghten* Test requires a defect in reasoning from a "disease of the mind." BONNIE ET AL., *supra* note 141, at 11 (citing *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 722 (H.L.)). The MPC requires that the defendant suffer from a "mental disease or defect." MODEL PENAL CODE § 4.01(1) (2001). The Product Test holds that the act must be "the offspring and product of mental disease." BONNIE ET AL., *supra* note 141, at 17 (citing *State v. Jones*, 50 N.H. 369 (1871)). Finally, the Control Test requires that the person's inability to control behavior be the result of "mental disease." BONNIE ET AL., *supra* note 126, at 563–64. In addition, under the federal test, the defendant's inability to appreciate the nature and quality or the wrongfulness of his or her acts must be the result of a "severe mental disease or defect." 18 U.S.C. § 17.

152. *See* BONNIE ET AL., *supra* note 141, at 20 ("[A]ll formulations of the insanity defense require as a threshold condition that the defendant be suffering from a 'mental disease or defect.'").

153. *See* BONNIE ET AL., *supra* note 126, at 551.

154. *See generally* Packer, *supra* note 62.

155. *See* DSM-IV-TR, *supra* note 18, at 297. *See generally id.* at 467 (discussing psychotic disorders).

156. *Cf.* Debra D. Burke & Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 *How. L.J.* 183, 183 (1994) ("An extreme case of post-traumatic stress disorder ('PTSD') may be argued as the basis for an insanity defense from criminal responsibility."); Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 *U. FLA. J.L. & PUB. POL'Y* 7, 52–53 (2007) ("Extreme cases of Posttraumatic Stress Disorder (PTSD) may serve as the qualifying 'mental disease or defect' for an insanity defense. Of course, to do so effectively in the overwhelming majority of courts in the United States, the disorder would have to render the defendant unable to substantially appreciate the wrongfulness or criminality of his or her actions."). *See generally* Packer, *supra* note 62, at 126 (noting that not all psychiatric disorders listed in the *DSM-IV-TR* qualify for the insanity defense, including disorders such as tobacco dependence and antisocial personality disorder, with the latter specifically excluded from consideration for an insanity defense by the Model Penal Code).

157. *See* DSM-IV-TR, *supra* note 18, at 466 (stating that the "predominance" of experiencing the symptoms may vary); Psych Central, *Posttraumatic Stress Disorder (PTSD) Symptoms*, <http://psychcentral.com/disorders/sx32.htm> (discussing the many different ways that PTSD symptoms may manifest themselves); *see also* Dobbs, *supra* note 12, at 65 (citing experts

delusions or dissociation. In addition, although the severity of the symptoms experienced by a given individual may vary over time,¹⁵⁸ the “mental disease” requirement will only generally be met if the PTSD caused a severe psychiatric impairment at the time of the offense.¹⁵⁹

Nevertheless, some of the symptoms associated with a diagnosis of PTSD may be viewed as constituting a psychotic disorder.¹⁶⁰ For example, PTSD may result in a gross impairment in reality testing,¹⁶¹ especially when the disorder leads the individual to believe that he or she is reliving a traumatic event or otherwise perceives the surrounding environment to be substantially different (and often more threatening) from that which actually exists.¹⁶² Consequently, PTSD-afflicted veterans experiencing delusions or dissociative states may be able to meet this threshold requirement for the insanity defense.

In addition, not only has PTSD been receiving more attention and validation as a mental disorder, but its origins in a given individual can be established on a relatively reliable basis, in part because, before the diagnosis can be assigned, there must be “exposure to an extreme traumatic stressor.”¹⁶³ This requirement may help counter the

who assert that “[t]he diagnostic criteria for PTSD . . . represent a faulty, outdated construct that has been badly overstretched so that it routinely mistakes depression, anxiety or even normal adjustment for a unique and especially stubborn ailment”).

158. DSM-IV-TR, *supra* note 18, at 466 (“The symptoms of the disorder . . . may vary over time. . . . In some cases, the course is characterized by a waxing and waning of symptoms.”).

159. *See* LOW ET AL., *supra* note 124, at 128–30 (noting that Congress in 1984 enacted legislation “requiring a ‘severe’ mental disease” in an effort to narrow the scope of the insanity defense); *id.* at 20 (“Some have contended that the concept [of ‘mental disease’ required for a successful insanity defense] should be limited to the kinds of gross disturbance of mental functioning commonly referred to as psychoses.”); Packer, *supra* note 62, at 126 (“In cases of mild impairment [associated with PTSD], a label of ‘mental disease’ would not be warranted, though it might be applicable in cases of severe impairment.”).

160. *See generally* BONNIE ET AL., *supra* note 141, at 20 n.r (“According to the glossary of the fourth edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-IV) the meaning of the term ‘psychotic’ varies somewhat in relation to particular disorders. However, the ‘narrowest definition’ is restricted to delusions or prominent hallucinations in the absence of insight into their pathological nature. Conceptually, the term refers to a ‘gross impairment in reality testing’: When there is gross impairment in reality testing, the individual incorrectly evaluates the accuracy of his or her perceptions and thoughts and makes incorrect inferences about external reality, even in the face of contrary evidence. The term psychotic does not apply to minor distortions of reality that involve matters of relative judgment.”).

161. *See* Toni Luxenberg & Patti Levin, *The Role of the Rorschach in the Assessment and Treatment of Trauma*, in *ASSESSING PSYCHOLOGICAL TRAUMA AND PTSD* 190, 201 (John P. Wilson & Terence M. Keane eds., 2d ed. 2004) (“Numerous studies have shown problems in reality testing in traumatized individuals.”).

162. *See* DSM-IV-TR, *supra* note 18, at 822 (defining “dissociation” as “[a] disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment. The disturbance may be sudden or gradual, transient or chronic.”); Gover, *supra* note 59, at 567.

163. *See* DSM-IV-TR, *supra* note 18, at 463; *see also* Heathcote W. Wales, *Causation in Medicine and Law: The Plight of the Iraq Veterans*, 35 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 373, 385–86 (2009) (describing how most diagnoses of PTSD can be traced to at least one highly traumatic event). *But see* Richard J. McNally, *Progress and Controversy in the*

concerns of skeptics of its use in conjunction with the insanity defense as defendants making this claim must generally show they have been exposed to or witnessed a life-threatening or other traumatic event, with the evidence of this event often readily subject to verifiable proof (e.g., exposure to combat or other life-threatening situations). It provides a relatively objective means of verifying the validity of the claimed disorder.¹⁶⁴

Study of Posttraumatic Stress Disorder, 54 ANN. REV. PSYCHOL. 229, 231 (2003) (“Despite references to life threat and injury, *DSM-IV* significantly broadens the definition of a traumatic stressor. For example, a person who merely learns about someone else being threatened with harm qualifies as having been exposed to trauma and is therefore eligible for a PTSD diagnosis (assuming fulfillment of symptomatic criteria). . . . No longer must one be the direct (or even vicarious) recipient of trauma; merely being horrified by what has happened to others now counts as a PTSD-qualifying event.”).

164. See generally Gover, *supra* note 59, at 568–69 (laying out the ways that a defendant can prove he or she has PTSD). However, there is considerable controversy regarding the validity of PTSD diagnoses in general and within the military and concerns have been expressed that such claims may be feigned to gain benefits that may be associated with such a diagnosis. For example, from a clinical perspective, an individual making such a claim may find it more personally acceptable to view the course of one’s life as negatively altered by an external event rather than admit to what may be a more personal flaw. Concerns have also been expressed that some clinicians do not adequately assess an individual’s self-described symptoms before assigning a diagnosis, for example by failing to employ a relatively time-consuming but evidence-based assessment instrument such as the Clinician Administered Post Traumatic Stress Disorder Scale. Concerns have also been expressed that PTSD is over diagnosed within the Veterans’ Administration, with calls to eliminate reliance on what is perceived to be the relatively unreliable traumatic stressor event requirement and focus instead shifted to the symptoms specific to a PTSD diagnosis, such as whether the person is re-experiencing the prior traumatic event. E-mail from Mary Tramontin, Clinical Psychologist, PTSD Clinic/Traumatic Stress Studies Program, James J. Peters Veterans Affairs Medical Center, to Thomas Hafemeister, Director of Legal Studies, Institute of Law, Psychiatry, and Public Policy, University of Virginia (Oct. 15, 2009, 08:50 EST) (on file with author); see also Frueh et al., *supra* note 12, at 467, 470 (pointing to potential problems with overdiagnosis of PTSD based on their study in which they found a significant number of veterans diagnosed with PTSD had exaggerated their combat exposure in Vietnam, noting that “[t]he financial incentive to present as psychiatrically disabled with PTSD within the US Veterans Affairs healthcare system is significant[, as v]eterans may obtain monetary compensation if they are rated as ‘service-connected’ for PTSD”); Paul R. McHugh & Glenn Treisman, *PTSD: A Problematic Diagnostic Category*, 21 J. ANXIETY DISORDERS 211, 212 (2007) (“[M]ental health professionals have overworked [the PTSD] theme and led themselves into diagnostic and therapeutic practices that now confound the discipline. Specifically, those who promote PTSD have (1) disregarded time-honored lessons about traumatic stress reactions; (2) permitted political and social attitudes to sway their judgments and alter their practices; (3) dispensed with diagnostic fundamentals and so made claims that are regularly (and embarrassingly) misleading; and (4) slighted other explanations and treatments for patients with trauma histories.”); McNally, *supra* note 163, at 229, 234 (discussing the problem of increased claims of PTSD within the military and asserting that “[a]s many as 94% of veterans with PTSD apply for financial compensation for their illness, and the incentive to do so is strong, especially for those with limited occupational opportunities” (citations omitted)); Robert L. Spitzer, Michael B. First & Jerome C. Wakefield, *Saving PTSD from Itself in DSM-V*, 21 J. ANXIETY DISORDERS 233, 234, 236 (2007) (arguing that “a large part of the problem with PTSD concerns the expansion of the PTSD construct of trauma” and suggesting that the definition of trauma for PTSD after DSM-IV should be tightened).

Nonetheless, even if a defendant pursuing a PTSD-based insanity defense can establish in a given case the existence of the requisite mental disorder at the time of the offense, the defendant must also show that the mental disorder had the required incapacitating effect (i.e., there must be a connection between the disorder and the criminal act).¹⁶⁵ If the mental disorder did not have the “specified incapacitating effects at the time of the offense,” the insanity defense will fail.¹⁶⁶ Some individuals with PTSD will indeed have episodes when they lose touch with reality and during which they commit a criminal act.¹⁶⁷ However, for most individuals with PTSD, this disorder is not the source of the criminal behavior, at least from the viewpoint of the criminal justice system.¹⁶⁸

In addition, most insanity defenses are limited to cognitive impairments, namely, that the defendant, as a result of the disorder, was either unable to appreciate the nature and quality of the act or the wrongfulness of the act.¹⁶⁹ Even if PTSD is linked to a criminal act, such individuals may still know what they are doing (e.g., that they are attacking another individual) and know that they are engaging in a wrongful act (e.g., that they are not acting in self-defense). This knowledge will defeat an insanity defense claim in jurisdictions that employ an insanity test limited to “cognitive” impairments.¹⁷⁰

Even under a cognitive test, however, individuals with PTSD may successfully employ the insanity defense if they exhibit the PTSD symptom of dissociation.¹⁷¹ As one commentator notes, “[i]f [a person’s] crime [was] one of violence, such as murder or assault, and he indeed believed that he was in combat in Vietnam, then it could reasonably be concluded that he did not know his actions were wrong as he believed he was attacking or killing the enemy.”¹⁷² During such a dissociative state, these individuals believe they are in another setting or environment and grossly misconstrue what is occurring.¹⁷³ These individuals are neither cognizant of the character of their actions nor the need for them, and thus they do not know the nature and quality or the

165. BONNIE ET AL., *supra* note 126, at 552.

166. *Id.*

167. Packer, *supra* note 62, at 128.

168. *See id.*; *see also* Gover, *supra* note 59, at 569 (noting that even if an individual has experienced a war-based trauma and asserts that the “trauma sufficiently qualifies for an insanity defense, diminished capacity, self-defense, unconsciousness and so on,” ultimately, it is up to the fact finder to determine if the trauma experienced was sufficient “to cause the [PTSD] symptoms purported, and thus affect the mens rea to the extent necessary to reduce culpability”).

169. BONNIE ET AL., *supra* note 126, at 540 (“The sole criterion in about half the states is whether the defendant was unable to ‘know’ or ‘appreciate’ the nature or wrongfulness of the conduct.”); LAFAYE, *supra* note 126, at 369 (“[U]nder the prevailing *M’Naghten* rule . . . the defendant cannot be convicted if, at the time he committed the act, he was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, as not to know he was doing what was wrong.”).

170. *See* Cristie L. March, *The Conflicted Treatment of Postpartum Psychosis Under Criminal Law*, 32 WM. MITCHELL L. REV. 243, 254–55 (2005) (describing the cognitive tests, which require that the defendant did not know, or did not appreciate, the wrongfulness of his or her actions at the time of the crime because of mental disease or disorder).

171. *See* Gover, *supra* note 59, at 573.

172. Elizabeth J. Delgado, Comment, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 483 (1985).

173. *Id.* at 476.

wrongfulness of their actions.¹⁷⁴ As the cognitive prong is utilized in most courts where the insanity defense is recognized, establishing that the individual with PTSD experienced a dissociative state, or some other symptom that rendered the defendant incapable of knowing the nature and quality of his or her action or of knowing right from wrong, is likely to be extremely important to the defendant's case.¹⁷⁵

The PTSD insanity defense may be most readily available in those states that also employ some iteration of the Control Test. This volitional test allows veterans who can show they were unable to control their actions as a result of PTSD to assert an insanity defense, even though they knew the nature and quality of what they were doing or that what they were doing was wrong.¹⁷⁶ Although less than half of the states in the United States utilize this test,¹⁷⁷ where it is employed a person who is driven by delusions or hallucinations, and who has suffered a loss of control and is unable to restrain his or her behavior as a result, can qualify for the insanity defense despite knowing what he or she was doing and that such behavior was wrong at the time of the offense.¹⁷⁸

The Control Test does require the judicial fact finder to speculate as to whether the individual could have acted differently than he or she did, and whether the mental disorder prevented the defendant from exercising the degree of choice about his or her behavior that other individuals can normally exert.¹⁷⁹ Nevertheless, deficits in impulse control have been found in individuals who suffered childhood trauma, particularly when they experienced multiple or repeated traumas.¹⁸⁰ Similarly, if war veterans

174. *Id.*

175. *See, e.g., Clark v. Arizona*, 548 U.S. 735, 748–56 (2006). As discussed earlier, under the *M'Naghten* test the defendant can qualify for the insanity defense if the defendant did not know the nature and quality of the act *or* did not know that the act was wrong. The United States Supreme Court in *Clark v. Arizona*, however, held that a state does not violate the federal constitution when it narrows its definition of insanity to focus only on whether as a result of mental disease or defect the defendant was unable to understand that the act was wrong. *Id.*

176. *See supra* notes 137–38 and accompanying text.

177. *Clark*, 548 U.S. at 751 (“Fourteen jurisdictions . . . have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either . . . being enough to excuse. Three States combine a full *M'Naghten* test with a volitional incapacity formula.”); BONNIE ET AL., *supra* note 126, at 540 (“About 20 states retain the Model Code formula [which contains both a cognitive and the Control Test], and a few states use *M'Naghten* together with some variation of the “irresistible impulse” test[, which is a variation on the Control Test].”).

178. *See BONNIE ET AL., supra* note 126, at 540.

179. *See* Stephen J. Morse, *Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility*, 5 OHIO ST. J. CRIM. L. 505, 518 (2008) (describing the fact finder's analysis under the Control Test); Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 81–82 (2006) (same).

180. Kathleen M. Heide & Eldra P. Solomon, *Biology, Childhood Trauma, and Murder: Rethinking Justice*, 29 INT'L J.L. & PSYCHIATRY 220, 221 (2006) (“Traumatic stress caused by child neglect and/or abuse compromises homeostasis and leads to a constellation of long-term biological changes involving the nervous and endocrine systems. . . . When confronted with stressful situations, Type III trauma survivors often have difficulty accessing higher cortical centers, the areas of the brain essential for thinking logically and formulating appropriate decisions. Instead, their responses are driven by limbic and brain stem activity, often resulting in socially inappropriate behaviour. This primitive response mode results in a variety of problems including difficulty regulating affective impulses and inappropriate expression of anger.”).

“relive” a traumatic event, they may lose control over their actions and act impulsively.¹⁸¹ This may satisfy the Control Test in those jurisdictions that recognize it, leading to a successful PTSD insanity defense.

Notwithstanding the potential for a successful PTSD-based insanity defense under either a cognitive or a volitional test, additional factors may impede its application. For example, not all individuals exposed to a potentially life-threatening or otherwise traumatic event develop PTSD symptoms, let alone experience symptoms that manifest themselves in criminal behavior at a subsequent time.¹⁸²

Responses to traumatic events vary with the individuals involved and are dependent on a range of personal and environmental factors.¹⁸³ Two factors are particularly influential: the intensity of the traumatic event encountered and the resources available to help the person cope with the stress associated with the event.¹⁸⁴ However, it may be difficult to objectively measure just how “severe” the stress associated with an event is. Moreover, the requisite resources needed to cope with this stress will tend to vary with each individual involved. Thus, it can be difficult to discern who is suffering from PTSD and to what degree, and how the symptoms were manifested at the time of the criminal offense.

In general, a PTSD diagnosis is neither a necessary nor a sufficient condition for determining an individual to be not guilty by reason of insanity. People with PTSD suffer a broad range of impairments and it is usually only in rare instances that they

181. C. Peter Erlinder, *Post-Traumatic Stress Disorder, Vietnam Veterans and the Law: A Challenge to Effective Representation*, BEHAV. SCI. & L., Summer 1983, at 25, 29 (“This tendency to ‘reexperience’ or ‘relive’ the original event is common to those who experience PTSD symptoms after a traumatic event whatever its source. However, for those trained in combat, a ‘reexperiencing’ of the original event may include combat-like reactions. DSM-III, for example, specifically mentions ‘unpredictable explosions of aggressive behavior’ as characteristic of war veterans with PTSD.” (citations omitted)); Wilson & Zigelbaum, *supra* note 70, at 73 (“[I]f the individual is placed in a situation which is perceived as threatening . . . a dissociative reaction may occur as a response . . . In this dissociative state the veteran is likely to function predominately in the survivor mode by behaving as he did in combat in Vietnam.” (emphasis in original)).

182. See generally KULKA ET AL., *supra* note 74, at xxvii (“The majority of Vietnam theater veterans have made a successful reentry into civilian life and currently experience few symptoms of PTSD or other readjustment problems.”); *id.* at 77 (“[T]hese results are consistent with a model of PTSD that posits a role for individual vulnerability . . . and a role for exposure to environmental factors . . . in determining who . . . develops PTSD.” (emphasis in original)); Packer, *supra* note 62, at 133 (“Those experiencing [PTSD] range broadly in degree of functional impairment. In rare instances some of these individuals may experience brief psychotic or dissociative states, during which time they appear to be reliving or reenacting the traumatic episodes.”).

183. See Eric G. Benotsch, Kevin Brailey, Jennifer J. Vasterling, Madeline Uddo, Joseph I. Constans & Patricia B. Sutker, *War Zone Stress, Personal and Environmental Resources, and PTSD Symptoms in Gulf War Veterans: A Longitudinal Perspective*, 109 J. ABNORMAL PSYCHOL. 205, 205 (2000).

184. Stevan E. Hobfoll, Charles D. Spielberger, Shlomo Breznitz, Charles Figley, Susan Folkman, Bonnie Lepper-Green, Donald Meichenbaum, Norman A. Milgram, Irwin Sandler, Irwin Sarason & Bessel van der Kolk, *War-Related Stress: Addressing the Stress of War and Other Traumatic Events*, 46 AM. PSYCHOLOGIST 848, 848–49 (1991).

experience dissociative or psychotic states during which their connection to reality is severely impaired.¹⁸⁵ If an individual is experiencing only mild PTSD symptoms without a dissociative or psychotic state, then a PTSD diagnosis does not warrant a finding of legal insanity;¹⁸⁶ although the diagnosis may have other implications for a determination of criminal responsibility.¹⁸⁷

One concern that may arise in discussing a PTSD-based insanity defense is that it may be overused.¹⁸⁸ However, one study ascertained that insanity pleas from defendants diagnosed with PTSD constituted only 0.3% of the cases where the insanity defense was raised.¹⁸⁹ Additionally, the study found that PTSD insanity pleas were no more likely to succeed than insanity pleas based on other psychiatric diagnoses.¹⁹⁰ Hence, there should be no fear that recognizing the validity of PTSD-based insanity defenses in some cases will open the floodgates for insanity pleas.

C. Case Law on PTSD as the Basis for an Insanity Defense for Vietnam War Veterans

Although many of the symptoms associated with PTSD have no doubt existed from time immemorial, after the PTSD diagnosis was included for the first time in the third edition of the APA's *Diagnostic and Statistical Manual* in 1980, defense attorneys hoped that a PTSD diagnosis might increasingly supply a credible foundation for an insanity defense, especially when the defendant had not previously committed a violent crime or manifested a psychiatric disorder.¹⁹¹

185. *See id.* at 850.

186. *See* 75A AM. JUR. 2D *Trial* § 1071 (2007) (“A court may properly refuse to charge upon the [insanity defense] where there is no proof of insanity offered by the defense or disclosed by the circumstances established by the prosecution”); *id.* § 1071, n.3 (“The defendant’s testimony that he ‘blacked out’ after firing a shot, coupled with a nondiagnosing physician’s testimony that the defendant appeared to have been suffering from post-traumatic stress disorder (PTSD) during the commission of the crime, was insufficient to warrant an instruction on the insanity defense, because even if PTSD could in severe cases amount to insanity, the trial record contained no evidence as to the severity of any mental defect.” (citing *U.S. v. Long Crow*, 37 F.3d 1319 (8th Cir. 1994))).

187. For example, it may be germane to whether the defendant had the necessary state of mind for a given offense, is entitled to assert that he or she acted in self-defense, or should receive a reduced sentence because his or her state of mind constitutes mitigating evidence. Gover, *supra* note 59, at 575–81; *infra* Part III.

188. Gover, *supra* note 59, at 581. *See generally supra* note 164.

189. Paul S. Appelbaum, Rose Zoltek Jick, Thomas Grisso, Daniel Givelber, Eric Silver & Henry J. Steadman, *Use of Posttraumatic Stress Disorder to Support an Insanity Defense*, 150 AM. J. PSYCHIATRY 229, 231 (1993).

190. *Id.* at 232.

191. *See* Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 422 n.55 (1988) (“In its first five years of use, the PTSD defense has helped at least 250 Vietnam veterans get shorter sentences, treatment instead of jail, or acquittals.”); Gover, *supra* note 59, at 562 (“[The] use [of PTSD] as a defense rose dramatically when the American Psychiatric Association officially recognized it as a mental disorder in 1980.” (citation omitted)).

During a PTSD-linked dissociative state the defendant may have reacted as he or she would have responded to the initial traumatic event.¹⁹² The dissociative state may be triggered by various environmental stimuli and may be accompanied by flashbacks, which in turn could trigger attacks on others by the defendant.¹⁹³ The defendant may neither be responsible for nor able to control these dissociative states.¹⁹⁴

Extreme instances of PTSD may provide the basis for an insanity defense.¹⁹⁵ Such instances can constitute the requisite mental disorder that renders individuals unable to control their behavior or leaves them unable to cognitively appreciate the nature or wrongfulness of their actions.¹⁹⁶

In one case where an individual with PTSD was able to successfully raise an insanity defense, a Vietnam War veteran was charged with armed robbery for holding up a gun shop and taking semiautomatic weapons and ammunition.¹⁹⁷ He was apprehended in a field where he had fired one of the guns into an abandoned building. When questioned by police, he was unable to explain the motivation for his behavior and his memory of the incident was patchy.¹⁹⁸ Although he was wary about discussing his experience in Vietnam, he recollected one battle where he had assaulted an enemy bunker and killed enemy troops. He revealed that he had been thinking about his experiences earlier in the day before the robbery occurred.¹⁹⁹

A forensic psychologist examined him and determined that the veteran had PTSD. The psychologist further determined that, at the time of the offense, the defendant was in an altered state of consciousness (i.e., a dissociative state), did not have the "ability to appreciate the wrongfulness of his behavior," and "lacked the ability to conform his conduct to the requirements of the law."²⁰⁰ The defendant was subsequently found not guilty by reason of insanity.²⁰¹

In a Louisiana case, the defendant, a Vietnam War veteran, was charged with murdering his sister-in-law's husband.²⁰² During the crime, the defendant, in search of his estranged wife, broke into his sister-in-law's house and fired a loaded pistol.²⁰³ After firing all the bullets in the pistol, he grabbed a rifle from the trunk of his car and continued the assault.²⁰⁴ The defendant was convicted of murder at his first trial but was granted a new trial after a series of appeals.²⁰⁵

192. See *supra* text accompanying notes 12, 23, 29–33; see also *supra* note 22 and accompanying text.

193. See *supra* text accompanying notes 12, 23, 29–33; see also *supra* note 22 and accompanying text.

194. Harold V. Hall & Frederick L. Hall, *Post-Traumatic Stress Disorder as a Legal Defense in Criminal Trials*, 5 AM. J. FORENSIC PSYCHOL. 45, 48 (1987).

195. See Fradella, *supra* note 156, at 53; *supra* Part II.B.

196. See Fradella, *supra* note 156, at 53.

197. Packer, *supra* note 62, at 128–30.

198. *Id.* at 128.

199. *Id.* at 129.

200. *Id.*

201. *Id.*

202. *State v. Heads*, 370 So. 2d 564, 566 (La. 1979), *vacated*, *Heads v. Louisiana*, 444 U.S. 1008 (1980).

203. *Id.*

204. *Id.* at 566.

205. *State v. Heads*, 385 So. 2d 230, 231 (La. 1980).

Between his first and second trial, the APA recognized PTSD as a diagnostic category, providing the basis for a PTSD-linked defense at his second trial.²⁰⁶ Evidence at this proceeding established that the defendant did not have a prior criminal record, documented his combat history in Vietnam, and indicated his difficult adjustment upon return.²⁰⁷ After hearing expert testimony that the defendant “had experienced at least one ‘dissociative state’” since his return home from Vietnam, as well as testimony regarding the Vietnam-like conditions present at the scene of the crime, and “the emotional threat” the defendant felt at “losing his wife and family,” the jury returned a verdict of not guilty by reason of insanity.²⁰⁸

In an Illinois case, the defendant was “charged with attempted murder” when he shot his foreman “after a dispute at work.”²⁰⁹ The defendant had no criminal record and had served in Vietnam. After hearing testimony about the symptoms of PTSD and the defendant’s prior diagnosis of PTSD, the defendant’s work environment (which included tape recordings that showed a similarity between the noises in the factory and noises the defendant heard during combat), the defendant’s military service (including combat duty in Vietnam), and recent events in the defendant’s life (including the death of his brother), the jury in this case also returned a verdict of not guilty by reason of insanity.²¹⁰

Despite the fact that these defendants were war veterans who successfully invoked their PTSD diagnosis as a basis for an insanity defense, their cases are not the norm.²¹¹ For example, in *State v. Simonson*,²¹² the defendant was tried and convicted of murdering two of his supervisors at his place of employment. The defendant argued that he had acquired PTSD from serving in Vietnam and was rendered legally insane at the time of the shooting.²¹³ Despite testimony from psychologists—who primarily worked with Vietnam veterans—establishing that the defendant suffered from PTSD, conflicting state evidence established that the defendant did not commit his violent crime during a PTSD dissociative flashback.²¹⁴ After considering the evidence, the jury rejected the insanity defense, and the defendant received a pair of life sentences with the conviction affirmed on appeal.²¹⁵

An attempt to employ PTSD as a basis for an insanity defense for a Vietnam veteran also failed in *State v. Felde*.²¹⁶ Felde, the defendant and a Vietnam War veteran, claimed that he was attempting to shoot himself while in police detention.²¹⁷ When one of the officers driving Felde to a police station intervened, the gun went off and killed

206. Erlinder, *supra* note 181, at 33–34.

207. *Id.* at 34.

208. *Id.*

209. *Id.* at 35 (citing *People v. Wood*, No. 80-7410 (Cir. Ct. of Cook County Ill. 1982)); see also BAKER & ALFONSO, *supra* note 57.

210. Erlinder, *supra* note 181, at 35–36; see also BAKER & ALFONSO, *supra* note 57.

211. See, e.g., Packer, *supra* note 62, at 125.

212. 669 P.2d 1092, 1094 (N.M. 1983).

213. *Id.* at 1094–97.

214. See *id.* at 1094, 1097.

215. *Id.* at 1094, 1098.

216. 422 So. 2d 370 (La. 1982).

217. *Id.* at 375.

one of the officers.²¹⁸ Felde pled that he was not guilty by reason of insanity because he suffered from PTSD at the time of the shooting.²¹⁹ Despite agreement among several expert witnesses that Felde suffered from PTSD, the jury convicted Felde because they concluded that he was aware of the wrongfulness of his actions at the time they were committed.²²⁰

The outcomes in these two cases constitute the more prevalent disposition of PTSD insanity defenses raised by war veterans.²²¹ The defense has tended to be more successful for veterans who could show they were experiencing a dissociative state and committed crimes as if they were on “autopilot,” although this is not characteristic of most individuals suffering PTSD.²²² But even if the insanity defense is not widely available to war veterans (although as will be discussed, the insanity defense may be more available to veterans of Iraq and Afghanistan²²³), there may be alternative options

218. *Id.*

219. *Id.* at 376.

220. *See id.* at 376–78; Samuel P. Menefee, *The “Vietnam Syndrome” Defense: A “G.I. Bill of Criminal Rights”?*, *ARMY LAW.*, Feb. 1985, at 1, 13.

221. For other sources where assertions were unsuccessful that a PTSD diagnosis provided the basis for a defense for a Vietnam War veteran, see, for example, *United States v. Cartagena-Carrasquillo*, 70 F.3d 706 (1st Cir. 1995); *United States v. Murphy*, No. 07-cr-00133-LTB, 2008 WL 4696068 (D. Colo. Oct. 22, 2008); *Taus v. Senkowski*, 293 F. Supp. 2d 238 (E.D.N.Y. 2003); *BAKER & ALFONSO, supra* note 57 (Although the decision was overturned on appeal, a defendant was found guilty at trial of kidnapping and assault, notwithstanding that the defendant was a Vietnam combat veteran who had entered a bank “dressed in a suit with his military decorations pinned on it and armed with two M-16 automatic rifles, the weapon used by U.S. forces in Vietnam. He announced that he was not robbing the bank, let the women and children go, and took the remaining occupants hostage. Over a five-hour period, [the defendant] fired over 250 rounds of ammunition into the air and at inanimate objects before the police apprehended him without serious injury to anyone. . . . The examining psychiatrist determined that [the defendant] had been one of very few survivors of an ambush in Vietnam, and the psychiatrist testified that the defendant’s behavior in the bank was an attempt to recreate an ambush situation. Also, his behavior was viewed as an attempt at passive suicide in order to relieve the intense guilt he felt about having survived the ambush in Vietnam when so many others perished.”); Daniel E. Speir, *Application and Use of Post-Traumatic Stress Disorder as a Defense to Criminal Conduct*, *ARMY LAW.*, June 1989, at 17, 18.

222. *See Packer, supra* note 62, at 129–30 (“[The Vietnam veteran’s] behavior was understood as a reenactment, in an altered state of consciousness, of a traumatic experience in Vietnam. . . . Had he committed an offense in a normal state of consciousness . . . his reaction to the stresses of Vietnam would not have provided sufficient basis for exculpation.”); *id.* at 133 (“[D]iagnosing an individual as experiencing a PTSD is neither a necessary nor a sufficient condition for determining that individual’s sanity at the time of the commission of an offense. Those experiencing this disorder range broadly in degree of functional impairment. In rare instances some of these individuals may experience brief psychotic or dissociative states, during which time they appear to be reliving or reenacting the traumatic episodes. Under such conditions the individual’s contact with reality is impaired and he or she would be considered legally insane. However, if the individual is not experiencing such a state, then the fact that he or she manifests symptoms of a stress disorder is not sufficient to warrant a finding of insanity.”).

223. *See* discussion *infra* Part IV. In addition, as discussed *supra* note 20, the United States Supreme Court’s apparent endorsement of the view that PTSD in war veterans provides a basis

available for veterans who have run into trouble with the law and want their diagnosis of PTSD taken into account.

III. BEYOND THE INSANITY DEFENSE

A. PTSD and Other Bases for Avoiding or Reducing Culpability

Even though PTSD generally will not satisfy the mental disorder threshold for the insanity defense, a PTSD diagnosis may still enable defendants to avoid or reduce their criminal culpability by supporting an assertion that either they did not possess the requisite mens rea or they were acting in self-defense. These arguments have not only been raised by defendants with PTSD, but also by defendants with other similar mental states such as Battered Spouse Syndrome (BSS) and Urban Survival Syndrome (USS).

BSS and USS have been asserted to provide a legal justification for a defendant's conduct or to negate the prosecution's effort to establish that the defendant had the mens rea—that is, the state of mind—required for a criminal conviction.²²⁴ Like PTSD, BSS and USS are attributed to severe stress-inducing environments that are unlike those that the average person experiences. All three “defenses”²²⁵ attempt to explain the defendant's actions by focusing on prior violence and threatening environments to which the defendant was subjected.

Hence, if the legal system accepts BSS or USS, this can serve as a benchmark for the potential utilization of PTSD to mitigate the culpability of Iraq and Afghanistan War veterans charged with a crime. As mental health professionals and society gain greater understanding of the psychological disruption that can result from exposure to violence and threatening environments, wider acceptance of PTSD as a basis for reducing the criminal culpability of war veterans may emerge.²²⁶

for affording them greater leniency in criminal justice proceedings could similarly have the effect of making the insanity defense more available to them in general. *See* Porter v. McCollum, 130 S. Ct. 447, 455 (2009).

224. *See* discussion *infra* Parts III.C, III.E.

225. Technically, a claim that a defendant lacked mens rea because of a mental disorder is not a defense per se, but a rebuttal to the prosecution's required showing that all the elements of a charged crime were present. *See* Clark v. Arizona, 548 U.S. 735, 766 (2006) (“[A] defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged, including the mental element or *mens rea*.” (citations omitted)).

226. For example, early in 2009 the federal Department of Veterans Affairs (VA) launched a program, Veterans Justice Outreach Initiative, that involves “training 145 specialists at its hospitals nationwide to help veterans who are in jails, awaiting trial or serving misdemeanor sentences,” who will “report to a civilian court on an accused veteran's medical history—and available VA benefits or programs that might help,” with prosecutors and judges determining “whether and how to use that information when deciding if a veteran should undergo treatment instead of incarceration.” P. Solomon Banda, *Troubled Veterans Get a Hand: VA Offers Legal Alternatives to Those Accused of Crimes*, WASH. POST, Aug. 7, 2009, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080603757.html>. In addition, “patterned after drug courts,” the VA “is participating in 10 ‘veterans courts’ to help former service members accused of crimes get into treatment programs, in exchange for reduced sentences or dismissed charges[, with m]ore than 40 such courts . . . planned across the country.” *Id.* In 2002, prior to the Iraq War, but using the most recent figures available, “veterans accounted for roughly 10 percent of the nation's jail and prison population.” *Id.*

1. Mens Rea

With regard to mens rea, the American justice system attempts to impose proportionately greater sanctions on offenders who are more blameworthy. Often, culpability is based on the defendant's mental state, or mens rea, when the illegal act was committed. Mens rea requirements distinguish among individuals who intentionally, knowingly, recklessly, or negligently broke the law, according to the Model Penal Code (MPC).²²⁷ Because the American legal system is committed to individualized justice, an accidental act, for example, should not be punished as harshly, if at all, as an intentional act.²²⁸

Under a scenario germane to this Article, an individual is confronted with a situation that reminds him or her of a traumatic event or causes him or her to relive a traumatic event that invoked PTSD. During this episode, the individual—believing that he or she needs to respond or act in a certain manner—may commit a crime, but lack the requisite criminal intent associated with the criminal charge. In such a situation, the individual may be able to argue that he or she did not form the requisite mens rea and thus should have the criminal charges dropped or mitigated.

Under the MPC, “[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.”²²⁹ About one-fourth of the states have adopted a rule similar to this provision and admit evidence of a mental disorder when a subjective inquiry is conducted regarding the defendant's mens rea.²³⁰ Additionally, approximately one-third of the states will admit such evidence when the offense requires a specific intent.²³¹

227. MODEL PENAL CODE § 2.02(1) (“Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”). Although many states have adopted the mens rea categories of the Model Penal Code, other states employ different terms to categorize the state of mind a defendant must possess to be guilty of a given crime. See generally Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003); see also Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455 (2008).

228. See Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a “Cultural Defense”?*, 99 DICK. L. REV. 141, 143 (1994).

229. MODEL PENAL CODE § 4.02(1) (2001).

230. BONNIE ET AL., *supra* note 126, at 608. A “subjective inquiry” examines an individual's judgment or opinion about a phenomenon, while an “objective inquiry” focuses on what is directly observable (i.e., it is not dependent on the individual's “state of mind” or subjective impression).

231. *Id.* at 608–09. The mens rea requirements for some crimes are subjective and require an examination of the defendant's intent at the time of the offense. The mens rea requirements for other crimes are typically “objective” and require an examination of what a reasonable person would have intended under these or similar circumstances (i.e., an “objective” test), regardless of whether the defendant actually intended the harm or knew that harm would likely result. INSTITUTE OF LAW, PSYCHIATRY & PUBLIC POLICY, BASIC FORENSIC EVALUATION: PRINCIPLES AND PRACTICE ch. 5, p. 7 (Oct. 2008). A “specific intent” crime focuses on whether the

Indeed, it has been argued that it is unfair to define mens rea in subjective terms and then not to allow the defendant to introduce evidence to support a claim that he or she did not have the requisite state of mind.²³² However, it is worth noting, for example, that the Virginia Supreme Court has ruled that when “determining criminal responsibility a [defendant] is either legally insane or sane; there is no sliding scale of insanity,” and that “[u]nless [the] accused contends that he was [legally insane] when he acted, his mental state is immaterial to the issue of specific intent.”²³³

2. Self-Defense

PTSD may also have implications for a defendant’s claim that he or she acted in self-defense.²³⁴ According to the MPC, “the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”²³⁵

For example, when individuals are confronted with a situation reminiscent of the event that led to their PTSD, they may believe that they must take steps to “defend” themselves. Veterans with PTSD may under these circumstances assume a “survival mode” in which they believe, regardless of the actual reality, that it is necessary to use force for self-protection.²³⁶ A dissociative state may not even exist, but a veteran suffering from PTSD might simply overreact to surrounding events and stimuli because of their PTSD.²³⁷ The PTSD can cause the veteran to view the threat and danger posed by the other person to be far greater than is actually the case.

If the self-defense test used in that jurisdiction assesses the threat level from the defendant’s perspective (i.e., a subjective test is employed), the veteran with PTSD may have a valid self-defense claim under these circumstances.²³⁸

defendant personally had the mental state that constitutes an element of a crime.

232. Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 477 (1980).

233. *Stamper v. Commonwealth*, 324 S.E.2d 682, 688 (Va. 1985).

234. Gover, *supra* note 59, at 580.

235. MODEL PENAL CODE § 3.04 (2001).

236. Gover, *supra* note 59, at 581.

237. *See id.*

238. *See generally* John F. Wagner Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant’s Belief, for Purposes of Self-Defense Claim, That Physical Force Is Necessary—Modern Cases*, 73 A.L.R.4th 993 (1989). In some states, however, “the requisite reasonableness of a criminal defendant’s belief that the use of physical force in self-defense was necessary is determined under an objective standard,” that is, the defendant “must have an objectively reasonable belief, in light of the surrounding circumstances, that the use of force was necessary to avert death or serious bodily harm” (i.e., the belief of a reasonable person). *Id.* § 3 (referring to the test applied in *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973)). In contrast, under the subjective test, the fact finder is to determine whether the “circumstances were sufficient to create in this defendant’s mind an honest and reasonable belief that . . . force was necessary.” *Id.* § 4 (referring to the test applied in *State v. Leiholm*, 334 N.W.2d. 811 (N.D. 1983)).

B. Cases Where PTSD Has Been Used to Negate the Culpability of a War Veteran

Recent cases illustrate that some courts are willing to consider PTSD evidence when it is used to support a claim of self-defense or to rebut the prosecution's claim that the defendant had the requisite mens rea for a charged crime.²³⁹

In one Florida case, PTSD evidence was permitted on the question of self-defense in a prosecution for attempted second-degree murder where the defendant was a war veteran.²⁴⁰ An appellate court held that because in Florida a defendant's perceptions are relevant when assessing whether the defendant acted in self-defense, evidence could be introduced in an attempt to explain how PTSD affects an individual's perceptions.²⁴¹

Similarly, a Washington appellate court, after noting that mental health professionals recognize a link between PTSD and diminished culpability, ruled that it was inappropriate to exclude expert testimony regarding a murder defendant's claimed inability to form specific intent due to PTSD.²⁴² The court determined that the expert's testimony indicated that the defendant suffered from PTSD and, as a result, may have experienced a flashback during her struggle with the victim.²⁴³ If such was the case, the court concluded, PTSD would have impaired the defendant's ability to act with the intent required for a conviction and this evidence would have helped the jury determine whether the defendant was capable of forming the "requisite specific intent to murder" the victim.²⁴⁴

This "defense," however, may not necessarily exonerate the defendant from all criminal liability as there may be a lesser-included offense (e.g., breaking and entering) for which the prosecution needs only to establish the existence of an objective or general intent to obtain a conviction.²⁴⁵ Nevertheless, a mens rea approach may be more generally available to a defendant than the insanity defense as the defendant claiming a lack of mens rea is not limited to when the PTSD induced a psychotic state—as is typically required for an insanity defense—but can include various other

239. Combat-related PTSD may also be invoked as a mitigating factor in sentencing. See Christopher Hawthorne, *Bringing Baghdad into the Courtroom: Should Combat Trauma in Veterans Be Part of the Criminal Justice Equation?*, 24 CRIM. JUST. 4, 12 (2009) ("Given the unpopularity of the insanity defense, PTSD and the defendant's combat experience generally show up in the sentencing phase of a criminal trial. In fact, most of the Vietnam-era cases dealing with PTSD involved reductions in sentences, usually in state courts."); see also Porter v. McCollum, 130 S. Ct. 447 (2009); discussion *supra* note 20. However, PTSD as a mitigating factor at sentencing is beyond the scope of this Article.

240. State v. Mizell, 773 So. 2d 618, 619 (Fla. Dist. Ct. App. 2000).

241. *Id.* at 620 ("Defense counsel proposed to offer expert trial testimony from . . . a licensed clinical psychologist."); *id.* at 621 ("[W]e hold that PTSD evidence is relevant on the question of self-defense.").

242. State v. Bottrell, 14 P.3d 164, 165–66 (Wash. Ct. App. 2000).

243. See *id.* at 170.

244. *Id.* As discussed, in a specific intent crime, the prosecution must prove that the defendant committed the crime with the requisite intent or purpose, which is usually listed in the statute establishing that a given act is a punishable crime. In this case, the defendant may not have been capable of forming the requisite malice aforethought or intent for the established crime of murder. *Id.* at 165–66; see also BLACK'S LAW DICTIONARY 882 (9th ed. 2009).

245. Higgins, *supra* note 118, at 272–73.

PTSD symptoms.²⁴⁶ Although a mens rea “defense” will not necessarily result in an acquittal, it can result in less severe punishment, such as a lighter sentence or probation.²⁴⁷

Although PTSD has not been widely accepted or applied as a basis for an insanity defense (particularly for Vietnam War veterans),²⁴⁸ courts may be more amenable to testimony establishing the existence of this mental disorder in conjunction with these alternative “defenses.” For example, the Supreme Judicial Court of Massachusetts—after reviewing the totality of the circumstances and hearing evidence that the defendant was wounded on two occasions in the Vietnam War, was treated for shell shock, and suffered severe reactions to loud noises—determined that justice would best be served by changing the verdict from first-degree to second-degree murder.²⁴⁹ Although a PTSD-based insanity defense was not specifically alleged, the Massachusetts Supreme Court, in reducing the charge, took testimony regarding the defendant’s Vietnam War service, injuries, and psychological trauma, as well as other mitigating factors, into consideration.²⁵⁰

Additionally, in a Wisconsin case, the defendant, a Vietnam War veteran accused of murdering his wife, asserted that he lacked mental responsibility for the crime.²⁵¹ The Supreme Court of Wisconsin concluded that he should be given a new trial because testimony indicated he had some mental or emotional problems and thus the issue of mental responsibility should be explored further.²⁵² The court determined that the evidence provided, which included testimony from six experts in mental health, weighed “quite heavily” in favor of the defendant on the mental responsibility question, and that it was likely that there had been a miscarriage of justice.²⁵³

These cases illustrate that a diagnosis of PTSD—when supported by findings that the disorder impacted a defendant’s cognitive and emotional state and causes him or her to react to a situation differently than would otherwise be expected—can result in the culpability of war veterans being negated or diminished. These rulings have likely implications for the Iraq and Afghanistan War veterans suffering from PTSD. With the advances in the recognition and treatment of PTSD, as well as the increased support for these soldiers and veterans, these defenses are likely to be increasingly available to Iraq and Afghanistan War veterans.

Further enhancing the likelihood that these various mental status defenses will be accepted when presented on behalf of Iraq or Afghanistan War veterans suffering from PTSD is that “[s]ince the 1980s, the introduction [and acceptance] of expert testimony

246. *Id.*

247. *Id.* at 273.

248. *See supra* Part II.C.

249. *Commonwealth v. Vanderpool*, 328 N.E.2d 833, 835 n.2, 837–38 (Mass. 1975).

250. *See id.* at 838. Other mitigating circumstances taken into account were “that all those involved in the [incident] were under the influence of alcohol,” that the defendant’s intention in approaching the victim was to resolve a conflict and not to intensify it, and that there was a lack of premeditation on the defendant’s behalf. *Id.* at 837.

251. *Kemp v. State*, 211 N.W.2d 793, 794–95 (Wis. 1973).

252. *Id.* at 799.

253. *Id.* at 797, 799. Further information regarding the final disposition of this case has not been reported.

that a defendant . . . suffers from a psychological ‘syndrome’ has increased.”²⁵⁴ As will be discussed, courts have become more amenable to considering evidence that certain “syndromes,” including Battered Spouse Syndrome (BSS),²⁵⁵ show that the defendant was acting in self-defense or did not possess the requisite criminal mens rea.²⁵⁶ However, other “syndromes,” including the Urban Survival Syndrome (USS), have not been as successful as the basis for a criminal defense, with courts generally rejecting their admission into evidence.²⁵⁷

C. Battered Spouse Syndrome

Battered Spouse Syndrome (BSS) has been defined as “a series of common characteristics that appear in [spouses] who are abused physically and psychologically over an extended period of time by the dominant . . . figure in their lives.”²⁵⁸ This syndrome, like PTSD, can alter an individual’s perception of the surrounding environment and cause the individual to react unexpectedly to certain cues or events that are perceived to be threatening.²⁵⁹ Because BSS can alter perceptions of reality

254. Joe W. Dixon & Kim E. Dixon, *Gender-Specific Clinical Syndromes and Their Admissibility Under the Federal Rules of Evidence*, 27 AM. J. TRIAL ADVOC. 25, 25 (2003).

255. Battered Spouse Syndrome was originally and is still often referred to as “Battered Woman Syndrome.” See LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (3d ed. 2009). To indicate that violence in relationships can target both men and women, as well as both unmarried and married partners, the more frequently used phrase today to describe this violence is “intimate partner violence.” See CENTERS FOR DISEASE CONTROL AND PREVENTION, *INTIMATE PARTNER VIOLENCE* (2009), <http://www.cdc.gov/violenceprevention/pdf/IPV-FactSheet.pdf>; see also WALKER, *supra*, at 5 (“[T]he limited available research suggest that while there may be some differences in same sex violence from male to female heterosexual violence, its use to obtain power and control over one’s partner is still primary.”). However, the phrase “Intimate Partner Violence Syndrome” has not been employed, most likely because research on the existence of a syndrome and its impact has largely been confined to women who were victims of this violence. The phrase “Battered Spouse Syndrome” is used throughout the remainder of this Article because it seems to be more frequently employed in recent judicial rulings and because it is gender-neutral, although it fails to encompass unmarried intimate partners, who may also, it can be argued, be subject to this violence and manifest a similar syndrome.

256. See Dixon & Dixon, *supra* note 254, at 26–27.

257. See *infra* Part III.E.

258. State v. Kelly, 478 A.2d 364, 371 (N.J. 1984). See generally *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1575 (1993) (“Much of the current debate about the criminal law’s treatment of women who kill their abusers focuses on the use of expert testimony about the psychological effects of battering that are collectively known as the ‘battered woman syndrome.’”); *id.* at 1578 (“‘Battered woman syndrome’ is a descriptive term that refers to the effects of physical or psychological abuse on many women. It describes a ‘pattern of responses and perceptions presumed to be characteristic of women who have been subjected to continuous physical abuse by their mate.’” (quoting Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom*, 16 LAW & HUM. BEHAV. 273, 274 (1992))).

259. See David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 627 (1986) (“[T]he battered woman is reduced to a state of fear and anxiety . . . and her perception of danger extends beyond the time of the battering episodes themselves. A ‘cumulative terror’ consumes the woman and holds her

and induce certain behaviors, this diagnosis has been thoroughly studied and its application sought within the criminal justice system.²⁶⁰ Testimony related to this disorder is typically presented at trial when a battered woman claims she injured or killed her spouse in self-defense.²⁶¹

For example, in 1981, the Georgia Supreme Court recognized the scientific foundation of BSS as sufficiently established to permit related expert testimony to be admitted into evidence to assist a jury evaluating a defense based on this syndrome.²⁶² In a 1997 ruling, the court added that evidence of BSS can be used to show “that the defendant had a mental state necessary for the [self-]defense . . . justification [for the crime, even] though the actual threat of harm [to the defendant did] not immediately precede the homicide.”²⁶³

In the latter case, the defendant had been convicted of voluntary manslaughter for shooting her husband.²⁶⁴ The defendant testified that her husband had not only “beat[en] her repeatedly,” but also “held a gun to her head and threatened to kill her and abscond with her child.”²⁶⁵ She had called the police about a dozen times and left her husband twice. On the day of the shooting, her husband was upset with her because she had been out visiting friends, subsequently hitting her in the face.²⁶⁶

The Georgia Supreme Court determined that testimony regarding these incidents provided adequate evidence that the defendant had been psychologically traumatized by these beatings and that she lived in a fear-invoking environment.²⁶⁷ Thus, the court ruled, the jury should have been instructed on BSS and its implications for self-defense and that in the future a jury instruction “be given in all battered person syndrome cases, when authorized by the evidence and requested by defendant, to assist the jury in evaluating the battered person’s defense of self-defense.”²⁶⁸

BSS received further support when the Supreme Court of New Jersey reversed a conviction of reckless manslaughter after it held that BSS testimony was admissible on

in constant fear of harm.” (citations omitted)); *id.* at 628 (“[T]he battered woman’s knowledge of the batterer’s history of violence shapes her perception of harm. A woman’s experience in the recurring cycles of violence puts her in constant fear of what appears to her as imminent harm.”); *see also* WALKER, *supra* note 255, at 44 (“When domestic violence events occur and reoccur, the woman recognizes the man’s escalating anger and she becomes physiologically aroused with fear that activates the autonomic nervous system to release its neurotransmitters and hormones that produce hyperarousal. . . . and then, to psychologically escape using a variety of methods including minimization or denial of the danger from the particular incident, depression, dissociation, or even repression and forgetting.”); *id.* at 68 (“The analysis of the data obtained from the women who participated in this research indicated that BWS existed as a subcategory of PTSD.”).

260. *See* Faigman, *supra* note 259, at 626–30 (discussing research on battered woman syndrome and describing its use in criminal trials); *Developments, supra* note 258, at 1578–88.

261. *See* Faigman, *supra* note 259, at 619.

262. *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981).

263. *Smith v. State*, 486 S.E.2d 819, 822 (Ga. 1997) (quoting *Chapman v. State*, 386 S.E.2d 129, 131 (Ga. 1989)).

264. *Id.* at 820.

265. *Id.*

266. *Id.* at 821.

267. *Id.* at 823.

268. *Id.* The court also crafted what such a jury instruction might look like. *Id.*

the issue of self-defense.²⁶⁹ The court noted the prevalence of domestic violence in America (citing studies that report that over one million women are beaten in this country every year) and the increased attention that BSS has received.²⁷⁰

A BSS expert at trial had explained the long-standing, deep-seated fear of severe bodily harm and isolation that results from being a battered spouse.²⁷¹ The expert had been prepared to testify that the defendant, who had stabbed her husband with scissors after seven years in an abusive relationship, suffered from BSS and to explain how this affected her perception of her environment and shaped her behavior at the time of the stabbing.²⁷² The Supreme Court of New Jersey ultimately held that the expert's testimony could be relevant to a claim of self-defense and would have aided the jury "in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life."²⁷³

The acceptance of BSS as a defense may have direct implications for PTSD-linked determinations of criminal culpability. For example, researchers are becoming increasingly aware of the development of PTSD in women who are the victims of domestic violence,²⁷⁴ with symptoms exhibited by battered women consistent with a *DSM-IV-TR* PTSD diagnosis.²⁷⁵ Research also indicates that the extent, type, and severity of the abuse correlate with the severity of the PTSD disorder, with women who experience the most severe or life-threatening abuse displaying more symptoms of PTSD.²⁷⁶ Unfortunately, these victims of domestic violence are often only treated for depression, with their PTSD symptoms overlooked and, consequently, untreated.²⁷⁷

As may be the case with regard to mental status defenses raised on behalf of Iraq and Afghanistan War veterans, the timing of efforts to invoke defenses based on BSS evidence was vital to their acceptance. Initial attempts to introduce BSS evidence in criminal proceedings were concurrent with efforts to secure parity and respect for the rights of women in the United States.²⁷⁸ In 1979, Lenore Walker authored her seminal work, *The Battered Woman*, which was followed five years later by her publication of *The Battered Woman Syndrome*.²⁷⁹ By that time, tremendous strides had been made in

269. State v. Kelly, 478 A.2d 364, 382 (N.J. 1984).

270. *Id.* at 369–73.

271. *Id.* at 372–73.

272. *Id.*

273. *Id.* at 377.

274. Loring Jones, Margaret Hughes & Ulrike Unterstaller, *Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of Research*, 2 TRAUMA VIOLENCE, & ABUSE 99, 99–100 (2001).

275. *See id.* at 100; *see also* WALKER, *supra* note 255, at 68 ("The analysis of the data obtained from the women who participated in this research indicated that BWS existed as a subcategory of PTSD.").

276. Jones et al., *supra* note 274, at 100.

277. *Id.* at 112. The undertreatment of PTSD in war veterans has also had negative effects, including an increase in suicide. *See supra* notes 14–21 and accompanying text; *see also* Hoge et al., *supra* note 14, at 13.

278. Janet C. Hoeffel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases*, 24 U. ARK. LITTLE ROCK L. REV. 41, 43 (2001).

279. *Id.* at 42–43. For additional background, *see* LENORE E. WALKER, *THE BATTERED WOMAN* (1979) and WALKER, *supra* note 255.