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Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans

Erin M. Gover*

Of the approximately 1.5 million troops¹ expected to be discharged from the armed forces after serving in Iraq and Afghanistan, up to 20 percent² (or 300,000) could be afflicted with Post-Traumatic Stress Disorder ("PTSD"). That number could rise, as was the experience of the Vietnam veterans: as of 1988, 70 percent of Vietnam veterans were diagnosed with PTSD.³ Translated into real numbers, 70 percent of troops would equal 1,050,000 Iraq war⁴ veterans that developed PTSD. Furthermore, "[r]esearchers also have found that 25% of the soldiers who participated in and survived heavy combat [in Vietnam] have since been charged with a criminal offense."⁵ This statistic could mean up to 375,000 new cases for our court systems, all claiming Post-Traumatic Stress Disorder as a defense, but not all able to receive appropriate punishments for their disorder.

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1. VETERANS' DISABILITY BENEFITS COMMISSION, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 383 (Oct. 2007) <http://www1.va.gov/advisory/docs/ReportDisabilityBenefitsCommission9-27-97.pdf> (last visited Mar. 28, 2008).

2. U.S. Department of Veterans Affairs National Center for PTSD, Fact Sheet, How Common is PTSD? http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_how_common_is_ptsd.html?opm=1&rr=rr1363&srt=d&echorr=true (last visited Feb. 21, 2008).

3. 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).

4. The author realizes that Operation Iraqi Freedom has not been classified as a war, but is part of the Global War on Terror. The conflict will thus hereinafter be designated as the "Iraq war."

5. Ann R. Auberry, *PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System*, 68 MARQ. L. REV. 647, 650 (1985).

This is because of the vast differences in punishments for existing criminal defenses that PTSD can prove. This problem needs to be addressed before approximately 375,000 veterans are either jailed or institutionalized without the proper treatment for their disorder.

PTSD has been used to prove existing criminal law defenses since 1978.⁶ Its use as a defense rose dramatically when the American Psychiatric Association officially recognized it as a mental disorder⁷ in 1980.⁸ Depending on the jurisdiction, PTSD can be used to prove a defense of insanity, diminished capacity, unconsciousness/automatism, or self defense and can also be used as a mitigating factor in sentencing proceedings.⁹ If a PTSD defense is successfully used to prove insanity, the veteran will be committed to a mental health institution.¹⁰ A successful unconsciousness defense will result in a complete acquittal,¹¹ as will diminished capacity in some jurisdictions.¹² Thus, the wide variety of plausible defenses available to a veteran suffering from PTSD exists, but none of the defenses listed above can fully address the symptoms and results of PTSD. The unconsciousness defense only applies to those who experience

6. Samuel Pyeatt Menefee, *The "Vietnam Syndrome" Defense: A "G.I. Bill of Criminal Rights"?*, 1985 ARMY LAW. 1, 27 (1985).

[John R.] Coughlin's flashback in May 1978 [where he assaulted a Quincy, MA police station with a sawed-off shotgun, screaming, "The gooks are everywhere . . . Kill them!"] was apparently the first time PTSD had been brought to the attention of the general public as a legal issue, although insanity had previously been used as a defense by Vietnam veterans.

Id.

7. C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 317 (1984) (Stating, "[o]nce PTSD was recognized as a disorder that could be isolated and diagnosed by psychiatrists and psychologists, it became a legitimate issue to be raised in legal proceedings. After the publication of DSM III, therefore, PTSD was raised in several cases as an explanation for a defendant's criminal conduct.").

8. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, 236-39 (1980).

9. See generally Ann R. Auberry, Comment, *PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System*, 68 MARQ. L. REV. 647 (1985).

10. *Id.* at 665 (noting that "[i]n many jurisdictions an acquittal based upon an insanity defense creates a situation of automatic commitment to a mental institution").

11. *Id.* at 668-69.

12. *United States v. Fishman*, 743 F. Supp. 713, 721 (N.D. Cal. 1990).

dissociative states.¹³ Insanity results in committal to a mental institution which may not be the best treatment. When PTSD is used only as a mitigating factor, a PTSD veteran is sent to prison where the veteran's symptoms may be exacerbated by being locked up in a cell alone. Veterans suffering from PTSD who commit crimes deserve to be punished only to the extent that they are culpable for their actions. It is because of the unique nature of PTSD that veterans need a defense that addresses the symptoms and provides appropriate treatment.

Furthermore, the cultural conditions of the United States exacerbate the problems with the PTSD defense in its current state. The disorder itself spawned several similar defenses, such as Holocaust Syndrome, Battered Child's Syndrome, Black Rage and Love Fear Syndrome.¹⁴ The proliferation of PTSD made the disorder a household phrase.¹⁵ Thus, it is likely that many Iraq veterans have gone into combat knowing about the PTSD defense. This, when coupled with the fact that the symptoms are easily falsified,¹⁶ may attribute to an increase in acquittals based on fraudulent PTSD defenses. Given this problem, there remains the need to create a PTSD defense so that the goals of punishment¹⁷ are served, while the plight of veterans genuinely plagued by PTSD is recognized and treated appropriately. The goal of this comment is to draw attention to this issue and propose a prototype defense that may prevent Iraq from becoming a psychological quagmire.

I. What is Post-Traumatic Stress Disorder?

*"The most common difficulty people have is fitting into civilian life. You'll never be an average citizen again."*¹⁸

13. Elizabeth J. Delgado, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 484 (1986).

14. Ralph Slovenko, *The Watering Down of PTSD in Criminal Law*, J. OF PSYCHIATRY & L., Fall 2004, at 421.

15. *Id.* at 419.

16. *Id.* at 415.

17. MODEL PENAL CODE § 1.02(2) (1962) (Stating that "the general purposes of the provisions governing the sentencing and treatment of offenders are: (a) to prevent the commission of offenses; (b) to promote the correction and rehabilitation of offenders; (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment . . .").

18. Kevin Sajdak, *Soldier Under Stress*, THE DAILY ORANGE, Nov. 1, 2006, available at <http://www.dailyorange.com/home/index.cfm?event=displayArticle&>

War veterans are among the prime candidates for PTSD because of the causes of the disorder. PTSD may develop after one experiences a life-threatening or highly traumatic event, such as military combat, rape, abuse (sexual or physical), or terrorist attacks.¹⁹ When an individual experiences such an event, the body produces a stress response which begins in the reticular activating system and continues to the hypothalamus.²⁰ The hypothalamus signals the pituitary gland to secrete the adrenocorticotrophic hormone ("ACTH") which eventually causes the production of adrenaline.²¹ The adrenaline causes the stress response of rapid heartbeat, pain desensitizing and hyper-alertness.²² The brain then terminates the stress response when needed in a negative feedback process where more ACTH is released in order to stop the ACTH production.²³ The problem in persons with PTSD is that they experience a stress response every time there is a reminder of the stressor (i.e. a flashback, triggering image or related incident). The person is, thus, under continuous stress, which can have a "deleterious effect on the brain."²⁴

There are many symptoms that result from being under continuous stress. They can include dissociation (flashbacks), exaggerated startle response, irritability and impulsive behavior.²⁵ The American Psychiatric Association lists the diagnostic criteria for PTSD in the *Diagnostic & Statistical Manual of Mental Disorders* as follows:

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

(1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions

uStory_id=69eb9005-6dd3-4f3f-ae70-ee1fc076faa (last visited Mar. 28, 2008) (quoting Ben Tupper, an Operation Enduring Freedom soldier).

19. U.S. Department of Veterans Affairs, National Center for PTSD, What is PTSD?, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_what_is_ptsd.html (last visited Feb. 21, 2008).

20. Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 18 (2001).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Delgado, *supra* note 13, at 476.

- (2) recurrent distressing dreams of the event
- (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, includes those that occur on awakening or when intoxicated)
- (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
- (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
- C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
 - (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma
 - (2) efforts to avoid activities, places, or people that arouse recollections of the trauma
 - (3) inability to recall an important aspect of the trauma
 - (4) markedly diminished interest or participation in significant activities
 - (5) feeling of detachment or estrangement from others
 - (6) restricted range of affect (e.g., unable to have loving feelings)
 - (7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)
- D. Persistent symptoms of increased arousal (not present before trauma), as indicated by two (or more) of the following:
 - (1) difficulty falling or staying asleep
 - (2) irritability or outbursts of anger
 - (3) difficulty concentrating
 - (4) hypervigilance
 - (5) exaggerated startle response
- E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.
- F. The disturbance causes clinically significant distress or impairment of social, occupational, or other important areas of functioning.²⁶

Using the above criteria in diagnosing patients, the American Psychiatric Association concluded that eight percent of the American population suffers from PTSD that will have lifetime prevalence, with the highest rates among those who have

26. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, 468 (4th ed. 2000).

served in military combat.²⁷ With at least 1.5 million American troops returning from Iraq,²⁸ that percentage will increase.

Other factors can increase the probability of acquiring PTSD. Indicators such as family history, severity of the stressor, proximity to the event, childhood experiences and preexisting mental conditions can increase the likelihood of developing PTSD when exposed to trauma and exacerbate its severity.²⁹ Existing evidence also suggests that PTSD can be inherited.³⁰ However, "[t]his disorder can develop in individuals without any predisposing conditions, particularly if the stressor is especially extreme."³¹ In short, there is no profile of a person who can develop PTSD. A person exposed to trauma can be subject to its debilitating symptoms and another person may not be. Researchers are working to discover more about the causes and treatments of this disorder.³²

With regards to military personnel, new and varied U.S. military missions have an impact on a soldier's psyche. In particular, the "diversity in the nature and character of the missions"³³ created a vast difference in combat experiences for veterans.³⁴ Because of this, evaluators of PTSD developed new assessment instruments that "account for the changing nature of the mission"³⁵ (i.e. changing from a peacekeeping mission to a combat mission or changing from a mission to remove a dictator to a defense mission). Evaluators now take into consideration the environment, the person's emotional responses, what type of military activities they participated in and the dimensions of the mission itself.³⁶ The dimensions of the mission will help determine which stressors may be present.

As applied to a veteran suffering from PTSD who has committed a crime, veterans tend to engage in crime because of the

27. *Id.* at 466.

28. VETERANS' DISABILITY BENEFITS COMMISSION, *supra* note 1.

29. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 26, at 466.

30. *Id.* at 466-67.

31. *Id.* at 466.

32. Garcia-Rill & Beecher-Monas, *supra* note 20, at 19.

33. ASSESSING PSYCHOLOGICAL TRAUMA AND PTSD, 278 (John P. Wilson & Terence M. Keane, eds., 1997).

34. *Id.*

35. *Id.* at 279.

36. *Id.*

survival mode derived from combat. According to John P. Wilson and Sheldon D. Zigelbaum in their 1983 study of 114 Vietnam veterans, this survival instinct manifests itself in three modes: the dissociative reaction, the sensation seeking syndrome and the depression-suicide syndrome.³⁷ The most prevalent symptom is dissociation; this symptom causes the person to believe that they are in combat and respond to perceived stressors with violence as they would in combat.³⁸ Because of this survivor-mode reaction, PTSD is commonly associated with violent criminal behavior.³⁹

However, PTSD can also be associated with non-violent criminal activities because of a second way in which this survival-mode instinct affects veterans: sensation seeking syndrome.⁴⁰ The syndrome causes veterans to engage in dangerous and thrilling behavior in order to maintain control over the traumatic imagery they are experiencing. "[I]t performs a defensive function since the sensation seeking syndrome is a complex form of repetition compulsion which blocks the onset of intrusive experiences."⁴¹ If the veteran does not fulfill this urge, he begins to suffer the extreme symptoms of PTSD.⁴²

Finally, the survivor-mode may cause the veteran to experience the depression-suicide syndrome. Here, the veteran is plagued by depression, guilt that he survived and his fellow troop members did not, and a sense that he was a mere pawn used by the government.⁴³ Because of these rampant feelings of self-loathing and depression, the veteran may seek to take his own life as a way to end the terrible imagery he or she is experiencing or to join his or her departed brethren.⁴⁴ "Such a suicidal wish may then give rise to criminal action if the veteran unconsciously acts out his anger at the government or other authority figures symbolically equivalent."⁴⁵ Considering the cur-

37. John P. Wilson & Sheldon D. Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 BEHAV. SCI. & L. 69, 73-76 (1983).

38. *Id.* at 73.

39. *Id.*

40. *Id.* at 74.

41. *Id.* (citation omitted).

42. *Id.*

43. *Id.* at 75.

44. *Id.*

45. *Id.*

rent opposition to the conflict in Iraq, this syndrome may be the most prevalent among those veterans returning from a tour of duty in Iraq.

Thus, PTSD may reveal itself in many forms, all equally debilitating and all equally dangerous. However, knowledge of the disorder and its symptoms may provide the veteran an appropriate defense in a criminal prosecution.

II. Proving PTSD

It can be argued that the true difficulty for attorneys in PTSD defense cases is the manner in which the disorder is proven.⁴⁶ In an interview with C. Peter Erlinder, Professor of Law at William Mitchell College of Law, he states that the success of a PTSD case depends on the method of proof.⁴⁷ As mental state is always an issue in any criminal case, proof of PTSD should demonstrate that the actor was less culpable or not culpable.⁴⁸ To show this, attorneys must prove PTSD factually, using detailed exhibits and testimony that describe the trauma incurred. For a war veteran, this would include testimony from members of the defendant's military unit present at the time of the trauma, testimony from military commanders detailing the mission itself, military records and lay testimony concerning the defendant's behavior before and after the tour of duty.⁴⁹ The facts proven would then apply towards one of the defenses applicable to mental state (insanity, diminished capacity, self-defense, etc.). PTSD is the one psychological disorder that can be proven absolutely, because it stems from an identifiable trauma and the evidence of that trauma is discernable.⁵⁰ Therefore, if proven, a PTSD defense has the potential to be successful regardless of the defense used.⁵¹

Professor Erlinder describes PTSD in terms of an analogy to a civil personal injury case.⁵² He states that where there was

46. Telephone Interview with C. Peter Erlinder, Professor of Law, William Mitchell College of Law, in St. Paul, Minn. (Nov. 10, 2006).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

a car accident and the injured plaintiff sues the driver of the other car, the lawyer would not just offer evidence of the plaintiff's injuries without proving that an accident occurred.⁵³ The same is true of PTSD. The lawyer representing a PTSD defendant should not be offering evidence of his client's PTSD symptoms without first proving the trauma that caused the disorder.⁵⁴ The problem is that this is the way lawyers have typically argued PTSD cases. They use expert psychiatrists who testify that the defendant has PTSD but who do not bother to investigate the trauma itself.⁵⁵ It is virtually guaranteed that the expert psychiatrist also failed to investigate the trauma independently.⁵⁶ Thus, the "tendency is to just throw psychological testimony at the jury and see what sticks."⁵⁷ This method is wrong, and when it is done, Professor Erlinder states that the PTSD defense should fail.⁵⁸ If PTSD is not presented in the way a personal injury case is proven, it is not a PTSD defense.⁵⁹

However, it can also be argued that even if PTSD is proven in the manner described by Erlinder, the inadequacies in the legal standards and defenses still pose a barrier to PTSD defense success. The trauma suffered by a war veteran may be admissible, but it is ultimately up to the fact finder to determine if that trauma sufficiently qualifies for an insanity defense, diminished capacity, self-defense, unconsciousness and so on. The trauma qualifies if it affects the mental state to the extent prescribed by statute in order to negate mens rea. A veteran may well have suffered trauma, but a judge or jury may not see it as enough to cause the symptoms purported, and thus affect the mens rea to the extent necessary to reduce culpability. A defense designed to encompass the symptoms of PTSD specifically may solve this issue for the predicted Iraq war veteran cases.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

III. Iraq vs. Vietnam

The Vietnam experience and Operation Iraqi Freedom are quite similar, thus indicating that the crime rates of Vietnam veterans may repeat themselves in Iraq veterans.⁶⁰ In both conflicts, troops were sent off to combat, backed by patriotism and the want of victory. They returned, however, to animosity towards an immoral war and a public demand for withdrawal. The public mood after Vietnam and currently in regards to Iraq is embittered, untrusting and scornful. Iraq veterans are coming back to a public who may value their work in general, but disagrees with their cause. In the case of Vietnam, this worked to create higher rates of PTSD⁶¹ and higher crime rates among those veterans with PTSD. The same predication can be made for Iraq.

IV. PTSD and its Use as a Defense

A. *The Insanity Defense*

The insanity defense is the most common strategy for presenting PTSD as a defense. The insanity defense itself can vary from jurisdiction to jurisdiction, but most use some form of the *M'Naghten* standard.⁶² The standard came from *M'Naghten's Case*, an 1843 English case where M'Naghten (the defendant) intended to murder the Prime Minister but instead shot his secretary.⁶³ The jury acquitted M'Naghten on the ground of insanity.⁶⁴ Outraged by the verdict, the House of Lords, in response to the *M'Naghten* acquittal, created a new legal test for insanity and criminality in general.⁶⁵

"The jurors ought to be told . . . that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the na-

60. Michael J. Davidson, *supra* note 3, at 416-18.

61. *Id.*

62. *Clark v. Arizona*, 126 S. Ct. 2709, 2720-22 (2006).

63. Geraldine L. Brotherton, *Post-Traumatic Stress Disorder-Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91, 104 (1982).

64. *Id.*

65. *Id.* at 104-05.

ture 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.⁶⁶

The *M'Naghten* test is the strictest of all insanity defenses and requires that a defendant not know right from wrong.⁶⁷ "For all practical purposes, a defendant must be almost totally and irrevocably deranged in order to be acquitted under the *M'Naghten* test; this is a result of the rigid formulation of the rule."⁶⁸ For example, in the case of *State v. Felde*,⁶⁹ defendant Robert Felde, a Vietnam veteran, escaped from prison where he was serving time for a Maryland manslaughter and assault conviction.⁷⁰ Felde was subsequently arrested as a simple drunk.⁷¹ While in the back of the police cruiser, Felde was leaning too far into the front seat.⁷² The officer pushed him back and a shot was fired with three following it.⁷³ The officer was killed and Felde was charged with first degree murder.⁷⁴ Felde claimed that he didn't remember anything after the first shot and at trial pleaded not guilty by reason of insanity.⁷⁵

Several psychiatrists examined Felde and determined that he was suffering from PTSD.⁷⁶ Dr. John P. Wilson testified that the recent loss of Felde's mother, coupled with the news that police were looking for him, triggered a helpless feeling.⁷⁷ Felde bought a gun as a "form of security against an impending threat."⁷⁸ In Wilson's opinion, Felde satisfied the *M'Naghten* test adopted by Louisiana because Felde could not discern right from wrong and was unable to abide by the law.⁷⁹ However, the jury decided otherwise and did not believe that the evidence, including lay testimony on how Felde had changed since re-

66. *Clark*, 126 S. Ct. at 2718-19 (citing *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (H.L.)).

67. Davidson, *supra* note 3, at 424.

68. Brotherton, *supra* note 63, at 109.

69. *State v. Felde*, 422 So. 2d 370 (La. 1982).

70. *Id.* at 375.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 376.

76. *Id.* at 376-79.

77. *Id.* at 378.

78. *Id.*

79. *Id.*

turning from Vietnam,⁸⁰ supported a finding of insanity.⁸¹ Felde was sentenced to death upon his own request: "All I can say to you all is . . . I would advise you to return the death penalty in this case" ⁸² When asked by a juror whether he believed that he would be able to control his actions in the future if the death penalty were not returned, Felde replied, "I think other deaths will result."⁸³ In Felde's closing argument, he also stated, "A walking time bomb, that's what it is. Somebody else will die as a result of it if I'm not put to death, I am sure . . . I think, as my countrymen, you owe me that much. I did my part. Please do yours."⁸⁴ Thus, *Felde* exemplifies why a defense specifically designed for PTSD sufferers is needed: we need to prevent those "walking time bombs."

In contrast to *Felde*, the insanity defense succeeded in *State v. Heads*.⁸⁵ The defendant, another Vietnam veteran, was charged with murder for killing his sister-in-law's husband.⁸⁶ After receiving a new trial, Heads raised a PTSD defense. Testimony relating to Heads' PTSD tended to establish that:

After returning from Vietnam, he had experienced at least one 'dissociative state' in which he reverted to combat-type behavior; the Vietnam-like physical conditions at the scene of the shooting which, together with the emotional threat of losing his wife and family, combined to cause a reaction in which Mr. Heads 'was on automatic'; and that after the shooting Mr. Heads was quietly arrested at the scene, still holding his weapon.⁸⁷

The jury subsequently found Heads not guilty by reason of insanity under Louisiana's *M'Naghten* test.⁸⁸

Other cases have had similar verdicts. In *New Jersey v. Cocuzza*,⁸⁹ the defendant, a Vietnam veteran, assaulted police

80. *Id.* at 376.

81. *Id.* at 375.

82. *Id.* at 394.

83. *Id.*

84. *Id.*

85. C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B. C. L. REV. 305, 319 (1984) (citing *State v. Heads*, No 106, 126 (First Jud. Dist. Ct. Caddo Parish, La. Oct. 10, 1981)).

86. *Id.*

87. *Id.* at 321.

88. *Id.*

89. *New Jersey v. Cocuzza*, No. 1484-79 (N.J. Super. Ct. 1981).

officers in a park with a log.⁹⁰ He was carrying the log like a rifle and believed that the officers following him were enemy soldiers.⁹¹ He claimed insanity based on PTSD and was found not guilty by reason of insanity under New Jersey's version of the *M'Naghten* test.⁹²

The federal courts use a test based on *M'Naghten* as well. The Insanity Defense Reform Act of 1984⁹³ is an even stricter "right-wrong" test. It states:

(a) Affirmative Defense—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of Proof—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.⁹⁴

The federal test requires that a defendant prove that he is afflicted with a *severe* mental defect, making it more rigid than *M'Naghten* and therefore more difficult to prove. Thus, the higher the level of proof required, the less likely a veteran suffering from PTSD will be able to meet the standards for an insanity defense.

This is the inherent problem of both the *M'Naghten* test and the Federal Insanity Defense Reform Act. The rigidity creates a defense only for a specific group of PTSD sufferers: those who suffer from dissociative states.

If [a person's] crime were 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 attacked or killing the enemy. If, however, he suffered from the myriad of other symptoms . . . the *M'Naghten* test would provide him no defense.⁹⁵

90. Menefee, *supra* note 6, at 15 (citing *New Jersey v. Cocuzza*, No. 1484-79 (N.J. Super. Ct. 1981)).

91. *Id.*

92. *Id.*

93. Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (2006).

94. *Id.*

95. Delgado, *supra* note 13, at 483.

However, the “other symptoms” can serve to negate mens rea, just as a dissociative state can, by reducing an individual’s culpability. Those veterans suffering from the sensation seeking syndrome, the depression-suicide syndrome, or those who “snap” due to irritability have reduced culpability because PTSD has impaired their mental state. Thus, criminal liability should be imposed in those circumstances and an insanity defense should be appropriate. Under the *M’Naghten* test, Iraq War veterans will rarely be able to pose a successful insanity defense.

In contrast to the *M’Naghten* rule, the American Law Institute (“ALI”), in the Model Penal Code, created another version of the insanity test, one with a volitional component. It reads:

- (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
- (2) As used in this Article, the terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.⁹⁶

The ALI approach presents a volitional component by addressing a defendant’s ability to conform his or her conduct to the necessities of the law. The volitional component of the ALI test allows it to be less rigid than the strict “right-wrong” two-component *M’Naghten* test. “Because the ALI test includes [this] volitional prong, the veteran who is unable to control his actions as a result of PTSD would be able to assert an insanity defense, even though he knows what he is doing and that it is wrong.”⁹⁷ The ALI test would thus cover a PTSD sufferer with dissociative state and/or impulsive or aggressive symptoms.

The ALI approach was successful in *State v. Wood*,⁹⁸ where the defendant, a Vietnam veteran, “claimed that the physical similarities of his factory workplace and his artillery base in Vietnam initiated a flashback that culminated in the shooting of

96. MODEL PENAL CODE § 4.01 (1962).

97. Delgado, *supra* note 13, at 483.

98. Davidson, *supra* note 3, at 426 (citing *State v. Wood*, No. 80-7410 (Ill. 1982)).

his foreman.”⁹⁹ Defendant Wood was found not guilty by reason of insanity under the ALI standard.¹⁰⁰

However, the ALI approach does not cover all symptoms of veterans with PTSD. The volitional component only addresses the symptom of impulsiveness. This results in a disservice to those veterans who have a legitimate PTSD defense but do not have dissociative states or impulsive symptoms.

The *M’Naghten* test and the Model Penal Code (ALI) test do not create a sufficient defense for addressing the needs of PTSD veterans. The less commonly used tests, such as the Irresistible Impulse test,¹⁰¹ also do not fit symptoms of PTSD. The Irresistible Impulse test “extends the insanity defense to situations where the defendant was incapable, by reason of mental disease or defect, of controlling his conduct.”¹⁰² This is merely the volitional component of the ALI test and would not include those who suffered from such symptoms as irritability, sensation-seeking syndrome, or depression.

Many PTSD veterans attempt to prove an insanity defense; however, it is rarely successful and usually only for those suffering from dissociative state symptoms. Depending on the type of insanity test (*M’Naghten*, ALI or Irresistible Impulse), a volitional component may work to get other symptoms, such as impulsion and aggression, past the insanity defense velvet rope. Even where the insanity defense is successful, it is difficult to gather statistical evidence to prove it. “If the defendant is acquitted, there is no appeal, and the dispositions in state trial courts (unlike federal trial courts) are essentially beyond study.”¹⁰³ Thus, the insanity defense does not seem to be the most viable option for those planning to use PTSD in an exculpatory manner.

B. *Diminished Capacity*

The diminished capacity defense is a variation of the insanity test in that it negates the mens rea required for the com-

99. *Id.*

100. *Id.*

101. Delgado, *supra* note 13, at 473 n.3.

102. *Id.*

103. Slovenko, *supra* note 14, at 431 n.7.

mission of the offense charged.¹⁰⁴ It negates specific intent.¹⁰⁵ When a defendant asserts a diminished capacity defense, he asserts that, due to mental incapacity, he or she could not form the requisite intent for the charge. The defense is likely to have an increased rate of success in PTSD cases¹⁰⁶ because it deals only with mental capacity and not the ability to discern right from wrong; however, it is only available in a limited number of jurisdictions.¹⁰⁷ It has even been abolished in jurisdictions that had previously adopted the defense.¹⁰⁸ Thus, the diminished capacity defense only has the power to reach a select few veterans choosing to use PTSD as an exculpatory device. It is yet another example of why a defense specifically designed for PTSD sufferers needs to be created.

When successful, the diminished capacity defense will result in a complete acquittal in federal courts.¹⁰⁹ In *United States v. Fishman*,¹¹⁰ defendant Fishman was charged with eleven counts of mail fraud; Fishman sought to assert both the insanity defense and a diminished capacity defense in the event that the insanity defense was not successful.¹¹¹ The United States District Court for the Northern District of California distinguished the diminished capacity defense from the insanity defense by stating that involuntary committal will not occur with diminished capacity.¹¹² Instead, a defendant will be acquitted.¹¹³ Furthermore, the court noted the differences with respect to expert testimony.¹¹⁴ The Insanity Defense Reform Act limits expert testimony to the defendant's mental disease or defect,¹¹⁵ whereas the diminished capacity defense allows "psychiatric testimony that goes beyond the defendant's cognitive defects"¹¹⁶ to negate specific intent. When applied to a PTSD

104. 21 AM. JUR. 2D *Criminal Law* § 38 (2006).

105. *Id.*

106. *Id.*

107. *Id.*

108. Delgado, *supra* note 13, at 474 n.6.

109. *United States v. Fishman*, 743 F. Supp. 713, 721 (N.D. Cal. 1990).

110. *Id.*

111. *Id.* at 715.

112. *Id.* at 721.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

sufferer, this difference allows expert testimony to comment on the various symptoms of PTSD and relate testimony to the changes in defendant's behavior and lifestyle pre- and post-Iraq. Thus, the big picture of PTSD reveals itself when using the diminished capacity defense.

However, in some jurisdictions, the diminished capacity defense may only qualify as a partial defense.¹¹⁷ In *State v. Brink*,¹¹⁸ Minnesota declared that the diminished capacity and responsibility defenses are "considered 'partial defenses' because they do not completely exonerate the defendant but merely reduce the degree or nature of the crime."¹¹⁹ In Pennsylvania, the court in *Commonwealth v. Paoello*¹²⁰ declared that the diminished capacity defense may only be used when the defendant admits criminal liability but contests the degree of guilt.¹²¹ This results in PTSD being used to downgrade a criminal offense and not acquitting the defendant of said offense.¹²²

Thus, the problem with diminished capacity is its infrequent use and its varied effect when the defense is used. Although appropriate for PTSD veterans because it focuses on the mental capacity to form intent, diminished capacity is suffering from its own disjunctive disorder and is not applicable to many veterans.

C. *Unconsciousness/Automatism*

Unlike diminished capacity, the defense of unconsciousness, also known as automatism, is uniform in nature. The ALI's Model Penal Code defines the defense as:

- (1) A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.
- (2) The following are not voluntary acts within the meaning of this Section:
 - (a) a reflex or convulsion;

117. *State v. Brink*, 500 N.W.2d 799, 806 (Minn. Ct. App. 1993).

118. *Id.*

119. *Id.*

120. *Commonwealth v. Paoello*, 665 A.2d 439 (Pa. 1995).

121. *Id.* at 78.

122. *Id.*

- (b) a bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual¹²³

In short, a person has to voluntarily commit a criminal act in order to be guilty. When a person is unconscious, he or she is not capable of committing a voluntary act.

As applied to PTSD, those in a dissociative state are in a state of unconsciousness.¹²⁴ In a combat setting, this is caused by the group bonding of the units.¹²⁵ Where there is loss to a group, the group responds, as directed, with violence.¹²⁶ The mantra becomes violence first, think later.¹²⁷ This creates a situation where loss becomes a learned behavior that is automatic.¹²⁸ When the veteran subsequently experiences loss, he or she reacts as he or she was trained: with violence.¹²⁹ It is an automatic and involuntary response. When successful, the unconsciousness/automatism defense will result in a complete acquittal because it negates the *actus reus* in the crime.¹³⁰

When *actus reus* is negated, the defendant is not committed to a mental institution. This is because the unconsciousness defense is not necessarily rooted in mental illness.¹³¹ By asserting the unconsciousness defense, "the defendant avoids both the stigma of an insanity defense and confinement in a mental institution."¹³² The PTSD defendant would thus escape any criminal record or punishment.

However, this defense also poses the problem outlined in the insanity defense: it is limited to those who experience dissociative states as a PTSD symptom.¹³³ "In order for the defendant to have been legally unconscious in a PTSD context, he would have to have been in a fugue or dissociative state."¹³⁴ In

123. MODEL PENAL CODE § 2.01 (1962).

124. Delgado, *supra* note 13, at 484-85.

125. Telephone Interview with C. Peter Erlinder, *supra* note 46.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Delgado, *supra* note 13, at 484-85.

131. Erlinder, *supra* note 85, at 329.

132. Delgado, *supra* note 13, at 484.

133. *Id.*

134. *Id.*

People v. Lisnow,¹³⁵ the defendant was in a restaurant and, without any provocation, struck the maitre d' twice.¹³⁶ Lisnow then went into the parking lot where he assaulted others until he was subdued and arrested.¹³⁷ Lisnow testified that he could not remember any of these events and said that he had experienced such black-outs and other "dream-like" experiences since his return from Vietnam where he had been engaged in a lengthy tour of duty and heavy combat.¹³⁸ A psychiatrist at his trial testified that Lisnow's lapse of memory was due to a loss of consciousness during the incident brought on by a fugue or dissociative state, symptoms of PTSD.¹³⁹ Lisnow's conviction was overturned on appeal because of his unconsciousness defense.¹⁴⁰ Thus, an unconsciousness defense is only available to those who experience dissociative flashbacks as a symptom of PTSD.

D. *Mitigating Factor*

PTSD used as a mitigating factor during the sentencing phase of a criminal proceeding, while successful, still usually results in imprisonment. In this context, PTSD works to downgrade the offense so as to result in a lesser punishment. This is evidenced in the most recent case of *State v. Denni*¹⁴¹ where the defendant, an Iraq war veteran, was charged with the first degree murder of his wife.¹⁴² Denni confessed to killing her,¹⁴³ explaining that after she had approached him in their bedroom and announced that she was leaving him for another man, he pulled out his 9 millimeter handgun and shot her once in the neck.¹⁴⁴ Denni claimed that he just "snapped" and had never thought about killing his wife.¹⁴⁵ At trial, Denni testified that he had been suffering from PTSD since returning from Iraq and

135. *People v. Lisnow*, 88 Cal. App. 3d 21 (1978).

136. *Id.* at 23.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *State v. Denni*, No. 33153-5-II, 2006 Wash. App. LEXIS 977 (Wash. Ct. App. May 16, 2006).

142. *Id.* at *1.

143. *Id.* at *2.

144. Michael Rosenwald, *The Iraq Defense: Can Lawyers Make the Case for PTSD?*, ESQUIRE, Oct. 2006, at 74.

145. *Denni*, 2006 Wash App. LEXIS 977, at *4.

that his mental health had worsened when his wife informed him that she had been having an affair.¹⁴⁶ Denni was subsequently convicted of second degree murder, with a firearm enhancement, because the jury believed his PTSD defense.¹⁴⁷ Thus, this case and another just like it¹⁴⁸ demonstrate that a jury is more likely to mitigate a charge when PTSD is asserted.

Of course, PTSD is also applicable when downgrading a murder charge to manslaughter. The ALI has recognized this possibility in their Model Penal Code:

(1) Criminal homicide constitutes manslaughter when:
it is committed recklessly; or
a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be¹⁴⁹

Most states have adopted the Model Penal Code definition of manslaughter, including Hawaii¹⁵⁰ and New York.¹⁵¹ For PTSD defendants on trial for murder, a manslaughter statute such as this would aid in downgrading the murder offense to manslaughter because PTSD is argued to be an extreme mental disturbance. However, this is unhelpful for any PTSD sufferer not charged with murder. Manslaughter statutes aid in downgrading offenses for PTSD sufferers, but can still result in imprisonment as opposed to treatment.

E. *Self-Defense*

Self-defense also is a viable option as a defense for PTSD veterans. The Model Penal Code defines the defense as: "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

146. *Id.*

147. *Id.* at *5.

148. *See generally* People v. Saldivar, 113 Ill. 2d 256 (1986).

149. MODEL PENAL CODE, § 210.3 (1962).

150. HAW. REV. STAT. §§ 707-702(2) (1976).

151. N.Y. PENAL LAW § 125.20 (2004).

force by such other person on the present occasion.”¹⁵² As applied to PTSD, this would apply where a defendant was in survival mode and felt it necessary to protect himself through his actions, regardless of the reality of the situation.

The use of PTSD in this context might parallel that of the ‘battered spouse syndrome’ that has been used to explain a female defendant’s violent acts towards her spouse. It may be possible to show that a particular type of provocation caused a PTSD-type reaction in which the defendant felt attacked and responded involuntarily or even reasonably given his or her experiences.¹⁵³

Thus, a PTSD veteran’s behavioral and lifestyle differences pre- and post-Iraq would be relevant in trial testimony to establish the circumstances that would provoke a defendant to defend himself against his perceived threat.¹⁵⁴ Self-defense, however, is only applicable in the scenario where the defendant used force or a threat of force.¹⁵⁵

Self-defense is a viable defense for a PTSD veteran if the jury believes that a person is justified in using force to protect himself against an imaginary aggressor. While there are no statistics on whether this defense has been successful, it seems difficult for a jury to accept.

V. The Problem

The problem with using PTSD as a defense is not just with the legal system. The problem is also with the current cultural state of the nation. American society is acutely aware of PTSD’s existence and symptoms, therefore making the disorder easily falsifiable.¹⁵⁶ Because of this, the court systems should be prepared for an onslaught of PTSD defense claims posed by Iraq war veterans.

PTSD has become a widely-publicized issue in American culture, beginning with its declaration as an official disorder in 1980.¹⁵⁷ Since then, it has proliferated into numerous other syndromes including, but not limited to, Battered Child Syn-

152. MODEL PENAL CODE § 3.04(1) (1962).

153. Erlinder, *supra* note 85, at 329.

154. *Id.*

155. Auberry, *supra* note 5, at 670.

156. Slovenko, *supra* note 14, at 412.

157. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 8.

drome, Battered Patient Syndrome, Policeman's Syndrome, Whiplash Syndrome, Lover's Syndrome, Low-Back Syndrome, Love Fear Syndrome, Organic Delusional Syndrome and Holocaust Syndrome.¹⁵⁸ Because of this proliferation, PTSD has become a household phrase.¹⁵⁹ Few subject areas have received as much attention as PTSD in the worlds of academia and psychiatry.¹⁶⁰ "It has [even] been quipped that if PTSD were listed on the New York Stock Exchange, it would be a growth stock worth watching."¹⁶¹ And this is just the beginning.

Furthermore, certain American tragedies and societal issues have exacerbated our fascination with PTSD. September 11, 2001, not only changed our view on the world, it also changed our psyches forever. As 9/11 was a severely traumatic event, it can be classified as a stressor under the APA guidelines for PTSD.¹⁶² The thousands who were involved in the tragedy and the millions more who viewed or read about the events now potentially classify as PTSD sufferers. Because of the impact this tragedy had on most United States citizens, research and fascination with PTSD has accelerated.¹⁶³ Not only are syndromes of PTSD proliferating, so are its symptoms and society's knowledge of its symptoms.

Because of PTSD's popularity in American culture and academia, Iraq war veterans are going to be more familiar with the disorder than Vietnam veterans were. Iraq veterans will know what it means to have PTSD, they will know what causes it and they may also know how to fake it. Iraq veterans will be going into war knowing that PTSD can be caused by war. This knowledge may result in increased instances of Iraq war veterans falsifying PTSD.

The danger of potentially false PTSD claims is high considering that falsification is simple.¹⁶⁴ This is evidenced by the case of *People v. Lockett*.¹⁶⁵ Lockett was charged with robbery and made a plea of non-responsibility on the basis of mental

158. Slovenko, *supra* note 14, at 421.

159. *Id.* at 419.

160. *Id.*

161. *Id.* at 420.

162. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 26.

163. Slovenko, *supra* note 14, at 419.

164. *Id.* at 415.

165. *People v. Lockett*, 121 Misc. 2d 549 (N.Y. Crim. Term 1983).

illness, specifically PTSD.¹⁶⁶ The state conceded that they could not prove criminal responsibility beyond a reasonable doubt because of this defense.¹⁶⁷ Several psychiatrists examined Lockett and concluded that he had PTSD. One psychiatrist reported that Lockett was

agitated; he 'paced back and forth, was tearful and appeared genuinely anxious and depressed' . . . [and was] 'altogether pre-occupied with experiences of that war which reportedly continue[d] to plague him and which repeatedly distracted him to the point where he could not effectively attend to the issues.'¹⁶⁸

Another reported that Lockett was feeling resentful and angry because there had been no grand homecoming for him when he returned to the United States.¹⁶⁹ Lockett even justified his heroin and cocaine use as attempts to "'quell [his] nightmares.'"¹⁷⁰ Lockett reported that the jets at LaGuardia Airport caused him to experience flashbacks while he was living on Rikers Island¹⁷¹ and that he was unable to do well at college, hold a job or stay sober because of his PTSD symptoms.¹⁷² He stated, "I fought in the jungles of Vietnam . . . you don't know what it is like . . . you walk through the jungles and swamps where leeches suck your blood . . . I am still a soldier [t]here."¹⁷³ Both the state's and the defense's psychiatrists concluded that Lockett was suffering from PTSD.¹⁷⁴

However, Lockett's criminal proceedings were interrupted by a motion by the state to vacate the plea, arguing that it was induced by fraud.¹⁷⁵ Subsequent evidence revealed that Lockett had never served in Vietnam.¹⁷⁶ His Air Force record stated that Lockett "never left Randolph Air Force Base, in Texas, where he was an accounting clerk."¹⁷⁷ Lockett attempted to claim that he had been in Vietnam on a "secret" mission for a

166. *Id.* at 549.

167. *Id.* at 550.

168. *Id.* at 551.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 552.

173. *Id.*

174. *Id.*

175. *Id.* at 553.

176. *Id.*

177. *Id.*

year and a half,¹⁷⁸ but was unable to convince the court and his plea was set aside.¹⁷⁹

The *Lockett* case exemplifies how PTSD can be falsified. Coupled with the fact that Iraq war veterans know of PTSD and probably know it can be used as a defense, this could mean a proliferation of PTSD defenses in the court systems. This is a problem that needs to be addressed in order to protect the integrity and credibility of both our veterans and our courts.

It can be argued that cases using a PTSD defense or cases involving war veterans fail and deserve to fail because of the incompetence of the attorneys working on the case.¹⁸⁰ However, attorney incompetence may appear in circumstances where the client has PTSD and the lawyer does not recognize it.¹⁸¹ The veteran may either be embarrassed as to his condition or in the dark about why he feels and acts the way he does.¹⁸² It is the attorney's duty to ask the questions and make a PTSD investigation when dealing with a war veteran.¹⁸³ If the attorney fails to do so, a veteran suffering from PTSD will likely be convicted and sent to jail where the disorder will increase in severity. Recidivism because of this attorney error appears almost certain under these circumstances. Thus, an attorney must remember to do his or her due diligence when dealing with a veteran accused of a crime.

VI. The Solution

In order to address the issues surrounding the use of PTSD as an exculpatory device, the answer may lie in a new defense. The current defenses, as outlined above, do not adequately represent the spectrum of PTSD symptoms and vary from jurisdiction to jurisdiction. The insanity defense under the *M'Naghten* standard creates almost impossible evidentiary burdens. The ALI Model Penal Code standard, which includes a volitional component, mainly applies to those suffering from dissociative states, as does the unconsciousness/automatism de-

178. *Id.* at 554.

179. *Id.* at 558.

180. Telephone Interview with C. Peter Erlinder, *supra* note 46.

181. *Id.*

182. *Id.*

183. *Id.*

fense. The defense of diminished capacity is seldom available and in the event that it does exist, the punishment varies as well. Self-defense is a viable option, but it is debatable whether it would be accepted by juries. Irresistible impulse also has viability, but appears to be identical to the volitional component of the ALI standard. When used as a mitigating factor, a PTSD defense is successful but still often results in imprisonment which will most likely exacerbate the condition, causing recidivism. In order to remedy these shortcomings, a new defense may be in order.

The defense would be designed specifically for PTSD in order to address the full spectrum of PTSD symptoms. However, it must also be designed to prevent falsification, which would be done by leaving the burden of proof on the defendant to prove PTSD by clear and convincing evidence. If the burden of proof was raised to the highest standard (beyond a reasonable doubt), the new defense may have the same fate as the insanity defense: impossible evidentiary burdens with a low success rate. Perhaps the burden of proof should be left at the same level as the federal and state insanity tests but the "severe mental disease" language should be redacted. Some PTSD symptoms may not classify as a severe mental disease, but may qualify under a different definition; however, the burden of proving it would remain the same, allowing more veterans a chance at success. The new defense must balance the interests of society in holding criminals accountable for their wrongdoing and the interests of veterans who are mentally ill.

The proposed new defense should solely deal with mental illness, but should not require a "severe mental illness" as the insanity defense requires. A proposed PTSD defense is as follows:

Affirmative Defense: It is an affirmative defense to a prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a proven extreme trauma which caused Post-Traumatic Stress Disorder as defined by the American Psychiatric Association, acted in response to what the defendant perceived as a threat of unlawful force, in response to an involuntary compulsion, or without requisite intent due to diminished mental capacity.

Burden of Proof: Defendant has the burden of proving this defense by clear and convincing evidence.

Result: If said defense is successful, defendant shall undergo intensive PTSD treatment for a period within the discretion of the court.

The defense thus encapsulates the spectrum of PTSD symptoms by identifying the American Psychiatric Association's definition of the disorder. The level of severity by which the trauma must qualify will dissuade falsification, as will the high evidentiary burden. The fact that the trauma must be proven, encapsulates the theory that PTSD is the one disorder that can be proven.¹⁸⁴ Thus, the trauma is proven and the presence of the disorder is proven which reduces falsification.

The defense addresses the actus reus component of criminal liability in that it includes a volitional component. The defense borrows from the irresistible impulse defense in that it suggests that a "snapping" or dissociative reaction may follow, and overreacting occurs if the person is over-stressed and hyper-vigilant. An overreaction caused by a mental disease is involuntary, thereby no criminal liability should attach if the defendant could not control his own actions. This applies to all symptoms of PTSD.

The defense also borrows from the diminished capacity. The shortcomings of that defense are solved by prescribing an appropriate punishment. No longer will those veterans acquitted by a diminished capacity defense (where they can find it) be let free into an unsuspecting society without treatment. Furthermore, should the defense be adopted by a majority of the states, more veterans will be able to avail themselves of the diminished capacity defense through the PTSD defense. This solves the problem of the defense being typically unavailable in most states.

The prototype also combines an element of the self-defense option. It provides for an affirmative defense if the veteran suffering from PTSD defends himself using force against what he perceives as an impending attack. This brings in the dissociative state symptom of PTSD and avoids the higher proof burden of the insanity defense.

184. *Id.*

In regards to the concern of uniformity, the states must obviously choose whether to adopt the defense. However, if adopted, it would cancel out the problems with using the other defenses. States will hopefully see this as an opportunity to improve the judicial system by weeding out any falsified PTSD cases, reducing the prison population and addressing the needs of mentally ill persons. As such, states may be more inclined to adopt the defense, thereby increasing its prevalence and improving upon uniformity.

Furthermore, the mandatory treatment provision of the proposed statute decreases the possibility of recidivism and aids the veteran. Prison would not be an available punishment, thereby avoiding an aggravation of the condition. Also, releasing an untreated mentally ill veteran back into society is avoided by removing the possibility of complete acquittal. While the proposed statute is not perfect, it is a step in the right direction.

VII. Conclusion

A new defense tailored to the symptoms of PTSD may solve the problems associated with the current defenses available to veterans with PTSD. It would create uniformity if adopted while encompassing the full range of PTSD symptoms. It would also prevent falsification attempts which would promote judicial integrity. The defense and the concepts implied within it have the potential to solve the PTSD problem and aid those veterans living with the debilitating symptoms of the disorder. A new defense may not be the perfect solution, but the fact remains that the court systems need to be prepared for an avalanche of PTSD cases. In keeping with the message of Mr. Felde, as the countrymen of our veterans, "we owe them at least this much."¹⁸⁵

185. *State v. Felde*, 422 So. 2d 370, 394 (La. 1982).