

# NEUROSCIENCE, PTSD, AND SENTENCING MITIGATION

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## INTRODUCTION

Recent years have seen an increasing acceptance of a link between Post Traumatic Stress Disorder (PTSD) and criminal behavior, both in the general populace and in the criminal justice system. The link appears to be most widely accepted in the case of military combat veterans.<sup>1</sup> Lawyers and scholars have called for use of PTSD related to military service both as a defense to criminal charges and as an argument for reducing the sentences of convicted military veterans.<sup>2</sup> Courts are generally more hospitable to military veteran PTSD claims at sentencing than as a defense at trial.<sup>3</sup>

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<sup>1</sup> Melody Finnemore, *Firestorm on the Horizon: Specialists Say Legal Professionals Ill-Prepared to Help Growing Population of U.S. Military Members with Post-Traumatic Stress Disorder*, 70 OR. ST. B. BULL. 19, 19–20 (2010) (noting that PTSD is poised to become a national epidemic due to wars in Afghanistan and Iraq); 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, 2972 (2009) (stating that PTSD “has historically been available to and used in courts primarily by combat veterans” and given particular weight in the sentencing phase of a capital trial); Christopher Hawthorne, *Bringing Baghdad into the Courtroom: Should Combat Trauma in Veterans Be Part of the Criminal Justice Equation?*, 24 CRIM. JUST. 4, 4, 5–6 (noting that with hundreds of thousands of veterans returning from Iraq and Afghanistan, combat-related PTSD is widespread and we can expect many more veterans in the criminal court system); F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 16 (2010) (“[The] legal system has begun to view combat-related PTSD as an important mitigating factor when assessing culpability, as well as the growing acceptance within the legal system and society of this diagnosis and its impact.”); Amir Efrati, *Judges Consider a New Factor at Sentencing: Military Service*, WALL ST. J., Dec. 31, 2009, at A14; Kim Murphy, *Did War Make Him Do It?*, L.A. TIMES, Nov. 28, 2009, at A1 (reporting that the President of the National Veterans Federation warns that the criminal justice system is facing an epidemic of defendant veterans with PTSD); Debra Cassens Weiss, *Judges Cite Wartime Stress in Granting Leniency to Veterans*, A.B.A. J. (Mar. 17, 2010, 5:30 AM), [http://www.abajournal.com/news/article/judges\\_cite\\_wartime\\_stress\\_in\\_granting\\_leniency\\_to\\_veterans](http://www.abajournal.com/news/article/judges_cite_wartime_stress_in_granting_leniency_to_veterans). *But see* David Brown, *Weak, Murky Links Found Between PTSD and Violence*, WASH. POST, Mar. 31, 2012, at A4. A 2008 Rand Corporation Report found that about 20% of the military veterans who served in Iraq or Afghanistan presently suffer from PTSD. CTR. FOR MIL. HEALTH POL’Y RES., *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* 434–35 (Terri Tanielian & Lisa H. Jaycox eds., 2008); *see* Lizette Alvarez, *Nearly a Fifth of War Veterans Report Mental Disorders, a Private Study Finds*, N.Y. TIMES, Apr. 18, 2008, at A20.

<sup>2</sup> *See, e.g.*, William B. Brown, *Another Emerging “Storm”: Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System*, 5 JUST. POL’Y J. 10 (2008); Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 123–25 (2010) (calling for greater weight to PTSD and defenses such as insanity, lack of mens rea, and self-defense); Timothy P. Hayes, *Post-Traumatic Stress Disorder on Trial*, 190/191 MIL. L. REV. 67, 104 (2006/2007); Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42. One scholar has argued for a per se exclusion of military veterans with PTSD from the death penalty. *See* Giardino, *supra* note 1.

<sup>3</sup> Hawthorne, *supra* note 1, at 12 (“Given the unpopularity of the insanity defense, PTSD . . . generally show[s] up in the sentencing phase of a criminal trial.”); Michael J.

PTSD is different from other mental disorders in one important regard: it traces back to an event that is the cause of the trauma—the “stressor.”<sup>4</sup> In contrast, a defendant looking to raise another mental disorder at trial or at sentencing need only present a diagnosis and, in some cases, that the diagnosis caused the criminal act; she need not identify the source of her disorder (i.e., the stressor). This Article examines the significance of the stressor’s origin when the claim of PTSD is used as a mitigating factor in criminal sentencing. Although courts and legislatures generally have not embraced PTSD claims as a mitigating factor, they have shown greater sympathy to defendants who claim they acquired PTSD in the military or as victims of Battered Woman Syndrome (BWS).<sup>5</sup> This Article questions the basis for favoring PTSD from those stressors, particularly when advances in neuroscience may allow us to test and establish the validity of PTSD claims in other contexts.

Historically, PTSD claims in the penalty phase, along with other claims of mental disorder, were given short shrift by the courts, largely because of concerns that the claims were fraudulent, potentially ubiquitous, or unconnected to the commission of the crime. More recently, however, certain traumatic experiences that can trigger PTSD have gained special treatment in sentencing. In the context of military veterans, two rationales for this special consideration are typically offered: (1) it is a natural extension of our country’s long legal tradition to offer returning veterans leniency in recognition of their service to our country; and (2) PTSD claims are more believable in the military veteran context. States also broadly admit testimony on BWS in

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Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 423 nn.60–63 (noting that most of the Vietnam era criminal cases raising PTSD involved reductions in sentences in state courts); see also Giardino, *supra* note 1, at 2992 (describing trend of sentencing judges to give combat veterans lesser sentences compared to average offenders); Erin J. Gover, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 575 (2008); Melissa Hamilton, *Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 BERKELEY J. CRIM. L. 340, 379 (2011) (describing difficulties veteran defendants face in convincing jury of a PTSD-related insanity defense); Carissa Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1116 (2008) (“[T]he practice of showing leniency to veterans dates back to at least the Civil War.”); Heathcote W. Wales, *Causation in Medicine and Law: The Plight of the Iraq Veterans*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 373, 393–94 (2009) (arguing that PTSD-related insanity defenses are rarely successful); Adam Caine, Comment, *Fallen From Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering from Post Traumatic Stress Disorder*, 78 UMKC L. REV. 215, 224 (2009).

<sup>4</sup> Hawthorne, *supra* note 1, at 8.

<sup>5</sup> This is sometimes referred to as “intimate partner violence” to broaden the scope of the syndrome to include domestic partners as well as both men and women. See *Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/index.html> (last updated Aug. 16, 2012). Because courts more frequently refer to BWS, the impact of the battered syndrome has largely been directed at women, and because the intimate partner violence is not referred to as a syndrome, I use the term BWS for purposes of this article.

criminal cases, although its usage is more complex than in the military veteran PTSD context, with some courts viewing BWS as a medical theory supporting claims of excuse and others viewing it as supporting a contextual self-defense claim or justification.<sup>6</sup>

Consideration of PTSD in these two contexts has gained acceptance among the general populace as well as within the law: we can believe the individual military veteran or battered woman just “snapped” and committed a crime.<sup>7</sup> Thus, although the claim may not rise to the level of a complete defense, some view these defendants as less than fully responsible for their actions. On closer examination, however, the special treatment given to PTSD claims in these contexts may go beyond assumptions about validity. The exceptionalism may instead reflect social judgments or stereotyping.

Advances in neuroscience provide a greater ability to characterize the physiological changes that occur in the brain after experiencing a traumatic or distressing event.<sup>8</sup> While other PTSD claims may not have the same policy imperatives (respect for returning military veterans or compassion toward battered wives), neuroscience advances may allow us to test and establish the validity of a wider range of PTSD claims.

Removing questions of validity may force us to recognize that normative judgments drive special treatment in sentencing with regard to PTSD claims. For example, military veterans and victims of domestic violence are assumed to be “deserving victims” of PTSD, but what about victims of PTSD triggered by imprisonment or participation in gang violence?<sup>9</sup> Should social disapproval of these stressors (i.e., causes of PTSD) allow the criminal justice system to withhold sentencing mitigation of these defendants even though they too suffer from PTSD?

Sentencing mitigation for mental disorders such as PTSD is

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<sup>6</sup> Landy F. Sparr & Roger K. Pitman, *PTSD and the Law*, in HANDBOOK OF PTSD: SCIENCE AND PRACTICE 449, 451 (Matthew J. Friedman et al. eds., 2007) (explaining that evidence of BWS may be used to support a claim of self-defense in some jurisdictions, whereas in others it may be used to support an insanity defense).

<sup>7</sup> See, e.g., John Genovese, *Ahwatukee Woman's Body Found After Confession*, ARIZ. REPUBLIC, Dec. 14, 2011, at B2 (reporting that the defendant told police that he shot his wife “due to the fact that he ‘snapped’ and his ‘military training kicked in’” and that the police indicated in the court record that the defendant appeared to be suffering from PTSD); Carol D. Leonnig, *Lawyer Says Accused Soldier Tells of PTSD-Like Symptoms*, WASH. POST, Mar. 29, 2012, at A7 (discussing a soldier accused of killing seventeen Afghan villagers on fourth combat tour who told lawyer of PTSD symptoms).

<sup>8</sup> Much ink has been spilled on the use of neuroscience to explain criminal behavior, including its use as a defense, see, for example, Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B 1775 (2004) (arguing for deterministic view of behavior); Stephen J. Morse, *Addiction, Genetics, and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165 (2006) (rejecting highly deterministic view of behavior); and as a lie detection device, see, for example, Henry T. Greeley & Judy Iles, *Neuroscience-Based Lie Detection: The Urgent Need for Regulation*, 33 AM. J.L. & MED. 377 (2007). I do not address its use regarding moral agency except to the extent that it affects mitigation in sentencing.

<sup>9</sup> See *infra* notes 240, 270.

sometimes justified because the disorder made it more difficult for the defendant to obey the law. This concept is oftentimes referred to as limited or diminished capacity. But if the justification for mitigation based on a claim of PTSD depends on diminished capacity, then presumably the law should not be concerned with the source of the traumatic event. Instead, it should ask only whether the defendant has manifested the symptoms of PTSD and whether those symptoms have caused criminal behavior. Similarly, if decisions about sentencing are tied only to the prevention of future crime, then the source of the stressor should play no role in the decision whether to mitigate a defendant's sentence. After all, the source of a defendant's PTSD tells us nothing about how likely a defendant is to commit future crimes.

If the cause of the PTSD evokes more sympathy or compassion in some contexts than others, and if that difference is sufficient to convince us to mitigate for some PTSD stressors but not others, then lawmakers and courts should acknowledge that their distinction between PTSD triggers for purposes of sentencing is unrelated to questions of an offender's capacity to choose or to the prevention of future crime. This acknowledgment may either lend legitimacy to the special treatment, recognizing the role that politics and social forces play in sentencing decisions, or force development of other, more neutral limiting principles in sentencing adjudications involving PTSD.

This Article proceeds in four parts. Part I discusses the anxiety disorder of PTSD, highlighting legislative and judicial developments, as well as the federal sentencing guidelines, concerning the use of PTSD in criminal sentencing proceedings involving veterans and battered women. It looks at these two areas against a backdrop in which courts generally hesitate to give weight to PTSD mitigating evidence. In Part II, this Article reviews different theoretical justifications of mitigation use in sentencing and how those justifications apply in the context of PTSD. Part III examines advances in neuroscience research that have begun to shed light on the biological basis of the harm suffered when an individual is exposed to extreme stress and explores whether those advances justify changes in our thinking about PTSD mitigation. In conclusion, the Article suggests that advances in neuroscience research may cause lawmakers and judges to clarify policies on the use of PTSD in sentencing and proposes other limiting principles that should be considered. In our efforts to recognize PTSD as a mitigating factor, we should identify whether we are concerned with the source of the traumatic event (e.g., from one's military or combat service), or simply that the defendant has manifested PTSD symptoms. Addressing this question may lead to a more principled and consistent approach to the use of this evidence in sentencing.

## I. PTSD IN SCIENCE AND IN LAW

## A. PTSD as a Medical Diagnosis

PTSD is an anxiety disorder triggered by the onset of an extreme stressor.<sup>10</sup> Patients with PTSD can suffer from a wide array of symptoms, including intrusive memories, flashbacks, hyper-vigilance, sleep disturbance, avoidance of traumatic stimuli, numbing of emotions, social dysfunction, and physiological hyper-responsivity.<sup>11</sup> These symptoms “are believed to reflect stress-induced changes in neurobiological systems and/or an inadequate adaptation of neurobiological systems to exposure to severe stressors.”<sup>12</sup> In its most severe forms, PTSD can disrupt social and occupational functions.<sup>13</sup>

Although symptoms of what we now call PTSD have been noted for over a hundred years,<sup>14</sup> the *Diagnostic and Statistical Manual of*

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<sup>10</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS—TEXT REVISION 463 (4th rev. ed. 2000) [hereinafter DSM-IV-TR].

<sup>11</sup> V. Francati et al., *Functional Neuroimaging Studies in Posttraumatic Stress Disorder: Review of Current Methods and Findings*, 24 DEPRESSION & ANXIETY 202, 202–18 (2007).

<sup>12</sup> Christine Heim & Charles B. Nemeroff, *Neurobiology of Posttraumatic Stress Disorder*, 1 CNS SPECTRUMS (SUPPLEMENT) 13, 14 (2009). See *infra* Part III.

<sup>13</sup> Robert Ursano et al., *Posttraumatic Stress Disorder and Traumatic Stress: From Bench to Bedside, From War to Disaster*, 1209 ANNALS N.Y. ACAD. SCI. 72, 73 (2010).

<sup>14</sup> See Matthew J. Friedman, Patricia A. Resick, & Terence M. Keane, *PTSD, Twenty-Five Years of Progress and Challenges*, in HANDBOOK OF PTSD, *supra* note 6, at 3, 3–6; Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 4–5 (2011). In an exhaustive survey of the history of PTSD, Professor Deirdre Smith traces its beginnings to the development of the railways in Britain and the United States, and the accompanying accidents, which led to the recognition of “trauma” as a psychiatric injury rather than exclusively a physical wound. Smith, *supra*, at 5. Traumatic syndromes later became associated with exposure to combat. World War I gave giving rise to the term “shell shock.” *Id.* at 10. Later, this term became synonymous with all war neuroses, and it was “based upon an assumption that the symptoms’ primary origin was a neurological injury from a specific event.” *Id.* This was a radical change for the military, which previously had attributed the illness to “cowardice.” *Id.* at 11. Despite this acceptance, the debate continued over whether an individual’s predisposition, rather than external traumatic experiences, was the key causal agent for most war neuroses. *Id.* at 13. Further, the fear of malingering dogged the label as well, and military psychiatrists sought to distinguish true injury from malingering. *Id.* at 12–13. These concerns of origin and validity also were reflected in the larger debate occurring in the psychiatric community as to whether an exogenous event could alter one’s behavior and cause a psychological injury; Sigmund Freud tied certain pathologies to the memory of a traumatic event. *Id.* at 9. Although he later abandoned this theory, his idea of a “‘traumatic blow’ to the ‘protective shell of the ego’ which was then followed by psychological consequences,” was highly significant and made an “indelible impact on contemporary psychological conceptualizations of PTSD.” *Id.* at 12 (quoting J. David Kinzie & Rupert R. Goetz, *A Century of Controversy Surrounding Posttraumatic Stress-Spectrum Syndromes: The Impact on DSM-III and DSM-IV*, 9 J. TRAUMATIC STRESS 159, 162 (1996)). However, research interest in this area waned later in the century, reemerging at the end of the Vietnam War. *Id.* at 15. But even before that war, a consensus had emerged that “terror and fright” as a result of a severe accident or intense experience could cause injuries to the nervous system. *Id.* While these developments occurred, there was a movement in law to seek compensation for emotional damages that allegedly stemmed from defendants’ actions. *Id.* at 16. Courts expressed skepticism about

*Mental Disorders (DSM)*—the bible of standard classification in psychiatry—did not list it as a distinct psychological disorder until its third edition in 1980.<sup>15</sup> Some have suggested that the *DSM*'s recognition was a result of a number of social forces drawing attention to reactions following combat and interpersonal violence.<sup>16</sup> As Deidre Smith describes, the *DSM-III* recognized PTSD “as a result of heavy lobbying by Vietnam veterans’ groups who saw it as a mechanism to legitimate the extreme symptoms of veterans, enabling them to receive care and benefits for combat-related mental illnesses.”<sup>17</sup> At the same time, according to the *Handbook of PTSD*, the women’s movement “converged to bring attention to reactions following interpersonal violence,” and landmark research “resulted in descriptions of child abuse syndrome, the rape trauma syndrome, and the battered woman syndrome” that were “much like those [descriptions of responses from] millions of Vietnam veterans who had returned from war.”<sup>18</sup> As a result of these converging movements, when the *DSM* was revised to include PTSD, “reactions to all traumatic events were pooled into one category.”<sup>19</sup> Clinicians welcomed the introduction of PTSD into the *DSM*,<sup>20</sup> but a number of critics argued that it should not be recognized as a diagnosis, citing problems with validity, reliability, and ubiquity, among others.<sup>21</sup>

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whether emotional distress injuries were real and whether they could be traced to a particular stressor, such as a car accident. *Id.*; see also Betsy J. Grey, *Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims*, in 13 *LAW AND NEUROSCIENCE: CURRENT LEGAL ISSUES* 203 (Michael Freeman ed., 2011).

<sup>15</sup> AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 236–37 (3d ed. 1980) [hereinafter *DSM-III*].

<sup>16</sup> See Friedman et al., *supra* note 14, at 4.

<sup>17</sup> Smith, *supra* note 14, at 3; see also Hamilton, *supra* note 3, at 361 (“[R]ecognition of PTSD as a disorder is widely credited as deriving from the military context.”).

<sup>18</sup> Friedman et al., *supra* note 14, at 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (“For the first time, interest in the effects of trauma did not disappear with the end of a war.”).

<sup>21</sup> Friedman et al. summarize the criticisms of the diagnosis:

[C]ritics of the diagnosis claimed and still claim that (1) people have always had reactions to events, and there is no need to pathologize it; (2) it is not a legitimate syndrome but a construct created by feminist and veteran special interest groups; (3) it serves a litigious rather than a clinical purpose, because the explicit causal relationship between traumatic exposure and PTSD symptoms has opened the door to a multitude of frivolous lawsuits . . . ; (4) verbal reports of both traumatic exposure and PTSD symptoms are unreliable; (5) traumatic memories are not valid; (6) the diagnosis is a European American culture-bound syndrome that has no applicability to posttraumatic reactions within traditional cultures; and (7) it needlessly pathologizes the normal distress experienced by victims of abusive violence.

*Id.* at 4–5; see also *id.* at 11–15; Smith, *supra* note 14, at 53, 60–65 (describing controversy surrounding PTSD’s origins as a social construct). The lead editor of the *DSM-III* has noted that since PTSD’s introduction into the *DSM*, no other diagnosis (except perhaps the Dissociative Identity Disorder) “has generated so much controversy in the field as to the boundaries of the disorder, diagnostic criteria, central assumptions, clinical utility, and

Although controversy remained over “whether the event, as opposed to a person’s predisposition, should be regarded as the primary cause of the symptoms,”<sup>22</sup> acceptance of PTSD as a diagnosis “reflected a break from the way traumatic neurosis and similar conditions were viewed,” in that it assumed that the main cause of the symptoms was the trauma and not due to the patient’s inability to adjust after experiencing the trauma.<sup>23</sup> The diagnosis has become a powerful term in our culture. “Affixing the label of PTSD to an individual suggests that the person was once mentally healthy and, as a result of a distinct and horrific experience, is now psychologically damaged and scarred.”<sup>24</sup>

The most recent version of the *DSM*, the *DSM-IV*, lists a cluster of symptoms for PTSD.<sup>25</sup> The diagnostic criteria include: exposure to a traumatic event; resulting symptoms from each of three symptom clusters (intrusive recollections, avoidant/numbing symptoms, and hyperarousal symptoms); duration of symptoms; and functioning assessment.<sup>26</sup> Listing a cluster of symptoms is typical for psychiatric categories in the *DSM*, but PTSD is unique among the disorders listed because “it has a determination of causation built into the definition.”<sup>27</sup> In other words, it requires the diagnostician to assign causal responsibility for the symptoms to a specific external event or other source as part of the diagnosis under the “A Criterion.”<sup>28</sup>

The A Criterion—the stressor criterion—requires that the triggering event must be

an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or threat to physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat or death or injury experience by a family member or other

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prevalence in various populations.” Robert Spitzer, *Saving PTSD from Itself in DSM-V*, 21 J. ANXIETY DISORDERS 233, 233 (2007); see also Anemona Hartocollis, *10 Years and a Diagnosis Later, 9/11 Demons Haunt Thousands*, N.Y. TIMES, Aug. 10, 2011, at A1, A18 (“[Diagnosis has become] so vague that stressed-out college students and people who watched horror movies could fit the profile . . .”).

<sup>22</sup> Smith, *supra* note 14, at 30.

<sup>23</sup> *Id.* at 30–31. For example, PTSD is considered a disability under the Americans with Disabilities Act, which defines “disability” as a physical or mental impairment that limits one or more major life activities. 42 U.S.C. § 12102(1) (2006); see also *Desmond v. Mukasey*, 530 F.3d 944, 953 (D.C. Cir. 2008); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997), available at <http://www.eeoc.gov/policy/docs/psych.html>. The diagnosis has even been applied to animals. See James Dao, *The Dogs of War, Suffering Like Soldiers*, N.Y. TIMES, Dec. 2, 2011, at A17.

<sup>24</sup> Smith, *supra* note 14, at 2.

<sup>25</sup> DSM-IV-TR, *supra* note 10.

<sup>26</sup> *Id.* at 463–68.

<sup>27</sup> Smith, *supra* note 14, at 2.

<sup>28</sup> The A Criterion is the subsection of the PTSD criteria in which this requirement appears. DSM-IV-TR, *supra* note 10, at 463–68.

close associate.<sup>29</sup>

Examples of triggering events under the A Criterion include rape, abuse, assault, car crashes, as well as combat situations.<sup>30</sup> In addition, the person's response to the stressor must involve "intense fear, helplessness, or horror."<sup>31</sup> This broad definition recognizes the wide spectrum of trauma thresholds and a range of differences regarding an individual's capacity to cope with catastrophic stress. While some individuals exposed to a traumatic event do not develop PTSD, others manifest all of its symptoms, or some combination of them.<sup>32</sup> A significant number do not immediately manifest symptoms of PTSD, instead demonstrating a "progressive escalation of distress or a later emergence of [the] symptoms."<sup>33</sup> The current version of the A Criterion expands prior definitions,<sup>34</sup> which some commentators have claimed has resulted in a substantial increase in diagnoses.<sup>35</sup>

### B. PTSD as a Mitigating Sentencing Factor

Defendants have raised PTSD both as a defense to criminal charges at trial and as a mitigating factor at sentencing.<sup>36</sup> There are three common PTSD claims in the criminal justice system: (1) dissociative

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 463–64.

<sup>31</sup> *Id.* at 463.

<sup>32</sup> *Id.* at 466.

<sup>33</sup> Alexander C. McFarlane, *The Long-Term Cost of Traumatic Stress: Intertwined Physical and Psychological Consequences*, 9 *WORLD PSYCHIATRY* 3, 3 (2010).

<sup>34</sup> The current version of the A Criterion reflects two revisions since its original inclusion in the *DSM-III*. Smith, *supra* note 14, at 32. The most significant changes are (1) broadening the range of events and experiences that qualify for the criterion; and (2) removing an objective element, and introducing a subjective component of what is "distressing." *Id.* at 32–33. A Harvard psychologist argues that the definitions have become too broad and should be made more limited. R.J. McNally, *Can We Fix PTSD in DSM-V?*, 26 *DEPRESSION & ANXIETY* 597 (2009). Proposals to amend the A Criterion are being considered for the *DSM-V*. *G 03 Posttraumatic Stress Disorder*, AM. PSYCHIATRIC ASS'N, <http://www.dsm5.org/proposedrevision/pages/proposedrevision.aspx?rid=165> (last updated May 11, 2012). This proposal restricts "exposure" to the types of events that can serve as a trigger to three: actual or threatened death, serious injury, or sexual violation. *Id.* The military has proposed changing the name of the condition in the *DSM-V* from "disorder" to "injury." Greg Jaffe, *Psychiatrists Seek New Name, and Less Stigma, for PTSD*, WASH. POST, May 6, 2012, at A1.

<sup>35</sup> Smith, *supra* note 14, at 33 & n.273. Deidre Smith notes that Harvard psychiatrist Judith Herman, who played a leading role in trying to apply PTSD diagnosis to women who had experienced sexual assault and domestic violence, had served on the APA committee that had advanced the amendments to the A Criterion. *Id.* (citing JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 426–27 (rev. ed. 1997)).

<sup>36</sup> See, e.g., *Coggin v. State*, 745 P.2d 1182, 1184–85 (Okla. Crim. App. 1987) (describing expert's testimony that on the night of the murder, certain events had "triggered a 'flashback' to Vietnam which put the appellant in a disassociative [sic] state"); *State v. Miller*, No. 48316, 1984 WL 6384, at \*2 (Ohio Ct. App. Dec. 20, 1984) (describing expert's testimony that the victim's attack "caused [defendant] to flash back to Vietnam"); Davidson, *supra* note 3, at 422–23.

reaction; (2) sensation-seeking syndrome; and (3) depression-suicide syndrome.<sup>37</sup> Individuals experiencing dissociation can believe they are in another setting, misconstrue what is occurring around them, or lose consciousness of their behavior or actions.<sup>38</sup> A defendant who misconstrues her surroundings and, for example, assaults another person whom she incorrectly perceives as presenting an immediate threat to her safety, could argue that she is not guilty of a crime because she lacked the appropriate mens rea. PTSD patients with sensation-seeking syndrome seek a high level of danger—including situations that can lead to criminal behavior—to compensate for lack of stimulation or thrill in everyday (civilian) life.<sup>39</sup> PTSD patients with depression-suicide syndrome feel deep depression, despondency, hopelessness, and guilt, which can lead to criminal behavior.<sup>40</sup> Both sensation-seeking syndrome and depression-suicide syndrome arguably affect an individual's capacity to conform her behavior to the law (i.e., make it more difficult to obey the law), and thus suggest less criminal culpability than a typical criminal defendant.

Traditionally, it has been difficult to advance PTSD as either a defense or as a mitigating factor linked to the commission of a crime for several reasons. Initially, there were doubts about the validity of PTSD in general,<sup>41</sup> but it has now gained more recognition in science as well as among the general populace.<sup>42</sup> More problematic is assessing the validity of a PTSD diagnosis in a particular context.<sup>43</sup> Most of the evidence for the diagnosis comes from interviews with the defendant, which leads to concerns about the trustworthiness of a particular diagnosis.<sup>44</sup> Put

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<sup>37</sup> Daniel Burgess et al., *Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 65–68 (2010).

<sup>38</sup> *Id.* at 65.

<sup>39</sup> *Id.* at 66–67.

<sup>40</sup> *Id.* at 68.

<sup>41</sup> See Hafemeister & Stockey, *supra* note 2, at 115 n.164 (describing controversy regarding the validity of PTSD diagnoses, including feigning, overdiagnoses, and misguided sympathy).

<sup>42</sup> Some psychiatrists and psychologists have noted the widespread use of PTSD as “a household word and courtroom plea.” Paul R. McHugh & Glenn Treisman, *PTSD: A Problematic Diagnostic Category*, 21 J. ANXIETY DISORDERS 211, 212 (2007). One psychiatrist suggested that the concept of PTSD has become so ubiquitous that a more accurate term is “Post Something Really Horrible Disorder.” Chris Cantor, *Post-Traumatic Stress Disorder's Future*, 192 BRIT. J. PSYCH. 394 (2008).

<sup>43</sup> See Gover, *supra* note 3, at 568 (“[T]rue difficulty for attorneys in PTSD defense cases is the manner in which the disorder is proven.”).

<sup>44</sup> See Hamilton, *supra* note 3, at 387 (describing repeated criticism of PTSD diagnosis as subjective and reliant on the individual's own account); Nidiffer & Leach, *supra* note 1, at 13 (“At present, PTSD is primarily diagnosed by self-report and interview measures.”); Smith, *supra* note 14, at 55 (“[C]oncerns about the heavy reliance during the diagnostic process on subjective reporting by the patient of both the stressor event and the resulting reactions . . . .”); see also *People v. Lockett*, 121 Misc. 2d 549 (N.Y. Crim. Ct. 1983) (involving a defendant who claimed he had PTSD as a result of service in Vietnam and several psychiatrists agreed, but subsequent evidence revealed he had never served in Vietnam); SAMUEL JAN BRAKEL & ALEXANDER D. BROOKS, *LAW AND PSYCHIATRY IN THE CRIMINAL JUSTICE SYSTEM* 118–23 (Fred

simply, there are concerns that an individual who raises a claim of PTSD after committing a crime might be faking symptoms in order to avoid criminal punishment. But even if concerns about malingering in particular cases and the validity of PTSD as a legitimate diagnosis can be overcome, it is difficult to establish a causal connection between the disorder and the alleged criminal act because a defendant's claim that he suffered a PTSD dissociative flashback while committing a crime can only be demonstrated by the defendant's own testimony.<sup>45</sup> Further, some studies have suggested a potential for "confirmatory" bias when a clinician is aware of an individual's exposure to a stressor.<sup>46</sup> In other words, if, for example, an expert knows that a particular defendant served in combat while in the military, the expert is more likely to find symptoms and diagnose that defendant with PTSD.

Acceptance of PTSD as a mitigating sentencing factor is inconsistent at best. This is primarily because courts treat PTSD like other mental disorders,<sup>47</sup> which frequently are met with judicial skepticism. In general, courts are skeptical about whether mental and emotional conditions actually exist because often there is no physical manifestation of the condition.<sup>48</sup> This judicial hesitation or skepticism

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B. Rothman Publ. 2001) (describing the feigning phenomenon associated with PTSD); Ralph Slovenko, *The Watering Down of PTSD in Criminal Law*, 32 J. PSYCHIATRY & L. 411, 415 (2004) (explaining that symptoms of PTSD are easily falsified); Constantina Aprilakis, Note, *The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD*, 3 GEO. J.L. & PUB. POL'Y 541, 561 (2005) ("[The jury's] disbelief is no doubt compounded when a defendant mounts a defense based on PTSD, since no one but the defendant himself is able to recount and describe the symptoms and behavior that resulted from PTSD and led to the criminal conduct.").

<sup>45</sup> *Martinez v. State*, 663 S.E.2d 675, 678–79 (Ga. 2008) (explaining that PTSD did not cause defendant's repeated stabbing of victim or conspiracy to conceal murder); *State v. Simonson*, 669 P.2d 1092, 1094 (N.M. 1983) (explaining that although defendant argued that his PTSD caused him to commit murder, the jury rejected his claim and a witness testified that the defendant had bragged that "he could shoot anyone he wanted because everyone would think he was crazy due to his being previously stationed in Vietnam"); Burgess et al., *supra* note 37, at 75. One jury explained that it believed the defendant suffered from PTSD, but that the condition did not cause him to commit murder:

We, the Jury, recognize the contribution of our Viet Nam veterans and those who lost their lives in Viet Nam. We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans . . . . Through long and careful deliberation, through exposure to all the evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thompkins' life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans.

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

<sup>46</sup> Marilyn L. Bowman, *Problems Inherent to the Diagnosis of Posttraumatic Stress Disorder*, in *PSYCHOLOGICAL INJURIES AT TRIAL* 820, 820–39 (Izabela Z. Schultz & Douglas O. Brady eds., 2003).

<sup>47</sup> See, e.g., *United States v. Kim*, 313 F. Supp. 2d 295, 297 (S.D.N.Y. 2004); Caine, *supra* note 3, at 224 ("[I]f a defendant chooses to invoke PTSD as part of mitigation or trial strategy, it functions like most other mental illness defenses.").

<sup>48</sup> See *United States v. Prochner*, 417 F.3d 54 (1st Cir. 2005) (denying a defendant's request for downward departure due to skepticism that he suffered from a mental condition sufficiently

may be expressed in various forms, that the claim is too ubiquitous to be useful, that it easily lends itself to malingering, or that there is an insufficient nexus between the mental disorder and the commission of the crime.

In addition to the skepticism of individual judges, there are sometimes structural barriers to reducing sentences based on PTSD claims. For example, under the United States Sentencing Guidelines, courts traditionally have been discouraged from imposing lower than average sentences because of the offender's mental or emotional condition.<sup>49</sup> As a result, federal courts frequently have found that mental or emotional disorders do not justify mitigation of a sentence.<sup>50</sup> To impose a below-average sentence a court must find that the offender's mental condition is extraordinary.<sup>51</sup>

Federal courts have been inconsistent in determining which mental and emotional illnesses are sufficiently "extraordinary" to justify a below-average sentence. This is attributable to several factors. Often a defendant will bring to a sentencing hearing a laundry list of mental and emotional conditions, hoping that one will be found to apply to mitigation.<sup>52</sup> The diagnoses which courts find worthy of downward departure range in severity from narcissism to PTSD and borderline retardation.<sup>53</sup> The range of conditions viewed as "un-extraordinary" and

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serious to warrant mitigation). Similar judicial skepticism exists in the civil tort area for emotional distress claims. Grey, *supra* note 14, at 207-10.

<sup>49</sup> Up until 2010, the federal sentencing guidelines stated that "[m]ental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted." U.S. SENTENCING COMM'N, 2009 FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.3 (2009) [hereinafter 2009 U.S.S.G.], available at [http://www.ussc.gov/Guidelines/2009\\_guidelines/Manual/Chap5.pdf](http://www.ussc.gov/Guidelines/2009_guidelines/Manual/Chap5.pdf) ("Mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted . . ."). The Sentencing Guidelines also limit the use of PTSD or any other mental defect as a consideration in awarding downward departure in violent crime. *Id.* § 5K2.13; see also *United States v. Keller*, 947 F.2d 739, 741 (5th Cir. 1991); *Evans v. United States*, Nos. A-10-CA-518-LY, A-08-CR-467(1)-LY, 2011 WL 2532680, at \*4 (W.D. Tex. June 24, 2011) (citing *Keller*, 947 F.2d at 741). The Sentencing Guidelines were amended in 2010 to take a more neutral stance, but it is unclear how the courts will interpret it. See Hawthorne, *supra* note 1, at 12 (describing how Federal Sentencing Guidelines discouraged downward departures in cases raising PTSD).

<sup>50</sup> Brian L. Porto, Annotation, *Construction and Application of U.S.S.G. § 5H1.3, Concerning Mental and Emotional Conditions as Ground for Sentencing Departure*, 34 A.L.R. FED. 457 (2009).

<sup>51</sup> See *United States v. Brady*, 417 F.3d 326, 333 (2d Cir. 2005); *United States v. Maldonado-Montalvo*, 356 F.3d 65, 74 (1st Cir. 2003); U.S. SENTENCING COMM'N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.3 (2011) [hereinafter 2011 U.S.S.G.], available at [http://www.ussc.gov/Guidelines/2011\\_Guidelines/Manual\\_PDF/Chapter\\_5.pdf](http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_PDF/Chapter_5.pdf) (explaining that mental and emotional conditions may be relevant if "present to an unusual degree" and distinguished from the typical case).

<sup>52</sup> Further, when presented with such a laundry list, courts rarely state which mental condition they are relying upon when they decide to mitigate. See *United States v. Bennett*, 9 F. Supp. 2d 513, 526-27 (E.D. Pa. 1998) (although specific type of mental disorder was "debatable," offender's diminished mental health warranted mitigation).

<sup>53</sup> See, e.g., *United States v. Walter*, 256 F.3d 891 (9th Cir. 2001) (extraordinary child abuse); *United States v. Garza-Juarez*, 992 F.2d 896 (9th Cir. 1993) (panic disorder with

not worthy of mitigation is equally as varied.<sup>54</sup> Adding to the problem, frequently one court will find that a specific mental condition, such as severe depression, is sufficient to mitigate a sentence,<sup>55</sup> while another court will deem the same condition too typical to be “extraordinary” and therefore will decline to consider it a justification for a below-average sentence.<sup>56</sup>

These inconsistent results may be explained by the fact that courts look to many factors in determining whether to accept mental disorders as mitigating factors. For example, one federal court stated, in order to grant mitigation due to mental conditions, it “must consider whether the offense was violent or non-violent, whether the [d]efendant suffered a significantly reduced mental capacity, whether the defendant’s mental incapacity contributed to the commission of the offense, and whether the defendant’s criminal record indicates a need for imprisonment to protect public safety.”<sup>57</sup> Even when a court decides that a particular mental disorder qualifies for diminished capacity, it will also look for evidence that the defendant was suffering from diminished capacity at the time of the commission of the crime.<sup>58</sup> For example, the defendant

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agoraphobia); *United States v. Rodriguez*, 214 F. Supp. 2d 1239 (M.D. Ala. 2002) (severe depression caused from rape by jail guard); *Bennett*, 9 F. Supp. 2d at 513 (personality disorders including narcissism, hypomania, and obsessive-compulsive personality); *United States v. Woodworth*, 5 F. Supp. 2d 644 (N.D. Ind. 1998) (inability to process information or reason due to multiple mental conditions); *United States v. Cotto*, 793 F. Supp. 64 (E.D.N.Y. 1992) (borderline retardation, vulnerability and incompetence).

<sup>54</sup> See, e.g., *United States v. Godin*, 489 F.3d 431 (1st Cir. 2007), *vacated*, 522 F.3d 133 (1st Cir. 2008) (general mental illness, including depression, suicidal tendencies, and schizoaffective disorder); *United States v. Jones*, 432 F.3d 34 (1st Cir. 2005) (mild retardation with a generally low I.Q. and problems with attention and executive functioning); *United States v. Derbes*, 369 F.3d 579 (1st Cir. 2004) (need for therapy and medication); *United States v. Cotto*, 347 F.3d 441 (2d Cir. 2003) (generalized fear derived from violent past and being present at a murder); *United States v. Rivera*, 192 F.3d 81 (2d Cir. 1999) (violent and tumultuous childhood); *United States v. Barton*, 76 F.3d 499 (2d Cir. 1996) (untreated depression and challenges perceiving oneself as an adult in an adult world); *United States v. Desormeaux*, 952 F.2d 182 (8th Cir. 1991) (spousal abuse and low self-esteem); *United States v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) (explaining that if suicidal tendencies were considered a mitigating condition, the claim would become a “boilerplate” defense argument); *United States v. Stevenson*, 325 F. Supp. 2d 543, 549–50 (E.D. Pa. 2004) (explaining that due to regularity of childhood abuse and neglect occurring in criminals, the condition could not be deemed extraordinary).

<sup>55</sup> See *Maldonado-Montalvo*, 356 F.3d at 65.

<sup>56</sup> See *Barton*, 76 F.3d 499 at 502. For example, in *United States v. Bennett*, the court found the obsessive-compulsive disorder, among other disorders, significantly extraordinary to be considered in downward mitigation. 9 F. Supp. 2d at 526–27 (E.D. Pa. 1998) (involving a defendant found guilty of bank fraud, mail fraud, wire fraud, filing false tax returns, and money laundering). On the other hand, in *United States v. Artim*, the court found the defendant’s mental condition, which also included obsessive-compulsive personality disorder, was not extraordinary and did not justify mitigation. 944 F. Supp. at 367 (D.N.J. 1996) (involving a defendant who pled guilty to receiving child pornography).

<sup>57</sup> *United States v. Watson*, 385 F. Supp. 2d 534, 538 (E.D. Pa. 2005), *aff’d*, 482 F.3d 269 (3d Cir. 2007).

<sup>58</sup> See *Evans v. United States*, Nos. A-10-CA-518-LY, (A-08-CR-467(1)-LY), 2011 WL 2532680, at \*4 (W.D. Tex. June 24, 2011) (“[Defendant] does not argue that she committed the crimes because of her PTSD.”); *Godin*, 489 F.3d at 437 (explaining that although the defendant

in *United States v. Johnson*,<sup>59</sup> who had been convicted of a drug offense, claimed that his sentence should be reduced because of PTSD resulting from the murder of his brother twenty years earlier.<sup>60</sup> The trial court denied the sentence reduction because there was no “direct connection” between Johnson’s PTSD and the offense, and the sentence was upheld on appeal.<sup>61</sup>

Some courts hesitate to consider claims of mental disorders in sentencing because of the ubiquity of such claims.<sup>62</sup> As one trial judge explained in sentencing a mother who claimed, among other things, that she had thrown two of her children down an airshaft because of PTSD:

[T]here has been nothing that has come before me that would cause me to think that, other than the sympathy that naturally occurs as a result of the victimization [by your father that] you went through, that makes this situation so unique . . . that would cause me to give you a probationary sentence when you’re charged with not one, but two second degree crimes.<sup>63</sup>

Concerns about fraud and malingering also surround claims of mental disorders and PTSD. One lawyer, whose client subsequently raised a claim of ineffective assistance of counsel for failure to present PTSD evidence at sentencing, testified that he believed that “most juries felt that PTSD was nothing more than a lawyer’s trick. . . . [and] a jury would only accept PTSD as legitimate if the client had seen active military service.”<sup>64</sup> (Kentucky is one of several states that allow juries rather than judges to impose criminal sentences in non-capital cases.<sup>65</sup>) In this case, the defendant claimed he suffered from PTSD not because of military service, but rather from being shot a year before he committed the crime.<sup>66</sup> In the lawyer’s opinion, unsuccessfully

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suffered from depression, suicidal tendencies and schizo-affective disorder, there was no evidence that defendant suffered from diminished capacity at time of the burglary, and so she was not entitled to downward departure).

<sup>59</sup> 49 F.3d 766 (D.C. Cir. 1995).

<sup>60</sup> *Id.* at 767.

<sup>61</sup> *Id.* at 768.

<sup>62</sup> See, e.g., *United States v. Brady*, 417 F.3d 326, 333–34 (2d Cir. 2005) (“[W]e adopted these high standards in *Rivera* not because—as the government inappropriately suggests—victims of child abuse might exaggerate or stretch the truth, but rather because it is the sad fact that so many defendants have unfortunate pasts and we cannot apply a disfavored departure to many or most defendants.”).

<sup>63</sup> *State v. L.V.*, 979 A.2d 821, 831 (N.J. Super. Ct. App. Div. 2009) (quoting the sentencing judge and reversing on appeal for failure to properly consider duress as mitigating factor).

<sup>64</sup> *Dixon v. Commonwealth*, No. 2007-CA-002438-MR, 2009 WL 414013, at \*3 (Ky. Ct. App. Feb. 20, 2009).

<sup>65</sup> See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314, 314 n.16 (2003) (identifying the six states that currently employ jury sentencing in non-capital cases).

<sup>66</sup> The Court of Appeals struck the ineffective assistance of counsel claim, noting among other things that the defendant had been diagnosed with “psychosis not otherwise specified,” not PTSD. *Dixon*, 2009 WL 414013, at \*6; cf. *People v. Lockett*, 468 N.Y.S.2d 802 (Crim. Ct. 1983) (involving a defendant who fraudulently claimed he suffered from PTSD caused by his

attempting to claim PTSD as a basis for mitigation in sentencing for a violent crime ran the risk of receiving a maximum sentence.<sup>67</sup>

In short, with respect to mental and emotional conditions in general and PTSD in particular, courts vary greatly in determining whether these conditions justify sentencing reductions. However, the American criminal justice system increasingly has recognized that, in certain settings, an offender's exposure to extreme trauma that results in PTSD is favored as a mitigating factor. Two stressor contexts that give rise to popularly viewed sympathetic defendants are discussed below: military service and BWS. Those two stressors are discussed in turn.

### 1. PTSD and Military Veterans

Showing leniency to war veterans in sentencing is well accepted on the state and federal levels.<sup>68</sup> In several states, this policy is either made explicit by statute or interpreted into statutory catch-all provisions through court decisions.<sup>69</sup> Acceptance of a link between military service and PTSD has resulted in some states giving special recognition beyond general leniency to military veterans claiming PTSD. Two states have enacted statutes singling out military service and PTSD for consideration in sentencing, and state court decisions recognize PTSD as a mitigating factor when the offender is a military veteran. Federal court decisions recognize this link as well, and recent changes to federal sentencing law have eased the way for military veterans to assert PTSD as a mitigating factor.

Both Minnesota and California have enacted statutes explicitly linking mental illness and military service as a mitigating sentencing factor. These state statutes focus on providing treatment as an alternative to prison time to the veteran suffering from mental illness.

California was the first state to single out by statute convicted veterans with PTSD for special treatment in sentencing. The statute gives judges the discretion to order treatment instead of jail for veterans who have been convicted of a crime. Under its penal code, California statutorily requires a presentencing investigation into a veteran's mental

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military service, but he had never served in Vietnam).

<sup>67</sup> *Dixon*, 2009 WL 414013, at \*3.

<sup>68</sup> Giardino, *supra* note 1, at 2992 (describing trend of sentencing judges to give combat veterans lesser sentences compared to average offenders); Hessick, *supra* note 3, at 1116 (“[T]he practice of showing leniency to veterans dates back to at least the Civil War.”).

<sup>69</sup> N.C. GEN. STAT. § 15A-1340.16(e)(14) (2011) (requiring mitigation of a defendant's sentence where “[t]he defendant has been honorably discharged from the United States armed services”); *State v. Overton*, No. 02C019510-CC00303, 1997 WL 287665, at \*3 (Tenn. Crim. App. June 2, 1997) (“With respect to [a defendant's] military service, honorable military service may always be considered as a mitigating factor consistent with the purposes of the 1989 Sentencing Act.”); *see also State v. Arterberry*, 449 So. 2d 1179, 1181 (La. Ct. App. 1984) (explaining that “good military history” tends to mitigate offenses).

health, explicitly including PTSD in the investigation.<sup>70</sup> Such an investigation is required whenever an offender claims that PTSD played a role in the crime. Under this statute an offender must demonstrate that he suffers from PTSD caused by military service, and that the crime was the result of the PTSD. If these elements are met, then the court has the discretion to order treatment instead of incarceration if the defendant is otherwise eligible for probation.<sup>71</sup>

Establishing a statutory nexus between the PTSD and the military service can be critical. In *People v. Ferguson*,<sup>72</sup> for example, the defendant, a combat veteran, argued that the trial court failed to adequately consider sentencing under the statutory alternative option when he was convicted of second-degree murder for causing an accident while driving under the influence of alcohol. The trial court found that the evidence did not demonstrate that the offender's PTSD was a result of having served in combat (as opposed to the car crash itself), and the decision was upheld on appeal.<sup>73</sup>

Minnesota was the second state to create a special statutory provision for convicted veterans with PTSD, joining California in 2008.<sup>74</sup> By statute, Minnesota requires a presentence investigation whenever any defendant is convicted of a felony, and it gives courts discretion to order an investigation for misdemeanors.<sup>75</sup> Regardless of the crime, the sentencing court must inquire into whether the defendant is a military veteran; if it so finds, the sentencing court may require an investigation to consider the defendant's mental health and alternative treatment options.<sup>76</sup> The statute thus gives courts the discretion to order

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<sup>70</sup> The relevant statute provides as follows:

In the case of any person convicted of a criminal offense who could otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service.

CAL. PENAL CODE § 1170.9(a) (West 2011). For a description of the history of this statute, see Caine, *supra* note 3, at 225–30.

<sup>71</sup> PENAL § 1170.9(b).

<sup>72</sup> 124 Cal. Rptr. 3d 182 (Ct. App. 2011).

<sup>73</sup> *Id.* at 199–200 (holding that the trial court did not abuse its discretion in determining that offender was ineligible for probation or alternative treatment sentencing).

<sup>74</sup> See Caine, *supra* note 3, at 230–31 (describing how the Minnesota legislature modeled its legislation after California's).

<sup>75</sup> MINN. STAT. ANN. § 609.115(1)(a) (West 2011).

<sup>76</sup> The relevant statute provides as follows:

(a) When a defendant appears in court and is convicted of a crime, the court shall inquire whether the defendant is currently serving in or is a veteran of the armed forces of the United States.

(b) If the defendant is currently serving in the military or is a veteran and has been

treatment in lieu of prison time if the defendant is a military veteran and suffers from mental illness. Unlike California's statute, it does not require that the mental illness be related to the veteran defendant's crime.

Recent changes in federal law have also made veterans' PTSD claims more likely to succeed. In particular, a recent amendment to the Federal Sentencing Guidelines has made federal sentencing more hospitable to PTSD claims by military veterans. The amendment recognized military service as an appropriate mitigating factor:

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.<sup>77</sup>

This new amendment distinguishes military service from "civic, charitable, or public service . . . and similar prior good works," which are "not ordinarily relevant" in determining whether a departure is warranted.<sup>78</sup>

Particularly significant is the inclusion of the phrase "in combination with other offender characteristics" in the new amendment. That is because another section of the Federal Sentencing Guidelines states:

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.<sup>79</sup>

Although the new provision in the Federal Sentencing Guidelines has not yet been widely applied,<sup>80</sup> when viewed together, the new

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diagnosed as having a mental illness by a qualified psychiatrist or clinical psychologist or physician, the court may:

- (1) order that the officer preparing the report . . . [provide] the court with information regarding treatment options available to the defendant . . . ; and
- (2) consider the treatment recommendations . . . together with the treatment options available to the defendant in imposing sentence.

*Id.* § 609.115(10) (2011).

<sup>77</sup> 2011 U.S.S.G., *supra* note 51, § 5H1.11.

<sup>78</sup> *Id.* This is a change from the prior guidelines, which stated that military service is not ordinarily relevant in departing from the guidelines. U.S. SENTENCING COMM'N, 2007 FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.11 (2007).

<sup>79</sup> 2011 U.S.S.G., *supra* note 51, § 5H1.3.

<sup>80</sup> Only a few reported cases have interpreted the new section. *See, e.g.*, United States v. Benjamin, Criminal No. DKC 96-0217, 2011 WL 3821534, at \*3-4 (D. Md. Aug. 26, 2011) (explaining that the amendments to sections 5H1.3 and 5H1.11 provided the court with discretion to consider these factors in determining whether a departure in sentencing is warranted); United States v. Garcia, No. 4:08CR000123-01JMM, 2010 WL 5279941, at \*1 (E.D. Ark. Dec. 17, 2010) (explaining that the amended sections allow for downward departures in

amendment regarding military service and the provision on mental and emotional conditions create a strong argument that veterans suffering from PTSD ought to receive sentencing reductions.<sup>81</sup> Notably, neither provision appears to require that the PTSD directly precipitated the circumstances of the crime.

Even in the absence of specific direction from statutes or sentencing guidelines, numerous federal and state decisions recognize PTSD as a mitigating factor when the offender is a military veteran.<sup>82</sup> In the capital sentencing context, for example, the U.S. Supreme Court has singled out the importance of military service and PTSD as a mitigating factor. In *Porter v. McCollum*, the Court held that the lawyer's failure to present evidence of PTSD connected to military service during the sentencing phase in a capital case constituted ineffective assistance of counsel.<sup>83</sup> The defendant, a decorated Korean War veteran, was convicted in Florida of murdering his former girlfriend. During the penalty phase, his counsel failed to provide any mitigation evidence of his active participation in two major battles.<sup>84</sup> On federal habeas corpus review, the Supreme Court conflated the reasons this omission was ineffective assistance. It stressed the importance of recognizing Porter's service to his country: "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did."<sup>85</sup> At the same time, the Court specifically linked the concept of PTSD to military service: "[T]he relevance of . . . combat experience . . . [is that] the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter."<sup>86</sup> Thus, the Supreme Court both emphasized the importance of raising the defendant's military service as part of a general policy to show leniency to war veterans and recognized the

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sentencing, but they do not alter the sentencing range).

<sup>81</sup> See Shein, *supra* note 2, at 49 (discussing how the 2010 amendments to the Federal Sentencing Guidelines, which changed departure areas once labeled "not ordinarily relevant" to factors that are "relevant" (including military service and mental and emotional condition), will make it "easier to request traditional departures based on these factors").

<sup>82</sup> See, e.g., *Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam); *United States v. Loranger*, 319 F. App'x 430 (7th Cir. 2009) (vacating sentence and remanding for resentencing when the trial court failed to consider evidence of defendant's PTSD stemming from his tour of Vietnam); *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008) (holding that state court improperly weighed the aggravating factors against mitigating factors when it failed to consider evidence of defendant's service-induced PTSD); *United States v. Gregg*, 451 F.3d 930 (8th Cir. 2006) ("[A]t the time of the altercation, [defendant] was not of a mental state which would warrant the application of a diminished mental capacity departure."); *People v. Saldivar*, 497 N.E.2d 1138 (Ill. 1986) (finding that the circuit court erred in sentencing a Vietnam veteran with PTSD to a maximum seven year term); *State v. Denni*, No. 33153-5-II, 2006 WL 1321294 (Wash. Ct. App. May 16, 2006) (involving use of PTSD as a mitigating factor when an Iraq war veteran was charged with murder of his wife).

<sup>83</sup> 130 S. Ct. at 448.

<sup>84</sup> *Id.* at 449-50.

<sup>85</sup> *Id.* at 455.

<sup>86</sup> *Id.*

possibility that the psychological trauma stemming from that experience could have diminished the offender's capacity to form the requisite intent in committing the crime.<sup>87</sup>

Similarly, federal judges in non-capital cases have emphasized the importance of PTSD and military service as potential mitigating factors.<sup>88</sup> In *United States v. Brownfield*, for example, a military veteran pled guilty to the crime of accepting a bribe as a public official.<sup>89</sup> The judge sentenced the defendant to five years of probation and ordered psychiatric evaluation for a suspected condition of PTSD, even though both the prosecutor and defense counsel originally recommended one year in prison.<sup>90</sup> The judge explained that "this case involves issues the Sentencing Guidelines do not address regarding the criminal justice system's treatment of returning veterans who have served in Afghanistan and Iraq."<sup>91</sup> He explained his decision to place Brownfield on probation instead of prison: "It would be a grave injustice to turn a blind eye to the potential effects of multiple deployments to war zones on Brownfield's subsequent behavior. A lengthy sentence of probation requiring effective treatment as determined by qualified experts ensures that these factors are adequately addressed."<sup>92</sup>

The same special consideration of PTSD evidence in sentencing of military veterans can be found in state cases as well. For example, in *People v. Lucero*,<sup>93</sup> the defendant was sentenced to death after being convicted of first-degree murder and arson. During the penalty phase, Lucero offered the testimony of a PTSD specialist that Lucero had a history of PTSD and that the murders were probably caused by the illness.<sup>94</sup> Because the specialist had not specifically discussed the circumstances of the murders with the defendant and could not say with certainty that the PTSD precipitated the killings, the trial court did not admit the testimony.<sup>95</sup> On appeal, the California Supreme Court held

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<sup>87</sup> Cf. *Bell v. Cone*, 535 U.S. 685, 712–13 (2002) (Stevens, J. dissenting) ("[T]here is a vast difference between insanity—which the defense utterly failed to prove—and the possible mitigating effect of drug addiction incurred as a result of honorable service in the military. By not emphasizing this distinction, [the trial attorney] made it far less likely that the jury would treat either the trauma resulting from [the defender's] tour of duty in Vietnam or other traumatic events in his life as mitigating.").

<sup>88</sup> See, e.g., *United States v. Howard*, No. 8:08CR387, 2010 WL 749782, at \*2, \*9 (D. Neb. Mar. 1, 2010); *United States v. Oldani*, No. 3:09-00010, 2009 WL 1770116, at \*6 (S.D. W. Va. June 16, 2009).

<sup>89</sup> *United States v. Brownfield*, No. 08-cr-00452-JLK, slip op. at 28 (D. Colo. Dec. 18, 2008), available at <http://graphics8.nytimes.com/packages/pdf/us/20100303brownfield-opinion-order.pdf>.

<sup>90</sup> *Id.* at 28.

<sup>91</sup> *Id.* at 1.

<sup>92</sup> *Id.* at 27–28.

<sup>93</sup> *People v. Lucero*, 750 P.2d 1342 (Cal. 1988). *Lucero* was decided before the current version of CAL. PENAL CODE § 1170.9 (West 2011) was enacted. See *supra* note 70 for the relevant provision.

<sup>94</sup> *Lucero*, 750 P.2d at 1352–53.

<sup>95</sup> *Id.* at 1355–56.

that the failure to admit the evidence was reversible error. Had Lucero been allowed to demonstrate his “traumatic military experience,” a jury could have found it to be a substantial mitigating factor.<sup>96</sup> Further, according to the court, it did not matter whether the PTSD was related to commission of the crime: “[Lucero] was entitled to have the jury consider his psychological disorder as a factor in mitigation whether or not the mental condition caused him to commit the crimes.”<sup>97</sup>

One final aspect of the increasing acceptance of mitigation for veterans who suffer from PTSD can be found in the recent popularity of veterans’ courts. These courts are designed to keep veterans with mental health issues, including PTSD, who are charged with criminal behavior out of the traditional justice system and place them into treatment programs instead.<sup>98</sup> The first veterans’ court was created in Buffalo in 2008<sup>99</sup> and over eighty have been created since then.<sup>100</sup>

## 2. PTSD and Battered Woman Syndrome

Battered Woman Syndrome<sup>101</sup> is considered by many to be a form of PTSD.<sup>102</sup> BWS is the outgrowth of work by Lenore Walker, who

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<sup>96</sup> *Id.* at 1357.

<sup>97</sup> *Id.* at 1356. See NAT’L VETERANS FOUND., *A Groundbreaking Court Decision for Vets With PTSD*, REUTERS, Oct. 28, 2009, <http://www.reuters.com/article/2009/10/28/idUS147712+28-Oct-2009+PRN20091028> (describing Iraq war veteran tried for murder found guilty by reason of insanity due to PTSD acquired while in combat and noteworthy because “a Veteran’s PTSD was successfully considered to mitigate the circumstances of a crime”).

<sup>98</sup> U.S. Dept. of Veteran’s Affairs, *Keeping Veterans with PTSD Out of the Justice System*, NAT’L CTR. FOR PTSD (Aug. 17, 2010), <http://www.ptsd.va.gov/public/pages/keeping-PTSD-vets-out-JS.asp>. See generally Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563 (2010).

<sup>99</sup> See Caine, *supra* note 3, at 233–36 (describing the development of Buffalo’s veterans court).

<sup>100</sup> William H. McMichael, *The Battle on the Home Front*, 97 A.B.A. J., 42, 44 (2011); see also Giardino, *supra* note 1, at 2990 (describing veterans programs in California, Minnesota, and Connecticut). Although these courts share the common purpose of offering an alternative for veterans who have committed crimes, they differ with regard to the standards for admission, including whether they must have a diagnosis of substance abuse or mental illness, such as PTSD, whether individuals charged with violent crimes will be admitted, and whether an individual must be a combat veteran. McMichael, *supra*, at 46–47. These differences reflect the evolving nature of the concept of the courts. See *id.* at 47; Giardino, *supra* note 1, at 2990 (describing a “trend” to treat combat veterans differently when they commit programs through veterans’ courts and diversion programs).

<sup>101</sup> LENORE E. A. WALKER ET AL., *What is the Battered Woman Syndrome?*, in THE BATTERED WOMAN SYNDROME 41–42 (3d ed. 2009). Lenore Walker argues that BWS has not been replaced with a more gender-neutral name, such as Battered Person Syndrome, because not enough empirical data exists for such a shift. *Id.* at 42. Furthermore, Walker claims that even when a man is the victim of domestic violence, the trauma is not the same as when the victim is a woman. *Id.*

<sup>102</sup> See *id.* at 42–43; see also Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1198 (1993); Hafemeister & Stockey, *supra* note 2, at 130 (“[R]esearchers are becoming

initially conducted extensive research of 400 battered women and caseworkers and extrapolated from the data she collected to construct the syndrome.<sup>103</sup> Walker described BWS as a subcategory of PTSD.<sup>104</sup> “BWS, as it was originally conceived, consist[s] of the pattern of the signs and symptoms that . . . occur after a woman has been physically, sexually, and/or psychologically abused in an intimate relationship . . . .”<sup>105</sup> According to Walker, the criteria for BWS align with those of PTSD under the *DSM-IV-TR*: the victims of BWS experience intrusive recollections of traumatic events, hyperarousal, high levels of anxiety, avoidance behavior, and emotional numbing.<sup>106</sup> Walker compared the PTSD effects of BWS to that experienced by military soldiers and abused children, who are also subject to “repeated traumatic events.”<sup>107</sup> She used empirical evidence to demonstrate that “intimate partner violence is experienced as a trauma and is predictive of the woman developing PTSD following the traumatic events.”<sup>108</sup>

Lawyers have used BWS literature in defending battered women from criminal charges,<sup>109</sup> but scholarship is sharply divided on the role of BWS in criminal law.<sup>110</sup> One line of thinking presents BWS as a psychological disorder, in particular PTSD, leading to claims of excuse, insanity, or diminished mental capacity.<sup>111</sup> Other scholars, sensitive to stigmatizing the syndrome as a mental illness, have viewed it as reasonable response to an abnormal situation, leading to a defense of justification, or as a form of self-defense or duress.<sup>112</sup> They argue that viewing BWS as a psychological disorder undermines the legitimacy of the battered woman’s actions, which could be considered reasonable

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increasingly aware of the development of PTSD in [battered] women . . . .”); Jozsef Meszaros, *Achieving Peace of Mind: The Benefits of Neurobiological Evidence for Battered Women Defendants*, 23 YALE J.L. & FEMINISM 117, 138, 138 n.111 (2011) (listing states that have stated that BWS is form of PTSD); Sparr & Pitman, *supra* note 6, at 451 (explaining that BWS is novel use of PTSD as a criminal defense); Krista L. Duncan, Note, “Lies, Damned Lies, and Statistics?” *Psychological Syndrome Evidence in the Courtroom After Daubert*, 71 IND. L.J. 753, 765 (1996).

<sup>103</sup> WALKER, *supra* note 101, at 41.

<sup>104</sup> *Id.* at 42, 414.

<sup>105</sup> *Id.* at 42.

<sup>106</sup> *Id.* at 42–43.

<sup>107</sup> *Id.* at 43.

<sup>108</sup> *Id.* at 59. Courts distinguish between using BWS as a defense when the act occurred during an abusive or confrontational situation, and when it occurred during a non-confrontational setting, such as when the batterer was asleep. *Compare* State v. Hundley, 693 P.2d 475, 480 (Kan. 1985) (holding that battered woman who killed her abuser during an attack was entitled to a self-defense instruction); *with* People v. Aris, 264 Cal. Rptr. 167, 175 (Ct. App. 1989) (holding the self-defense instruction not justified because battered wife was not facing immediate danger when she shot and killed her sleeping husband).

<sup>109</sup> Meszaros, *supra* note 102, at 130.

<sup>110</sup> For an overview of the history of BWS, see *id.* at 125–29.

<sup>111</sup> See Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 23–25, 43 (1986).

<sup>112</sup> See Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 171 (2004).

under the circumstances.<sup>113</sup> For example, one author has argued that the disorder construct of the syndrome promotes chauvinistic notions of women in abusive relationships as helpless victims rather than active survivors.<sup>114</sup> Still others have attacked the empirical evidence behind the syndrome.<sup>115</sup>

This jurisprudential divide results in a more complicated approach to the use of BWS in criminal law than to the use of PTSD resulting from military service. “[S]ome jurisdictions conceive of the syndrome in more medical terms while others focus on increased contextualization of the battered woman’s situation.”<sup>116</sup> Under either view, questions about malingering persist whether BWS is used as a defense or mitigating factor. The concern is that the woman can manufacture the psychological symptoms either consciously or unconsciously through suggestive questioning by the psychologist.<sup>117</sup>

In any event, BWS has become increasingly integrated into society’s conceptions about battered women.<sup>118</sup> This trend has been documented through several studies suggesting greater acceptance of the syndrome among jurors.<sup>119</sup> One author suggests that the syndrome has endured despite criticism about its scientific rigor “because of its

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<sup>113</sup> *Id.*

<sup>114</sup> See Kathleen J. Ferraro, *The Words Change, but the Melody Lingers: The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women*, 9 VIOLENCE AGAINST WOMEN 110, 113 (2003).

<sup>115</sup> E.g., David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997); David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

<sup>116</sup> Meszaros, *supra* note 102, at 136; see also WYO. STAT. ANN. § 6-1-203(a) (1999) (defining BWS “as a subset under the diagnosis of Post-Traumatic Stress Disorder” established in the *DSM-III*); *United States v. Johnson*, 956 F.2d 894, 899 (9th Cir. 1992) (“[BWS] is a post-traumatic stress disorder.”); *People v. Evans*, 648 N.E.2d 964, 965 n.1 (Ill. App. Ct. 1995) (“[BWS] is a type of post-traumatic stress syndrome.”); *Commonwealth v. Conaghan*, 720 N.E.2d 48, 59 (Mass. 1999) (“[BWS] is a form of post-traumatic stress disorder, which is ‘an anxiety-related disorder . . . occurring in response to traumatic events outside the normal range of human experience.’” (quoting *State v. Riker*, 869 P.2d 43, 47 (Wash. 1994))); *State v. Stringer*, 897 P.2d 1063, 1069 (Mont. 1995) (“[BWS] is recognized as a subcategory of posttraumatic stress disorder.”); *State v. Bednarz*, 507 N.W.2d 168, 172 (Wis. Ct. App. 1993) (“[BWS] is recognized as a subcategory of posttraumatic stress disorder.”); *Campbell v. State*, 999 P.2d 649, 660 (Wyo. 2000) (“[BWS] is defined [in *DSM-III*] as a subset under the diagnosis of Post-Traumatic Stress Disorder.” (citing WYO. STAT. ANN. § 6-1-203(a))).

<sup>117</sup> Meszaros, *supra* note 102, at 139–40.

<sup>118</sup> See *id.* at 126, 131–32 (“The reach and significance of battered woman syndrome can hardly be overstated.”); see also Dan Bilefsky, *5-Year Term for Woman Who Killed Her Husband*, N.Y. TIMES, Nov. 11, 2011, at A26 (describing case where a woman was acquitted of murdering her husband by shooting him eleven times, but convicted of gun possession).

<sup>119</sup> One commentator describes a 1989 study by Follingstad et al., and a 2002 study by Schuller and Rzepa demonstrating a greater knowledge base of BWS in jurors. Meszaros, *supra* note 102, at 132 (“[B]attered woman syndrome testimony is becoming less relevant, less necessary, and more integrated within the jury’s general base of knowledge.”). Another commentator describes a study in which jurors were twice as likely to convict for murder when a general expert testifies about battered women than when an expert describes battered woman syndrome. Regina A. Schuller, *Expert Evidence and Its Impact on Jurors’ Decisions in Homicide Trials Involving Battered Women*, 10 DUKE J. GENDER L. & POL’Y 225, 236–45 (2003).

ability to shield a sympathetic defendant from undeveloped intuitions about abuse.”<sup>120</sup> In other words, “[s]ociety has arrived at a basic political judgment: the balance of advantage should be shifted in litigation in favor of battered women who respond violently to their batterers.”<sup>121</sup>

Although ambiguity exists with regard to BWS as a mental disorder, legal exceptionalism given to BWS persists in various forms. Expert testimony on BWS has been admitted as evidence in all fifty states.<sup>122</sup> Some states authorize the admissibility of BWS evidence through special statutory provisions.<sup>123</sup> For example, the relevant Ohio statute finds that BWS “currently is a matter of commonly accepted scientific knowledge”<sup>124</sup> and allows expert testimony on BWS to be introduced in support of a self-defense claim.<sup>125</sup> California identifies BWS as a factor to be considered in deciding parole,<sup>126</sup> and several other states have tailored jury instructions to reflect BWS.<sup>127</sup>

Other states allow special consideration by identifying BWS, a

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<sup>120</sup> Meszaros, *supra* note 102, at 136.

<sup>121</sup> Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 485 (1996) (arguing that courts and legislatures are altering the substantive law of self-defense by admitting a new class of evidence); cf. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 247 (2002) (“[E]vidence of [BWS] has enjoyed a lengthy love affair with most courts, social scientists, and legal commentators. Courts have largely ignored the flaws in the scientific research underlying the battered woman syndrome theory and have held that scientific evidence regarding the syndrome is sufficiently reliable to meet evidentiary standards.” (footnote omitted)); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law*, 38 EMORY L.J. 1005, 1075 (1989) (stating that BWS, in the guise of science, reflects a “thinly disguised normative judgment”).

<sup>122</sup> Laura D. Warren, Comment, *The Indigent Defendant’s Toolbox: Debating the Addition of the Battered Woman Syndrome Expert*, 69 U. CHI. L. REV. 2033, 2043 (2002).

<sup>123</sup> See CAL. EVID. CODE § 1107 (West 2011); GA. CODE ANN. § 16-3-21(d)(2) (2011); LA. CODE EVID. ANN. art. 404(A)(2) (2011); MD. CODE ANN., CTS. & JUD. PROC. § 10-916(b) (West 2011); MASS. GEN. LAWS ch. 233, § 23E (2011); MO. ANN. STAT. § 563.033 (2011); NEV. REV. STAT. ANN. § 48.061 (2011); OHIO REV. CODE ANN. § 2906.06 (West 2011); OKLA. STAT. tit. 22, § 40.7 (2011); TEX. CODE CRIM. PROC. ANN. art. 38.36(b)(2) (West 2011); WYO. STAT. ANN. § 6-1-203(b) (2011). *But cf.* FLA. R. CRIM. P. 3.201 (2011) (requiring notice of intent to raise BWS defense).

<sup>124</sup> OHIO REV. CODE ANN. § 2901.06(A)(1) (West 2012).

<sup>125</sup> *Id.* § 2901.06B; see also *Byrd v. Brown*, No. 09-Civ-5755(GBD)(JCF), 2010 WL 6764702, at \*7 (S.D.N.Y. 2010) (“BWS has been widely accepted as a valid theory upon which to base expert testimony by federal and New York Courts for many years.”).

<sup>126</sup> CAL. CODE REGS. tit. 15, § 2402(d)(5) (2011) (providing that BWS should be considered to determine suitability for parole); see also *Jackson v. Grounds*, No. C-08-0923(MMC), 2010 WL 5211431, at \*4 n.6 (N.D. Cal. 2010) (quoting statute).

<sup>127</sup> The Supreme Court of Georgia determined that modification of the jury instructions was necessary to explain how the defendant’s experiences as a battered person affect that defendant’s state of mind at the time of the killing. *Smith v. State*, 486 S.E.2d 819, 823 (Ga. 1997) (“[W]e now require that a modified jury instruction on justification 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.”). In New Jersey, the Supreme Court reversed and set aside a manslaughter conviction of a battered woman because the jury instructions were not tailored to the circumstances of the case. *State v. Gartland*, 694 A.2d 564, 575 (N.J. 1997).

subset of domestic violence, as a mitigating sentencing factor.<sup>128</sup> In Kansas, for example, courts may consider as a mitigating factor that “[a]t the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.”<sup>129</sup> Similarly, in Alaska, the legislature has singled out domestic violence as a ground for departure from the sentencing guidelines: courts may depart from the sentencing guidelines “in a conviction for assault or attempted assault or for homicide or attempted homicide, [when] the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior.”<sup>130</sup> Indiana has also adopted legislation that allows courts to consider domestic violence in sentencing. The sentencing court may consider that the defendant “was convicted of a crime involving the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the [defendant] and evidence shows that the [defendant] suffered from the effects of battery as a result of the past course of conduct [by the victim].”<sup>131</sup>

Showing special leniency to victims of PTSD in these two contexts—stressors arising from combat or a battering relationship—may reflect greater confidence in the validity of these claims or it may reflect sympathy for the context in which the PTSD stressor arose. As discussed in Part III below, some of the validity concerns surrounding claims of PTSD may be alleviated by advances in neuroscience. Before

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<sup>128</sup> See Sparr & Pitman, *supra* note 6, at 452 (discussing how BWS is used for sentence mitigation, especially when facts fall short of establishing full legal defense); see also *State v. B.H.*, 183 N.J. 171, 201 (2005) (holding that if the complete defense of duress is rejected, BWS may be relevant to mitigation); *State v. Pascal*, 736 P.2d 1065, 1072 (Wash. 1987) (holding that BWS did not rise to level of self defense, but was used as a mitigating factor to “find that [defendant’s] actions significantly distinguished her conduct from that normally present in manslaughter” and justified sentence of sixty days total or partial imprisonment and 240 hours of community service); *People v. Hammond*, No. C044328, 2005 WL 236826, at \*9 (Cal. Ct. App. Jan. 27, 2005) (holding that the trial court did not err in refusing to apply BWS as a mitigating factor when three aggravating factors would have outweighed it anyway). One analysis showed that 20% of states permit BWS testimony for use as a mitigating factor in sentencing. Janet Parish, *Trend Analysis: Expert Testimony on Battering and Its Effect in Criminal Cases*, 11 WIS. WOMEN’S L.J. 75, 110, 125 n.140 (1996). See generally *Developments in the Law, Legal Response to Domestic Violence*, 106 HARV. L. REV. 1498, 1588–89 (1993) (explaining that courts frequently consider evidence of battering as part of a battered woman’s claim in sentencing and BWS has also been used to justify downward departure). In this Article, I focus on BWS, although the term “domestic violence” used in some sentencing statutes presumably could also capture childhood abuse. Courts hesitate to grant sentencing departures based on childhood abuse. See, e.g., *United States v. Brady*, 417 F.3d 326, 333–34 (2d Cir. 2005) (“Thus, we adopted these high standards in *Rivera* not because—as the government inappropriately suggests—victims of child abuse might exaggerate or stretch the truth, but rather because it is the sad fact that so many defendants have unfortunate pasts and we cannot apply a disfavored departure to many or most defendants.”).

<sup>129</sup> KAN. STAT. ANN. § 21-6625(a)(8) (2011).

<sup>130</sup> ALASKA STAT. § 12.55.155(d)(16) (2011).

<sup>131</sup> IND. CODE § 35-38-1-7.1(b)(11) (2011).

considering those advances, however, it is first important to understand the theoretical underpinnings of sentencing mitigation. To understand whether a particular factor—such as PTSD, military service, or BWS—ought to be treated as mitigating, it is necessary to ask what is the basis for sentencing decisions. That is the topic of Part II.

## II. THE UNDERLYING THEORY OF MITIGATION IN SENTENCING

Aggravation and mitigation are important sentencing concepts. An aggravating sentencing factor is a reason for a judge to impose a higher than average sentence. A mitigating sentencing factor is a reason for a judge to impose a lower than average sentence.<sup>132</sup> Therefore, an important question for every criminal justice system is which facts about a crime or a defendant ought to be accepted as aggravating or mitigating. While aggravation and mitigation decisions are sometimes made on an ad hoc or isolated basis, any serious discussion about whether a certain factor is appropriately classified as aggravating or mitigating must begin with the bigger question of what considerations ought to inform punishment decisions.<sup>133</sup> This bigger question is often referred to as punishment theory.<sup>134</sup> This Part uses punishment theory to explore whether recognition of PTSD as a mitigating sentencing factor ought to be limited to those defendants whose PTSD was caused by either military service or BWS.

Identifying the rationale behind a particular mitigating sentencing factor is a complex enterprise. We must begin with the two major theories of punishment: retribution and consequentialism. Retribution distributes punishment according to the blameworthiness of the offender; in particular, the more harm a defendant causes or the more culpable his mental state, the more punishment ought to be imposed.<sup>135</sup>

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<sup>132</sup> Stephen J. Morse, *Gene-Environment Interactions, Criminal Responsibility, and Sentencing*, in *GENE-ENVIRONMENT INTERACTIONS IN DEVELOPMENTAL PSYCHOPATHOLOGY* 207, 229 (Kenneth A. Dodge & Michael Rutter eds., 2011) (“[R]ange of permissible sentence for each crime and sentencing judge has virtually complete discretion to impose any sentence within that range or place the defendant on probation.”). For a listing of typical mitigating circumstances for capital and non-capital crimes, see 1 PAUL H. ROBINSON, *CRIM. L. DEF.* § 6 nn.7–8 (2011).

<sup>133</sup> See ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 191 (5th ed. 2010) (“In principle, aggravating and mitigating factors should flow from the same source as the rationale(s) of sentencing.”).

<sup>134</sup> It is beyond the scope of this Article to engage deeply with political philosophy to examine the theoretical basis of punishment. For some meaningful discussions, see ASHWORTH, *supra* note 133; and MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997). Nor is this Section intended to be comprehensive, but rather selectively focuses on the theories of mitigation most relevant to the two considered here, military service and domestic abuse. For an overview of theories of mitigation, see Hessick, *supra* note 3.

<sup>135</sup> MOORE, *supra* note 134, at 87, 91, 225, 228; Stephen P. Garvey, “*As the Gentle Rain from Heaven*”: *Mercy in Capital Sentencing*, 81 *CORNELL L. REV.* 989, 1012 (1996) (“Retributivism holds that . . . the greater the harm a defendant causes the more severely he deserves to be

Consequentialism, on the other hand, distributes punishment on the basis of the consequences that punishment is likely to yield—that is, based on what is most likely to prevent future crimes.<sup>136</sup> If retribution is the primary rationale for criminal law, then sentencing (and mitigation) should reflect that goal and those factors related to responsibility and desert should be taken into account in sentencing. If, however, the primary rationale is consequentialism, then sentencing and mitigating factors should trace to the prevention of future crime.

Although punishment theory is often described in either retributive or consequentialist terms, it is too limiting to tie the appropriate identification of mitigation solely to that of a single rationale for punishment, especially because sentencing is so closely linked to social policy and politically-sensitive factors.<sup>137</sup> Thus, sentencing considerations may also include factors such as respect for victims and the background of the offender.<sup>138</sup> For example, the Sentencing Reform Act of 1984 directed the U.S. Sentencing Commission to devise guidelines that reflected proportionality, deterrence, public protection and offenders' treatment needs;<sup>139</sup> in other words, the Sentencing Commission was directed to take both retributive and consequentialist theories into account in framing federal sentencing policy. Finally, it is important to distinguish between mitigating and aggravating factors for purposes of theoretical justifications, since they are not necessarily mirror images of each other.<sup>140</sup>

Although most American sentencing systems are not based on a single theory of punishment,<sup>141</sup> sentencing factors are often nonetheless discussed in the context of the two main theories: retributivism and

punished. Likewise, the more culpable a defendant is—the more morally responsible he is for what he has done—the more severely he deserves to be punished.”).

<sup>136</sup> As Mary Sigler has explained:

In the case of deterrence and incapacitation, the measure of success is crime control: punishment, or the threat of punishment, is distributed effectively to the extent that it inhibits offenders, or would-be offenders, from engaging in criminal conduct. Rehabilitation also aims at crime control but typically involves more ambitious goals as well, such as behavior or character modification, for the offenders' own benefit.

Mary Sigler, *The Methodology of Desert*, 42 ARIZ. ST. L.J. 1173, 1175 (2011).

<sup>137</sup> *Id.* at 1175; see also Hessick, *supra* note 3, at 1130 (“The tendency of sentencing systems to identify more aggravating than mitigating factors may be attributable to political pressure.”).

<sup>138</sup> See ROBINSON, *supra* note 132, § 6 n.8 (listing typical mitigating factors for non-capital crimes).

<sup>139</sup> Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(A) (2006).

<sup>140</sup> For example, pleading guilty may be used as a mitigating factor, but that does not necessarily mean that pleading not guilty should be used as an aggravating factor. See ASHWORTH, *supra* note 133, at 158; cf. Hessick, *supra* note 3, at 1133–34 (arguing for symmetry between good acts and bad acts, so that prior good acts should be treated as mitigating given that prior bad acts are treated as aggravating).

<sup>141</sup> Hessick, *supra* note 3, at 1137; see also Mary Sigler, *The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process*, 19 LAW & PHIL. 339, 350 (2000) (“Retributivism is by no means the only theory of punishment that informs the system of criminal justice in the United States . . .”).

consequentialism.<sup>142</sup> Most retributivists argue that offenders should be punished in proportion to their blameworthiness, which measures both the harm a defendant caused and his culpability.<sup>143</sup> Because culpability is a relevant consideration, diminished capacity—that is, a decreased ability to conform one’s behavior to the law—should translate into a lower punishment. Complete lack of capacity, such as in cases of insanity or duress, is usually a defense to criminal liability. Those offenders who are not able to meet the high threshold of a defense of insanity or duress may argue for mitigation based on similar facts.<sup>144</sup> A classic example is where an offender suffers from a psychiatric disorder but falls short of being able to assert an insanity defense.<sup>145</sup> Context is also important to punishment justified by retributivism. If an offender has the right to exercise self-defense, but does so with excessive force, for example, the sentence may be mitigated based on some notion of provocation and reduced responsibility.<sup>146</sup>

Consequentialists argue that punishment should be imposed

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<sup>142</sup> See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 9 (1968) (“Today as always the criminal law is caught between two fires. On the one hand, there is the view that punishment of the morally derelict is its own justification. On the other, there is the view that the only proper goal of the criminal process is the prevention of antisocial behavior.”).

<sup>143</sup> See MOORE, *supra* note 134, at 71; John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 4–5 (1955) (“[I]t is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing.”).

<sup>144</sup> Morse, *supra* note 132, at 230 (stating that mitigation may be warranted due to rationality or control deficits, even if they did not rise to the level of a full legal excuse).

<sup>145</sup> See *State v. Boggs*, 185 P.3d 111 (Ariz. 2008) (holding that the presentation of evidence during the penalty phase was sufficient to establish as a mitigating factor that defendant had diagnosed mental health issues of PTSD and bipolar disorder); *People v. Haskett*, 801 P.2d 323, 336 (Cal. 1990) (holding that even when the jury had no discretion to conclude that the defendant was insane, there was no reasonable likelihood that the jury believed it could not consider any and all of the evidence introduced at the penalty phase for mitigation purposes); *State v. English*, 367 So. 2d 815, 822 (La. 1979) (holding that witness testimony would have been material to insanity defense or to mitigating circumstance of mental disease or defect). The insanity defense, which excuses the mentally ill from liability for actions that are otherwise wrongful, is a complex doctrine with a long history. See MOORE, *supra* note 134, at 595–609. Broadly speaking, from a utilitarian view, we excuse this class of offenders from punishment because they are not deterrable nor are others like them likely to be deterred by punishing their behavior. *Id.* From a retributive view, we excuse these offenders “from the moral blame associated with punishment in the criminal law,” but we do not release them back into society. *Id.* at 597. Retributivists vary in their view about why it is morally wrong to punish the mentally ill, ranging from the belief that the illness negates free will, that it negates mens rea, that it causes either delusional ignorance or some form of psychological compulsion, or because the mentally ill are irrational. *Id.* at 597–98. See Debra D. Burke & Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 *HOW. L.J.* 183, 198 (1994) (discussing use of PTSD as a mitigator in capital cases even if it fails to support an insanity defense).

<sup>146</sup> See Adam J. Kolber, *The Experiential Future of the Law*, 60 *EMORY L.J.* 585, 629 (2011). Retributivists also debate whether the amount of harm actually caused also should be considered in determining punishment. *Id.* at 630; Michael S. Moore, *Harm v. Culpability: Which Should Be the Organizing Principle of Criminal Law? The Independent Moral Significance of Wrongdoing*, 1994 *J. CONTEMP. LEGAL ISSUES* 237, 240 (“[A] penal system should reflect [the] dependence of desert on the independent moral significance of wrongdoing in the amounts of punishment it metes out.”).

according to its consequences, so that the defining principle in determining punishment is preventing future harm to society.<sup>147</sup> Under this view, we punish offenders to incapacitate and rehabilitate dangerous offenders, and to deter future crimes by them and others.<sup>148</sup> Mitigating factors that are unrelated to the offense, such as giving the offender credit for “good deeds” like military service or voluntary work,<sup>149</sup> or considering such factors as the offender’s employment history,<sup>150</sup> may have some bearing upon consequentialist considerations. That is because there is social science evidence suggesting that those defendants who have served in the military or who have a good employment history pose a smaller risk of recidivism; in other words, because they are less likely to commit crimes in the future than other defendants, we can impose shorter sentences on them and obtain the same benefits of deterrence and/or incapacitation.<sup>151</sup> Some argue that taking these contributions into account goes to rehabilitation; these offenders need less punishment before they are reintegrated into society.<sup>152</sup>

Having discussed the two major punishment theories generally, we must now turn to the more difficult task of assessing the legitimacy of

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<sup>147</sup> See PACKER, *supra* note 142, at 39 (“The classic theory of prevention is what is usually described as deterrence: the inhibiting effect that punishment, either actual or threatened, will have on the actions of those who are otherwise disposed to commit crimes.”). Deterrence is described as having two aspects: special deterrence—inhibiting *ex post* the person being punished; and general deterrence—inhibiting *ex ante* by threat or example. *Id.*

<sup>148</sup> See C. L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 7–8 (1987).

<sup>149</sup> See Hessick, *supra* note 3, at 1116–25 (describing “prior good acts” used as mitigators in sentencing).

<sup>150</sup> See, e.g., N.C. GEN. STAT. § 15A-1340.16(e)(19) (2011) (providing that whether “[t]he defendant has a positive employment history or is gainfully employed” should be considered for mitigation purposes in sentencing).

<sup>151</sup> See Hessick, *supra* note 3, at 1139 (describing limited social science evidence).

<sup>152</sup> See ASHWORTH, *supra* note 133, at 182. A defendant’s prior good acts can also suggest that a criminal offense represents “aberrant behavior.” Accordingly, a first offender can expect to be treated more leniently than a repeat offender (unless the offense is grave, like murder or armed robbery). See, e.g., ALASKA STAT. § 12.55.125 (2011) (providing that for each felony class, first felony convictions are given a lower range for sentencing); WASH. REV. CODE § 9.94A.650(2) (2011) (“In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range.”); *State v. Hartye*, 522 A.2d 418, 422 (N.J. 1987) (a presumption of non-incarceration governs sentencing for persons who have not previously been convicted of an offense under N.J. STAT. ANN. § 2C:44-1(e) (West 2011)). At the same time, courts may also cite previous suffering as rationale for reducing a sentence because “the hard life suffered by the defendant has been ‘payment in advance.’” Morse, *supra* note 132, at 231 (citing MARTHA KLEIN, DETERMINISM, BLAMEWORTHINESS AND DEPRIVATION (1990)). Although this rationale has no legal basis, “it may play a role psychologically.” *Id.* When there is no clear principle involved in mitigation, it is sometimes translated into a notion of “showing mercy.” See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569 (1991); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 83–125 (1993) (arguing that justice should include mercy as well as the values of individuation, particularization and proportionality); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989).

PTSD, particularly in the context of military veterans and BWS, as a mitigating sentencing factor. This discussion, however, reveals ongoing disagreement about the nature of mitigation, especially in retributivism. From a legal perspective, mitigation is treated differently in the capital sentencing, with its heightened constitutional concerns, and the non-capital sentencing contexts. In the capital sentencing context, the Supreme Court has held that individualized sentencing for capital crimes requires consideration of “any relevant mitigating evidence,”<sup>153</sup> but it has not explained “by a substantive theory” what is constitutionally relevant.<sup>154</sup>

Carol and Jordan Steiker argue that the Court’s individualization requirement “makes constitutionally relevant any and all traits or experiences that distinguish one individual from another,”<sup>155</sup> based on an “equality” principle—that not all first-degree murderers are alike.<sup>156</sup> They examine three types of mitigating evidence—reduced culpability, good character, and lack of future dangerousness<sup>157</sup>—and argue that only reduced culpability is sufficiently rooted in societal consensus to warrant constitutionalization.<sup>158</sup> Reduced culpability includes examining whether the “defendant’s capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was impaired.”<sup>159</sup> Other characteristics may be taken into account, but they are not constitutionally required to be treated as mitigating at capital sentencing.<sup>160</sup>

In the particular context of childhood abuse as a mitigating capital sentencing factor,<sup>161</sup> another commentator distinguishes cause from responsibility: suffering childhood abuse may be a cause of a defendant’s criminal act, but that alone does not make the defendant less than fully responsible for his crime.<sup>162</sup> Instead, childhood abuse is mitigating in the capital context under two rationales: (1) when it lowers the offender’s capacity for rational self-control, and (2) when it is related to punishment and not responsibility. The first rationale traces directly to

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<sup>153</sup> See *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

<sup>154</sup> Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 843 (1992).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 845.

<sup>157</sup> *Id.* at 846.

<sup>158</sup> *Id.* at 848, 855 (“[S]tates uniformly regard reduced culpability as the essential focus of individualized sentencing.”).

<sup>159</sup> *Id.* at 849.

<sup>160</sup> Thus, although the Eighth Amendment demands only that states allow consideration of mitigation evidence of reduced culpability in the capital context, that requirement does not preclude the states from allowing consideration of evidence not related to the crime, such as lack of future dangerousness or general good character. *Id.* at 840.

<sup>161</sup> Paul Litton, *The “Abuse Excuse” in Capital Sentencing Trials: Is it Relevant to Responsibility, Punishment, or Neither?*, 42 AM. CRIM. L. REV. 1027 (2005).

<sup>162</sup> *Id.* at 1033. Litton explains that “causal explanations are more relevant to social science than to making a moral judgment about a particular act.” *Id.* at 1029.

retribution and captures those cases in which the abuse has lowered the offender's responsibility for his actions because the abuse has diminished his capacity for practical reasoning.<sup>163</sup> Responsibility comes in degrees—we lower responsibility for children and mentally handicapped individuals.<sup>164</sup> Even if the offender should be considered fully responsible for his actions, however, childhood abuse may deprive a defendant from obtaining a “minimally decent moral education,” which establishes certain safeguards that “provide a fair opportunity for persons to avoid incurring criminal punishment and, as such, help justify the burdens of the criminal law.”<sup>165</sup> Accordingly, the second rationale for childhood abuse as a mitigating factor is based on fairness; it is difficult to justify the death penalty for those whose childhood abuse interfered with obtaining such an education as compared to those who were provided that safeguard.<sup>166</sup>

Other commentators stress that compassion underlies mitigation in capital sentencing. One author has described mitigation in capital sentencing as “the empathy-evolving evidence that attempts to humanize the accused killer in death penalty cases” with the “transformative capacity to enable jurors to feel human kinship with someone whom they have just convicted of an often monstrous crime.”<sup>167</sup>

Outside of the capital context, where courts do not face the same level of constitutional constraints, the conceptualization of mitigation is broader, but its basis in law is less certain. In this broader context, some retributivists argue against use of “mercy” or leniency in mitigation based on characteristics that evoke sympathy but are unrelated to the offender's capacity or ability to choose.<sup>168</sup> Instead, they support the ideal of individual moral responsibility,<sup>169</sup> and they argue that only mitigating factors that “are tied to the offender's choice to commit the crime, or the severity of the crime itself” are appropriate for consideration in mitigation.<sup>170</sup> These retributivists attempt to separate out mitigating

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<sup>163</sup> *Id.* at 1053.

<sup>164</sup> *Id.* at 1050–51, 1067.

<sup>165</sup> *Id.* at 1033.

<sup>166</sup> *Id.*

<sup>167</sup> Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response to Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 237 (2008). Russell Stetler, the National Mitigation Coordinator for the federal death penalty projects, also notes: “Mitigation provides the biography of mental disability. It explains the influences that converged in the years, days, hours, minutes, and seconds leading up to the capital crime, and how information was processed in a damaged brain. It is a basis for compassion—not an excuse.” *Id.* at 262.

<sup>168</sup> See, e.g., JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

<sup>169</sup> Markel, *supra* note 168, at 1445. Markel argues for the principle of “equal liberty under law,” as well as promoting goal of “democratic self defense” to protect the political order, in support of this view. *Id.* at 1446, 1448.

<sup>170</sup> *Id.* at 1435–36. Markel would therefore draw a sharp distinction between “reasons that

factors that may be “lumped under mercy” when they should be identified as “reasons for justice.”<sup>171</sup> Under this interpretation, taking into account the offender’s status as a war veteran in mitigation would reflect mercy and compassion, not moral choice or competence.<sup>172</sup> But if duress or diminished capacity are advanced as mitigating factors, they reflect reduced capacity and therefore argue in favor of “justice-enhancing discretion, that is, judgments based on articulable standards of desert in relation to culpability and the severity of the offense.”<sup>173</sup>

A contentious question is whether to take into account prior good acts in mitigation. Some retributivists argue that under “the character theory of excuse,” prior behavior is an appropriate consideration for responsibility, since “the primary object of our responsibility is our own character, and responsibility for wrongful action is derivative of this primary responsibility, our actions being proxies for the characters such actions express.”<sup>174</sup> Other retributivists argue against a “social accounting” model of punishment, under which an offender’s prior good acts are recognized as mitigating factors, because this type of balancing suggests that sentencing is based on character rather than retribution.<sup>175</sup> Under this view, sentencing should not inquire into an offender’s background beyond its relevance to the current offense.<sup>176</sup>

Consequentialist punishment theory, which traces from the classical utilitarian tradition,<sup>177</sup> justifies punishment based on its future beneficial effects, including deterrence and the incapacitation of dangerous individuals.<sup>178</sup> Mitigation under this view is based on prediction and prevention, rather than on moral blame.<sup>179</sup> Accordingly, these theorists would distinguish classes of people who cannot be deterred by the law from those who can be deterred.<sup>180</sup> If they subscribe to the rehabilitation form of consequentialism, then they believe that the likelihood of an offender reforming and reintegrating into society as a

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serve to lessen punishment for purposes of justice and reasons that lessen punishment for purposes of mercy.” *Id.* at 1435.

<sup>171</sup> *Id.* at 1441.

<sup>172</sup> *Id.* at 1436, 1454, 1462.

<sup>173</sup> *Id.* at 1441, 1455.

<sup>174</sup> See MOORE, *supra* note 134, at 548.

<sup>175</sup> ASHWORTH, *supra* note 133, at 151 (explaining that using prior good acts at sentencing implies some sort of “social accounting”).

<sup>176</sup> Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 605–06 (1981) (“[D]esert theory in sentencing is concerned with the degree of blameworthiness of the offender’s criminal choices. Debate would then focus on whether, and to what extent, this should include prior criminality.”). Professor von Hirsch also argues that a desert-based sentencing scheme should have a closed criminal history score under which a first offender would be entitled to less blame because act was out of keeping with past choices. *Id.* at 619.

<sup>177</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (photo. reprint 2005) (1823).

<sup>178</sup> See PACKER, *supra* note 142, at 39–53.

<sup>179</sup> See Greene & Cohen, *supra* note 8, at 1776.

<sup>180</sup> *Id.* at 1783.

law-abiding citizen are relevant considerations for imposing less punishment. Under this view, excuses that involve “diminished capacity,” such as infancy and insanity, should be taken into account in punishment because they will produce better results—that is, better predictions about future offending and better treatment to promote rehabilitation.<sup>181</sup> Sentencing (including treatment) should be tailored to the needs of the offender and the rest of society, rather than determined by the nature of the offense.<sup>182</sup>

The preceding is not intended to be an exhaustive description of the theoretical basis of criminal responsibility. But it does suggest an important recurring insight: whether to take the source of PTSD into account may depend significantly on the theory of punishment pursued. The retributivist view suggests that PTSD claims may be taken into account in sentencing if it can be shown that the PTSD lowered capacity for the crime committed. The particular triggering stressor of the PTSD should not be significant. Therefore, the fact that PTSD exists—regardless of whether it is triggered by military service, by BWS, or by other stressors—and results in lowered capacity or ability to choose, would be an appropriate consideration in sentencing, even if the PTSD claim does not rise to the level of a defense. But if courts consider PTSD mitigating only when it was triggered in the context of a “prior good act” (such as military service) or in situations that evoke “mercy” (such as BWS), and when they consider it in contexts that are unrelated to moral choice, many retributivists would not consider it an appropriate mitigating factor. In other words, while retributivism supports the legitimacy of PTSD as a mitigating factor, it diverges from current legal trends in two important respects. First, it suggests that there must be a nexus between PTSD and the crime. Put simply, if a defendant is not suffering from PTSD at the time he commits the crime, then the PTSD did not affect the defendant’s capacity and mitigation is unwarranted. Second, retributivism supports the legitimacy of PTSD as a mitigating factor regardless of the stressor. Limiting PTSD mitigation claims to those defendants who served in the military or who suffer from BWS is inconsistent with retributivism.

In contrast, consequentialism suggests that the source of the PTSD may be taken into account if different stressors have different rates of recidivism or rehabilitation. If, for example, social science evidence indicates that PTSD triggered by military service is more receptive to treatment than PTSD acquired through other stressors (such as car crashes), then PTSD triggers would be legitimate sentencing considerations under consequentialism. Similarly, if social science evidence indicates that military service or exposure to domestic violence

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<sup>181</sup> *Id.*; see also PACKER, *supra* note 142, at 14 (explaining that under a utilitarian view, sentence should relate to the situation of the offender rather than nature of the offense).

<sup>182</sup> PACKER, *supra* note 142, at 14.

are correlated with lower rates of recidivism, then not only would a PTSD stressor be a legitimate mitigating sentencing factor, but a nexus between the PTSD and the crime would be irrelevant to the question of whether a particular defendant is likely to commit crimes in the future. The corollary under consequentialism, however, is that the source of PTSD should not matter if stressors have equal rates of recidivism or rehabilitation.

Regardless of the merits of these theoretical accounts of sentencing, sentencing courts and guidelines frequently do not specify the underlying basis for allowing mitigating factors in particular circumstances. A significant question is whether advances in neuroscience will affect mitigation theory with regard to PTSD claims in sentencing. In particular, if neuroscience advances can remove questions of malingering and validity from the claim, we will no longer have to rely on certain stressors as proxies for the validity of the claim. Then, courts and legislatures will have to confront the difficult issue of whether to mitigate simply because the defendant has manifested symptoms of PTSD or whether to inquire into the source of the stressor, for reasons unrelated to the defendant's capacity to choose or to the prevention of future crime. The next Part describes recent advances in neuroscience before reflecting on that question.

### III. ADVANCES IN NEUROSCIENCE RELATING TO PTSD

Advances in neuroimaging technology have allowed significant gains in understanding PTSD, which has become a widely studied disorder in both the medical and scientific communities.<sup>183</sup> Although limitations still exist, emerging neuroscience research and brain imaging technology have linked PTSD to detectable changes in the brain and someday may validate claims of PTSD.<sup>184</sup>

Despite the large body of literature highlighting different brain regions that are implicated in PTSD, there is to date “no objective

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<sup>183</sup> Ursano et al., *supra* note 13, at 72–81. Although I attempt to highlight research that suggests the beginnings of an increased ability to detect and quantify PTSD, it is not the province of this article to give a comprehensive survey of all of the literature emerging on these issues. Several recent articles give overviews of this area for the lay reader. *See, e.g.*, Barbara Bottalico & Tommaso Bruni, *Posttraumatic Stress Disorder, Neuroscience, and the Law*, 35 INT'L J.L. & PSYCHIATRY 112, 113–15 (2012); Grey, *supra* note 14, at 212–19; Hamilton, *supra* note 3, at 372–773; Meszaros, *supra* note 102, at 145–59; Francis X. Shen, *Mind, Body, and the Criminal Law* (Aug. 18, 2012) (unpublished manuscript) (on file with author). *See generally* Alexander Neumeister, Shannan Henry & John H. Krystal, *Neurocircuitry and Neuroplasticity in PTSD*, in *HANDBOOK OF PTSD*, *supra* note 6, at 151.

<sup>184</sup> Some authors have already started to argue for stronger applications of neurobiological evidence in the guilt phase of the criminal trial. *See* Meszaros, *supra* note 102 (arguing for application of neurobiological evidence to help measure the battered woman's culpability, accepting weak form of determinism).

laboratory biomarker test for PTSD.”<sup>185</sup> That is, although scientists are beginning to document functional changes and structural abnormalities in certain brain regions associated with memory, fear processing, and emotion, no consistent view has emerged regarding when such changes and abnormalities establish the presence of PTSD.<sup>186</sup> Even at this early stage of research, however, most scientists view PTSD as a stress-induced fear-circuitry disorder<sup>187</sup> involving a physiological response to traumatic stress that has overwhelmed an individual’s ability to control hyperactive stress responses. Researchers have identified a number of neurobiological systems commonly implicated in PTSD, as well as the neurochemical correlates of the symptoms of PTSD. This Part identifies the brain regions that have been implicated in PTSD, the hippocampus, amygdala and medial pre-frontal cortex, as well as the biochemical processes associated with PTSD.

#### A. *Brain Regions Implicated in PTSD*

Learning, perception, and memory are involved when an individual experiences acute stress.<sup>188</sup> Key structures of the brain operate when trauma and stress are experienced,<sup>189</sup> acting either to stimulate the “arousal system” or keep our emotions in check. At the same time, the brain is efficient in creating long-term memories (consolidation) of emotionally significant events.<sup>190</sup> The consolidation process enables us to interpret emotional information as well as control the mechanisms that influence our perception and interpretation of our environment.<sup>191</sup> When the brain is functioning properly, it facilitates creation of new neuron connections that override the traumatic memory, a process known as “extinction.” When this system becomes maladaptive, the retention of traumatic material in the brain can result in emotional disorders, including PTSD, which is basically a pathological form of learning known as fear conditioning.<sup>192</sup> To oversimplify, properly

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<sup>185</sup> See Ursano et al., *supra* note 13, at 76; see also Smith, *supra* note 14, at 63 (stating that no consensus has emerged for any biomarkers on PTSD).

<sup>186</sup> Francati et al., *supra* note 11 (attributing discrepancies and lack of clarity to a wide range of methodologies for measuring brain activity, including scanning technology used (PET, fMRI, SPECT, etc.), types of stimuli, control conditions, and the severity and type of PTSD).

<sup>187</sup> Thomas Steckler, *The Neurophysiology of Stress*, in HANDBOOK OF STRESS AND THE BRAIN 25, 26 (Thomas Steckler et al. eds., 2005).

<sup>188</sup> James L. McGaugh & Benno Roozendaal, *Memory Modulation*, in 3 LEARNING AND MEMORY: A COMPREHENSIVE REFERENCE 521 (John H. Byrne ed., 2009).

<sup>189</sup> Benno Roozendaal, Bruce S. McEwen & Sumantra Chattarji, *Stress, Memory and the Amygdala*, 10 NATURE REV. NEUROSCIENCE 423 (2009).

<sup>190</sup> James L. McGaugh, *Memory Consolidation and the Amygdala: A Systems Perspective*, 25 TRENDS NEUROSCIENCE 456 (2002); McGaugh & Roozendaal, *supra* note 188, at 521.

<sup>191</sup> Joseph E. LeDoux, *Emotion Circuits in the Brain*, 23 ANN. REV. NEUROSCIENCE 155 (2000).

<sup>192</sup> *Id.* at 160.

functioning brains have biological processes that allow an individual to adapt and overcome traumatic events, while brains affected by PTSD or similar disorders do not. With fear conditioning, previously neutral stimuli in the environment, such as sights, sounds, and smells, become linked with a trauma.

Three brain regions in particular have been implicated in studies of PTSD, namely the hippocampus, amygdala, and medial pre-frontal cortex.<sup>193</sup> Neuroscience research has begun to document structural changes to the brains of PTSD-diagnosed participants in these regions in terms of thickness, volume, and area as compared to brains of non-diagnosed individuals exposed to the same stimuli.<sup>194</sup> Based on these advances, scientists theorize that the brains of individuals with PTSD function abnormally, showing “exaggerated responsivity in the amygdala, diminished responsivity in the medial prefrontal cortex, and an inverse relationship between these two brain regions,” as well as “diminished volumes, neuronal integrity, and functional integrity of the hippocampus.”<sup>195</sup> In other words, the amygdala is hyperactive while the controlling mechanisms in the pre-frontal cortex are inadequately recruited.<sup>196</sup> This malfunction leads to changes in the interpretive process, or a threat-oriented bias in anxious individuals. As a result, individuals with anxiety disorders react with hyperarousal, distress, and avoidance behaviors to stimuli that objectively would be seen as neutral or only mildly stressful.<sup>197</sup>

The hippocampus is part of the limbic system and plays a central role in learning and the formation of episodic, declarative, and working memory. Several structural MRI studies have reported decreased hippocampus volumes in individuals with PTSD.<sup>198</sup> Some scientists interpret these neuronal deficits as an explanation for symptoms of avoidance and numbing in individuals with PTSD.<sup>199</sup> A deficit in the

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<sup>193</sup> Lisa M. Shin, Scott L. Rauch & Roger K. Pittman, *Structural and Functional Anatomy of PTSD: Findings from Neuroimaging Research*, in *NEUROPSYCHOLOGY OF PTSD: BIOLOGICAL, COGNITIVE, AND CLINICAL PERSPECTIVES* 59 (Jennifer J. Vasterling & Chris R. Brewin eds., 2005).

<sup>194</sup> See, e.g., Steven H. Woodward et al., *Smaller Global and Regional Cortical Volume in Combat-Related Posttraumatic Stress Disorder*, 66 *ARCHIVES GEN. PSYCHIATRY* 1373, 1379 (2009).

<sup>195</sup> Shin et al., *supra* note 193, at 74.

<sup>196</sup> Amy F. T. Arnsten, *Stress Signaling Pathways That Impair Prefrontal Cortex Structure and Function*, 10 *NATURE REV. NEUROSCIENCE* 410 (2009).

<sup>197</sup> Sonja J. Bishop, *Neurocognitive Mechanisms of Anxiety: An Integrative Account*, 11 *TRENDS COGNITIVE SCI.* 307 (2007).

<sup>198</sup> Sarah N. Garfinkel & Israel Liberzon, *Neurobiology of PTSD: A Review of Neuroimaging Findings*, 39 *PSYCHIATRIC ANNALS* 370 (2009).

<sup>199</sup> *Id.* One twin study comparing Vietnam veterans to identical twins who had not seen combat showed that both twins had smaller hippocampi, implying that a small hippocampus may predict vulnerability to PTSD, rather than be caused by traumatic stressors. Mark W. Gilbertson et al., *Smaller Hippocampal Volume Predicts Pathological Vulnerability to Psychological Trauma*, 5 *NATURE NEUROSCIENCE* 1242 (2002).

hippocampus may “impair the individual’s appreciation of safety cues and is partly responsible for an inappropriate physiological response to stress.”<sup>200</sup> Because of this deficit, the “fear response” may fail to turn off.<sup>201</sup>

The amygdala is integral to the generation and maintenance of emotional responses,<sup>202</sup> including the assessment of emotional and threat-related stimuli.<sup>203</sup> It lets us know when to react to stimuli with genuine fear and when to temper our response.<sup>204</sup> The amygdala also plays a critical role in consolidating the emotional significance of events and therefore plays a crucial role in our understanding of conditioned fear processing.<sup>205</sup> Abnormalities in amygdala pathways may impair fear processing.<sup>206</sup> One recent finding shows a positive correlation between memory-related amygdala activity and PTSD symptom levels.<sup>207</sup> Neuroimaging studies have shown that smaller amygdala volume correlates strongly with PTSD.<sup>208</sup>

The medial prefrontal cortex (mPFC) is largely responsible for judgment, cognition, behavior, personality expression, and decision-making. “[A] common finding in studies measuring neural activity in PTSD is a hypoactivation of the mPFC,” which means there appears to be a failure of higher brain regions to dampen amygdala arousal in PTSD.<sup>209</sup> The hypoactivity of the medial prefrontal cortex may contribute to an inability to curb reactivity to trauma-related cues and other intense stimuli.<sup>210</sup>

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<sup>200</sup> Hamilton, *supra* note 3, at 377 (footnote omitted) (citing Alexander C. McFarlane, *The Long-Term Costs of Traumatic Stress: Intertwined Physical and Psychological Consequences*, 9 WORLD PSYCHIATRY 3 (2010); Norbert Schuff et al., *Patterns of Altered Cortical Perfusion and Diminished Subcortical Integrity in Posttraumatic Stress Disorder: An MRI Study*, 54 NEUROIMAGE S62, S62 (2011).

<sup>201</sup> *Id.* (citing Bret A. Moore, *Drug Studies Show Some Promise for Preventing PTSD*, ARMY TIMES, Jan. 17, 2011, at 13).

<sup>202</sup> *Id.* at 376.

<sup>203</sup> *Id.*

<sup>204</sup> See Shen, *supra* note 183, app. B.

<sup>205</sup> D. Jeffrey Newport & Charles B. Nemeroff, *Neurobiology of Posttraumatic Stress Disorder*, 1 FOCUS 3 (2003).

<sup>206</sup> Thomas W. McAllister & Murray B. Stein, *Effects of Psychological and Biomechanical Trauma on Brain and Behavior*, 1208 ANNALS N.Y. ACAD. SCI. 46, 49 (2010).

<sup>207</sup> Dickie et al., *Neural Correlates of Recovery From Post-Traumatic Stress Disorder: A Longitudinal fMRI Investigation of Memory Encoding*, 49 NEUROPSYCHOLOGIA 1771 (2011); see also Mark A. Rogers et al., *Smaller Amygdala Volume and Reduced Anterior Cingulate Gray Matter Density Associated with History of Post-Traumatic Stress Disorder*, 174 PSYCHIATRY RES. 210 (2009) (smaller amygdala volume correlates with PTSD).

<sup>208</sup> Rogers et al., *supra* note 207, at 214.

<sup>209</sup> Francati et al., *supra* note 11, at 214–15; see also Vin David J. Nutt & Andrea L. Malizia, Supplement, *Structural and Functional Brain Changes in Posttraumatic Stress Disorder*, 65 J. CLINICAL PSYCHIATRY 11 (2004).

<sup>210</sup> Rogers et al., *supra* note 207, at 210.

B. *Biochemical Processes Associated with PTSD*

The brain is flooded with stress hormones during and after a stressful event, to facilitate fear processing. The flooding of stress hormones enhances the consolidation process of the mental and emotional experience of the event.<sup>211</sup> In other words, we respond to perceptions of danger with certain physiological reactions like rapid heart rate, palpitations, increased blood flow to muscles, and sweating. When an individual suffers from PTSD, it takes much longer than normal to rationally assess the situation and override the fear response.

In particular, traumatic stress can induce fear, which triggers an alarm system known as the “fight or flight” response in neurocircuitry.<sup>212</sup> PTSD involves the dysregulation of several neurotransmitter and hormonal systems, including the noradrenergic system, the serotonergic system, and the hypothalamic-pituitary-adrenal (HPA) axis.<sup>213</sup> Norepinephrine activates the amygdala, and through the HPA, stimulates the release of cortisol and adrenaline, which further activate fear responses to traumatic stimuli.<sup>214</sup> Release of increased levels of these hormones can “enhance the functioning of the amygdala, promoting fear conditioning and the consolidation of emotionally relevant memories,”<sup>215</sup> but release of these hormones can also “impair the cognitive functioning of the PFC.”<sup>216</sup> When this occurs in PTSD patients, they cannot inhibit a conditioned fear response even when they are not threatened: “[B]ody arousal mechanisms become impaired when reminders of traumatic events cause the autonomic nervous system to hyperactively respond to stimuli with a bias toward perceiving it as threatening.”<sup>217</sup> Prolonged release of cortisol causes the long-lasting neurological changes in the hippocampus, associated with the intrusive memories of PTSD.<sup>218</sup>

Three recent neuroscience studies highlight some of these findings: one focused on neuro-anatomical differences, and a second focused on neuro-physiological differences between healthy populations and

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<sup>211</sup> McGaugh & Roozendaal, *supra* note 188, at 205.

<sup>212</sup> Christian Grillon, *Models and Mechanisms of Anxiety: Evidence from Startle Studies*, 199 PSYCHOPHARMACOLOGY 421, 422, 424 (2008).

<sup>213</sup> Steven M. Southwick et al., *Neurobiological Alterations Associated with PTSD*, in HANDBOOK OF PTSD, *supra* note 6, at 166, 180.

<sup>214</sup> Steven M. Southwick et al., *Neurobiological and Neurocognitive Alterations in PTSD: A Focus on Norepinephrine, Serotonin, and the Hypothalamic-Pituitary-Adrenal Axis*, in NEUROPSYCHOLOGY OF PTSD: BIOLOGICAL, COGNITIVE, AND CLINICAL PERSPECTIVES 27, 42 (Jennifer J. Vasterling & Chris R. Brewin eds. 2005).

<sup>215</sup> *Id.* at 30.

<sup>216</sup> *Id.* at 31 (emphasis omitted) (footnote omitted).

<sup>217</sup> Hamilton, *supra* note 3, at 374.

<sup>218</sup> Benno Roozendaal et al., *Glucocorticoid Enhancement of Memory Requires Arousal-Induced Noradrenergic Activation in the Basolateral Amygdala*, 103 PROC. NAT'L ACAD. SCI. 6741, 6744 (2006).

military veterans with PTSD. A third is a meta-analysis of previous studies. The next Section describes those studies in further detail to demonstrate some of the changes that neuroscientists have found to exist in the brains of PTSD sufferers, moving beyond clinical descriptions to documentable physiological and anatomical changes.

### C. *Recent Neuroscience Studies in PTSD*

Much of the neuroscience research investigating PTSD has focused on individuals exposed to combat-related trauma. For instance, Elbert Geuze studied the prefrontal cortexes of Dutch veterans with PTSD, examining the cortical thicknesses of twenty-five veterans who had been clinically diagnosed with PTSD and twenty-five veterans who did not have PTSD.<sup>219</sup> All the participants in the study had served in UN peacekeeping missions in Lebanon, Cambodia, or Bosnia.<sup>220</sup> The veterans with PTSD displayed reduced cortical thickness in the frontal and temporal lobes, as well as poor performance on memory measures.<sup>221</sup> Thus, the study is highly significant in documenting evidence of physical, neuro-anatomical differences between individuals with PTSD and without PTSD.

A study by Lisa Shin documents physiological changes from PTSD in Vietnam veterans. During a symptom provocation exercise, Dr. Shin examined the cerebral blood flow in the amygdala and medial prefrontal cortex of seventeen male veterans and female nurse veterans with PTSD, as well as nineteen veterans without PTSD.<sup>222</sup> The group of veterans with PTSD exhibited regional cerebral blood flow decreases in their medial frontal gyri (convolutions of the brain) during traumatic script imagery. Equally significant, participants with PTSD showed blood flow changes in the medial frontal gyrus that were inversely correlated with blood flow changes in the amygdala, suggesting the hypo-responsivity and the hyper-responsivity of these two regions while experiencing PTSD.<sup>223</sup> While the relationship between the amygdala and medial prefrontal regions in clinically diagnosed PTSD patients had been suspected, previously reported studies had not produced data in support of such a relationship.

A study by Etkin and Wager suggests that individuals diagnosed with PTSD display more dramatic alterations in neural circuitry than

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<sup>219</sup> Elbert Geuze et al., *Thinner Prefrontal Cortex in Veterans with Posttraumatic Stress Disorder*, 41 *NEUROIMAGE* 675, 676 (2008).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Lisa M. Shin et al., *Regional Cerebral Blood Flow in the Amygdala and Medial Prefrontal Cortex During Traumatic Imagery in Male and Female Vietnam Veterans with PTSD*, 61 *ARCHIVES GEN. PSYCHIATRY* 168, 169 (2004).

<sup>223</sup> *Id.*

those with other anxiety disorders. In 2007, Etkin and Wager conducted a meta-analysis of studies that had used brain scans to study individuals who had been diagnosed with anxiety disorders.<sup>224</sup> Their analysis indicated that patients with anxiety disorders consistently showed greater activity in the amygdala and insula.<sup>225</sup> Patients diagnosed with PTSD showed the most exaggerated dysregulation of their neural circuitry, as compared to patients with other anxiety disorders.<sup>226</sup>

D. *Limitations of Using PTSD-Related Neuroscience Research in the Courtroom*

Despite the significant scientific advances linking PTSD to detectable changes in the brain, courts must approach neuroscience research of PTSD claims with caution. Understanding the process of storing the memory of an emotionally significant event is, of course, important to assessing anxiety disorders such as PTSD. But continued research is needed to better understand the roles of the brain regions involved in the neurocircuitry of PTSD in order for brain images to provide sufficient evidence of PTSD. Furthermore, brain images are simply snapshots, and current studies are based on averages.<sup>227</sup> In general, PTSD and non-PTSD groups tend to overlap on dependent measures of brain activation, and functional neuroimaging does not currently have the specificity and sensitivity needed to be a reliable diagnostic tool for this disorder.<sup>228</sup> Even if we could use it for diagnostic purposes, it would be unusual to have available baselines of individuals to measure biological differences before and after exposure to the

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<sup>224</sup> Amit Etkin & Tor D. Wager, *Functional Neuroimaging of Anxiety: A Meta-Analysis of Emotional Processing in PTSD, Social Anxiety Disorder, and Specific Phobia*, 164 AM. J. PSYCHIATRY 1476 (2007) (describing the use of meta-analysis to compare the fMRI and PET scans of individuals diagnosed with one of three anxiety disorders—PTSD, social anxiety disorder, and specific phobia—with scans of healthy individuals who had undergone fear conditioning).

<sup>225</sup> *Id.* at 1480.

<sup>226</sup> *Id.* A recent study measured the magnetic fields in the brains of military PTSD victims and healthy controls by using magnetoencephalographic (MEG) recordings. A.P. Georgopoulos et al., *The Synchronous Neural Interactions Test as a Functional Neuromarker for Post-Traumatic Stress Disorder (PTSD): A Robust Classification Method Based on the Bootstrap*, 7 J. NEURAL ENGINEERING 16011 (2010). The team examined the subjects in a task-free condition, which meant that their brains were in a “steady-state.” They reported that they were able to classify the PTSD victims with 90% accuracy, by measuring a recurring MEG pattern in the right temporal lobe. *Id.*; see also Bottalico & Bruni, *supra* note 183, at 115 (describing limitations of the study).

<sup>227</sup> See Owen D. Jones et al., *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 STAN. TECH. L. REV. 5, 33 (2009).

<sup>228</sup> See Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant’s Past Mental States*, 62 STAN. L. REV. 1119, 1151 (2010) (“[C]omparisons based on averaged group data [in neuroimaging studies] are not very useful for individual determination.”).

traumatic event.<sup>229</sup> It can be difficult to find an appropriate control group as well. Would an appropriate control be individuals never exposed to a traumatic event or healthy individuals exposed to a traumatic event who have not manifested symptoms of PTSD?<sup>230</sup> Moreover, brain images vary widely among individuals with “healthy” brains.<sup>231</sup> In general, most imaging studies of PTSD have been conducted to better understand the underlying neurocircuitry of this disorder rather than to develop a diagnostic tool or a way to link the disorder to the commission of a particular act.

Even with these limitations, it is an appropriate time to grapple with the implications of these advances. As one leader in the field has observed: “I am confident that we will soon be able to predict, with a high degree of accuracy, some neurological and mental illnesses. Then we will have to answer the question, ‘What do we do now?’”<sup>232</sup> Advances in science that continue to document structural and functional changes in PTSD patients, generally, may challenge the theories behind mitigation and, more specifically, challenge the premise of exceptional consideration for military veterans or battered women. If scientists can demonstrate changes to the brains of individuals with PTSD—removing questions of validity and malingering, regardless of the stressor that caused the PTSD—then courts and legislators will have to grapple with whether the stressor should matter when PTSD is used as a mitigating factor in sentencing. Either we follow the implicit logic of the physiological findings that are now emerging, and extend mitigation beyond certain limited PTSD settings, or we acknowledge the normative character of the boundary between acceptable or unacceptable stressors of PTSD mitigator claims.

#### IV. DEVELOPING A LIMITING PRINCIPLE FOR ASSESSING PTSD CLAIMS IN SENTENCING BASED ON THE STRESSOR

Assuming the advances in neuroscience research described in Part III eventually allow us to *scientifically* validate PTSD claims by external

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<sup>229</sup> See Jones et al., *supra* note 227, at 36; cf. Meszaros, *supra* note 102, at 159 (suggesting ways to gather evidence of causal presence of neurobiological effects of BWS).

<sup>230</sup> Brown & Murphy, *supra* note 228, at 1181 (describing problem of determining appropriate reference class in neuroimaging studies).

<sup>231</sup> *Id.* (“There is no predetermined reference class for making references to normal brain functioning.”).

<sup>232</sup> Henry T. Greely, Keynote Address, *Law and the Revolution in Neuroscience: An Early Look at the Field*, 42 AKRON L. REV. 687, 691 (2009); see also Stephen J. Morse, *The Future of Neuroscientific Evidence*, in *THE FUTURE OF EVIDENCE, HOW SCIENCE & TECHNOLOGY WILL CHANGE THE PRACTICE OF LAW* 137, 151 (Carol Henderson & Jules Epstein eds., 2011) (explaining that although neuroscience is presently unable to provide diagnostic markers for severe mental disorders, “most responsible observers think this will be a distinct possibility in the future”).

measures such as structural changes in the brain and neurotransmitter release (rather than by relying solely on clinical evidence), we must reassess how we *legally* validate defendants' claims of PTSD. This new assessment may allow us to avoid applications of mitigation that may be replete with stereotypes or act as proxies for other social goals.

As noted above, PTSD is unique among mental disorders in that it points to an identifiable traumatic event that "caused" the disorder. Unlike other mental disorders such as schizophrenia, PTSD requires an outside event or actor to cause the harm.<sup>233</sup> The stressor feature of PTSD may assist in its validation, both in law and society. Juries are likely to accept more readily a mental disorder attributable to an identifiable traumatic event rather than one simply based on a collection of clinical symptoms.<sup>234</sup> As a general matter, we more readily accept the "before and after" transformation of the individual after experiencing trauma.<sup>235</sup>

While the stressor feature of PTSD may result in more legal or social acceptance, that same feature has played a role in the law's treatment of PTSD. In particular, legal systems identify certain stressors in particular environments that justify leniency within the criminal justice system, while denying leniency to other stressors, without fully explaining why. The motivation for creating special consideration for the stressors of military service and battered women is understandable. PTSD has been commonly associated with military veterans since its recognition, and it later was associated with spousal abuse. The intuition of legislators, judges, and scholars, as well as much of the public, is that individuals subjected to these two stressors plausibly can develop PTSD. Science may well support this intuition. One problem, however, is that isolating these two contexts for special consideration may reflect more than intuition regarding the scientific validity of the diagnosis; it may reflect our natural sympathies with certain types of offenders—there is widespread recognition of the enormous social problems in our country associated with veterans returning from war or women subject to abuse by their partners<sup>236</sup>—or the increasing input of political influences on sentencing decision making.<sup>237</sup> Indeed, Professor David Faigman has

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<sup>233</sup> Rachel V. Rose et al., *Another Crack in the Thin Skull Plaintiff Rule: Why Women with Post Traumatic Stress Disorder Who Suffer Physical Harm from Abusive Environments at Work or School Should Recover from Employers and Educators*, 20 TEX. J. WOMEN & L. 165, 192 (2011).

<sup>234</sup> Hawthorne, *supra* note 1, at 8 ("The attorney seeking to introduce PTSD evidence can usually present evidence of a relatively happy and healthy client *before* the event; and a damaged client *after* the event.").

<sup>235</sup> See Barry L. Levin, *Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder*, 46 AM. JUR. TRIALS 441, §§ 5, 37 (2011) (describing the transformation of enlistees into individuals with a "warrior identity"); see also Giardino, *supra* note 1, at 2961 n.35.

<sup>236</sup> See Smith, *supra* note 14, at 60–64 (describing the "political" origins of the recognition of PTSD in the *DSM-III* and stating "that PTSD is a 'construct' is simply a given" in light of its socio-political and legal origins).

<sup>237</sup> See Mosteller, *supra* note 121, at 466–67 (describing use of syndrome evidence in the

argued that BWS, although proffered as scientific fact, reflects a “thinly disguised normative judgment” in which the “established policy of legal rules becomes modified, and in some cases nullified.”<sup>238</sup> Others have suggested that convicted military veterans may become a “class of privileged offenders.”<sup>239</sup>

If we can move beyond the empirical questions about validity and fraud, concerns that traditionally dog PTSD claims, it would force us to grapple with whether the special treatment given to certain stressors reflects a normative judgment in assigning punishment for behavior in these instances. Should we distinguish PTSD as a class from our treatment of other mental disorders, or are we concerned about opening the floodgates to claims of PTSD by criminal defendants, since many defendants may have experienced trauma in other contexts?<sup>240</sup> Do we want to rank claims of PTSD as a policy matter, so that the source of PTSD is determinative when the disorder is advanced as a mitigating factor?<sup>241</sup> For example, what if the PTSD arises from a less sympathetic trigger such as one’s association with gang violence or time spent in

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context of abuse of women and children “in a belated effort to make amends for prior societal and legal insensitivity”).

<sup>238</sup> Faigman, *supra* note 121, at 1074–75.

<sup>239</sup> See Alyson Sincavage, Note, *The War Comes Home: How Congress’ Failure to Address Veterans’ Mental Health has Led to Violence in America*, 33 NOVA L. REV. 481, 507 (2009) (quoting Lauren Sonis, *Local Iraq War Vet Found Not Guilty of Murder*, DAYTONA BEACH NEWS-J., Mar. 8, 2008, at A1); see also Efrati, *supra* note 1 (“[R]aising concern among some legal experts, who say singling out veterans for special treatment indulges criminal behavior and risks establishing a two-tier system of justice.”).

<sup>240</sup> For example, some research suggests that motor vehicle accidents are the leading cause of PTSD. See *Motor Vehicle Accidents are Leading Cause of Posttraumatic Stress Disorder, According to New Book*, AM. PSYCHOL. ASS’N (Dec. 7, 2003), <http://www.apa.org/news/press/releases/2003/12/accidents-ptsd.aspx> (citing EDWARD B. BLANCHARD & EDWARD J. HICKLING, AFTER THE CRASH: PSYCHOLOGICAL ASSESSMENT AND TREATMENT OF SURVIVORS OF MOTOR VEHICLE ACCIDENTS (2003)). One commentator attributes an increase in the diagnosis of PTSD to increased exposure to violence or reports of violence, the greater impact of natural disasters, and an increase of other traumatic events, which spreads to primary victims as well as secondary victims such as rescue workers. David Kinchin, *What is Post Traumatic Stress Disorder?*, BURN SURVIVORS THROUGHOUT THE WORLD, INC., <http://www.burnsurvivorsttw.org/articles/ptsd1.html> (last visited Sept. 15, 2012). The National Institute of Mental Health estimates that PTSD affects about 7.7 million Americans. NAT’L INST. OF MENTAL HEALTH, POSTTRAUMATIC STRESS DISORDER: FACT SHEET (2010), available at <http://report.nih.gov/nihfactsheets/ViewFactSheet.aspx?csid=58>; see also Hartocollis, *supra* note 21, at A1 (“At least 10,000 firefighters, police officers and civilians exposed . . . [to the 9/11] attacks . . . have been found to have [PTSD]. . .”).

<sup>241</sup> See Hawthorne, *supra* note 1, at 8–9 (“In a court (and in the court of public opinion) . . . the nature of the traumatic event, or ‘stressor’ is very important . . .”); Robert Barnes, *Death-Row Inmate’s Military Service is Relevant, Justices Say*, WASH. POST, Dec. 1, 2009, at A6 (“In an unsigned opinion without dissent, the justices were strikingly sympathetic . . . [and seemed to go out of their way] . . . to express the seriousness with which [they] view[] post-traumatic stress disorder.”); Linda Greenhouse, *Selective Empathy*, N.Y. TIMES OPINIONATOR BLOG (Dec. 3, 2009, 9:11 PM), <http://opinionator.blogs.nytimes.com/2009/12/03/selective-empathy/> (noting the sympathy that all nine justices displayed for a Korean War Veteran, who shot two people dead in cold blood).

jail?<sup>242</sup> Should we consider only whether the event was subjectively traumatic or apply a “reasonableness” test?

Further, courts and states inconsistently approach whether PTSD must precipitate the crime or whether it can be used solely as a general offender characteristic. At the very least, neuroscience research, by providing more factual information on documentable physical changes, should help us clarify our normative thinking about criminal responsibility and punishment: It should force us to articulate why we allow PTSD as a mitigating factor, whether tying it to military service or BWS should be treated specially, and whether it should be linked to commission of the crime itself before allowing it to be used as a mitigating factor.

Although use of syndrome evidence<sup>243</sup> in criminal trials has been heavily criticized,<sup>244</sup> some lessons for the PTSD setting can be drawn from the abuse-syndrome literature. Syndrome evidence has been used to connect a defendant to the more general behavior of other members of a group, what some experts have referred to as “social framework” or “group character” evidence.<sup>245</sup> It can be used to buttress the credibility of a witness, by identifying the link between the individual and the syndrome. For example, the “Child Sexual Abuse Accommodation Syndrome”<sup>246</sup> is used to describe general reactions to childhood abuse, and is used to explain to the jury that many children who were sexually abused may delay reporting the abuse or recant their accusations.<sup>247</sup> Syndrome evidence recognizes that many others have had similar reactions.

Borrowing from syndrome evidence, identifying certain stressors

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<sup>242</sup> See Mosteller, *supra* note 121, at 501 n.141 (“The State argues it would be impossible to confine such a standard to use in battered spouse cases and would lead to an application for other ‘identifiable psychological syndrome.’ For example, should Timothy McVeigh (the Oklahoma City Bombing suspect) be allowed to have a ‘reasonable militant militia-person’ standard applied to his actions?”) (quoting government’s brief in *State v. Grant*, 470 S.E.2d 1 (N.C. 1996)).

<sup>243</sup> Syndrome evidence has been defined as a type of proof designed “to educate jurors about typical human behavior in response to specified conditions.” *Id.* at 462. It is an amorphous concept, particularly when used in the courtroom. *Id.* Mosteller notes three uses of group character and syndrome evidence in criminal law: 1) to determine whether critical conduct has occurred; 2) to support credibility by showing that the aberrational behavior is normal for that group; and 3) to establish the reasonableness of the behavior. *Id.* at 463–64.

<sup>244</sup> See, e.g., ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 18–19 (1994); see also Faigman, *supra* note 121, at 1075; Mosteller, *supra* note 121, at 463 (arguing that the dangers to accurate factfinding posed by group character evidence depends on use and claims of such evidence).

<sup>245</sup> See Mosteller, *supra* note 121, at 462; Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559–60 (1987).

<sup>246</sup> This syndrome was first recognized by Roland Summit. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983) (explaining that Child Sexual Abuse Accommodation Syndrome is characterized by five behavioral features: (1) secrecy; (2) helplessness; (3) entrapment; (4) delayed disclosure; and (5) retraction).

<sup>247</sup> Mosteller, *supra* note 121, at 472.

as strong links to the mental disorder of PTSD may be appropriate.<sup>248</sup> Judicial acceptance of certain PTSD claims comes with assumptions about the “syndromes” of experiencing war or fear of assault. I do not argue that recognizing the link between PTSD and military service or battered women contexts is unreliable or invalid. Instead, I argue that other classes may well exist that reflect a high degree of validity between the stressor and PTSD, with similar effects on behavior.<sup>249</sup> Differential treatment per se is not justified. At the same time, use of PTSD “syndrome” evidence may be too limiting, since individuals exposed to stressors outside of recognized classes of stressors may also have PTSD.

Syndrome evidence can also serve to correct general public misperceptions about a particular social group’s behavior in certain situations.<sup>250</sup> For example, admitting evidence on Child Sexual Abuse Accommodation Syndrome serves a corrective function as well as a descriptive one. In demonstrating that delay in reporting sexual abuse is typical of children subjected to abuse, it can serve to correct misperceptions that jurors may have about a child’s reaction to abuse and counter-impeachment evidence.<sup>251</sup> Similarly, courts and legislatures may have singled out particular stressors to countermand misperceptions about PTSD, particularly with regard to the triggers of spousal battering or combat exposure. Whether some basic misunderstandings exist with regard to the triggering effect of certain stressors, as well as the type of behavior that may result from the disorder, presumably could be supported by social science research. As an alternative, use of syndrome-type evidence could be used to countermand misperceptions about what stressors can trigger PTSD in general, when it arises, and what the effects of that disorder may have on individuals in certain situations, without isolating certain pockets of stressors. In other words, syndrome evidence could follow—not lead—scientific findings. It should be used to correct misperceptions about science, not to generate sympathy for certain defendants.<sup>252</sup>

The danger of treating certain stressors differently is that the non-scientific issue of moral blameworthiness may actually be creeping into the analysis. This may serve as a proxy for character evidence or causal evidence. Certain traumatic events, like military service and domestic

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<sup>248</sup> It is not within the scope of this Article to discuss abuse-related defenses nor does this Article argue that granting special consideration of certain stressors for mitigation purposes rises to the level of creating a “syndrome.” It merely borrows the concept to argue that if a syndrome-type presumption is applied, it should be applied across the board.

<sup>249</sup> Mosteller, *supra* note 121, at 505 (“[C]ategorical rules that respond to broad social judgments as long as the underlying analysis is reasonably honest and takes only limited license with evidentiary principles.”).

<sup>250</sup> *Id.* at 472–73.

<sup>251</sup> *Id.* at 474–75.

<sup>252</sup> See *id.* at 509; see also Meszaros, *supra* note 102, at 130 (“Bringing the defense of battered women into congruence with contemporary neurobiological evidence offers a strong and objective foundation for limitless claims to mitigation and exculpation.”).

violence, are naturally sympathetic. There is considerable public sympathy for women who are subject to battery. And with regard to military veterans, the naturally sympathetic view may move beyond sympathy to one of collective guilt.<sup>253</sup> Singling out war-triggered PTSD for exceptional treatment has been justified as a “cost of war.”<sup>254</sup> One author argues that service-triggered PTSD is different from PTSD brought on by other stressors because “combat veterans would not have service-related PTSD . . . but for government action in the form of training them to kill and sending them to war.”<sup>255</sup> In other words, certain defendants are perceived as “victims” of PTSD and are consequentially perceived as more worthy of special treatment.

But this exceptional treatment for veterans and battered women—especially in the face of scientifically documentable physical changes to other victims of PTSD—cannot be justified by a pure retribution rationale of sentencing. If we accept that PTSD can alter an individual’s perception of a situation or environment and cause the individual to react unexpectedly or violently because of this altered perception, then the source of the trauma that triggers those changes should not be relevant. In other words, if the diagnosis of PTSD suggests that the offender has diminished culpability or enhanced dangerousness, so that it reduces capacity in decision-making, then suffering from the anxiety disorder should affect individuals similarly situated, regardless of the triggering trauma of the disorder. Similarly, if the offender is exercising a right to self-defense, but does so with excessive force due to the disorder, then a sentence may be mitigated, again, based on some notion of reduced capacity. Simply having the disorder should translate into a

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<sup>253</sup> See Giardino, *supra* note 1, at 2962 (“[O]ne can easily distinguish these combat veterans from other offenders with PTSD . . . because of the government’s involvement in sending them to war where [the PTSD was] . . . incurred.”); Hawthorne, *supra* note 1, at 9 (“[T]he public will have to make a decision on how much collective guilt we feel for sending young, untried men and women overseas to fight in an increasingly unpopular counterinsurgency campaign [in Iraq].”).

<sup>254</sup> See Caine, *supra* note 3, at 239 (“Providing veterans with treatment for wounds incurred on the battlefield is not being soft on crime, rather, a repayment for the sacrifice they made to their country.”); C. Peter Erlander, *Vietnam on Trial: Developing a Conceptual Framework for Presenting and Explaining PTSD in a Forensic Setting*, 42 GUILD PRAC. 65 (1985) (arguing that permitting PTSD evidence in a military veteran’s trial should be considered a cost of war when the government chooses to invade a sovereign country and engender guerrilla warfare and civilian deaths); Deborah Stonag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, at A1 (“To deny the frequent connection between combat trauma and subsequent criminal behavior is to deny one of the direct societal costs of war and to discard another generation of troubled heroes.”).

<sup>255</sup> See Giardino, *supra* note 1, at 2962 (“There is something very unique about a normal young man or woman who volunteers to serve his or her country, who is trained to kill other people, who is sent to war by the government and exposed to combat and then returns a changed person that ends up committing a capital crime.”); see also Hamilton, *supra* note 3, at 381 (“[O]ur societal obligations may include a reconceptualization of the criminal justice system’s response to combat veterans whose PTSD is related to their automatistic actions that result in what would otherwise be considered criminal harm.”).

lowered punishment across the board as a general mitigating condition. Thus, to the extent that the special treatment given to these two stressors is based on a perception of diminished capacity, it seems unprincipled not to expand that corrective function, assuming scientific research can support it.<sup>256</sup>

In a larger sense, if the adverse effects of PTSD are sufficiently great and documentable to warrant mitigation in sentencing, then perhaps we should use PTSD as a mitigating factor for offenders not based on the particular source of the PTSD, but as a class of PTSD sufferers as a whole. Although criminal law generally does not treat offenders as a class for purposes of sentencing—but rather proceeds on a case-by-case basis focusing on individual factors—important exceptions exist, such as with mental retardation and youth in capital sentencing.<sup>257</sup> It is at least arguable that with advances in neuroscience, PTSD could be viewed in the same light as those exceptions for purposes of capital sentencing.<sup>258</sup>

Validating the condition of PTSD should not be confused with causation. If science can completely answer the question whether having the disorder of PTSD causes criminal behavior, it has the potential of transforming the focus of the legal system from one based on considerations of desert to a system that relies solely on prediction and prevention.<sup>259</sup> It is unlikely that neuroscience will ever be able to provide a complete explanation of behavior to suggest that someone with PTSD is no longer a minimally responsible agent.<sup>260</sup> Instead, to the extent that PTSD is viewed as a causal explanation of criminal behavior, the relevance of the causal information to criminal sentencing likely will remain one explanation of many. Some people with PTSD (and other mental disorders) can distinguish right from wrong; others cannot. The significant question is whether the legal excusing condition exists; the cause of the behavior does not matter for purposes of assigning responsibility.<sup>261</sup> Even if the condition of PTSD is recognized as a primary excusing condition in some contexts, “[c]riminal responsibility and its consequences, such as whether and how much to punish a

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<sup>256</sup> See *supra* Part II, notes 177–182 and accompanying text.

<sup>257</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that murderers who were 16 or 17 at the time of the murder may not be subject to the death penalty); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that murderers with retardation may not be subject to the death penalty).

<sup>258</sup> See *Giardino*, *supra* note 1 (arguing that veterans suffering from PTSD or traumatic brain injury should not be subject to the death penalty).

<sup>259</sup> See *Morse*, *supra* note 132, at 219; *cf.* *Greene & Cohen*, *supra* note 8.

<sup>260</sup> See *Brown*, *supra* note 1. *But see* *Hamilton*, *supra* note 3 (arguing that PTSD-afflicted veteran’s automatic behavior can negate the actus reus element so that the veteran is not engaged in a voluntary act and therefore not criminally culpable); *cf.* *Meszaros*, *supra* note 102, at 161–67 (describing potential use of neurobiological evidence for causal proof in BWS setting).

<sup>261</sup> *Morse*, *supra* note 132, at 222 (“A person who is mentally disordered and does not know right from wrong will be excused from criminal responsibility whether his or her rationality impairment was primarily a product of faulty genetics, a neurotransmitter defect, bad parenting, social stress, the alignment of the planets, or some combination of the above . . .”).

wrongdoer, are normative moral, political, and ultimately legal questions.”<sup>262</sup>

From a consequentialist point of view, the source of the stressor also should not hold significance. To the extent that sentencing decisions should be based predominantly on reducing recidivism and maximizing public safety,<sup>263</sup> the context of how PTSD was acquired should not matter.<sup>264</sup> Deciding how difficult it will be for the offender to reintegrate into society should not depend on the source of the trauma triggering the disorder, although it may depend on society’s response to the event.<sup>265</sup> Although many have called for treatment in lieu of incarceration for convicted veterans suffering from PTSD,<sup>266</sup> nothing in the literature suggests that the effectiveness of treatment options in lieu of prison is tied to the source of the trauma.<sup>267</sup>

Once we remove concerns of validity, moral choice, competence, and rehabilitation, then singling out certain sources of PTSD for sentencing mitigation must be driven by other concerns. If the exceptionalism is based on notions of “mercy,” then it is important for courts and legislatures to recognize it as such. Perhaps we think that a victim of combat-induced PTSD is more worthy of mercy than PTSD

<sup>262</sup> *Id.* at 210 (not a scientific question).

<sup>263</sup> See Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1390 (2008).

<sup>264</sup> Although certain risk variables may affect an individual’s probability of developing chronic PTSD (trauma impact variables, personal and history variables, and cultural and environment variables), “[v]arious qualitative and quantitative features . . . make every traumatic event unique differentially affect people’s coping capacities and long-term psychological health.” Brett T. Litz & Shira Maguen, *Early Intervention for Trauma*, in HANDBOOK OF PTSD, *supra* note 6, at 306, 312; see also Mary Tramontin, *Exit Wounds: Current Issues Pertaining to Combat-Related PTSD of Relevance to the Legal System*, 29 DEV. MENTAL HEALTH L. 23, 30 (2010) (“[T]he combined influence of prior trauma history, prior maladjustment, family history of psychopathology, and lack of social support contributed substantially more to an adverse outcome than specific event characteristics.”).

<sup>265</sup> See Brian P. Marx, et. al, *Association of Time Since Deployment, Combat Intensity, and Posttraumatic Stress Symptoms with Neuro Psychological Outcomes Following Iraq War Deployment*, 9 ARCHIVES GEN. PSYCH. 996 (2009) (observing that untreated PTSD tends to get worse over time); Lawrence J. Raifman, *Problems of Diagnosis and Legal Causation in Courtroom Use of Post-Traumatic Stress Disorder*, 1 BEHAV. SCI. & L. 115, 129 (1983) (suggesting that some events are “traumatic” due in part to society’s response to the event, and certain events will have less impact as traumatic stressors “as society begins to supply victims with social support services”); Smith, *supra* note 14, at 57–58, 58 nn.450–51 (suggesting that individuals may have greater risk of developing PTSD when they receive limited psychological support after a traumatic event); Jennifer J. Vasterling, Mieke Verfaelli & Karen D. Sullivan, *Mild Traumatic Brain Injury and Posttraumatic Stress Disorder in Returning Veterans: Perspectives from Cognitive Neuroscience*, 29 CLINICAL PSYCHIATRY REV. 674, 681 (2009) (observing that early intervention reduced development of PTSD); see also Litz & Maguen, *supra* note 264, at 312 (explaining that formal early intervention is not appropriate for all because most people exposed to trauma recover on their own, but social support may affect risk for acquiring PTSD).

<sup>266</sup> See, e.g., Caine, *supra* note 3; see also *supra* notes 98–100 and accompanying text.

<sup>267</sup> See Hamilton, *supra* note 3, at 386 nn.258–60 and accompanying text (listing available treatments that have been shown to be effective); Tramontin, *supra* note 264, at 27.

diagnosed in car accident victims. Similarly, if favoring some stressors over others is meant to reflect the value judgment of “good character,” or some sense of lack of future dangerousness, then it should be made explicit.<sup>268</sup> Yet following this path, without empirical evidence, leads to arbitrary, biased, and intuition-based social judgments. “[W]hen a court makes changes based on political and social considerations while claiming the change is based on a more neutral basis, such as social science, the court may undercut its claim to legitimacy, which should rest on bases more neutral than political responsiveness.”<sup>269</sup>

In developing legal rules, criminal law serves normative goals that may be addressed here. For example, if the actor intentionally or negligently subjected himself to certain contexts that could induce PTSD that lawmakers view as irresponsible, then legal standards could take this action into account for purposes of mitigation. PTSD acquired from gang violence or commission of a crime would fall into this category.<sup>270</sup> Limiting principles exist in other areas that presumably could be applied in this context. A defendant relying on an involuntary intoxication defense, for example, may need to demonstrate that he did not recklessly place himself in a situation where intoxication was likely.<sup>271</sup> Similarly, a defendant asserting a defense of extreme emotional disturbance may need to demonstrate that the disturbance was not the result of the “defendant’s own intentional, knowing, reckless, or criminally negligent act.”<sup>272</sup> In the same vein, one could also argue that military veterans who have PTSD should not be licensed to have guns in their homes without further medical certification.

Further, assuming that retribution is the primary consideration behind mitigation, it would make sense to require that the defendant was suffering from PTSD at the time of his or her offense. Courts have used the requirement of a “nexus” between the PTSD and the

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<sup>268</sup> As one article states: “[T]o what extent does PTSD as an origin of problem behaviors diminish the need to hold veterans responsible for their behavior?” Nidiffer & Leach, *supra* note 1, at 16.

<sup>269</sup> Mosteller, *supra* note 121, at 513 (arguing that BWS’s legal foothold provides a model for other political influences to affect evidence law).

<sup>270</sup> See J. Vincent Aprile II, *PTSD: When the Crime Punishes the Perpetrator*, 23 CRIM. JUST. 39 (2009) (describing how perpetrators of violent, criminal acts can develop PTSD as a result of the commission of those offenses and arguing that courts should take this into account during sentencing even though the PTSD was self-induced); see also Nidiffer & Leach, *supra* note 1, at 16 (noting that the process of litigation itself can produce negative effects on veterans with PTSD, resulting in “Forensic Stress Disorder”).

<sup>271</sup> See MO. REV. STAT. § 562.071 (2011) (prohibiting a defense of duress in any offense when defendant recklessly places himself in situation in which it is likely he will be subjected to coercion); ROBINSON, *supra* note 132, § 176 (“[L]imitation is supported by arguing that the actor who is responsible for causing his own excusing condition, should not benefit from it.”). Although the problem of an actor causing his disability or excusing his condition most frequently arises in intoxication cases, there is no reason why such a circumstance should not be taken into account for all excuses. *Id.* § 162.

<sup>272</sup> 40 C.J.S. *Homicide* § 107 (2006).

commission of the crime, which does not rise to the level of causation, to avoid a judgment based on “character.” Neuroscience cannot demonstrate this nexus; it is unlikely it will ever be able to do so.<sup>273</sup> Accordingly, we will need to rely on expert testimony and circumstantial evidence to demonstrate the connection between the disorder and the criminal act.<sup>274</sup> Without requiring a nexus, we are inviting the use of a “get out of jail free” card for PTSD sufferers. Of course, if proof of a nexus is required, it would be difficult to justify imposing the requirement for some defendants and not others.

Finally, courts and legislatures will need to grapple with whether it is sufficient that the stressor event is subjectively traumatic or whether a normative element should be introduced into the analysis.<sup>275</sup> Criminal law has faced this question in other areas.<sup>276</sup> In determining whether a

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<sup>273</sup> See Nidiffer & Leach, *supra* note 1, at 13–15 (“[O]ne can not [sic] be confident that situations and events that have been identified as triggers of PTSD-related symptoms are actual triggers until they have been ‘tested’ for PTSD-like reactions in the home or community environment.”).

<sup>274</sup> See Burgess et al., *supra* note 37, at 75 (“[C]ausal link [between crime and defense] will almost always be the most difficult element to establish.”); *see also* sources cited *supra* note 45.

<sup>275</sup> Treating the reaction to the trauma as a subjective experience tracks the current version of the A Criterion in the DSM-IV-TR, *supra* note 10.

<sup>276</sup> For example, the Extreme Emotional Disturbance (EED) defense, which is an outgrowth of the common law provocation defense, can mitigate a murder charge to manslaughter. *See* 40 C.J.S. *Homicide* § 107 (2006). As the law has moved away from the common law provocation defense, which was confined to strict categories of legally adequate provocation, it has adopted a more open-ended, jury-driven, and socially-sensitive version of the defense. *See* Arnold H. Loewy, *Critiquing Crump: The Strengths and Weaknesses of Professor Crump’s Model Laws of Homicide*, 109 W. VA. L. REV. 369, 373 (2007) (“[The Model Penal Code] is explicitly designed to eschew the rigidity of the common law so that deserving cases of extreme emotional disturbance achieve mitigation . . .”). Under the Model Penal Code’s test, “a homicide which would otherwise be murder is [mitigated to manslaughter if] committed under the influence of an extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.” MODEL PENAL CODE § 210.3(1)(b) (2001). Under the Code, “[t]he 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 be.” *Id.* Presumably, under this subjective test, the nature of the trigger should be irrelevant to the question whether an individual has committed murder in response to an extreme emotional disturbance, but courts and juries have had to grapple with whether to accept the claim of EED where the apparent trigger is racism or homophobia. *See, e.g.,* Mills v. Shepard, 445 F. Supp. 1231, 1237 (W.D.N.C. 1978) (involving defendant’s successful argument that he was provoked into a heat of passion by unwanted homosexual advance); Shick v. Indiana, 570 N.E.2d 918, 922, 926 (Ind. Ct. App. 1991) (involving defendant’s argument that an unwanted homosexual overture provoked him into a heat of passion; jury convicted defendant of voluntary manslaughter); *Green v. Regina* (1997) 148 ALR 659 (Austl.) (explaining that the trial court erred in refusing testimony of family history of sexual abuse in support of defense of provocation from homosexual advances and that provocation is essentially a jury question). Academics have argued that a normative element should be introduced into the analysis. *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 505 (2008) (“Equating reasonableness with typicality . . . is problematic because it enables entrenched social norms that may embody messages of bias based on race, gender, or sexual orientation to govern outcomes in provocation cases.”); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133 (1992) (arguing that homosexual advance defense is a misguided application of provocation and judicially institutionalizes homophobia).

defendant can validly claim that he or she suffers from PTSD, it is difficult to argue that the trigger matters. But should we judge whether the reaction to the trigger was objectively warranted or normatively appropriate? The danger is that introducing a normative element to the analysis may countenance the sort of social and political discrimination that already seems to be at play in this area.

#### CONCLUSION

While a presumption has begun to emerge that military service or domestic violence are legitimate bases for PTSD claims in mitigation, the same is not true of PTSD claims arising from other contexts. One reason that this exceptionalism has emerged may be that we find PTSD arising from certain contexts more believable than others. Or it may reflect other political or social considerations.

PTSD is unique because it is “a mental disorder attributable to an external cause.”<sup>277</sup> We accept that veterans returning from military service possess psychological scars that can lead to the disorder. World War I introduced the term “shell shocked” and by the time veterans began to return from Vietnam, PTSD was relatively well established as a distinct psychological condition.<sup>278</sup> This intuition—that combat experience can profoundly affect one’s mental health—rooted itself in the public consciousness and contributes to the ease with which we now accept the concept of a veteran with PTSD “snapping” and committing a crime that otherwise would not occur. This presumption of trustworthiness partially explains the explicit acceptance of courts and legislatures of PTSD and military experience. At the same time, we also may believe that veterans are less deserving of punishment because we value and honor their service. In some ways, we may have decided as a policy matter to grant a partial “pass” to military veterans convicted of criminal behavior.

A similar trajectory has occurred with BWS claims. Acceptance of the syndrome has occurred along with an increased social awareness of domestic violence as a pervasive problem. We have come to accept that although women may remain in abusive relationships, they may “snap” one day and confront their abusers. Although use of BWS as a mitigating factor does not have as strong a position as PTSD with military veterans, the majority of states have accepted usage of the syndrome in some form in criminal cases.

These two stressor contexts of military combat and domestic violence may serve as a proxy for the trustworthiness of PTSD claims.

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<sup>277</sup> Smith, *supra* note 14, at 2.

<sup>278</sup> *Id.* at 3 (describing how diagnosis first appeared in *DSM-III* as a result of heavy lobbying by Vietnam veterans groups).

But now that we have begun to develop external measures of PTSD through advances in neuroscience, the concerns about malingering should no longer prevent accepting PTSD claims outside these particular contexts. Perhaps the scientific developments in this area raise more questions than they answer. But our legal system should recognize the implications of these scientific advances and develop a more principled approach to the use of PTSD in sentencing. What is distinctive about PTSD and mitigation is the normative character of the boundary between acceptable and unacceptable stressors of mitigating PTSD claims. Either we have to make difficult choices about our social values—which stressors are more like military service or domestic violence and which are more like gang-bangers?—or we follow the implicit logic of the physiological findings emerging from neuroscience and extend mitigation based on PTSD to some more controversial settings.

As this Article notes, how we answer those questions ultimately depends on whether we perceive our sentencing decisions as retributive or consequentialist. If retributive concerns drive our sentencing decisions, then presumably the law should only be concerned with whether an individual's PTSD made it more difficult for her to obey the law and not with the particular traumatic event that was the source of the PTSD. If consequentialist concerns dominate our sentencing decisions, so that we are concerned with the prevention of future crime, the source of the PTSD may be relevant if different stressors have different rates of recidivism or rehabilitation, but otherwise, the context of how PTSD was acquired should not matter. In any event, there may still be a role for the distinction of particular stressors to combat social misperceptions of behavior associated with PTSD sufferers. Certain stressors that have been better studied can serve to explain what can trigger PTSD and what effects the disorder may have on individuals in certain settings, such as the failure to remove oneself from a dangerous setting. This Article ultimately concludes, however, that the modern trend of special treatment for military veterans and victims of domestic violence—that is, the fact that those defendants whose PTSD resulted from either of these stressors are more likely to receive sentencing mitigation than those whose PTSD arose from other sources—has gone too far. As neuroscience and brain imaging become increasingly capable of allowing a non-clinical PTSD diagnosis, treating military veterans and domestic violence victims more leniently than other defendants suffering from PTSD becomes increasingly difficult to justify.