

Military Veterans, Culpability, and Blame

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Introduction

Recently in *Porter v. McCollum*, the United States Supreme Court, citing “a long tradition of according leniency to veterans in recognition of their service,” held that a defense lawyer’s failure to present his client’s military service record as mitigating evidence during his sentencing for two murders amounted to ineffective assistance of counsel.¹ After *Porter*, the Federal Sentencing Commission amended the Sentencing Guidelines in 2010 to single out military service as “relevant” when it is “present to an unusual degree” despite its general view that “prior good works are not ordinarily relevant” in sentencing determinations.² Also, as American troops have started to return from Iraq and Afghanistan, there has been a steady stream of media accounts focusing on veterans who commit crimes after returning home³ and noting a “growing number of judges” who express the view that offenders with military service backgrounds should be treated differently at sentencing from nonveterans.⁴

While the *Porter* Court’s invocation of the “long tradition of . . . leniency” for military veterans is not incorrect,⁵ the legal system’s treatment of this issue has not been uniform. Some jurisdictions mandate a consideration of military service background as a mitigating factor at sentencing;⁶ others permit it.⁷ Federal Sentencing Guidelines, until the aforementioned amendment in 2010, discouraged it, by stating that “[m]ilitary, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.”⁸ As a general matter, the issue is left to judges’ discretion, with

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¹ *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).

² U.S. Sentencing Guidelines Manual § 5H1.11 (2011); U.S. Sentencing Guidelines Appendix C, Amendment 739 (2011). For a recent case discussing the phrase “present to an unusual degree,” see *United States v. Jager*, 2011 WL 831279 (D.N.M. 2011).

³ See, e.g., Erica Goode, *Coming Together to Fight for a Troubled Veteran*, N.Y. Times, July 17, 2011; John Schwartz, *Defendants Fresh from War Find Service Counts in Court*, N.Y. Times, Mar. 15, 2010; James Dao, *Study Suggests More Veterans May Be Helped by Talking About Killing*, N.Y. Times, Feb. 13, 2010; Lizette Alvarez & Dan Frosch, *A Focus on Violence by Returning G.I.’s*, N.Y. Times, Jan. 1, 2009; Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Is Taking the Stand*, N.Y. Times, Jan. 27, 2008.

⁴ Amir Efrati, *Judges Consider New Factor at Sentencing: Military Service*, Wall St. J., Dec. 31, 2009; see also Judge 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).

⁵ See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. Rev. 1109, 1116-17 (2008).

⁶ *Id.* at 1116-17 (discussing North Carolina).

⁷ *Id.* at 1117 (discussing Tennessee).

⁸ U.S. Sentencing Guidelines Manual § 5H1.11 (2009); see also Hessick, *supra* note 5, at 1119-25.

some judges being more sympathetic than others to the idea that military veterans should be treated differently.⁹

Neither is it the case, despite its long history and prominence, that there is a clear understanding of normative justifications for treating military service background as a mitigating factor. Two rationales are typically set forth. The *Porter* Court raised each, stating that we should treat veterans differently “in recognition of” both “their service”¹⁰ and “the intense stress and mental and emotional toll” of combat.¹¹ The former factor suggests there being a “social contributions” or gratitude-based discount, whereas the latter factor points towards a “mental disturbance” discount, bearing some resemblance to other incapacity-based factors, such as insanity and intoxication. The “mental disturbance” account is frequently linked to the claim that these military veterans suffer from post-traumatic stress disorder (“PTSD”).¹² Although it seems plausible that these factors are somehow relevant, it is nevertheless frequently unclear in these discussions how such factors fit into an overall theory of punishment.

The purpose of this Article is to come to a better understanding, from the just deserts perspective, of the grounds to believe that veterans who commit crimes are to be blamed less by the State than offenders without such backgrounds. Of course, there may be sound penological reasons, such as incapacitation or rehabilitation, for the practice of giving discounts to veterans. It may be the case that military veterans are more likely than other, ordinary criminals to reform in settings other than prisons.¹³ Some have also suggested, and put into practice, the idea of having a special court for veterans.¹⁴ This Article does not address the wisdom of these approaches. Rather, it focuses on the question of blameworthiness – whether offenders with military backgrounds are, all other things being equal, less blameworthy than others, and whether the State can blame them to the full extent of their blameworthiness.

More specifically, because much of the debate in this area takes place in terms of PTSD,¹⁵ this Article focuses on PTSD-based arguments in favor of mitigation. Although the issue is by no means settled, this Article starts from the assumption that PTSD has the effect of diminishing one’s capacity to control one’s own behavior and that, for that reason, it reduces one’s culpability for

⁹ See, e.g., *Forgey v. State*, 886 N.E.2d 16, 24 (Ind. App. 2008) (“While we recognize that Forgey was honorably discharged from the Marine Corps in 1993 and commend Forgey for his service to this nation, we cannot conclude that the trial court abused its discretion by failing to consider Forgey’s service to be a significant mitigating factor with respect to the instant crimes. Indeed, many of Forgey’s actions during the commission of the instant crimes appear to be attributable to his military training. For example, Forgey dressed in military fatigue-style camouflage clothing, duct-taped the ankle shackles and thumb cuffs together to maintain silence, and hid on Gus’s property, undetected, for nearly twenty-four hours before committing the offenses. The trial court was within its discretion to conclude Forgey’s military training assisted his commission of the instant offenses and to reject Forgey’s military record as a mitigating sentencing factor.”); Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. Times, Jan. 13, 2008; Tim McGlone, *Navy Officer Who Claimed PTSD in Child-Porn Case Gets 40 Months*, Virginia-Pilot, Dec. 12, 2009; Anne Jungen, *Iraq War Veteran Avoids Prison in Bar Robbery*, La Crosse Tribune, Jan. 9, 2009. See also Betsey J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 *Cardozo L. Rev.* 53 (2012).

¹⁰ *Porter*, 130 S. Ct. at 455.

¹¹ *Id.*

¹² See, e.g., Hawkins, *supra* note 4, at 563; 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 *Ford. L. Rev.* 2955 (2009); Goode, *supra* note 3; Alvarez & Frosch, *supra* note 3; Sontag & Alvarez, *supra* note 9

¹³ Dahlia Lithwick, *A Separate Peace: Specialized Courts for War Veterans Work Wonders. But Why Stop at Veterans?*, Slate, Feb. 11, 2010.

¹⁴ *Id.*; see also Hawkins, *supra* note 4.

¹⁵ See sources cited in *supra* note 12.

conduct committed while one's self-control is compromised due to it. In order to justify the assumption, this Article begins with a brief discussion of PTSD generally – what causes it, who can be subject to it, and how it is thought to be linked to criminal behavior. The rest of the Article focuses on the limits of the PTSD-based argument for mitigation and advances the following propositions: First, a veteran's PTSD does not mitigate his blameworthiness if his PTSD symptoms can be traced to his own culpable behavior. Second, a veteran's PTSD does not mitigate if his PTSD arises from his acts in violation of certain *jus in bello* principles. Third, a veteran's PTSD does not mitigate if his PTSD is traced to his participation in an unjust war, unless he had actually and reasonably believed that the war was just. Fourth, even if a veteran's participation in an unjust war precludes mitigation, he should not be blamed to the full extent of his blameworthiness because the State's hand in producing his criminality undermines its standing to blame him. The Article ends by exploring the implications of these arguments for the social contributions account of mitigation for offenders with military service backgrounds.

A final caveat. The issue of a veteran's PTSD and its contribution to his criminal behavior may come up at either the guilt or the sentencing stage. At the guilt stage, PTSD symptoms may be sufficiently strong to defeat a charge altogether, either by negating an element of the offense or by establishing an element of a defense, such as self-defense or insanity.¹⁶ At the sentencing stage, on the other hand, the PTSD symptoms and their contribution to one's criminal behavior may be thought to be a mitigating factor.¹⁷ The focus of this Article is on the relevance of military service as a reason to mitigate, not acquit. That is, this Article is only about those who commit crimes with sufficient capacity to be held criminally responsible, and it does not address situations where one's military service has caused a disability that is serious enough to negate criminal liability.¹⁸

I. PTSD and Culpability

A. PTSD and Criminal Behavior

Although PTSD is frequently associated with military combat, it is a mental disorder that can arise from a variety of events: such as law enforcement,¹⁹ violent assaults generally, terrorist attacks,²⁰ torture, incarceration, natural disasters, automobile accidents, or even “being diagnosed with a life-threatening illness,” even if, for some of these events, a person merely witnesses them happen to

¹⁶ 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, 96 (2010); see also Landy F. Sparr, *Mental Defenses and Posttraumatic Stress Disorder: Assessment of Criminal Intent*, 9 J. Traumatic Stress 405, 406 (1996) (“There has been some difficulty establishing posttraumatic stress disorder . . . as a criminal defense because generally those with PTSD have not lost touch with reality and can appreciate wrongfulness.”); Grey, *supra* note 9, at 54.

¹⁷ Christopher Hawthorne, *Bringing Baghdad into the Courtroom*, 24 Crim. Just. 4, 12 (2009) (“Given the unpopularity of the insanity defense, PTSD and the defendant's combat experience generally show up in the sentencing phase of a criminal trial. In fact, most of the Vietnam-era cases dealing with PTSD involved reductions in sentences, usually in state courts.”).

¹⁸ For a useful discussion of some conceptual difficulties concerning the distinction between full and partial defenses, see Douglas Husak, *Partial Defenses*, in *The Philosophy of Criminal Law: Selected Essays* 311 (2010).

¹⁹ J. Michael Rivard et al., *Acute Dissociative Responses in Law Enforcement Officers Involved in Critical Shooting Incidents: The Clinical and Forensic Implications*, 47 J. Forensic Sci. 1 (2002); Jimmy P. Mann & John Neece, *Workers' Compensation for Law Enforcement Related Post Traumatic Stress Disorder*, 8 Behav. Sci. & L. 447 (1990); Robert Loo, *Post-Shooting Stress Reactions Among Police Officers*, 12 J. Hum. Stress 27 (1986); John G. Stratton et al., *Post-Traumatic Stress: Study of Police Officers Involved in Shootings*, 55 Psychol. Rep. 127 (1984).

²⁰ Robert M. Brackbill et al., *Asthma and Posttraumatic Stress Symptoms 5 to 6 Years Following Exposure to the World Trade Center Terrorist Attack*, 302 J. Am. Med. Ass'n 502 (2009).

others or learns about their occurrence.²¹ PTSD has also been associated with miscarriage, surgery, poisoning, rape, and domestic violence,²² and Battered Woman Syndrome has been considered a sub-category of PTSD.²³

PTSD can cause a variety of symptoms.²⁴ The Diagnostic and Statistical Manual of Mental Disorders (DSM) requires “clinically significant distress or impairment in social, occupational, or other important areas of functioning” in order for one to be diagnosed with PTSD, and the symptoms of PTSD can range from “persistent symptoms of increased arousal” (such as “difficulty falling or staying asleep” and “difficulty concentrating”) to “persistent avoidance of stimuli associated with the trauma” (such as “inability to recall an important aspect of the trauma”) in combination with a “feeling of detachment or estrangement from others” and “restricted range of affect (e.g., unable to have loving feelings),” to “persistent[] reexperience[]” of the traumatic event (such as “acting or feeling as if the traumatic event were recurring”).²⁵

Among the three types of symptoms outlined in DSM, only the last one, which could involve “dissociative states,” where “the person behaves as though experiencing the event at that moment,” is obviously related to criminal culpability.²⁶ “For people with posttraumatic stress disorder,” according to one expert, “remembering trauma feels like reliving it.”²⁷ People may experience “intrusive recollections,”²⁸ which manifest as “flashbacks” in extreme cases, and such recollections are “so vivid that it seems as if the trauma is actually happening again,” meaning that “the person may see, hear, smell, or feel the original sensations while remembering the trauma.”²⁹ Flashbacks can occur even among people who did not experience the traumatic events themselves; sometimes being in a close relationship with a victim of a traumatic event, such as a murder victim, is sufficient.³⁰ People who are experiencing flashbacks can react physically, a phenomenon known as “psychophysiological reactivity.”³¹ This is where extreme cases of PTSD may produce criminal behavior.³²

The link between criminal behavior and PTSD may exist in other ways, although the exact mechanism is not always clear.³³ Nevertheless, multiple pathways have been hypothesized, and here

²¹ Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 463-64 (4th ed., text rev. 2000) (hereinafter DSM-IV-TR).

²² Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* 49 (1992); Lisa H. Gold & Robert I. Simon, *Posttraumatic Stress Disorder in Employment Cases, in Mental and Emotional Injuries in Employment Litigation* 502, 507 (James J. McDonald Jr. & Francine B. Kulick, eds., 2001).

²³ Lenore E. Walker, *Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome*, 28 *Psychotherapy* 21 (1991); Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 *Notre Dame J.L. Ethics & Pub. Pol’y* 321, 327 (1992).

²⁴ Robert S. Laufer et al., *Dimensions of Posttraumatic Stress Disorder Among Vietnam Veterans*, 173 *J. of Nervous and Mental Disease* 538 (1985); Robert S. Laufer et al., *War Stress and Trauma: The Vietnam Veteran Experience*, 25 *J. of Health and Soc. Behav.* 65 (1984).

²⁵ DSM-IV-TR, *supra* note 21, at 468.

²⁶ *Id.* at 464.

²⁷ Richard J. McNally, *Remembering Trauma* 105 (2003) (describing the phenomenon of “intrusive recollections” that “come to mind even when the person does not want to think about it”).

²⁸ *Id.* at 105.

²⁹ *Id.* at 106.

³⁰ *Id.* at 116.

³¹ *Id.* at 106, 118-20.

³² Hafemeister & Stockey, *supra* note 16, at 114.

³³ Philip H. Pollock, *When the Killer Suffers: Post-Traumatic Stress Reactions Following Homicide*, 4 *Legal & Criminological Psychology* 185, 186 (1999) (noting “a general consensus among researchers that the presence of PTS reactions or

I mention a few.³⁴ First, people who experience traumas tend to rely on drugs and alcohol to avoid confronting the painful memories.³⁵ Drugs and alcohol can in turn diminish one's capacity to control oneself. Second, one common symptom of PTSD is hyperarousal and sensitivity to potential sources of danger and threat.³⁶ Third, veterans with PTSD can have "anger regulation deficits" and have trouble controlling their anger and aggression.³⁷ Fourth, PTSD may bring about the "sensation seeking syndrome," often characterized by a tendency to engage in risky activities in order to recreate the level of arousal and excitement they experienced in combat.³⁸ These factors, each by itself or in combination, can lead to criminal behaviors.

Although this discussion is a very short summary of an area with an enormous literature, the basic idea should be clear for our purposes. The question I explore in the rest of the Article is this: assuming that the links suggested in the psychological and legal literature between combat, trauma, and criminality are real, how should we morally evaluate veterans who commit crimes while suffering from PTSD?³⁹

B. When Does PTSD Mitigate?

Assuming it is correct that PTSD can contribute to criminal activities, the question is whether the presence of PTSD is relevant to the issue of blameworthiness. Unfortunately, in reported cases and media accounts, sentencing judges have not always spoken clearly about whether PTSD is relevant to sentencing, and, if so, in what way.⁴⁰ However, it does not take much imagination to link PTSD to the question of criminal responsibility. If it is indeed the case that PTSD has the effect of diminishing one's capacity to control one's own behavior, it seems that, at

combinations of symptoms increases the person's propensity to demonstrate violent actions" while noting also that the "actual mechanisms which underlie the relationship between PTSD and subsequent violence remain equivocal at present").

³⁴ For discussions, see John P. Wilson & Sheldon D. Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 Behav. Sci. & L. 69, 73-76 (1983); Landy F. Sparr et al., *Military Combat, Posttraumatic Stress Disorder, and Criminal Behavior in Vietnam Veterans*, 15 Bull. Am. Acad. Psychiatry & Law 141 (1987); Bruce Pentland & James Dwyer, *Incarcerated Viet Nam Veterans*, in *The Trauma of War: Stress and Recovery in Viet Nam Veterans* 403, 407-10 (Stephen M. Sonnenberg et al., eds., 1985).

³⁵ J. Douglas Bremner et al., *Chronic PTSD in Vietnam Combat Veterans: Course of Illness and Substance Abuse*, 153 Am. J. Psychiatry 369 (1996).

³⁶ Matthew J. Friedman, *Posttraumatic Stress Disorder Among Military Returnees from Afghanistan and Iraq*, 163 Am. J. Psychiatry 586 (2006); Bremner et al., *supra* note 35; Natasha B. Lasko et al., *Aggression and Its Correlates in Vietnam Veterans with and without Chronic PTSD*, 35 Comprehensive Psychiatry 373 (1994).

³⁷ Claude M. Chetomb et al., *Anger Regulation Deficits in Combat-Related Posttraumatic Stress Disorder*, 10 J. Traumatic Stress 17 (1997); Claude M. Chetomb et al., *Anger, Impulsivity, and Anger Control in Combat-Related Posttraumatic Stress Disorder*, 62 J. Consulting & Clinical Psychol. 827 (1994); Edward M. Carroll et al., *Vietnam Combat Veterans with Posttraumatic Stress Disorder: Analysis of Marital and Cohabiting Adjustment*, 94 J. Abnormal Psychol. 329 (1985).

³⁸ Wilson & Zigelbaum, *supra* note 34, at 74.

³⁹ As mentioned above in Introduction, in considering this question, I set aside cases where PTSD-related disability is so extreme that the person suffering from it can avoid criminal liability altogether. This Article is only about those who are capable enough to be held criminally responsible.

⁴⁰ See, e.g., *State v. Bilke*, 781 P.2d 28, 30 (Ariz. 1989) (en banc) ("Had the sentencing judge been aware that a mental disease known as post-traumatic stress disorder existed, that defendant suffered from it as a direct result of his outstanding military service in Vietnam, and that the disorder was a causative factor leading to the commission of the crimes, he might well have sentenced defendant differently."); Kathleen Kreller, *Iraq War Veteran George Nickel Won't Go to Prison for Armed Standoff with Police Last Summer*, Idaho Statesman, Apr. 6, 2010 (quoting the trial judge during sentencing a defendant for a firearms offense as saying that "[b]ecause he served his country honorably and courageously, he has developed some significantly bad conditions with his alcoholism . . .").

least under one standard account of criminal responsibility,⁴¹ it should reduce one's culpability for conduct committed while one's self-control is compromised even if it is not so compromised that one ought to be acquitted.⁴²

The issue, however, may not be so straightforward. Consider the following accounts:

Case 1:

John reported . . . flashbacks John compared these flashbacks to a running movie of events surrounding the [traumatic incident]. He remarked upon the vividness and clarity of the images. He estimated that the flashbacks could persist from a matter of minutes up to one hour and reported a frequency of approximately twice a week during the night, plus two or three episodes during the day. The flashbacks that occurred during the day were fleeting . . . , while those that occurred during the night generally persisted from between half-an-hour to an hour and were particularly resistant to his attempt to distract his thoughts elsewhere. . . . John was adamant that these images were unwelcome, involuntary, . . . and caused him considerable distress.

Case 2:

CH had weekly nightmares of the [traumatic incident], intrusive images of the stabbing, and flashbacks and panic when exposed to related stimuli . . . and psychogenic amnesia relating to aspects of [the incident]. When thinking about the attack, she experienced severe anxiety, low mood, and guilt. She avoided all [incident]-related stimuli including using sharp kitchen knives, reading about stabbings, . . . , going to sleep for fear of nightmares, and watching films with knife scene.

Case 3:

Following the [traumatic incident], R reported . . . re-experiencing the [incident] in repetitive flashbacks and nightmares. He would become physically agitated and anxious, commonly drinking alcohol "to the point where I was oblivious." . . . R experienced a recurrent flashback of a single image of the [incident] and a repetitive nightmare He reported that the vividness of the images was the most distressing aspect. [H]e suffered from anxious arousal, defensive avoidance, intrusive symptoms, depressed mood and self-destructive behaviors.

Now imagine that John, CH, and R, who have been suffering from these symptoms, commit crimes, and that that these PTSD symptoms arise from their deployment as members of the military in combat zones. Should their PTSD symptoms mitigate their culpability? It seems that what we have here are typical fact patterns that give rise to PTSD-based arguments for mitigation for offenders with military service backgrounds.

⁴¹ See, e.g., H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 136-57 (1968).

⁴² See, e.g., Giardino, *supra* note 12, at 2975 (arguing that PTSD can alter "behavior and judgment" and that "the introduction of the existence of PTSD at the time of the offense . . . should cause a sentencer to recognize the special mitigating nature of this evidence"); Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq to Afghanistan*, Federal Lawyer, Sept. 2010, at 42, 48 (arguing that criminal defense lawyers whose clients suffer from PTSD should consider requesting a mitigation under the Federal Sentencing Guidelines on the basis of "a significantly reduced mental capacity" which "contributed substantially to the commission of the offense") (quoting U.S. Sentencing Guidelines Manual § 5K2.13).

But these quotes are not from military veterans. They are from those who have PTSD symptoms arising from their past criminal offenses. John raped and strangled a woman,⁴³ CH killed a co-worker in a fit of anger,⁴⁴ and R killed a person as a hitman.⁴⁵ If these people – those who suffer from PTSD symptoms arising from their own criminal activities⁴⁶ -- commit new crimes, should their PTSD symptoms mitigate their culpability? It does not seem that they should.

And why not? It seems that the source of one's PTSD influences how we evaluate the relationship between PTSD factors and criminal behavior. Is this a mistake? As discussed above, if PTSD lessens one's capacity to control one's behavior, it seems that one suffering from its symptoms has reduced culpability if such symptoms have contributed to one's criminal activities. But the issue is more complicated than that. Sometimes in criminal law, how one has behaved in the past can cast a shadow on how one behaves at a later point even if the behavior at the later point may be entirely or partially blameless.

In intoxication cases, for instance, a person who committed a criminal act while intoxicated may not be able to use his diminished capacity as an excuse if it resulted from his voluntary partaking of alcohol.⁴⁷ Similarly, in epileptic seizure cases, a person who loses control over his or her behavior because of a medical or psychiatric condition may be held responsible for such involuntary conduct if the behavior was foreseeable and could have been prevented through self-medication or avoidance of dangerous situations at a prior time.⁴⁸ Some of these cases, especially in the intoxication context, are controversial chiefly because it seems wrong to treat all ingestion of intoxicants as reckless.⁴⁹ However, the basic idea that one may be held responsible for what one does while intoxicated by going back in time and identifying the culpable event is not problematic.⁵⁰

There are also examples in criminal law where certain affirmative defenses are made unavailable if the defendant himself has brought about the condition that made it necessary or unavoidable to commit the crime. So, for instance, a person cannot invoke the self-defense defense if he was the initial aggressor who started the cycle of physical violence, thereby necessitating an act of violence to defend himself.⁵¹ Similarly, a person who culpably creates an emergency cannot invoke the necessity defense after resorting to criminal acts to choose the lesser evil in the emergency.⁵² Neither can a person who places himself in a situation where he would likely be coerced to commit a crime raise the duress defense.⁵³ These cases, too, are controversial because

⁴³ Ilona Kruppa, *Perpetrators Suffer Trauma Too*, 4 *The Psychologist* 401, 401 (1991).

⁴⁴ Paul Rogers et al., *Behavioral Treatment of PTSD in a Perpetrator of Manslaughter: A Single Case Study*, 13 *J. Traumatic Stress* 511, 514 (2000).

⁴⁵ Philip H. Pollock, *Eye Movement Desensitization and Reprocessing (EMDR) for Post-Traumatic Stress Disorder (PTSD) Following Homicide*, *J. Forensic Psychiatry* 176, 179 (2000).

⁴⁶ For more discussion of criminals suffering from PTSD caused by their own behaviors, see, for example, Rachel M. MacNair, *Perpetration-Induced Traumatic Stress: The Psychological Consequences of Killing* 60-63 (2005); Ilona Kruppa et al., *The Prevalence of Post-Traumatic Stress Disorder in a Special Hospital Population of Legal Psychopaths*, 2 *Psycho., Crime & L.* 131 (1995).

⁴⁷ See, e.g., Model Penal Code § 2.08(2).

⁴⁸ *People v. Decina*, 138 N.E.2d 799 (1956).

⁴⁹ Susan Dimock, *What are Intoxicated Offenders Responsible for?: The "Intoxication Defense" Re-examined*, 5 *Crim. L. & Phil.* 1, 12 (2010).

⁵⁰ *Id.* at 17.

⁵¹ Wayne R. LaFare, *Criminal Law* § 10.4(e) (5th ed. 2010).

⁵² *Id.* § 10.1(d)(6);

⁵³ Paul H. Robinson, *Causing the Conditions of One's Own Defense*, 71 *Va. L. Rev.* 1, 11 (1985).

some of the actual provisions can be either too narrow or too wide.⁵⁴ However, it is widely accepted that one who would otherwise have an affirmative defense should sometimes be denied the defense because of his role in creating the difficult situation.

In these criminal law doctrines, different moral intuitions seem to be doing the normative work. One intuition is that a person who, at t_1 , creates a reasonably foreseeable risk of himself doing something undesirable at t_2 may be held responsible for his actions at t_2 , even if what he does at t_2 would otherwise be excusable or justifiable, because his original creation of risk at t_1 is culpable. A person who gets drunk at a bar when he knows he has to drive home afterwards and a person who gets into a car knowing that he is subject to epileptic seizures can be held responsible for crashing their cars while unconscious due to their respectively diminished faculties.

Another intuition is that a person who, at t_1 , behaves in a certain undesirable manner that brings about negative consequences has “unclean hands” and can be held responsible for harms that he newly creates at t_2 in his attempts to contain such negative consequences, even if his attempts at t_2 ultimately minimize the amount of harm. The “unclean hands” idea can be broader than the foreseeable risk creation idea because, for example, the particular risk of certain negative consequences at t_2 may not be reasonably foreseeable at t_1 . So, for instance, if a man rapes a woman in his apartment on a high floor, and the oppressiveness of the environment drives the rape victim to jump out the window and die, the rapist can bear responsibility for the death even if the particular victim’s reactions may have taken him (and a hypothetical reasonable observer) by surprise.⁵⁵ Now, let’s say that the rapist knows that if his victim jumps out the window, she will fall on and likely kill several children playing directly underneath the window, and that in order to save the children’s lives he prevents her jump by shooting her. It seems doubtful that he can then raise a defense of others or necessity defense for the shooting, even though he may have done the right thing by saving the children’s lives.

The principle that the law should not permit one to “profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime,” in the words of the court deciding *Riggs v. Palmer*, seems relevant here, too.⁵⁶ *Riggs*, a case made famous by Ronald Dworkin’s discussion,⁵⁷ was about a person who attempted to inherit property from his murder victim, and it was decided on the basis that one should not be allowed to benefit from his own wrongdoing. The controversy over whether criminals should be able to profit from writing books about their experience as criminals also is partially based on this idea. The laws that prevent assertions of the self-defense defense to aggressors or the duress defense for those who join criminal enterprises seem to get some normative support from this idea that one should not be permitted to “take advantage of his own wrong” as well.

So what we have here is a cluster of related ideas about the ways in which one’s past behavior can shape our normative responses to the current behavior. Such ideas may explain why we would not be sympathetic to a criminal who seeks to mitigate his punishment by pointing at PTSD symptoms when the PTSD originates from his own past criminal conduct. I should clarify, however, that I am making the doctrinal analogies here only for the purpose of illustration. The

⁵⁴ Id. at 3-7.

⁵⁵ Cf. *Stephenson v. State*, 179 N.E. 633 (1932). This conclusion is controversial, and there may be a debate over whether the suicide victim’s actions are foreseeable.

⁵⁶ 22 N.E. 188, 190 (N.Y. 1889).

⁵⁷ Ronald Dworkin, *Law’s Empire* 15-21 (1986).

discussion here is not meant to suggest that the question of evaluating offenders suffering from PTSD can be answered simply by extracting an abstract idea from these doctrines and applying it to a new context. After all, these examples are all different from one another. What we need instead is a separate, independent principle for the military veterans context that bears a family resemblance to these other doctrines and draws its appeal partly from the intuitions that underlie them.

Such a relevant principle here may be this: *as a general matter, a person's PTSD does not mitigate his culpability if he has acquired his PTSD through his own culpable conduct.* A principle like this would explain why we may be reluctant to reduce culpability of ordinary offenders, like John, CH, and R, who suffer from PTSD from their past criminal conduct.⁵⁸ So, the important question for our purposes is whether we could think about military offenders' supposed mitigation on the basis of PTSD in the same way. One may simply deny the analogy on the ground that veterans' traumas come from a socially valuable activity, whereas ordinary criminals' traumas arise from socially undesirable activities. It seems, however, that this response is too quick. The mere existence of a category of crimes called "war crimes" should be an indication that the matter is not so simple. Military veterans' traumas may arise from activities of varying moral significance, and we may accordingly arrive at varying conclusions as to the appropriateness of treating their traumas as culpability reducers. In order to make headway into this issue, we need to consider the ways in which we morally evaluate soldiers' behaviors.

II. PTSD and Culpability of Soldiers

Consider the example of the Nazi German *Einsatzgruppen*, also known as "mobile killing units."⁵⁹ *Einsatzgruppen* were killing squads charged with killing Jews and others. They engaged in mass killings throughout Europe, usually by shooting,⁶⁰ and are thought to be responsible for rounding up and killing one million Jews throughout the war.⁶¹ And there are some indications that some members of the group found the process of systematic killings of Jews to be traumatizing.⁶² Rudolf Hoess, the commandant of Auschwitz, wrote in his autobiography that "[m]any members of the *Einsatzgruppen*, unable to endure wading through blood any longer, had committed suicide," that some had "gone mad," and that "[m]ost of the members of these *commandos* had to rely on alcohol when carrying out their horrible work."⁶³ Erich von dem Bach-Zelewski, one of the officers directing these killing squads is reported to have suffered from "hallucinations connected with the shootings of Jews which he himself carried out."⁶⁴

All of these are classic PTSD symptoms. It certainly seems credible that those who go through various towns, round up innocent civilians, murder masses of them, and bury them into hastily dug graves would have some serious psychological issues afterwards, to say the least. But if such psychological conditions contribute to further criminality, perhaps by way of drug or alcohol

⁵⁸ Again, if one's disability is serious enough to negate criminal liability altogether, the source of the disability should not make a difference. See *supra* note 18.

⁵⁹ See generally Raul Hilberg, *The Destruction of the European Jews* 275-408 (3rd ed. 2003).

⁶⁰ See *id.* at 327-28 (describing the method of killing).

⁶¹ Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1845-1958: Atrocity, Law, and History* 7 (2009).

⁶² See Hilberg, *supra* note 59, at 337; see also Richard Rhodes, *Masters of Death: The SS-Einsatzgruppen and the Invention of the Holocaust* 215-28 (2002).

⁶³ Rudolf Hoess, *The Commandant of Auschwitz: The Autobiography of Rudolf Hoess* 148 (Constantine FitzGibbon trans., Phoenix Press 2000) (1959); see also Earl, *supra* note 61, at 165-178.

⁶⁴ Heinz Höhne, *The Order of the Death's Head: The Story of Hitler's S.S.* 363-66 (Richard Barry trans., Coward-McCann 1970) (1966).

abuse, by these people in a more tranquil, postwar everyday setting, would it make sense to think that their PTSD symptoms mitigate their culpability for the later crimes? It seems bizarre to believe that those whose current PTSD symptoms can be traced to their execution of atrocities should be considered less culpable simply because they have PTSD symptoms that contribute to current criminal activities.

Is the case of the Nazi killing unit instructive for our topic? Some might argue that the degree of evil is so exceptional in these cases that we should not draw any general lessons. Perhaps that is the case, but what the Nazi example shows is that we cannot evade the issue of the source of one's trauma and its moral character when thinking about the significance of PTSD on a person's culpability, even if we are dealing with wartime activities. The relevant question then becomes how we should evaluate soldiers' activities that give rise to PTSD when we morally evaluate veterans with military backgrounds.

Things that soldiers do in situations like these do not materialize in isolation. Individual moral evaluations of soldiers necessitate a moral understanding of the wars that they participate in. Traditionally, wars are evaluated along two separate moral metrics, one having to do with reasons for going to war (*jus ad bellum*) and the other having to do with the manner in which such wars are fought (*jus in bello*).⁶⁵ The Nazis in the example above are in violation of both because Germany was an unjust aggressor during the war and fighting the war by killing civilians – indeed by committing genocide – is in violation of rules that govern wartime practices.

A. PTSD and *Jus in Bello*

Perhaps the most important *jus in bello* principles are the principle of discrimination between legitimate and illegitimate targets and the principle of non-combatant immunity. Some of the war crimes listed in the Rome Statute of the International Criminal Court are as follows: “[i]ntentionally directing attacks against the civilian population,” “torture or inhuman treatment,” “[c]ommitting outrages against personal dignity,” and willful killing of those protected under the Geneva Conventions such as prisoners of war.⁶⁶ One of many reasons we may be unsympathetic to the Nazis in the particular example given above is that they were in clear violation of *jus in bello* principles like these.⁶⁷ Could we apply the same intuition to at least those American soldiers whose post deployment criminal behavior is rooted in PTSD arising from acts of atrocities they themselves perpetrated?

It would be a gross mistake to equate American troops with the Nazis, but we must at the same time be careful not to fall into a state of moral complacency just because Americans' acts are not as depraved as that of the Nazis. In fact, it is unfortunately the case that the American military is not immune from credible allegations of war crimes. The most well-known case is the Abu Ghraib abuse of prisoners, where American soldiers beat and sexually humiliated Iraqi detainees,⁶⁸ but there are other publicized cases, such as: the exploits of the “kill team,” which was a group of American soldiers in Afghanistan who, in 2010, killed unarmed Afghan civilians for fun and staged them to look like legitimate combat killings during the war in Afghanistan;⁶⁹ Operation Iron

⁶⁵ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 21 (4th ed. 2006).

⁶⁶ Rome Statute of the International Criminal Court, art. 8.

⁶⁷ For an account of the *Einsatzgruppen* trials after the war, see generally Earl, *supra* note 61.

⁶⁸ See Seymour M. Hersh, *Torture at Abu Ghraib*, *New Yorker*, May 10, 2004.

⁶⁹ See William Yardley, *Calvin Gibbs Convicted of Killing Civilians in Afghanistan*, *N.Y. Times*, Nov. 10, 2011; William Yardley, *Soldier Gets 24 Years for Killing 3 Afghan Civilians*, *N.Y. Times*, Mar. 23, 2011.

Triangle, during which American soldiers killed unarmed Iraqi detainees, apparently following an order to kill any military-age male during an operation to search for insurgents, and in one case killing Iraqi detainees by first freeing them and then shooting them as they ran away;⁷⁰ the “Baghdad canal killings,” an incident in which soldiers shot and killed four handcuffed and blindfolded Iraqi detainees and then pushed them into a canal in Baghdad in 2007;⁷¹ and the “Haditha incident,” where marines killed twenty-four Iraqi civilians, apparently in retaliation for a roadside bombing, in 2005 in the city of Haditha.⁷²

These sorts of incidents are terrible atrocities that are likely traumatizing for not only the victims but also the perpetrators.⁷³ Some of these perpetrators, suffering from PTSD, may find themselves being led to criminal activities. But if a person’s PTSD symptoms can be traced to these sorts of wrongful acts committed by himself, his culpability should not be reduced. One tentative conclusion we may draw from these observations is that one’s PTSD does not mitigate his culpability for his crime if those PTSD symptoms have arisen from his own perpetration of atrocities during war, such as intentionally killing civilians, torturing detainees, or similar mistreatments of combatants and noncombatants.

There may be a question as to whether this conclusion affects a large number of veterans or just a few. The answer is that we do not know. There may be many incidents like them that we never learn about, or, alternatively, there may not be many more than the reported cases. There are, however, reasons to pay attention to PTSD cases arising from atrocities perpetrated by American soldiers.

First, most veterans who return from war zones do not turn out to be criminals.⁷⁴ Second, there are indications that the existence of PTSD symptoms is highly correlated with veterans’ criminal behavior.⁷⁵ Third, several studies have found a link between participation in atrocities and both PTSD and post deployment criminality. One study of Vietnam veterans, for example, reported that “warzone abusive violence,” which the authors defined as “warzone violence that, from a military point of view, is considered unnecessary,” is a predictor of PTSD and post deployment violence to self, spouse, and others.⁷⁶ Another study of Vietnam veterans reported that participation in atrocities, defined as “torture, mutilation, or severe mistreatment of military personnel or civilians,”⁷⁷ “conferred a uniquely strong risk for posttraumatic stress disorder.”⁷⁸ Finally, there is at

⁷⁰ See Raffi Khatchadourian, *The Kill Company*, New Yorker, July 6, 2009.

⁷¹ Paul von Zielbauer, *American Soldier Is Found Guilty in Iraqi Killings*, N.Y. Times, April 15, 2009.

⁷² Michael S. Schmidt, *Junkyard Gives Up Secret Accounts of Massacre in Iraq*, N.Y. Times, Dec. 14, 2011.

⁷³ See generally Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* 225-27 (Rev. ed. 2009); Rachel M. MacNair, *Perpetration-Induced Traumatic Stress: The Psychological Consequences of Killing* 13-27 (2005).

⁷⁴ Christopher J. Mumola, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Special Report: Veterans in Prison or Jail* (2000).

⁷⁵ Wilson & Zigelbaum, *supra* note 34; see also Hafemeister & Stockey, *supra* note 16, at 114, at 101-02.

⁷⁶ Bruce Hiley-Young et al., *Warzone Violence in Vietnam: An Examination of Premilitary, Military, and Postmilitary Factors in PTSD In-Patients*, 8 J. Traumatic Stress 125 (1995).

⁷⁷ Naomi Breslau & Glenn C. Davis, *Posttraumatic Stress Disorder: The Etiologic Specificity of Wartime Stressors*, 144 Am J. Psychiatry 578, 583 (1987).

⁷⁸ *Id.* at 581; see also Richard Strayer & Lewis Ellenhorn, *Vietnam Veterans: A Study Exploring Adjustment Patterns and Attitudes*, 31 J. Soc. Stud. 81, 90 (1975) (reporting that there are “significant relationships . . . between involvement in atrocities” (defined as “acts of cruelty resulting in death or injury that were both unnecessary and beyond the scope of normal warfare”) and feelings of hostility, feelings of guilt, and severity of adjustment problems”); Thomas Yager et al., *Some Problems Associated with War Experience in Men of the Vietnam Generation*, 41 Archives Gen. Psychiatry 327, 327 (1984)

least some anecdotal evidence that intentional, unjustified killing of civilians in Iraq and Afghanistan by American troops happens and goes unreported.⁷⁹

These studies combined together still do not give us an estimate of the number of people affected by the analysis given here. At the same time, while it is probably not the case that most offenders with military backgrounds have participated in acts of atrocities, given the links between participation in atrocities, PTSD, and post deployment criminality, it would be misguided to ignore the issue of how to think about this relationship. And if we do not feel particularly sympathetic to the Nazis who complain of psychological trauma, then we should similarly subscribe to the notion that those who participate in atrocities in Iraq or Afghanistan and later suffer from PTSD that in turn leads to criminal behaviors are not any less culpable despite their PTSD symptoms.

Should it make a difference that in many of these cases, there is likely a degree or coercion, either in the form of superior orders⁸⁰ or of duress⁸¹? It should make a difference, depending on the facts of the case, but it should also be kept in mind that the superior orders defense and the duress defense for war crimes are limited. Although it is controversial, the duress defense has been held to be unavailable against a charge of murder in this setting.⁸² The defense of superior orders also is limited. The International Tribunals for former Yugoslavia or Rwanda did not regard it as a proper defense,⁸³ and while the Rome Statute allows it as a defense, it is available only if the defendant was unaware at the time of the act that the “order was unlawful” and only if the order was “not manifestly unlawful.”⁸⁴ Such limited availability of defenses of duress and superior orders in the context of war crimes reflects the underlying moral sense that when one is pressured to commit serious moral wrongs, one is morally required to resist such pressures.⁸⁵ Those who fail to resist, it seems then, should be held responsible for their actions and the consequences of their actions,

(“Participants in atrocities reported more stress symptoms and greater use of heroin and marijuana than did the other veterans.”); Sarah A. Haley, *When the Patient Reports Atrocities: Specific Treatment Considerations of the Vietnam Veteran*, 30 Archives Gen. Psychiatry 191 (1984); Alan Fontana & Robert Rosenheck, *Attempted Suicide Among Vietnam Veterans: A Model of Etiology in a Community Sample*, 152 Am J. Psychiatry 102 (1995).

⁷⁹ See, e.g., The Wounded Platoon (PBS 2010) (“We were trigger-happy. . . . Like, we’d . . . open up on anything. We usually rolled with three or four trucks. One of them got hit and there was, like, any males around, we’d open up and we’d shoot at them. It was kind of like that. . . [T]hey even didn’t have to be armed. We were just bragging like that. We’d be, like, ‘Well, I got one last week, all right?’ . . .” We were keeping track. We were keeping scores.”); see also id. (“Most of all it’s all murder. . . . It’s easy to get away You can just do it and be, like, ‘Oh, he had a gun. I don’t know’ I mean, nobody really looks into it. They’re like, ‘Fuck it. It’s just another dead haji.”); Schmidt, *supra* note 72 (“The stress of combat left some soldiers paralyzed, the testimony shows. Troops, traumatized by the rising violence and feeling constantly under siege, grew increasingly twitchy, killing more and more civilians in accidental encounters. Others became so desensitized and inured to the killing that they fired on Iraqi civilians deliberately while their fellow soldiers snapped pictures, and were court-martialed.”).

⁸⁰ Rome Statute of the International Criminal Court, art. 33.

⁸¹ Id. art. 31(1)(d).

⁸² See Antonio Cassese, *International Criminal Law* 285-89 (2d ed., 2008).

⁸³ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(4) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”); Statute of the International Criminal Tribunal for Rwanda, art. 6(4) (same).

⁸⁴ Rome Statute of the International Criminal Court, art. 33; see also Walzer, *supra* note 65, at 39 (“[W]hen [a soldier] violates the rules of war, superior orders are no defence. The atrocities that he commits are his own . . .”).

⁸⁵ Some also argue that the pressures of the combat zone drive people to commit acts of atrocities. See, e.g., James Dao, *Reprehensible Behavior is a Risk of Combat, Experts Say*, N.Y. Times, Jan. 13, 2012. However, it is not generally argued that such pressures excuse reprehensible behaviors. See *id.*

including symptoms of PTSD that may lead to commit further crimes.⁸⁶ After all, the Nazi defendants in the Nuremberg trial of *Einsatzgruppen* leaders (unsuccessfully) invoked the defense of superior orders, too.⁸⁷

B. PTSD and *Jus ad Bellum*

Even if a side fighting in a war strictly adheres to all *jus in bello* principles, it can still be acting wrongfully if it lacks just cause for its use of force. The Charter of the United Nations articulates the just cause requirement by prohibiting States from using “threat or use of force against the territorial integrity or political independence of any State”⁸⁸ albeit while preserving “the inherent right of individual or collective self-defense if an armed attack occurs” against a State.⁸⁹ Although we are entering a more controversial territory, yet another reason we may be unsympathetic to the *Einsatzgruppen* killers is that they were participating in an unjust war as aggressors, and it is appropriate to describe them as a group of criminal thugs attacking people with no justification. And if we apply the principle that those who engage in wrongful acts should be held responsible for the consequences, we may conclude that soldiers who participate in unjust wars do not have reduced culpability even if their criminal behavior is traceable to PTSD that they acquired from their military activities.

How does this thought apply to American soldiers returning from, say, Iraq or Afghanistan? It seems to follow that in order to evaluate the blameworthiness of veterans who commit crimes, we must first decide whether the wars that they participated in can be defended on moral grounds. While I will not address the question whether the Iraq and Afghanistan wars are just wars in this Article, a typical combination of views is that the 2003 war in Iraq is unjust and that the war in Afghanistan may have started out as just in 2001 but that its moral defensibility is increasingly doubtful.⁹⁰ Let’s assume that these views are correct. If we further subscribe to the view that soldiers who participate in unjust wars and later develop symptoms of PTSD due to the wars should be held fully responsible for the crimes they commit, then veterans from the Iraq war are not eligible for PTSD-based sentencing discounts whereas those from the Afghanistan war may or may not be depending on *when* they participated in the war.

Many will resist this line of reasoning, but why? If members of group *A* attack members of group *B* with no just cause, and members of group *B* defend themselves by attacking members of

⁸⁶ Now, it is true that even if defenses of duress and superior orders do not fully exculpate, they can serve as a mitigating factor at sentencing. The question is whether we could say something similar. That is, if the defendant *D* does a wrongful act *W* under duress or a superior order that would mitigate his sentence if he were punished for *W* and if *W* causes in *D* symptoms of PTSD which eventually cause *D* to commit a crime *C*, should the fact that he would have received mitigation for *W* translate to a culpability reducer for *D* for the crime *C*? I do not think so. The connection between the duress/superior order and the wrongful act *W* is not only immediate but also causal; *D*’s wrongful acts can be partially attributed to the duress/superior order in a way that diminishes *D*’s responsibility. The connection between the duress/superior order and the crime *C*, on the other hand, is attenuated. The duress/superior order cannot plausibly be described as (partially) *causing* the crime *C* because in order to believe that, one would have to posit that the causal link from the duress/superior order to the crime *C* runs through two autonomous actors at different time periods, first through *D* at the time of the event that gave rise to PTSD and second through *D* at the time *D* committed the crime *C*. Perhaps some trace of effects from the duress or superior order remains, but it would be marginal.

⁸⁷ Earl, *supra* note 61, at 148-54, 249-50.

⁸⁸ U.N. Charter art. 2, para. 4; see also Walzer, *supra* note 65, at 61-62.

⁸⁹ U.N. Charter art. 51; Walzer, *supra* note 65, at 61-62.

⁹⁰ See e.g., Michael Walzer, *Regime Change and Just War*, Dissent, Summer 2006 (on Iraq); Michael Walzer, *Is Obama’s War in Afghanistan Just?*, Dissent (online), Dec. 3., 2009. See also Jeff McMahan, *Unjust War in Iraq*, The Pelican Record, Dec. 2004; Richard W. Miller, *The Ethics of America’s Afghan War*, 25 Ethics & Int’l Aff. 103 (2011).

group *A*, then members of *A* are criminals, and they do not have the right to counterattack *B*'s violent response in self-defense.⁹¹ If members of both groups, due to the harrowing experience of being in a violent conflict, develop PTSD symptoms that lead to criminal activities, it seems that the members of group *B*, the victims, have a stronger claim to reduced culpability than members of group *A*, the aggressors, who should have no analogous claim.

One of those who would object is Michael Walzer, who has argued that we “draw a line between the war itself, for which soldiers are not responsible, and the conduct of the war, for which they are responsible, at least within their own sphere of the activity.”⁹² This principle applies even to the Nazi military for Walzer, and he speaks approvingly of Erwin Rommel because while he was “one of Hitler’s generals, . . . he did not shoot prisoners.”⁹³ If this view is true, then the fact that a soldier participated in an aggressive war does not reflect badly on him. If the *Einsatzgruppen* members have PTSD, we may not be sympathetic to them, but that is not because of their participation in a war of aggression but solely because of their murder of civilians, according to this view. Something like Walzer’s position is the conventional view.

If the conventional view is true, then even those who participate on the aggressor’s side in unjust wars can have reduced culpability on the basis of their military service related PTSD. It seems that there are a few recurring arguments in favor of the conventional view, and those arguments may be organized in terms of different mental states.

First, a soldier may believe that a war is unjust, or that there is a substantial risk that it is unjust, but participate in it anyway because he or she is under duress, superior orders, and peer pressure,⁹⁴ and also may face punishment for desertion,⁹⁵ absence without leave,⁹⁶ disobedience of orders,⁹⁷ and dereliction of duty.⁹⁸ A soldier in this category may participate in unjust wars reluctantly and unwillingly because he feels coerced to do so. Call this the “duress argument.”

Second, a soldier may believe that the war he or she is participating in is just simply because their political leaders have said so. Such beliefs may be reasonable. Whether a war is just or not is often controversial, uncertain, and shifting over time, and it may be reasonable for the soldiers to believe their political leaders, given the limited information the soldiers have. Even if it turns out that their belief is mistaken, their participation may be justified in the same way a reasonable but mistaken act of self-defense in the individual self-defense context may be justified.⁹⁹ Call this the “epistemic argument.”

Third, a soldier may either lack beliefs one way or the other on the matter or set aside his or her personal beliefs, deeming them to be irrelevant. Some may argue that such a soldier is still justified in participating in unjust wars for the following reason. The military is an important

⁹¹ For a detailed development and defense of this core idea, see Jeff McMahan, *Killing in War* (2009). Among other things, McMahan challenges the conventional view that one can abide by *jus in bello* principles in wars that violate *jus ad bellum* principles and argues that unjust combatants cannot satisfy the principles of *jus in bello*. *Id.* at 15-32.

⁹² Walzer, *supra* note 65, at 38.

⁹³ *Id.*

⁹⁴ Dan Zupan, *A Presumption of the Moral Equality of Combatants: A Citizen-Soldier's Perspective*, in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* 214, 224-25 (David Rodin & Henry Shue eds., 2008)

⁹⁵ 10 U.S.C. § 85 (2006).

⁹⁶ *Id.* § 86.

⁹⁷ *Id.* § 92.

⁹⁸ *Id.*

⁹⁹ See Zupan, *supra* note 94, at 218-21. *Cf.* David Estlund, *On Following Orders in an Unjust War*, 15 *J. Pol. Phil.* 213 (2007).

institution, vital for national security, which is of paramount importance for obvious reasons. In order for the military to function well, it has to be organized hierarchically, and there has to be a clear chain of command and a division of labor among its members. The task of deciding whether to engage in a military conflict is reserved for political leaders, and the soldiers cannot substitute their private judgments for the judgment of the government officials. Because of this duty of soldiers to obey the orders given to them, participating in a conflict, even if it is unjust, may be morally required for soldiers.¹⁰⁰ Call this the “duty to obey” argument.

The duress argument must be evaluated while keeping in mind the consequences of refusing service and comparing their seriousness to the gravity of what one is frequently asked to do in an unjust war. The consequences of disobeying can certainly be substantial. According to one study, the average punishment for the crime of desertion is 26.35 months.¹⁰¹ That number may sound low, given that the maximum punishment allowed for the crime of desertion is the death penalty, if it happens in time of war.¹⁰² However, the number actually overstates the seriousness of consequences for deserters, as it appears that deserters are rarely punished,¹⁰³ let alone receive the death penalty, even if the desertions happen during war. The last time someone was executed for the crime of desertion was in 1945,¹⁰⁴ and a more typical consequence, judging from what happened during the Iraq War, is to receive an “other than honorable” discharge.¹⁰⁵ On the other side of the ledger, the consequences of giving into the pressure to fight in an unjust war are grave: for those in direct combat, the consequence is to kill those who should not be killed, and for those not in direct combat, it is to aid and abet such killings. As we saw when we considered *jus in bello* principles, when one is pressured to commit serious moral wrongs, one is morally required to resist such pressures, even if it is difficult to do so. For these reasons, the duress argument seems weak.¹⁰⁶

Whether the epistemic argument is available or not for servicemen will depend on individual situations. Some soldiers may in fact believe that the war is unjust but participate in it anyway for whatever professional or personal reasons, and such people cannot argue that they believed that the war was just. Second, a soldier’s actual belief that the war is just would also have to be reasonable, and whether it is or not would depend on the information available in a given case. These two conditions would have to be met for a soldier to show that his participation in an unjust war is justified.

What about the duty to obey argument? We should start by noting that the duty to obey is not absolute, and it may be overridden by a competing consideration if the reason to disobey is of a correct kind and of sufficient strength. At least three things follow from this feature of the duty to obey. First, it is morally irresponsible for a soldier to obey without giving a thought to whether what

¹⁰⁰ Cheney Ryan, *Democratic Duty and the Moral Dilemmas of Soldiers*, 122 *Ethics* 10 (2011). Cf. Zupan, *supra* note 94, at 221-22.

¹⁰¹ Scott Sylkatis, *Sentencing Disparity in Desertion and Absent Without Leave Trials: Advocating a Return of “Uniform” to the Uniform Code of Military Justice*, 25 *Quinnipiac L. Rev.* 401, 408 (2006).

¹⁰² 10 U.S.C. § 85 (2006).

¹⁰³ Associated Press, *Military Makes Little Effort to Punish Deserters*, June 28, 2007; Melba Newsome, *Going AWOL*, *Details*, Nov. 2007.

¹⁰⁴ Sylkatis, *supra* note 101, at 401 n.5.

¹⁰⁵ Newsome, *supra* note 103.

¹⁰⁶ As we also saw when we considered *jus in bello* principles, there are some complications here. See *supra* note 86.

he is being asked to do is morally permissible,¹⁰⁷ unless one can justify one's lack of thoughts on such matters on the basis of reasonableness, in which case his position should be evaluated as a form of the epistemic argument discussed above. Second, similarly, if a soldier believes that obedience is justified in a given case because the war is just, then whether the obedience argument works or not turns on the reasonableness of his belief that the war is just, which, again, brings us back to the epistemic argument. Finally, if a soldier believes that a war is unjust and that he would be perpetrating violence against those who should not be attacked, then the gravity of the acts contemplated would likely create a permission, and perhaps even a duty, to disobey.¹⁰⁸ The upshot is that a successful pure duty to obey argument for participating in an unjust war – separate from the epistemic argument – is bound to be rare.

So, it appears that a soldier may be justified in participating in an unjust war only when he actually and reasonably believes that he is participating in a just war. In such cases, we cannot say that the PTSD that is brought on by his participation in an unjust war is a result of culpable behavior on his part, and his PTSD symptoms can then reduce his culpability. We can therefore conclude that a veteran's PTSD should not mitigate when his PTSD is traced to his participation in an unjust war, unless he actually and reasonably believed that the war was just.¹⁰⁹

III. State Responsibility and Standing to Blame

From the discussion in Part II, the picture that emerges is as follows. The strongest claim for PTSD to mitigate culpability is for those offenders whose PTSD symptoms arose from their participation in a just war and did not come about as a result of their participation in atrocities during war. The second strongest claim is for those whose PTSD symptoms came about from an unjust war that they actually and reasonably believed was just, where their symptoms were also not related to any atrocities committed during the war.

The position we have arrived at is thus complex. Yet, it is still incomplete. Among those whose PTSD symptoms cannot be traced to their perpetration of atrocities but arose from their

¹⁰⁷ Cf. Mitchell N. Berman, *Blackmail*, in *The Oxford Handbook of Philosophy of Criminal Law* 37, 70-71 (John Deigh & David Dolinko eds., 2011) (“While it would be lunacy to suppose that we are under an obligation to deliberate about *all* our actions, we do have such an obligation whenever we become aware of a prima facie or pro tanto moral reason not to do whatever we happen to be contemplating.”).

¹⁰⁸ Cf. McMahan, *supra* note 91, at 72-73.

¹⁰⁹ There is a threshold issue here, however, that some readers may have trouble getting past. If what I am proposing here as a standard is to be adopted, we would have to devise a way, within our judicial system, to determine whether a particular armed conflict is just or unjust, and the prospect of such a thing happening will strike most as remote. Here is my response. First, there is a difference between arguing that it is difficult for people to come to an agreement on whether a war is just and arguing that there is no such thing as the right answer on the question. This Article assumes that there are right and wrong answers on such questions. Second, there is a difference between rejecting an idea because it is theoretically unsound and rejecting an idea because the idea, for a host of ideological and pragmatic reasons, is unlikely to be implemented, and the focus of this Article is to defend the soundness of the theory, not necessarily to propose that we in fact implement these ideas. Third, there is a difference between arguing that we, as a matter of practice, have not held individuals morally responsible for participating in unjust wars in formal, legal settings and arguing that individuals are not morally responsible for participating in unjust wars. Much of the discussion in this section has been devoted to the latter, normative issue, not in the former, more pragmatic issue. Fourth, if it is the case that there are just wars and unjust wars, *and* if it is the case that individuals can be thought to be culpable in participating in unjust wars, *and* if it is the case that a person's PTSD should not mitigate his culpability if he has acquired his PTSD through culpable conduct on his part, *then* the question as to whether the war a veteran participated in was just or not has to be asked in order to evaluate the claim that his PTSD reduces his culpability. Otherwise, the analysis will be woefully incomplete, and one modest goal of this section has been to highlight that incompleteness.

participation in unjust wars without justification, another reason to punish less exists. The reason does not concern their reduced culpability but instead centers around the State's involvement in the production of their criminality.

As I have implicitly assumed throughout this Article, when the State punishes, it blames, condemns, and stigmatizes the offenders. Two things follow from this. First, the State must ensure that its acts of condemning are fair to, and are in fact deserved by, their recipients. Thus, the discussion about offenders with military backgrounds far has focused, up until now, on this question of their blameworthiness. Second, even if the intended recipients of the State's blaming are blameworthy, the State's standing to blame – and to punish -- may be undermined for various reasons. One of those reasons is that the State itself is partly responsible for the wrongdoing that it seeks to condemn.¹¹⁰

The most obvious aspect of the State involvement in the soldiers' participations in unjust war is that the soldiers are not out there on their own. First, they engage in acts of violence in their official capacity, as extensions of the State itself. Second, soldiers are placed in the types of situations – such as combat situations – that are likely to give rise to symptoms of PTSD by the State itself. That is, a foreseeable consequence of sending soldiers to battlefields is that many of them would end up psychologically damaged. War can be, in short, criminogenic for those susceptible. If the soldiers, while working as agents of the State in places and situations designated by the State as their mission sites, develop symptoms of PTSD, which drive them toward criminal activities post-deployment, the State's standing to condemn their behavior is undermined because the State itself has caused the conditions leading to the crimes.

Also, if one of the reasons soldiers participate in unjust wars is because of their willingness to obey even commands that lead them to unjust wars, the State's standing to blame soldiers for consequences that follow from their obedience is undermined. One mechanism by which soldiers act as agents of the State is through a system of commands. Such commands are mandatory, accompany a strict system of hierarchy and a clear chain of commands in the military, and disobedience within the military is an offense that can result in court martial and punishment. Thus, a State that orders its soldiers to participate in unjust wars cannot then turn around and blame the soldiers for having followed the commands.¹¹¹

The State's involvement is in fact deeper than a mere issuance of commands backed up with sanctions. There is a powerful ethos of obedience that runs throughout the institutions of the military, and indeed the military actively cultivates a culture of obedience.¹¹² As Jeff McMahan observes:

In most military organizations, the ability of soldiers to engage in autonomous reflection and deliberation about the content of their orders is also deliberately and systematically sabotaged. They are subjected to intensive

¹¹⁰ R.A. Duff, *Blame, Moral Standing, and the Legitimacy of the Criminal Trial*, 23 Ratio 123 (2010); Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. Value Inquiry 391, 394-400 (2009); G.A. Cohen, *Casting the First Stone: Who Can, Can't, Condemn the Terrorists?*, 58 Royal Inst. Phil. Supplement 113 (2006); T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, and Blame* 175-79 (2008).

¹¹¹ The claim advanced here should be distinguished from the idea that soldiers who follow orders are either justified or excused and hence rendered blameless. Rather, the argument is that X who orders Y to do P lacks standing to criticize Y for having done P.

¹¹² Grossman, *supra* note 73, at 141-48.

conditioning and indoctrination, to endless drills, and to processes intended to efface their individuality and subvert their autonomy. The suppression of individual identity is achieved in part through shaving of the heads of males and making all soldiers wear the same uniform. They are all to look and act in exactly the same ways. Their wills are broken through intimidation, bullying, and humiliation by their instructors, through demands for repeated public displays of deference and submissiveness, and so on. The aim is to convert them into largely unreflective instruments of the wills of their superiors.¹¹³

There are many reasons of efficiency and effectiveness to cultivate such a culture. But one of the most powerful reasons perhaps is that soldiers are frequently required to do something that people generally find very difficult to do: kill other human beings. In the often discussed study by General S.L.A. Marshall, it was discovered that only about fifteen to twenty of every hundred American soldiers in a battle with enemies consciously fired at the other side.¹¹⁴ The study is controversial, but its basic findings that soldiers are extremely reluctant to kill and that they try to find ways to avoid shooting even if the situations they are in call for them to shoot are accepted as valid.¹¹⁵ The lesson of the Marshall study was that an important part of the military training had to be about overcoming such human inhibitions to kill, and by all accounts, the military has achieved some success in doing so.¹¹⁶ This is yet another way in which the State has involved itself in inducing soldiers to act in ways that are potentially immoral – thereby burdening them with a kind of *moral risk*, which undermines its own standing to blame the soldiers for adverse consequences of their willingness to obey and kill.¹¹⁷

Assuming that this analysis is correct and the State's moral standing to blame can be undermined for various reasons, there are still a number of questions. First, these arguments appear to be especially strong in cases where the State is culpable in the sense that it has carried out an unjust war. The State has then contributed to the veterans' criminality and has done so by engaging in an unjust conflict. Thus, its moral standing seems particularly compromised.¹¹⁸ This observation raises the following question: do these arguments apply even when the State is involved in a just war? If it is the case that the moral standing to blame is not undermined when a State does not act

¹¹³ McMahan, *supra* note 91, at 119.

¹¹⁴ Grossman, *supra* note 73, at 3.

¹¹⁵ Randall Collins, *Violence: A Micro-Sociological Theory* 47-48 (2008).

¹¹⁶ Grossman, *supra* note 73, at 252-63; Giardino, *supra* note 12, at 2967-71; Hafemeister & Stockey, *supra* note 16, at 103-04.

¹¹⁷ This explanation for a sentencing discount for military veterans gives us the third reason why we may think that members of *Einsatzgruppen* are not entitled to mitigation. Unlike, say, the United States government responsible for Vietnam, Iraq, and Afghanistan wars, which, for better or worse, is thought of as "our" government by Americans, very few people – not even Germans -- would identify with the Nazi government as their own government. The only government whose moral standing to blame has been undermined by its own complicity of atrocities committed by Nazi soldiers is the Nazi government, which no longer exists. The closest candidate would be the current German government, and even if there were a viable argument that the current German government has no standing to judge its own war criminals, reasons of transitional justice – a need to make a decisive break with the past in order to reconcile oneself with its own past – militate against any gesture that would be construed as sympathy for Nazi war criminals. Plus, to the extent that the current German government cannot make a complete break from its Nazi past, the fact that it has been scrupulous about blaming itself for its past deeds at least partially restores its moral standing to blame. *Cf.* Tadros, *supra* note 110, at 410; Duff, *supra* note 110, at 139-40.

¹¹⁸ However, as discussed in *supra* note 115, in exceptional situations, for reasons of transitional justice, where a State must distance itself from its predecessor in order for a polity to move forward, a State may be right in not displaying any sign of impunity regarding wrongdoers from the previous regime. In such cases, sentencing discounts may not be called for.

culpably, then it seems that these arguments should not apply if the war is just. This may not make a difference in the end since offenders whose criminal behavior can be traced to their military service in a just war are eligible for a discount according to the analysis above.

However, it seems to me that the State's standing can be compromised even if the State has not done anything wrong. Even if the State engages only in morally justified conflicts and even if we grant that the State's efforts to train soldiers to obey orders and overcome their inhibitions to killing are not culpable, the State's total, intimate, and intrusive involvement in shaping the soldiers' psyche and day-to-day lives makes it difficult to declare that the State is not to share the blame in soldiers' criminal behaviors, no matter the justness of the source of the criminality.¹¹⁹ In other words, to the extent that the State has created and operated the military and turned individuals into those capable of killing efficiently and deployed them into combat, the State must share the blame for some of the foreseeable negative manifestations of such training and deployments, even if we cannot say that the State has done anything wrong.¹²⁰

Another question is whether the State's standing to blame is so compromised with regard to veterans that even those whose PTSD symptoms arise from participating in atrocities – torture, intentional killing of civilians, etc. – cannot be criticized properly. The answer here is no, at least assuming that the State has not commanded the soldiers to engage in such wrongdoings. This is because there is a clear understanding among all participants that the minute soldiers start flouting rules that govern their conduct during a war, they are no longer acting within the scope of authorized violence. They cannot claim to have acted as agents of the State; neither can they claim that they were ordered to do so by the State. The *jus in bello* principles and the rules governing how to handle orders that require them to violate *jus in bello* principles are part of their training.¹²¹ Therefore, the arguments given above as to why the State's moral standing to blame is compromised do not generally apply here. Now, it is true that the State may be responsible for cultivating traits in soldiers that make them more likely to submit even to illegal orders, but by stressing the *jus in bello* rules and enforcing them, the State may immunize itself from the forces that may undermine its moral standing to criticize.

¹¹⁹ It should be kept in mind that the State's standing to blame is not undermined by the mere fact that the military training led one to become a criminal. The standing to punish argument here is limited to situations where a veteran's criminal activity is brought about due to PTSD symptoms stemming from his or her military service. The reason this limitation is important is because the military may contribute to people's criminal activities in all kinds of ways that do not undermine the State's standing to blame. For instance, the military obviously trains people to be good at certain things (such as ability to shoot a gun), and some of the skills or character traits that one may develop in the military may be useful for criminal activities. And it seems odd to think that the State's standing to blame is undermined just because the State has given a person tools that happen to be useful for criminal activities. For instance, John Allen Muhammad, the "Beltway Sniper," was a Gulf War veteran who apparently used his skills as a marksman to go on a murder spree, setting aside the question of whether his mental stability had to do with his experience during the war. See Ian Urbina, *Sniper Who Killed 10 Is Executed in Virginia*, N.Y. Times, Nov. 10, 2009; Byron Acohido & Blake Morrison, *Expert Marksman, Eager Student Lived as Vagabonds*, USA Today, Oct. 25, 2002. See also *Forgey v. State*, 886 N.E.2d 16, 24 (Ind. App. 2008) (noting that "many of Forgey's actions during the commission of the instant crimes appear to be attributable to his military training").

¹²⁰ One implication of this argument, for those who are interested in implementation questions, is that courts, when deciding whether to grant a sentencing discount for offenders with military backgrounds, may bypass the vexing question as to whether a particular conflict is morally justified and still grant the discount, simply because mitigation is called for whether the war that a veteran was involved in was just or not.

¹²¹ See, e.g., William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 Chi. J. Int'l L. 431, 440 (2003); Major Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. Rev. 41, 58 (1994).

Conclusion

This Article has defended the following propositions: First, if a person's PTSD symptoms contribute to his criminal behavior, the PTSD does not reduce his culpability if his PTSD originally stemmed from his own culpable behavior. Second, a veteran's PTSD does not reduce his culpability if his PTSD arises from an instance of his violation of certain *jus in bello* principles during a war. Third, a veteran's PTSD does not mitigate if his PTSD is traced to his participation in an unjust war, unless he actually and reasonably believed that the war he was participating in was just. Fourth, even if a veteran's participation in an unjust war without suitable justification or excuse defeats the argument for culpability reduction, he should not be punished to the full extent of his blameworthiness because the State, through its involvement in the production of his criminality, has undermined its standing to blame him.

There are two other arguments that I have not addressed. The first argument is mercy,¹²² and I will not address it here, partly because the idea of mercy seems capacious enough to serve simply as a way of discussing multiple, all-things-considered grounds for leniency.¹²³ The second argument is what I have above called the "social contributions" argument. The standard justification that we saw in the *Porter* case has two parts. We should treat veterans differently "in recognition of," first, "their service,"¹²⁴ and, second, "the intense stress and mental and emotional toll" of combat.¹²⁵ This Article has primarily focused on the second factor, but the arguments made here have implications for the first factor.

The first thing to note is that the analysis above shows the awkwardness of the idea of describing military veterans as having contributed to the society. Those who have violated *jus in bello* principles probably should not be described as having contributed in a positive manner; in fact, it may be the opposite as they may have damaged the State's standing in the international community and its foreign relations. Those who should be honored instead, some have argued, are those who, at great personal and professional risk, dissented from certain practices, criticized certain policies, and reported on them.¹²⁶

Those who have participated in unjust wars without justification, on the other hand, may not have damaged the State in such an obvious manner but nevertheless have behaved in ways that are contrary to the path the State ought to have been on by assisting the State to go down an immoral path. And even if individual soldiers had justifications, if they have participated in objectively wrongful acts, all they ought to receive is freedom from blame; it seems odd to express gratitude to those who participated in a morally wrongheaded activity.

These considerations highlight the deficiencies of the social contributions account as the general justification of reduced punishments for veterans. The only veterans who may be entitled to

¹²² See, e.g., John Gardner, *Relations of Responsibility*, in *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* 87, 101 (2011). See generally R.A. Duff, *The Intrusion of Mercy*, 4 *Ohio St. J. Crim. L.* 361 (2007).

¹²³ See, e.g., John Tasioulas, *Where is the Love?: The Topography of Mercy*, in *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* 37, 45-48 (2011).

¹²⁴ *Porter*, 130 S. Ct. at 455; see also Efrati, *supra* note 4 (quoting a judge stating that a criminal defendant "is to be credited for his contributions to the United States Army, to his unit, and, in turn, to his country").

¹²⁵ *Porter*, 130 S. Ct. at 455.

¹²⁶ See, e.g., Jameel Jaffer & Larry Siems, *Honoring Those Who Said No*, *N.Y. Times*, April 27, 2011.

a gratitude-based mitigation are, then, those who participated justly in just wars. Here it seems that the case for mitigation on this basis is still weak, but mainly for reasons that have to do with the general problems of social contributions as a sentencing factor. Namely, the institution of punishment should concern itself with individual acts and should not as a general matter serve as a forum where some kind of social accounting examining a person's entire life takes place.¹²⁷ However, fully defending this argument is beyond the scope of this Article.¹²⁸

¹²⁷ Andrew Ashworth, *Sentencing and Criminal Justice* 182-83 (5th ed. 2010).

¹²⁸ One way of taking one's social contributions into account without turning the institution of punishment into a forum to conduct an overall social accounting of a person's entire life is by providing larger incapacity-based discounts to those whose incapacities are caused by injuries one has suffered while engaging in valuable conduct for the society. I thank Antony Duff for this suggestion.