
**ASSESSING SOLDIERS' MENTAL HEALTH: MEETING
THE NEEDS OF VETERANS WITH PTSD, TBI, AND CTE—
PRE-DEPLOYMENT, AT HOME, AND IN COURT**

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I. INTRODUCTION

*“The rush of battle is often a potent and lethal addiction,
for war is a drug”*¹

For many U.S. troops, extensive military service is about patriotism and serving our country.² For some, the military is about a career and a source of income.³ For others, combat is an addiction and its potential side effects are benign.⁴ Regardless of the reason for enlisting, combat deployments are practically inevitable in today’s landscape.⁵ This creates one certainty: an

1. THE HURT LOCKER (Voltage Pictures 2009) (adapting a passage from CHRIS HEDGES, WAR IS A FORCE THAT GIVES US MEANING 3 (2002)).

2. See Anna Haislip, *Five Years of War: The New Patriotism*, DENVER POST, Mar. 19, 2008, at A10, available at 2008 WLNR 5345502 (quoting Rudy Roth, Army veteran from the 1960s: “What I think is patriotic is to defend the country from both domestic and foreign enemies because I love the country”).

3. See Lolita C. Baldor, *Pay Soars to Keep People in Military*, USA TODAY (Apr. 11, 2007, 2:21 PM), http://usatoday30.usatoday.com/news/washington/2007-04-11-3587527397_x.htm (“The Pentagon poured more than \$1 billion into bonuses [in 2006] to keep soldiers and Marines in the military. . . . The bonuses can range from a few thousand dollars to as much as \$150,000 for very senior special forces soldiers who re-enlist for six years. All told, the Army and Marines spent \$1.03 billion for re-enlistment payments [in 2006], compared with \$174 million in 2003, the year the war in Iraq began.”).

4. See Eli Saslow, *Ugh. I Miss It.*, WASH. POST, Apr. 19, 2014, at A01, available at 2014 WLNR 10619740 (describing that many soldiers miss combat and want to “get back into the fight,” while others miss the camaraderie).

5. Erica Goode, *Coming Together to Fight for a Troubled Veteran*, N.Y. TIMES, July 18, 2011, at A1, available at LEXIS (quoting former Army Recruiter Brad Eifert: “Everybody I put in I know is going to get deployed . . . and I have to look their parents in the face and be like, ‘It’s not that bad, look at me, I’m great after two deployments. Your son will be fine’”).

increased risk of mental health problems for those serving in multiple deployments.⁶

Since 2001, approximately 800,000 troops deployed multiple times to Iraq and Afghanistan.⁷ Troops deployed at least twice are three hundred percent more likely to endure a mental health problem.⁸ For those engaged in heavy combat, the risk of serious mental health problems, such as post-traumatic stress disorder (PTSD)⁹ and traumatic brain injury (TBI),¹⁰ is even more severe.¹¹ Tragically, this increased risk of mental health problems among veterans and service members is translating into an astonishing suicide rate.¹² There are roughly eighteen to twenty-two veterans

6. *Traumatic Brain Injury (TBI)*, PBS (Nov. 10, 2011), <http://www.pbs.org/pov/wheresoldierscomefrom/traumatic-brain-injury.php> (citing Karen H. Seal et al., *Trends and Risk Factors for Mental Health Diagnoses Among Iraq and Afghanistan Veterans Using Department of Veterans Affairs Health Care, 2002–2008*, 99 AM. J. PUB. HEALTH 1651, 1651–58 (2009)).

7. *Id.* Operation Enduring Freedom (OEF) began on October 7, 2001, with airstrikes on Taliban and al Qaeda targets in Afghanistan and remains ongoing to this day. *Operation Enduring Freedom Fast Facts*, CNN (Dec. 31, 2014), <http://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts>. On March 19, 2003, President George W. Bush announced military action against Iraq by U.S. and coalition forces, which is known as Operation Iraqi Freedom (OIF). *Operation Iraqi Freedom and Operation New Dawn Fast Facts*, CNN (Sept. 3, 2014), <http://www.cnn.com/2013/10/30/world/meast/operation-iraqi-freedom-and-operation-new-dawn-fast-facts>. On September 1, 2010, OIF was renamed Operation New Dawn (OND) to mark the reduced role U.S. troops played in securing Iraq. *Id.* On December 15, 2011, the mission ended. *Id.*

8. *Traumatic Brain Injury (TBI)*, *supra* note 6.

9. *Post-Traumatic Stress Disorder (PTSD)*, MAYO CLINIC (Apr. 15, 2014), <http://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/basics/definition/con-20022540> (“Post-traumatic stress disorder (PTSD) is a mental health condition that’s triggered by a terrifying event—either experiencing it or witnessing it. Symptoms may include flashbacks, nightmares and severe anxiety, as well as uncontrollable thoughts about the event.”).

10. *Traumatic Brain Injury*, MAYO CLINIC (May 15, 2014), <http://www.mayoclinic.org/diseases-conditions/traumatic-brain-injury/basics/definition/con-20029302?p=1> (“Traumatic brain injury occurs when an external mechanical force causes brain dysfunction. Traumatic brain injury usually results from a violent blow or jolt to the head or body. An object penetrating the skull, such as a bullet or shattered piece of skull, also can cause traumatic brain injury.”).

11. See Marilyn Elias, *Multiple Tours Up Mental Health Risks*, USA TODAY, Aug. 15, 2008, at 6A, available at 2008 WLNR 15308031 (noting that approximately one in three troops exposed to heavy combat, with at least three deployments to Iraq, suffer from mental health problems).

12. Nicholas D. Kristof, *A Veteran’s Death, the Nation’s Shame*, N.Y. TIMES, Apr.

who commit suicide per day.¹³ Over the past three years, the suicide rate is even worse among young male veterans.¹⁴

As troops return from combat with mental health issues, substance abuse problems, and a shortage of adequate counseling from the U.S. Department of Veterans Affairs (VA), many veterans are surfacing in the criminal justice system.¹⁵ As veterans continued to emerge on the docket, jurisdictions started to implement veterans courts.¹⁶ As of 2012, there were 104 veterans courts across our nation and that number continues to grow.¹⁷ Following the mold of drug and mental health courts, most veterans courts prioritize rehabilitation of veterans through close supervision,

15, 2012, at SR1, *available at* LEXIS (“More than 6,500 veteran suicides are logged every year—more than the total number of soldiers killed in Afghanistan and Iraq combined since those wars began.”).

13. *See Service Should Not Lead to Suicide: Access to VA's Mental Health Care: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. (2014) [hereinafter *Service Should Not Lead to Suicide*], <http://veterans.house.gov/opening-statement/hon-jeff-miller-22> (statement of the Hon. Jeff Miller, Chairman, H. Comm. on Veterans' Affairs) (“Despite significant increases in VA's mental health and suicide prevention budget, programs, and staffing in recent years, the suicide rate among veteran patients has remained more or less stable since 1999, with approximately twenty-two veteran suicide deaths per day.”).

14. *Id.* (“[T]he most recent VA data has shown that over the last three years, rates of suicide have increased by nearly forty percent among male veterans under thirty who use VA healthcare services and by more than seventy percent among male veterans between the ages of eighteen and twenty-four years of age who use VA healthcare services.”).

15. *See* 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, 564 (2010) (“The very nature of their service will make them more susceptible to a range of anti-social behavior.”); *see also* Greg Jaffe, *Criminals or Victims? When Good Soldiers Scarred from War Do Wrong at Home*, WASH. POST (Sept. 21, 2014), <http://www.washingtonpost.com/sf/national/2014/09/20/criminal-or-victim/> (“Iraq and Afghanistan veterans who reported problems with PTSD and alcohol were seven times as likely to engage in acts of ‘severe violence’ than veterans with neither of those problems, according to a 2014 study conducted by researchers affiliated with the University of North Carolina School of Medicine and the Department of Veterans Affairs.”).

16. *See* Hawkins, *supra* note 15, at 565–66. In 2004, Anchorage, Alaska, instituted the first known veterans court. *Id.* at 565.

17. *The History*, JUST. FOR VETS, <http://www.justiceforvets.org/vtc-history> (last visited Jan. 24, 2015).

mentorship, and treatment.¹⁸ This veterans court model is working.¹⁹

Many issues still remain, however, regarding the ability of veterans to get access to treatment and the quality of that treatment.²⁰ The waitlists for treatment at some VA Medical Centers are so severe that some veterans are going untreated and even taking their own lives while waiting for care.²¹ In response to the backlog, the VA initiated a Choice Card program in November 2014, which allowed veterans to seek private medical care.²² But, not many veterans are taking advantage of the program.²³

Another treatment location emerging for veterans is at Veteran Centers (Vet Centers). Services are free and confidential at Vet Centers and the majority of staff are combat veterans themselves.²⁴ The most attractive part of Vet Centers may be the fact that they are strictly confidential.²⁵ Neither a commander nor a

18. See Hawkins, *supra* note 15, at 568–69.

19. See Abby Simons, *Study: Veterans Court Is Effective, Should Continue*, STAR TRIB. (Minneapolis), Apr. 16, 2013, at 02B, available at 2013 WLNR 10068475 (“About three-fourths of graduates have no new offenses at six, 12 and 18 months after entering the program. At 24 months, 56 percent still have not reoffended.”).

20. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 868 (9th Cir. 2011) (“In the absence of procedures designed specifically to safeguard veterans’ rights to timely, effective treatment, veterans are suffering and dying, heedlessly and needlessly.”), vacated, 678 F.3d 1013 (2012). Even though the Ninth Circuit Court of Appeals vacated the district court’s holdings, it widely acknowledged the problems facing veterans seeking care at the VA. *Veterans for Common Sense*, 678 F.3d at 1016 (“As much as we as citizens are concerned with the plight of veterans seeking the prompt provision of the health care and benefits to which they are entitled by law, as judges we may not exceed our jurisdiction.”).

21. *Id.*

22. See Patricia Kime, *Amid Backlogs, Vets Can Seek Private Primary Care Docs*, USA TODAY (Aug. 14, 2014, 8:17 AM), <http://www.usatoday.com/story/news/nation/2014/08/14/veterans-primary-care-private-physician/14045651/>.

23. As of February 2015, only 27,000 veterans made appointments with private medical care facilities compared to nine million people who use VA health care. Emily Wax-Thibodeaux, *Far Fewer Veterans Use Choice Card and Private Health Care than Expected, VA Says* (Feb. 13, 2015), <http://www.stripes.com/news/veterans/far-fewer-veterans-use-choice-card-and-private-health-care-than-expected-va-says-1.329819>.

24. Janice Gibbs, *Justice Program, Vet Centers Serve Veterans*, KILLEEN DAILY HERALD (Sept. 7, 2014, 4:30 AM), http://kdhnews.com/military/justice-program-vet-centers-serve-veterans/article_94feed9e-360f-11e4-affb-001a4bcf6878.html

(“Ninety percent of vet centers’ staff are veterans and more than 65 percent are combat veterans . . .”).

25. See *Vet Centers and the Veterans Health Administration: Opportunities and*

judge in veterans court has access to treatment information from Vet Centers.²⁶ Is that confidentiality simply the price that needs to be paid for veterans to get the adequate treatment they need and deserve? Should all treatment facilities for veterans utilize the same confidentiality policy? Or is the confidentiality from Vet Centers being utilized as a shield from commanders and the courts, so soldiers with mental health issues may return to battle and likely endanger their health even more?

II. PRE-DEPLOYMENT

In 1997, a congressional mandate required the Department of Defense (DOD) to give medical evaluations to troops before sending them to war.²⁷ A mental health assessment was to be part of those evaluations.²⁸ In practice, however, the mental health assessment was merely a one-question questionnaire asking the service member whether they “received mental health care in the past year.”²⁹ In fairness, in 1997 nobody knew that four years later the United States would engage in lengthy wars, resulting in TBIs and PTSD as the signature wounds.³⁰

In 2006, as a response to the emergence of TBIs and PTSD, the DOD decided to start barring troops from deployments if they

Challenges: Field Hearing Before the Subcomm. on Health of the H. Comm. on Veterans' Affairs, 112th Cong. 47 (2012), available at <https://veterans.house.gov/sites/republicans.veterans.house.gov/files/documents/112-55.pdf> (prepared statement of Roger Savage Duke, Readjustment Counseling Therapist, Modesto Vet Center) (“From orientation to closure the message is the same: No information will be communicated to any person or agency outside of RCS unless specifically requested by the Veteran, or as excepted in current clinical practices.”).

26. *See id.*

27. Lisa Chedekel, *Army Study Pushes Better Mental Health Screening for Troops*, CONN. HEALTH I-TEAM (Jan. 25, 2011), http://c-hit.org/2011/01/25/army_study_pushes_better_mental_health/.

28. *Id.*

29. *Id.*

30. Since 2000, the DOD reports over 300,000 troops have been diagnosed with TBI and over 100,000 with PTSD. HANNAH FISCHER, CONG. RESEARCH SERV., RS22452, A GUIDE TO U.S. MILITARY CASUALTY STATISTICS: OPERATION INHERENT RESOLVE, OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM 2, 4 (2014), available at <http://fas.org/sgp/crs/natsec/RS22452.pdf>; see also *DoD Numbers for Traumatic Brain Injury*, DEF. & VETERANS BRAIN INJURY CENTER, <http://dvbic.dcoe.mil/sites/default/files/DoD-TBI-Worldwide-Totals-2000-2014-Q1-Q4-Feb23-2015.pdf> (last visited Apr. 6, 2015).

were being treated for serious mental illnesses.³¹ As of October 2014, the DOD's pre-deployment health assessment includes thirty-three questions focused on extracting information from troops suffering from mental health problems, such as PTSD.³² If troops respond truthfully to these screening questions, it can help "protect them from developing psychiatric or behavioral problems in the field and from requiring clinical care for combat stress."³³

In 2007, the Army created a study of six combat brigades in which half of the brigades took part in pre-deployment mental health screening before a fifteen-month tour in Iraq.³⁴ Three other brigades acted as the control group and received no mental health screening.³⁵ The screened brigades "were significantly less likely than the control group to suffer from psychiatric or behavioral disorders."³⁶ Importantly, the screened troops who raised red flags during screening were analyzed further by a mental health expert.³⁷

31. Samantha Rollins, *Study: Screening Before Deployment Protects Soldiers' Mental Health*, TIME (Jan. 19, 2011), <http://healthland.time.com/2011/01/19/study-screening-before-deployment-protects-soldiers-mental-health/>.

32. If two of the first four questions are answered in the affirmative, then the troops are directed to answer an additional eighteen questions regarding their mental state. The initial four questions are:

Have you ever had any experience that was so frightening, horrible, or upsetting that, in the PAST MONTH, you: (a) Have had nightmares about it or thought about it when you did not want to? (b) Tried hard not to think about it or went out of your way to avoid situations that remind you of it? (c) Were constantly on guard, watchful or easily startled? (d) Felt numb or detached from others, activities, or your surroundings?

Pre-Deployment Health Assessment, DEP'T DEF. 2, <http://www.dtic.mil/whs/directives/forms/eforms/dd2795.pdf> (last visited Jan. 24, 2015). The additional eighteen questions ask the troops to check a box ranging from "not at all" to "extremely" about how much they have been bothered by specific problems in the past month, such as "[f]eeling very upset when something reminded you of a stressful experience in the past," "[f]eeling irritable or having angry outbursts," and "[f]eeling jumpy or easily startled." *Id.* at 3. Troops are then asked to answer two questions focusing on depression and directed to answer an additional nine questions depending on how they answer those two questions. *Id.*

33. Rollins, *supra* note 31.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

The troops were then cleared for deployment, deployed with restrictions, or deployed after further evaluation.³⁸

Pre-deployment mental health screening is paramount to reducing the number of troops who will suffer mental health problems. But the nature of today's combat can still put even the healthiest soldier's welfare at risk.

III. COMBAT

“Combat is the supreme adrenaline rush. You take rounds. Shoot back . . . It’s sensory overload. It’s the one thing that’s not overrated in the military.”³⁹

“Modern warfare is characterized by demanding missions, extreme climates, sleep deprivation, cultural dissonance, physical fatigue, prolonged separation from family, and the ever-present threat of serious bodily injury or death.”⁴⁰ The landscape from the wars in Iraq and Afghanistan include everything Brigade General Rhonda Cornum just described.⁴¹ The rash of rocket-propelled grenades and improvised explosive devices (IEDs)⁴² littering Iraq and Afghanistan caused an ever-present threat of serious bodily injury or death.⁴³ Because troops often have access to advanced body armor and may quickly obtain medical care,⁴⁴ the immensely powerful blasts produced by those weapons caused many more

38. *Id.*

39. EVAN WRIGHT, GENERATION KILL, DEVIL DOGS, ICEMAN, CAPTAIN AMERICA AND THE NEW FACE OF AMERICAN WAR 349 (2004), available at http://storage.blackwater.ru/generation%20kill/Generation_Kill.pdf (quoting Corporal Daniel Redman).

40. Charley Keyes, *Army to Implement New Mental Health Screening Procedures*, CNN (Jan. 19, 2011), <http://www.cnn.com/2011/US/01/19/military.mental.health/> (quoting Brigade General Rhonda Cornum, a doctor with the Comprehensive Soldier Fitness program).

41. *Id.*

42. See James Dao, *Afghan War’s Buried Bombs Put Risk in Every Step*, N.Y. TIMES, July 15, 2009, at A1, available at LEXIS (“The bombs are often made with fertilizer and diesel fuel, but some use mortar shells or old mines that litter the countryside. Some bombs are set off when vehicles pass over pressure plates. Others require remote control, like a cellphone. Still others detonate with a button or a wire touched to a battery.”).

43. Emily Singer, *Brain Trauma in Iraq*, MIT TECH. REV. (Apr. 22, 2008), <http://www.technologyreview.com/featuredstory/409938/brain-trauma-in-iraq/>.

44. See *id.*

brain injuries than fatalities.⁴⁵ The frequency of IEDs in Iraq and Afghanistan reached such a fever pitch that TBIs quickly became a signature wound from these wars.⁴⁶

A. *Traumatic Brain Injury (TBI)*

Since 2000, the DOD reports over 300,000 troops have been diagnosed with TBIs and over 100,000 with PTSD.⁴⁷ Some researchers believe, however, that “as many as 300,000 service members may meet criteria for PTSD.”⁴⁸ These are staggering numbers in comparison to the number of soldiers wounded in action or with battle-injury major limb amputations since 2001.⁴⁹ Even though the number of TBI diagnoses is a worldwide count, including service members not in combat, TBI is clearly the *physical* signature wound from the wars in Iraq and Afghanistan.⁵⁰

1. *Mild TBI*

Of the four severity levels of TBI,⁵¹ mild TBI is the most common but least severe.⁵² Over 250,000 TBIs sustained by U.S. forces from 2000 to 2014 were mild TBIs, according to the DOD.⁵³

45. See Gregg Zoroya, *How the IED Changed the U.S. Military*, USA TODAY, Dec. 19, 2013, at 1A, available at 2013 WLNR 31675661 (“Somewhere between more than half to two-thirds of Americans killed or wounded in combat in the Iraq and Afghanistan wars have been victims of IEDs planted in the ground, in vehicles or buildings, or worn as suicide vests, or loaded into suicide vehicles, according to data from the Pentagon’s Joint IED Defeat Organization or JIEDDO. That’s more than 3,100 dead and 33,000 wounded. Among the worst of the casualties are nearly 1,800 U.S. troops who have lost limbs in Iraq and Afghanistan, the vast majority from blasts, according to Army data.”).

46. See *Traumatic Brain Injury (TBI)*, *supra* note 6.

47. *DoD Numbers for Traumatic Brain Injury*, *supra* note 30; see also FISCHER, *supra* note 30, at 2 tbl.2, 4 tbl.3.

48. *The Uncounted*, CNN, <http://www.cnn.com/interactive/2014/03/us/uncounted-suicides/> (last visited Jan. 24, 2015) (citing Dr. Stephen Cozza from the Center for the Study of Traumatic Stress).

49. See FISCHER, *supra* note 30, at 1, 6 (noting that the number of those wounded in action is over 50,000 and the number of those with battle-injury major limb amputations is slightly over 1500).

50. See *Traumatic Brain Injury (TBI)*, *supra* note 6.

51. According to the DOD, the four levels of TBI severity are mild, moderate, severe, or penetrating. See *DoD Numbers for Traumatic Brain Injury*, *supra* note 30.

52. *Id.*

53. *Id.*

A mild TBI is commonly referred to as a concussion, which can cause a loss of consciousness for up to thirty minutes and a temporary dysfunction of brain cells.⁵⁴ But even the least severe TBI is still severe enough to cause long-lasting and devastating effects on anyone.⁵⁵ Even scarier, mild TBI can be incredibly hard to diagnose because the symptoms can be easily disguised by other ailments.⁵⁶

2. *Moderate TBI*

A moderate TBI is more severe than a mild TBI, and it accounted for a little more than 25,000, or roughly eight percent, of TBIs sustained by U.S. forces from 2000 to 2014.⁵⁷ Moderate TBI is more severe than a concussion and includes a loss of consciousness for more than thirty minutes, but less than twenty-four hours.⁵⁸ Moderate TBIs can also cause memory loss for more than twenty-four hours, but less than seven days.⁵⁹

3. *Severe TBI*

Severe TBIs accounted for a little more than 3000, or one percent of, TBI cases in U.S. forces from 2000 to 2014, according to the DOD.⁶⁰ A severe TBI results in a loss of consciousness for more than twenty-four hours and memory loss for more than seven days.⁶¹

4. *Penetrating TBI*

Penetrating TBIs, also known as open head injuries, accounted for a little more than 4500, or one and a half percent of, TBI cases

54. *Id.* The DOD defines mild TBI/concussion as “[a] confused or disoriented state which lasts less than 24 hours; loss of consciousness for up to 30 minutes; memory loss lasting less than 24 hours; and structural brain imaging (MRI or CT Scan) yielding normal results.” *Id.*

55. See James Dao, *Symptoms of Traumatic Brain Injury Can Persist for Years*, N.Y. TIMES WAR BLOG (July 18, 2012, 1:29 PM), <http://atwar.blogs.nytimes.com/2012/07/18/symptoms-of-traumatic-brain-injury-can-persist-for-years/>.

56. *See id.*

57. *DoD Numbers for Traumatic Brain Injury*, *supra* note 30.

58. *See id.*

59. *Id.*

60. *Id.*

61. *Id.*

in U.S. forces from 2000 to 2014, according to the DOD.⁶² Penetrating TBIs sustained in combat can result from projectiles and skull fractures that drive into the brain.⁶³

B. Chronic Traumatic Encephalopathy (CTE)

One frightening condition caused by repeated blows to the head and TBIs is chronic traumatic encephalopathy (CTE).⁶⁴ Most popularly known for afflicting boxers and football players,⁶⁵ CTE is a degenerative condition that accumulates and destroys brain cells in the frontal and temporal lobes, which control impulse, memory, and emotions.⁶⁶ Currently, there is no treatment for CTE, and those who have it do not know it.⁶⁷ The only way to diagnose CTE is to examine the brain posthumously.⁶⁸ Often developed later in life, CTE has been found during autopsies in at least a dozen veterans.⁶⁹

The first published case of CTE in a veteran was discovered in a twenty-seven-year-old Marine who spent two tours in Iraq.⁷⁰ During one tour, he was exposed to mortar and IED blasts at a close range.⁷¹ Shortly before the Marine committed suicide, he was suffering from memory loss, mood swings, and PTSD, and he was abusing alcohol.⁷²

Considering the 300,000-plus TBIs sustained by U.S. forces in the past fourteen years,⁷³ the incidence of CTE in veterans may very

62. *Id.*

63. *Id.*

64. Nicholas D. Kristof, Op-Ed., *Veterans and Brain Disease*, N.Y. TIMES, Apr. 26, 2012, at A23, available at LEXIS.

65. *Id.*; see also Gary Mihoces, *Belcher Showed Signs of Disease with CTE Finding, Player's Daughter Eligible for Settlement*, USA TODAY, Sept. 30, 2014, at 03C, available at 2014 WLNR 27180055. See generally Alan Schwarz, *Duerson's Brain Trauma Diagnosed*, N.Y. TIMES, May 3, 2011, at B11, available at LEXIS ("Boston University researchers announced that [Duerson's] brain had developed the same trauma-induced disease recently found in more than 20 deceased [football] players.").

66. Kristof, *supra* note 64, at A23.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See Bennet Omalu et al., *Chronic Traumatic Encephalopathy in an Iraqi War Veteran with Posttraumatic Stress Disorder Who Committed Suicide*, 31 NEUROSURGICAL FOCUS 1, 1–2 (2011), available at <http://thejns.org/doi/pdf/10.3171/2011.9.FOCUS11178>.

72. *Id.* at 1–4; see also Kristof, *supra* note 64, at A23.

73. See *supra* Part III.A.

well increase.⁷⁴ According to medical experts, CTE may be a cause of the rash of veteran suicides.⁷⁵

C. *Suicide*

“More than 6,500 veteran suicides are logged every year—more than the total number of soldiers killed in Afghanistan and Iraq combined since those wars began.”⁷⁶ Over the past three years, the suicide rate is even worse among young male veterans.⁷⁷ Even a decorated combat veteran, who became a well-known advocate for troops suffering from PTSD, committed suicide.⁷⁸ That veteran was Clay W. Hunt.⁷⁹

1. *Clay W. Hunt*

The example of Clay W. Hunt suggests that any veteran from the wars in Iraq and Afghanistan may be susceptible to suicide.⁸⁰ Hunt was a model Marine.⁸¹ In 2005, he enlisted in the Marine Corps.⁸² In 2007, he deployed to Iraq as part of the infantry.⁸³ While in Fallujah, a roadside bomb killed one of Hunt's good friends; he witnessed firsthand another friend get shot and killed; and he “took a sniper round through his wrist, 2 inches from his face.”⁸⁴ Post-deployment, Hunt was diagnosed with PTSD.⁸⁵ Undaunted,

74. Kristof, *supra* note 64, at A23 (“The discovery of C.T.E. in veterans could be stunningly important. Sadly, it could also suggest that the worst is yet to come, for C.T.E. typically develops in midlife, decades after exposure. If we are seeing C.T.E. now in war veterans, we may see much more in the coming years.”).

75. *Id.*

76. Kristof, *supra* note 12, at SR1.

77. *See Service Should Not Lead to Suicide, supra* note 13.

78. T. Rees Shapiro, *Iraq Veteran Tried to Help Troops Haunted by War Experiences*, WASH. POST, Apr. 17, 2011, at B05, *available at* 2011 WLNR 7523183.

79. *Id.*

80. *Id.* (quoting Paul Rieckhoff, president of Iraq and Afghanistan Veterans of America: “The message I’ve been trying to convey to people is that if this can happen to Clay Hunt, it can happen to anyone”).

81. Clay Hunt was a well-decorated soldier; his honors included a Purple Heart. *Id.*

82. *Id.*

83. Wade Goodwyn, *One Marine’s Journey: War, Activism, Then Tragedy*, NPR (Apr. 21, 2011), <http://www.npr.org/2011/04/21/135600345/marine-loses-battle-with-ptsd>.

84. *Id.*

85. *Id.*

Hunt enrolled in the Marines' grueling scout sniper school and then deployed to Afghanistan in 2008.⁸⁶ While deployed in the dangerous Sangin District in southern Afghanistan, Hunt witnessed two more friends get killed.⁸⁷

After being honorably discharged in 2009 as a corporal, Hunt became a prominent advocate urging veterans to get help with PTSD.⁸⁸ Hunt's advocacy included lobbying Congress for veterans' rights and appearing in a television public-service announcement promoting mental health awareness in veterans.⁸⁹ Despite his outreach efforts, Hunt still struggled with his own PTSD.⁹⁰ He also became outspoken against the VA⁹¹ and had to drop out of college when he did not receive his benefits checks on time.⁹² Although Hunt received treatment from the VA, he tragically took his own life in 2011.⁹³ Hunt's mother considers him a casualty of war, because "[h]e died as a result of his war experience."⁹⁴

On February 12, 2015, President Obama signed the Clay Hunt Suicide Prevention for American Veterans Act (Clay Hunt SAV Act).⁹⁵ During the signing ceremony, President Obama stated that "[t]oday we honor a young man who isn't here, but should be here."⁹⁶ In support of the bill, President Obama said, "This has to be a national mission. As a nation, we should not be satisfied, will

86. *Id.*; see also Shapiro, *supra* note 78, at B05.

87. Shapiro, *supra* note 78, at B05.

88. *Id.*; Goodwyn, *supra* note 83.

89. Shapiro, *supra* note 78, at B05.

90. *Id.*

91. *Id.* (noting that Hunt told the *Los Angeles Times* in 2010, "I can track my pizza from Pizza Hut on my BlackBerry, but the VA can't find my claim for four months" (quoting David Zucchini, *Battlefield of Red Tape: Back Home, Veterans Are Fighting Bureaucracy to Get Benefits. The VA Admits It Has to be More Efficient.*, L.A. TIMES, June 1, 2010, at 1, available at 2010 WLNR 11189461)).

92. *Id.*

93. Dan Lamothe, *The Legacy of Clay Hunt: Marine Recalled in New Suicide Legislation*, WASH. POST (Nov. 19, 2014), <http://www.washingtonpost.com/news/checkpoint/wp/2014/11/19/the-legacy-of-clay-hunt-marine-recalled-in-new-suicide-legislation/>.

94. Shapiro, *supra* note 78 (quoting Paul Vercammen, *One Big Question Haunts Marine's Suicide: Why?*, CNN (Apr. 15, 2011, 9:05 AM), <http://www.cnn.com/2011/US/04/15/california.marine.suicide/>).

95. Gregory Korte, *Obama Signs Veteran Suicide Prevention Bill*, USA TODAY (Feb. 12, 2015, 4:24 PM), <http://www.usatoday.com/story/news/politics/2015/02/12/obama-clay-hunt-act-bill-signing-ceremony/23298971/>.

96. *Id.*

not be satisfied until every man and woman in uniform, every veteran, gets the help that they need to stay strong and healthy.”⁹⁷ The House introduced the Clay Hunt SAV Act to provide awareness about veteran suicides, to require annual evaluations of the mental health care and suicide prevention programs of the DOD and the VA, and to provide loans for psychiatrists seeking a career in mental health at the VA.⁹⁸ The Clay Hunt SAV Act, however, was not the first of its kind to address the increasing concerns about veteran suicides.

2. *Joshua Omgig*

In 2007, Congress passed the Joshua Omgig Veterans Suicide Prevention Act.⁹⁹ This Act implemented a crisis phone line for veterans with suicidal thoughts, increased suicide prevention training for VA staff, provided twenty-four-hour mental health care for veterans, and provided for research into mental health care for veterans who have suffered sexual trauma during their service.¹⁰⁰ “A simple screening and tracking process could have provided Joshua [Omgig] with the counseling he needed, saving his life.”¹⁰¹

Omgig took his own life at age twenty-two, which was a little more than a year after he returned home from an eleven-month tour in Iraq.¹⁰² The morning after being arrested for operating a motor vehicle while intoxicated, Omgig put on his desert fatigues and handed his mother a note on his way out of the house.¹⁰³ He went into his truck, locked the doors, and shot himself as his mother looked on screaming for him to stop.¹⁰⁴ His parents believed that transitioning from “war zone to home was too much.”¹⁰⁵ They described their son as never being the same after he

97. *Id.*

98. *Id.*

99. Pub. L. No. 110-110, 121 Stat. 1031 (2007) (codified as amended at 38 U.S.C. § 1720F (2012)).

100. *Id.*

101. *His Legacy*, MEMORY JOSHUA LEE OMVIG, <http://joshua-omvig.memory-of.com/legacy.aspx> (last visited Feb. 22, 2015) (quoting Congressman Leonard Boswell’s *Boswell Briefing*).

102. Chaplain Kathie, *The Legacy of Joshua Omgig*, WOUNDED TIMES (Dec. 2, 2008), <http://woundedtimes.blogspot.com/2008/12/legacy-of-joshua-omvig.html>.

103. *His Legacy*, *supra* note 101.

104. *Id.*

105. Kathie, *supra* note 102.

returned home from Iraq.¹⁰⁶ His parents later learned that their son suffered from one of the signature wounds from the wars in Iraq and Afghanistan: PTSD.¹⁰⁷ “Not all wounds inflicted in combat are visible.”¹⁰⁸

D. Post-Traumatic Stress Disorder (PTSD)

“There are few stresses on the human psyche as extreme as the exposure to combat and seeing what war can do.”¹⁰⁹

Since 2001, more than two million troops have served in Iraq and Afghanistan.¹¹⁰ The number of those veterans diagnosed with PTSD¹¹¹ is anywhere from 100,000 to 300,000 and potentially many more.¹¹² Many veterans go undiagnosed with PTSD, and many suffer from major depression.¹¹³ Regardless of the actual statistic, it is widely known that PTSD is crippling our veterans and those around them. According to one researcher, “The service member is like a pebble dropped in a pool The pain that person carries affects everyone around them. Trauma ripples outward.”¹¹⁴ More than one million service members reported suffering from two indicators of PTSD: relationship problems and angry outbursts.¹¹⁵

106. *Josh's Story: The Shot Heard Around the World*, MEMORY JOSHUA LEE OMVIG, <http://joshua-omvig.memory-of.com/About.aspx> (last visited Feb. 22, 2015) (follow the “About Him” tab and scroll down for *Josh's Story*).

107. Kathie, *supra* note 102.

108. *His Legacy*, *supra* note 101.

109. Elisabeth Bumiller & John H. Cushman Jr., *Suspect's Tours Call Attention to War Strain*, N.Y. TIMES, Mar. 18, 2012, at A1, available at LEXIS (quoting former Army Surgeon General and Lieutenant General Eric B. Schoomaker).

110. *The Uncounted*, *supra* note 48.

111. *Post-Traumatic Stress Disorder (PTSD)*, *supra* note 9.

112. *The Uncounted*, *supra* note 48.

113. *Id.*

114. *Id.* (quoting Melinda Moore, a University of Kentucky researcher who has worked with a DOD-funded group studying service member suicide).

115. Rajiv Chandrasekaran, *After the Wars: A Legacy of Pain and Pride*, WASH. POST (Mar. 30, 2014), <http://www.washingtonpost.com/sf/national/2014/03/29/a-legacy-of-pride-and-pain/>.

E. Acts of Violence

Digesting all the problems affecting our veterans is difficult enough, but one of the hardest issues to understand is when veterans commit random acts of violence and murder civilians.

1. Ivan A. Lopez

On April 2, 2014, Army Specialist Ivan A. Lopez opened fire at Fort Hood military base in Texas.¹¹⁶ The rampage injured sixteen and left four dead.¹¹⁷ Even though Lopez's "record showed no combat injuries or contact with the enemy," he reported sustaining a TBI and was screened for PTSD.¹¹⁸ It was also reported that he was taking medications for anxiety and depression.¹¹⁹

2. Robert A. Bales

No case may ever be more shocking or controversial than that of Army Sergeant Robert A. Bales. Bales received a life sentence for senselessly massacring sixteen Afghan men, women, and children while they slept in their homes in 2012.¹²⁰ At the time of the incident, Bales was on his fourth deployment.¹²¹ Previous tours took a toll on Bales. He lost part of his foot, sustained a mild TBI, and likely suffered from PTSD.¹²² Medical professionals debate, however, whether TBI or PTSD was the underlying root cause that set Bales off on that tragic night in March 2012.¹²³ For example, an unexplainable manic episode could have been to blame.¹²⁴

116. Manny Fernandez et al., *Soldier's Attack at Base Echoed Rampage in 2009*, N.Y. TIMES, Apr. 14, 2014, at A1, available at LEXIS.

117. Ivan A. Lopez was one of the four casualties, which resulted from a self-inflicted gunshot wound. *Id.*

118. *Id.*

119. *Id.*

120. Greg Botelho, *Army's Robert Bales Gets Life, No Parole, for Afghan Rampage—but Was It Justice?*, CNN, <http://www.cnn.com/2013/08/23/justice/robert-bales-afghan-killings/> (last updated Aug. 23, 2013).

121. Charles Raison, *What's the Link Between PTSD, TBI and Violence?*, CNN, <http://www.cnn.com/2012/03/22/health/raison-robert-bales-tbi-ptsd/> (last updated Mar. 22, 2012).

122. James Dao, *At Home, Asking How 'Our Bobby' Became War Crime Suspect*, N.Y. TIMES, Mar. 19, 2012, at A1, available at LEXIS.

123. See Raison, *supra* note 121 ("Traumatic brain injury almost never causes otherwise solid citizens to ruthlessly massacre men, women and children. Thousands upon thousands of people develop severe manic episodes every year.

IV. POST-DEPLOYMENT

*“Everything that we hold precious in this country was made possible by Americans who gave their all. And because of them, our nation is stronger, safer, and will always remain a shining beacon of freedom for the rest of the world.”*¹²⁵

Few Americans receive more praise, support, and respect than veterans, especially when they return home from war.¹²⁶ Families, friends, and communities plan large homecoming gatherings. Videos go viral of troops coming home to elaborate, surprising, and heartwarming reunions. Major sporting events allot specific time to recognize soldiers for their service. National and local television stations routinely report on service members coming home. It is a time to rejoice and give thanks to our heroes.

Additionally, many troops are thriving when they return home from deployment. “[T]hey are attending college, paid in full by the post-9/11 G.I. Bill; they are finding employers who covet their leadership skills and work ethic; they are receiving the medical attention they need.”¹²⁷

However, many other veterans return home and feel left behind. Thousands of veterans feel as if they are “fighting for benefits, struggling to land a job, wrestling with psychological demons unleashed by combat or coping with shattered families.”¹²⁸ One veteran stated, “When I raised my right hand and said, ‘I will support and defend the Constitution of the United States of America,’ when I gave them everything I could, I expect the same in return.”¹²⁹ Despite billions of dollars allocated to assist veterans

Thousands upon thousands of service men and women have been multiply deployed and have suffered various levels of traumatic brain injury, and yet there is only one Bales.”).

124. *See id.*

125. President Barack Obama, Remarks by the President on Memorial Day—Arlington National Cemetery (May 26, 2014), <http://www.whitehouse.gov/the-press-office/2014/05/26/remarks-president-memorial-day>.

126. *See* Chandrasekaran, *supra* note 115 (quoting Defense Secretary Chuck Hagel: “They have come back to a nation that has embraced them—warmly, strongly, positively—and put tremendous value and appreciation into their service”).

127. *Id.*

128. *Id.*

129. *Id.* (quoting Christopher Steavens, former Army staff sergeant, who said he waited seven months to see a doctor upon filing a claim with the VA).

transitioning from war to home and extensive programming and funding to research and treat mental health issues, veterans are still struggling post-deployment.

A. *Post-Deployment Screening*

Upon return from Iraq or Afghanistan, service members must engage in a post-deployment health screen for depression, PTSD, and other mental health problems.¹³⁰ “Overall, 20.3% of soldiers who screened positive for depression or PTSD reported that they were uncomfortable reporting their answers honestly on the routine post-deployment screening.”¹³¹ It can be hard to get soldiers to talk about their problems, let alone for them to actually seek the help they need.¹³²

B. *Waitlist Problem*

Compounding the problem of getting veterans to seek the help they need is the waitlist disaster at the VA.¹³³ Even when some veterans eventually seek help, the VA has been unable to provide timely assistance.¹³⁴ An internal audit of the VA's wait times

130. See Christopher H. Warner et al., *Importance of Anonymity to Encourage Honest Reporting in Mental Health Screening After Combat Deployment*, 68 ARCHIVES GEN. PSYCHOL. 1065, 1068 (2011) (discussing congressionally mandated screening).

131. *Id.*

132. See Sandhya Somashekhar & Ellen Nakashima, *Military's Mental-Health System Faces Shortage of Providers, Lack of Good Diagnostic Tools*, WASH. POST (Apr. 5, 2014), http://www.washingtonpost.com/world/national-security/militarys-mental-health-system-faces-shortage-of-providers-lack-of-good-diagnostic-tools/2014/04/05/e7e7da42-bb4a-11e3-96ae-f2c36d2b1245_story.html (“[T]here remains in the military a stigma that prevents soldiers from seeking the help they need, said Barbara Van Dahlen, president of Give an Hour, a nonprofit group that connects troops and their families with free mental-health services.”).

133. See *Service Should Not Lead to Suicide: Access to VA's Mental Health Care: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. (2014), <http://veterans.house.gov/opening-statement/hon-michael-michaud-9> (statement of the Rep. Michael Michaud, Ranking Member, H. Comm. on Veterans' Affairs) (“A 2012 IG report found that VHA's data on whether it was providing timely access to mental health services is totally unreliable.”).

134. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 868 (9th Cir. 2011) (“The number of veterans diagnosed as suffering from mental illnesses, and the percentage of those who are awaiting treatment, is simply staggering. As of April 2008, at least 85,450 veterans were languishing on VHA waiting lists for mental health care—a number that may significantly under-represent the scale of the problem both then and now.”), *vacated*, 678 F.3d 1013 (9th Cir. 2012).

revealed that a staggering “57,000 new patients have waited at least 90 days for their first appointments and that about 13 percent of VA schedulers indicated they were told to falsify appointment-request dates to give the impression that wait times were shorter than they really were.”¹³⁵ “[S]ome veterans with severe depression or PTSD are forced to wait over eight weeks for mental health referrals. During that period, some of those veterans take their own lives.”¹³⁶

During Memorial Day weekend 2014, Sergeant Isaac Shawn Sims perished from what was likely “suicide by cop.”¹³⁷ After completing two tours in Iraq with the Army’s 82nd Airborne Division, Sims suffered from PTSD, nightmares, and flashbacks;¹³⁸ he had an “eardrum . . . blown out and [was] 80 percent disab[led] from brain injuries.”¹³⁹ Sims attempted to get help at a hospital run by the VA.¹⁴⁰ His mother, Patricia Sims, “pleaded with doctors to let him sleep on the hospital floor,” but the overbooked facility turned him away.¹⁴¹ After her son’s passing, Patricia Sims stated that “[t]he last six months have been such a nightmare for him. The V.A. kept saying, ‘we’ll get to you later.’”¹⁴² Unable to get adequate help in his transition back to civilian life, Sims unfortunately did what many veterans do in his situation: self-medicate with drugs and alcohol.¹⁴³

135. Josh Hicks, *VA Says More Than 57,000 Patients Are Waiting for First Visit*, WASH. POST (June 9, 2014), <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/06/09/va-says-more-than-57000-patients-waiting-for-first-visit/> (“The report came less than two weeks after the VA inspector general’s office confirmed recent allegations that VA hospitals have falsified appointment records to hide treatment delays. Former VA Secretary Eric Shinseki resigned over the scandal on May 30.”).

136. *Veterans for Common Sense*, 644 F.3d at 872.

137. See David Von Drehle, *Iraq Vet Killed in Gunfight with Police Was Turned Away by VA Hospital*, TIME (May 27, 2014), <http://time.com/121438/iraq-vet-killed-in-gunfight-with-police-was-turned-away-by-va-hospital/>.

138. *Id.*

139. Laura McCallister, *Family: Vet Killed in Weekend Standoff Sought Medical Care*, KCTV (May 27, 2014, 8:18 PM), <http://www.kctv5.com/story/25624962/family-vet-killed-in-weekend-standoff-sought-medical-care>.

140. Von Drehle, *supra* note 137.

141. *Id.*

142. *Id.*

143. *Id.* (noting that upon returning from deployment Sergeant Sims’s mother stated he “began abusing drugs—huffing aerosols primarily”).

C. Chemical Dependency

“Many soldiers, unable or unwilling to get treatment for psychological problems, self-medicate with alcohol and drugs.”¹⁴⁴ The group with the highest risk of abusing chemicals is combat veterans with multiple deployments.¹⁴⁵ Young veterans, ages eighteen to twenty-five, are even more apt to abuse chemicals.¹⁴⁶ “Maj. Gen. Michael L. Oates[] says that since his arrival in early 2007, [soldier] misconduct related to substance abuse has reached ‘unacceptable’ levels, despite a toughened regimen of education, designated-driver programs and penalties.”¹⁴⁷

Additionally, service members are returning home from combat with chronic physical pain.¹⁴⁸ To manage the pain, doctors are increasing prescriptions,¹⁴⁹ which in turn increases dependencies.¹⁵⁰ Partly because of the VA’s waitlist problem,¹⁵¹ lack of medical professionals,¹⁵² and increased demand for services,¹⁵³ the “VA’s doctors have become increasingly liberal in prescribing

144. Matthew Wolfe, *From PTSD to Prison: Why Veterans Become Criminals*, DAILY BEAST (July 28, 2013), <http://www.thedailybeast.com/articles/2013/07/28/from-ptsd-to-prison-why-veterans-become-criminals.html>.

145. *DrugFacts: Substance Abuse in the Military*, NAT’L INST. ON DRUG ABUSE 1 (Mar. 2013), http://www.drugabuse.gov/sites/default/files/drugfacts_military_0.pdf.

146. *Id.* (“According to a report of veterans in 2004–2006, a quarter of 18- to 25-year-old veterans met criteria for a past-year substance use disorder, which is more than double the rate of veterans aged 26–54 and five times the rate of veterans 55 or older.”).

147. Lizette Alvarez, *After the Battlefield, Fighting the Bottle at Home*, N.Y. TIMES, July 8, 2008, at A1, *available at* LEXIS.

148. Alan Zarembo, *Painkiller Use High as Soldiers Return; Back Home, Troops Take Prescription Opioids at a Far Higher Rate than Civilians Do*, L.A. TIMES, July 1, 2014, at 7, *available at* 2014 WLNR 17796385.

149. *See id.*

150. Wolfe, *supra* note 144 (“According [to] the National Institute on Drug Abuse, pain-reliever prescriptions issued to members of the military quadrupled between 2001 and 2009. As more drugs are prescribed, more soldiers are developing dependencies.”).

151. Michael D. Shear & Richard A. Oppel Jr., *V.A. Chief Resigns in Face of Furor on Delayed Care*, N.Y. TIMES, May 31, 2014, at A1, *available at* LEXIS.

152. Wolfe, *supra* note 144 (quoting Dr. Judith Broder: “It’s just more cost effective and takes fewer man-hours to write a prescription than to sit and talk to a veteran about what they need”).

153. Shear & Oppel, *supra* note 151, at A1.

powerful drugs.”¹⁵⁴ “According to a study by the Institute of Medicine, rates of prescription drug abuse among veterans saw a fivefold increase between 2002 and 2008.”¹⁵⁵ Misuse of pain medications among veterans, however, may be no different than the general American public’s appetite for opioids.¹⁵⁶

V. VA MEDICAL CENTERS VERSUS VETERANS CENTERS

“[T]o fulfill President Lincoln’s promise ‘[t]o care for him, who shall have borne the battle and for his widow and for his orphan’ by serving and honoring the men and women who are America’s veterans.”¹⁵⁷

The VA was neither prepared nor ably responsive to the influx of veterans from the wars in Iraq and Afghanistan to fulfill President Lincoln’s promise as part of its mission statement. Of the 2.6 million troops who deployed to Iraq and Afghanistan, more than half “struggle with physical or mental health problems stemming from their service, feel disconnected from civilian life and believe the government is failing to meet the needs of this generation’s veterans.”¹⁵⁸ Furthermore, “[m]ore than 600,000 Iraq and Afghanistan veterans who have become partially or totally disabled from physical or psychological wounds are receiving lifelong financial support from the government.”¹⁵⁹

For the VA to provide care for more than eight million veterans, the Veterans Health Administration (VHA) has 152 medical centers (hospitals).¹⁶⁰ The VHA also runs approximately “1400 community-based outpatient clinics, community living centers, Vet Centers and Domiciliaries.”¹⁶¹ Unfortunately, the

154. Wolfe, *supra* note 144.

155. *Id.*

156. Zarembo, *supra* note 148 (“A rapid rise in the use of prescription opioids such as oxycodone and hydrocodone has been a growing public health concern. More than 16,000 people a year die from overdoses—quadruple the number in 1999.”).

157. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 852 (9th Cir. 2011) (citing *Mission Statement*, U.S. DEP’T VETERANS AFF., http://www.va.gov/about_va/mission.asp (last visited Jan. 24, 2014)), *vacated*, 678 F.3d 1013 (9th Cir. 2012).

158. Chandrasekaran, *supra* note 115.

159. *Id.*

160. *Where Do I Get the Care I Need?*, U.S. DEP’T VETERANS AFF., <http://www.va.gov/health/findcare.asp> (last updated Mar. 26, 2014).

161. *Id.*

amount of money and resources being funneled into the VA may not be not enough to effectively handle and catch up to the increasing number of veterans seeking help.¹⁶²

A. *Daniel Somers*

“Too trapped in a war to be at peace, too damaged to be at war.”¹⁶³

After waiting twenty months for the VA to resolve his claim for full disability for PTSD, Army veteran Daniel Somers took his own life on June 10, 2013.¹⁶⁴ As a result of multiple deployments to Iraq and intense combat missions, Somers had severe PTSD and a TBI.¹⁶⁵ Somers “once tried to get himself admitted to the hospital during a mental breakdown, only to be turned away for lack of beds in both the mental health and emergency departments.”¹⁶⁶ At one point, Somers did see a psychiatrist at the VA, but “the doctor retired. And when he tried to get information about his next appointment, the office told him that there was a shortage of mental health providers and that he’d be notified when he was assigned a new one.”¹⁶⁷ In his suicide note, Somers wrote the “government has turned around and abandoned me.”¹⁶⁸ Since Daniel’s passing, his parents (Howard and Jean Somers) made it their crusade to stop veterans’ suicides and increase the access and

162. See Shear & Opper, *supra* note 151, at A1 (“Veterans’ demand for medical services is soaring. The number of outpatient visits to V.A. health care facilities has grown by 26 percent over the last five years, to 94.6 million in the current fiscal year, according to the department. Over the same period, the number of staff doctors and nurses has grown by 18 percent.”).

163. Daniel Somers, “*I Am Sorry That It Has Come to This*”: A Soldier’s Last Words, GAWKER (June 22, 2013, 11:12 AM), <http://gawker.com/i-am-sorry-that-it-has-come-to-this-a-soldiers-last-534538357>.

164. Steve Vogel, *After Veteran Daniel Somers’s Suicide, His Family Has a New Mission: Improve VA Services*, WASH. POST (Aug. 23, 2013), http://www.washingtonpost.com/politics/after-veteran-daniel-somers-suicide-his-family-has-a-new-mission-improve-va-services/2013/08/23/ae67b2c2-0526-11e3-9259-e2aaf5a5f84_story.html (“[A]t its peak in March [the VA’s disability claims backlog] included more than 900,000 compensation requests from veterans, two-thirds of them waiting for more than 125 days.”).

165. *Id.*

166. Meredith Clark, *Parents on VA Mental Health Care: “No One Was There to Help,”* MSNBC (July 11, 2014, 8:00 AM), <http://www.msnbc.com/msnbc/veterans-affairs-suicide-hearing>.

167. Vogel, *supra* note 164.

168. Somers, *supra* note 163.

quality of care veterans receive.¹⁶⁹ They have been meeting with VA officials and congressional staffers¹⁷⁰ and testified before the House Veterans Affairs Committee on July 10, 2014.¹⁷¹

B. Veterans for Common Sense v. Shinseki

Discouraged by bureaucracy, two nonprofit organizations took the fight for better care at the VA to federal court in California.¹⁷² Eventually decided by the Ninth Circuit Court of Appeals in 2012, *Veterans for Common Sense v. Shinseki* addressed the issue whether veterans' statutory entitlements and constitutional right to due process were violated because:

- (1) VHA mental health care waiting lists are extremely long, resulting in lengthy delays and in some cases 'the absence of any care,' and there are no transparent procedures in place for a veteran to appeal his placement on such a waiting list
- (2) Mental health care is unavailable or inaccessible at some VHA facilities and there are no procedures in place to improve accessibility
- (3) The VHA has no procedure through which Veterans can obtain expedited relief in urgent cases such as an imminent suicide threat
- (4) The VHA had delayed implementing governmental recommendations for improve[d] procedures pertaining to clinical care and education[.]¹⁷³

The court acknowledged the mental health problems, suicide rate, and access to care at the VA plaguing veterans.¹⁷⁴ But the court ultimately held that it did not have jurisdiction to hear the

169. Vogel, *supra* note 164.

170. *Id.*

171. Clark, *supra* note 166.

172. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), *vacated*, 678 F.3d 1013 (9th Cir. 2012).

173. *Id.* at 860.

174. *Id.* at 868 ("The urgent need to provide veterans with the mental health care to which they are entitled is clear, not least in light of the high suicide rate among this vulnerable population. In the absence of procedures designed specifically to safeguard veterans' rights to timely, effective treatment, veterans are suffering and dying, heedlessly and needlessly.").

plaintiffs' claims.¹⁷⁵ The court wrote, "As much as we may wish for expeditious improvement in the way the VA handles mental health care and service-related disability compensation, we cannot exceed our jurisdiction to accomplish it."¹⁷⁶ The court went on to state, "There can be no doubt that securing exemplary care for our nation's veterans is a moral imperative. But Congress and the President are in far better position 'to care for him who shall have borne the battle, and for his widow and his orphan.'"¹⁷⁷

C. *Waitlist Problem Fallout*

The VA's antiquated scheduling and registration system collided with a flood of veterans seeking care to create a waitlist problem so bad that officials began to manipulate the waitlists in an attempt to cover up the problem.¹⁷⁸ In the wake of the scandal, the secretary of Veterans Affairs at the time, Eric Shinseki, was forced to resign.¹⁷⁹ But the waitlist fiasco at the VA only appears to be a part of the problem. As a peer counselor to veterans, retired Army Sergeant Josh Renschler stated, "Access is an issue, but we have to ask ourselves, 'Access to what?'"¹⁸⁰

D. *Quality of VA Care*

Not too long ago, VA healthcare had one of the best reputations anywhere.¹⁸¹ "[O]utcomes, safety and patient satisfaction" at the VA were among the highest in the country as

175. *Veterans for Common Sense*, 678 F.3d at 1037.

176. *Id.* at 1036.

177. *Id.* at 1037 (quoting President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.loc.gov/rr/program/bib/ourdocs/Lincoln2nd.html>).

178. Neil Versel, *VA Scheduling Scandal Obscures System's Healthcare Quality, Interoperability Gains*, FORBES (June 19, 2014), <http://www.forbes.com/sites/neilversel/2014/06/19/va-scheduling-scandal-obscures-systems-healthcare-quality-interoperability-gains/> ("[T]he Phoenix VA hospital . . . made it look like new enrollees got care within 24 days, when the actual number was closer to 115 days . . ."); see also Shear & Oppel, *supra* note 151, at A1.

179. Shear & Oppel, *supra* note 151, at A1.

180. Clark, *supra* note 166.

181. Versel, *supra* note 178 ("Recall the 2007 book by Phillip Longman, 'Best Care Anywhere: Why VA Healthcare is Better Than Yours,' which chronicled the transformation of the Veterans Health Administration from a bureaucratic sinkhole to a safe, efficient, technology-enabled series of integrated delivery networks that could serve as a model for nationwide healthcare reform.").

recent as the mid-2000s.¹⁸² Then, veterans from Iraq and Afghanistan started to flood VA hospitals with mental health problems, such as TBI and PTSD, as they returned home from multiple deployments.¹⁸³ While some VA hospitals have been able to still provide high-quality care, other locations are clearly suffering.¹⁸⁴

In 2013, the VA hospital in Jackson, Mississippi, reported that over the past six years problems included “poor sterilization procedures, chronic understaffing of the primary care unit and missed diagnoses by the radiology department.”¹⁸⁵ A former radiologist at the hospital “regularly marked patients’ radiology images as ‘read’ when, in fact, he failed to properly review the images and at times failed to review them at all”¹⁸⁶ Additionally, one doctor “asserted that she and other doctors were pressured by superiors to sign prescriptions even if they had not seen the patients.”¹⁸⁷ This clear incompetency in Jackson, Mississippi—and likely, to some degree, at other VA hospitals—compounds the problem of veterans abusing prescription medications.¹⁸⁸ Merely writing prescriptions ill serves veterans dealing with serious mental health problems.

E. Vet Centers

Besides VA hospitals, the VHA runs approximately 1400 outpatient clinics and Vet Centers to provide care to veterans.¹⁸⁹

182. *Id.*; see also Phillip Longman, *The Best Care Anywhere*, WASH. MONTHLY (June 3, 2014, 11:42 AM), <http://www.washingtonmonthly.com/features/2005/0501.longman.html>.

183. Shear & Opper, *supra* note 151, at A1.

184. Thomas M. Burton & Damian Paletta, *Veterans Affairs Hospitals Vary Widely in Patient Care—Internal Records Show Some Facilities Have Far Higher Death Rates than Peers*, WALL ST. J., June 3, 2014, at A1, available at LEXIS (“In all, the data point to VA hospitals in Phoenix, Atlanta, Houston and Dublin, Ga., as among the system’s lower-rated facilities, while those in Boston, Cleveland and Minneapolis rank among the top performers, according to VA officials and internal documents.”).

185. James Dao, *A Pattern of Problems at a Hospital for Veterans*, N.Y. TIMES (Mar. 18, 2013), <http://www.nytimes.com/2013/03/19/us/whistle-blower-complaints-at-veterans-hospital-in-mississippi.html>.

186. *Id.*

187. *Id.*

188. Wolfe, *supra* note 144.

189. *Veterans Health Administration*, U.S. DEP’T VETERANS AFF., <http://www.va.gov/health/findcare.asp> (last updated Mar. 25, 2014).

With 300 community-based locations, Vet Centers provide a wide array of services focusing on counseling, substance abuse treatment, and mental health care.¹⁹⁰ In 1979, Congress established Vet Centers as a response to the increase of Vietnam veterans having difficulty with readjusting to civilian life back home.¹⁹¹ As Vet Centers' popularity grew, Congress began to extend Vet Center eligibility to veterans who served in other wars.¹⁹² Today, Vet Centers remain a popular resource for veterans because they are mainly staffed by veterans¹⁹³ and because of their strict confidentiality policy.¹⁹⁴

In 2012, Roger Duke, a Vet Center readjustment counseling therapist from Modesto, California, testified in a congressional hearing about Vet Centers.¹⁹⁵ In his testimony, Duke explained that Vet Centers are a popular choice for veterans because "it's not so much the uniqueness of clinical services that sets Vet Centers apart from other [c]ommunity-based [o]utpatient clinics, as it is the combat veteran's sense of safety and belonging experienced when they first come through the doors of the center."¹⁹⁶ Additionally, Duke stated, "There is an elevated sense that staff respects the uniqueness of all combat Veterans and hold[s] in strictest confidence all information disclosed in the counseling process."¹⁹⁷ Vet Centers do not share any information on participants unless specifically requested by the veteran or in clinical exceptions.¹⁹⁸

Therefore, active service members who receive treatment at Vet Centers can shield that fact from their commanders and judges in veterans courts. Getting a veteran's, or active service member's, foot in the door to receive mental health care is paramount. But

190. *Services—Vet Center Program*, U.S. DEP'T VETERANS AFF., http://www.vetcenter.va.gov/Vet_Center_Services.asp (last updated Jan. 13, 2014).

191. *Who We Are—Vet Center Program*, U.S. DEP'T VETERANS AFF., http://www.vetcenter.va.gov/About_US.asp (last updated Jan. 13, 2014).

192. *Id.* (stating that Vet Center eligibility was extended to "veterans who served during other periods of armed hostilities," including World War II, Korea, the Persian Gulf, Kosovo/Bosnia, Iraq, and Afghanistan, among others).

193. Gibbs, *supra* note 24.

194. *Id.* (explaining that services are free and confidential: "No one outside our vet center has access to our records").

195. See *Vet Centers and the Veterans Health Administration*, *supra* note 25, at 24–26, 46–48.

196. *Id.*

197. *Id.*

198. *Id.*

should military personnel and courts be denied access to that information? Especially when the primary directive of veterans courts is treatment and rehabilitation?

VI. VETERANS TREATMENT COURTS

Based on the model of drug and mental health courts, a typical veterans court prioritizes rehabilitation of veterans through treatment and intensive supervision.¹⁹⁹ Currently, there are over one hundred veterans courts across the country.²⁰⁰ Thankfully for many veterans, that number is growing.²⁰¹ Often, there is a great disparity in outcomes for veterans who complete veterans court compared to those who never have that chance.²⁰²

A. *Brad Eifert*

In August 2010, Staff Sergeant Brad Eifert dared police officers to shoot him during an armed confrontation.²⁰³ After deployments to Iraq as an infantry gunner and a truck commander with the Army, Eifert returned home suffering from depression, PTSD, nightmares, panic attacks, and alcohol abuse.²⁰⁴ Instead of sending Eifert back into combat, the Army made him a recruiter.²⁰⁵ After two suicide attempts in 2010, Eifert attempted to take his life by “suicide by cop.”²⁰⁶ As police officers surrounded his home, Eifert held a gun to his head, lowered it, and fired nine rounds.²⁰⁷ He

199. Hawkins, *supra* note 15, at 565.

200. *The History*, *supra* note 17.

201. *Id.*

202. Simons, *supra* note 19; *see also* Jeremiah M. Glassford, “*In War, There Are No Unwounded Soldiers*”: *The Emergency of Veterans Treatment Courts in Alabama*, 65 ALA. L. REV. 239, 249 (2013).

203. Goode, *supra* note 5, at A1.

204. *Id.* (“[H]e continued drinking, sometimes as much as a fifth of Jack Daniel’s a day. He was haunted by memories: friends being killed; the day he shot up a house filled with women and children, killing many of them; another when he watched a truck full of military contractors burn and did nothing to save them.”); *see also Judge Focuses on Treating Vets, Not Jailing Them*, MLIVE.COM (Dec. 12, 2011), http://www.mlive.com/lansing-news/index.ssf/2011/12/judge_focuses_on_treating_vets.html (describing the psychological issues and consequent legal issues state-side veterans face).

205. Goode, *supra* note 5.

206. *Id.*

207. *Id.*

then ran into his driveway screaming for officers to shoot him.²⁰⁸ After being subdued, Eifert was later “charged with five counts of assault with intent to murder the officers, each carrying a potential life sentence.”²⁰⁹

Without a veterans court, an understanding prosecutor and police officers, a persistent defense attorney, and a sympathetic judge, Eifert may still be in jail today.²¹⁰ Instead, all the aforementioned players came together to help Eifert “start a new life.”²¹¹ Eifert still spent seven months in jail, pled guilty to carrying a weapon with unlawful intent as a felony and endured the intensive veterans court process, including treatment and wearing an alcohol monitor on his ankle.²¹² But veterans court gave Eifert a chance, a chance that some veterans never get.²¹³

B. Robert D. Carlson

Staff Sergeant Robert D. Carlson’s “suicide by cop” attempt played out similarly to Eifert’s, but his fate in the criminal justice system did not. In July 2012, Carlson was alone on the second floor of his house holding a gun to his head.²¹⁴ Carlson lowered the gun and fired nine rounds out of the window.²¹⁵ Carlson later emerged from his house, with his gun at his chin, encouraging officers to shoot him.²¹⁶ After lowering his gun and being subdued, Carlson was charged with attempted murder.²¹⁷ He later pled guilty to

208. *Id.*

209. *Id.*

210. *Id.*; see also *Judge Focuses on Treating Vets, Not Jailing Them*, *supra* note 204.

211. *Judge Focuses on Treating Vets, Not Jailing Them*, *supra* note 204.

212. Goode, *supra* note 5.

213. Major Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 11 (2011) (“[T]wo soldiers began a journey through the criminal justice system. One will undergo intensive treatment through the VA, with the potential to have his criminal charges dismissed based on adherence to a mental health treatment plan. The other will enter confinement at a military facility, where he will be able to see a counselor regarding emergency care and handle some aspects of anxiety, but where he has little incentive to undergo mental health treatment.” (citations omitted)).

214. See Jaffe, *supra* note 15.

215. *Id.*

216. *Id.*

217. *Id.*

assault with a deadly weapon and was sentenced to eight years in prison.²¹⁸

Similar to Eifert, Carlson was a combat veteran.²¹⁹ Carlson served three combat tours (Iraq twice and Afghanistan once) totaling forty months.²²⁰ Like so many veterans, Carlson witnessed the horrors of war firsthand.²²¹ And, like so many combat veterans, he struggled with PTSD, anxiety, depression, and alcohol abuse.²²²

In civilian court, the prosecutor failed to get a grand jury indictment.²²³ So the Army took jurisdiction and charged Carlson with attempted murder. Carlson's lawyers negotiated a plea deal in which the attempted murder charge would be dropped; Carlson would plead guilty to assault charges and his jail sentence would not exceed eight years.²²⁴ However, Carlson received no opportunity to access a veterans court with all its resources, and subsequently no leniency at sentencing.²²⁵ A strikingly similar situation to Eifert's, but a drastically different conclusion.²²⁶

C. *Veterans Courts in Minnesota*

In Minnesota, four heavily populated counties have veterans courts: Hennepin, Ramsey, Washington, and Anoka.²²⁷ Hennepin County runs upwards of one hundred cases in its veterans court at any given time, while Ramsey County limits its veterans court

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* ("He had survived a blast from a suicide car bomb. He had killed an Iraqi insurgent as the man's children watched in horror. He had traded places one day with a fellow soldier who then was killed by a sniper's bullet, standing in the very place where Carlson would have been if he hadn't switched.").

222. *See id.*

223. *Id.*

224. *Id.*

225. *See id.*

226. One main difference between Eifert's situation and Carlson's is that when Carlson fired his gun out of the window of his home, he hit an apartment building and a police vehicle. Also, Carlson's "suicide by cop" attempt was preceded by a physical altercation with his wife and a statement to her that "[i]f the cops show up, there will be blood!" *Id.*

227. *See Simons, supra* note 19; *see also* Chao Xiong, *Veterans Get Their Own Court*, STAR TRIB. (Minneapolis), Dec. 7, 2013, at 01B, *available at* 2013 WLNR 30955562.

caseload to twenty-five.²²⁸ Washington and Anoka Counties also carry a smaller caseload in their specialty courts.²²⁹

To enter veterans court in Hennepin County, the prosecutor, judge, and veteran must all agree to send the case to veterans court.²³⁰ An objection by anyone, and the veteran must stay in civilian court.²³¹ Hennepin County Veterans Court takes any criminal offense, except mandatory and presumptive prison commit sentences.²³² Once all parties agree to divert a veteran's case to Hennepin County Veterans Court, the defendant is screened by the program's coordinator.²³³

If accepted to veterans court, the veteran must be willing to undergo a twelve- to eighteen-month process with intensive supervision, abide by a strict no-alcohol-or-drugs condition, and may be subject to random testing.²³⁴ In exchange, the veteran can receive a more lenient sentence, avoiding jail time and potentially no conviction for the crime charged.²³⁵ More importantly, the resources available in Hennepin County Veterans Court are second to none. The court connects participants with a probation officer, often a veteran who is more mentor than probation officer.²³⁶ Additional services include housing assistance, medical assistance,

228. Xiong, *supra* note 227, at 01B; *see also* Mary-Margaret Zindren, *Graduation Day at Veterans Court*, INSIDEHCBA (Mar. 21, 2012), <http://insidehcba.wordpress.com/2012/03/21/graduation-day-at-veterans-court/>.

229. *See* David Chanen, *Anoka County Veterans Court Fills Key Niche*, STAR TRIB. (Minneapolis), June 3, 2013, at 01A, *available at* 2013 WLNR 14258641 (stating that, as of mid-2013, Anoka County's veterans court has six participants and Washington County's veterans court serves twenty).

230. ANNE CARON, FOURTH JUDICIAL DIST. RESEARCH DIV., MINN. JUDICIAL BRANCH, FOURTH JUDICIAL DISTRICT VETERANS COURT—TWO YEAR REVIEW: JULY 2010–JUNE 2012, at 8 (2013), *available at* http://www.mncourts.gov/Documents/4/Public/Research/Veterans_Court_Two_Year_Review.pdf.

231. *See id.*

232. *See Veterans Court*, MINN. JUD. BRANCH FOURTH DISTRICT, <http://www.mncourts.gov/district/4/?page=4010> (last visited Jan. 24, 2015).

233. *See* CARON, *supra* note 230, at 8 (“The purpose of the screening is to determine the impact that behavioral and chemical health issues are having on the defendant's criminal behavior.”).

234. *See id.* at 19; *Veterans Court*, *supra* note 232.

235. *Veterans Treatment Court Marks 1st Year: Advocates Hope to Make It Permanent*, ST. PAUL PIONEER PRESS (Minn.), July 26, 2011, at A9 [hereinafter *Veterans Treatment Court*], *available at* [http://www.mncourts.gov/Documents/4/Public/Court_Administration/Veterans%20Court/HCVC_\(article_AP_7-26-11\).pdf](http://www.mncourts.gov/Documents/4/Public/Court_Administration/Veterans%20Court/HCVC_(article_AP_7-26-11).pdf).

236. *See* Chanen, *supra* note 229.

mental health services,²³⁷ treatment, disability claim assistance, and assistance with scheduling appointments at the VA.²³⁸

D. Repercussions of Criminal Charges

One pitfall for active service members in veterans court, or in any criminal court, is that a conviction or placement on supervised probation can immobilize them from their unit or trigger a discharge from service. A former client of the author received an honorable discharge following a repeat DWI charge. Another was immobilized until his probation status changed from supervised to administrative. For active service members about to be deployed, prosecutors may even dismiss the charges and refile upon the troop's return from service. Keeping the chain of command from knowing about a pending criminal charge is critical for service members.²³⁹ Some troops want to serve their country, some want to keep their job, and some want to return to combat—for war is a drug.

E. Confidentiality

***“I was trying to be the tough marine I was trained to be—
not to talk about problems, not to cry”***²⁴⁰

“Trained to be tough and ignore their fear, many combat veterans are reluctant to acknowledge psychic wounds. Or they worry that getting help will damage their careers. And so . . . they treat themselves with the liquor bottle or illegal drugs.”²⁴¹ Furthermore, “lack of confidentiality . . . deters many [veterans] who need treatment from seeking it.”²⁴²

To assist veterans and service members in getting mental health care, strict confidentiality may be a necessary evil. In

237. See *Veterans Treatment Court*, *supra* note 235.

238. See CARON, *supra* note 230, at 4 (stating that one of the six goals of the veterans court is to “[i]mprove access to VA benefits and services”).

239. See *Drug Facts: Substance Abuse in the Military*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/substance-abuse-in-military> (last updated Mar. 2013) (“Zero-tolerance policies and stigma pose difficulties in identifying and treating substance use problems in military personnel, as does lack of confidentiality that deters many who need treatment from seeking it.”).

240. Alvarez, *supra* note 147.

241. *Id.*

242. *Drug Facts: Substance Abuse in the Military*, *supra* note 239.

addition to a primarily veteran-run staff, the strict confidentiality adhered to in Vet Centers may be one of the most attractive aspects about seeking treatment at a Vet Center. The crucial first step is getting the veteran in the door. The second, and just as important concern, is treating the veteran with timely and quality care. If veterans have confidence in those characteristics at a treatment facility, then it is likely they will be more apt to seek care there.

Even though the strict confidentiality at Vet Centers can be kept from commanders, it may simply be the price that needs to be paid for veterans to get the adequate treatment they need and deserve. Non-VA clinics and hospitals may still disclose to commanders some billing records for active service members, therefore deterring troops from seeking the care they need. If all VA and non-VA outlets adhered to a strict confidentiality policy for veterans and active service members for their mental health treatment, more of them would likely seek care—completing the key first step.

Would fewer veteran suicides occur? Would strict confidentiality assist in Howard and Jean Somers's crusade?²⁴³ Or, is the risk too great that service members would use the confidentiality as a shield to return to service and further endanger themselves? The answer may be that strict confidentiality is a necessary evil to assist veterans in seeking mental health care. It will then be up to thorough pre-deployment screening to make sure troops are fit for service. Even though pre-deployment mental health screening is improved since OEF began in 2001, it will not stop those who will do anything to get back on the battlefield.

VII. CONCLUSION

While pre-deployment mental health screening is an incredibly important precaution, post-deployment screening and health care can be lifesaving. As war wages on in the Middle East, and the population of veterans continues to increase, so will cases of those with PTSD, TBIs, and CTE. To slow the veteran suicide rate and adequately care for the mental health of our veterans, strict confidentiality of mental health treatment may be needed. Commanders and judges may just need to adapt.

243. See *supra* Part V.A.