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## ESSAY

# COMBAT VETERANS, MENTAL HEALTH ISSUES, AND THE DEATH PENALTY: ADDRESSING THE IMPACT OF POST- TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY

Anthony E. Giardino\*

*More than 1.5 million Americans have participated in combat operations in Iraq and Afghanistan over the past seven years. Some of these veterans have subsequently committed capital crimes and found themselves in our nation's criminal justice system. This Essay argues that combat veterans suffering from post-traumatic stress disorder or traumatic brain injury at the time of their offenses should not be subject to the death penalty. Offering mitigating evidence regarding military training, post-traumatic stress disorder, and traumatic brain injury presents one means that combat veterans may use to argue for their lives during the sentencing phase of their trials. Alternatively, *Atkins v. Virginia* and *Roper v. Simmons* offer a framework for establishing a legislatively or judicially created categorical exclusion for these offenders, exempting them from the death penalty as a matter of law. By understanding how combat service and service-related injuries affect the personal culpability of these offenders, the legal system can avoid the consequences of sentencing to death America's mentally wounded warriors, ensuring that only the worst offenders are subject to the ultimate punishment.*

## INTRODUCTION

Since the U.S. Supreme Court decisions *Atkins v. Virginia*<sup>1</sup> and *Roper v. Simmons*<sup>2</sup> established categorical exclusions from execution for the

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1. 536 U.S. 304, 321 (2002).

mentally retarded and juveniles, the debate over who should be exempt from the death penalty has been intense.<sup>3</sup> In August 2006, the American Bar Association (ABA) weighed in and issued a report on the death penalty that stated,

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement the following policies and procedures:

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.
2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.<sup>4</sup>

The ABA recommendations have been criticized for excluding too large a class of offenders without addressing their individualized circumstances, diagnoses, and culpability.<sup>5</sup> Other scholars have criticized the entire notion of categorical exclusions as creating "a psychiatric can of worms" that raises more problems than it does solutions regarding who should be subject to the death penalty.<sup>6</sup> Some have also argued that categorical exclusions

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2. 543 U.S. 551, 578 (2005).

3. See generally ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006) [hereinafter ABA Report]; Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 BROOK. L. REV. 1211 (2007); Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255 (2003); Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351 (2006); Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005); Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283 (2006); Helen Shin, Note, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465 (2007).

4. ABA Report, *supra* note 3, at 668.

5. See *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) ("[T]he punishment should be directly related to the personal culpability of the defendant . . . ." (quoting *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989))); ABA Report, *supra* note 3, at 668; Klein, *supra* note 3, at 1214–15, 1258–59; Slobogin, *supra* note 3, at 1147–50.

6. Mossman, *supra* note 3, at 286; see also Klein, *supra* note 3, at 1258–59.

ultimately work against the abolitionist movement by strengthening the argument that the death penalty is appropriate for some offenders.<sup>7</sup>

Even with these criticisms, there are strong arguments for not putting to death those offenders who suffer from severe mental disorders or mental defects that impair their ability to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law.<sup>8</sup> Fortunately, capital defendants suffering from severe mental disorders, such as post-traumatic stress disorder (PTSD), or mental defects, such as traumatic brain injury (TBI), enjoy wide latitude to argue for their lives by putting on any relevant mitigating evidence during the sentencing phases of their trials.<sup>9</sup> Arguing for a legislatively or judicially created categorical exclusion presents another means by which defendants with certain mental disorders or defects can avoid the death penalty in light of the risk that mitigating evidence based on psychology or psychiatry will be undervalued, misunderstood, or treated as an aggravating factor by a sentencer.<sup>10</sup>

In particular, combat veterans deserve special consideration when determining whether the death penalty should be imposed.<sup>11</sup> For more than seven years, we have been a nation at war. For most people, life has gone on, and very few in society have any connection whatsoever to the military.<sup>12</sup> One study indicates that, of veterans who returned from ground combat duty in 2004, 89% reported having been "attacked or ambushed" by the enemy during their tour of duty, and 93% reported having been shot at or receiving small arms fire.<sup>13</sup> The Veterans Administration has already

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7. See Klein, *supra* note 3, at 1258; Ryan & Berson, *supra* note 3, at 359–60; Shin, *supra* note 3, at 516.

8. See, e.g., MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962) (section titled "Sentence of Death for Murder; Further Proceedings to Determine Sentence"); ABA Report, *supra* note 3, at 668; Slobogin, *supra* note 3, at 1139–47; Shin, *supra* note 3, at 513–16.

9. See *Kansas v. Marsh*, 126 S. Ct. 2516, 2525 (2006) ("In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence."); *Tennard v. Dretke*, 542 U.S. 274, 284 (2004); *McKoy*, 494 U.S. at 435; *infra* notes 69–76 and accompanying text.

10. See *Roper v. Simmons*, 543 U.S. 551, 564–79 (2005); *Tennard*, 542 U.S. at 288–89; *Atkins v. Virginia*, 536 U.S. 304, 311–21 (2002); John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 90 (2003); Leona D. Jochnowitz, *Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing*, 43 CRIM. L. BULL. 3, 5 (2007); Ryan & Berson, *supra* note 3, at 376–77; *infra* Part III.A.

11. See, e.g., *Johnson v. Singletary*, 612 So. 2d 575, 577 (Fla. 1993) (Kogan, J., concurring) ("When this death warrant is executed, Florida will electrocute a man injured and most probably maimed psychologically while serving in his nation's military in Vietnam and elsewhere."); *infra* notes 34–66 and accompanying text.

12. See, e.g., James P. McGovern, Editorial, *The Iraq Money Pit*, BOSTON GLOBE, Oct. 4, 2007, at A9.

13. See Kevin Bowe, *A Prosecutor Anticipates Post-traumatic Stress Disorder*, 39 PROSECUTOR 30, 36 (2005) (citing Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 16–17, 18 & tbl.2 (2004) ("Respondents to our survey who had been deployed to Iraq reported a very high level of combat experiences, with more than 90 percent of them reporting being

diagnosed more than 90,000 combat veterans of Iraq and Afghanistan as possibly suffering from PTSD and estimates indicate that as many as 100,000 veterans will require mental health support due to PTSD in the future.<sup>14</sup> Additionally, an April 2008 RAND Corporation report, "Invisible Wounds of War," (RAND Report) found that about 300,000 military veterans who deployed to Iraq or Afghanistan presently suffer from PTSD, or about 20% of the 1.64 million veterans who served in those environments.<sup>15</sup>

Also overlooked is the fact that there have been more than 1800 combat veterans diagnosed as suffering from service-related TBIs due to the ongoing conflicts in Iraq and Afghanistan.<sup>16</sup> According to experts, tens of thousands of combat veterans are suspected of having suffered a mild form of TBI, an injury for which the long-term effects are unknown.<sup>17</sup> The RAND Report further estimates that over 300,000 veterans of Iraq and Afghanistan have suffered some form of a TBI.<sup>18</sup> Because TBIs are primarily caused by the improvised explosive devices (IEDs) that are the preferred weapon used by insurgents against American forces, these injuries have become known as the "signature wound" of the war on terror.<sup>19</sup>

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shot at and a high percentage reporting handling dead bodies, knowing someone who was injured or killed, or killing an enemy combatant (Table 2).").

14. See Bowe, *supra* note 13, at 36; Press Release, Senator John F. Kerry, The Battle Within: Washington Must Stop Ignoring Hidden War Wounds (Aug. 11, 2006), available at <http://kerry.senate.gov/cfm/record.cfm?id=265327>; see also Hoge et al., *supra* note 13, at 16; William H. McMichael, *VA Diagnosing Higher Rates of PTSD*, MARINE CORPS TIMES, Jan. 18, 2009, [http://www.marinecorpstimes.com/news/2009/01/military\\_veterans\\_carestats\\_011609w/](http://www.marinecorpstimes.com/news/2009/01/military_veterans_carestats_011609w/).

15. CTR. FOR MIL. HEALTH POL'Y RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY, at xxi, 434-35 (Terri Tanielian & Lisa H. Jaycox eds., 2008); see Lizette Alvarez, *Nearly a Fifth of War Veterans Report Mental Disorders, a Private Study Finds*, N.Y. TIMES, Apr. 18, 2008, at A20; Ann Scott Tyson, *Combat Stress May Cost U.S. up to \$6 Billion*, WASH. POST, Apr. 18, 2008, at A18; see Marek M. Sipko, *Combat Operational Stress Control: Prevention Through Training and Education*, MARINE CORPS GAZETTE, Nov. 2008, at 77, 77-80 (discussing the increased incidence of mental disorders, alcohol abuse, drug abuse, and PTSD diagnoses in the Marine Corps since the start of combat operations in Iraq and Afghanistan).

16. Ronald Glasser, *A Shock Wave of Brain Injuries*, WASH. POST, Apr. 8, 2007, at B1.

17. See Charles W. Hoge et al., *Mild Traumatic Brain Injury in U.S. Soldiers Returning from Iraq*, 358 NEW ENG. J. MED. 453, 454 (2008) ("[L]ittle is known about the epidemiology of mild traumatic brain injury during deployment and its association with adverse health outcomes after deployment."); Benedict Carey, *Battle Concussions Tied to Stress Disorder*, N.Y. TIMES, Jan. 31, 2008, at A21; Gina Cavallaro, *TBI Task Force Identifies Deficiencies in Care: Mild Injuries Need More Attention, Experts Report*, MARINE CORPS TIMES, Feb. 11, 2008, at 19; Glasser, *supra* note 16; Kelly Kennedy, *Doctor, Engineers Discover TBI Detection Breakthrough: Portable Equipment Could Be Used to Find Injury in Field*, MARINE CORPS TIMES, Mar. 10, 2008, at 16.

18. Alvarez, *supra* note 15; Tyson, *supra* note 15.

19. See, e.g., Hoge et al., *supra* note 17, at 454 ("Traumatic brain injury has been labeled a signature injury of the wars in Iraq and Afghanistan."); Joshua Holland, Editorial, *4,000 Doesn't Even Begin to Tell the Toll of Iraq War*, CHI. SUN-TIMES, Mar. 25, 2008, at 21.

Not surprisingly, U.S. courts are beginning to see these afflicted combat veterans on trial for capital crimes.<sup>20</sup> If the death penalty is truly only for the worst offenders, justice requires that combat veterans<sup>21</sup> suffering, at the time of their offenses,<sup>22</sup> from service-related<sup>23</sup> PTSD or TBI not be executed or sentenced to death.<sup>24</sup> This should be so because PTSD is a

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20. See, e.g., Dennis Huspeni, *Soldier's Murder Trial Opens Today*, GAZETTE (Colo. Springs), Nov. 1, 2008, available at [http://www.gazette.com/articles/eastridge\\_42727\\_\\_article.html/court\\_farry.html](http://www.gazette.com/articles/eastridge_42727__article.html/court_farry.html) (discussing case of Louis Bressler and other soldiers from the Fort Carson area who are facing first-degree murder charges for a murder that took place after their return from Iraq); David Olinger, *Deadly Duty*, DENVER POST, Nov. 15, 2008, at 1A ("In three years, nine men from [the 3700-soldier 4th Brigade Combat Team] have been charged in 10 murders and attempted homicides, all but two in or around Colorado Springs."); Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, at A1; Deborah Sontag & Lizette Alvarez, *Combat Trauma Takes the Witness Stand*, N.Y. TIMES, Jan. 27, 2008, at A1 [hereinafter Sontag & Alvarez, *Combat Trauma*]; Deborah Sontag & Lizette Alvarez, *When Strains on Military Families Turn Deadly*, N.Y. TIMES, Feb. 15, 2008, at A1 [hereinafter Sontag & Alvarez, *When Strains*]; David Young, *Cortez Gets Life Plus 80 Years*, GREELEY TRIBUNE (Colo.), Nov. 13, 2008, at A2, available at <http://www.greeleytribune.com/article/20081113/NEWS01/81139993/1051&parentprofile=1001&title=Cortez%20gets%20life%20plus%2080%20years> (discussing the case of Ricardo Cortez, a veteran of two tours in Iraq, who was convicted of first-degree murder in the shooting deaths of his estranged wife and unborn child after unsuccessfully arguing insanity due to PTSD); Angela K. Brown, *Marine Charged in Ex-girlfriend's Death*, USA TODAY, Mar. 27, 2008, [http://www.usatoday.com/news/nation/2008-03-27-1913814200\\_x.htm](http://www.usatoday.com/news/nation/2008-03-27-1913814200_x.htm) (discussing case of Eric Acevedo, who was charged with capital murder after stabbing his ex-girlfriend to death); *The Cases*, N.Y. TIMES, Jan. 12, 2008, [http://www.nytimes.com/interactive/2008/01/12/us/20080113\\_VETS\\_DATABASE.html](http://www.nytimes.com/interactive/2008/01/12/us/20080113_VETS_DATABASE.html); see also Susan Davies, *Troop-Related Felonies Expected to Increase*, KOAA.COM, Feb. 5, 2009, [http://www.kaaa.com/aaa\\_top\\_stories/x407184412/Troop-related-felonies-expected-to-increase](http://www.kaaa.com/aaa_top_stories/x407184412/Troop-related-felonies-expected-to-increase).

21. For the purposes of this Essay, the term "combat veteran" refers to one who has served or is serving in the armed forces during a war or contingency operation and has been involved in hostilities by either taking fire from or returning fire with an enemy force. See *infra* notes 251–53 and accompanying text. "The term 'contingency operation' means a military operation that . . . is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force . . ." 10 U.S.C. § 101(a)(13) (2006).

22. Because the effects of either post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) persist for years, even decades, after exposure to a combat environment or a service-related head injury, a combat veteran may use the concepts discussed in this paper so long as it can be determined by a prior or forensic diagnosis by a mental health professional that the mental health issue existed at the time of the offense. See, e.g., *Bell v. Cone*, 535 U.S. 685, 702–19 (2002) (Stevens, J., dissenting); *Johnson v. Singletary*, 612 So. 2d 575, 580 (Fla. 1993).

23. See *infra* notes 257–60 and accompanying text.

24. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (holding that the death sentence is improper for those who are not the "worst offenders"); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (holding that the death sentence is improper for those with "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"); ABA Report, *supra* note 3, at 668 (saying that the death sentence is improper for those suffering from TBI or a severe mental disorder at the time of the offense); Slobogin, *supra* note 3, at 1135–36. There is some indication that mild TBIs are strongly associated with the development of PTSD and physical health problems in combat veterans. See Hoge et al., *supra* note 17, at 453, 457, 461–62.

severe mental disorder<sup>25</sup> that can cause “acting or feeling as if the traumatic event were recurring (includ[ing] . . . dissociative flashback episodes . . . ),” “intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event,” “difficulty falling or staying asleep,” “irritability or outbursts of anger,” “difficulty concentrating,” “hypervigilance,” and “exaggerated startle response.”<sup>26</sup> And, TBI is a mental defect that can cause “a number of deficits in intellectual and adaptive functioning, such as agnosia (failure to recognize or identify objects) and disturbances in executive functioning connected with planning, organizing, sequencing, and abstracting.”<sup>27</sup>

The effects of PTSD and TBI do not necessarily excuse criminal actions, but do reduce the personal culpability of combat veterans for their capital crimes because “[a]t the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect.”<sup>28</sup> Mitigating evidence regarding this diminished culpability due to the existence of PTSD or TBI in combat veterans at the time of the offense should be given great weight by the sentencer in determining whether or not death is the appropriate punishment.<sup>29</sup> Additionally, the rationale used by the Supreme Court in *Roper* and *Atkins* to create categorical exclusions for juveniles and the mentally retarded could support a further argument for excluding certain combat veterans from the application of the death penalty as a matter of law.<sup>30</sup>

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25. M. B. FIRST ET AL., NAT'L CTR. FOR POSTTRAUMATIC STRESS DISORDER, U.S. DEP'T OF VETERANS AFFAIRS, STRUCTURED CLINICAL INTERVIEW FOR THE DSM-IV AXIS I DISORDERS (SCID PTSD MODULE) (1996), available at [http://www.ncptsd.va.gov/ncmain/ncdocs/assmnts/structured\\_clinical\\_interview\\_for\\_the\\_dsmiv\\_axis\\_i\\_disorders\\_scid\\_ptsd\\_module.html?printable-template=assessment](http://www.ncptsd.va.gov/ncmain/ncdocs/assmnts/structured_clinical_interview_for_the_dsmiv_axis_i_disorders_scid_ptsd_module.html?printable-template=assessment) (noting that PTSD is an Axis I diagnosis); ABA Report, *supra* note 3, at 670 (explaining that a severe mental disorder is one “roughly equivalent to disorders that mental health professionals would consider the most serious ‘Axis I diagnoses’”); PsychNet-UK, DSM IV Explained, [http://www.psychnet-uk.com/dsm\\_iv/misc/dsm\\_diagnosis.htm](http://www.psychnet-uk.com/dsm_iv/misc/dsm_diagnosis.htm) (last visited Mar. 31, 2009) (explaining what defines and distinguishes different Axis categories in the DSM-IV).

26. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467–68 (4th rev. ed. 2000) [hereinafter DSM-IV-TR]; CLAUDIA BAKER & CESSIE ALFONSO, NAT'L CTR. FOR POSTTRAUMATIC STRESS DISORDER, U.S. DEP'T OF VETERANS AFFAIRS, FORENSIC VALIDITY OF A PTSD DIAGNOSIS (n.d.), available at [http://www.ncptsd.va.gov/ncmain/ncdocs/fact\\_shts/fs\\_forensic.html?opm=1&rt=rr92&srt=d&echor=true](http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_forensic.html?opm=1&rt=rr92&srt=d&echor=true); Nicholas J. Motherway, *Post-traumatic Stress*, 49 AM. JUR. 2D *Proof of Facts* 73, §§ 4–10 (2007); *infra* Part II.B.

27. ABA Report, *supra* note 3, at 669–70; see also Slobogin, *supra* note 3, at 1135–36; *infra* Part II.C.

28. MODEL PENAL CODE § 210.6(4)(g); see also ; DSM-IV-TR, *supra* note 26; BAKER & ALFONSO, *supra* note 26; Barry L. Levin, *Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder*, 46 AM. JUR. TRIALS 441, §§ 5, 17–24; Motherway, *supra* note 26, §§ 4–10; D. Michael Bitz & Jean Sepp Bitz, *Incompetence in the Brain Injured Individual*, 12 ST. THOMAS L. REV. 205, 230–34 (1999); Tabak, *supra* note 3, at 293.

29. See, e.g., *Tennard v. Dretke*, 542 U.S. 274, 287–89 (2004); DSM-IV-TR, *supra* note 26; BAKER & ALFONSO, *supra* note 26; Bitz & Bitz, *supra* note 28, at 230–34.

30. See *Roper v. Simmons*, 543 U.S. 551, 564–79 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311–21 (2002).

Because the existence of service-related PTSD or TBI in combat veterans reduces personal culpability, they cannot be regarded as “among the worst offenders” and should not be subject to the ultimate sentence.<sup>31</sup> Presenting PTSD, TBI, and military training evidence to a sentencer during the sentencing phase of a capital trial represents one way to avoid subjecting combat veterans to the death penalty.<sup>32</sup> Because the characteristics of those suffering from PTSD and TBI are similar to those of minors and the mentally retarded, legislatures or the courts should create a categorical exclusion from the death penalty for combat veterans suffering from PTSD or TBI at the time of their offenses to ensure that only the worst offenders are put to death.<sup>33</sup>

This Essay examines these issues and argues against imposing the death penalty on combat veterans who were suffering, at the time of their offenses, from service-related PTSD or TBI. Part I explains why combat veterans are a distinct and special population of offenders who should be treated differently for purposes of the death penalty. Part II addresses the different types of mitigating evidence that a combat veteran can present to argue for his or her life during the sentencing phase of a capital trial. Part III discusses the role categorical exclusions can play in the imposition of the death penalty and argues that there should be a narrow categorical exclusion for certain combat veterans. Lastly, this Essay concludes with a summary of the issues presented and a restatement of the main points to consider when combat veterans are involved in capital crimes.

## I. DISTINGUISHING COMBAT VETERANS FROM OTHER OFFENDERS

How can one distinguish a combat veteran with service-related PTSD or TBI from a battered woman with PTSD or an adult who suffered a TBI as a youth? How can one distinguish a combat veteran with PTSD or TBI from a veteran who served in peacetime and suffered a TBI in military training? When combat veterans use their military service, PTSD, or TBI as mitigating evidence to argue against the imposition of the death penalty, courts and sentencers are reluctant to acknowledge that they should be treated any differently than other classes of offenders.<sup>34</sup> The distinguishing characteristic, however, is that combat veterans would not have service-related PTSD or TBI but for government action in the form of training them to kill and sending them to war.<sup>35</sup>

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31. See *Roper*, 543 U.S. at 569.

32. See Levin, *supra* note 28, §§ 37–38.

33. See *Roper*, 543 U.S. at 564–79; *Atkins*, 536 U.S. at 311–21.

34. See, e.g., Sontag & Alvarez, *Combat Trauma*, *supra* note 20.

35. See, e.g., Levin, *supra* note 28, § 5 (discussing transformation of enlistees into persons with a “warrior identity” and “central focus upon killing” (citing ROBERT JAY LIFTON, *HOME FROM THE WAR: VIETNAM VETERANS: NEITHER VICTIMS NOR EXECUTIONERS* 28 (1973))); Sontag & Alvarez, *When Strains*, *supra* note 20 (“‘I am quite sure that, but for the war, he would have taken a different approach. When you see people being shot every day, death is not a big thing.’” (quoting the brother-in-law of a combat veteran who committed a murder-suicide)); Brown, *supra* note 20 (discussing what Eric Acevedo’s

There is something very unique about a normal young man or woman who volunteers to serve his or her country, who is trained to kill other people, who is sent to war by the government and exposed to combat, and then returns a changed person that ends up committing a capital crime.<sup>36</sup> Some courts and states recognize the psychological wounds of war and try to give credit for the service of combat veterans in their sentencing calculus.<sup>37</sup> Many courts, however, would rather ignore this elephant in the room than confront the reality that the combined effect of government-sponsored military training and combat exposure transforms men and women into something quite different from their former selves.<sup>38</sup>

Facts relating to exposure to combat and government-sponsored military training present a unique form of mitigating evidence that can aid in distinguishing combat veterans from the "average" offender for purposes of imposing the death penalty.<sup>39</sup> Exposure to combat is most often the triggering event that causes service-related PTSD in combat veterans.<sup>40</sup> IED blasts are most often the cause of combat-related TBIs.<sup>41</sup> Because there is often a clear link between combat- and service-related PTSD or TBI, one can easily distinguish these combat veterans from other offenders with PTSD or TBI because of the government's involvement in sending them to war where these disabilities were incurred.<sup>42</sup>

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mother said about her son who is currently facing capital murder charges: "I gave him to the government nice and healthy, and the government returned somebody who is capable of [murdering an ex-girlfriend with a kitchen knife]").

36. See, e.g., *Bell v. Cone*, 535 U.S. 685, 704–05 (2002) (discussing dramatic changes in Gary Cone's character following combat service in Vietnam); *Johnson v. Singletary*, 612 So. 2d 575, 580 (Fla. 1993) ("This is a man who devoted his adult life to the defense of his nation, who then was abandoned without the medical intervention he obviously needed after being injured while on his nation's business."); Levin, *supra* note 28, § 5; Dennis H. Grant, Letter to the Editor, *Psychological Damage of Combat*, 148 AM. J. PSYCHIATRY 2, 271 (1991) ("And yet I find it hard to believe that any human being is made for trauma, is made to be traumatized, or comes through it unscathed. I find it hard to believe that men were made for wars."); Sontag & Alvarez, *Combat Trauma*, *supra* note 20; Brown, *supra* note 20.

37. See, e.g., Sontag & Alvarez, *Combat Trauma*, *supra* note 20; *The Cases*, *supra* note 20; *infra* Part III.C.2.

38. See *Bell*, 535 U.S. at 709–10 (discussing difficulties defense counsel faced in admitting PTSD-related evidence); *Johnson*, 612 So. 2d at 581 ("I am gravely disturbed that Johnson was not even permitted the tiniest mitigating value for his physical and mental disabilities, nor for the one thing that caused them: his years of good and productive service in the military."); DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY *passim* (1995) (discussing the killing conditioning process); Sontag & Alvarez, *Combat Trauma*, *supra* note 20 (Judge Charles B. Kornmann of the U.S. District Court for South Dakota "cautioned the jury that nobody got 'a free pass to shoot somebody' because they 'went to Iraq or Afghanistan or the moon'"); *The Cases*, *supra* note 20.

39. See Levin, *supra* note 28, § 5 ("hyperalert, combat-ready, and still poised for action"); S. L. A. MARSHALL, MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND IN FUTURE WAR 36–43, 64–84 (William Morrow & Co. 1961) (1947); Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 71–76 (1994).

40. See *infra* Part II.B.

41. See *infra* Part II.C.

42. See *infra* Part II.C.

While combat exposure is the leading cause of PTSD and TBI in combat veterans, one could argue that combat veterans with these mental illnesses are indistinguishable for the purposes of analyzing culpability relative to other offenders with similar mental illnesses, such as a battered woman suffering from PTSD or an adult who suffered a TBI as a child.<sup>43</sup> But, it is the combination of government-sponsored combat exposure and military training that sets these combat veterans apart as a unique and different class of offenders.<sup>44</sup> Understanding how military training indoctrinates and conditions soldiers<sup>45</sup> to kill is necessary to appreciate the differences between combat veterans and other offenders with similar mental illnesses.

Modern military training was built on the lessons of World War II. In the aftermath of that conflict, S. L. A. Marshall, a prominent military historian, conducted detailed interviews with veterans about how men fought and what drove them to fight.<sup>46</sup> His results, at least in one regard, were very surprising. He found that as few as fifteen percent of soldiers would consciously fire their weapon at the enemy in battle, and he backed up his findings with historical research into past conflicts and wars.<sup>47</sup> These findings were startling and begged the question in the minds of many military leaders: why can't Johnny kill?<sup>48</sup>

For Marshall, the answer to increasing the lethality of soldiers came down to training them in a different way, and his advice to the Army in 1947, was, "What we need to seek in training are any and all means by which we can increase the ratio of effective fire when we have to go to war."<sup>49</sup> To get to that point, he made recommendations for breaking down the "inner and usually unrealized resistance towards killing a fellow man" that is within all of us.<sup>50</sup> His suggestions were implemented by the military in the years between World War II and the Korean War, where firing rates in combat rose to fifty-five percent.<sup>51</sup> By Vietnam, the percentage of soldiers who would fire their weapon at the enemy had risen to ninety percent or higher.<sup>52</sup>

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43. See, e.g., Sontag & Alvarez, *Combat Trauma*, *supra* note 20 (jury instructions directed granting of no "free pass" for combat service).

44. See Levin, *supra* note 28, § 5 ("Thus, the seeds of PTSD were sown in basic combat training. The fertilizer, water, and sunlight were Vietnam, without which all that training was nothing more than a sophisticated and elaborate G.I. Joe war game."); Grant, *supra* note 36, at 271.

45. The term "soldier" is used in this Essay in the generic sense to refer to any member of the U.S. Army, Navy, Marine Corps, Air Force, or Coast Guard.

46. See GROSSMAN, *supra* note 38, at 1-4; MARSHALL, *supra* note 39, at 5-13; Martins, *supra* note 39, at 14.

47. See GROSSMAN, *supra* note 38, at 4, 17-28; MARSHALL, *supra* note 39, at 56; Martins, *supra* note 39, at 14.

48. See GROSSMAN, *supra* note 38, at 29.

49. MARSHALL, *supra* note 39, at 23, 50-63; see also Martins, *supra* note 39, at 14.

50. GROSSMAN, *supra* note 38, at 1 (quoting MARSHALL, *supra* note 39, at 79); see also Levin, *supra* note 28, § 5; Grant, *supra* note 36, at 271.

51. See GROSSMAN, *supra* note 38, at 251; MARSHALL, *supra* note 39, at 9.

52. GROSSMAN, *supra* note 38, at 251; Chuck Vinch, *On Killing: Film Explores Warrior's Inner Struggle*, MARINE CORPS TIMES, Oct. 20, 2008, at 50.

After WWII, a combination of stimulus-response training and psychological inoculation increased the willingness of American soldiers to kill during battle.<sup>53</sup> This modern method of military training subjects soldiers to operant conditioning in order to break down the innate psychological resistance to killing another human being.<sup>54</sup> Repetitive stimulus-response training ensures that soldiers will reflexively take another life when a given set of circumstances exist.<sup>55</sup> Psychological inoculation is imposed upon soldiers to desensitize them to the act of killing and allow them to deny to themselves that they have killed another human being.<sup>56</sup>

The effect of modern military training is most apparent when a combat veteran suffering from service-related PTSD or TBI commits an act of violence. The act of violence may take place as a reflexive response to a set of stimuli, such as a “flashback” at the time of the killing, or as another similar violent reaction to an event due to the judgment-altering effects of PTSD or TBI.<sup>57</sup> Because military personnel have been conditioned to kill,

53. See Levin, *supra* note 28, § 5; GROSSMAN, *supra* note 38, at 81–82, 160–64, 251–64; MARSHALL, *supra* note 39, at 36–43, 50–84; Martins, *supra* note 39, at 71–76. See generally BRUCE K. SIDDLE, *SHARPENING THE WARRIOR’S EDGE* (1998) (discussing modern use of psychological methods to train people for combat situations).

54. See GROSSMAN, *supra* note 38, at 1, 81–82, 160–64, 251–64; MARSHALL, *supra* note 39, at 36–43, 50–84; Mark S. Martins, *Deadly Force Is Authorized, but Also Trained*, ARMY L., Sept.–Oct. 2001, at 1, 3–5, 8–9, 15; Martins, *supra* note 39, at 71–76.

55. See Levin, *supra* note 28, § 5 (discussing the link between military indoctrination and “all the incessant marching, pugil and bayonet training, guard duty, [kitchen patrol duty], and the overwhelming demand to obey authority without question”); GROSSMAN, *supra* note 38, at 233, 252–61; Martins, *supra* note 54, at 9 (discussing the training of soldiers in reflexive shooting techniques to ensure “rapid incapacitation of the threat” and “to inculcate effective responses under the stress of a deadly force encounter, when visual narrowing, auditory exclusion, decreased fine motor skills, and other symptoms are to be expected”); Martins, *supra* note 39, at 71–76 (discussing the U.S. Army’s use of cognitive psychology and human learning theories in military training to improve decision making and actions under stress). The objective of military training is not to create one who can kill without remorse or restraint. See GROSSMAN, *supra* note 38, at 251–64. Rather, all military combat training assumes that a soldier will think rationally in deciding when and whether to kill another human being. See Levin, *supra* note 28, § 5; GROSSMAN, *supra* note 38, at 260–61; Martins, *supra* note 54, at 5, 8–9, 15; Martins, *supra* note 39, at 71. The duty to obey regulations and orders of superiors serves as a check on the use of deadly force in combat and peacetime by soldiers. See GROSSMAN, *supra* note 38, at 260–61. See generally Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939 (1998) (discussing the role of authority and obedience to orders in the military).

56. See Levin, *supra* note 28, § 5 (discussing the need for soldiers to be desensitized “to common everyday events” in order to be an effective killer on the battlefield); GROSSMAN, *supra* note 38, at 81–82, 160–64, 251–64 (discussing the role of dehumanization and desensitization in the training of soldiers to kill); David Zucchino, *When It Comes Time to Kill*, L.A. TIMES, Apr. 27, 2008, at 1 (discussing the infantry training process for enlisted Marines bound for Iraq).

57. See Martins, *supra* note 54, at 3–4; Tabak, *supra* note 3, at 299–300 (discussing the case of Vietnam veteran George Franklin Page on North Carolina’s death row for killing during a manic flashback episode); Michael J. Davidson, Note, *Post-traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 424–29 (1988); Sontag & Alvarez, *Combat Trauma*, *supra* note 20 (“‘What does he think?’ the lawyer said. ‘Lethal threat, lethal threat, lethal threat, neutralize threat, boom, boom, boom, boom, boom, boom, boom, boom, continues to shoot.’”).

desensitized to the act of killing, and taught to deny to themselves that they have in fact killed, combat veterans who suffer from the judgment-altering effects of PTSD and TBI are less culpable than others suffering from the same mental illnesses.<sup>58</sup> This is true because military training has impaired their ability to appreciate fully the wrongfulness of killing and, when they act violently in response to a set of stimuli, to conform their conduct to the requirements of the law.<sup>59</sup>

In distinguishing between combat veterans and peacetime veterans with service-related PTSD or TBI who have both received this same type of military training, the difference is that exposure to combat, in many ways, is a unique and transformative experience for soldiers.<sup>60</sup> A peacetime veteran who commits a crime while suffering from service-related PTSD or TBI may still use evidence of military training to argue for a lesser sentence.<sup>61</sup> While peacetime veterans may use this military training evidence to distinguish themselves from the average offender in sentencing, they are unlikely to find much sympathy with a court as compared to a veteran who has also been exposed to combat, especially one who suffered from service-related PTSD or TBI at the time of the offense.<sup>62</sup> This is because combat exposure is recognized as a very unique and distinguishing trait that sets a combat veteran apart from a peacetime veteran because the combat veteran

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58. See MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962); see also Levin, *supra* note 28, § 5; Martins, *supra* note 54, at 3–5, 8–9, 15; Martins, *supra* note 39, at 71–76.

59. *Supra* note 58.

60. See, e.g., Bell v. Cone, 535 U.S. 685, 704–05 (2001); Johnson v. Singletary, 612 So. 2d 575, 580 (Fla. 1993); State v. Phipps, 883 S.W.2d 138, 139–41 (Tenn. Crim. App. 1994) (discussing how a soldier changed from exemplary to disturbed after enduring Iraqi SCUD attacks during the first Gulf War); Levin, *supra* note 28, §§ 4–5; GROSSMAN, *supra* note 38, *passim*; Grant, *supra* note 36, at 271; Sontag & Alvarez, *Combat Trauma*, *supra* note 20; Brown, *supra* note 20.

61. A peacetime veteran could incur PTSD or TBI through any variety of noncombat, service-related causes ranging from training exercise accidents to incidents occurring while performing day-to-day military duties. See, e.g., Johnson, 612 So. 2d at 578 (describing “a freak head injury on military maneuvers”); Levin, *supra* note 28, § 5.

62. See, e.g., Bell, 535 U.S. at 703–14 (Stevens, J., dissenting) (discussing how Gary Cone unsuccessfully attempted to use his noncombat military service as a supply clerk in Vietnam to argue an insanity defense and to obtain a sentence other than death); Johnson, 612 So. 2d at 579–80 (describing how a Vietnam veteran facing execution who suffered service-related head injuries should be “given proper credit for the good that he has done and the bad that he has suffered while in service to his nation in Vietnam and elsewhere”); Phipps, 883 S.W.2d at 148, 149–51 (rejecting a diminished capacity defense based on a claim of PTSD in a capital crime where the death penalty was not sought); Levin, *supra* note 28, § 5 (recounting the general impact of military training in changing behavior); Grant, *supra* note 36, at 271 (illustrating the psychologically damaging effects of combat); Sontag & Alvarez, *Combat Trauma*, *supra* note 20 (noting that a federal judge gave no downward departure from the sentencing guidelines when sentencing a combat veteran with a severe case of PTSD to twenty-one years in jail for second-degree murder); The Cases, *supra* note 20 (displaying 121 cases involving unlawful killings by combat veterans and how courts have handled them); see also *supra* note 273.

has willingly exposed himself or herself to danger in service of his or her nation.<sup>63</sup>

What we see as a result of the combination of military training and exposure to combat are combat veterans who are very different than average offenders or peacetime veterans.<sup>64</sup> When combat exposure additionally causes service-related PTSD or TBI in combat veterans, their personal culpability is diminished relative to average offenders who also suffer from PTSD or TBI, but lack the element of government-sponsored military training.<sup>65</sup> Combat veterans are a distinct and special population of offenders who should be treated differently under the law because they are far from those who are “‘the most deserving of execution.’”<sup>66</sup> Fortunately, the Supreme Court’s interpretation of the Eighth Amendment permits combat veteran offenders to argue for their lives in capital trials in a number of ways.

## II. ARGUING FOR LIFE BY PRESENTING MITIGATING EVIDENCE

In the thirty-two years since the Supreme Court decided *Gregg v. Georgia*,<sup>67</sup> reinstating the death penalty as a potential punishment,<sup>68</sup> the tension between the requirement to narrow the class of offenders eligible for the death penalty and the need for wide latitude in sentencing to allow for individualized consideration has led to the adoption of a bifurcated capital trial process.<sup>69</sup> Once guilt has been established in the trial phase, the

63. See, e.g., *Bell*, 535 U.S. at 704–05 (illustrating a “pre-Vietnam Cone”); *Johnson*, 612 So. 2d at 578–79 (suggesting that the defendant lost his mind due to Vietnam experiences); *Phipps*, 883 S.W.2d at 141 (discussing the defendant’s experiences during combat that led to his PTSD); Levin, *supra* note 28, § 5 (equating combat with nuclear winter); Grant, *supra* note 36, at 271; Sontag & Alvarez, *Combat Trauma*, *supra* note 20; Brown, *supra* note 20.

64. See Levin, *supra* note 28, §§ 4–5; GROSSMAN, *supra* note 38, *passim*; Martins, *supra* note 54, at 3–5, 8–9, 15; Martins, *supra* note 39, at 71–76 (discussing soldier training methodology).

65. See MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962) (listing mitigating circumstances); Levin, *supra* note 28, § 5.

66. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

67. 428 U.S. 153 (1976).

68. *Id.* at 165–87.

69. See *Kansas v. Marsh*, 126 S. Ct. 2516, 2524–25 (2006) (“Together, our decisions in *Furman v. Georgia* . . . and *Gregg v. Georgia* . . . establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.” (citing *Gregg*, 428 U.S. at 189)); *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) (“[T]he punishment should be directly related to the personal culpability of the defendant . . .” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989))); *Marshall v. Lonberger*, 459 U.S. 422, 456–57 (1983) (Stevens, J., dissenting) (“Bifurcated proceedings are now the rule in capital cases throughout the Nation.”); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (“[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976))); *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*) (requiring the application of the death

admission of mitigating evidence in the sentencing phase of these trials is essential to meeting the requirement that the punishment fit the crime and providing a sentence tailored to the individual.<sup>70</sup> To serve this end, the Supreme Court has given defendants wide latitude to offer anything, “if the sentencer could reasonably find that [the information] warrants a sentence less than death.”<sup>71</sup>

The almost unlimited ability of a capital defendant to offer anything in arguing for life is based on the notion that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”<sup>72</sup> In dealing with cases involving mental illnesses, such as PTSD, and mental defects, such as TBI, the Court has refused to limit the admission of such evidence to only the guilt phase because “[i]mpaired intellectual functioning has mitigating dimension beyond the impact it has on the individual’s ability to act deliberately.”<sup>73</sup> The Court has made clear that “[e]vidence of significantly impaired intellectual functioning is obviously evidence that ‘might serve as a basis for a sentence less than death.’”<sup>74</sup>

In the case of combat veterans suffering from PTSD or TBI who are on trial for their lives in the capital sentencing phase, three specific types of mitigating evidence are particularly relevant and helpful in arguing against the imposition of the death penalty.<sup>75</sup> Evidence regarding (1) military training, (2) PTSD, and (3) TBI may be offered to show the sentencer that a combat veteran suffering from PTSD or TBI has diminished personal culpability that does not make him or her “most deserving of execution.”<sup>76</sup>

### A. Modern Military Training

The above discussion about how modern military training transforms a citizen into a soldier is important to consider in distinguishing a combat

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penalty in a nonarbitrary manner); Fabian, *supra* note 10, at 79 (describing the “humanization strategy” used in the penalty phase).

70. See *Marsh*, 126 S. Ct. at 2525 (“The use of mitigation evidence is a product of the requirement of individualized sentencing.” (citing *Graham v. Collins*, 506 U.S. 461, 484–89 (1993) (Thomas, J., concurring))); *Tennard v. Dretke*, 542 U.S. 274, 284–89 (2004); *McKoy*, 494 U.S. at 443; *Eddings*, 455 U.S. at 111–12; Fabian, *supra* note 10, at 79.

71. *Tennard*, 542 U.S. at 285 (quoting *McKoy*, 494 U.S. at 441); see also *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (“[I]n capital cases ‘the sentencer . . . [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’” (quoting *Eddings*, 455 U.S. at 110)).

72. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

73. See *Tennard*, 542 U.S. at 288. The Court also found that “impaired intellectual functioning is inherently mitigating.” *Id.* at 287.

74. *Id.* at 288 (quoting *Skipper*, 476 U.S. at 5).

75. See generally *infra* Part II.A–C.

76. See *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

veteran with a mental illness from an "average" offender. But, in making an argument that aspects of modern military training should be considered as mitigating evidence,<sup>77</sup> this Essay explains with some detail how a government trains its soldiers and how such training reduces culpability so as to have a mitigating effect.<sup>78</sup>

The process of transforming a normal, young man or woman into a Soldier, Sailor, Airman, or Marine to serve in defense of the United States has commonly been referred to as an activity that breaks down the psyche in order to build a new person in the mold of what the military desires in its fighting men and women.<sup>79</sup> In this process, the objective is to develop instant and willing obedience to orders, which ensures that military commands and duties will be carried out without question in times of combat, extreme stress, and fatigue.<sup>80</sup> The method employed by drill instructors and other personnel who train soldiers, whether they realize it or not, is operant conditioning.<sup>81</sup>

Operant conditioning is one step removed from the more commonly known method of classical conditioning.<sup>82</sup> Classical conditioning, popularized by the studies and research of Ivan Pavlov, involves the simple technique of conditioning a response based on providing a stimulus.<sup>83</sup> The most famous example of classical conditioning is the creation of salivation in a dog through the repetitive ringing of a bell at dinner time when food is provided.<sup>84</sup> At the conclusion of the classical conditioning process, the dog would salivate whenever the bell would ring regardless of whether or not food was provided at the same time.<sup>85</sup>

Operant conditioning takes this process further to condition behaviors, not just responses.<sup>86</sup> By incorporating the use of positive and negative reinforcement techniques, it is possible to condition behaviors.<sup>87</sup> In the military context, the clearest example of operant conditioning is the use of punishments and rewards in basic training.<sup>88</sup> A recruit in boot camp will be rewarded for performing a task, such as shining her boots or cleaning her

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77. See MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962).

78. *Infra* Part II.A.

79. See, e.g., Levin, *supra* note 28, § 5; Zucchino, *supra* note 56.

80. See Levin, *supra* note 28, § 5; GROSSMAN, *supra* note 38, at 81–82, 251–64; MARSHALL, *supra* note 39, at 36–43, 50–84; Martins, *supra* note 54, at 3–5, 8–9, 15; Martins, *supra* note 39, at 71–76.

81. See *supra* note 80.

82. See GROSSMAN, *supra* note 38, at 252–53.

83. *Id.*

84. See *id.*

85. See *id.*

86. See Levin, *supra* note 28, § 5; GROSSMAN, *supra* note 38, at 81–82, 160–64, 251–64 (describing conditioning by hate, psychological inoculation, cultural distance, and desensitization); Martins, *supra* note 54, at 3–5, 8–9, 15 (explaining the military's deadly force policy); Martins, *supra* note 39, at 71–76 (describing the rules of engagement scheme, which teaches when soldiers should use force).

87. See GROSSMAN, *supra* note 38, at 252–53.

88. See Levin, *supra* note 28, § 5; GROSSMAN, *supra* note 38, at 81–82, 251–64; Martins, *supra* note 54, at 3–5, 8–9, 15; Martins, *supra* note 39, at 71–76.

rifle properly, with words of praise or by not being yelled at by a drill instructor.<sup>89</sup> A recruit who does not properly perform these tasks will be yelled at and subjected to physical punishment in the form of having to do push-ups or other physical exercises.<sup>90</sup> The net result of operant conditioning in the recruit training process is that certain behaviors are taught and indoctrinated over time so that when a recruit graduates from basic training, she should automatically polish her boots and clean her rifle properly in the hope of a reward or avoiding punishment.<sup>91</sup>

In the killing context, the process is slightly more complicated, but uses the same methodology. In training, a soldier will receive introductory instruction in how to shoot a weapon.<sup>92</sup> As part of this training, she will be rewarded for being able to shoot a rifle properly with a variety of marksmanship badges to be worn on her uniform based on accuracy of fire.<sup>93</sup> Shooting well is further rewarded with praise from peers and supervisors.<sup>94</sup> Failing to shoot accurately can result in punishment through remedial training and ridicule from peers for not performing to the basic standard.<sup>95</sup> These skills and behaviors are reinforced and built upon once a soldier reports to the military unit with which she will train and deploy overseas.<sup>96</sup> This positive and negative reinforcement conditions a soldier to perform the desired behavior—accurately shooting at a target.<sup>97</sup>

Psychological inoculation goes hand-in-hand with training designed to condition desired behavior in a fighting man or woman.<sup>98</sup> Soldiers are desensitized to the act of killing in boot camp and in follow-on training with a hypermilitaristic attitude that teaches them that killing the enemy on a

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89. See, e.g., GROSSMAN, *supra* note 38, at 81–82, 251–64; Zucchini, *supra* note 56.

90. See, e.g., GROSSMAN, *supra* note 38, at 81–82, 251–64; Zucchini, *supra* note 56.

91. See Levin, *supra* note 28, § 5; GROSSMAN, *supra* note 38, at 81–82, 251–64; Martins, *supra* note 54, at 3–5, 8–9, 15; Martins, *supra* note 39, at 71–76; Zucchini, *supra* note 56.

92. See Levin, *supra* note 28, § 5 (discussing how the introductory training process results in “creating a new sense of identity, structure, and social group adherence for the inductee”); GROSSMAN, *supra* note 38, at 177–78, 233, 253–56 (discussing initial marksmanship training and the introductory training process); Martins, *supra* note 54, at 3–4, 8–9, 15 (discussing marksmanship training and the military’s focus on accurate fire and effective target engagement); Martins, *supra* note 39, at 71–76 (discussing the U.S. Army’s training methodology).

93. See GROSSMAN, *supra* note 38, at 177–78, 253–56 (discussing positive reinforcement).

94. See *id.* at 177–78, 233, 253–56.

95. See *id.*

96. See Levin, *supra* note 28, § 5 (discussing the behavior of a combat-ready soldier); GROSSMAN, *supra* note 38, at 177–78; Martins, *supra* note 54, at 3–5, 8–9, 15; Martins, *supra* note 39, at 71–76; Zucchini, *supra* note 56 (discussion of Iraq predeployment training for an infantry Marine).

97. See Levin, *supra* note 28, § 5; GROSSMAN, *supra* note 38, at 177–79, 253–56; Martins, *supra* note 54, at 3–5, 8–9, 15; Martins, *supra* note 39, at 71–76; Zucchini, *supra* note 56.

98. See Levin, *supra* note 28, § 5; GROSSMAN, *supra* note 38, at 81–82, 160–64, 251–52, 255–56; Zucchini, *supra* note 56.

battlefield is a good and honorable action.<sup>99</sup> In marksmanship training, soldiers shoot at man-sized and man-shaped targets in order to mimic the moment in the future when they may be called upon to aim at a person and pull the trigger.<sup>100</sup> In training with military units, hyperrealistic training is employed, which involves everything from killing live animals to simulate human casualties in first aid training<sup>101</sup> to using Hollywood-style theatrical makeup to place realistic wounded and dead enemy soldiers in the middle of training exercises.<sup>102</sup> The net effect is that a soldier is conditioned by her government to shoot accurately at a human being when necessary, desensitized to the act of killing, and taught that she can rationalize killing another human being on a battlefield because it is a good and honorable action.<sup>103</sup>

It is not novel to say that these operant conditioning techniques provide an explanation as to how a person's behavior changes to permit him or her to commit an unlawful killing.<sup>104</sup> Evidence of operant conditioning and desensitization to the act of killing has previously been used in the video game context.<sup>105</sup> In *James v. Meow Media, Inc.*,<sup>106</sup> the U.S. Court of Appeals for the Sixth Circuit examined the effect that the repetitive playing of role-player video games involving killing other people had on a teenager who killed three students and wounded five others at his high school in Paducah, Kentucky.<sup>107</sup> While the court decided this civil products liability case on other grounds, it entertained and did not dismiss the idea that one could be conditioned and desensitized to the act of killing by repeated exposure to realistic marksmanship-type video games.<sup>108</sup> Other cities and states seeking to reduce their homicide rates by banning violent video

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99. See Levin, *supra* note 28, § 5 (emphasizing the value in killing and dying); GROSSMAN, *supra* note 38, at 81–82, 160–64, 251–52, 255–56; Zucchini, *supra* note 56. For example, recruits in basic training will often chant songs as they run that glorify killing the enemy in battle. See Zucchini, *supra* note 56. Dehumanization is another technique that is often employed to portray the enemy as less deserving of living. See GROSSMAN, *supra* note 38, at 82, 160–64, 251–64.

100. See GROSSMAN, *supra* note 38, at 177–78, 233, 253–56.

101. Jennifer Hlad, *PETA Protests Use of Animals in Military Training*, JACKSONVILLE DAILY NEWS (N.C.), Mar. 30, 2009, available at <http://www.jdnews.com/common/printer/view.php?db=jdn&id=63342> (describing how combat trauma training using live animals “duplicat[es] the kind of stress our corpsmen might experience when they have to save a fellow Marine or sailor”).

102. See GROSSMAN, *supra* note 38, at 254–56; Zucchini, *supra* note 56.

103. See Levin, *supra* note 28, § 5 (describing how soldiers become desensitized to the violence of war); GROSSMAN, *supra* note 38, at 160–64, 251–64; Tom Roeder, *Homicides Give Reason to Review Standards*, GAZETTE (Colo. Springs), Oct. 17, 2008, available at [http://www.gazette.com/articles/army\\_42037\\_\\_\\_article.html/iraq\\_mental.html](http://www.gazette.com/articles/army_42037___article.html/iraq_mental.html) (“For the most part, soldiers are conditioned out of feeling empathy for the people they must kill . . . .” (quoting psychology professor Lucinda Woodward)); Zucchini, *supra* note 56.

104. See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683, 688 (6th Cir. 2002).

105. See, e.g., *id.* at 688, 693–95, 698; GROSSMAN, *supra* note 38, at 299–305, 312–16.

106. 300 F.3d 683, 688 (6th Cir. 2002).

107. See *id.* at 688, 693–95, 698.

108. See *id.* at 700–01.

games have also cited this type of conditioning as having a linkage with an increased propensity to take human life.<sup>109</sup>

The overall effect of state-sponsored training and techniques that condition people to kill, desensitize them to the act of killing, and allow them to rationalize the act of killing is that it affects, in varying degrees, the ability to appreciate the wrongfulness of killing another person.<sup>110</sup> Because military operant conditioning promotes the behavior of killing another person only when authorized in defined circumstances or when ordered to by a superior, it follows that society is protected when a soldier or a veteran is thinking and acting rationally.<sup>111</sup>

A rational person who has been subjected to operant conditioning by the government still has a different perspective on the wrongfulness of killing and a lower psychological barrier to killing another person than a non-combat veteran offender.<sup>112</sup> When a soldier or veteran commits an unlawful killing, evidence of military training has some mitigating value in that it helps explain her mindset and actions as they relate to the act of killing another human being.<sup>113</sup> If a combat veteran's judgment is impaired by PTSD or TBI, the mitigating nature of military training evidence is amplified to further reduce personal culpability relative to the average offender. This is because the combination of impaired judgment and military training significantly interferes with the ability to appreciate the wrongfulness of the act of killing and to conform one's conduct to the requirements of the law.<sup>114</sup>

### B. Post-traumatic Stress Disorder

In examining the mitigating role that PTSD plays in cases of combat veterans suffering from the disorder at the time of a capital crime, it is very telling that PTSD first gained formal recognition as a combat-related

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109. See, e.g., H. 1423, 2007 Leg., 185th Sess. (Mass. 2007), available at <http://www.mass.gov/legis/bills/house/185/ht01pdf/ht01423.pdf> (restricting the sale of violent video games to minors); GROSSMAN, *supra* note 38, at 299–305, 312–16; Bob Egelko, *Ruling Banning Age Restriction on Video Game Sales Is Upheld*, S.F. CHRON., Feb. 21, 2009, at B1; Lynda Gledhill, *Judge Blocks Ban on Sale of Violent Video Games to Minors*, S.F. CHRON., Dec. 23, 2005, at A1.

110. See Levin, *supra* note 28, § 5 (explaining that psychological military training alters human behavior regarding killing); GROSSMAN, *supra* note 38, at 81–82, 160–64, 251–64.

111. See GROSSMAN, *supra* note 38, at 251–64; Martins, *supra* note 39, at 71–76; *supra* note 55 and accompanying text.

112. See Levin, *supra* note 28, § 5; Roeder, *supra* note 103. Michael Hagan, the civilian coordinator for the U.S. Army's "Battlemind Training" mental health program, stated, "A key component of [reintegration into society after combat] . . . is having soldiers turn off instinctual reactions that saved their lives in combat." Roeder, *supra* note 103.

113. Levin, *supra* note 28, § 18.

114. See MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962); Roeder, *supra* note 103 ("Ray Scurfield, a PTSD expert at the University of Southern Mississippi Gulf Coast, said the way America is using troops in Iraq and Afghanistan makes it harder for troops to turn off the kill-or-be-killed instincts of war.").

disorder following the Vietnam War.<sup>115</sup> While PTSD has been diagnosed in car accident victims, battered women, abused children, and other people who have experienced traumatic events, the disorder has historically been available to and used in courts primarily by combat veterans.<sup>116</sup> The history of PTSD gives this mitigating evidence particular weight and credibility when introduced by combat veterans in the sentencing phase of a capital trial.<sup>117</sup>

PTSD is “not a new phenomenon.”<sup>118</sup> For as long as there has been war, there have been combat veterans who have borne the psychological scars of battle.<sup>119</sup> In the aftermath of the Civil War, these mentally ill combat veterans were said to have “irritable heart.”<sup>120</sup> After World War I, combat veterans were said to have shell shock.<sup>121</sup> It was not until the aftermath of World War II and the advent of attempts by modern mental health professionals to treat mental illnesses that these psychological ailments started to gain some level of formal recognition as a gross stress reaction.<sup>122</sup>

Combat stress was referred to in early versions of the Diagnostic and Statistical Manual of Mental Disorders (DSM) as a gross stress reaction, but was removed from the manual as the United States entered the Vietnam

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115. See Motherway, *supra* note 26, §§ 2–3; Timothy P. Hayes, Jr., *Post-traumatic Stress Disorder on Trial*, 190 MIL. L. REV. 67, 71–72 (2006); Daniel E. Speir, *Application and Use of Post-traumatic Stress Disorder as a Defense to Criminal Conduct*, ARMY L., June 1989, at 17, 17 (explaining the effect of PTSD on Vietnam veterans); Davidson, *supra* note 57, at 415–22 (discussing the unique Vietnam experience with PTSD).

116. See Speir, *supra* note 115, at 22; Davidson, *supra* note 57, at 424–40; see also Rich Chlodofsky, *War Stress Basis for Ex-Loyalhanna Man's Murder Case Appeal*, TRIB.-REV. (Pittsburgh), Oct. 4, 2008, available at [http://www.pittsburghlive.com/x/tribunereview/news/westmoreland/print\\_591590.html](http://www.pittsburghlive.com/x/tribunereview/news/westmoreland/print_591590.html) (discussing a Desert Storm veteran's request for a new trial and desire to use PTSD as a defense to the specific intent requirement of a murder charge).

117. See Motherway, *supra* note 26, §§ 2–3 (discussing the development of PTSD as a combat-related psychological reaction); Davidson, *supra* note 57, at 424–40 (discussing generally the development of the use of PTSD as a criminal defense by Vietnam veterans).

118. Motherway, *supra* note 26, § 2 (describing the historical background and nomenclature of mental health problems in combat veterans); see Hayes, Jr., *supra* note 115, at 69–70 (discussing the history of PTSD from the days of Hebrew civilization to present times); Speir, *supra* note 115, at 17 (describing the history of PTSD); Davidson, *supra* note 57, at 418–20 (providing an historical overview of postcombat mental health reactions).

119. See Motherway, *supra* note 26, § 2; Bowe, *supra* note 13, at 30; Hayes, Jr., *supra* note 115, at 69–72; Speir, *supra* note 115, at 17.

120. Hayes, Jr., *supra* note 115, at 70 (quoting Jo Knox & David H. Price, *Healing America's Warriors, Vet Centers and the Social Contract* (Apr. 18–20, 1996) (unpublished paper), available at [http://www.vietnam.ttu.edu/vietnamcenter/events/1996\\_Symposium/96\\_papers/healing.htm](http://www.vietnam.ttu.edu/vietnamcenter/events/1996_Symposium/96_papers/healing.htm)); see Bowe, *supra* note 13, at 30.

121. Motherway, *supra* note 26, § 2 (citing PETER G. BOURNE, MEN, STRESS AND VIETNAM 10–22 (1970)); Bowe, *supra* note 13, at 30; Hayes, Jr., *supra* note 115, at 70 (citing Steve Bentley, *A Short History of PTSD: From Thermopylae to Hue, Soldiers Have Always Had a Disturbing Reaction to War*, VVA VETERAN, Jan. 1991, at 11, 14); Speir, *supra* note 115, at 17; Davidson, *supra* note 57, at 418 (citing BOURNE, *supra* note 121, at 6).

122. See Motherway, *supra* note 26, §§ 2–3 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952)); Hayes, Jr., *supra* note 115, at 71 (citing Bentley, *supra* note 121, at 11–16); Davidson, *supra* note 57, at 419–20 (citing JOSEFINA J. CARD, LIVES AFTER VIETNAM 103 (1983)).

War.<sup>123</sup> In many ways, this removal can be attributed to the fact that World War II combat veterans had a much easier time dealing with the aftermath of their combat experiences.<sup>124</sup> Service in the war was almost universal amongst male citizens, there was widespread support for their service, and there was a broad support network of family and friends that these veterans could turn to for help after coming home.<sup>125</sup> Largely for these reasons, World War II combat veterans exhibited few problems, and there was no pressing call to recognize mental health issues that affected their behavior or required treatment.<sup>126</sup>

Vietnam was a different conflict that created unique issues for its combat veterans involving mental health issues, homelessness, and substance abuse.<sup>127</sup> Unlike World War II, service in Vietnam was not universal, military service in the war was unpopular, and people who did not serve there did not understand the difficulties of that combat environment and the effect on mental health.<sup>128</sup> The rise of mental health issues in Vietnam-era combat veterans, as compared to World War II-era combat veterans, could also be partly accounted for by the changes to military training that broke their psyche in order to make them better killers on the battlefield.<sup>129</sup>

As these disaffected combat veterans mobilized and began to advocate for help and benefits in the 1970s, many pushed for formal recognition of what mental health professionals were terming Vietnam Stress Syndrome.<sup>130</sup> Courts were also beginning to see the introduction of Vietnam Stress Syndrome in criminal trials as a basis for an insanity

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123. Motherway, *supra* note 26, § 3; Davidson, *supra* note 57, at 419–20. The Diagnostic and Statistical Manual of Mental Disorders (DSM) is the authoritative text used by mental health professionals in assessing and diagnosing mental illnesses and disorders. See Levin, *supra* note 28, §§ 17–27.

124. See GROSSMAN, *supra* note 38, at 285–89; Davidson, *supra* note 57, at 419.

125. See GROSSMAN, *supra* note 38, at 285–87; Davidson, *supra* note 57, at 417–19 (discussing the differences between the experiences of Vietnam veterans and World War II-era veterans upon returning to the United States).

126. See GROSSMAN, *supra* note 38, at 285–87; Davidson, *supra* note 57, at 416–22.

127. See GROSSMAN, *supra* note 38, at 264–80, 287–89; Motherway, *supra* note 26, § 2; Davidson, *supra* note 57, at 415–22; see also Phillip Dine, *War's Legacy: Its Human Toll*, ST. LOUIS POST-DISPATCH, Mar. 16, 2008, at A1 (comparing problems experienced by Iraq veterans to those experienced by Vietnam veterans).

128. See GROSSMAN, *supra* note 38, at 264–80, 287–89; Hayes, Jr., *supra* note 115, at 71–72; Davidson, *supra* note 57, at 417–19.

129. See Levin, *supra* note 28, § 5 (discussing the specific military training soldiers received during the Vietnam era); GROSSMAN, *supra* note 38, *passim*. It is important to note that each war creates veterans with different psychological reactions, and further study of the particular effects of combat operations in Iraq and Afghanistan is in order. See Hoge et al., *supra* note 13, at 14 (“The all-volunteer force deployed to Iraq and Afghanistan and the type of warfare conducted in these regions are very different from those involved in past wars, differences that highlight the need for studies of members of the armed services who are involved in the current operations.”).

130. See Motherway, *supra* note 26, § 2 (discussing the push to recognize the “common pattern of psychic reaction to traumatic events” observed in Vietnam veterans in the 1970s); Hayes, Jr., *supra* note 115, at 71–72 (discussing work by veterans groups and mental health workers regarding PTSD in the 1970s); Speir, *supra* note 115, at 17.

defense or other excuses regarding criminal liability.<sup>131</sup> While these issues were being raised, the version of the DSM in effect since before the Vietnam War was undergoing significant revision regarding treatment and recognition of mental health issues based on traumatic events.<sup>132</sup>

When the DSM-III was published in 1980, PTSD was formally recognized as a mental disorder by the community of mental health professionals, largely due to the widespread incidence of mental health problems in Vietnam veterans.<sup>133</sup> This led to increased acceptance and use of PTSD by combat veterans in trials because it did not require courts to recognize the undefined concept of Vietnam Stress Syndrome based solely on expert testimony.<sup>134</sup> Since being formally recognized, the use of PTSD in trials has expanded beyond Vietnam veterans to include anyone who has undergone a traumatic event in her life and fits within the diagnostic criteria.<sup>135</sup>

Although the DSM has been revised since 1980, the definition of the symptoms and what is required to diagnose PTSD has changed very little.<sup>136</sup> The current version of the DSM requires the following to diagnose PTSD:

- Must have been exposed to a “traumatic event” involving “actual or threatened death or serious injury” that caused a response involving intense “fear, helplessness, or horror”;
- Must exhibit specific symptoms consistent with PTSD, such as reexperiencing the traumatic event, “avoidance of stimuli” that recall the traumatic event, or “increased arousal” of the senses.
- Must exhibit “clinically significant distress or impairment in social, occupational, or other important areas of functioning” after exposure to the traumatic stressor.
- Must exhibit symptoms for “more than one month” duration.<sup>137</sup>

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131. See Speir, *supra* note 115, at 17–22 (discussing the early uses of PTSD as a criminal defense and as a factor in mitigation in sentencing).

132. See Motherway, *supra* note 26, §§ 2–3; Hayes, Jr., *supra* note 115, at 71–72; Davidson, *supra* note 57, at 419–22.

133. See Motherway, *supra* note 26, §§ 2–3; Hayes, Jr., *supra* note 115, at 71–72; Davidson, *supra* note 57, at 419–22.

134. See Speir, *supra* note 115, at 17; Davidson, *supra* note 57, at 424–40; Sontag & Alvarez, *Combat Trauma*, *supra* note 20.

135. See BAKER & ALFONSO, *supra* note 26; Motherway, *supra* note 26, § 2; Speir, *supra* note 115, at 22.

136. See DSM-IV-TR, *supra* note 26; BAKER & ALFONSO, *supra* note 26; Hayes, Jr., *supra* note 115, at 72; Levin, *supra* note 28, §§ 17–27; Motherway, *supra* note 26, §§ 4–10.

137. DSM-IV-TR, *supra* note 26; see BAKER & ALFONSO, *supra* note 26; Levin, *supra* note 28, §§ 17–27; Motherway, *supra* note 26, §§ 4–10. PTSD can also be characterized as having a delayed onset in that the disorder need not arise immediately after the event. DSM-IV-TR, *supra* note 26; see BAKER & ALFONSO, *supra* note 26; Levin, *supra* note 28, §§

In addition, there are a number of specific symptoms that are associated with a diagnosis of PTSD, including sleep problems, hypervigilance, exaggerated startle response, irritability, outbursts of anger, difficulty concentrating, difficulty completing tasks, “flashbacks” that involve reliving the traumatic event, impulsive behavior, and, in some cases, psychotic behavior.<sup>138</sup> In recognizing that PTSD is a serious clinical disorder with symptoms that alter behavior and judgment, the DSM classifies it as an Axis I disorder along with illnesses including depression, schizophrenia, and other major mental disorders.<sup>139</sup> Furthermore, the ABA considers all Axis I disorders to be severe mental disorders that alter behavior and judgment to the degree that persons who suffer from such disorders should be exempt from the death penalty.<sup>140</sup>

Because PTSD alters behavior and judgment, a diagnosis has mitigating value since its symptoms affect “the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”<sup>141</sup> For a combat veteran, the effects of PTSD are significant and the introduction of the existence of PTSD at the time of the offense through either a prior or forensic diagnosis should cause a sentencer to recognize the special mitigating nature of this evidence and spare the combat veteran’s life.<sup>142</sup>

### C. Traumatic Brain Injury

Traumatic brain injuries are neither uncommon nor insignificant. In fact, more than ninety thousand people a year suffer severe and debilitating brain injuries in the United States.<sup>143</sup> While TBIs in the United States are already numerous, there has been a marked increase in the number of TBIs in combat veterans as a result of the conflicts in Iraq and Afghanistan over the past seven years.<sup>144</sup> In light of this recent increase in the incidence of brain injury in combat veterans, TBI has become a key issue in both the guilt and

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17–27; Motherway, *supra* note 26, §§ 4–10; Bowe, *supra* note 13, at 33 (stating that one in three cases of PTSD may be delayed).

138. See DSM-IV-TR, *supra* note 26; Levin, *supra* note 28, § 22; Motherway, *supra* note 26, § 4. PTSD has also been linked to behaviors that involve substance abuse, risky sexual habits, and physical abuse. See Kelly Kennedy, *Links Between PTSD, Substance Abuse Explored*, MARINE CORPS TIMES, Jan. 7, 2009, [http://www.marinecorpstimes.com/news/2009/01/military\\_substanceabuse\\_ptsd\\_010809w/](http://www.marinecorpstimes.com/news/2009/01/military_substanceabuse_ptsd_010809w/).

139. See FIRST ET AL., *supra* note 25; PsychNet-UK, *supra* note 25 (explaining what defines and distinguishes different Axis categories in the DSM-IV).

140. ABA Report, *supra* note 3, at 668, 670–71.

141. MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962) (alteration in original); see BAKER & ALFONSO, *supra* note 26; Motherway, *supra* note 26, §§ 4–10.

142. See *Johnson v. Singletary*, 612 So. 2d 575, 579–80 (Fla. 1993); BAKER & ALFONSO, *supra* note 26; Levin, *supra* note 28, §§ 17–27; Motherway, *supra* note 26, §§ 4–10.

143. William J. Winslade, *Traumatic Brain Injury and Criminal Responsibility*, MED. ETHICS, Fall 2003, at 2, 4.

144. See Alvarez, *supra* note 15; Tyson, *supra* note 15; Memorandum from Jonathan B. Perlin, Undersecretary for Health, Dep’t of Veterans Affairs, to Dep’t of Veterans Affairs Primary Care Clinicians, Screening and Clinical Management of Traumatic Brain Injury 1 (Jan. 25, 2006) [hereinafter VA TBI Memo] (on file with the Fordham Law Review).

sentencing phases of murder trials involving combat veterans as defendants.<sup>145</sup>

There are a number of reasons that explain why TBIs are so common in combat veterans to have become known as the “signature wound” of the wars in Iraq and Afghanistan.<sup>146</sup> First, the use of IEDs is one of the preferred methods employed by insurgents to attack and kill American forces.<sup>147</sup> These explosions cause concussive blasts that emit shock waves that often result in unconsciousness, disorientation, and other injuries in soldiers.<sup>148</sup>

Many soldiers would have died as a result of these blasts in past conflicts.<sup>149</sup> However, advances in vehicle armor, helmets, body armor, and medical treatment on the battlefield have resulted in many more soldiers surviving their injuries and returning to society.<sup>150</sup> In light of these factors, it is now estimated that more than three hundred thousand combat veterans have survived and suffer from some form of TBI as a result of the war on terror.<sup>151</sup>

For those soldiers who survive combat actions that cause head injuries, it is difficult to diagnose specifically the existence of a TBI.<sup>152</sup> As opposed to an illness like PTSD, which uses the DSM criteria to make a diagnosis,<sup>153</sup> there are no universal definitions or evidence-based guidelines available to

145. See Kelly Kennedy, *Traumatic Brain Injury: Common Wound of War*, MARINE CORPS TIMES, Aug. 30, 2007, [http://www.marinecorpstimes.com/news/2007/08/marine\\_brainmain\\_070828/](http://www.marinecorpstimes.com/news/2007/08/marine_brainmain_070828/) (discussing the increase in the TBI diagnosis in veterans); *The Cases*, *supra* note 20 (providing examples of 121 veterans who have been charged with committing murders since returning from war).

146. See, e.g., Alvarez, *supra* note 15; Tyson, *supra* note 15.

147. See, e.g., Glasser, *supra* note 16.

148. See *id.* Consider the following explanation regarding the danger of improvised explosive device (IED) blasts:

Here's why IEDS carry such hidden danger. The detonation of any powerful explosive generates a blast wave of high pressure that spreads out at 1,600 feet per second from the point of explosion and travels hundreds of yards. The lethal blast wave is a two-part assault that rattles the brain against the skull. The initial shock wave of very high pressure is followed closely by the “secondary wind”: a huge volume of displaced air flooding back into the area, again under high pressure. No helmet or armor can defend against such a massive wave front.

It is these sudden and extreme differences in pressure—routinely 1,000 times greater than atmospheric pressure—that lead to significant neurological injury.

*Id.*

149. See *id.*

150. See Hoge et al., *supra* note 17, at 454 (“Because of improved protective equipment, a higher percentage of soldiers are surviving injuries that would have been fatal in previous wars.” (citing Susan Okie, *Traumatic Brain Injury in the War Zone*, 352 NEW ENG. J. MED. 2043, 2045 (2005)); Glasser, *supra* note 16. The wounded-to-killed ratio in Vietnam was 2.6 wounded for each person killed. In the war on terrorism, it is sixteen wounded for each person killed. See Glasser, *supra* note 16.

151. See Alvarez, *supra* note 15; Tyson, *supra* note 15.

152. See Kennedy, *supra* note 17; VA TBI Memo, *supra* note 144, at 1–3.

153. See DSM-IV-TR, *supra* note 26; BAKER & ALFONSO, *supra* note 26; Levin, *supra* note 28, § 20; Motherway, *supra* note 26, §§ 4–10.

diagnose TBI in a combat veteran.<sup>154</sup> The existence of different forms of TBI, such as mild and moderate forms of TBI, adds to the diagnostic difficulties because it is believed that minor concussions, which do not result in unconsciousness or other outward symptoms, can cause delayed and severe symptoms that are not apparent for months after the injury.<sup>155</sup>

Since medical experts generally define TBI as a blow or jolt to the head that disrupts the functioning of the brain, a diagnosis is currently only possible through an intensive mental and physical examination by medical professionals to determine if there has been a disruption in the functioning of the brain.<sup>156</sup> Diagnosing a less severe form of TBI is more difficult because the injury is often undetectable in scans of the brain, the symptoms often mirror those of PTSD, and complaints range from passing headaches to mild seizures.<sup>157</sup> Although TBI may be difficult to diagnose, there is an overall consensus within the medical community regarding the symptoms exhibited by those who have suffered a TBI.<sup>158</sup>

Those afflicted with TBI exhibit symptoms that include:

- “Headaches, sleep disturbances, and sensitivity to light and noise . . . .”<sup>159</sup>
- Cognitive symptoms in the form of “disturbances in attention, memory, or language, as well as delayed reaction time during problem solving” as “diagnosed on mental-

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154. See Kennedy, *supra* note 17; VA TBI Memo, *supra* note 144, at 2. The federal government has defined traumatic brain injury for the purposes of educational disabilities as an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech.

34 C.F.R. § 300.8(c)(12) (2008).

155. See Ryan & Berson, *supra* note 3, at 372–73; Bruce H. Stern, *Representing the Mildly Brain-Injured Client*, TRIAL, Sept. 2000, at 48, 48–50; Robina Riccitiello, *Iraq: A Marine's Experience of Brain Injury*, NEWSWEEK, Mar. 17, 2006, <http://www.msnbc.msn.com/id/11882164/site/newsweek/print/1/displaymode/1098/>; VA TBI Memo, *supra* note 144, at 1–3.

156. See Stern, *supra* note 155, at 48–50; Kennedy, *supra* note 17; VA TBI Memo, *supra* note 144, at 1–3.

157. See Richard A. Bryant, Editorial, *Disentangling Mild Traumatic Brain Injury and Stress Reactions*, 358 NEW ENG. J. MED. 525, 525 (2008) (“[Mild TBI] symptoms can include problems with memory, balance, and concentration, as well as ringing in the ears, sensitivity to light or sound, and irritability.”); Stern, *supra* note 155, at 48–50; Kennedy, *supra* note 17 (“‘Mild’ is a misnomer because it can mean anything from a Marine who bangs his head but has nothing more than a passing headache, to [a Marine] who bangs his head and has headaches, permanent short-term memory loss and mild seizures.”).

158. See Ryan & Berson, *supra* note 3, at 371–73; Stern, *supra* note 155, at 48–49; VA TBI Memo, *supra* note 144, at 1–3.

159. Okie, *supra* note 150, at 2045.

status examination or through neuropsychological testing.”<sup>160</sup>

- Behavioral symptoms in the form of “mood changes, depression, anxiety, impulsiveness, emotional outbursts, or inappropriate laughter.”<sup>161</sup>
- “Common behavioral deficits includ[ing] decreased ability to initiate responses, verbal and physical aggression, agitation, learning difficulties, shallow self-awareness, altered sexual functioning, impulsivity, and social disinhibition . . . .”<sup>162</sup>
- “[E]motional disturbances and personality changes . . . leading to alterations in the individual’s ability to make decisions, plan, focus, make selections and self-monitoring of their own performance.”<sup>163</sup>
- “[D]eficits in intellectual and adaptive functioning, such as agnosia (failure to recognize or identify objects) and disturbances in executive functioning connected with planning, organizing, sequencing, and abstracting.”<sup>164</sup>

These symptoms, and numerous studies about the effect of brain injuries on behavior, all establish that there is a link between TBIs and an inability to conform one’s behavior to society’s expectations and the law.<sup>165</sup>

When mitigating evidence of a diagnosis of TBI in an offender is properly admitted through expert medical testimony and results of diagnostic testing, there is great value since TBI and its symptoms affect “the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.”<sup>166</sup> The Supreme Court itself has acknowledged the mitigating nature of deficiencies in cognitive, behavioral, and emotional abilities in stating that “[e]vidence of significantly impaired intellectual functioning is obviously

160. *Id.*

161. *Id.* at 2045–46.

162. Brief for National Disability Rights Network et al. as Amici Curiae in Support of Petitioner at 5, *Leonard v. Simpson*, 128 S. Ct. 24 (2007) (No. 06-1317), 2007 WL 1319342 (quoting NIH Consensus Development Panel, *Rehabilitation of Persons with Traumatic Brain Injury*, 282 J. AM. MED. ASS’N 974, 976 (1999)).

163. Bitz & Bitz, *supra* note 28, at 232 (citing Donald T. Stuss & Catherine A. Gow, “Frontal Dysfunction” After Traumatic Brain Injury, *NEUROPSYCHIATRY, NEUROPSYCHOLOGY & BEHAV. NEUROLOGY* 272, 273 (1992)).

164. ABA Report, *supra* note 3, at 669–70 (citing DSM-IV-TR, *supra* note 26, at 135) (describing symptoms of dementia).

165. See MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962); Bitz & Bitz, *supra* note 28, at 230–35; Ryan & Berson, *supra* note 3, at 372–73; see also VA TBI Memo, *supra* note 144, at 1–3.

166. MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962) (alteration in original); see Brief for National Disability Rights Network et al., *supra* note 162, at 9–20; Bitz & Bitz, *supra* note 28, at 230–34.

evidence that might serve as a basis for a sentence less than death.”<sup>167</sup> For a combat veteran, the effects of TBI are significant, and the introduction of the existence of TBI at the time of the offense through either a prior or forensic diagnosis should cause a sentencer to recognize the unique mitigating nature of this evidence and spare the combat veteran’s life.<sup>168</sup>

### III. ARGUING FOR LIFE BY PROPOSING A CATEGORICAL EXCLUSION

Ideally, mitigating evidence would ensure that the death penalty was only imposed on those offenders who are “the most deserving of execution.”<sup>169</sup> Unfortunately, the discretion of judges has proven over time that certain offenders have been sentenced to death despite evidence of impairments in intellectual and mental functioning.<sup>170</sup> To guard against this danger, the Supreme Court created specific categorical exclusions that put certain classes of offenders, such as the mentally retarded and juveniles, outside the reach of the death penalty as a matter of law.<sup>171</sup>

#### A. Justification for and Criticisms of Categorical Exclusions

Categorical exclusions are necessary because sentencers may not, in their own discretionary role, give effect to some forms of mitigating evidence regarding certain offenders.<sup>172</sup> Mitigating evidence of mental health issues should evoke sympathy and explain why a capital defendant is not among “the most deserving of execution.”<sup>173</sup> Yet, all too often, sentencers construe the mitigating nature of mental health issues as a factor in aggravation because it also speaks to future dangerousness and lack of rehabilitative potential.<sup>174</sup> Thus, mitigating evidence of mental health

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167. See *Tennard v. Dretke*, 542 U.S. 274, 288 (2004) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)) (internal quotation marks omitted).

168. See Brief for National Disability Rights Network et al., *supra* note 162, at 9–20; MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962); Bitz & Bitz, *supra* note 28, at 230–34.

169. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)); Fabian, *supra* note 10, at 90; Jochnowitz, *supra* note 10, at 5; Ryan & Berson, *supra* note 3, at 376–77; Slobogin, *supra* note 3, at 1150–51; Tabak, *supra* note 3, at 288–93.

170. See, e.g., *Roper*, 543 U.S. at 558; *Atkins*, 536 U.S. at 309; see also Fabian, *supra* note 10, at 90; Jochnowitz, *supra* note 10, at 5, 9–16; Ryan & Berson, *supra* note 3, at 376–77; Slobogin, *supra* note 3, at 1150–51; Tabak, *supra* note 3, at 288–93.

171. *Roper*, 543 U.S. at 564–79; *Atkins*, 536 U.S. at 311–21.

172. See *Roper*, 543 U.S. at 573; *Atkins*, 536 U.S. at 320–21; Slobogin, *supra* note 3, at 1150–51; Tabak, *supra* note 3, at 288–93.

173. See *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319); Slobogin, *supra* note 3, at 1150–51; Tabak, *supra* note 3, at 288–93.

174. See *Roper*, 543 U.S. at 573; *Atkins*, 536 U.S. at 320–21; Fabian, *supra* note 10, at 90; Ryan & Berson, *supra* note 3, at 376–77; Slobogin, *supra* note 3, at 1150–51; Tabak, *supra* note 3, at 288.

issues functions as a double-edged sword that can cut both ways to both help and hurt a defendant's plea to be given a sentence of less than death.<sup>175</sup>

An additional justification for having categorical exclusions is that mitigating evidence based on psychology or psychiatry is undervalued and often misunderstood by sentencers.<sup>176</sup> It is understandable that skepticism exists when a psychiatrist or psychologist attempts to advance a unique expert opinion regarding behavior in the sentencing phase of a capital trial.<sup>177</sup> However, when judges properly serve as the evidentiary gatekeeper in a *Daubert* inquiry,<sup>178</sup> they ensure that junk science and untested theories do not enter the courtroom; rather, only diagnoses based on accepted medical theories and diseases should be admitted.<sup>179</sup> In those circumstances where it is established that a valid mental health issue existed at the time of the offense based on expert testimony,<sup>180</sup> a categorical exclusion precludes the sentencer from devaluing and discounting that mitigating factor to assess a sentence of death where it is unwarranted.<sup>181</sup>

Categorical exclusions based on the existence of certain characteristics, such as mental retardation, mental illness, or being a juvenile, may protect defined classes of offenders from being put to death, but these exclusions also inspire criticism from many fronts. A number of death penalty abolitionists dislike categorical exclusions because they acknowledge that some offenders deserve to die for their crimes.<sup>182</sup> Some critics argue that

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175. See *Roper*, 543 U.S. at 573; *Atkins*, 536 U.S. at 320–21; Fabian, *supra* note 10, at 90; Jochnowitz, *supra* note 10, at 14; Ryan & Berson, *supra* note 3, at 376–77; Slobogin, *supra* note 3, at 1150–51; Tabak, *supra* note 3, at 288–93.

176. See *Roper*, 543 U.S. at 564–79; *Tennard v. Dretke*, 542 U.S. 274, 288–89 (2004); *Atkins*, 536 U.S. at 317–21; Fabian, *supra* note 10, at 90; Jochnowitz, *supra* note 10, at 5; Ryan & Berson, *supra* note 3, at 376–77.

177. See Fabian, *supra* note 10, at 90; Ryan & Berson, *supra* note 3, at 376–77.

178. E.g., *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–95 (1993) (describing several factors federal courts must review when performing “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue”).

179. See, e.g., *Bado-Santana v. Ford Motor Co.*, 482 F. Supp. 2d 192, 193–97 (D.P.R. 2007).

180. Interesting issues are presented regarding who should determine whether an offender meets the criteria for a categorical exclusion. Is it an issue of law for the judge to decide after weighing expert testimony? Or, is it an issue of fact for a jury to determine after hearing differing expert testimony? Such questions are worthy of further examination but are beyond the scope of this Essay. See Nava Feldman, Annotation, *Application of Constitutional Rule of Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that *Execution of Mentally Retarded Persons Constitutes “Cruel and Unusual Punishment” in Violation of Eighth Amendment*, 122 A.L.R.5th 145 (2004).

181. See *Roper*, 543 U.S. at 564–79; *Atkins*, 536 U.S. at 311–21; Fabian, *supra* note 10, at 90; Jochnowitz, *supra* note 10, at 9–16; Ryan & Berson, *supra* note 3, at 376–77; Slobogin, *supra* note 3, at 1150–51; Tabak, *supra* note 3, at 290–93.

182. See Klein, *supra* note 3, at 1259 (“The Court in both *Roper* and *Atkins* seems to have forgotten, however, about the Eighth Amendment rights of those who are still subject to the death penalty, and also about its own prior commitment to the Eighth Amendment principle that capital punishment must be imposed fairly and consistently or not at all.”); Ryan & Berson, *supra* note 3, at 359–60 (discussing arguments about categorical exclusions for the

categorical exclusions are out of step with the death penalty jurisprudence that has developed because they substitute legal exclusions for measured assessments of individualized culpability by sentencers.<sup>183</sup> Other critics point to the practical definitional difficulties in establishing standards and criteria for classifying an offender as part of the protected class.<sup>184</sup>

While one commentator has referred to the recent establishment of categorical exclusions as akin to the opening up of “a psychiatric can of worms,”<sup>185</sup> the Supreme Court applied a clear framework for analyzing whether to adopt a categorical exclusion in the cases of *Atkins v. Virginia* and *Roper v. Simmons*.<sup>186</sup> The ABA has already argued for extending the categorical exclusion framework to include those with severe mental disorders and TBIs that significantly impair the capacity of an offender “(a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.”<sup>187</sup> This recommendation has been criticized for being overly broad.<sup>188</sup> But, within the ABA recommendations and the categorical exclusion framework applied in *Atkins* and *Roper*,<sup>189</sup> it is clear that a narrow categorical exclusion should exist for combat veterans who were suffering, at the time of their offense, from service-related PTSD or TBI.

#### B. *Atkins* and *Roper* Framework for Recognizing a Categorical Exclusion

In 1980, Johnny Paul Penry, a mentally retarded murderer, was sentenced to death in Texas for raping and killing Pamela Carpenter.<sup>190</sup> In 1986, Georgia executed Jerome Bowden, another mentally retarded murderer.<sup>191</sup>

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mentally ill and the dilemmas created by “incremental abolition” of the death penalty (quoting *Atkins*, 536 U.S. at 353)); Shin, *supra* note 3, at 516 (“[I]n the long run, advocating for the categorical exemption may be counterproductive to [the abolitionist] goal of eradicating the [death] penalty in this country.”).

183. See *Kansas v. Marsh*, 126 S. Ct. 2516, 2525 (2006); *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) (“[T]he punishment should be directly related to the personal culpability of the defendant . . .” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989))); ABA Report, *supra* note 3, at 668; Klein, *supra* note 3, at 1258–59 (“Because juvenile and mentally retarded offenders are not necessarily less culpable, categorically excluding them from capital punishment results in unjust treatment for similarly culpable non-juvenile and non-mentally retarded offenders.”); Slobogin, *supra* note 3, at 1147–50 (discussing and addressing arguments against a categorical exclusion for those with severe mental illnesses).

184. See Ryan & Berson, *supra* note 3, at 355 (citing AMNESTY INT’L, UNITED STATES OF AMERICA: THE EXECUTION OF MENTALLY ILL OFFENDERS (2006), available at <http://www.amnesty.org/en/library/info/AMR51/003/2006>) (discussing the failure of the Supreme Court to specify standards or procedures for determining if a person is competent or suffering from mental illness).

185. See, e.g., Mossman, *supra* note 3.

186. See *Roper*, 543 U.S. at 564–79; *Atkins*, 536 U.S. at 311–21; *infra* Part III.B.

187. ABA Report, *supra* note 3, at 668, 670.

188. See Mossman, *supra* note 3, at 289–91; Ryan & Berson, *supra* note 3, at 381.

189. See *Roper*, 543 U.S. at 564–79; *Atkins*, 536 U.S. at 313–21; ABA Report, *supra* note 3, at 668.

190. *Penry v. Lynaugh*, 492 U.S. 302, 307–10 (1989); Mossman, *supra* note 3, at 257.

191. *Atkins*, 536 U.S. at 313 n.8.

The execution of Bowden apparently caused the federal government and the states of Maryland and Georgia to pass statutes that prohibited the execution of those who are mentally retarded.<sup>192</sup> Penry used these statutes on appeal to argue that the Eighth Amendment of the U.S. Constitution<sup>193</sup> requires a categorical exclusion from execution for the mentally retarded because such a punishment is cruel and unusual.<sup>194</sup>

In 1989, the Supreme Court, in *Penry v. Lynaugh*,<sup>195</sup> rejected his argument for a categorical exclusion, refusing to exempt mentally retarded offenders from being subject to the death penalty as a matter of law under the prohibitions of the Eighth Amendment.<sup>196</sup> On the same day as deciding *Penry*, the Court also examined the propriety of imposing the death penalty on juvenile offenders in *Stanford v. Kentucky*,<sup>197</sup> holding that the Eighth Amendment did not bar the imposition of the death penalty on offenders who were older than fifteen but younger than eighteen years of age.<sup>198</sup> Although rejecting the arguments for categorical exclusions in both cases, the Court in its analyses clarified the factors and considerations inherent in determining if executing a given class of offenders violates the Eighth Amendment prohibition on cruel and unusual punishment.<sup>199</sup>

It was not until *Atkins v. Virginia* and *Roper v. Simmons* that the Court had the opportunity to once again examine adopting a categorical exclusion for a given class of offenders. In 2002, the Court held in *Atkins* that it was unconstitutional to impose the death penalty on mentally retarded persons.<sup>200</sup> In 2005, the Court held in *Roper* that it was unconstitutional to impose the death penalty upon juvenile offenders.<sup>201</sup> The Court employed a two-step analysis for determining whether the death penalty is an acceptable punishment for certain classes of offenders under the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>202</sup> In the first part of this

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192. See, e.g., Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1967 (codified as amended at 18 U.S.C. § 3596(c) (2006)); GA. CODE ANN. § 17-10-61 (Supp. 2008); MD. CODE ANN. CRIM. LAW § 2-202(b)(2)(ii) (LexisNexis 2008); see also *Atkins*, 536 U.S. at 313-14; *Penry*, 492 U.S. at 334.

193. U.S. CONST. amend VIII.

194. *Penry*, 492 U.S. at 328-29, 333-34; Mossman, *supra* note 3, at 257-58.

195. 492 U.S. 302.

196. *Id.* at 328-30, 339-40 ("In sum, mental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone."); see *Atkins*, 536 U.S. at 306-07, 313-15; Mossman, *supra* note 3, at 255, 257-59; Ryan & Berson, *supra* note 3, at 355.

197. 492 U.S. 361 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551, 568-75 (2005).

198. *Id.* at 380; see also *Roper*, 543 U.S. at 555-56; Ryan & Berson, *supra* note 3, at 355.

199. *Penry*, 492 U.S. at 328-40; *Stanford*, 492 U.S. at 368-80; see Mossman, *supra* note 3, at 257-59.

200. *Atkins*, 536 U.S. at 321; see Mossman, *supra* note 3, at 261-63; Ryan & Berson, *supra* note 3, at 355; Shin, *supra* note 3, at 481.

201. *Roper*, 543 U.S. at 574-75; see Ryan & Berson, *supra* note 3, at 355; Shin, *supra* note 3, at 487.

202. *Roper*, 543 U.S. at 564-79; *Atkins*, 536 U.S. at 311-21; see Shin, *supra* note 3, at 477-81, 483-87.

analysis, the Court attempted to determine whether putting to death certain offenders constitutes punishment that is “‘graduated and proportioned to [the] offense’”<sup>203</sup> and within the boundaries of the “evolving standards of decency that mark the progress of a maturing society.”<sup>204</sup>

In assessing whether the death penalty is appropriate for certain classes of offenders and reflective of “evolving standards of decency,”<sup>205</sup> the Court first examined “objective evidence of contemporary values”<sup>206</sup> and other evidence that serves as “‘a significant and reliable objective index’ of societal mores.”<sup>207</sup> The Court held that the clearest objective evidence is to be found in “the legislation enacted by the country’s legislatures.”<sup>208</sup> The Court additionally looked to “data reflecting the actions of sentencing juries” as indicia of a national consensus against putting to death certain classes of offenders.<sup>209</sup> National consensus about contemporary values and standards of decency was also ascertained from the views of professional organizations, religious groups, and opinion polls.<sup>210</sup> While there is much disagreement about relying on international opinion to define American standards of decency, the Court acknowledged that world opinion can “provide respected and significant confirmation for [its] own conclusions” when seeking to determine if the death penalty is a disproportionate punishment for a given category of offenders.<sup>211</sup>

Objective evidence of contemporary values and societal mores is important but did not dictate in *Atkins* and *Roper* whether or not a class of offenders should be exempt from the death penalty under the Eighth Amendment.<sup>212</sup> The second part of the analysis required that the Supreme Court “determine, in the exercise of [its] own independent judgment, whether the death penalty is a disproportionate punishment for [a class of

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203. *Roper*, 543 U.S. at 560 (quoting *Atkins*, 536 U.S. at 311); see also *Weems v. United States*, 217 U.S. 349, 367 (1910); Shin, *supra* note 3, at 477–78.

204. *Atkins*, 536 U.S. at 341 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

205. *Roper*, 543 U.S. at 594 (quoting *Trop*, 356 U.S. at 101) (internal quotation marks omitted).

206. *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)) (internal quotation marks omitted); *Atkins*, 536 U.S. at 312.

207. *Roper*, 543 U.S. at 90 (O’Connor, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion)); *Atkins*, 536 U.S. at 323 (same).

208. See *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331); see also *id.* at 324 (Rehnquist, C.J., dissenting); Shin, *supra* note 3, at 477–79, 483–85.

209. See *Roper*, 543 U.S. at 590 (O’Connor, J., dissenting) (citing *Coker*, 433 U.S. at 596).

210. See *Atkins*, 536 U.S. at 316 n.21. But see *id.* at 325–28 (Rehnquist, C.J., dissenting); Shin, *supra* note 3, at 479.

211. See *Roper*, 543 U.S. at 575–79; *Atkins*, 536 U.S. at 316 n.21; *id.* at 324–28 (Rehnquist, C.J., dissenting) (stating that data gathered by professional and religious organizations should not be given any weight in the Eighth Amendment analysis); Shin, *supra* note 3, at 479, 486–87.

212. See *Roper*, 543 U.S. at 575–79; *Atkins*, 536 U.S. at 312–13; Shin, *supra* note 3, at 477–81.

offenders].”<sup>213</sup> This second step allowed the Court to weigh in with its own judgment and consider subjective factors, such as the penological goals of punishment, specific mitigating factors that may entitle a class of offenders to a categorical exclusion, and whether or not there is an unacceptable likelihood that a sentencer could disregard those mitigating factors to still arrive at a sentence of death.<sup>214</sup>

# 1. Defining a Categorical Exclusion for the Mentally Retarded in *Atkins v. Virginia*

Daryl Renard Atkins was sentenced to death in Virginia for the 1996 murder of Eric Nesbitt.<sup>215</sup> In the Supreme Court of Virginia, he challenged his sentence on the grounds that he was “‘mentally retarded and thus [could not] be sentenced to death.’”<sup>216</sup> In a divided opinion, a majority of the court relied upon *Penry v. Lynaugh* to hold that a mentally retarded person can be sentenced to death.<sup>217</sup> The U.S. Supreme Court granted certiorari to address “the gravity of the concerns expressed by the dissenters” from the Supreme Court of Virginia and revisit the issue in *Penry* regarding the constitutionality of imposing the death penalty upon mentally incompetent adults.<sup>218</sup>

In deciding *Atkins v. Virginia*, the U.S. Supreme Court held that the mentally retarded should not be subject to execution because, “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”<sup>219</sup> The Court held that the mentally retarded are entitled to a categorical exclusion from the death penalty because of the national consensus that had developed regarding the “relative culpability of mentally retarded offenders,” the lack of satisfaction of the “penological” goals of the death penalty in executing the mentally retarded, the mitigating nature of the characteristics of mental retardation, and the “risk ‘that the death penalty will be imposed in spite of factors which may call for a less severe penalty.’”<sup>220</sup>

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213. *Roper*, 543 U.S. at 564; see *Atkins*, 536 U.S. at 312–13; Shin, *supra* note 3, at 478, 480–81, 485–87.

214. See, e.g., *Roper*, 543 U.S. at 564–79; *Atkins*, 536 U.S. at 312–13; Shin, *supra* note 3, at 478–81, 484–87.

215. *Atkins*, 536 U.S. at 307.

216. *Id.* at 310 (quoting *Atkins v. Virginia*, 534 S.E.2d 312, 318 (Va. 2000)); see Mossman, *supra* note 3, at 261.

217. *Atkins*, 534 S.E.2d at 319; see Mossman, *supra* note 3, at 261.

218. *Atkins*, 536 U.S. at 310; see Mossman, *supra* note 3, at 261; Shin, *supra* note 3, at 477.

219. *Atkins*, 536 U.S. at 319; see Klein, *supra* note 3, at 1219–28; Ryan & Berson, *supra* note 3, at 357–58; Slobogin, *supra* note 3, at 1140; Shin, *supra* note 3, at 480–81.

220. *Atkins*, 536 U.S. at 317, 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)); see Mossman, *supra* note 3, at 262–63; Ryan & Berson, *supra* note 3, at 357–58; Slobogin, *supra* note 3, at 1140; Shin, *supra* note 3, at 478–81.

First, the Court determined that objective indicia of contemporary values and societal mores reflected a discomfort with and intolerance for the execution of the mentally retarded.<sup>221</sup> The Court found that, in the years since *Penry v. Lynaugh*, a national consensus had developed based on the actions of legislatures that “unquestionably reflect[ed] widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.”<sup>222</sup>

After determining that the objective evidence indicated that there was a national consensus against the imposition of the death penalty on the mentally retarded, the Court moved onto the second step of the analysis and examined the issue using its own independent judgment.<sup>223</sup> It examined the penological goals of the death penalty and found that neither deterrence nor retribution was advanced by executing the mentally retarded.<sup>224</sup> The Court held that the retributive purpose of the death penalty was not served because, if execution was an improper punishment for the average offender, it was most certainly improper in the case of a mentally retarded person.<sup>225</sup> The Court also reasoned that the deterrent purposes of the death penalty were not advanced because it is “less likely that [the mentally retarded] can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”<sup>226</sup>

The Court also assessed how the characteristics of mental retardation served as mitigating factors and found that the mentally retarded “by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”<sup>227</sup> In addition, the Court found that there was an unacceptable risk that evidence of mental retardation presented in mitigation could be construed by a sentencer as a factor in aggravation in spite of the fact that it should call for a penalty less severe than death.<sup>228</sup>

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221. See *Atkins*, 536 U.S. at 313–17; Mossman, *supra* note 3, at 262; Shin, *supra* note 3, at 478–80.

222. *Atkins*, 536 U.S. at 317; see Mossman, *supra* note 3, at 262–63; Shin, *supra* note 3, at 478–80.

223. See *Atkins*, 536 U.S. at 317–21; Shin, *supra* note 3, at 480–81.

224. See *Atkins*, 536 U.S. at 318–20; Slobogin, *supra* note 3, at 1140; Shin, *supra* note 3, at 480–81.

225. See *Atkins*, 536 U.S. at 319; Slobogin, *supra* note 3, at 1140; Shin, *supra* note 3, at 480.

226. See *Atkins*, 536 U.S. at 320; Slobogin, *supra* note 3, at 1140; Shin, *supra* note 3, at 480.

227. *Atkins*, 536 U.S. at 18; see Klein, *supra* note 3, at 1223–28; Mossman, *supra* note 3, at 262; Slobogin, *supra* note 3, at 1140; Shin, *supra* note 3, at 480.

228. See *Atkins*, 536 U.S. at 320–21; Shin, *supra* note 3, at 481.

## 2. Defining a Categorical Exclusion for Juveniles in *Roper v. Simmons*

Christopher Simmons was a seventeen-year-old junior in high school when he murdered Shirley Crook by kidnapping her, tying her up, and throwing her from a bridge so that she would drown.<sup>229</sup> In the Missouri state courts, he was tried as an adult and sentenced to death.<sup>230</sup> Subsequent to being denied postconviction relief in both state and federal courts, the U.S. Supreme Court issued its decision in *Atkins*, holding that the mentally retarded could not be sentenced to death.<sup>231</sup> Simmons then sought relief from the Missouri Supreme Court, “arguing that the reasoning of *Atkins* established that the Eighth Amendment prohibits the execution of a juvenile who was under eighteen when the crime was committed.”<sup>232</sup> The Missouri Supreme Court agreed with his rationale and set aside the death sentence.<sup>233</sup> The state appealed, and the Supreme Court granted certiorari.<sup>234</sup>

In *Roper v. Simmons*, the U.S. Supreme Court held that juveniles should not be subject to execution because their “objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”<sup>235</sup> The Court held that juveniles were entitled to a categorical exclusion from the death penalty because objective indicia provide evidence that juveniles are categorically less culpable than the average criminal; the penological goals of the death penalty regarding deterrence and retribution are not served by executing juveniles; the characteristics of being a juvenile have mitigating qualities; and there is an unacceptable risk of a sentencer disregarding mitigating arguments based on youth and imposing the death penalty where a sentence less severe than death is appropriate.<sup>236</sup>

In seeking to determine whether or not there was a national consensus against the execution of juveniles, the Court recognized that there was a consensus, but there was no clear objective evidence of legislative action by the states as there was in *Atkins*.<sup>237</sup> Lacking clear evidence of legislative action, the Court instead recognized a “trend toward abolition of the juvenile death penalty [that] carries special force in light of the general popularity of anticrime legislation” in the nation’s state legislatures.<sup>238</sup> This national consensus, the Court claimed, could be observed in “the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even

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229. *Roper v. Simmons*, 543 U.S. 551, 556–57 (2005); Shin, *supra* note 3, at 482.

230. *Roper*, 543 U.S. at 557–58; Shin, *supra* note 3, at 482–83.

231. *Roper*, 543 U.S. at 559.

232. *Id.*; see Shin, *supra* note 3, at 482–83.

233. *Roper*, 543 U.S. at 559–60; Shin, *supra* note 3, at 483.

234. *Roper*, 543 U.S. at 560.

235. *Id.* at 573; Shin, *supra* note 3, at 484–87.

236. See *Roper*, 543 U.S. at 566–75; Klein, *supra* note 3, at 1228–29; Slobogin, *supra* note 3, at 1140; Shin, *supra* note 3, at 484–87.

237. See *Roper*, 543 U.S. at 564–67; Klein, *supra* note 3, at 1228.

238. *Roper*, 543 U.S. at 566; see Shin, *supra* note 3, at 484–85.

where it remains on the books; and the consistency in the trend toward abolition of the practice.”<sup>239</sup>

When the Court applied its own independent judgment in *Roper*, it came to conclusions that were similar to those it reached in *Atkins*.<sup>240</sup> The Court found that the retributive goals of the death penalty were not advanced by executing juveniles because the most severe penalty under the law should not be “imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”<sup>241</sup> The Court also found that the deterrent purposes of the death penalty were not served by executing juveniles because “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”<sup>242</sup>

Additionally, the Court examined how the characteristics of juveniles served as mitigating factors and found that “[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”<sup>243</sup> Specifically, the Court found that (1) juveniles “lack . . . maturity and [have] an underdeveloped sense of responsibility” that often results “in impetuous and ill-considered actions and decisions”;<sup>244</sup> (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”;<sup>245</sup> and (3) “the character of a juvenile is not as well formed as that of an adult.”<sup>246</sup> Based on these mitigating factors, the Court reasoned that a juvenile should never be characterized as among the worst offenders because the factors indicate that juveniles may “be forgiven for failing to escape negative influences in their whole environment,” juveniles are still developing their character and may not be irretrievably depraved, and there is a greater possibility “that a minor’s character deficiencies will be reformed” as compared to an adult offender.<sup>247</sup>

Finally, the Court found that there was an unacceptable risk that a sentencer would disregard mitigating arguments based on youth and impose the death penalty.<sup>248</sup> In recognizing that individualized consideration of mitigating circumstances was not enough to prevent juveniles from being sentenced to death, the Court found “that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective

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239. *Roper*, 543 U.S. at 567; see Shin, *supra* note 3, at 484–85.

240. See *Roper*, 543 U.S. at 568–79; Klein, *supra* note 3, at 1228.

241. *Roper*, 543 U.S. at 571; see Slobogin, *supra* note 3, at 1140; Shin, *supra* note 3, at 486.

242. *Roper*, 543 U.S. at 571; Shin, *supra* note 3, at 486 (quoting *Roper*, 543 U.S. at 571).

243. See *Roper*, 543 U.S. at 569; Shin, *supra* note 3, at 485.

244. *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted).

245. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)); Shin, *supra* note 3, at 485 (quoting *Roper*, 543 U.S. at 569).

246. See *Roper*, 543 U.S. at 569–70; Shin, *supra* note 3, at 485–86.

247. *Roper*, 543 U.S. at 570; see Shin, *supra* note 3, at 485–86.

248. See *Roper*, 543 U.S. at 572–73; Shin, *supra* note 3, at 486.

immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”<sup>249</sup>

### C. *Narrow Categorical Exclusion for Certain Combat Veterans*

Based on the rationales of *Atkins* and *Roper*, there should be a narrow categorical exclusion for combat veterans who were suffering at the time of their offense from service-related PTSD or TBI. This categorical exclusion would reflect the national consensus that has developed regarding the impropriety of putting to death this class of offenders; recognize that the penological goals of the death penalty are not served by executing these offenders; acknowledge the significant mitigating nature of PTSD and TBI in combat veterans who have also been trained to kill by the government; and address the unacceptable risk that a sentencer could disregard mitigating evidence of military training, PTSD, and TBI to impose a death sentence where it is unwarranted. Such a categorical exclusion will not excuse the actions of those who commit capital offenses, but will merely limit their punishment to a term of years or life imprisonment without the possibility of parole.

#### 1. Defining the Proposed Categorical Exclusion

Some critics of categorical exclusions point to definitional difficulties in opposing the creation of classes of offenders that are exempt from the death penalty as a matter of law.<sup>250</sup> A categorical exclusion for combat veterans with service-related PTSD or TBI would pose some definitional problems, but it is possible to clearly define the requirements for who should and should not be included in the proposed class.

First, one meets the criteria for being a combat veteran only if he or she has taken fire from or fired at an enemy force while serving in the armed forces.<sup>251</sup> Enemy fire should include both direct fire, such as bullets from rifles and pistols, and indirect fire, such as mortars, rockets, and artillery.<sup>252</sup> As with mental retardation, the burden of proving this point should be on

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249. *Roper*, 543 U.S. at 573; see Shin, *supra* note 3, at 486.

250. See Ryan & Berson, *supra* note 3, at 355.

251. See U.S. DEP'T OF THE NAVY, SECRETARY OF THE NAVY INSTRUCTION NO. 1650.1G, NAVY AND MARINE CORPS AWARDS MANUAL 2-27 to 2-29 (2002); Monique Randolph, *Airmen Receive First AF Combat Action Medals*, AIR FORCE LINK, June 12, 2007, <http://www.af.mil/news/story.asp?id=123056767>; U.S. Army, *Combat Action Badge*, [http://www.army.mil/symbols/combatbadges/Action.html?story\\_id\\_key=7285](http://www.army.mil/symbols/combatbadges/Action.html?story_id_key=7285) (last visited Mar. 31, 2009).

252. See Randolph, *supra* note 251 (describing the creation of the Air Force Combat Action Medal, which was “created to recognize Air Force members who were engaged in air or ground combat off base in a combat zone. . . . [or] were under direct and hostile fire, or who personally engaged hostile forces with direct and lethal fire”); U.S. Army, *supra* note 251 (specifying that soldiers are eligible for a combat action badge if they have “perform[ed] assigned duties in an area where hostile fire pay or imminent danger pay is authorized”). See generally U.S. DEP'T OF THE NAVY, *supra* note 251 (describing active engagement of fire as a requirement to receiving certain award medals and honors).

the person attempting to assert that they are part of the proposed class.<sup>253</sup> Military records, eyewitness testimony, and news reports could all be relied upon by a combat veteran to establish that one was exposed to enemy fire or took part in shooting at the enemy.

Second, it would be required that a combat veteran be suffering from a diagnosis of PTSD or TBI at the time of his or her offense.<sup>254</sup> The defense would have the burden of proving that a combat veteran was suffering from PTSD or TBI at the time of the offense.<sup>255</sup> Additionally, any prior or forensic diagnosis of PTSD or TBI should be based on a medical evaluation using the DSM criteria for PTSD and the diagnostic criteria accepted within the medical community for determining the existence of a TBI.<sup>256</sup>

Finally, for a diagnosis of PTSD or TBI to be considered service-related, some aspect of military service must be the primary cause of the injury in the opinion of a medical expert.<sup>257</sup> There can be preexisting or other causal factors at play in a diagnosis of PTSD or TBI.<sup>258</sup> But, for it to be considered service-related where there are other causes, the medical expert examining and diagnosing the combat veteran must find that the primary cause of the PTSD or TBI is related to military service.<sup>259</sup> This determination is not difficult to make, and the current U.S. Department of Veterans Affairs disability rating process already provides an existing method that may easily be adopted by the courts.<sup>260</sup>

## 2. Objective Evidence of Contemporary Values and Societal Mores

Objective indicia of societal mores and contemporary values support the adoption of a categorical exclusion from the death penalty for combat veterans who commit capital crimes while suffering from service-related PTSD or TBI. Much like the situation in *Roper v. Simmons*, where there was a lack of explicit legislative action with regard to executing juveniles,

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253. See *supra* note 180 and accompanying text.

254. See *supra* Part II.B–C (defining and discussing PTSD and TBI).

255. See *supra* Part II.B–C (discussing diagnoses for PTSD and TBI). It is important that one allow for a forensic diagnosis in light of the fact that there are barriers to care and a stigma attached to seeking out mental health issues as a result of military service. See Hoge et al., *supra* note 13, at 13 (“Our findings indicate that among the study groups there was a significant risk of mental health problems and that the subjects reported important barriers to receiving mental health services, particularly the perception of stigma among those most in need of such care.”).

256. See *supra* Part II.B–C.

257. See U.S. Dep’t of Veterans Affairs, VA Health Care Eligibility & Enrollment, <http://www.va.gov/healtheligibility/Library/Glossary/#s> (last visited Mar. 31, 2009) (“Generally a service-connected disability is a disability that VA determines was incurred or aggravated while on active duty in the military and in the line of duty. A service-connected rating is an official ruling by VA that your illness/condition is directly related to your active military service. Service-connected ratings are established by VA Regional Offices located throughout the country.”).

258. See *supra* Part II.B–C.

259. See *supra* note 257.

260. See *supra* note 257.

there is little evidence regarding executing combat veterans in the expression of the country's legislatures.<sup>261</sup> However, there is a trend evidenced in the actions of at least three state legislatures—California, Minnesota, and Connecticut—and four cities—Anchorage, Alaska; Tulsa, Oklahoma; Edwardsville, Illinois; and Buffalo, New York—in treating combat veterans differently when they commit crimes through diversion programs and “veterans courts” that recognize their diminished culpability relative to the average offender.<sup>262</sup> Two other states, Massachusetts and New Hampshire, have initiated community-based programs to deal with veterans with PTSD in the criminal justice system.<sup>263</sup> These legislative actions are important and carry “special force in light of the general popularity of anticrime legislation.”<sup>264</sup>

Public opinion and legislative action in support of veterans who suffer from PTSD and TBI also present objective evidence of a national consensus that supports recognizing combat veterans as a distinct and unique group worthy of special treatment by the government and under the law.<sup>265</sup> From magnetic yellow ribbons on cars to broad campaign promises to take care of our veterans, it appears that popular sentiment backing those combat veterans who have served in Iraq and Afghanistan favors helping them with any service-related injuries they may have incurred.<sup>266</sup> This sentiment

261. See *supra* notes 237–39 and accompanying text.

262. See Sontag & Alvarez, *Combat Trauma*, *supra* note 20; Ruben Rosario, *Talk Doesn't Mean Action for Vets*, PIONEER PRESS (St. Paul, Minn.), Apr. 27, 2008, at B1; *Alaskan City Establishes Diversion Court for Veterans*, JOIN TOGETHER, July 15, 2004, <http://www.jointogether.org/news/headlines/inthenews/2004/alaskan-city-establishes-for.html>; *Conn. Bill Creates Criminal Docket for Vets*, MARINE CORPS TIMES, Feb. 23, 2009, [http://www.marinecorpstimes.com/news/2009/02/ap\\_ct\\_vets\\_court\\_022209/](http://www.marinecorpstimes.com/news/2009/02/ap_ct_vets_court_022209/); Shanna McCord, *Boulder Creek Woman Speaks on National Veterans Panel*, SANTA CRUZ SENTINEL, Oct. 31, 2008, <http://www.scsextra.com/story.php?sid=80753&storySection=Local&fromSearch=true&searchTerms> (discussing the California Assembly Bill 2586, which provides for alternative sentences for veterans involved in drug, alcohol, and other minor offenses); Michelle Rabinowitz & Sway Calloway, *Veterans Fight for an Alternative Justice System that Takes Their Trauma into Account: Former Marines in Oklahoma Help Set Up a System to Provide Treatment for Vets Arrested for Drug- and Alcohol-Related Crimes*, MTV.COM, Oct. 23, 2008, <http://www.mtv.com/news/articles/1597696/20081022/story.jhtml>; Jim Suhr, *Another Veterans-Only Court Established*, MARINE CORPS TIMES, Jan. 12, 2009, [http://www.marinecorpstimes.com/news/2009/01/ap\\_veterans\\_court\\_011209/](http://www.marinecorpstimes.com/news/2009/01/ap_veterans_court_011209/); Beth Walton, *Crime and PTSD: Pending Legislation Would Help Veterans Get Treatment Instead of Prison Time*, CITYPAGES, Mar. 26, 2008, <http://www.citypages.com/2008-03-26/feature/crime-and-ptsd/>. El Paso County, Colorado; Waupaca County, Wisconsin; and Rock County, Wisconsin also have plans to launch veterans courts in the summer of 2009. See Dan Wilson, *Vets Get Attention from Courts*, POST-CRESCENT (Wis.), Feb. 23, 2009, at A3; Susan Davies, *Troop-Related Felonies Expected to Increase*, KOAA.COM, Feb. 5, 2009, [http://www.koa.com/aaaa\\_top\\_stories/x407184412/Troop-related-felonies-expected-to-increase](http://www.koa.com/aaaa_top_stories/x407184412/Troop-related-felonies-expected-to-increase).

263. Bowe, *supra* note 13, at 33–34.

264. See *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)).

265. See Shin, *supra* note 3, at 494–96, 502–04.

266. See, e.g., Matthew J. Friedman, Editorial, *Acknowledging the Psychiatric Cost of War*, 351 NEW ENG. J. MED. 75, 76 (2004) (“Americans no longer confuse war with the warrior; those returning from Iraq or Afghanistan enjoy national support, despite sharp

indicates that a significant number of Americans would support, or at least tolerate, a narrow categorical exclusion from the death penalty for combat veterans who committed a capital offense while suffering from service-related PTSD or TBI.

The opinions of professional organizations also serve as objective indicia that there should be a categorical exclusion for combat veterans who were suffering from service-related PTSD or TBI at the time of their offenses.<sup>267</sup> The ABA recommendations from August 2006 clearly support extending a categorical exclusion to this class of combat veterans.<sup>268</sup> Additionally, the ABA recommendations have also been endorsed by the American Psychiatric Association, the American Psychological Association, and the National Alliance of the Mentally Ill.<sup>269</sup> The support of these professional organizations indicates that there is a national consensus behind treating combat veterans with service-related PTSD or TBI differently under the law and recognizing that they have diminished culpability relative to the average offender.<sup>270</sup>

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political disagreement about the war itself.”); Rosario, *supra* note 262; Sontag & Alvarez, *Combat Trauma*, *supra* note 20; Press Release, Office of the White House Press Sec’y, Fact Sheet: President Bush Has Provided Unprecedented Support for Our Veterans (Nov. 7, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081107-5.html> (“We have a moral obligation to provide the best possible care and treatment to the men and women who have served our country.” (quoting President George W. Bush)); Press Release, Pew Research Ctr. for the People & the Press, A Year After the Walter Reed Scandal: Public Continues to Fault Government for Troop Care (Mar. 19, 2008), available at <http://people-press.org/reports/pdf/404.pdf> (“A year after the problems at Walter Reed Army Medical Center and other military hospitals made major news, the public remains highly critical of the government’s performance in supporting and caring for soldiers who have returned from Iraq and Afghanistan.”); *Americans Believe Wounded Iraq War Veterans Are Not Receiving High Quality Medical Care When They Return to the U.S.*, HARRIS INTERACTIVE, May 25, 2008, <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1309> (“This new research is consistent with research we recently conducted with the American Psychiatric Association that found that citizens of all types and political leanings, service men and women, and their families alike do not believe veterans are able to access and receive the best mental healthcare possible here in the United States.” (quoting Humphrey Taylor, chairman of *The Harris Poll*)); Jeffrey M. Jones, *Eight in 10 Say Leaders Pay Too Little Attention to Veterans*, GALLUP, Apr. 25, 2007, <http://www.gallup.com/poll/27310/Eight-Say-Leaders-Pay-Too-Little-Attention-Veterans.aspx> (“Eighty-one percent of Americans say government leaders pay too little attention to the needs of military veterans, according to the March 26–29 poll.”); Kevin Maurer, *Mind Training Helps with Combat, Then PTSD*, MARINE CORPS TIMES, Oct. 8, 2008, [http://www.marinecorpstimes.com/news/2008/10/ap\\_warriormind\\_100708/](http://www.marinecorpstimes.com/news/2008/10/ap_warriormind_100708/) (“‘At the end of the day, a yellow ribbon bumper sticker is not going to cut it’ . . . . ‘If this [PTSD treatment] is something that will help some of our soldiers, we should do it.’” (quoting Sarah Ernst, senior Warrior Mind instructor for the Warrior Mind Training program at Camp Lejeune, North Carolina)); Lydia Saad, *Americans Respect the Military, Honor Veterans*, GALLUP, Nov. 11, 2002, <http://www.gallup.com/poll/7177/Americans-Respect-Military-Honor-Veterans.aspx> (“Nearly three-quarters (73%) of veterans say they have received the respect and thanks [they] deserve for serving in the armed forces.” (alteration in original) (internal quotation marks omitted)).

267. See *supra* Parts II.B–C, III.A; *supra* note 210 and accompanying text.

268. See ABA Report, *supra* note 3, at 668.

269. *Id.*

270. See *id.*; *supra* notes 210–11 and accompanying text.

Perhaps the best objective indicia of societal mores is reflected in the cases that have come up regarding combat veterans who have faced trial for capital crimes.<sup>271</sup> While it is likely too early to say that the sentencing data reflects an undeniable trend, sentencing judges do seem to be giving combat veterans lesser sentences in certain cases in recognition of their reduced culpability relative to the average offender.<sup>272</sup> For example, the recent study of 121 unlawful killings in the United States involving combat veterans of Iraq or Afghanistan as defendants or perpetrators indicates that the courts have shown some degree of leniency in a number of cases.<sup>273</sup> Comments from the bench, and even from prosecutors, may indicate a trend in showing leniency during sentencing and compassion for those combat veterans who were suffering from PTSD or TBI at the time of their offense.<sup>274</sup>

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271. See *The Cases*, *supra* note 20.

272. For example, Cody Morris, a veteran suffering from PTSD, shot and killed someone at a house party after returning from Iraq two weeks earlier. See Shelly Byrne, *Probation Considered for Carlisle Veteran: Cody Morris Was Sentenced in July in the Death of His Friend Casey Hall*, PADUCAH SUN (Ky.), Nov. 2, 2008, at 1A, available at <http://www.tmcnet.com/usubmit/2008/11/02/3753455.htm> ("The jury considered murder and manslaughter charges, but ultimately decided he was guilty of the lesser charge of reckless homicide."); see also Sontag & Alvarez, *Combat Trauma*, *supra* note 20; *The Cases*, *supra* note 20.

273. After claiming that his gun went off accidentally and killed a neighbor, Kenneth Baginski received a reduced sentence as a result of plea negotiations that took into account his combat injuries and combat stress. See *The Cases*, *supra* note 20. Michael Hulett's lawyer believed "the judge gave [him] a break on what could have been a more severe sentence for first-degree murder 'because he was a 19-year-old with an Iraq background.'" *Id.* Michael Kempton, Jr., was given a lighter sentence for a charge of drunken vehicular homicide due to his service in Iraq. See *id.* Anthony Klecker was sentenced to less than a year in jail for the drunken vehicular homicide of a 16-year-old cheerleader while he was suffering from PTSD and self-medicating with heavy alcohol usage. See *id.* David Murphy was sentenced to probation for the drunken vehicular homicide of two newlyweds in Texas that occurred soon after his return from Iraq. See *id.* Matthew Sepi had a murder charge and an attempted murder charge against him dismissed by a Las Vegas court "after he successfully completed two Veterans Affairs treatment programs, one for substance abuse and another for post-traumatic stress disorder." *Id.* Walter Smith killed his girlfriend and mother of his twin children after being discharged from the U.S. Marine Corps due to PTSD and was only sentenced to one to fifteen years in prison after pleading guilty to manslaughter. See *id.* Jared Terrasas was allowed to plead guilty to felony child endangerment instead of murder in the death of his infant son after his return from Iraq. See *id.* After deploying twice to Iraq and having previously pleaded no contest to felony child abuse, Jessie Ullom's son died, and he subsequently pleaded no contest to a charge of involuntary manslaughter, was placed on probation, and received an honorable discharge from the U.S. Army. See *id.*

274. See Deborah Sontag, *An Iraq Veteran's Descent; a Prosecutor's Hard Choice*, N.Y. TIMES, Jan. 20, 2008, at A1 ("We looked at this case and said, 'When he presents to a jury that he served his country like his country asked him to serve, and even his country admits, with his discharge and his disability pay, that he has severe psychological trauma'—we felt there was a very good chance that the members of a jury would find him not guilty and basically punish the government for the position he's in."); Sontag & Alvarez, *Combat Trauma*, *supra* note 20 ("I see these stickers that people have on their vehicles saying, 'Support the troops.' . . . I don't see much support for the troops as years go on when these people come back injured and maimed.") (quoting Judge Charles B. Kornmann, before he

### 3. Applying the Court's Own Judgment to the Proposed Categorical Exclusion

While these objective indicia of national consensus reflect broad support for treating combat veterans who were suffering from service-related PTSD or TBI at the time of their crimes differently under the law, the Supreme Court will be required to apply its own independent judgment to determine “whether the death penalty is a disproportionate punishment for [a class of offenders].”<sup>275</sup> The application of the Court’s own independent judgment should lead to conclusions that are similar to those of *Atkins v. Virginia* and *Roper v. Simmons*.<sup>276</sup>

In applying its own judgment and considering subjective factors, the Court will find that the penological goals of the death penalty are not served by executing these offenders on many of the same grounds discussed regarding the mentally retarded in *Atkins*.<sup>277</sup> The retributive purpose of the death penalty is not served by executing anyone in this proposed class of offenders because the diminished culpability of one suffering from PTSD or TBI certainly does not warrant a death sentence “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State.”<sup>278</sup> The deterrent goals of the death penalty are not furthered by executing the proposed category of combat veterans because, as a result of the judgment-impairing effects of PTSD and TBI at the time of their crime, it will be “less likely that they [could] process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”<sup>279</sup>

The Court, in exercising its own independent judgment, should also undertake an examination of the mitigating characteristics of PTSD and TBI in combat veterans.<sup>280</sup> By conducting the same sort of examination that it did in *Atkins* and *Roper*, the Court should find that both PTSD and TBI symptoms significantly affect judgment so as to render combat veterans suffering from those conditions similar to, if not less culpable than, the mentally retarded and juveniles. The symptoms of PTSD and TBI are similar to mental retardation and juvenile status insofar as the ability to appreciate the wrongfulness of one’s conduct and to conform one’s conduct to the requirements of the law is significantly diminished. The Court should also examine the role that government-sponsored military training plays in diminishing culpability in combat veterans, especially those with PTSD or TBI, to find further support for a categorical exclusion.

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sentenced James Allen Gregg, who was found guilty of second-degree murder for a killing committed while suffering from PTSD)); *The Cases*, *supra* note 20.

275. *Roper v. Simmons*, 543 U.S. 551, 564 (2005); *see Atkins v. Virginia*, 536 U.S. 304, 318–21 (2002); *supra* Parts II.B–C, III.A; *supra* notes 212–14 and accompanying text.

276. *See supra* Part III.B.1–2.

277. *See supra* Part III.B.1.

278. *Atkins*, 536 U.S. at 319; *see supra* Parts II.B–C, III.B.1.

279. *Atkins*, 536 U.S. at 320.

280. *See supra* Part II.B–C (describing the mitigating effects of PTSD and TBI).

Perhaps most importantly, the Court could likely address the unacceptable risk that a sentencer could disregard mitigating evidence of military training, PTSD, or TBI offered by a combat veteran who committed a crime while suffering from service-related PTSD or TBI to impose a death sentence where it is unwarranted. In assessing the degree of risk that a sentencer might undervalue or disregard this type of mitigating evidence, the Court should consider the declining representation of veterans in the community, in the judiciary, in Congress, and in society as a whole.<sup>281</sup> Fewer veterans means fewer on the bench and fewer in the jury box who have a meaningful understanding of what sacrifices these people made in combat and what they have been exposed to in combat.<sup>282</sup> Another consideration the Court could examine is the considerable risk, already evidenced by some comments from prosecutors and judges,<sup>283</sup> that a sentencer might treat this evidence of stress disorder or brain injury as aggravating evidence, seeing a heightened risk to society of permitting a "crazy, government-trained killer" to live. Should it consider these factors, the Court will probably conclude that combat veterans who commit capital crimes, but were also suffering from PTSD or TBI at the time of their offenses, should be spared the death penalty because of the unacceptable "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"<sup>284</sup>

Lastly, the Court should consider the more fundamental question of whether the government should be in the business of putting to death the volunteers they have trained, sent to war, and broken in the process.<sup>285</sup> The Court should find that it is unconscionable for the government to sentence soldiers and veterans to death for criminal actions that would likely not have happened but for their military service.

When a combat veteran with service-related PTSD or TBI commits a capital crime, it is a unique circumstance that requires sparing them from the hand of the executioner. No one ever deserves a "free pass" for killing another person,<sup>286</sup> but crafting a categorical exclusion to recognize the mitigating nature of PTSD and TBI is the least that the government can do

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281. See Michael S. Woodson, Soldiers for the Truth, *SFTT Special Report: A Combat Vet Needed for the Supreme Court*, DEFENSEWATCH, July 12, 2005, <http://www.sftt.org/cgi-bin/csNews/csNews.cgi?command=viewone&id=19&database=DefenseWatch%202005%20A.db>; Military Officers Association of America, Declining Military Experience in Congress, [http://www.moaa.org/lac/lac\\_resources/lac\\_resources\\_tips/lac\\_resources\\_tips\\_decline.htm](http://www.moaa.org/lac/lac_resources/lac_resources_tips/lac_resources_tips_decline.htm) (last visited Mar. 31, 2009); U.S. Census Bureau, People: Veterans, [http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?\\_pageId=tp12\\_veterans](http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=tp12_veterans) (last visited Mar. 31, 2009).

282. See Woodson, *supra* note 281; Military Officers Assoc. of Am., *supra* note 281; U.S. Census Bureau, *supra* note 281.

283. See Sontag & Alvarez, *Combat Trauma*, *supra* note 20; *The Cases*, *supra* note 20.

284. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

285. See, e.g., Grant, *supra* note 36, at 271; Tabak, *supra* note 3, at 299–300 (discussing case of Vietnam veteran George Franklin Page on North Carolina's death row for killing during a manic flashback episode).

286. Sontag & Alvarez, *Combat Trauma*, *supra* note 20.

to account for the psychological wounds that have, in effect, been caused by service to the nation.<sup>287</sup> Such a categorical exclusion will prevent a sentencer from construing these factors as aggravating to impose the death penalty where it is unwarranted.<sup>288</sup>

#### CONCLUSION

Because the existence of service-related PTSD or TBI in combat veterans reduces personal culpability, these veterans cannot be regarded as “among the worst offenders” and should not be subject to the ultimate sentence. Presenting PTSD, TBI, and military training evidence to a sentencer during the sentencing phase of a capital trial represents one way to avoid subjecting combat veterans to the death penalty. Because the characteristics of PTSD and TBI are similar to those of minors and the mentally retarded that merit a categorical exclusion from the death penalty for those classes, an exclusion for combat veterans suffering from PTSD or TBI at the time of their offenses must be created by legislatures or the courts to ensure that only the worst offenders receive their “just deserts” and are put to death.

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287. See *id.*; *supra* notes 11–19 (describing the “[i]nvisible [w]ounds of [w]ar” that veterans suffer after returning from war).

288. See *supra* Part III.

## *Notes & Observations*