

Abstract

With increasing numbers of veterans returning to both the United States of America (US) and United Kingdom (UK) from recent wars in Afghanistan and Iraq who go on to commit offences, the question of whether their status as veterans, or for those to whom the diagnosis applies, veterans with post-traumatic stress disorder (PTSD) ought to affect their interactions with the criminal law is a pressing and timely one.

This thesis sets out to examine the position of war veterans with PTSD with respect to the criminal law, in general, and criminal responsibility, in particular. The question is how ought a liberal democratic state treat war veterans with PTSD who commit crimes as a result of their PTSD? This question is addressed in three steps. First, it examines the claim that war veterans are owed gratitude in some way or other and that this argument explains why war veterans ought to be in some special category of defendants. In light of this, second, the thesis then looks at whether war veterans with PTSD who commit crimes are able to offer a defence such as insanity, automatism, self-defence, and diminished responsibility. Third, and finally, it looks at whether war veterans with PTSD ought to be able to appeal for mitigation.

In addressing this question, the thesis draws on examples from the USA and England and on the philosophy of criminal law. The goal of this thesis is to present evidence, and clarification regarding philosophical issues of criminal responsibility with respect to veterans with PTSD to fill a gap in the literature.

9.2.2.4. VTCs in Action	320
9.2.2.5. Obstacles to Access to VTCs	324
9.2.2.6. Advantages and Disadvantages of VTCs	325
9.2.2.7. Conclusion	326
Chapter Ten: Conclusion and Recommendations	328
10.1. Summary of the Findings	328
10.2. Conclusion	329
10.3. Recommendations	335
10.3.1. Legal Communities	336
10.3.2. Medical Communities	338
10.4. Suggestions for Future Research	338
Abbreviations	341
References	342

List of Legislation

UK Legislation

- 1- Coroners and Justice Act 2009
- 2- Crime and Courts Act 2013
- 3- Criminal Damage Act 1971
- 4- Criminal Justice Act 2003
- 5- Criminal Justice and Immigration Act 2008
- 6- Criminal Law Act 1967
- 7- Homicide Act 1957

US Legislation

- 1- An act to amend Section 1170.9 of, and to add Section 1170.91 to, the Penal Code, relating to sentencing, California Legislature, Assembly Bill (2014) 2098
- 2- California Penal Code
- 3- Model Penal Code
- 4- Vet. Posttraumatic Stress/Mitigating Factor, General Assembly of North Carolina Bill (2017) 483

Author's Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, university. All sources are acknowledged as references.

These tensions were delineated in the trial of Vietnam veteran Eugene de Kock, where an expert pointed that the veteran was able to plan and control the events.²³³ Another expert witness, a criminologist ‘considered de Kock a first offender,’ and recommended therapeutic treatment (or therapeutic jurisprudence which means to treat/rehabilitate the offender to reach proper consequences) for de Kock in relation to his PTSD symptoms.²³⁴ Thus, the issue in regard to criminal responsibility for PTSD patients is whether or not it is fair to forego the interests of retributive justice for victims or to focus on rehabilitative justice for PTSD patients. The question is more controversial for veterans who arguably deserve some measure of protection and treatment due to the fact that their condition was caused in the course of service to their country.

How we treat returning veterans is important for encouraging these veterans to voluntarily submit to screening and treatment of PTSD. Usually, the appropriate diagnosis of PTSD for the crimes committed by veterans as a result of their mental illness is not carried out.²³⁵ The issue is usually extracted when they are subjected to the criminal justice system.²³⁶ Shein reports that the conditions under which returning Vietnam veterans were exposed to in the US contributed to their contraction of PTSD.²³⁷ In other words, due to their sacrificial and life threatening service, returning war veterans have “special circumstances” and should therefore receive “special treatment,” rather than being punished for exhibiting the symptoms of a mental disorder contracted while in service for their country (the reasons that veterans with PTSD should receive special treatment will be examined more fully in Chapter Four).

However, retributive justice has also been advocated. Retributive justice arguably requires that returning war veterans who commit crimes due to PTSD must face both

²³³ Nicholas and Coleridge (n189) 35.

²³⁴ *ibid* 33.

²³⁵ Gansel (n18) 158.

²³⁶ *ibid*.

²³⁷ Shein (n153) 43.

punishment and treatment if they are to be successfully integrated back into society.²³⁸ The civilian courts have vacillated between rehabilitative and retributive approaches.²³⁹ The retributive approach is desirable since civilians suffering from PTSD have also been exposed to serious trauma, and are no less susceptible to the disorder than returning war veterans. As noted by Jordan, Howe, Gelsomino, and Lockert, PTSD is not specific to war veterans.²⁴⁰

What distinguishes war veterans from civilians, however, is that military service is a voluntary risk taken on behalf of the state. The military does not consider the issue of PTSD as something unique and they also believe that the military forces are much more likely to suffer from this issue compared to civilians.²⁴¹ Soldiers go into war knowing that it is a frightening and traumatic experience, and that PTSD is a likely outcome since ‘PTSD is a debilitating condition that follows a terrifying event.’²⁴²

2.3.5. Use of PTSD in both the USA and England

This section helps to heighten awareness of when and how the US and England have come to accept and allow PTSD to be a medically and legally recognised condition. The number of cases that have used this form of defence in England are very few. However, the US has seen PTSD used as a legal defence in many criminal cases, including cases that have fallen under the jurisdiction of California State such as, *People v Lisnow* and *In re Nunez*.²⁴³

In the 1978 *People v Lisnow* case, the defendant appealed a conviction to the Superior Court of Los Angeles after the jury trial denied him due process of law, because it did not

²³⁸ Peyton Cooke, ‘Post-Traumatic Stress Disorder & the Military Justice System’ (2009) 79 Mississippi Law Journal 1.

²³⁹ *ibid* 33.

²⁴⁰ Harold W. Jordan and others, ‘Post-Traumatic Stress Disorder: A Psychiatric Defense’ (1986) 78 Journal of the National Medical Association 119, 120.

²⁴¹ Susan Stuart, ‘All Roads Lead from Vietnam to your Home Town: How Veterans have become Casualties of the War on Drugs’ (2013) Valparaiso University School of Law/Albany Government Law Review, 500
<http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1220&context=law_fac_pubs> accessed 21 July 2017.

²⁴² Timothy P. Hayes, ‘Post-Traumatic Stress Disorder on Trial’ (2006/2007) 190/191 Military Law Review 67, 72.

²⁴³ *In re Nunez* [2009] Cal Ct App 93 Cal Rptr 3d 242.

permit him to prove a defence of unconsciousness due to mental illness. The superior court agreed and reversed the judgment.²⁴⁴ Thus, the superior court accepted the use of PTSD as a legal defence in the criminal case.

According to a report by Shute in the Telegraph, the use of PTSD in criminal cases is increasingly being adopted in England, and was recently used in the case of Jonathan Dunne who had punched his victim. Dunne had been dismissed from the army because of PTSD after serving twice in Afghanistan. The court accepted his claim and he was spared prison sentence.²⁴⁵

In a similar case involving a war veteran, David James was convicted for stamping on a woman's head. He had been discharged from the army after developing PTSD while on duty as an army officer in Afghanistan.²⁴⁶ While delivering his decision, Judge Peter Heywood said that it was sad to see that criminal cases involving war veterans who have been affected by PTSD had become more regular, and suggested increased psychological help be offered to the members of the UK armed forces.²⁴⁷ Thus, the admission of PTSD as evidence in criminal cases in England depends significantly on other factors surrounding the case. For example, the defence in James's case argued that he could not directly link the PTSD events that the suspect had gone through in the battlefield with the crime that he committed. He was said to have resorted to drugs and alcohol, and that was the primary reason for committing the crime.²⁴⁸

In the case of John Hinckley in 1982, a jury in Washington declared that the suspect of the attempted assassination of President Ronald Reagan was not guilty, due to insanity.²⁴⁹

²⁴⁴ *People v Lisnow* (n206).

²⁴⁵ Joe Shute, 'Post-Traumatic Stress Disorder: the Bomb Waiting to Explode' (The Telegraph, 24 May 2014) <www.telegraph.co.uk/news/uknews/defence/10853636> accessed 16 November 2016.

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*

²⁴⁹ David W. Jones, *Disordered Personalities and Crime: An Analysis of the History of Moral Insanity* (Routledge 2016) 218.

Even though a majority of the population did not agree with that decision, the court reintroduced the debate of the use of insanity as legal defence in criminal cases.²⁵⁰ The pressure from the public after the verdict led to the introduction of law reforms, both in Congress and in various states, in order to guide the use of the insanity defence, and most made it more difficult to use insanity as a legal defence.²⁵¹ Therefore, the use of PTSD as a defence in criminal cases became indirectly strenuous in the US after the acquittal of Hinkley because of public outcry.

Friel, White, and Hull state that the use of PTSD has caused controversy in the US because of the subjective nature of the symptoms and the danger of malingering.²⁵² Hence, it is possible for suspects to fake PTSD in order to avoid responsibility for their criminal acts. Savla agrees with this argument and warns the courts in England to be aware of possible fraudulent and exaggerated use of PTSD as a legal defence for criminal acts.²⁵³ He argues that suspects can fake the symptoms of psychiatric conditions, and exploit legitimate variations in medical opinions.²⁵⁴

The US and England differ in the use of PTSD as evidence in criminal cases because the former has had more cases than the latter, particularly after the Vietnam War.²⁵⁵ Some states in the US have a defence known as “guilty but mentally ill” (GBMI), which acts as a compromise and recognises that the defendant is guilty although not mentally stable, and the court is left to decide on the most appropriate sentence.²⁵⁶ England does not have such a law,

²⁵⁰ *ibid.*

²⁵¹ Ellsworth Lapham Fersch, *Thinking about the Insanity Defense: Answers to Frequently Asked Questions with Case Examples* (New York Lincoln Shangai 2005) 193.

²⁵² Friel, White and Hull (n2) 68.

²⁵³ Sandeep Savla, ‘Criminal Law – Post-Traumatic Stress Disorder: the Legal View’ (1999) 18 *Amicus Curiae* 13, 15.

²⁵⁴ *ibid.*

²⁵⁵ Berger, McNiell and Binder (n165) 520.

²⁵⁶ Philip Carlan, Lisa S. Nored and Ragan A. Downey, *A Brief Introduction to Criminal Law* (2nd edn, Jones & Bartlett Learning 2016) 207.

although it could, of course, bring it in by legislation, especially at this time when cases involving war veterans suffering from PTSD are growing.

Generally speaking, it is possible to say that the application of PTSD as a defence in the US is much more established. In England, the issue of PTSD as a defence for the violent actions of veterans has not yet been properly addressed. PTSD raises several concerns among legal experts.²⁵⁷ Lawyers may argue that it is hard to prove insanity and persuade juries of such, because the main problem here is establishing the direct linkage between the committed crime and the PTSD of the client accused of the offence. With that, the breakthrough in the legislation of California in relation to PTSD should be noted (this is examined in Chapter Nine). In particular, in 1982 California required PTSD to be considered (where relevant) in decisions over the duration of non-violent crimes. In this regard, veterans should be provided with the opportunity to receive treatment for their PTSD.²⁵⁸

2.4. Conclusion

A review of the literature as analysed and reported in this chapter, reveals that war veterans with PTSD seem to have a particularly difficult time adjusting to civilian life upon returning from war. PTSD complicates what is already a very difficult readjustment experience. War veterans with PTSD have serious difficulties coping with their symptoms and adjusting to life at home with this condition, and as a result, many self-medicate with drugs and/or alcohol.

Thus, the fate of the untreated and undiagnosed war veteran with PTSD is uncertain. A review of the literature presented in this chapter demonstrates that PTSD is an especially significant criminal defence for the war veteran with PTSD, and therefore, establishes that

²⁵⁷ Bessel A. Van der Kolk, Alexander C. McFarlane and Lars Weisaeth, *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society* (Guilford Press 1996) 378.

²⁵⁸ Peter Erlinder, 'Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior' (1984) 25 *Boston College Law Review* 304, 339.

war veterans may fall into a special category of criminal defendants who deserve to be treated for war-related PTSD.

Chapter Three: Responsibility and Defences in Criminal Law

3.1. Introduction

Criminal responsibility refers to being accountable for one's criminal activities.²⁵⁹ Unless one is criminally responsible, one's punishment would not be justified, and therefore, ultimately, criminal responsibility is strictly a question of law.²⁶⁰ The question for consideration here is whether or not there are defences that may render the defendant unaccountable, and in turn, outside of the reach of criminal responsibility. The insanity defence comes to mind immediately because insanity can exonerate an offender based on his defective reasoning.²⁶¹ Yet, it is important to bear in mind that not all mental illnesses will form the basis of exoneration from criminal responsibility.²⁶² Still, there are times when mental illnesses may be used to provide a partial escape from criminal responsibility. For instance, the defendant may suffer from a mental/emotional disturbance that does not reach the degree of insanity, but may be such that it can act as a mitigating factor in sentencing.²⁶³

This chapter provides a detailed discussion of criminal responsibility, and in doing so, lays out the background for discussing and analysing the criminal responsibility of veterans with PTSD. In order to understand how this process works, this chapter focuses on explaining and describing the concept of the normal person (or reasonable man). This concept serves as a foundation upon which all defences available in criminal law to justify, excuse, mitigate, or aggravate criminal behaviour are anchored. Thus, the question to be asked is – would a normal person behave in the way that the accused has behaved under the same

²⁵⁹ Keedy, 'Insanity and Criminal Responsibility' (1912) (n28) 523.

²⁶⁰ *ibid.*

²⁶¹ David M. Riggs, 'Mental Illness and Criminal Responsibility' (1968) 5 *Tulsa Law Journal* 171.

²⁶² Stephen J. Morse, 'Mental Disorder and Criminal Justice' (2018) *University of Pennsylvania Law School* 251, 257.

²⁶³ Stephen J. Morse, 'Mental Disorder and Criminal Law' (2011) 101 *Journal of Criminal Law and Criminology* 885, 887.

circumstances? However, this chapter also presents situations in which the test of a normal person obviously cannot be used in cases of persons suffering from some form of disability that renders normal functioning useless.

3.2. Nature of Criminal Law

This section addresses the nature of criminal law as a means of setting the stage for analysing how and why veterans with PTSD may have a suitable defence. Criminal law is defined as a set of limits and responses to behaviour with the intention of maintaining ‘public order and decency,’ and for protecting people ‘from what is offensive or injurious,’ and to establish protection against exploitive conduct.²⁶⁴ However, this applies to the regulation of people who are capable of acting responsibly in relation to certain kinds of conduct (non-responsible persons may be regulated by, for example, mental health acts and non-criminal conduct by other forms of control). According to criminal law, at least in its core offences, one must be able to freely choose between acting and not acting to incur responsibility, because criminal law starts out with the presumption that the individual has free choice. It is up to the offender to argue that he did not have free choice, or that he had no choice at all.

It is also important to note that criminal law is different from civil law, mainly because the complainant in criminal cases is the government, while the complainant in civil cases can be anyone from the government to individual citizens. To this end, limits are set in which a duty is imposed upon ordinary citizens to refrain from those activities that are properly criminalised. In fact, in England there are approximately 9,000 criminal offences.²⁶⁵ Offences are consistent with the communitarian argument which assumes that communities must set limits for achieving ‘moral homogeneity backed by a sense of intuitive outrage.’²⁶⁶

²⁶⁴ S. W. Stewart, *Modern View of the Criminal Law: Pergamon Modern Legal Outlines* (Oxford University Press 1969) 17.

²⁶⁵ Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019) 1.

²⁶⁶ Ronald Dworkin, ‘Liberal Community’ (1989) 77 *California Law Review* 479, 487.

The original goal of criminal law is to assist with the protection of society by punishing people who commit crimes. It manifests society's act of condemning those who have offended against its members, aside from ensuring that offenders are prevented from committing further acts that endanger public order. For conviction, it is important that the court is sure of the defendant's culpability.²⁶⁷ The defendant has to be blameworthy in order to be punished by the law, and the punishment should reflect the crime of which the defendant is found guilty.

It is expected that when individuals commit offences, they will be punished for their crimes, in accordance with criminal law. However, much goes into the appropriate punishment, and it is not merely confined to the response of the criminal act itself. The offender's own personal responsibility must be examined. Such an assessment will also include 'a review of the broad array of forces operating upon' him to determine the "extent" of his criminal responsibility.²⁶⁸

In other words, the commission of a crime is not enough by itself to establish criminal responsibility. The court looks inward to determine whether there were any internal factors operating that may negate the necessary *actus reus* or *mens rea*. The offender may have been acting in self-defence, based on a correct or misconceived perception that his life or property was in danger. Here the offender may have felt threatened and as though he had no choice, other than to strike out to protect himself. The offender may also have felt compelled to commit the crime under duress, and therefore did not act voluntarily. The offender may have been suffering from a mental disorder that left him with defective reasoning. Again, in these cases, the offender did not have the ability to rationalise or reason as to what he might or might not choose to do.

²⁶⁷ D. Justin Coates and Neal A. Tognazzini (eds), *Blame: Its Nature and Norms* (Oxford University Press 2013) 22.

²⁶⁸ Paul H. Robinson, *Distributive Principle of Criminal Law: Who Should Be Punished, How Much?* (Oxford University Press 2008) 138.

Ultimately, theories of liability take two positions which stand in opposition to one another. On the one hand, the first of these theories suggest that society is entitled to punish offenders due to the offender's "dangerousness or wickedness."²⁶⁹ On the other hand, criminal liability theories suggest that society is entitled to punish offenders because of the problems that they cause in society.²⁷⁰ In both cases, punishment may not be an option unless the information necessary for determining the degree of danger, or problems caused to society, is available.²⁷¹ In other words, liability theory relies on information that can be difficult to calculate and analyse, for example, an individual may commit a serious crime, but may not be a threat to society. There is no real way to accurately predict this outcome, therefore, in this regard, the liability theory fails.

3.3. Criminal Law's Conception of the Person as a Choosing Being who is Capable of Responding to Reasons

This section establishes the background (in theory) for arguing when and how a defence can be founded on a claim of PTSD by a war veteran. Rational choice theory forms a basis for justifying the formation and enforcement of criminal law. According to rational choice theory, individuals take action after deliberating over outcomes.²⁷² Ultimately, individuals only act when there is a pay off or to avoid unpleasant consequences.²⁷³ Thus, in accordance with rational choice theory, criminal law is intended to interrupt deliberative thinking about committing crimes, and therefore, an individual will think about the punishment for the crime, and, ideally, make the decision to not commit the crime after all.

In other words, the thought is that a rational human being will usually take the position that the commission of a crime will have unpleasant consequences, and will,

²⁶⁹ Lawrence Crocker, 'Justice in Criminal Liability: Decriminalizing Harmless Attempts' (1992) 53 Ohio State Law Journal 1057.

²⁷⁰ *ibid* 1058.

²⁷¹ *ibid* 1057-1058.

²⁷² Thomas S. Ulen, 'Rational Choice Theory in Law and Economics' (1999) Encyclopedia of Law and Economics 790, 791.

²⁷³ *ibid* 792.

therefore, decide not to commit the offence. The difficulty with this theory when applied to the criminal law is that one might assume that unless the punishment is particularly unpleasant to the individual, the crime defined by criminal law and its punishment will not deter criminal behaviour. Similarly, if the putative offender is of the opinion that he might get away with the crime, the putative offender might foresee greater pleasure, which will then outweigh the risk of unpleasant consequences.

Still, the theory of rational choice is tied to utility and deterrence theories which hold that human behaviour is predicated on rational choices.²⁷⁴ This means that the individual is more likely to be driven to act based on the likely consequences of his actions. Deterrence theory argues that the purpose of criminal law and of punishment is to deter criminal behaviour, because individuals will make the choice that involves lower costs and higher rewards.²⁷⁵

Rational choice theory obviously assumes that human beings are rational.²⁷⁶ The law, likewise, assumes that human beings will reason prior to taking action. Hence, the law tells us what we may and may not do, and what we are and are not entitled to.²⁷⁷ The law proceeds on the basis that individuals are capable of responding to reasons, otherwise rules and laws would be meaningless, as the law depends on compliance.²⁷⁸ At the same time, morality and responsibility are individualised, so that the decision to take any course of action is personal, albeit influenced by social environments at times.²⁷⁹

²⁷⁴ Ronald L. Akers, 'Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path not Taken' (1990) 81 *Journal of Criminal Law and Criminology* 653, 654.

²⁷⁵ *ibid.*

²⁷⁶ Glenn D. Walters, 'The Decision to Commit Crime: Rational or Nonrational?' (2015) 16 *Criminology, Criminal Justice Law & Society* 1.

²⁷⁷ Stephen J. Morse, 'Deprivation and Desert' in William C. Heffernan and John Kleinig (eds), *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford University Press 2000) 118.

²⁷⁸ *ibid.*

²⁷⁹ *ibid* 115.

The question is whether criminal behaviour is only ever carried out by non-rational or irrational human beings. It is difficult to come to this conclusion because individuals are guided by very different experiences, expectations and resources. What might amount to a greater degree of pain and pleasure for one individual may not be the same for another. Much will depend on the circumstances surrounding each individual, and so what might, therefore, appear to be an irrational or non-rational choice for one individual, will be an entirely rational choice for someone else under very different circumstances.

A good example is the wealthy human being who might end up in a jail cell if he makes the decision to steal food, when he can afford to pay for it, whereas, a poor or homeless person may feel that they really have nothing to lose. If they steal food and get caught, the worse that could happen is that they might end up with a warm bed for the night if they are locked up in a jail cell, and will even be fed. Getting away with the theft of food will not have a better pay off. In fact, they would end up with food, but would remain homeless. Thus, rational choice theory might explain why criminal law is created, but will not adequately explain how criminal law acts to achieve its purpose of securing law and order.

Ultimately, despite the fact that many human beings are driven by rational choices, the factors behind human behaviour most likely relate to the individual's own social and personal environment.²⁸⁰ Thus, rational choice theory alone does not explain criminal law, nor will rational choice theory alone explain why people decide to commit crimes, or not.

3.4. Legal Standards of Liability

Before we can analyse how and when a war veteran may succeed in a criminal defence based on war-related PTSD, it is necessary to understand what the legal standards are for founding liability. This section discusses the legal standards accordingly. The reasonable doubt doctrine originated from a criminal trial before the Old Bailey court in London in 1784.

²⁸⁰ Serdar Kenan Gul, 'An Evaluation of the Rational Choice Theory in Criminology' (2009) 4 Journal of Social and Applied Science 36, 37.

In this trial, Richard Corbett was on trial for arson (he was found not guilty). The presiding judge instructed the jury that if they had a “reasonable doubt,” it must be resolved “in favour of the prisoner.”²⁸¹ This standard of liability has transcended through the times, and is commonly referred to in Anglo-American criminal jurisprudence. Still, proof beyond a reasonable doubt (abbreviated to BRD) is prefaced by a degree of scepticism where the defendant must be presumed innocent until the reasonable doubt burden is discharged by the prosecutor.²⁸²

No individual shall be held criminally responsible unless, or until, he is adjudicated guilty BRD.²⁸³ BRD is a very high standard, and typically places a significantly onerous burden of proof on the prosecutor, unless the defendant decides to plead guilty.

The reason for this high standard is that prior to the administration of justice, the defendant’s guilt must be as certain as possible about the facts and evidence presented in court.²⁸⁴ It is important to note that the defendant’s punishment is captured by constitutional law where an individual shall not be deprived of life, liberty, or property without due process. Therefore, establishing the defendant’s guilt BRD goes hand in hand with these tenets of constitutional law and practice.

Based on the reasonable doubt standard, it can be concluded that unless an individual’s guilt is established BRD, he will not have to take criminal responsibility for his behaviour. What often makes this burden more difficult to discharge is that the reasonable doubt doctrine is usually coupled with the right to remain silent and the presumption of innocence. This means that the prosecutor begins a trial with the jury instructed to assume

²⁸¹ Thomas P. Gallanis, ‘Reasonable Doubt and the History of the Criminal Trial’ (2009) 76 University of Chicago Law Review 941.

²⁸² Henry L. Chambers, ‘Reasonable Certainty and Reasonable Doubt’ (1998) 81 Marquette Law Review 655, 656.

²⁸³ Doron Teichman, ‘Convicting with Reasonable Doubt: An Evidentiary Theory of Criminal Law’ (2017) 93 Notre Dame Law Review 757, 758.

²⁸⁴ Alec Walen, ‘Proof Beyond a Reasonable Doubt: A Balanced Retributive Account’ (2015) 76 Louisiana Law Review 355, 356-357.

that the defendant is innocent until such time as his guilt is proven BRD. In the meantime, the defendant does not have to say anything in his defence because the burden is on the prosecutor to prove the defendant's guilt (although the precise rules with respect to the right to silence depends on the legal rules of particular jurisdictions).

In criminal law, the normal person or reasonable man test was established to set a standard and understand how a person charged with the violation of the law has deviated from that standard.²⁸⁵ This is generally the purpose of standardised tests: to compare a specific person with a "norm," or an average of a group of persons – a principle that obviously finds universal application.

However, while trying to conceptualise the responsible subjects of criminal law, Lacey notes that the criminality of an act is directly relative to the laws governing a given jurisdiction, and also the importance of one being able to understand what one is doing just before committing the criminal act.²⁸⁶ Therefore, in the case where the defence is able to prove that the suspect has acted without an understanding of what they were about to do, this then means that the person is not criminally guilty.

According to Covlin, an individual who has been accused of a crime should only be gauged against standards that are within his grasp if the principle of criminal liability is to be followed.²⁸⁷ On the basis of that principle, a universal application of standards, thus, becomes unjust when a person against whom it is gauged is incapable of meeting those standards for, say, concentration or memory problems, among others. Therefore, the standards that are used to assess the culpability of one person ought not to be the same as those used to assess another unless they share characteristics, and the crimes they have committed are similar. It

²⁸⁵ Claire de Than and Russell Heaton, *Criminal Law* (4th edn, Oxford University Press 2013) 169.

²⁸⁶ Nicola Lacey, 'Socializing the Subject of Criminal Law? Criminal Responsibility and the Purposes of Criminalization' (2016) 99 *Marquette Law Review* 541-557.

is also in this context that the word “normal” should be considered with regard to the tendencies of the individual, compared to the rest of society.²⁸⁸

Duff brings up an important point in stating that criminal liability is often focused on the issues of causation. In particular liability rests on the harm caused and the actor’s responsibility for the harm. According to Duff, this is insufficient for finding criminal liability. The law should instead offer greater emphasis on ‘the way, the context and the spirit in which harm is done.’²⁸⁹

3.5. Concept of Criminal Responsibility

The notion of criminal responsibility is thus at the core of criminal law. This chapter, thus, extensively explains the concept, its usage and relevance in criminal law, the importance not only of the physical act involved, but also the state of mind of the person committing a criminal act. This chapter underscores the notion that criminal responsibility can be attached only when the person committing a criminal act has the pre-requisite state of mind capable not only of comprehending his actions, but also of controlling them.

The concept behind criminal responsibility rulings involves the differing mental states that are related to the crimes committed, while also considering the evaluations that determine the mental states that are related to these crimes, as well as to commonly associated legal defences.²⁹⁰ Criminal responsibility refers to the ability of an individual to understand his conduct at the time when a crime occurs or is committed.²⁹¹ It basically concerns a person’s manner of thinking when he commits a particular crime. For example, if

²⁸⁷ Eric Colvin, ‘Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility’ (2001) *Monash University Law Review* 1, 5.

²⁸⁸ Daniel Gardner, ‘Legal, Moral, Normal’ (The Clarion-Ledger, 6 July 2015) <<http://www.clarionledger.com/story/opinion/2015/07/06/lega-moral-normal/29765925/>> accessed 6 March 2017.

²⁸⁹ R. A. Duff, ‘Criminalizing Endangerment’ (2005) 65 *Louisiana Law Review* 941, 947.

²⁹⁰ Stephen J. Morse, ‘Brain and Blame’ (1996) 84 *Georgetown Law Journal* 527, 539.

²⁹¹ John Deigh, ‘Responsibility’ in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 195.

when the defendant killed person X, did he know that he was going to kill him? Did he plan to kill him? Also, did he know that he was killing X? A guilty or culpable mental state has an essential element in most so-called “core” crimes, such as assault and murder (so-called “strict liability” crimes do not require a particular mental state and, for that reason, are controversial).

As Duff puts it, the term “criminal responsibility” frequently invokes discussions of control and knowledge. For instance, if an individual walks down a hall and knocks over a vase and breaks it, he is not morally responsible, unless he was in a position to control the knocking over of the vase, and was aware that the actions he took would end with a broken vase, and proceeded to act nevertheless.²⁹²

Responsibility in criminal law is an essential element when deciding whether or not someone is fit to stand trial, and also whether that individual was sane or insane during the commission of the crime. We begin with the assumption that everyone is responsible. However, we do recognise that while this is the general rule, there are exceptions. An individual may be too young to be responsible or may have some defect in reasoning or mentality that precludes responsibility.²⁹³

The term “criminal responsibility,” it is said, is a purely legal question.²⁹⁴ The implication of this is that criminal responsibility is determined by the law of the land. It makes sense, thus, that in England and Wales, the age of criminal liability is set at ten years old, in Scotland it was at eight (however, the Age of Criminal Responsibility (Scotland) Act 2019 raised it to twelve), and in Northern Ireland at ten.²⁹⁵ The concept, however, is not associated with age for the sake of technicality, but because of deeper reasons. Age and

²⁹² R. A. Duff, ‘Legal and Moral Responsibility’ (2009) 4 *Philosophy Compass* 978.

²⁹³ R. A. Duff, ‘Who is Responsible, for What, to Whom?’ (2005) 2 *Ohio State Journal of Criminal Law* 441, 444.

²⁹⁴ Edwin R. Keedy, ‘Insanity and Criminal Responsibility’ (1916) 30 *Harvard Law Review* 724, 737.

²⁹⁵ Terry McGuinness, ‘The Age of Criminal Responsibility’ (House of Commons Library, Briefing Paper No 7687, 15 August 2015) <researchbriefings.files.parliament.uk/documents/CBP-7687/CBP-7687.pdf> accessed 15 February 2017.

mental competence, or sanity, both presuppose that a person understands his actions and their consequences.²⁹⁶ A very young child or an insane person lacks this capacity. Since *mens rea*, which refers to states such as intention and recklessness, requires a mature level of thinking, criminal responsibility does not attach to those whose minds are too young or too ill to grasp the gravity of their actions.²⁹⁷

Criminal responsibility is, thus, closely associated with *mens rea*, therefore, the criminal justice system does not attach criminal responsibility to children who are too young to understand criminal law, and persons who may be of mature age but suffer from a severe disorder of the mind resulting in lacking the ability to rationally grasp the law.²⁹⁸ Such an individual is not a free choosing human being, and is not capable of identifying or making a rational choice.

3.6. General Requirements for Criminal Responsibility

This chapter focuses in detail on the elements of *actus reus* and *mens rea*, and relative to the latter, the concept of strict liability. As will be seen, the concept of strict liability can be very disadvantageous to people suffering from some form of mental disability that hinders them from fully understanding or controlling their actions.

The execution of criminal law is carried out in a way that reasonable judgments are made to rebuff those individuals who have committed violations of the law.²⁹⁹ Warranted, that is justifiable actions or excused acts, are not considered crimes.³⁰⁰ Blameworthiness, and in contrast praiseworthiness, underscores the moral element of criminal law, as emphasised by

²⁹⁶ Randolph Clarke, Michael McKenna and Angela M. Smith (eds), *The Nature of Moral Responsibility: New Essays* (Oxford University Press 2015) 78.

²⁹⁷ Gabriel Hallevy, *The Matrix of Insanity in Modern Criminal Law* (Springer International Publishing Switzerland 2015) 86.

²⁹⁸ R. A. Duff, 'What Kind of Responsibility Must Criminal Law Presuppose?' (2011) 187.

²⁹⁹ Christopher M. V. Clarkson, *Understanding Criminal Law* (4th edn, Sweet & Maxwell 2005) 106.

³⁰⁰ David Ormerod and Karl Laird, *Smith and Hogan's Text, Cases, and Materials on Criminal Law* (11th edn, Oxford University Press 2014) 437.

Harry Kalven in 1955.³⁰¹ In being blameworthy, the accused must be to blame with respect to the charges that the prosecution has presented before the court.³⁰² Blameworthiness, and even praiseworthiness, its opposite concept, however, do not have a single meaning or connotation, but may be interpreted in various ways, depending on their use and under the circumstances of the case.³⁰³

With regard to intention and capacity, it is important to consider whether the individual is disabled in a legal capacity. The mental condition of the suspect is assessed with respect to the crime that they have committed. As noted by Morse, the question of why a person has committed a crime can be answered in two ways; either referring to the offender's intentions, or by an explanation of the natural factors behind the crime.³⁰⁴

Of central importance in the study of criminal responsibility is the line drawn between the concepts of *mens rea* and *actus reus*. *Actus reus*, as a criminal liability requirement, refers to the actual or physical act of committing the crime. The implication of the *actus reus* concept is that criminal liability is absent unless there is a voluntary act, and that such an act is objective and external (causation must exist between the individual's act and criminal conduct).

Mens rea, in short, refers to the "guilty mind," which most often relates to intentionality (or sometimes recklessness). This means that the individual is capable of making a rational choice and intends to act as he did. Criminal responsibility usually requires evidence of a guilty mind.³⁰⁵ Criminal law is traditionally anchored on the principle that human beings are capable of acting on reasons, understanding values, and distinguishing

³⁰¹ Thomas Andrew Green, *Freedom and Criminal Responsibility in American Legal Thought* (Cambridge University Press 2014) 269.

³⁰² Catherine Elliott, 'Criminal Responsibility and Children: A New Defense Required to Acknowledge the Absence of Capacity and Choice' (2011) 75 *Journal of Criminal Law* 289, 293.

³⁰³ Green (n301) 269.

³⁰⁴ Morse, 'Brain and Blame' (n290) 528.

³⁰⁵ Kumaralingam Amirthalingam, 'Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness' (2004) 67 *Modern Law Review* 491.

between right and wrong.³⁰⁶ A person who commits an act of sufficient seriousness as to be criminalised, voluntarily, and with the knowledge that it will cause harm, is thus a candidate for criminal liability.³⁰⁷ According to this definition, there are several instances in which some wrongful acts will not pass as crimes in legal parlance. This is because although acts may cause harm to others, without the wrongdoer's intent to cause that harm criminal liability is not attached. A wrongful act must usually be accompanied by criminal intent or *mens rea* in order to qualify as a crime.³⁰⁸

Mens rea is fundamental in proving that a crime was committed, as it helps to ensure that the mental culpability of the defendant is proportional to the provided punishment.³⁰⁹ *Actus rea* and *mens rea* are both necessary constituents of a crime.³¹⁰ This is actually based on a maxim "*actus reus non facit reum nisi mens sit rea*" – an act by a person cannot be judged to be guilty if the mind of the person is not also guilty.³¹¹ According to the US Supreme Court, the necessity of intent as a requirement in criminal liability is not a "provincial or transient notion," but is founded and anchored on more mature systems of rule.³¹² Indeed, a physical act alone is insufficient to convict crime.³¹³ However, this is true most of the time, but not all of the time, because of the strict liability offences.

³⁰⁶ Stephen Schafer, 'The Problem of Free Will in Criminology' (1977) 67 *Journal of Criminal Law and Criminology* 481, 482.

³⁰⁷ Matthew Lippman, *Essential Criminal Law* (Sage 2013) 54.

³⁰⁸ John M. Scheb and John M. Scheb II, *Criminal Law* (6th edn, Wadsworth Cengage Learning 2012) 91.

³⁰⁹ Stephanie Siyi wu, 'Unknown Elements: The Mens Rea Question In 18 U.S.C. § 924(C)(1)(B)(i)'S Machine Gun Provision' (2014) 114 *Columbia Law Review* 407, 410.

³¹⁰ Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law: Text and Materials* (Cambridge University Press 2003) 60.

³¹¹ 'Actus Non Facit Reum Nisi Mens Sit Rea Law and Legal Definition' (uslegal.com) <<https://definitions.uslegal.com/a/actus-non-facit-reum-nisi-mens-sit-rea/>> accessed 19 February 2017.

³¹² *Morrisette v United States* [1952] 342 US 246 No 12 P 251.

³¹³ Eugene J. Chesney, 'The Concept of Mens Rea in the Criminal Law' (1939) 29 *Journal of Criminal Law and Criminology* 627.

Strict liability offences skip the *mens rea* requirement of criminal liability.³¹⁴ In this type of criminal offence, a specific *actus reus* is a prerequisite to conviction without the necessity of proving *mens rea*. This is why retributivists argue that criminal strict liability is about “punishing the blameless.”³¹⁵ Ultimately, criminal strict liability is not concerned with the offender’s morality in terms of criminal responsibility.³¹⁶ As a result, strict liability will not involve the submission of evidence demonstrative of the defendant’s state of mind, motives, or intentions at the time of the commission of the offence.³¹⁷

3.7. Criminal Responsibility: Contextual Issues

This section discusses the circumstances regarding who, what, why, and when, criminal responsibility applies. This discussion requires an examination of the contexts in which criminal responsibility may apply or may be excluded. Criminal responsibility flows from what Dworkin refers to as a “second class” of moral responsibility.³¹⁸ According to Dworkin, there are two types of moral responsibility. The first is based on personal values and beliefs and cannot be forced on others. The second can be forced on others for the protection of society as a whole.³¹⁹ Thus, when we speak of secondary moral responsibility we are thinking of criminal law, and therefore, criminal responsibility.

Criminal responsibility assumes that we are all potentially ‘criminally responsible’ to ‘our fellow citizens,’ and when we commit crimes we are required to assume responsibility or to ‘answer to them, through the criminal courts, for our alleged criminal wrongs.’³²⁰ Even so, criminal responsibility in the context of calling to account, requires an understanding of what

³¹⁴ David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) 174.

³¹⁵ Kenneth W. Simons, ‘When is Strict Criminal Liability Just’ (1997) 87 *Journal of Criminal Law and Criminology* 1075-1076.

³¹⁶ Paul J. Larkin, ‘Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause’ (2010) 37 *Harvard Journal of Law & Public Policy* 1065, 1067-1068.

³¹⁷ *ibid* 1068.

³¹⁸ Ronald Dworkin, ‘Lord Devlin and the Enforcement of Morals’ (1966) 75 *Yale Law Journal Company* 986, 989.

³¹⁹ *ibid*.

³²⁰ Duff, ‘Who is Responsible, for What, to Whom?’ (n293) 441.

constitutes responsibility. Criminal law distributes blame and only when responsibility is established through capacity, voluntariness, *mens rea* and *actus reus*, can one be called to account. The question, therefore, centres on who can be called to account?

Criminal responsibility assumes that only those human beings capable of responding to reasons can be called to account.³²¹ Therefore, capacity, voluntariness, *mens rea* and *actus reus* are the requirements of criminal responsibility. The concept of the normal person as a responsible agent in criminal law is the individual who does not fit the criteria for “insanity,” “diminished” or “partial responsibility.”³²² Unless it is a crime of strict liability, criminal responsibility and culpability require consideration of the mental state, including the ability to form “purpose,” have “knowledge,” intention, or just recklessness as to the consequences of one’s act.³²³ Still, questions of criminal responsibility and culpability do not end at the intersection of mental normalcy and abnormality.

A test is applied for determining whether criminal responsibility or culpability is appropriate in a particular case. This requires the application of a test which determines whether the human agent was acting within “reason” or responding to “reason.”³²⁴ The result is a reasonable man standard for culpability and responsibility in criminal law systems globally.³²⁵ An individual will not incur responsibility if he is found to be incapable of acting rationally, which usually applies in cases where the individual successfully pleads insanity.³²⁶

Responsibility is intricately tied to concepts of justice: distributive justice (rewards and non-penal forms of justice) and retributive justice (penal responses to misconduct).³²⁷ In

³²¹ Keith Culver (ed), *Readings in the Philosophy of Law* (Broadview Press 1999) 410.

³²² Morse, ‘Mental Disorder and Criminal Law’ (n263) 887.

³²³ Michael Freeman (ed), *Law and Neuroscience: Current Legal Issues Volume 13* (Oxford University Press 2011) 531.

³²⁴ Duff, ‘Who is Responsible, For What, to Whom?’ (n293) 445.

³²⁵ Michael Vitiello, ‘Defining the Reasonable Person in the Criminal Law: Fighting the Lernaen Hydra’ (2010) 14 *Lewis & Clark Law Review* 1435, 1436.

³²⁶ Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press 2012) 7.

³²⁷ Matt Matravers, *Responsibility and Justice* (Polity Press 2007) 2.

criminal law, individual justice is applicable to those found responsible for their criminal behaviour. Determining satisfactory justice typically involves an assessment of the consequences of behaviour and of culpability, the seriousness of the crime, the correct punishment, and matching the crime with the punishment.³²⁸ Consequences and culpability are only considered when responsibility is determined, which means assessing “responsibility” and therefore, determining whether or not the acts alleged were within the “knowledge” and “control” of the accused.³²⁹

Knowledge and control within the context of criminal responsibility are founded on the basis of ascertaining whether or not the accused has acted in a way that “an ordinary reasonable man” would have behaved in the same set of circumstances, and would have reasonably foreseen the consequences of that behaviour.³³⁰ In H. L. A. Hart’s general doctrine of responsibility, the elements of knowledge, reasonable foresight, and *mens rea*, are coupled with voluntary action and omission.³³¹ Therefore, criminal responsibility is constructed around the idea of the person who is capable of thinking and acting rationally, but for one reason or another does not.³³²

The first step in establishing responsibility is volition or voluntariness, and this usually means establishing that the accused has acted deliberately, rather than inadvertently, with knowledge or foresight of consequences.³³³ One example is the individual who voluntarily becomes intoxicated and drives which results in a road traffic accident, causing

³²⁸ John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press 2002) 149.

³²⁹ Duff, ‘Legal and Moral Responsibility’ (n292) 978.

³³⁰ Philip Mullock, ‘Responsibility, Propensity & Choice’ (1964) 16 *Mercer Law Review* 1.

³³¹ H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008) IV.

³³² Kent A. Kiehl and Walter P. Sinnott-Armstrong (eds), *Handbook on Psychopathy and Law* (Oxford University Press 2013) 350.

³³³ Bernadette McSherry, ‘Voluntariness, Intention, and the Defence of Mental Disorder: Toward a Rational Approach’ (2003) 21 *Behavioural Sciences and the Law* 581.

the death of another.³³⁴ The voluntary act of drinking, aware of the dangers of doing so while driving, establishes responsibility.

Voluntariness therefore enables the individual human agent to acquire criminal responsibility.³³⁵ This is because if an individual lacks the ability to make rational choices, his actions are involuntary.³³⁶ By implication, if irrational choices are made voluntarily by a rational actor, and those actions amount to criminal behaviour, criminal responsibility is attached to the actor. Basically, rationality requires that criminal responsibility occurs when the individual is rational and has made a voluntary and reasoned choice to commit the crime or crimes in question.³³⁷

In all cases, blameworthiness or criminal responsibility will be established where the *actus reus* is present and the defendant was not acting in response to a hard choice or acting because of a pre-existing or a concurrent non-culpable irrational state of mind.³³⁸ The hard choice standard refers to a scenario where the individual is forced to choose to commit a criminal act.³³⁹ The implications are that the defendant is not exercising free choice. Therefore, unless the individual with the requisite mental capacity is acting under duress, or, in some jurisdictions, necessity – where the choice is one that a reasonable person would make – there is an absence of hard choice and, given rational capacities, criminal responsibility will exist.³⁴⁰

³³⁴ Douglas B. Marlowe, Jennifer B. Lambert and Robert G. Thompson, 'Voluntary Intoxication and Criminal Responsibility' (1999) 17 *Behavioural Sciences and the Law* 195-210.

³³⁵ Charles P. Nemeth, *Criminal Law* (2nd edn, CRC Press 2012) 91.

³³⁶ Stephen J. Morse, 'Rationality and Responsibility' (2000) 74 *Southern California Law Review* 251, 267.

³³⁷ Rebecca Hollander-Blumoff, 'Crime, Punishment, and the Psychology of Self-Control' (2012) 61 *Emory Law Journal* 502-503.

³³⁸ Dorothy K. Kagehiro and William S. Laufer (eds), *Handbook of Psychology and Law* (Springer-Verlag 1992) 208.

³³⁹ Stephen J. Morse, 'Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note' (2006) 3 *Ohio State Journal of Criminal Law* 397, 399.

³⁴⁰ Stephen J. Morse, 'Criminal Responsibility and the Disappearing Person' (2007) 28 *Cardozo Law Review* 2545, 2552.

Irrationality usually refers to a mental disorder which prohibits reasoning. Mental disorders can be used in criminal law in order to counter the requirement of voluntary and intentional criminal conduct. The lack of rationality or a “defect of reason” has been described by the UK’s House of Lords as a “disease of the mind,” and certainly not a condition that would permit the defendant to simply be acquitted and resume his life as if nothing had happened.³⁴¹ Generally, the lack of rationality is required to be bad enough to warrant post-acquittal mental health treatment as a finding of insanity, and a disease of the mind does not entitle the defendant to an unqualified acquittal.³⁴² Not just any mental illness will qualify as a lack of understanding of the nature of the act, or of what is right and what is wrong (see Chapter Five).³⁴³

This section discusses the contextual issues relative to establishing criminal responsibility. Two exculpatory conditions were discovered and discussed: hard choice (duress and necessity), and insanity/lack of mental capacity. The next section briefly examines the available defences in relation to criminal responsibility.

3.8. Operation of Defences in Criminal Law

Although a person may be adjudged as criminally liable for his actions, the law still presents him with the opportunity to escape punishment by offering evidence that could justify, excuse, and exculpate him. These are called defences and this section will discuss the role and nature of defences in the criminal justice system. However, it is also important to provide an outline as to how defences operate in criminal law, and at what stage of the proceeding they are relevant.

As previously mentioned in this chapter, the Law Reform Commission confirms that the role of criminal law is the protection of society and its members from harmful and

³⁴¹ *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.

³⁴² *ibid.*

³⁴³ Andrea L. Glenn, Adrian Raine and William S. Laufer, ‘Is it Wrong to Criminalize and Punish Psychopaths?’ (2011) 3 *Emotion Review* 302.

dangerous behaviour, as well as the preservation of basic social values.³⁴⁴ It is not supposed to be an instrument of vengeance.³⁴⁵ To this end, criminal law has incorporated defences that could be used by persons or entities whose actions do not really merit a conviction.³⁴⁶ Moreover, the availability of defences in criminal law is a manifestation of a fair, equitable and balanced mechanism, by which the state, on one hand, employs its resources to prove the guilt of an accused in the pursuit of its role, which is the maintenance of peace and order in society; and the accused, on the other, is given the opportunity to present legally recognised reasons for his behaviour, so that the law can adjudge him as criminally blameworthy, or not.³⁴⁷ In fact, many defences are nothing more than resistance to criminal responsibility and these defences include insanity, automatism and infancy.³⁴⁸

In order to convict a criminal defendant, the prosecutor has the task of proving that the respondent has committed the crime without any reasonable doubt, where the probability of the judgment being right is very high.³⁴⁹ In other words, crimes are composed of a criminal act, a criminal intent (and the shortage of lawful justification or excuse). The quantum of proof required for the purpose of conviction in a criminal case is BRD (as previously stated).

Aside from the beyond reasonable standard of proof, the criminal justice system allows the accused to mount a defence based on various other legal principles in criminal law. There are criminal law defences to criminal liability in civilised legal systems such as affirmative defences, necessity, self-defence, intoxication, error of law, mistake of fact, and so forth.

³⁴⁴ Law Reform Commission, 'Report: Defences in Criminal Law' (2009) 25.

³⁴⁵ *ibid.*

³⁴⁶ *ibid.*

³⁴⁷ Alan Reed and Michael Bohlander (eds), *Gen Contract: The Rise eral Defences in Criminal Law: Domestic and Comparative Perspectives* (Routledge 2016) 159.

³⁴⁸ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press 2013) 233.

³⁴⁹ Svein Magnussen and others, 'The Probability of Guilt in Criminal Cases: Are People Aware of Being 'Beyond Reasonable Doubt'?' (2014) 28 *Applied Cognitive Psychology* 196.

Insanity is a form of defence that is used in criminal cases where the defendant seeks to prove that he was not acting rationally when he committed the criminal act.³⁵⁰ Morse argues that since the law is a system of rules that guides and governs how people interact, the people expected to follow it must be able to use it practically in their deliberations.³⁵¹ Clearly, insane persons lack the capacity to think rationally (see Chapter Five).

The insanity defence prevents people with certain mental disorders from being criminally punished if the occurrence of the criminal act is directly related to the state of mind of the defendant during the commission of the crime.³⁵² A defendant who suffers from a mental disorder can, therefore, defend himself by arguing that the sole reason for the commission of the specific crime was because he was not in his right mind (although the precise legal rules and definition of insanity will differ by jurisdiction).³⁵³ Gulayets notes that for the insanity defence to stand, there is a need to for a consensus to be agreed between psychiatrists who often do not understand jurisprudence, and the judge and prosecution who are more likely to misunderstand the psychiatric discourse.³⁵⁴

Insanity as a defence may have a two-fold function. One is to prevent non-dangerous persons from being punished, and the other is to prevent the punishment of morally innocent persons.³⁵⁵ The philosophy behind the insanity defence rests on the notion that there is a basic difference between a person who is mentally equipped with the ability to fully understand the wrongness of their actions, and the person who cannot comprehend the nature of his actions

³⁵⁰ David C. Brody and James R. Acker, *Criminal Law* (2nd edn, Jones & Bartlett Publishers 2010) 167.

³⁵¹ Morse, 'Brain and Blame' (n290) 529.

³⁵² Michael Gulayets, 'Exploring Differences between Successful and Unsuccessful Mental Disorder Defences' (2016) *Canadian Journal of Criminology and Criminal Justice* 161, 163.

³⁵³ Joel Samaha, *Criminal Law* (12th edn, Cengage Learning 2015) 218.

³⁵⁴ Gulayets (n352) 162.

³⁵⁵ Michael S. Moore, 'The Quest for a Responsible Responsibility Test: Norwegian Insanity Law after Breivik' (2014) 9 *Criminal Law and Philosophy* 1, 8.

or has no control over them.³⁵⁶ In the first, it is only fair that he suffers the consequences of his action – which is to be punished in accordance with the law. In the second, it is neither fair nor equitable to impose sanctions under the law.³⁵⁷ Such a person cannot be subjected to aversive measures, such as incarceration, but only measures where the goal of which is to keep him isolated in order to keep society safe.³⁵⁸

Automatism is another defence in criminal law (see Chapter Six). Under English law, a thin line is drawn between automatism and insanity, so that the reform of one usually entails the reform of the other.³⁵⁹ Automatism can either take the form of insane automatism or non-insane automatism. Also, the related defence of intoxication, which may be defined as a condition in which a person loses control of his physical or mental faculties due to the consumption of intoxicants, such as liquor or drugs.³⁶⁰ It has been acknowledged that the use of alcohol or drugs temporarily impairs such faculties.³⁶¹ The defence of intoxication, however, has no statutory law basis under English law.³⁶² It may, however, be used by a party when his intoxication has substantially affected him and deprived him of subjective fault in committing an act.³⁶³ The potential for the use of intoxication is dependent on the type of intoxication.³⁶⁴

Self-defence is another defence that is allowed under the criminal justice system that bars criminal liability (see Chapter Seven). An important aspect of self-defence in a criminal case is the degree of the force used in effecting it. The force employed must be reasonable

³⁵⁶ Douglas Walton, 'Philosophical Perspectives on the Insanity Defense' (1975) 7 *The Human Context* 546, 549.

³⁵⁷ *ibid.*

³⁵⁸ *ibid.*

³⁵⁹ Law Commission, 'Criminal Liability: Insanity and Automation. A Discussion Paper-Summary for non-specialists' (2013) 5.

³⁶⁰ Azhar Javed, 'Intoxication and Self-Defence: A Comparative Study of the Principles of English Law and Shari'ah' (PhD Thesis, University of Leeds 2004) 142.

³⁶¹ *ibid.*

³⁶² Law Commission, 'Intoxication and Criminal Liability' (2009) 6.

³⁶³ *ibid.*

³⁶⁴ *ibid.*

and its reasonableness is anchored on necessity under the circumstances, and reasonableness under the circumstances.

Diminished responsibility, which is referred to as diminished capacity in many US jurisdictions, is an important factor when it comes to any form of defence in criminal cases (see Chapter Eight). In the case of *R v Bunch*,³⁶⁵ the defendant was charged with murder, but notwithstanding overwhelming evidence against him, he pleaded not guilty to the charge. Instead, he offered the following line of defence: absence of premeditation or malice as he had consumed too much alcohol with some cocaine on the day in question. This defence is built on the principle of diminished responsibility. The court rejected this defence, however, although the fact that diminished responsibility is an acceptable defence in criminal law, it must be established first with sufficient evidence.³⁶⁶ The different factors that can support defence based on diminished responsibility includes medical records, witnesses and extreme scrutiny of the evidence presented to prove that the defendant committed a criminal act, because he was not in his right mind.³⁶⁷ It is important to note that mental disease is not defined in law, but is vaguely described as “abnormal conditions of the mind.”³⁶⁸

The remaining sections of the chapter present the various available defences (in detail) that PTSD sufferers (especially war veterans with PTSD) can resort to as their defence in the event that they are accused of a crime.

3.9. Factors Undermining Criminal Responsibility

For the purpose of building a case for war veterans using PTSD as a criminal defence, this section discusses the factors that might defeat criminal responsibility claims. According

³⁶⁵ *R v Bunch* [2013] EWCA Crim 2498.

³⁶⁶ Tony Storey, ‘Diminished Responsibility: No Defence without Evidence: *R v Bunch* [2013] EWCA Crim 2498’ (2014) 78 *Journal of Criminal Law* 113-114.

³⁶⁷ ‘Murders - Defences - Diminished Responsibility’ (Sixth Form Law) <http://sixthformlaw.info/01_modules/mod3a/3_31_voluntary/01_vol_mans_dim_res.htm> accessed 28 February 2017.

³⁶⁸ Moore, ‘The Quest for a Responsible Responsibility Test: Norwegian Insanity Law after Breivik’ (n355) 22.

to Morse, criminal responsibility and punishment are predicated on “free will, personhood, and action.”³⁶⁹ Ultimately, this means that the individual must have free will in deciding, and in taking a particular course of action, in order to have the requisite criminal responsibility. In fact, as Morse states ‘it is a commonplace that the assumption of free will is foundational for our criminal law responsibility doctrines and practices.’³⁷⁰ In other words, if an individual fails to have the requisite free will, he will not usually have the requisite *mens rea* necessary for finding criminal responsibility.

Free will for finding criminal responsibility is founded on choice theorists’ presumption that human beings are ultimately responsible for the consequences of their free choices.³⁷¹ Choice theorists take that position that defences can fall into two realms for reducing criminal responsibility – first, the individual may have decided to take certain action based on justification in the surrounding circumstances, which is typically a welfare reason, and secondly, the individual may have taken action based on the lack of free choice.³⁷²

Relative to the subject of defences, there are factors that criminal law takes into consideration. This section is devoted to the discussion of these factors, which are usually a physical or mental condition that hampers the individual from fully grasping the nature of their act and its consequences.

Perhaps the most commonly debated item is the mental condition of the individual that robs him of free will. The inability to tell the difference between right and wrong is well-established in insanity defences, however, less commonly, other defences such as diminished responsibility can aid in partial defence. For instance, Dan White, who was charged with the murder of Mayor George Moscone and Supervisor Harvey Milk (San Francisco-1978), was

³⁶⁹ Morse, ‘Criminal Responsibility and the Disappearing Person’ (n340) 2545.

³⁷⁰ *ibid* 2547.

³⁷¹ Claire Finkelstein, ‘Excused and Dispositions in Criminal Law’ (2002) 6 Buffalo Criminal Law Review 317, 319.

³⁷² *ibid*.

able to escape a first-degree murder conviction on the basis of diminished responsibility. Accordingly, it was determined that White could not tell the difference between right and wrong because of “a major mood disturbance.”³⁷³

Essentially, if the defendant has a mental condition that makes it impossible to say with a degree of certainty that he was fully aware of the action he was taking and of its consequences, then it is not possible to conclude that he acted with free choice and free will. The question for the court will then be whether or not the defendant should be held criminally responsible and to what degree.

As discussed previously, a person suffering from insanity is not criminally responsible for his actions. This is based on the notion that an insane person does not have the capacity to understand or distinguish between right and wrong, and therefore is unable to exercise free will and to make a competent choice of actions. A mental illness that is so severe that it interferes with free will cannot, therefore, ground responsibility.³⁷⁴ However, it is not insanity itself, whether temporary or permanent, but the symptoms of insanity that may determine whether criminal responsibility attaches.³⁷⁵

There are several factors that can undermine responsibility. One of the factors discussed by Feld is the age of the suspect, arguing that juvenile criminal offenders should be recognised as normal criminals in the justice system, and not be taken to juvenile courts.³⁷⁶ He argues that the difference between underage offenders and adult offenders is experience, maturity of judgment, and exposure to peer influence, but he notes that most of these factors are generic.³⁷⁷

³⁷³ Deborah W. Denno, ‘Human Biology and Criminal Responsibility: Free Will or Free Ride?’ (1988) 137 *University of Pennsylvania Law Review* 615, 616.

³⁷⁴ Michael R. Bradley, ‘Criminal Law – Insanity – Test for Criminal Responsibility’ (1961) 7 *Villanova Law Review* 136, 138.

³⁷⁵ Keedy, ‘Insanity and Criminal Responsibility’ (1912) (n28) 524.

³⁷⁶ Barry C. Feld, ‘Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy’ (1997) 88 *Journal of Criminal Law and Criminology* 68-136.

³⁷⁷ *ibid* 70.

Automatism is one of the conditions that negates criminal responsibility. Characterised by unconscious behaviour or a lack of awareness that he is acting in a certain way. Criminal responsibility is negated in automatism because it impairs the voluntary aspect of the *actus reus* manifested in the loss of total voluntary control, and more importantly, the lack of consciousness which affects the ability of the mind to competently understand or grasp the body's actions.³⁷⁸

Diminished capacity, therefore, undermines criminal responsibility because the defendant lacks complete control of his mental functioning due to the presence of a medical condition.³⁷⁹ The factor affecting criminal responsibility is the mindset of the accused during the time he committed the act.

3.10. Justification Defences that Negate Criminal Responsibility

This section discusses the concept of justification as used in criminal law, particularly in the area of defence. All of the defences discussed earlier fall within the ambit, or umbrella, of a larger category of defence, which are differentiated by the focus of the defence, and the manner in which liability is evaded.

The accused, or the defendant, still has a way out to escape liability in the form of the defences discussed earlier. Not all defences have the same impact on the case.³⁸⁰ A group of defences are called justification defences, and the effect of these defences is to justify the actions of the actor, so that even if the elements of the crime have been established, the actor still escapes liability because the action, although criminal, was the right thing to do under the circumstances.³⁸¹ Thus, the circumstances in themselves have made the otherwise criminal act acceptable.

³⁷⁸ Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (n326) 126.

³⁷⁹ Stephen J. Morse, 'Criminal Law: Undiminished Confusion in Diminished Capacity' (1984) 75 *Journal of Criminal Law and Criminology* 1, 1-56.

³⁸⁰ R. A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2013) 339.

³⁸¹ Law Reform Commission (n344) 14.

Justification defences essentially work by having the defendant accept the commission of the offence, but then offer evidence to prove that the action was justified because he had a right to do so, or had a duty or obligation to do so.³⁸² Thus, according to Greenwalt, the core of a justification, as used in criminal law, is warranted action.³⁸³ However, George Fletcher provoked much interest in the subject of justification and its central distinguishing character through his extensive discussion of the subject. Among the factors attached by Fletcher to the notion of justification is association to morally right and good conduct, but not to tolerable or permissible ones. He also made the following claims in relation to justification: in two contending parties, only one party can be justified; it implicates conduct that is objectively right; and justifications are universalised.³⁸⁴ An implication of these claims, among others, is that justification exists, not from the perspective of individuals, but from an established fact.

Justification defences based on rights are self-defence, defence of others, and defence of property and necessity. Under English common law, these rights have long been embedded in the system. On the one hand, so long as the elements of these defences are fully met, a person who has committed an otherwise criminal action is deemed not guilty of it.³⁸⁵ On the other hand, justification defences based on obligation or duty usually refer to actions taken by a person who is obliged under law to perform a certain act, and in the course of performing the duty commits an act that otherwise would be criminal.³⁸⁶ An example of this would be a police officer shooting a suspect in order to prevent him from killing another person.

³⁸² Philip Carlan, Lisa S. Nored and Ragan A. Downey, *An Introduction to Criminal Law* (Jones & Bartlett Publishers 2011) 146.

³⁸³ Donald L. Horowitz, 'Justification and Excuse in the Program of the Criminal Law' (1986) 49 *Law and Contemporary Problems* 109.

³⁸⁴ Joshua Dressler, 'New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking' (1984) 32 *University of California - Los Angeles Review* 61, 63-64.

³⁸⁵ *ibid* 65.

³⁸⁶ 'Justification as a Defense' (Guerrero Law Offices) <<http://guerrerolaw.com/practice-areas/criminal-defense/justification-as-a-defense/>> accessed 7 April 2017.

3.11. Excuse Defences that Negate Criminal Responsibility

Specific defences will be covered and discussed in later chapters. This section discusses the concept of excuse defences; their nature, moral underpinnings, and their philosophy, and will briefly explain the differences between the concepts of excuse defences and justification defences.

Excuse defences, like justifications, have elements that are both objective and also subjective. The distinction between these elements is while the former is the triggering element, the latter is the particular mental state that the actor must have in order for the excuse defence to be acceptable. In an insanity defence, for example, the triggering element is a confirmable medical diagnosis, showing that the actor suffers from a mental illness that should excuse him from the responsibility of carrying out the criminal act.³⁸⁷ On the other hand, the subjective element of the insanity defence is the mental state of the actor at the time that the criminal act was committed.³⁸⁸

While justification defences zero in on facts and circumstances to negate the criminal liability of the accused, excuse defences take into account the personality of the accused.³⁸⁹ Reznick puts it aptly when he suggests that in justification, the action is shown to be not evil, but in excuse, it is the person who is shown as not evil.³⁹⁰ This nature of excuse, as distinguished from justification, is perhaps the reason that there is a common understanding that morally speaking, excuse is not on the same level as justification.³⁹¹ In justification, the actor has the right to act in the manner that they did, which was right under the circumstances, but in an excuse defence, the actor has no right to do what he has done, except

³⁸⁷ Lawrie Reznick, *Evil or Ill?: Justifying the Insanity Defence* (Routledge 1997) 11.

³⁸⁸ Neal R. Bevans, *Criminal Law and Procedure for the Paralegal* (2nd edn, Cengage Learning 2014) 377.

³⁸⁹ Stanley Yeo (ed), *Partial Excuses to Murder* (Federation Press 1990) 262.

³⁹⁰ Onder Bakircioglu, *Self-Defence in International and Criminal Law: The Doctrine of Imminence* (Routledge 2011) 25.

³⁹¹ Michael S. Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press 2010) 483.

that he cannot be blamed for it because of a particular condition or circumstance that pertains to him specifically.³⁹²

Thus, in excuse defences a person is rendered not liable for his action because he has a condition that is disabling, which interferes with the person's exercise of his free will, or the ability to control his conduct.³⁹³ This disabling condition stops the actor from being blameworthy and, therefore, he should not be punished.³⁹⁴ The defendant accepts and admits the charges, but is not blameworthy.³⁹⁵

Excuse defences can be divided into two categories. On one hand, there are those defences that are anchored on the inability of the actor to do the right thing because the situation precludes him from doing so. On the other hand, there are defences in which the actor suffers from a particular condition that impedes him from acting in accordance with the law.³⁹⁶ Nonetheless, there are excuse defences that can also be categorised as justification, which makes them straddle the line between justification and excuse. An example of this is the defence of provocation, which has elements of both categories of defences. Another problematic defence is duress, which seems to have a split personality in that most often it is categorised as an excuse, but sometimes a justification.³⁹⁷

3.12. War Veterans with PTSD in the Realm of Criminal Law

This section is necessary in order to establish how war veterans contract PTSD, and how it affects them, and thus, it begins the discussion of why war veterans with PTSD might be entitled to a defence in general in criminal courts. This section therefore introduces the specific issue of war veterans with PTSD that is then continued throughout the rest of the dissertation.

³⁹² Marcia Baron, 'Justification and Excuses' (2005) 2 Ohio State Journal of Criminal Law 387-388.

³⁹³ Brody and Acker (n350) 196.

³⁹⁴ *ibid.*

³⁹⁵ 'Excuse, Justification and Exculpation' (The Lectric Law Library, 2017)

<<http://www.lectlaw.com/mjl/cl041.htm>> accessed 5 April 2017.

³⁹⁶ Baron (n392) 388-389.

³⁹⁷ *ibid* 389.

As we have seen, PTSD is an anxiety disorder that impairs both cognitive and behavioural functions.³⁹⁸ Considering that the APA recommends the use of antidepressants, such as selective serotonin re-uptake inhibitors, clearly shows that PTSD is a mental condition.³⁹⁹ Most traumatic occurrences that cause people to suffer with PTSD are out of the hands of the defendants, and therefore, there is an argument that these people do not need to be condemned to prison sentences, but rather need help to get back to their normal lives.⁴⁰⁰ PTSD in a combat population is likely to make them lapse and commit violent crimes with no self-control.⁴⁰¹ For this purpose, it is important to understand how those persons with PTSD can think when acting. War veterans with PTSD must be allowed to present their defences so that the jury and the courts will understand the underpinnings of their actions.

War veterans with PTSD arguably deserve less punishment because they have contracted PTSD during their service in the military. This kind of condition, and the circumstances in which it is acquired, automatically brings to mind the issue of the choosing human being. Obviously, the war veteran did not choose to have PTSD and the lack of control that comes with it. This alone leaves open the question of culpability. Just how culpable is an individual who incurs an illness while serving his country and his fellow citizens, and the illness causes criminal behaviour? Indeed, it is an established norm in some jurisdictions that military background alone is usually capable of supporting a plea or claim in mitigation.⁴⁰² Still, when the war veteran is coupling military service with PTSD, it must be clear that the service in the military is linked to the trauma that brought about PTSD (absolute culpability is tenuous when the war veteran's crime is a result of war-related PTSD).

³⁹⁸ Raja Sree R. Subramaniam, *Post Traumatic Stress Disorder: Theoretical Findings and Treatment Models* (GRIN Verlag 2016) 1.

³⁹⁹ Friel, White and Hull (n2) 70.

⁴⁰⁰ Mark Goulston, *Post-Traumatic Stress Disorder for Dummies* (Wiley Publishing 2008) 10.

⁴⁰¹ Maria Marshall, 'Post-Traumatic Stress Disorder and Violence: Selective Processing of Threat Cues' (PhD Thesis, University of Leicester 2002) 20.

⁴⁰² Lee, 'Military Veterans, Culpability, and Blame' (n209) 286.

An important issue that may emerge from this discussion is determining whether having a PTSD condition can be grounds for excusing criminal action. The obvious starting point is that the defendant's violence is directly linked to PTSD, and without PTSD the violent behaviour would not have occurred. In other words, the defendant might successfully argue that his criminal behaviour is due to his mental disorder.

The acquisition of PTSD while serving one's country should be automatically considered as a defence and in mitigation in sentencing. There are two primary reasons for this suggestion. First, there is an established correlation between PTSD and crime which is prominent among war veterans.⁴⁰³ Clearly, some war veterans with PTSD would not turn to criminal activity if they did not have PTSD, and most likely they would not have PTSD had they not been exposed to the trauma of war.

Secondly, lawyers and scholars equally are increasingly requesting changes that will permit war veterans with PTSD to receive special treatment in terms of defence and sentencing in criminal courts.⁴⁰⁴ This is very different from requesting that the status of war veterans alone should be permitted as a mitigating factor in sentencing. When we accept that there is a link between PTSD and military service, and that there is a further link between PTSD and criminal behaviour, an argument can be made for "less punishment" for war veterans with PTSD. However, our expectations are increased when the war veteran has contracted PTSD as a mental disorder that is linked to criminal behaviour.

Reed points out that criminal responsibility is also a question of morality, as opposed to pure science. This is because criminal responsibility looks at the link between the offender and "the state," the allocation of blameworthiness, and whether it is appropriate to publicly

⁴⁰³ Grey (n24) 54.

⁴⁰⁴ *ibid.*

condemn this individual.⁴⁰⁵ Thus, in considering the criminal responsibility of war veterans with PTSD, one must determine whether it is appropriate for the public to condemn them.

War veterans with PTSD are hard cases. A hard case is a situation where the issues have not been determined by a strict set of rules, laws, practices, and policies.⁴⁰⁶ Thus, whether PTSD in a war veteran is a mitigating factor remains to be settled by the law and practice. Once the contexts in which criminal responsibility may apply, or may be excluded, are understood, it will be possible to gain greater insight into the circumstances under which PTSD may be exculpatory, or rather, a viable defence to criminal charges. At this stage, there is no doubt that PTSD is linked to violence and aggression.

When we hear of war veterans with PTSD who have committed violent crimes, we hope to see results such as those achieved by war veteran Jessie Bratcher. Bratcher committed a killing while experiencing a flashback of the war (Oregon, in 2008, found him guilty of murder, but legally insane, and sent him to get treatment in hospital instead of prison). The court accepted the extenuating and mitigating circumstances (insanity defence based on PTSD). In an ordinary case, Bratcher would have stood trial for premeditated murder and his defence would not have been accepted.⁴⁰⁷ As a result, he received treatment rather than punishment via imprisonment.

Alternatives to incarceration are necessary because an individual with a severe untreated mental condition cannot be expected to assume criminal responsibility for his actions. Many war veterans with PTSD do not receive treatment. This is also due to what

⁴⁰⁵ Alan Reed, 'Quasi-Involuntary Actions and Moral Capacity: The Narrative of Emotional Excuse and Psychological-Blow Automatism' in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing 2015) 180.

⁴⁰⁶ Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057.

⁴⁰⁷ Jamshid A. Marvasti (ed), *War Trauma in Veterans and their Families: Diagnosis and Management of PTSD, TBI and Co-morbidities of Combat Trauma* (Charles C. Thomas Publisher L.T.D. 2012) 165-166.

Duff refers to as “overcriminalization,” where far too many people are convicted when they should not be criminally responsible.⁴⁰⁸

Taking into consideration the previous factors that have described a normal person, those suffering from PTSD, a condition known to render sufferers irrational at certain times, cannot be included within the ambit of “normal.” According to Steven Woodward et al., PTSD can be described as a ubiquitous psychological condition that causes functional impairment, especially when one is exposed to trauma reminders.⁴⁰⁹ Clearly, in the case of the commission of a criminal act by someone suffering from PTSD, it is crucial to consider on a case-by-case basis whether there had been an instance that provoked or “triggered” the accused.

It is evident, however, that from the medical description of PTSD, the standard conditions set under the normal person, or a reasonable man, test cannot always apply without inflicting injustice and unfairness. An individual with PTSD who is hyper-vigilant and therefore prone to misperceiving threats and respond accordingly, is not acting as one would expect a reasonable man to act.

Understanding the concept of criminal responsibility (as previously discussed) is important in understanding how PTSD sufferers should be treated under the criminal justice system. Is this individual a choosing human being? Is he capable of making a rational and reasoned choice when labouring under the symptoms of PTSD? The individual with PTSD cannot always be expected to act like the ordinary man, and as such should not always be treated as the ordinary man when considering and determining criminal responsibility. This brings up the point made by Fischer about moral responsibility including a historical

⁴⁰⁸ R. A. Duff, ‘A Criminal Law for Citizens’ (2010) *Theoretical Criminology* 1, 2.

⁴⁰⁹ Steven H. Woodward and others, ‘A Psychophysiological Investigation of Emotion Regulation in Chronic Severe Posttraumatic Stress Disorder’ (2014) *52 Psychophysiology* 667.

element.⁴¹⁰ For example, a drunk driver who was involuntarily intoxicated and one that was voluntarily intoxicated may be assumed to have the same responsibility at the time of their respective accidents, since they are both driving under the influence when the accidents occur. However, when you go back in history, you will discover that one driver's intoxication was forced.⁴¹¹ This argument also shows that when we go back into the history of some veterans with PTSD, we will discover that their criminal behaviour, although similar to other criminals, is different because of their PTSD; a condition acquired prior to the commission of the crime, and separate and apart from it.

In a bid to understand the use of PTSD as a criminal defence, and whether it is a viable option, the critical question is whether PTSD is an excuse, or a cause of a behaviour. According to Morse, the only way that a cause can be used as an excuse is if the cause made the individual lose their ability to act rationally.⁴¹²

The war veteran defendant with PTSD will strive to persuade the court that he was not acting out of choice, and therefore is not criminally liable for the offence. Obviously, the individual's argument rests on the presumption that while suffering from the symptoms of PTSD, he was not a choosing human being. For example, that he was in a state of fugue in which he was segregated from reality, to the point that he really believed he was confronting a threat. Most of these fugue states arise out of reliving the trauma that caused PTSD. In line with these factors, an extensive discussion of the nature of PTSD was undertaken in Chapter Two in order to align its symptoms with some of the factors undermining criminal responsibility. The following chapters will also locate PTSD within the context of these defences.

⁴¹⁰ John Martin Fischer, 'Responsibility, History and Manipulation' (2000) 4 *The Journal of Ethics* 385, 388.

⁴¹¹ *ibid.*

⁴¹² Morse, 'Brain and Blame' (n290) 549.

3.13. Conclusion

In conclusion, it is evident that PTSD sufferers have to choose between the categories of defences, and that in the main, they seek refuge under the excuse defences. This is because in most cases, the inability of PTSD sufferers to comply with the law stems not from the facts or circumstances, but from emotional and mental disturbance brought about by the experience of a traumatic event in the past.

It has been established in this study that PTSD is empirically linked to criminal behaviour (PTSD drives individuals' behaviour). It has also been established in the literature that PTSD is linked to higher risks of re-offending. In other words, PTSD is linked to the offender's first criminal behaviour, and the criminal behaviour that follows. It is therefore reasonable to conclude that for most cases, war veterans with PTSD would not be criminals, and very likely would not have PTSD, had they not been participants in the military in a war situation.

Rational choice theory, which assumes that human beings make rational choices, makes a very strong case for separating war veterans with PTSD and PTSD sufferers in general from ordinary defendants. More often than not, the PTSD sufferer will be triggered by stimuli that transport him back in time to a traumatic situation. Typically, the PTSD sufferer finds himself reliving the war experience or the trauma that caused their PTSD, and in doing so, his reality is transformed to a fanciful atmosphere of terror. His actions are in response to this perceived terror.

In such a case, it is impossible to conclude that the PTSD sufferer is acting out of free will and free choice. While his choices may appear to be entirely rational to him, they are irrational from the perspective of the ordinary citizen who is not burdened by a mental malady. It therefore stands to reason that PTSD sufferers (or war veterans) who act on the

basis of triggers, and due to the symptoms of PTSD, can make strong cases for escaping criminal responsibility, either in part or absolutely.

Chapter Four: Special Status of War Veterans with PTSD

4.1. Introduction

When we think of war veterans, we often assume that they should be treated differently by the criminal justice system due to their service. This is especially true when the defendant is a war veteran with PTSD which is linked to the war experience. The fact that a defendant's status as a war veteran alone can invoke questions about mitigation demonstrates that alternatives to punishment may come into play when a war veteran with PTSD is brought before the courts. For instance, in *Bell v Cone* (2002), the US Supreme Court ruled that a failure to use substance abuse in mitigation for a war veteran could in fact amount to ineffectiveness of counsel.⁴¹³ This ruling creates a question surrounding the judiciary's view of war veterans and their entitlement to special status.

This part of the chapter is concerned with the extent to which the mere fact of war veteran status is enough to invoke the philosophies in support of alternatives to punishment, especially for the war veteran with PTSD. Therefore, this part of the chapter deals with the status of war veterans and what this means.

Of particular concern is the fact that war veterans with PTSD are in a "special category," because they are not merely war veterans, but war veterans with permanent strains and scars from their own personal military experience. The question for consideration is, therefore, whether the terms of service should matter when considering whether these war veterans should acquire the official status of war veteran.

The official status of war veteran is very important because it determines the extent to which a soldier can seek treatment and aid for his adjustment to civilian life in the post-deployment era. While it is thought that merely serving time in the military should be

⁴¹³ *Bell v Cone* [2002] 535 SCUS 685.

sufficient for obtaining veteran status, this is not necessarily true. This part of the chapter therefore examines the status of war veterans and makes a case for why the quantity and quality of service should not matter for obtaining this status.

This part of the chapter also emphasises the special position of war veterans with PTSD and how they require some degree of “leniency.” The war veteran has made sacrifices for the life and freedom of his countrymen. This alone requires some degree of “appreciation.” When the veteran is the victim of a life altering injury such as PTSD, we might consider his status as “special,” even more. However, the case for mitigating at sentence (or for a defence) is based on the connection between PTSD and military experience, as well as on the link between PTSD and the crime for which the war veteran seeks leniency. Ultimately, this part of the chapter examines the status of war veterans with PTSD as a pathway toward alternative punishments (such as hospital treatment or community service), that will benefit war veterans, their families, and society in the long-term.

4.2. Status of War Veterans

To begin with this section calls direct attention to what veteran status is, how it is achieved, how veteran status may be lost, and what the benefits of veteran status actually are. In a typical case, a veteran is an individual who has previously served in the military. However, the acquisition of veteran status is not as straightforward as it seems. There are different boundaries and limitations to relying on previous service in order to support a designation of veteran status. This part of the chapter sheds light on just what veteran status means.

When we think of war veterans, we think of them as the heroes of war. For example, following the First World War, there was a sense of “patriotism” which was reflected in the

honoring of the soldiers who fought the war.⁴¹⁴ Whether a veteran fought in the war or not is beside the point. When the individual signed up for the military, he was certainly prepared to participate in war, and therefore, veteran status should not depend on whether the soldier was engaged in combat during his service.

Veteran status, however, is achieved differently depending on what country the soldier served. For instance, to qualify for veteran status in the US, the military service member must have been involved in active duty for at least two years or a period of ordered active duty, and have been “discharged under conditions other than dishonourable.”⁴¹⁵ In England, a veteran is quite different. Veteran status is bestowed on any individual who is 16 years old or older, who has “served at least one day” in the military.⁴¹⁶ Veteran status is conferred by the British to those who were not part of the British military. For instance, veteran status is accorded to anyone who served in Poland’s past forces under the Command of the British during the Second World War, and who served as Merchant Marines during that war’s military operations.⁴¹⁷

It would therefore appear that qualifying for veteran service in the US is far more difficult than it is in England. Any amount of military service in England will suffice to obtain veteran service, whereas in the US, a veteran with one year’s service may not be entitled to veteran status. In fact, a veteran with many years in military service will be disqualified if he was dishonorably discharged. This is an unfortunate disqualifier because the

⁴¹⁴ Melissa K. Stockdale, ‘United in Gratitude: Honoring Soldiers and Defining the Nation in Russia’s Great War’ (2006) 7 *Explorations in Russian and Eurasian History* 459.

⁴¹⁵ Scott D. Szymendera, ‘Who is a “Veteran”? – Basic Eligibility for Veterans’ Benefits’ (2016) Congressional Research Service 7-5700 <<https://fas.org/sgp/crs/misc/R42324.pdf>> accessed 2 August 2019.

⁴¹⁶ ‘Annual Population Survey: UK Armed Forces Veterans Residing in Great Britain, 2016’ (Ministry of Defence, 26 October 2017) 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/654734/20171023_-_APS_2016_Bulletin.pdf> accessed 2 August 2019.

⁴¹⁷ ‘A Guide to Veterans Services’ (Ministry of Defence) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/616586/Veterans_services_leaflet_02-17-shrunk.pdf> accessed 2 August 2019.

veteran may have been dishonourably discharged due to a mental illness or a breakdown which was directly related to his military service. This brings us to the question of how veteran status may be lost.

Veteran status can be lost despite years of service and sacrifice. As Moulta-Ali and Panangala stated, any dishonourably discharged veteran is not eligible for veteran services. Individuals are routinely discharged dishonourably for misconduct.⁴¹⁸ This is because the US military seeks punishment over treatment for veterans who end up on the wrong side of the law, regardless of their mental health status.⁴¹⁹ The loss of veteran status is significant because as a veteran there are benefits. It is important to look at what the benefits are for those who have achieved veteran status.

For instance, in the US, mortgages, tax exemptions, and immigration tend to benefit war veterans to a much greater extent than they benefit the ordinary citizen.⁴²⁰ Veteran court systems, which operate across the USA, are only available to those who have the officially recognised status of war veteran or active service member.⁴²¹ Veterans may receive federal assistance, such as VA pensions, if they have served at least three months in the military. However, at least one of those service days has to have been during a war.⁴²² Therefore, if a veteran has served for three days during which there was no war, he will not qualify for the federal VA pension in the US.

⁴¹⁸ Umar Moulta-Ali and Sidath Viranga Panangala, 'Veteran Benefits: The Impact of Military Discharges on Basic Eligibility' (2015) Congressional Research Service 7-5700, 1 <<https://fas.org/sgp/crs/misc/R43928.pdf>> accessed 2 August 2019.

⁴¹⁹ Evan R. Seamone and others, 'A Rehabilitative Justice Pathway for War-Traumatized Offenders Caught in the Military Misconduct Catch-22' (2018) 44 *Armed Forces & Society* 139, 140.

⁴²⁰ Michael J. Wishnie, "'A Boy Gets into Trouble': Service Members, Civil Rights, and Veterans' Law Exceptionalism' (2017) 97 *Boston University Law Review* 1709, 1712.

⁴²¹ Allison E. Jones, 'Veterans Treatment Courts: Do Status-Based Problem-Solving Courts Create an Improper Privileged Class of Criminal Defendants?' (2013) 43 *Journal of Law & Policy* 307, 309.

⁴²² 'Federal Benefits for Veterans, Dependents and Survivors' (Department of Veterans Affairs, 2011) 37 <https://www.va.gov/opa/publications/benefits_book/federal_benefits.pdf> accessed 2 August 2019.

England takes the position that how you treat veterans will determine recruitment outcomes for future veterans, and therefore, England's definition of "veteran" is relaxed in order to ensure that valuable aid reaches all service members during and after active duty.⁴²³ By taking this approach, England grants a special status to all those who serve. In the US, the practice comes across as though service is a privilege instead. This impression stems from the fact that it is rather difficult to achieve veteran status in the US compared to England.

In England, the Royal British Legion is the largest charity supporting war veterans, and it also puts pressure on the government to improve pensions, housing, and so on, for war veterans and their partners and spouses.⁴²⁴ Veterans and their dependents in the UK are entitled to child benefit, sick pay, military and personal independence payments, maternity leave, job-seekers allowance, and tax concessions.⁴²⁵

Having discussed what veteran status is, and how it is achieved, how it might be lost, and its benefits, we can reasonably draw some conclusions as to why the status of war veteran is important. There is a paucity of literature on veteran status which is surprising given how important it is to the post-deployment life of veterans who require assistance with adjusting to civilian life all over again. For many, returning to civilian life is a challenge because their lives may have been altered significantly.

Veterans returning to civilian life after a period of deployment who are suffering from physical and/or psychological injuries will benefit from all the help they can get. For instance, a veteran with lost limbs will need support and care from professionals and relatives. A veteran with a psychological illness will also have many adjustments to make and

⁴²³ Christopher Dandeker and others, 'What's in a Name? Defining and Caring for "Veterans:" The United Kingdom in International Perspective' (2006) 32 *Armed Forces & Society* 161.

⁴²⁴ 'The Strategy for Our Veterans: HM Government, The Royal British Legion Consultation Response' (Royal British Legion, February 2019) 2 <https://www.britishlegion.org.uk/docs/default-source/campaigns-policy-and-research/veterans_strategy_rbl_response.pdf?sfvrsn=614cd690_0> accessed 17 October 2019.

⁴²⁵ 'Benefits and Concessions for the Armed Forces, Veterans and their Families' (Citizens Advice) <<https://www.citizensadvice.org.uk/benefits/armed-forces-and-veterans/benefits-and-concessions-for-the-armed-forces-veterans-and-their-families/>> accessed 17 October 2019.

will also benefit from professional and familial support and care. Without the status of veteran, the individual will have limited resources available. This is very unfortunate because both the physically and psychologically injured war veteran is returning to resume their previous civilian lives while now significantly impaired.

There is obviously no doubt that the status of war veteran is important because it determines whether the individual in question can receive the military and government funded aid necessary for relocation, treatment, and other welfare programmes in civilian society. In England, a veteran attains this status after only one day of service, and it makes no difference whether he was dishonourably discharged. This is significant because, as stated above, the war veteran returns to England with a range of benefits. However, in the US, there are time limits, conditions, and discharge requirements. What this means is that a veteran in England who is suffering from a war related trauma will have no problem receiving the necessary aid. On the other hand, a veteran in the US will have a range of obstacles obtaining treatment and welfare services.

4.3. War Veterans as a Special Category

Any individual who serves in the military for any length of time, and regardless of the reason for discharge, deserves to be recognised. At least in England this is the accepted standard for recognising that veterans are a special category of civil servants. In the US, this status is only recognised if the war veteran officially serves during a war, and for a limited period of time, and is discharged honourably. In this regard, only war veterans with a specific quality are deserving of special recognition in the US. In England, serving in the military is enough to confer special status on war veterans.

According to a report by the American Civil Liberties Union in California, a veteran's special category in the US is eradicated after just one mistake. Regardless of how long the veteran has served, and in doing so has given up his freedom and risked sacrificing his life,

all of this is overlooked when the veteran commits a crime upon return to civilian life. If the veteran is an immigrant, he will not only be punished for the crime, but will also be deported.⁴²⁶

As claimed by Dieter, war veterans who since returning home have committed grave criminal offences present the criminal justice system with a complicated dilemma.⁴²⁷ Dieter goes on to explain that:

‘The violence that occasionally erupts into murder can easily overcome the special respect that is afforded most veterans. However, looking away and ignoring this issue serves neither veterans nor victims.’⁴²⁸

There is no doubt that war veterans have sacrificed for their countries, and as such are deserving of special recognition. What the public fails to understand, due to a lack of academic attention, is the fact that the sacrifices among soldiers are not shared equally. Some veterans serve on the front lines, while others are deployed to post-war missions or peacekeeping missions, where obviously the threat to life is different, and therefore the sacrifices are not equally shared.

There is some evidence that how soldiers are deployed in terms of risk and sacrifice may be related to the soldier’s status in society. In a study involving half a million war casualties among American soldiers, it was discovered that the overwhelming majority were soldiers from the poorer parts of the US.⁴²⁹ In other words, poorer American soldiers make

⁴²⁶ Bardis Vakili, Jennie Pasquarella and Tony Marcano, ‘Discharged, then Discarded: How U.S. Veterans are Banished by the Country They Swore to Protect’ (ACLU of California, July 2016) 2-9 <<https://www.aclusandiego.org/wp-content/uploads/2017/07/DischargedThenDiscarded-ACLUofCA.pdf>> accessed 3 August 2019.

⁴²⁷ Richard C. Dieter, ‘Battle Scars: Military Veterans and the Death Penalty’ (A Death Penalty Information Center Report, 2015) 2 <<https://deathpenaltyinfo.org/files/pdf/BattleScars.pdf>> accessed 26 November 2017.

⁴²⁸ *ibid.*

⁴²⁹ Douglas L. Kriner and Francis X. Shen, ‘Invisible Inequality: The Two Americas of Military Sacrifice’ (2016) 46 *University of Memphis Law Review* 545, 546.

more sacrifices than wealthier American soldiers.⁴³⁰ Still, in the US, a war veteran's special category of citizenship will not be decided on the basis of actual sacrifice, but rather on the basis of good behaviour and length of service.

Gates, Holowka, Vasterling, Keane, Marx, and Rosen point out that PTSD is linked to many debilitating consequences for both war veterans and soldiers in active duty. The consequences of PTSD for combat soldiers and veterans are costly for the affected individual, their family members, and for society as a whole. The actual PTSD sufferer experiences some significant difficulties in areas such as finding and keeping jobs, marriage and domestic problems, legal problems, and health problems.⁴³¹

The problem is two-fold. First, war veterans acquire PTSD in service of their country in a way in which they have risked their lives and health in the process.⁴³² Secondly, in the course of this brave and sacrificial service, many war veterans have been inflicted with PTSD. The data collected in the literature reveals that more than 800,000 war veterans from Vietnam ended up with PTSD. Approximately 175,000 soldiers participating in Operation Desert Storm were also PTSD sufferers. More than 300,000 veterans of Iraq and Afghanistan have PTSD (further examples and literature were examined in Chapter Two).⁴³³

The sacrifices that soldiers make are not limited to combat or the risk of combat. Soldiers basically lend their lives to a strict regimen, and in the meantime are separated from their families. These soldiers miss key milestones in their children's development, also often missing the birth of their children. Soldiers spend important family holidays away from their families in isolated situations.

Communication with loved ones is restricted, so that there are periods of time when the soldier has no-contact at all. In the meantime, families and loved ones who go through

⁴³⁰ *ibid.*

⁴³¹ Gates and others (n39) 362.

⁴³² Dieter (n427) 2.

⁴³³ *ibid.*

these periods of no-contact are concerned that their loved one is either missing in action or dead. Every knock on the door is an alarm bell and a warning that an official could be about to report the death of the loved one who is serving in the military.

According to Bird, war transforms the character of the individual soldier. Individuals who live normal lives suddenly find themselves 'living in unprecedented situations and enduring hardships with great calm and utter fearlessness.'⁴³⁴ The character transformation may very well create a criminal who, but for the war experience, may have never committed a crime. Since the decision to go to war was instigated by the state, it is only fair that the state accepts some responsibility for the war veteran's post-war criminal behaviour.

A case can be made for exploring whether the individual veteran who served based on the standards offered in the US or in England, should be entitled to the status of veteran which should automatically involve some degree of leniency for criminal charges. In other words, it is worthwhile considering that a broad definition of "veteran" should be adopted, so that more veterans suffering from PTSD can make a case for a more lenient sentence. Still, the question in this chapter asks is why? By virtue of what do states treat war veterans (including, but not limited) to those with PTSD, as special?

4.4. Status of War Veterans with PTSD

It is worthwhile exploring the assumption that war veterans with PTSD should occupy a "special status." This is because war veterans with PTSD have two special mitigating factors: they are individuals whose service compels us to be grateful, and also they are suffering from a mental disability.⁴³⁵ Surely, if a victim can forgive any offender, it would be the war veteran with PTSD. Forgiveness is important because it promotes healing.⁴³⁶ Healing

⁴³⁴ Charles Bird, 'From Home to the Charge: A Psychological Study of the Soldier' (1917) XXVIII American Journal of Psychology 315.

⁴³⁵ Arlie Loughnan, "'Society Owes them Much': Veteran Defendants and Criminal Responsibility in Australia in the Twentieth Century' (2015) 2 Critical Analysis of Law 106.

⁴³⁶ Stephanos Bibas, 'Forgiveness in Criminal Procedure' (2007) 4 Ohio State Journal of Criminal Law 329.

is something both victims and war veterans with PTSD can benefit from. However, in the US, much will depend on whether the soldier is a qualified veteran, otherwise he will be regarded as nothing more than a criminal if he commits a crime. This is the case regardless of whether the war veteran is suffering from PTSD at all. In the US, if a war veteran is dishonourably discharged, he will not be entitled to federal aid nor federally funded treatment for PTSD.

The obstacles to war veteran status may therefore be linked to the lack of treatment for PTSD. As Cushing, Braun, Alden and Katz reported, ‘clinical and pharmaceutically based treatments are underutilized.’⁴³⁷ This may be because soldiers do not want to miss days off work with reduced or no pay at all. It may also be a reluctance to obtain treatment due to the stigma attached to mental illnesses.⁴³⁸ Still, failure to seek and receive treatment is costly, not only to the war veteran, but also his family and society.⁴³⁹ This is because the war veteran with PTSD is left with a greater difficulty attempting to adjust to post-deployment civilian life. In the meantime, his close friends suffer along with the veteran, and society loses out on a productive citizen in the war veteran disabled by untreated PTSD.⁴⁴⁰

Thus, the status of the war veteran with PTSD is important for the war veteran’s post-deployment experience, particularly with adjustment to civilian society, his family’s welfare, and for his status as a productive citizen for the good of society. The American Public Health Association describes the war veteran with mental illness and trauma as “vulnerable” members of the population.⁴⁴¹ Obstacles to treatment for these war-related conditions only further compromise the post-deployment adjustment to civilian life for these war veterans. It

⁴³⁷ Robin E. Cushing and others, ‘Military-Tailored Yoga for Veterans with Post-Traumatic Stress Disorder’ (2018) 183 *Military Medicine* 223.

⁴³⁸ *ibid.*

⁴³⁹ Steven G. Koven, ‘Veteran Treatments: PTSD Interventions’ (2018) 6 *Healthcare* 1.

⁴⁴⁰ *ibid.*

⁴⁴¹ ‘Removing Barriers to Mental Health Services for Veterans’ (APHA, 18 November 2014) <<https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/01/28/14/51/removing-barriers-to-mental-health-services-for-veterans>> accessed 4 August 2019.

is therefore important for US officials (Congress/VA) to implement measures for improving this category of war veteran, so that they can seek and receive treatment.⁴⁴²

Perhaps the US can learn from England, where veteran status is much easier to establish, and where there are twelve service providers that offer treatment for war veterans with PTSD.⁴⁴³ However, in the UK, the Parliamentary Office of Science and Technology reviewed the mental health consequences of combat. The Office concluded that there is a problem with correct diagnosis and treatment, and in addition to further research steps should be taken to understand, diagnose, and treat the offending war veterans.⁴⁴⁴

Looking back at the lack of treatment, it can be assumed that the most important measure for improving access to treatment for veterans with trauma such as PTSD, would be to improve the qualifications for obtaining the status of veteran in the US. The status of veteran in the US should be as easy to achieve as it is in England. Anyone who has served their country for any period of time should be accorded veteran status, independent of the reason for discharge. Moreover, any individual soldier who acquired PTSD or any other illness, whether physical or mental, during deployment or service, should automatically acquire the status of war veteran.

If these recommended changes are made to the definition and acquisition of the status of veteran, war veterans with PTSD will have significantly fewer barriers to diagnosis and treatment of PTSD. In the meantime, the criminal justice system can recognise the special status of war veterans with PTSD who succumb to the associated symptoms and commit crimes. Recognising the special status of war veterans who have incurred PTSD during their

⁴⁴² *ibid.*

⁴⁴³ J. Dalton and others, 'The Provision of Services in the UK for UK Armed Forces Veterans with PTSD: A Rapid Evidence Synthesis' (Health Services and Delivery Research, February 2018) <<https://www.ncbi.nlm.nih.gov/books/NBK482406/>> accessed 4 August 2019.

⁴⁴⁴ House of Parliament, Parliamentary Office of Science & Technology, 'Psychological Health of Military Personnel' (Post Note 518, February 2016) <<https://www.kcl.ac.uk/kcmhr/publications/Reports/Files/Parliamentary-Office-of-Science-&-Technology---Psychological-Health-of-Military-Personnel-Feb-2016-Report.pdf>> accessed 20 February 2018.

service, the court should have the discretion to order treatment as an alternative to punishment.

General strain theory reasonably provokes interest and concern about the status of the war veteran with PTSD. According to the general strain theory of criminal behaviour, individuals are more likely to act anti-socially if they have been confronted by trauma with negative consequences previously, usually in the form of “anger and irritability.” What’s more is that this theory is confirmed by research.⁴⁴⁵ Therefore, based on the general strain theory, a war veteran with PTSD is expected to act out in ways that amount to criminal offences. Therefore, with this status, one might generally expect that the state would take all of the necessary steps to get treatment for those afflicted. Thus, when PTSD comes to the attention of the state after a crime is committed this obligation should not cease.

Hunter and Else came up with the PTSD defence theory which argues for the special treatment of those with the status of war veterans. According to Hunter and Else, war veterans with PTSD should benefit from this condition as a defence because they are placed in a position to defend themselves in ways that others with other mental maladies are not permitted to. The individual with the status of war veteran with PTSD can describe the trauma of war and the conditions that they were exposed to that caused PTSD. They can go on to describe just how these symptoms have impacted their behaviour.⁴⁴⁶

An ordinary person cannot claim to have contracted PTSD while at war in the service of his country. The war veteran can do this and provide rich details of the war experience. It is therefore a plausible assumption to expect that war veterans with PTSD have a status that confers upon them a right to expect an outcome at trial that addresses more than the crime committed. This is expected due to the events leading up to the condition, and how those

⁴⁴⁵ Eric B. Elbogen and others, ‘Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans’ (2012) 80 *Journal of Consulting and Clinical Psychology* 1097, 1098.

⁴⁴⁶ Brockton D. Hunter and Ryan Christian Else, ‘Legal Strategies for Defending the Combat Veteran in Criminal Court’ (2017) 43 *Mitchell Hamline Law Review* 471, 491-492.

events were relived and re-experienced at the time of the commission of the crime. In such a case, it is difficult to imagine how the PTSD experience and the war veteran factors do not combine to demand some form of leniency for the war veteran with PTSD.

4.5. War Veterans with PTSD are a Special Category

Conventional wisdom dictates that just as a minor may escape capital punishment, it makes sense to consider whether veterans with PTSD should also be accorded some degree of leniency for their crimes. There are two ways to make the case for this. To start with, it is a very difficult commitment (or a hard work) as the war veterans leave their home behind and enter a war zone, with no guarantees that they will return home alive or in good health. Secondly, once the war veteran returns home, he is promised aid that will make his recovery and relocation easier. When he returns home injured or with PTSD, his expectations should be higher (protection for the future, for example, by providing help finding housing or a job, and sometimes it helps by protecting war veterans from the full costs of criminality). Naturally, in support of these arguments, attention is turned to restorative justice and/or therapeutic jurisprudence under criminal justice theory.

Perhaps the strongest case for restorative justice and/or therapeutic jurisprudence is the fact that criminal justice theory is aimed at accommodating the ordinary person's understanding of justice.⁴⁴⁷ Both theories help us to come to an understanding that the war veteran who contracted PTSD during his military service, and committed a crime due to PTSD, is a special case because he sacrificed much in service and was harmed in ways that reflect that sacrifice. Therefore, the special status of veteran is earned and he deserves healing (restorative justice), and can therefore benefit from therapeutic jurisprudence. This trade-off makes sense because while dead soldiers are commemorated in ceremonies, the surviving soldier who is mentally and/or physically harmed by the war effort is systematically

⁴⁴⁷ Paul H. Robinson, 'Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine' (1985) 71 Virginia Law Review 1.

forgotten.⁴⁴⁸ The trend for paying due respect and earned appreciation for military service, and honoring dead soldiers, while forgetting or neglecting the achievement of the surviving soldier, has been covered by three novels, *Au revoir là-haut*, *Le Retour d'Ulysse* and *Le Réveil des morts* on the subject that closely resemble reality.⁴⁴⁹

This is one of those cases in which mercy is applicable. Mercy is a decisive factor which should be employed in certain cases when it is the right thing to do.⁴⁵⁰ One can make the argument that when a war veteran with PTSD commits a crime triggered by the symptoms of the condition, it is right and fair to render assistance for recovery rather than punishment. Punishing the war veteran with PTSD whose crime is connected to PTSD, which is in turn a war-related syndrome, is unfair and unjustifiable compared to the individual who deliberately and consciously commits a crime. The fact is, as previously discussed in Chapter Two, exposure to and experience with combat conditions has been consistently linked to PTSD. This is an important area of concern because there are many war veterans with PTSD, and those with this mental condition are also linked to homicide.

In the case of the war veteran with PTSD, the order for treatment has a much more predictable outcome than an order for incarceration. An order for treatment virtually ensures that the war veteran with PTSD will adjust to civilian life more productively, and will likely not commit further crimes. This is because incarceration predictably means that the PTSD sufferer will not receive treatment. This is very important because PTSD has proved to be a major contributing factor to the risk of recidivism (as previously stated).

A soldier who has been involved in an independent traumatic situation that causes PTSD should not be in the same position as the soldier who is involved in a military trauma that causes PTSD. There is an obvious difference. The war veteran who contracts PTSD due

⁴⁴⁸ Ana Carden-Coyne, 'Ungrateful Bodies: Rehabilitation, Resistance and Disabled American Veterans of the First World War' (2007) 14 *European Review of History* 543.

⁴⁴⁹ Nancy Sloan Goldberg, 'Gratitude: A Different Kind of War Reparation' 13 *Lingua Romana* 18.

⁴⁵⁰ R. A. Duff, 'The Intrusion of Mercy' (2007) 4 *Ohio State Journal of Criminal Law* 361.

to his war experience is a special case compared to the veteran who contracts PTSD from independent sources.

Gansel argues that war veterans with PTSD deserve special treatment in terms of “extra attention and access to treatment.”⁴⁵¹ As Gansel points out, the war veteran with PTSD deserves less punishment because of his sacrifices which is manifested in a mental condition as debilitating as PTSD.⁴⁵² Still, we must be careful to ensure that we are not asking for leniency for the war veteran just because he has contracted PTSD during service. We are asking for leniency because the PTSD is a result of their service which has already required significant sacrifice. Thus, leniency is justified in this regard because the military contributes to the criminal consequences of PTSD.

“Leniency” is necessary because these war veterans with PTSD can benefit from treatment and will only end up back in court at some later date if they are punished as opposed to treated (however, this is true of many people). It is up the criminal courts to take the position that war veterans with PTSD should receive less punishment and more treatment. This is unfortunate because there are service members who are discharged on account of PTSD-related behaviour, or those who did not serve for a long enough period of time. Thus, retributive theories of justice which seek to punish rather than rehabilitate are unsuited to war veterans with PTSD.⁴⁵³ This is demonstrated by the implementation and use of VTCs.⁴⁵⁴ These courts are designed to circumvent retribution, with the focus being on rehabilitation instead.

Huskey puts forward an argument for the special treatment of war veterans on the basis of restorative justice theory. Here, Huskey argues that war veterans with PTSD,

⁴⁵¹ Gansel (n18) 149.

⁴⁵² *ibid.*

⁴⁵³ Seamone, ‘Reclaiming the Rehabilitative Ethnic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism’ (n225) 34.

⁴⁵⁴ *ibid.*

traumatic brain injury, and even substance abuse disorders, should all be under the jurisdiction of the VTC. This is because restorative justice theory is built around communities coming together in the form of the victim, the offender, and other stakeholders, with a view to restoring everyone to their original position where possible to promote healing and reduce recidivism.⁴⁵⁵ This is the ideal outcome for all war veterans, especially those with life-altering conditions such as PTSD.

Arno takes a similar position with regards to VTCs, arguing that based on the neo-rehabilitation theory, there ought to be a move toward considering alternative methods of treating war veterans with PTSD who come into contact with the criminal justice system. These veterans should be subjected to the VTC which will aid the state in moving away from “mass incarceration” and take action, which is more in line with rehabilitative justice. After all, the purpose of criminal justice is to prevent recidivism and offending in the first place.⁴⁵⁶ If a veteran with PTSD is punished rather than treated, it can result in additional veterans with PTSD refusing treatment and offending while those who are punished will be released to re-offend. The status of war veterans with PTSD can therefore be considered as special when determining the appropriate treatment in the criminal justice system.

It is also possible to conclude that the war veteran with PTSD is in a special category due to his acquisition of a psychological injury during service to his country. The law of torts has been expanded and reformed to include psychological injuries and emotional distress.⁴⁵⁷ War veterans with PTSD can be reasonably described as a special category of defendants.

⁴⁵⁵ Kristine A. Huskey, ‘Justice for Veterans: Does Theory Matter?’ (2017) 59 Arizona Law Review 697.

⁴⁵⁶ Claudia Arno, ‘Proportional Response: The Need for More – and More Standardized- Veterans’ Courts’ (2015) 48 University of Michigan Journal of Law Reform 1053.

⁴⁵⁷ Landy F. Sparr and James K. Boehnlein, ‘Posttraumatic Stress Disorder in Tort Actions: Forensic Minefield’ (1990) 18 Bulletin of the American Academy of Psychiatry and Law 283, 285-286.

This is because PTSD is caused by an external factor which alone garners much sympathy from tribunals of fact.⁴⁵⁸

Moreover, as previously mentioned throughout this dissertation, especially in Chapter Two, Sparr, Reaves and Atkinson inform us that there is a proven link between the level of military combat involvement, PTSD, and criminal conduct.⁴⁵⁹ What this means is that a veteran who takes the greatest risk through combat is more likely to end up with PTSD, and in turn will more likely end up committing crimes. This connection with greater involvement in combat can arguably support a claim that the veteran in trouble with the law is entitled to the acquisition of special status.

4.6. Treating War Veterans with PTSD differently from others

When a war veteran signs up for the military, he is aware of the benefits that he can expect to receive upon retirement or following service (it is a part of the deal). These benefits may include pensions and access to healthcare service. These kinds of pay-offs and benefits become a part of the recruitment process. At the same time, these benefits do not include benefits for other war-related consequences, such as intermingling with crime and the criminal justice system. So, why ought a state treat war veterans with PTSD differently from others?

According to Kinney, in the most recent wars in Iraq and Afghanistan, the psychological and physical damages incurred by soldiers who contract PTSD will require around 50 years of treatment for full recovery.⁴⁶⁰ Hence, any crime committed by war veterans with PTSD must be viewed as a part of the recovery process and point toward improved treatment and recovery aid.

⁴⁵⁸ *ibid* 293.

⁴⁵⁹ Landy F. Sparr, Michael E. Reaves and Roland M. Atkinson, 'Military Combat, Posttraumatic Stress Disorder, and Criminal Behavior in Vietnam Veterans' (1987) 15 *Bulletin of the American Academy of Psychiatry and Law* 141.

⁴⁶⁰ Wayne Kinney, 'Comparing PTSD among Returning War Veterans' (2012) 20 *Journal of Military and Veterans' Health* 21.

War veterans with PTSD are a special category of individuals with this condition. This is because the war veteran had to have been exposed to a “life-threatening” or “extremely traumatic event,” and PTSD is a ‘psychological disorder that can have long-term psychological and behavioral effects.’⁴⁶¹ PTSD is a linked to “life-threatening” or “highly traumatic events” in which the war veteran who was placed in the war effort finds that he is more likely to contract PTSD. This naturally raises the question of whether or not it is fair to treat war veterans with PTSD in the same way that we treat ordinary civilians who come into contact with the criminal justice system. Surely war veterans with PTSD deserve special consideration and treatment?

The theory of neo-rehabilitation or an improved rehabilitation theory suggests that there should be pathways toward rehabilitating rather than punishing this category of defendants. The category of defendants that should benefit from rehabilitation strategies are those that can be rehabilitated.⁴⁶² This puts war veterans with PTSD upfront because their PTSD relates to their service, and their crimes are related to their PTSD, for which they can be rehabilitated if properly treated.⁴⁶³ Therefore, according to the neo-rehabilitation theory, war veterans with PTSD deserve to be treated differently from other defendants because of the greater odds that they will be rehabilitated and less likely to re-offend.

Beginning in 2002, “hundreds of thousands” of US soldiers returned to civilian life from the wars in Afghanistan and Iraq, with high rates of PTSD (this fact previously mentioned in Chapter Two).⁴⁶⁴ Right away, the mere fact that these PTSD sufferers return from a war with PTSD sets them apart from anyone else with PTSD, because the phrasing of this report indicates that the veterans did not have PTSD prior to going to war, and therefore

⁴⁶¹ Hafemeister and Stockey (n21) 92.

⁴⁶² Arno (n456) 1052-1053.

⁴⁶³ *ibid* 1053.

⁴⁶⁴ Richard L. Frierson, ‘Combat-Related Post Traumatic Stress Disorder and Criminal Responsibility Determinations in the Post-Iraq Era: A Review and Case Report’ (2013) 41 *Journal of the American Academy of Psychiatry and the Law* 79.

acquired PTSD while at war. Thus, one may accept that war veterans are in a special category of PTSD defendants since their condition was brought on by a war that was fought for the country in which their subsequent crimes were committed.

In a case against an American war veteran (Massachusetts-2006), Daniel Cotnoir was acquitted by a jury in Salem (the jury obviously accepted the distinction between Cotnoir as a war veteran and other defendants). Cotnoir went on trial for attempted murder because he fired into a crowd outside a night club and injured two persons. According to Cotnoir's testimony, he felt that he was "under attack" after someone threw a bottle through his house window. This is why he took out his gun and fired into the nearby crowd. The jury accepted that Cotnoir acted in self-defence.⁴⁶⁵ It is highly unlikely that a jury would accept this kind of response from an ordinary citizen.

This does not mean that service alone should compensate the state for the crimes of war veterans with PTSD. What this means is that the country in which the crimes were committed must accept some responsibility for war veterans with PTSD who commit crimes. This is because most of the time, the war veteran with PTSD commits a crime when he relives the trauma of war. The war that traumatised the veteran and brought on PTSD was instigated by the state, and fought by the veterans on behalf of the state and its population. The commission of a crime while reliving this trauma separates the war veterans with PTSD from other defendants who deliberately and consciously commit crimes.

Actually, responding to the trauma of war in a way that includes the commission of a crime is also different from the defendant with PTSD. Although both sets of defendants are responding to triggers, rather than consciously setting out to commit criminal offences, the war veteran with PTSD is still different from the ordinary defendant with PTSD. The war

⁴⁶⁵ 'Jury Acquits Marine in Crowd Shooting: Finds he Acted in Self-defense' (The Boston Globe, 30 June 2006)
<http://archive.boston.com/news/local/massachusetts/articles/2006/06/30/jury_acquits_marine_in_crowd_shooting/> accessed 10 August 2019.

veteran is responding to triggers incurred while serving his country and putting his life in the line of fire. But for this sacrifice on behalf of the state, the defendant would not have PTSD and would probably not have committed a crime at all. Other PTSD sufferers were not making a sacrifice for the most part but may, for example, have been caught up in a natural disaster during a vacation, or while at work in a private enterprise.

War veterans, on the other hand, are constantly subjected to traumatic events while fighting a war. What makes war veterans with PTSD special, and therefore entitled to different treatment by the criminal justice system, is the fact that when a war veteran returns with PTSD he will have served in a combat zone at a very high level.

In other words, soldiers who are involved in combat are more likely to contract PTSD than soldiers who are not involved in combat. Therefore, the war veteran with PTSD definitively put his life on the line for the protection of his country and fellow citizens, and in doing so develops PTSD. It is therefore fair and reasonable to argue that war veterans with PTSD are perceived as different from the conventional defendant and the ordinary defendant with PTSD. It is not PTSD alone that warrants mitigation, but the differences in how PTSD was acquired. It is this difference that speaks to a special place for war veterans with PTSD (in the US, a special class can be seen in sentencing statutes and VTCs). After all, war veterans do end up in trouble due to the experience of war and the training which is necessary for learning how to stay alive in the war zone.⁴⁶⁶ This outcome places some responsibility and accountability on the state.

What is even more troubling is the fact that only approximately one half of war veterans with PTSD have received treatment for their conditions (as previously confirmed with other references and arguments in Chapter Two).⁴⁶⁷ Thus, when PTSD is a mitigating factor for war veterans on trial for criminal behaviour, there is an opportunity to address the

⁴⁶⁶ Huskey (n455) 699.

⁴⁶⁷ Dieter (n427) 2.

treatment gap. Rather than punish veterans who have gone beyond the call of duty in service to this country, they should be diagnosed and treated.

Attribution theory also gives us reason to argue that war veterans with PTSD ought to be treated differently than other defendants. Attribution theory argues that people are less likely to want to punish those whose criminal conduct is beyond their control.⁴⁶⁸ The symptoms of PTSD have been known to leave the offender with little to no control over his thoughts, beliefs, and actions. It is therefore within the realm of possibility that PTSD sufferers will end up with a majority unwilling to punish them when the connection between PTSD and the crime is made clear.⁴⁶⁹

When the PTSD is clearly linked to military service, one can expect even greater reluctance to punish the war veteran for his criminal behaviour. Therefore, the willingness to treat war veterans with PTSD differently is a reality that can be promoted and considered. Where a war veteran has PTSD due to trauma experienced during military service, and subsequently goes on to commit a crime because of his PTSD symptoms, one can readily argue that he deserves to be treated differently by the criminal justice system.

4.7. Social Contribution (Gratitude)

An argument can already be made based on the fact that the war veteran has risked his life, limb, and sacrificed his liberty for his country, and as a result is owed some leniency. The socio-historical perspective on criminal law attempts to fit criminal responsibility along the lines of present conditions with the aim of legitimising criminal law.⁴⁷⁰ It is therefore necessary to examine the social aspects of criminal responsibility. What this means is that

⁴⁶⁸ Amanda M. Vicary and Amanda Larsen, 'Potential Factors Influencing Attitudes toward Veterans who Commit Crimes: An Experimental Investigation of PTSD in the Legal System' (2018) *Current Research in Social Psychology*, 13
<http://www.uiowa.edu/crisp/sites/uiowa.edu/crisp/files/crisp_vol_26_2.pdf> accessed 17 September 2019.

⁴⁶⁹ *ibid.*

⁴⁷⁰ Loughnan, "'Society Owes Them Much': Veteran Defendants and Criminal Responsibility in Australia in the Twentieth Century' (n435) 107.

criminal law in practice reflects normative values.⁴⁷¹ From the socio-historical perspective, society owes war veterans a debt of gratitude for their service, and this debt of gratitude should therefore be reflected when assessing criminal responsibility.

There have been arguments that veterans do not deserve civilian gratitude when they voluntarily enlist in unjustified warfare.⁴⁷² However, veterans will generally only enlist in a war if they believe the war is justified. For instance, an individual witnessing a man and his dog may erroneously believe that the dog owner is in danger and will intervene, putting his health and life at risk. Even though the witness is mistaken, he is acting on good intention. Certainly, such an individual is entitled to gratitude from the dog owner that he thought he was saving. Similar gratitude is owed to the veteran who enlists in an unjust war under the belief that he is defending the freedom, life, and safety of civilians.⁴⁷³

In fact, official claims that the government and citizens owe a debt of gratitude to veterans and active service members are usually unqualified. This means that there are hardly ever provisos that the debt of gratitude is excluded for veterans who have fought in unjust wars. This is a very unusual qualification because there is no fixed method for determining what amounts to an unjust war. Besides those who fight in war are separate and apart from the unjust or just reasons for that war.⁴⁷⁴ Ultimately, even the combatants of an unjust war may follow the rules and laws regulating the conduct of war.⁴⁷⁵ Therefore, what we believe about the propriety of the war in question is not a factor. It is the soldiers' perspectives that matter. Besides, once the soldier has enlisted, he cannot choose the wars in which he fights.

⁴⁷¹ *ibid.*

⁴⁷² Michael Robillard, 'A Case for Gratitude: A Response to Stephen Kershner's Gratitude toward Veterans' (2017) 39 Reason Papers 65, 69-71.

⁴⁷³ *ibid* 70-71.

⁴⁷⁴ Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 Ethics 693-694.

⁴⁷⁵ *ibid.*

There is always the possibility of being court-martialed and dishonorably discharged for misconduct.⁴⁷⁶ No doubt insubordination will fall under the parameters of misconduct.

It is, therefore, hardly surprising when officials such as the Attorney General of the State of Illinois publishes a statement on the website of the Illinois Attorney General's website that, 'we owe a debt of gratitude to the men and women' who protected freedom and served their country.⁴⁷⁷ This is ironic given the limits set on the acquisition of veteran status in the US. Still, according to the Attorney General for the State of Illinois, these veterans have suffered both physically and psychologically, and this suffering does not end once they re-enter civilian life. This suffering continues, and to show gratitude for their service, veterans are often entitled to government assistance via benefits which may include 'case advocacy, health outreach and public advocacy forums.'⁴⁷⁸ Putting war veterans with PTSD in prison means that treatment is not going to be administered for a proven condition. This will not do anything to prevent re-offending.

Due to the risk of recidivism for an untreated veteran with PTSD, it is therefore reasonable to argue that veterans belong in a "special category" of citizens due to the sacrifices that they have made for the lives, safety, and freedom of their countries, governments and fellow citizens. As a result, it makes sense that veterans should belong in a special category of criminal defendants. Indeed, this kind of thinking is behind the VTCs which are aimed at therapeutic jurisprudence and restorative justice. The idea is to help war veterans "get back on their feet."⁴⁷⁹ Thus, putting war veterans with PTSD behind bars only helps to further destroy them rather than help them "get back on their feet."

⁴⁷⁶ Richard J. Bednar, 'Discharge and Dismissal as Punishment in the Armed Forces' (1962) 16 *Military Law Review* 1, 10.

⁴⁷⁷ Kwame Raoul, 'Military & Veterans Rights' (Illinois Attorney General, 2018)

<<http://www.illinoisattorneygeneral.gov/rights/veterans.html>> accessed 6 August 2019.

⁴⁷⁸ *ibid.*

⁴⁷⁹ Huskey (n455) 700.

Society owes war veterans a debt of gratitude. The liberties and protections accorded to society are a direct result of the sacrifices that veterans have made. According to social contract theory, as members of society we all enter into social contracts with one another. These social contracts form the basis upon which individuals agree to form a society and live together as they discharge their socially agreed upon “moral and/or political obligations.”⁴⁸⁰ Based on social contract, one can argue that when soldiers join the war effort, there is a social contract with society in that soldiers will fight for our country and our rights at significant risk to themselves, and we will recognise this sacrifice and its benefits by rewarding our soldiers once they return.

As established in this paper the VTCs are limited in their reach and will only apply to veterans who have committed minor offences. There is a need for the special treatment and categorisation of veterans more broadly. After all (in the US), veterans are already given exceptional treatment within the legal and administrative systems (as previously mentioned, such as with mortgages, tax exemptions, and immigration). It would therefore make sense to extend this legal exceptionalism to criminal law, so that our gratitude toward veterans is displayed where it is needed the most in the criminal justice system.

There is an obvious cycle that demands some form of leniency for the war veteran with PTSD. The cycle starts with war, which involves tremendous sacrifices on the part of the soldier. Next, the trauma of war creates the conditions for PTSD which in turn creates the conditions for crime. Today’s modern warfare environment, such as counter-insurgencies, facilitates the swift and deleterious mental conditions of the soldier.⁴⁸¹

⁴⁸⁰ Jaren Wilkerson, ‘Disappearing Together? American Federalism and Social Contract Theory’ (2014) 17 *Journal of Constitutional Law* 569, 572.

⁴⁸¹ Hunter and Else (n446) 473.

In fact, the modern day training and experiences of today's drone fighter sets up a situation in which the veteran can be in a permanent state of warfare.⁴⁸² When this training and experience of the modern day soldier is taken together with PTSD society, the government and citizens must discharge an incredible debt of gratitude toward the veteran with PTSD who ends up in contact with the criminal justice system.

4.8. State's Complicity in Producing PTSD

The prevalence of PTSD is founded on research results indicating that where veterans are involved in combat, they are four times more likely to develop PTSD than regular US civilians.⁴⁸³ In addition, the number of veterans seeking treatment for PTSD has increased significantly over the last ten years.⁴⁸⁴ Based on these outcomes of war (also in Chapter Two), it can be argued that the state cannot "call to account" an individual whose conduct is, in part, the result of its own actions. The prevalence of war-related PTSD is bound to raise the issue of the state's complicity in the contraction of PTSD by war veterans.

When we look at the relationship between the soldier and the state, it is relatively easy to confer special status on war veterans, and to look at the state's possible complicity. It is arguable that the state is involved in the war experience, and is therefore complicit to some extent. After all, it is the state's war and the soldier is serving at the behest of the state that made the decision to go to war. The soldier is commissioned by the state as a prerequisite for service, and is fighting a war for state's purpose, which in and of itself raises the question of state complicity. The doctrine of complicity is that when an individual commits a crime as the primary offender, there are times when secondary parties who have contributed to the

⁴⁸² Evan R. Seamone, *Rescuing Soldiers of Misfortune: A Full-Spectrum Approach to Veterans in the Criminal Justice System from Arrest to Reentry* (Charles C. Thomas Publisher L.T.D. 2019) 79-80.

⁴⁸³ William B. Brown, Robert Stanulis and Gerrad McElroy, 'Moral Injury as a Collateral Damage Artifact of War in American Society: Serving in War to Serving Time in Jail and Prison' (2016) 13 Justice Policy Journal 1, 2.

⁴⁸⁴ *ibid.*

commission of the crime are accountable.⁴⁸⁵ It is reasonable to argue that the state has contributed to the crimes committed by war veterans with PTSD.

The retributivist theory, which is based on just deserts, requires that an individual is only punished for crimes that he deserves to be punished for. The retributivist believes that punishment is meted out to those who deserve it.⁴⁸⁶ In this regard, criminal responsibility is linked to moral responsibility. The retributivist also requires that criminal responsibility arises out of free will.⁴⁸⁷ When we look at free will and moral responsibility along the lines of the retributivist's perspective on criminal responsibility, the state basically robs the soldier of his free will in training and exposure to war where he contracts PTSD which controls his thinking and behaviour. Therefore, the state shares moral responsibility for this outcome.

The prevalence of war-related PTSD points to the state's complicity because it indicates that the war experience and/or military experience altogether contributes to or causes PTSD, which in turn creates difficulties for repatriation, and increases the risk of criminal behaviour. Given that the state makes the decision to deploy soldiers to war zones, the state is "complicit" in the production of PTSD. It is also the states' own decisions and actions that either create the conditions for war, or perpetuates the conditions for war.

An argument can be made that the state directly implants PTSD symptoms. This argument is supported by observations that military training instills hyper-vigilance and "rapid response to threatening encounters," which can turn into aggression and ultimately criminal prosecution and sentencing.⁴⁸⁸ Although hyper-vigilance is found among trauma

⁴⁸⁵ Sanford H. Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 California Law Review 323, 336-337.

⁴⁸⁶ Moore, *Placing Blame: A Theory of the Criminal Law* (n391) 87.

⁴⁸⁷ Youngjae Lee, 'What is Philosophy of Criminal Law?' (2013) Fordham Law Legal Studies Research Studies Paper No 2189821, 7.

⁴⁸⁸ Institute for Veteran Policy, 'Veterans and Criminal Justice: A Review of the Literature' (2012) 1 <<https://www.swords-to-plowshares.org/wp-content/uploads/Veterans-and-Criminal-Justice-A-Review-Literature-2012.pdf>> accessed 8 August 2019.

related sufferers, including PTSD, it is directly linked to the war experience (as previously mentioned). This may obviously include training and deployment.

This hyper-vigilance was observed in war veteran Matthew Sepi (Nevada-2005) who took an assault rifle with him to a convenience store one night. He used the weapon when he felt under threat and in doing so killed one person and wounded another. Yet Sepi, who claimed self-defence, was able to bargain for a conditional discharge and a conviction on the unlawful possession of a firearm.⁴⁸⁹

Given the state's role in the creation and perpetuation of the conditions for war which inevitably causes PTSD, which in turn causes crime, it is wrong and unfair for the state to insist on punishing these veterans for crimes indirectly and directly linked to state decisions, training, and war-time activities. There is no doubt that the state is complicit and therefore should offer the war veterans with PTSD some leniency, such as treatment rather than incarceration (for example, as will be discussed in Chapter Nine, Mike Jones received treatment instead of incarceration).

We might sympathise with this argument, but of course the state creates all kinds of conditions – including poverty, bad education, and bad housing – that contribute to individuals committing crimes. So, the question arises again, what makes war veterans with PTSD special? The veteran who suffers from his condition due to war, which is service to one's country, is special compared to those who are poor or otherwise disadvantaged. This is because these individuals' conditions were not caused by service to the state, but were independent of the state's behaviour.

Arguably, the state is “aware” that training and war experiences lead to PTSD, which in turn, leads to crime. With this knowledge and understanding, the state still makes the decision to go to war and to recruit citizens to fight in the war effort. Greenfield's discussion

⁴⁸⁹ Ken Ritter, 'Iraq War Vet Makes Plea Deal in Vegas Slay' (24 September 2005) <<https://www.apnews.com/48f161cf8af67259d7bc5111a6be2a9>> accessed 9 August 2019.

on complicity to genocide provides a reasonable theoretical approach supporting this argument of the state's complicity in the crimes committed by war veterans with PTSD. According to Greenfield, complicity can arise when the party who is guilty of complicity did not necessarily intend that genocide would be the outcome. All that is required is that the party could have reasonably foreseen that genocide would be the outcome of his behaviour.⁴⁹⁰

Likewise, given the prevalence of PTSD among war veterans, and the significant research linking violence to PTSD, it can also be argued that the state could have reasonably foreseen that PTSD and crime were likely outcomes for soldiers. Therefore, using Greenfield's argument, it is reasonable to conclude that the state does share some responsibility for the criminal behaviour of war veterans with PTSD.

The right to treatment is necessitated by the fact that war veterans have increasingly suffered from war-related PTSD.⁴⁹¹ In addition, it has become an established fact that war veterans are at a greater risk of contracting PTSD than the average citizen.⁴⁹² Moreover, treatment barriers do exist.⁴⁹³ Treatment barriers have been discussed in this chapter and throughout this dissertation. For present purposes, the most important treatment barriers include stigma associated with mental illnesses such as PTSD, the veteran's unpreparedness for treatment, and logistics.⁴⁹⁴ We have also learned that the veteran's status and failure to have a condition diagnosed are additional barriers to treatment for PTSD.

The government is obviously responsible for the failure of veterans to receive treatment for PTSD because it can take a more proactive role in establishing and implementing treatment programmes (and their availability and accessibility). Since the

⁴⁹⁰ Daniel M. Greenfield, 'The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got it Wrong and Why it Matters' (2008) 98 *Journal of Criminal Law and Criminology* 921.

⁴⁹¹ Miriam Reisman, 'PTSD Treatment for Veteran: What's Working, What's New, and What's Next?' (2016) 41 *Pharmacy & Therapeutics* 623.

⁴⁹² *ibid.*

⁴⁹³ *ibid.*

⁴⁹⁴ Tracy Stecker and others, 'Treatment-Seeking Barriers for Veterans of the Iraq and Afghanistan Conflicts Who Screen Positive for PTSD' (2013) 64 *Psychiatric Services* 280.

untreated and undiagnosed veterans are more likely to commit a crime, the government's failure to intervene becomes a complicit factor.

In a study carried out by Smith, it was discovered that veterans who were diagnosed with and treated for PTSD before their arrest were more likely to be sentenced to treatment over those who were diagnosed with PTSD after arrest.⁴⁹⁵ In this regard, the government is “complicit” in the PTSD, and corresponding criminal conviction and sentencing, because the government has not only set up the conditions for war-related PTSD, but also failed to ensure the prompt diagnosis and treatment of PTSD for veterans. Obviously, a part of the healing and reintegration process includes mandatory treatment (or a mandatory screening process) for war-related illnesses, both psychological and physical. When the government fails to identify and treat those war-related conditions, the government is “responsible” for both the direct and indirect consequences.

4.9. Conclusion

This chapter has established that the soldier's status as a war veteran is very important when considering what forms of benefits they can expect when returning to civilian life. This status as a war veteran is very important because the war veteran in need of care may be denied state aid if he cannot satisfy the veteran requirements. This is so important for war veterans with PTSD because it is this category of veterans that are vulnerable to criminal behaviour. The provision of state aid can provide these veterans with the treatment needed for eliminating, if not reducing, the risk of criminal behaviour.

Moreover, the question that continues to loom is whether it is fair to dismiss the causative factors behind the war veteran's PTSD. These causative factors can be traced back to the state that starts wars and recruits citizens. The sacrifices made by the soldiers are manifested in the life altering consequences of PTSD, therefore the state ought to consider

⁴⁹⁵ Brandt A. Smith, ‘Impact of Veteran Status and Timing of PTSD Diagnosis on Criminal Justice Outcomes’ (2018) 6 Healthcare 1.

helping, rather than punishing, these war veterans. The imposition of criminal responsibility and punishment under criminal law is counterproductive.

War veterans with PTSD are, therefore, in a “special category” of defendants, and should receive the benefit of leniency compared to other defendants, and even ordinary defendants with PTSD, because the country and its citizens share a level of “responsibility” for the conditions that placed the veteran in a situation in which he would contract PTSD, and become a crime actor. It therefore makes sense that our gratitude is expressed through “leniency” within the criminal justice system.

The chapters that follow examine how the “specialness” of war veterans with PTSD is recognised in criminal defences and in sentencing. The picture that emerges is one of inconsistent approaches and confusion. Similarly, situated war veterans with PTSD are sometimes able to plead a particular defence, and sometimes not, and their PTSD is sometimes used in mitigation, and sometimes not. Chapters Five to Eight each deal with a particular defence, Chapter Nine with mitigation, and Chapter Ten concludes by reflecting on the need for reform.

Chapter Five: Insanity Defence

5.1. Introduction

This chapter considers the insanity defence, and its implications, for defendants with PTSD and emphasises the consequences of deploying this defence for veterans with PTSD. The insanity defence rests on the moral assumption that it is unfair and unjust to hold the insane criminally responsible. In general, where a defendant charged with a crime successfully pleads insanity, he will receive appropriate treatment, and will be institutionalised, but for treatment rather than punishment. Under English law, when a sane defendant is acquitted, or an insane defendant found not guilty by reason of insanity (NGRI), there is no criminal culpability, and therefore, there can be no punishment.⁴⁹⁶

In an ideal world, where a war veteran with PTSD successfully pleads insanity, he would receive appropriate treatment in order to ensure that the condition does not become any worse, his behaviour improves, and this would thus respond to the “specialness” arguments presented in Chapter Four.

However, there is significant “stigma” attached to being labelled insane, and there is evidence that in a number of cases an individual charged with a crime would rather plead guilty than risk the return of a verdict of NGRI.⁴⁹⁷ Furthermore, a successful plea of insanity automatically results in the disposal of indefinite detention.⁴⁹⁸ Thus an individual who is accorded a special verdict can face an indefinite sentence.

It is therefore possible that the state of the law on insanity leads to some individuals being convicted, who should not be convicted. This is troubling because it both violates moral intuition that only those who are guilty ought to be punished, and means that instead of

⁴⁹⁶ Jill Peay, ‘Responsibility, Culpability and the Sentencing of Mentally Disordered Offenders: Objectives in Conflict’ (2016) 3 *Criminal Law Review* 152, 154.

⁴⁹⁷ Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) (n314) 334.

⁴⁹⁸ Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (n326) 26.

receiving appropriate treatment, some of the “insane” are being incarcerated, thus adding to the disproportionate numbers of prisoners suffering from mental illness.⁴⁹⁹

5.2. Controversies over the Insanity Defence

Criminal responsibility was initially founded on the exercise of free will by a rational human being.⁵⁰⁰ This initial thinking in the earlier part of the 20th century has developed over time to dispense with the free will requirement. Still, insanity raises the presumption that the individual is unable to form rational thought and action, and is therefore outside the realm of criminal responsibility.⁵⁰¹ In England and in various states in the US, a defence of insanity will only succeed if the accused is able to prove that he suffered from a “mental disease” or “defect” at the time of the commission of the crime.⁵⁰²

The insanity defence has proved hugely controversial. In part, these controversies relate to the individual elements of specific tests, and the inclusion or exclusion of other tests. For example, as Hostettler points out, in England the insanity defence rules fail to recognise the issue of irresistible impulse.⁵⁰³ As such, an individual is unable to access the defence if he is fully aware of the nature and quality of the crime, and knows the difference between right and wrong, but because of a mental illness is unable to stop or control his behaviour. The irresistible impulse defence is permitted in several Commonwealth jurisdictions, as well as in some states in the US.⁵⁰⁴ These issues are examined below.

With respect to the theories of the overall purpose of criminal law, insanity has also proved controversial. As noted above, for blame-based or retributive theories, the insane are

⁴⁹⁹ Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) (n314) 334.

⁵⁰⁰ S. S. Glueck, ‘Ethics Psychology and the Criminal Responsibility of the Insane’ (1923) 14 *Journal of Criminal and Criminology* 208, 209.

⁵⁰¹ *ibid.*

⁵⁰² Caton F. Roberts, Stephen L. Golding and Frank D. Fincham, ‘Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense’ (1987) 11 *Law and Human Behaviour* 207, 208.

⁵⁰³ John Hostettler, *A History of Criminal Justice in England and Wales* (Waterside Press 2009) 220.

⁵⁰⁴ *ibid.*

not held responsible, and therefore not blameworthy; insanity provides an excusable explanation for criminal behaviour.⁵⁰⁵ For some retributivists, the nature of insanity is such that rather than operate as a defence, it ought to be an exemption (or bar to trial). This is because it makes no sense to call the insane to account and then excuse them.⁵⁰⁶ Rather, by virtue of their insanity, they cannot be a participant in the moral community of “blame.”

Within the realm of the protective theory of criminal law, punishment is warranted for the purpose of deterring criminal behaviour.⁵⁰⁷ At the same time, an individual who successfully pleads insanity is ‘said not to be deterrable,’ and therefore ‘not rightly subject to the criminal law.’⁵⁰⁸ The result is that with respect to “individual deterrence,” it would seem that the insane ought not be punished, but rather treated instead.

However, this is too quick. Some consequentialist theories (of which protective theories are a sub-set) hold that punishment for an insane defendant can result in deterrence in two different ways.⁵⁰⁹ Firstly, because it is not clear that all insane people are undeterrable, the fear of punishment can act as a deterrence to “some insane criminals.”⁵¹⁰ The mechanism is the same as for the sane, in that the fear of punishment may be sufficient in some cases to hold back the “insane inclinations” to commit crimes.⁵¹¹

Secondly, punishing the insane can act as a deterrent to those who are sane.⁵¹² This is because the fact that a successful insanity defence can result in an alternative to incarceration,

⁵⁰⁵ R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 287.

⁵⁰⁶ *ibid* 285.

⁵⁰⁷ Gary Watson, ‘The Insanity Defense’ in Andrei Marmor (ed), *The Routledge Companion to the Philosophy of Law* (Routledge 2012) 208.

⁵⁰⁸ *ibid*.

⁵⁰⁹ Walter Sinnott-Armstrong and Ken Levy, ‘Insanity Defenses’ in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 320.

⁵¹⁰ *ibid*.

⁵¹¹ *ibid*.

⁵¹² *ibid*.

which could motivate criminals to malingering and launch a bogus, but convincing, insanity defence.⁵¹³

As ever with consequentialist theories, the assessment of these claims depends on the facts. Punishing or treating the insane will have consequences, and which is to be preferred will depend on those and other consequences, including recidivism rates (it might be, for example, that simply incarcerating the insane would lead to higher recidivism rates for those released). Moreover, for those who are not thoroughly consequentialist, there remains the issue of whether it can ever be right to punish the blameless, and whether those who need treatment have a right to that treatment. Finally, controversies around insanity are part of larger debates about mental health and the criminal justice system.

There is a persistent and well-grounded complaint that far too many individuals with mental health issues are in prison. This is a common theme throughout the literature on war veterans with PTSD. A similar observation was made by the Howard League that advocates criminal justice reform in England.⁵¹⁴ Of course, this is not to say that all those with mental health issues in prison are insane, but rather that insanity belongs to a family of issues that remain unresolved, despite years of advocacy for reform.⁵¹⁵

Having looked at the general controversies around the insanity defence, it is time to turn to the specifics, beginning with the rule that is used in England and in a number of US states, which is the M’Naghten rule, named after Daniel M’Naghten, who was charged with killing a personal secretary to the British Prime Minister in 1843. He was acquitted because

⁵¹³ *ibid.*

⁵¹⁴ Jill Peay, ‘Mental Disorder and Imprisonment: Understanding an Intractable Problem?’ in Anita Dockley and Ian Loader (eds), *The Penal Landscape: The Howard League Guide to Criminal Justice in England and Wales* (Routledge 2013) 139.

⁵¹⁵ Janet Dine, James Gobert and William Wilson, *Cases and Materials on Criminal Law* (6th edn, Oxford University Press 2010) 440.

the court determined that he was insane, and thus, M’Naghten became the first appellate case of insanity.⁵¹⁶

The M’Naghten special verdict more than 40 years later was notorious as it was perceived by the public as setting the stage for permissible crimes.⁵¹⁷ This worry persists across a number of jurisdictions, despite it being, in most instances, a misunderstanding. As noted previously, in England, those found NGRI are liable to indefinite detention (although, of course, this does not mean that they serve the same), and across other jurisdictions an individual who is NGRI may be liable to institutionalisation for a period longer than the maximum sentence, if the individual is convicted.⁵¹⁸ For example, it was held by the US Supreme Court in 1983 that an individual who had been found NGRI who had attempted shoplifting could face an indefinite period of institutionalisation, compared to the actual maximum penalty of one year.⁵¹⁹

It is important to point out that in the USA and England, the defence of insanity needs to be made by the defendant, therefore, the burden on the defendant claiming insanity is onerous. The shifting of the burden here is unconventional because in a typical case the prosecutor is the accuser and is required to make the case. The burden of proof rests with the prosecution because the defendant is entitled to the presumption of innocence and will not be deemed guilty until the prosecution discharges that burden of proof. This is referred to as the “golden thread” that runs throughout the English criminal justice system.⁵²⁰ In a conventional trial, the defendant’s not guilty plea invokes the presumption of innocence which places the burden of proving the defendant’s guilt BRD upon the prosecution.⁵²¹

⁵¹⁶ Jacques M. Quen, ‘An Historical View of the M’Naghten Trial’ (1968) 42 Bulletin of the History of Medicine 43-51.

⁵¹⁷ Sinnott-Armstrong and Levy (n509) 299.

⁵¹⁸ *ibid.*

⁵¹⁹ *ibid* 300.

⁵²⁰ *Woolmington v DPP* [1935] AC 462.

⁵²¹ Jack B. Weinstein and Ian Dewsbury, ‘Comment on the Meaning of ‘Poof beyond a Reasonable Doubt’’ (2006) 5 Law, Probability and Risk 167, 168.

5.3. M’Naghten Rule

The M’Naghten rule is a legal test implemented to ascertain whether the person accused of a crime was insane or sane at the time of committing it.⁵²² Although the test refers to “disease,” it is important to note that M’Naghten is not a medical test, and the insanity it establishes is not a medical diagnosis.⁵²³

The insanity defence has little, if anything, to do with psychiatry in terms of its legal definition.⁵²⁴ In fact, the defence dates back in time before psychiatry and psychology became officially recognised areas of practice.⁵²⁵ That said, by the 19th century, and especially with the introduction of the M’Naghten rules and its tests, psychiatrists and psychologists began to play an important role in the development of the insanity defence, and how the disease of the mind is linked to requisite defective reasoning.⁵²⁶

A pivotal issue under the test is determining whether or not the defendant was capable of distinguishing between right and wrong at the time of the commission of the crime. Moreover, the defendant must also be unable to appreciate the nature of his crime due to a defect of reason linked to a disease of the mind. Under the M’Naghten rules:

‘to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.’⁵²⁷

The following three sections will discuss each of these elements.

⁵²² Arthur H. Coleman and Arthur T. Davidson, ‘M’Naghten Rule: The Right or Wrong of Criminal Law’ (1987) 70 *Journal of the National Medical Association* 599.

⁵²³ Sinnott-Armstrong and Levy (n509) 300.

⁵²⁴ Charles Patrick Ewing, *Insanity: Murder, Madness, and the Law* (Oxford University Press 2008) xxi.

⁵²⁵ *ibid.*

⁵²⁶ *ibid.*

⁵²⁷ *M’Naghten* [1843] UKHL J16.

5.3.1. Elements of M'Naghten Rule

5.3.1.1. Defect of Reason

A defect of reason on its own is inconsequential under the M'Naghten rules, and having nothing more than a defect of reason will not satisfy the M'Naghten rule. Although the defect of reason is a key component of the M'Naghten rules, it is only a key component if it is consequential to a diseased mind.⁵²⁸ English criminal law is clear that the defect of reason must be a result of a disease of the mind to the extent that the reasoning ability of the individual is “impaired.”⁵²⁹

A defect of reason is a failed ability to reason.⁵³⁰ It cannot be a situation in which the defendant may be absent-minded or forgetful as determined in *R v Clarke*.⁵³¹ Defect of reason due to a diseased mind must be cognitive, and cannot be related to emotional or volitional matters of the mind.⁵³² This cognitive focus is the reason that irresistible impulse is excluded in the English insanity defence. The defendant must show that he suffers from defect of reasoning caused by a disease of the mind. The defect of reasoning must be in action at the time of the commission of the offence and must be such that the defendant cannot appreciate the difference between right and wrong or acknowledge the nature of the crime.⁵³³ Thus, defect of reason is required to have a negative impact on one's cognitive/intellectual faculties, including one's ability to remember, to reason, to think, and so on.⁵³⁴

⁵²⁸ Michael J. Allen, *Textbook on Criminal Law* (13th edn, Oxford University Press 2015) 143.

⁵²⁹ Jonathan Herring, *Criminal Law: Text, Cases and Materials* (8th edn, Oxford University Press 2018) 670.

⁵³⁰ David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, Oxford University Press 2018) 298.

⁵³¹ *R v Clarke* [1972] EWCA 1 All ER 219.

⁵³² Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, Oxford University Press 2016) 160.

⁵³³ James Fitzjames Stephen, *A History of the Criminal Law of England* (Cambridge University Press 2014) 158.

⁵³⁴ Janet Loveless, Mischa Allen and Caroline Derry, *Complete Criminal Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2018) 340.

The defect of reason due to a disease of the mind is relevant only if the defendant either did not know the quality or nature of his behaviour or was unaware that what he was doing was wrong.⁵³⁵ Applying defect of reason due to a disease of the mind can be tricky in the context of intoxication. According to the Law Commission, an individual with alcohol induced defective reasoning ought to be able to plead insanity, although the disease of the mind under the influence of alcohol is temporary.⁵³⁶

Apparently, when intoxicants induce defective reasoning due to a diseased mind, the defendant does not have to be intoxicated during the commission of the crime.⁵³⁷ At the same time, it was determined in the *Attorney-General for Northern Ireland v Gallagher* case that a defendant with a pre-existing psychiatric condition, in which he is predisposed to “outbursts” when under the influence of intoxicants, cannot rely on the defect of reason due to a diseased mind component to substantiate an insanity defence.⁵³⁸

5.3.1.2. Defect of Reason must be caused by a Disease of the Mind

In order to escape criminal responsibility using an insanity defence, the individual must prove that they suffered from a disease of the mind according to the M’Naghten test. “Disease of the mind” is defined by several English cases. For instance, in *R v Kemp*, Devlin J defined disease of the mind as distinguishable from the brain and relevant only to cognition, such as ‘the mental faculties of reason, memory and understanding.’⁵³⁹ Devlin J specifically stated that the brain’s condition is not the issue.⁵⁴⁰ In this regard, it does not matter what or how the mind malfunctions, and thus any external factor may be applicable.

⁵³⁵ Herring, *Criminal Law: Text, Cases and Materials* (8th edn, Oxford University Press 2018) (n529) 666.

⁵³⁶ Law Commission, ‘Intoxication and Criminal Liability’ (n362) 42.

⁵³⁷ *ibid.*

⁵³⁸ *ibid.*

⁵³⁹ *R v Kemp* [1957] 1 QB 399.

⁵⁴⁰ *ibid.*

What is important is that the disease of the mind must be such that it has an impact on the mind's ability to function regardless of the cause.⁵⁴¹ The only requirement in this regard is that the disease of the mind was operating during the commission of the crime. In other words, any mental illness or disorder that impacts the mind's ability to function, and results from an internal rather than external factor, is a disease of the mind.⁵⁴²

Similarly, in *R v Sullivan*, the House of Lords ruled that if a disease had the ability to impact cognitive functioning, such as one's memory, reason, and understanding, it was a disease of the mind, pursuant to the M'Naghten rules.⁵⁴³ Thus, the broadening of opportunities for pleading insanity due to a disease of the mind leaves open the possibility of defendants using any number of mental disorders in support of an insanity defence.

The House of Lords subscribed to Devlin J's definition of disease of the mind in the case of *Bratty v Attorney-General for Northern Ireland*. The House of Lords stated in *Bratty* that while diseases such as schizophrenia are undoubtedly diseases of the mind, there are also others. For instance, any mental disorder that reveals itself violently and has a tendency to return is a disease of the mind.⁵⁴⁴

The relevant sense of "disease of the mind" has been considerably expanded to the point where diabetes may amount to the requisite defence element for a successful insanity defence.⁵⁴⁵ In addition, in English law, according to Horder 'the internal factor doctrine has resulted in epilepsy, sleepwalking, and hyperglycemia being classified as insanity.'⁵⁴⁶ At the same time, the "internal" and cognitive elements of the test mean that M'Naghten remains narrower than other insanity tests.

⁵⁴¹ Horder, *Ashworth's Principles of Criminal Law* (8th edn, Oxford University Press 2016) (n532) 160.

⁵⁴² *ibid.*

⁵⁴³ *R v Sullivan* [1984] AC 156.

⁵⁴⁴ *Bratty v Attorney-General for Northern Ireland* [1963] (n341).

⁵⁴⁵ Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) (n314) 296.

⁵⁴⁶ Horder, *Ashworth's Principles of Criminal Law* (8th edn, Oxford University Press 2016) (n532) 160.

Defect of reason is connected to cognition. This is because in order to successfully claim defect of reason, the defendant must show that his reasoning was so defective that he could not appreciate the nature and quality of his conduct, or, if he could, he could not tell whether it was wrong or not.⁵⁴⁷ However, while the defendant may satisfy the M’Naghten rules by showing a temporary defect of reason, courts have tended to interpret the defective reasoning arm of the rules very narrowly, and focus has been on the cognitive aspect of defect of reasoning which alters the individual’s ability to distinguish between right and wrong, or appreciate the nature and quality of his crime.⁵⁴⁸ This cognitive focus has proved controversial and, as discussed below, narrows the scope of insanity in ways relevant to veterans with PTSD.

5.3.1.3. Cognitive Test

In England, a person seeking to substantiate a defence of insanity may rely on a cognitive incapacity, provided it is consistent with the standards established within the M’Naghten rules.⁵⁴⁹ What this means is that a defendant can only succeed on a NGRI plea if they are able to prove that their cognitive functioning is related to some form of physical or mental illness. Essentially, the cognitive deficiency must be such that the defendant is unable to distinguish between right or wrong. Moreover, a cognitive malfunction can also be substantiated if the defendant is unable to appreciate the nature and quality of his behaviour. These elements of the cognitive test within the M’Naghten rules are discussed in the sections below.

⁵⁴⁷ Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (n326) 117.

⁵⁴⁸ Arlie Loughnan, ‘M’Naghten’s Case (1843)’ in Philip Handler, Henry Mares and Ian Williams (eds), *Landmark Cases in Criminal Law* (Hart Publishing 2017) 137.

⁵⁴⁹ Paul Catley and Lisa Claydon, ‘The Use of Neuroscientific Evidence in the Courtroom by those Accused of Criminal Offenses in England and Wales’ (2015) *Journal of Law and the Biosciences* 510, 524.

5.3.1.3.1. Difference between Right and Wrong

The defendant is unaware that what he is doing is wrong. The right and wrong test has been used to refer to the M’Naghten rules.⁵⁵⁰ Essentially, the defendant seeking to succeed in an insanity defence must prove that they did not know the nature and quality of the act, or did not know that it was wrong.⁵⁵¹ In English law, the test is narrowly directed toward whether the accused knew that his behaviour was lawfully wrong.⁵⁵² This is narrower than a possible interpretation of wrong as morally wrong or incompatible with society’s normative values and practices.⁵⁵³

This engages a complex conundrum, because we are left with the crucial question of whether it makes sense to distinguish a moral obligation from a legal obligation in this way. For example, a defendant may claim to have killed a child based on the belief that the child was really a reincarnation of Hitler, or the defendant may have killed a child believing the child was an alien, and the killing was necessary in self-defence. The issue here is that the defendant erroneously believed that he had a moral duty to commit the crimes, but in the first case may have been aware that the act was legally wrong.

This, however, must be on account of a mental disease that affects the functioning of the mind and voluntary behaviour. This is a necessary requirement otherwise individuals would just be able to proceed on an ignorance defence (if available). There must be something so wrong with the defendant’s mind that it is categorised as a disease.

The main idea is to show that the defendant is insane because he is not morally responsible.⁵⁵⁴ Distinguishing between right and wrong addresses two alternative norms: law

⁵⁵⁰ Carl Cohen, ‘Criminal Responsibility and the Knowledge of Right and Wrong’ (1959) XIV University of Miami Law Review 30.

⁵⁵¹ *ibid.*

⁵⁵² David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Text, Cases, and Materials on Criminal Law* (12th edn, Oxford University Press 2017) 705.

⁵⁵³ Sinnott-Armstrong and Levy (n509) 303.

⁵⁵⁴ *ibid* 300.

and morality.⁵⁵⁵ The law, in support of an insanity defence, goes beyond the idea that the insane person is unaware that his conduct is against the law. This is because ignorance is not a valid response to a criminal charge.

The legal basis for establishing whether the defendant knows the difference between right and wrong was established by early English authority. For instance, in *R v Windle*, Chief Justice Lord Goddard stated in the House of Lords that the courts are only able to ‘distinguish between that which is in accordance with the law and that which is contrary to law,’ and it is inappropriate to leave it up to a juror to determine whether an ‘act was morally right or wrong.’⁵⁵⁶

This is especially contrary to the principles of justice within England where non-insane principles establish that ignorance is not a defence. Judges in England have notoriously ruled under the maxim “*ignorantia juris neminem excusat*” in declining a defence based on ignorance or mistake.⁵⁵⁷ However, under the M’Naghten rules the cognitive test requires that courts forego this maxim and general principle of English criminal law, and consider whether the defendant meets the requirements of insanity based on ignorance of the law. The only saving grace is that ignorance of the law emanates from a disease of the mind that contributes to defective reasoning.

As far back as the mid 19th century, Stephen points out that an individual may not have a mental illness but may still end up in a condition in which he is unable to even think about the legalities of his conduct. For example, an individual driven by extreme anger or provocation can lose all sense of reality, and in that instance fail to distinguish between right

⁵⁵⁵ Ormerod and Laird, *Smith, Hogan, and Ormerod's Text, Cases, and Materials on Criminal Law* (12th edn, Oxford University Press 2017) (n552) 705.

⁵⁵⁶ *R v Windle* [1952] 2 QB 826, 833.

⁵⁵⁷ Andrew Ashworth, ‘Testing Fidelity to Legal Values: Official Involvement and Criminal Justice’ in Stephen Shute and Andrew P. Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002) 302.

or wrong.⁵⁵⁸ Yet, since the reaction is driven by emotion as opposed to cognition, the defendant's inability to distinguish between right and wrong during the commission of the crime does not allow insanity to be a viable defence (although "loss of control" type defences may be available).

The mental conditions affecting the defendant's mind must make the defendant incapable of realising that his behaviour was against the law, or inconsistent with community standards. It is worth noting that were the test to include reference to volitional loss of control, such as an irresistible impulse, then the test of knowing legal and/or moral right from wrong would have less of a sting; a defendant may actually know that he is acting against morality or the law, but the unreasonable fear or belief is so strong due to a defect of the mind that he is incapable of controlling his behaviour.

The primary problem for the right and wrong test is that it is not specifically detailed. The defendant must not be able to form an opinion about whether his behaviour is right or wrong (and might in any case be incapable of conforming his behaviour accordingly).⁵⁵⁹ The difficulty here is that the accused person's beliefs are not the standard for the test. The defendant had to definitively know or not know that their behaviour was lawfully wrong. This in turn basically provides a defence where one is usually denied: ignorance of the law. To say that the defendant believed that his behaviour was unlawful is more compatible with establishing defective reasoning while labouring under a disease of the mind.

5.3.1.3.2. Knowing the Nature and Quality of the Act

Not knowing the nature of the conduct appears to be a straightforward requirement for proving insanity under the M'Naghten rules. This means that the defendant, by some disease of the mind, is unaware of what he is doing under some appropriate description. This is

⁵⁵⁸ Stephen (n533) 164-165.

⁵⁵⁹ *R v Byrne* [1960] 2 QB 396.

accepted by the requirement that the fact that the defendant was either not aware of the nature of his actions, or if he was, did not know that what he was doing was wrong.⁵⁶⁰

Essentially, an individual who commits a crime, in the absence of appreciation for the nature and quality of the act, does not have the necessary intent, nor did they “act” in the relevant sense of the term. Knowing the nature and quality of the act is straightforward, however, the cognition test is not so simple.

The question for consideration is how one determines the quality of an act. Is the quality of the act based on the act itself, or the motivating factors behind the act? If a man believes it is in the world’s best interests to kill all boys younger than 5 years old, for example, is the quality of this act any different from a man who believes it is in his best interest to murder six adults because he believes they are aliens?

The defendant unreasonably or irrationally perceives that he is justified in his actions, or due to hallucinations or other misperceptions interprets his surroundings erroneously. For example, an individual commits murder under the belief that the victim is an inanimate object, such as a jar.⁵⁶¹ As Loveless, Allen, and Derry point out, the courts will not consider the mental disease, but rather will look at the defendant’s cognitive inability to understand.⁵⁶² Still, the House of Lords ruled in *R v Clarke* that an individual relying on an insanity defence under the M’Naghten rules must present some evidence of a disease of the mind.⁵⁶³ This is because the courts have consistently refused to accept that an individual with a fleeting mental incapacitation qualifies as an individual who cannot appreciate the quality of his crime. The fact that the individual is a rational human being and loses his rational thinking in a transitory manner will not suffice.

⁵⁶⁰ Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) (n314) 335.

⁵⁶¹ John Child and David C. Ormerod, *Smith, Hogan, and Ormerod's Essentials of Criminal Law* (2nd edn, Oxford University Press 2017) 564.

⁵⁶² Loveless, Allen and Derry (n534) 341.

⁵⁶³ Ormerod and Laird, *Smith and Hogan's Text, Cases, and Materials on Criminal Law* (11th edn, Oxford University Press 2014) (n300) 345.

However, if an individual commits a heinous act under some delusional interpretation of the environment, or as a result of hallucinations, it is very likely to be in response to a mental disorder impairing cognition.⁵⁶⁴ This kind of behaviour is very unlikely to be a result of an emotional lapse, and therefore, in the context of understanding the nature and quality of one's act, this arm of the cognitive test under the M'Naghten rules makes sense. If substantiated by expert testimony, this establishes that the defendant was labouring under a mind that was so defected or diseased that he could not appreciate the nature of his crime.

Essentially, the defect of reason must be such that it negatively impacts the accused person to the point where they are unaware of the nature and quality of their behaviour. What this actually comes down to is the criminal law establishing a threshold of morality, and in this instance, the defendant's ability to know the nature and quality of his act allows for a consideration of the defendant's moral standing with respect to the conduct.⁵⁶⁵

5.4. War Veterans, PTSD, and the M'Naghten Test

As we have seen, the M'Naghten test requires

a defect of reason caused by a disease of the mind, such that the defendant did not know the nature and quality of his act, or, if he did know, then he did not know the act was wrong.

The discussion of the elements of the test above has highlighted the ways in which a "defect of reason caused by a disease of the mind" has been interpreted broadly as including any physical disease that affects mental functioning. Thus, including epilepsy, sleepwalking, and hyperglycemia.⁵⁶⁶ However, it is also very narrow in two important senses: first, the defect of reason must be caused by an internal and not external source. For example,

⁵⁶⁴ Stephen J. Morse, 'Excusing the Crazy: The Insanity Defense Reconsidered' (1985) 58 Southern California Law Review 779, 810.

⁵⁶⁵ Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (n326) 120.

⁵⁶⁶ Horder, *Ashworth's Principles of Criminal Law* (8th edn, Oxford University Press 2016) (n532) 160.

hypoglycaemia, which is the result of the external cause of taking too much insulin, is excluded.⁵⁶⁷ Second, the test focuses on cognitive rather than volitional features.

In addition, the requirement that the defect of reason must be such that the defendant did not know what he was doing, or, if he did know, then he did not know the act was wrong, has also been narrowed to not knowing that the act was legally wrong (independent of the defendant's beliefs about the act's moral rightness or wrongness).

All of these factors are important in considering the accessibility of the insanity defence to war veterans with PTSD, and it is worth considering each in more detail.

5.4.1. Defect of Reason caused by a Disease of the Mind

Intuitively, one might think that an individual suffering from PTSD would be able to claim a defect of reason due to a disease of the mind. The English Court of Appeal made it clear that in order to succeed in an insanity defence, the defendant must present clear evidence that he was labouring under a defect of reason due to a disease of the mind.⁵⁶⁸ PTSD sufferers have been found to suffer from episodes in which they relive a traumatic experience with no sense of reality. However, as we have seen, in England it is doubtful that PTSD symptoms would support an insanity defence, because the "disease of the mind" requirement under the M'Naghten rules, requires an internal factor capable of affecting reasoning capabilities.⁵⁶⁹

In *R v Quick*, the Court of Appeal stated that a "malfunctioning of the mind" is not a disease of the mind under insanity parameters if the malfunctioning is due to an external factor, such as violence, substances, and hypnosis.⁵⁷⁰ It therefore follows that where the mind malfunctions due to an external cause, it is more consistent with a defence of automatism as

⁵⁶⁷ *R v Quick* [1973] QB 910.

⁵⁶⁸ *Attorney-General's Reference* (No 3 of 1998) [1999] EWCA Crim 835.

⁵⁶⁹ Savla (n253) 13.

⁵⁷⁰ Ashworth and Horder (n348) 91.

opposed to insanity.⁵⁷¹ Similarly, in *R v T* – where T was charged with robbery and assault occasioning actual bodily harm, and it emerged that she was suffering with PTSD having been raped a few days prior to the offence – it was held that PTSD was not a disease of the mind in itself, as it was the result of external causes (in this case, T’s rape), but that T’s dissociative state at the time of the offence was such as to allow the jury to consider non-insane automatism (they did, but subsequently convicted).⁵⁷²

The *R v T* case suggests that violence induced PTSD is not sufficient to ground a successful insanity defence, although according to Friel, White and Hull, a search of UK case databases reveals one case in which PTSD was successfully used as an insanity defence.⁵⁷³ However, the case was not identified. Yet, in other cases in other jurisdictions, using similar legal tests, violence induced PTSD has successfully been used in an insanity defence. For example, in Louisiana, US, in *State v Heads*, the defendant – a combat veteran who shot and killed his brother-in-law following the breakup of his marriage – was found insane due to flashbacks in a dissociative state during the commission of the crime.⁵⁷⁴ Louisiana operated a modified M’Naghten test, that due to mental disease or defect the defendant did not know the nature or quality of the act or that it was wrong. Similarly, in *New Jersey v Cocuzza*, the accused was a Vietnam War veteran who was charged with assaulting a police officer. During his trial, the accused reportedly thought that when assaulting the police officer, he was assaulting a war enemy.⁵⁷⁵

In itself, these differences are not surprising. Absent in an internal/external division, it makes sense to think that different jurisdictions could come to different judgments on whether PTSD is “really” a disease. Rather, the point is that the weight given to the internal/external distinction is in tension with the fundamental moral idea to which we are

⁵⁷¹ *ibid.*

⁵⁷² *R v T* [1990] Crim LR 256.

⁵⁷³ Friel, White and Hull (n2) 77.

⁵⁷⁴ *State v Heads* (n205).

⁵⁷⁵ *State v Cocuzza* (n177).

appealing that it is unjust to punish those who lack responsibility and therefore blameworthiness. The division of diseases between internal and external conditions arguably results in unfair outcomes since the fact of the matter is that whether internal or external, some conditions will have the same impact on the mind.⁵⁷⁶ The Law Commission of England has criticised the internal/external parameters of disease of the mind. According to the Law Commission, many individuals suffer from a psychological trauma which causes them to enter into a dissociative state.⁵⁷⁷ Still, dissociation ‘has not yet been classified authoritatively in England.’⁵⁷⁸

This worry is exacerbated when one considers the further distinction made famous by Stephen J, that ‘drunkenness is one thing and the diseases to which drunkenness leads are different things.’⁵⁷⁹ That is, whilst it may be the case that violence induced PTSD is externally caused, it may lead to further problems, such as psychosis or dissociation, which ought to bear independent weight. In fact, it was determined in *Coley & Others v R* that a psychotic breakdown qualifies as a defect of reason linked to a disease of the mind.⁵⁸⁰ Moreover, based on a review of the evidence in the US and the UK, Friel, et al. state that if PTSD sufferers can illustrate a link between the crime and a dissociative state, they will have a better chance of succeeding with an insanity defence.⁵⁸¹ In the American case of *United States v Rezaq* (war veteran with PTSD), it was upheld that PTSD can support a defence of insanity if the symptoms are grave.⁵⁸²

⁵⁷⁶ Child and Ormerod, *Smith, Hogan, and Ormerod's Essentials of Criminal Law* (2nd edn, Oxford University Press 2017) (n561) 544.

⁵⁷⁷ Law Commission, ‘Criminal Liability: Insanity and Automation. A Discussion Paper- Summary for non-specialists’ (n359) 9.

⁵⁷⁸ Ashworth and Horder (n348) 91.

⁵⁷⁹ *DPP v Beard* [1920] UKHL AC 479.

⁵⁸⁰ *Coley & Others v R* [2013] EWCA Crim 223, para 11.

⁵⁸¹ Friel, White and Hull (n2) 77.

⁵⁸² *United States v Rezaq* [1996] DDC 918 F Supp 463.

5.4.2. Nature and Quality of the Act and its being Wrong

As with the defect/disease test, one's intuitions that war veterans with PTSD might, on occasion, not appreciate the nature and quality of their act or, if they do, the wrongfulness of those acts might seem intuitively plausible.

Consider as an example a war veteran with PTSD who is triggered by a sound or an image and experiences flashbacks to the war trauma that caused their PTSD. Their flashbacks are realistic that the war veteran believes that he is reliving the trauma, and immediately responds by shooting at innocent bystanders, killing them in the unshakable belief that he is killing his enemies at war. For example, a soldier on active duty was referred for an evaluation for criminal responsibility after he kicked in the door of a home and shot at several people inside, including children. The report revealed that the soldier was adamant that he had to kill someone, and that he did not know what he was doing. It was also revealed that the soldier was in and out of a dissociative state in which he was experiencing flashbacks, and thought that he was in combat at that time. It was concluded that the soldier was suffering from PTSD, did not know the difference between right and wrong, and could not appreciate the nature and quality of his behaviour.⁵⁸³ Obviously, such a war veteran with PTSD will not stop for a moment to consider whether the act is legal or not when acting in response to the symptoms of PTSD.

Of course, this will not always be the case. In *State v Felde*, a Vietnam veteran with PTSD pleaded NGRI, and two psychiatrists were appointed to evaluate him. Both psychiatrists agreed that at the time of the murder, Felde was capable of distinguishing between right and wrong.⁵⁸⁴ The facts of the case showed that it was obvious that the murder was committed in an intoxicated burst of violence, and the defendant's ability to distinguish between right and wrong was evidenced by the defendant attempting to escape the law

⁵⁸³ Frierson (n464) 81-83.

⁵⁸⁴ *State v Felde* [1982] La 422 So 2d 370 No 81-KA-0998.

enforcement when they arrived at the scene.⁵⁸⁵ In *Cooke v DPP*, a defendant with PTSD appealed to have an anti-social order set aside. However, the appellate court examined the record of the lower court which indicated that the defendant had made threats and had continuously behaved in ways that indicated that he did know the difference between right and wrong.⁵⁸⁶ Therefore, the appeal was dismissed.⁵⁸⁷

5.4.3. M’Naghten Insanity

The fact that PTSD can cause deficits in cognitive functioning is uncontroversial. The fact that a war veteran with PTSD who believes he is shooting at the enemy is not aware of the nature and quality of his act is similarly convincing. However, the availability of the insanity defence depends, as one would expect, on the legal test that defines insanity. In England, the narrowness of “disease of the mind” means that war veterans with PTSD are unlikely to successfully claim insanity. In other “M’Naghten jurisdictions” that do not appeal to the external/internal division, the availability of the defence will hinge in the main on the degree to which PTSD is thought of as a genuine psychiatric illness.

PTSD is a trauma induced mental malady. Within the realm of the DSM-III and subsequent amendments, PTSD is a recognised mental illness. However, PTSD is not listed as a psychosis. This is an important omission, because the legal definition of insanity under the M’Naghten rule insists on a mental disease, but jurors may have a difficult time accepting that individuals with PTSD truly suffer from a disease of the mind. The phrase brings more dangerous conditions, such as paranoid schizophrenia and multiple personality disorders, to mind. This is not a fair assessment for jurors to consider because PTSD victims can also have difficulties distinguishing reality from illusion. Therefore, a more appropriate standard may

⁵⁸⁵ *ibid.*

⁵⁸⁶ *Cooke v DPP* [2008] EWHC 2703, para 6.

⁵⁸⁷ *ibid.*, para 21.

be necessary to ensure that PTSD victims who truly lose touch with reality can justifiably escape responsibility.

The legal tests for insanity within the Anglo-American criminal justice system share one common theme, which is while a person may have a mental illness in the psychiatric field, he is not necessarily insane in the legal realm. For example, an individual diagnosed with anti-social personality disorder does have a recognised psychiatric condition, but in most cases, will be thought of as nothing more than a criminal in the eyes of the law in both the US and England.⁵⁸⁸ Thus, as a legal matter, “insanity” can be (and is) one thing in England and another in Louisiana. However, the legal tests are themselves accountable to the moral purpose of distinguishing those who are responsible and blameworthy, and who it makes sense to call to account. In this view, there is (something at least approximating to) a right answer for the question of whether a given defendant is answerable or not, and the fact that different, and even very similar, legal tests can give contradictory answers is at least a good reason for a critical reflection. In England, this critical reflection has resulted in many criticisms of the M’Naghten test, but no change in policy. Elsewhere, this is not true, and a number of alternative tests have been proposed.

5.5. PTSD and other Insanity Tests

The underlying rationale for the M’Naghten test is to remove insanity as an excuse for criminal behaviour.⁵⁸⁹ Other tests have been subsequently presented as a means of relaxing the strict application of the M’Naghten rule. As seen below, the irresistible impulse alternative to the strict application of the M’Naghten rule will provide the PTSD sufferer with greater advantages when attempting to claim an insanity defence.

⁵⁸⁸ William Waller, “‘Criminal’ Insanity, Diagnosis and Public Morality’ (2011) 4 Washington University Jurisprudence Review 183.

⁵⁸⁹ George P. Fletcher, *Rethinking Criminal Law* (Oxford University Press 2000) 837.

Ultimately, to get away from the restrictions imposed by the cognitive test established by the M’Naghten rules, some jurisdictions in the US have moved, in the main, towards the Model Penal Code (MPC) test, and in far fewer cases, the Durham rule. Embedded in these rules within the US is the idea of an irresistible impulse, which is among the most controversial arms of the alternative insanity tests.⁵⁹⁰ Ultimately, the irresistible impulse is best understood as a medium that distinguishes the MPC and Durham tests from the M’Naghten rule.

The Durham test excuses a criminal defendant whose behaviour is “the product” of a mental disease or defect.⁵⁹¹ It is also known as a “product test,” because it requires the jury only to consider whether the defendant’s crime was “the product” of a mental defect/disease.⁵⁹² The Durham rule is the broadest in its application, and its product test was almost immediately subject to criticism. For instance, Judge Burger, as well as two other judges sitting in the same appellate court that administered the Durham rule, stated that the main issue should always be knowledge and appreciation of the act, and the ability to choose against committing the act.⁵⁹³

In the meantime, the M’Naghten rule appears to have significant longevity. The M’Naghten rule is the narrowest of the three rules. The M’Naghten rule appears to be consistent with Judge Burger and his colleagues’ argument that the real test of insanity should be the defendant’s ability to know and appreciate the wrongness of his conduct. Added to this, by Judge Burger and his colleagues, which distinguishes it from the M’Naghten rule,

⁵⁹⁰ Edwin R. Keedy, ‘Irresistible Impulse as a Defense in the Criminal Law’ (1952) 100 University of Pennsylvania Law Review 956.

⁵⁹¹ Samaha (n353) 220.

⁵⁹² Sinnott-Armstrong and Levy (n509) 309.

⁵⁹³ ‘Criminal Law: The Defendant’s “Capacity” – Toward a Reformed Test of Criminal Insanity’ (1962) Duke Law Journal, 277

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1807&context=dlj>> accessed 18 November 2018.

was whether the defendant is able to freely refrain from committing the act.⁵⁹⁴ As Helen Howard points out, one of the critical failings of the M’Naghten rule is its failure to connect incapacity with regards to criminal liability to the irrational choices of the defendant.⁵⁹⁵

The MPC test relaxes the M’Naghten rule, stating:

‘A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.’⁵⁹⁶

It thus allows the distinction between sane and the insane to be made on the basis of the capacity to conform.⁵⁹⁷ It is important to note that the MPC prefaces this irresistible impulse element with a knowledge requirement, so that an inability to conform alone will not suffice. The sole irresistible impulse faction has been criticised as capable of allowing some criminals, such as paedophiles, who cannot conform their behaviour to the requirements of the law to receive reduced sentences.⁵⁹⁸ In fact, in *People v Parrish*, a special verdict was reached for a defendant who was diagnosed with anti-social personality disorder, sexual perversions, and atypical gender identity disorder.⁵⁹⁹ Therefore, it is possible for an insanity defence to succeed in the US where the defendant’s deviance is backed by impulse control disorders.

Essentially, under the MPC’s volition test, a defendant who knows that what he is doing is wrong can escape liability if he is unable to resist the act due to a mental disease or

⁵⁹⁴ *ibid.*

⁵⁹⁵ Helen Howard, ‘Reform of Insanity Defence: Theoretical Issues’ (2003) 67 *Journal of Criminal Law* 51.

⁵⁹⁶ Model Penal Code, s 4.01 (1).

⁵⁹⁷ Julie E. Grachek, ‘The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System’ (2006) 81 *Indiana Law Journal* 1480, 1481-1482.

⁵⁹⁸ Carlos M. Pelayo, ‘“Give Me a Break! I Couldn’t Help Myself!?”: Rejecting Volitional Impairment as a Basis for Departure under Federal Sentencing Guidelines Section 5K2.13’ (1999) 147 *University of Pennsylvania Law Review* 729.

⁵⁹⁹ *People v Parrish* [1994] Colo App 879 P 2d 453.

defect.⁶⁰⁰ Therefore, in the US jurisdictions that apply the MPC, defendants with PTSD have a better opportunity for successfully launching an insanity defence. The M’Naghten rule will be more difficult for a PTSD sufferer if he is not in a dissociative state when acting in response to triggers.

Ultimately, PTSD symptoms can also fit neatly within the realm of the US MPC. Where a defendant with PTSD is triggered into hyper-vigilance, and knows that what he is doing is wrong, but cannot resist the urge to act due to fear and panic caused by the hyper-vigilance, he will have a better opportunity of claiming insanity under the MPC than under the M’Naghten rules, due to the cognitive test under the latter rule. In the meantime, the volition test under the MPC is more favourable for the PTSD sufferer.

In 1982, in *United States v Hinckley*, a jury returned the verdict of NGRI using the MPC test.⁶⁰¹ This proved to be hugely controversial and led to several jurisdictions in the US narrowing their insanity tests, or returning to something closer to the M’Naghten rule.

Defendants residing in jurisdictions with the MPC test have been more successful in their defence because it is possible to consider the defendant insane, even after he is able to appreciate the criminality of his actions.⁶⁰² Furthermore, compared to the M’Naghten test, the MPC test is broader. Until now, the MPC has been considered as the most accepted insanity test that is implemented by courts in the US to check the validity of insanity claims.⁶⁰³

Robert Willey notes that the legal definition of insanity is antiquated and unrealistic since the law and criminal courts continue to rely on the M’Naghten rule, which tests insanity

⁶⁰⁰ Davidson (n201) 424.

⁶⁰¹ *United States v Hinckley* [1982] No 97-3094.

⁶⁰² Landy F. Sparr, ‘Mental Defences and Posttraumatic Stress Disorder: Assessment of Criminal Intent’ (1996) 9 *Journal of Traumatic Stress* 405, 407.

⁶⁰³ Paul H. Robinson and Markus D. Dubber, ‘The American Model Penal Code: A Brief Overview’ (2007) 10 *New Criminal Law Review: An International and Interdisciplinary Journal* 319.

on the basis of cognition.⁶⁰⁴ According to Willey, it is erroneous to establish insanity by segregating the mentally ill from the mentally well on the basis of a cognition test.⁶⁰⁵

The M’Naghten rule is a very old method for testing insanity. It was created more than 100 years before the official listing and recognition of PTSD as a mental disorder in the APA’s DSM-III in 1980. The Law Commission argued that despite the broadening of the definition of insanity over the years, it remains substantively the same as it did over 100 years ago.⁶⁰⁶ The problem with the stagnant state of the legal definition of insanity is that developments over the years have not taken account of the reality of today’s psychiatry, medicine, and psychology.⁶⁰⁷

While examining the insanity defence in England, Memon quotes McAuley defining legal insanity as an excuse for wrongdoing, and hence suggests that judges and jurors should examine the sanity of defendants on a case-by-case basis.⁶⁰⁸ It is also better to utilise a similar strategy when determining whether people suffering from PTSD have acted rationally during the commission of a criminal act. In reference to the types of insanity recognised by Mathew Hale, who would later ascend to the position of the Lord Chief Justice of England, the following are listed – idiocy, melancholy, total alienation of mind, and perfect madness.⁶⁰⁹ The four instances of insanity still apply in the M’Naghten principles, and the “total alienation of mind” coincides with the symptoms of PTSD in most systems. Therefore, if the jury is convinced that a person is mad, they are then compelled to declare him not responsible for the crime.

⁶⁰⁴ Robert J. Willey, ‘Criminal Responsibility: Knowledge, Will and Choice’ (1967) 1 *Akron Law Review* 1, 4.

⁶⁰⁵ *ibid.*

⁶⁰⁶ Law Commission, ‘Criminal Liability: Insanity and Automation. A Discussion Paper- Summary for non-specialists’ (n359) 1.

⁶⁰⁷ *ibid.*

⁶⁰⁸ Rafiq Memon, ‘Legal Theory and Case Law Defining the Insanity Defence in English and Welsh Law’ (2006) 17 *Journal of Forensic Psychiatry & Psychology* 230, 232.

⁶⁰⁹ Stephen Allnutt, Anthony Samuels and Colman O’Driscoll, ‘The Insanity Defence: From Wild Beasts to M’Naghten’ (2007) 15 *Australasian Psychiatry* 292.

The US MPC test confers upon courts the authority to look beyond the boundaries established by the M’Naghten rules and the English criminal law interpretations and applications of the law. As noted above, the US test provides that insanity is established if the individual has suffered from a ‘mental disease or defect,’ and as such ‘lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct’ to the law.⁶¹⁰ The last part of this rule provides more room for interpreting insanity over the narrow limits imposed by English law.⁶¹¹

It is, therefore, not surprising that scholars have found cases in the US where the defendant has been successful in relying on PTSD in support of an insanity defence, and these cases have shown defective reasoning for PTSD sufferers who were war veterans. The facts and evidence in these cases are also consistent with what one might expect of war veterans with PTSD. There are many images in popular films of the war veteran triggered by sights and/or sounds that immediately bring on the dissociative state. For instance, in the case of *State v Wood*, a Vietnam veteran pleaded insanity in defence of charges stemming from his shooting of a factory foreman at his place of work. The defendant had been exposed to combat and the factory was found to be reflective of his combat experiences that caused PTSD. The shooting took place when the defendant sank into a dissociative state.⁶¹²

Thus, war veterans with PTSD in those US states that utilise the MPC test have a much better chance of successfully pleading insanity in defence of criminal charges. In the US, MPC provides courts with greater room for dealing with an individual who pleads insanity. The substantial capacity case separates disease and defect, making it possible for the defendant to choose to substantiate insanity through a disease of the mind or defect. This broadens the boundaries established by the M’Naghten rules that otherwise hamper the

⁶¹⁰ Sinnott-Armstrong and Levy (n509) 311.

⁶¹¹ Friel, White and Hull (n2) 77.

⁶¹² *State v Wood* (n204).

availability of the insanity defence for war veterans. Therefore, US war veterans with PTSD have a much better chance of successfully pleading insanity, compared to English war veterans.

5.6. Insanity and War Veterans Suffering from PTSD

There is a strong moral argument that punishing an individual who has a mental malady that renders him incapable of understanding his criminal conduct, or of taking control of his criminal behaviour (cognition vs. volition), is wrong. The question of balance of the impact of PTSD on cognition and control holds the key to concluding the debate on the legality of using PTSD as a defence for certain crimes, such as murder and rape.⁶¹³

It is difficult to imagine a scenario in which a war veteran with PTSD, who is triggered to the point where he re-experiences a traumatic war event, and in the course of doing so, kills civilians, and while re-experiencing the war is aware of how wrong it is, and can immediately adjust his behaviour. It is unrealistic to expect this kind of control, unless the defendant is in treatment where he is learning effective strategies for recognising and coping with triggers.

5.7. Conclusion

There are controversies over the insanity defence. This chapter has argued that some of these can be brought to light through looking at examples of war veterans with PTSD, and that there is a chance that some war veterans with PTSD who ought to escape criminal responsibility are not able to do so. In particular, this chapter has argued that the narrowness in the various forms of the M’Naghten rules that dominate in England has several regrettable consequences. These are particularly problematic when applied to those to whom, as argued in Chapter Four, the state has some special obligations.

⁶¹³ Ralph Slovenko, ‘The Watering Down of PTSD in Criminal Law’ (2004) 32 *Journal of Psychiatry & Law* 411, 413.

On a practical level, the difficulties of establishing insanity, the stigma that is attached to it, and the disposal of potential confinement, means that the insanity defence is only very rarely used. This not only means that some people who ought not to be punished are being punished, but also that those with severe mental health issues are first being inappropriately punished, and then confined in the name of “dangerousness.”

On a theoretical level, punishment – condemnation and blame – ought only to be attached to those who are criminally responsible, whereas there is a complex relationship between the criminal conduct and PTSD, and for some war veterans with PTSD, their violent conduct will follow a pattern of combat addiction, flashbacks, and their inability to control their actions. Such conduct arguably meets Stephen Morse’s blunt statement of what the insanity test should say:

‘A defendant is not guilty by reason of insanity if, at the time of the offense, the defendant was so extremely crazy and the craziness so substantially affected the criminal behavior that the defendant does not deserve to be punished.’⁶¹⁴

⁶¹⁴ Morse, ‘Excusing the Crazy: The Insanity Defense Reconsidered’ (n564) 820.

Chapter Six: Automatism Defence

6.1. Introduction

This chapter analyses the automatism defence with a particular emphasis on the likelihood of it being accepted in the case of war war veterans with PTSD who are facing criminal trials. Automatism refers to a state in which the actor proceeds to act, or omits to act, involuntarily and unconsciously.⁶¹⁵ It was introduced as a means of filling a gap left by the insanity and diminished responsibility defences.⁶¹⁶ Automatism was thought to resolve these limitations by providing a defence to those with temporary mental break-downs, short of the mechanisms of a diseased mind. For example, in England, sleepwalking crimes are categorised as insane automatism (insanity defence), and crimes committed when awakened suddenly can be excused on the basis of non-insane automatism (automatism defence).⁶¹⁷ Thus, an individual in both situations who is unable to form the intention to commit an offence due to a defect of reasoning, but is not suffering from a disease of the mind can still avoid an absolute conviction (in the US, this defence is known as unconsciousness, but in England it is known as non-insane automatism).

In fact, individuals relying on a defence of non-insane automatism can be completely exonerated.⁶¹⁸ For war veterans with PTSD, both insane and non-insane automatism are promising defences because in many cases, the war veteran with PTSD is in a dissociative state where he automatically and involuntarily responds to triggers.⁶¹⁹

⁶¹⁵ I. D. Elliott, 'Automatism and Trial by Jury' (1967) 6 Melbourne University Law Review 53.

⁶¹⁶ C. R. Williams, 'Development and Change in Insanity and Related Defences' (2000) 24 Melbourne University Law Review 711.

⁶¹⁷ Irshaad Osman Ebrahim and Peter Fenwick, 'Sleep-Related Automatism and the Law' (2008) 48 Medicine, Science and the Law 124.

⁶¹⁸ De Than and Heaton, *Criminal Law* (4th edn, Oxford University Press 2013) (n285) 245.

⁶¹⁹ Melissa Hamilton, 'Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder' (2011) 16 Berkeley Journal of Criminal Law 340, 341-342.

Automatism is used in circumstances in which the individual accused of a crime claims that he had no control over their behaviour.⁶²⁰ The question for consideration is to what extent, and in what circumstances, ought automatism exonerate an individual’s criminal behaviour, especially a war veteran with PTSD.

6.2. Controversies over the Automatism Defence

Theoretically, under the common law, criminal behaviour must be the result of “free will and volition.”⁶²¹ The theory of choices argues that where one lacks the freedom to make choices there is an excuse justifiable in law.⁶²² The problem for the defence of automatism is that it may excuse conduct that ought to be criminal, therefore, controversy arises when a defendant claims involuntariness and non-consciousness under automatism for offences that require a suspension of reality.

Rumbold reports that the defence of automatism has been controversial at times garnering the media’s attention, and recently, the media’s incredulity over accused persons acquitted due to actions carried out while sleepwalking has created controversy. Some of these cases have been incredible. For example, cases of sexual assault while asleep have involved intoxication which is the most likely factor contributing to the crime.⁶²³

Thus, the theory of excuses gives weight to the controversy that sexual assailants claiming to be sleepwalking benefit from an excuse. The theory of excuses argues that defences such as automatism are excuse defences because this provides conditions under which a defendant might argue existed in order to excuse culpability.⁶²⁴

⁶²⁰ Law Commission, ‘Criminal Liability: Insanity and Automation. A Discussion Paper- Summary for non-specialists’ (n359) 3.

⁶²¹ Emily Grant, ‘While You Were Sleeping or Addicted: A Suggested Expansion of the Automatism Doctrine to Include an Addiction Defense’ (2000) 2000 University of Illinois Law Review 997, 999.

⁶²² Michael Corrado, ‘Notes on the Structure of a Theory of Excuses’ (1991) 82 Journal of Criminal Law and Criminology 465, 475.

⁶²³ John Rumbold, *Automatism as a Defence in Criminal Law* (Routledge 2018).

⁶²⁴ Andrew Botterell, ‘A Primer on the Distinction between Justification and Excuse’ (2009) 4 (1) Philosophy Compass 172, 183.

This controversy was heightened when a doctor from the Royal College of Psychiatrists acknowledged that people may perform various actions involuntarily while asleep, such as teeth grinding or lip smacking, for example. Some sleepers may even get up and make a cup of tea. However, it is obviously ‘extremely difficult to perform such a complex manoeuvre as having sexual intercourse while asleep – especially if the other person is unwilling.’⁶²⁵

Reznek goes further in his review of automatism and refers to it as “an insane law.” In addition, Reznek argues that automatism is really nothing more than an excuse for criminal behaviour. As such, automatism is no different from the “excuse of ignorance.”⁶²⁶ Quite simply, a defendant is only required to prove that he was ignorant of the act that he was carrying out and/or ignorant of its nature and quality.⁶²⁷

Reznek also takes issue with the division of automatism into the insane and non-insane categories. The division is “meaningless” because it makes no sense to assume that insulin arising from an injection and resulting in violence is non-insane, and insulin from the pancreas resulting in a crime is insane.⁶²⁸

Citing a Canadian case and the comments of one of the presiding judges, Coles opens his article with a strong argument relaying the controversial aspect of the defence of automatism. In the opening citation, Coles points out how difficult it is to believe that an individual who commits a crime under the guise of automatism could carry out the activities involuntarily and/or in an unconscious state.⁶²⁹

Rumbold argues that the defence of automatism is very concerning due to the fact that rapists who have consumed alcohol may use it to defend themselves, claiming they were

⁶²⁵ Rumbold, *Automatism as a Defence in Criminal Law* (n623).

⁶²⁶ Reznek (n387) 93.

⁶²⁷ *ibid.*

⁶²⁸ *ibid* 94.

⁶²⁹ E. Michael Coles, ‘Scientific Support for the Legal Concept of Automatism’ (2000) 7 *Psychiatry, Psychology and Law* 33.

sleepwalking at the time. Moreover, the defence of automatism is not confirmed, nor explained, by medical science.⁶³⁰ At the same time, the court must rely on the opinions of experts as opposed to scientific proof of the link between sleepwalking and involuntary criminal offending.⁶³¹

This brings up the question often posed by the responsibility thesis within the scope and range of the theory of excuses. Pursuant to the responsibility thesis, excuses function to permit the defendant to deny responsibility. Excuses are not based on reasoning as a defence, but rather as a basis for denying responsibility, and there is remorse involved in presenting an excuse in defence of criminal behaviour.⁶³²

Another controversy that arises out of the defence of automatism is the voluntariness issue. The defence of automatism is intended to prevent a defendant paying for a crime when he was not acting voluntarily. However, what amounts to involuntariness is not defined nor discussed enough.⁶³³ Therefore, the emphasis on involuntariness in the defence of automatism is problematic because its lack of definition renders the defence uncertain and unpredictable.

Moreover, in Westen's examination of the theory of excuses, automatism is not totally involuntary, nor is it totally uncontrollable. For example, the sleepwalker who goes downstairs and retrieves a weapon before returning to use it on a victim is not acting on reflexes. Rather the sleepwalker's behaviour is "agent-directed," and there are series of choices the sleepwalker must make in order to carry out the crime.⁶³⁴

⁶³⁰ John Rumbold, 'The Parasomnia Defence: Expert Evidence in Criminal Trials' (2015) Keele University, ii <<https://core.ac.uk/download/pdf/76978774.pdf>> accessed 2 January 2019.

⁶³¹ *ibid.*

⁶³² Botterell (n624) 181.

⁶³³ Stanley Yeo, 'Putting Voluntariness Back into Automatism' (2001) 32 Victoria University of Wellington Law Review 387.

⁶³⁴ Peter Westen, 'An Attitudinal Theory of Excuse' (2004) 76 <<https://www.law.columbia.edu/sites/default/files/microsites/law-theory-workshop/files/Master.Excuses.3.31.pdf>> accessed 2 January 2019.

The preceding discussion illustrates that the major controversy over the defence of automatism is that it might provide some individuals with an excuse for their criminal offending. It is difficult to refute the claim that the defendant was asleep, and therefore unaware of his actions, during the commission of a crime. It is therefore troubling for many observers that this defence is available and can help a criminal get away with murder. At the same time, some war veterans with PTSD can benefit from automatism because there is no doubt that when such individuals slip into dissociative states, they are unaware of what they are doing.

The law in England draws a distinction between what amounts to insanity and what amounts to automatism. Essentially, an internal factor causing the defect of reason and the subsequent act will support a defence of insanity. However, an external factor contributing to a specific act will be recognised as automatism. For example, in *R v Quick*, the defendant suffered from hypoglycemia having taken too much insulin, and the Appeal Court ordered that he ought to have been allowed to use the defence of automatism rather than insanity, as the administration of insulin was an external factor. By contrast, in *R v Hennessey*, the diabetic defendant acted when his blood sugar was too high (hyperglycemia) and therefore acted due to an internal factor. Therefore, insanity was the proper defence.⁶³⁵

Under the law of England (and the US), automatism is a common law defence.⁶³⁶ This means that judges interpret facts and circumstances that can amount to the defence of automatism. Therefore, in the absence of a statute fixing and defining the automatism defence, judges have not consistently applied and interpreted what amounts to automatism.⁶³⁷ Therefore, in an attempt to launch the defence of automatism, defendants essentially face significant uncertainty pertaining to the likely outcome of the trial. In other words, defendants

⁶³⁵ Law Reform Commission (n344) 19-20.

⁶³⁶ Keith J. B. Rix, 'The Common Law Defence of Automatism: A Quagmire for the Psychiatrist' (2015) 21 BJ Psych Advances 242.

⁶³⁷ *ibid.*

seeking to use automatism as a defence to a crime are unable to refer to a statutory definition and requirement for establishing automatism.

6.3. Automatism as a Defence

Automatism is a physical action in which the actor has no control. A simple definition of automatism was posed by the Law Reform Commission of Ireland. Automatism takes place when an individual completely loses control of the self, due to externalities such as a head injury.⁶³⁸ In such a case, the individual loses conscious awareness of their behaviour, and will normally lack *mens rea* and *actus reus*.⁶³⁹ Therefore, the defence of automatism would involve showing that the accused was completely devoid of voluntary judgment, and that such a loss of control was due to external events outside of the individual's control.⁶⁴⁰

Automatism can be insane or induced by insanity or, non-insane which is unrelated to insanity. Non-insane automatism may be the loss of control due to a non-conscious state. Plausibly, the non-conscious state in the non-insane automatism may be seen as a state of temporary insanity, although the disease of the mind element is difficult to establish. All that matters in England is that the defendant loses control altogether.

Regardless of the type of automatism (insane or non-insane), the criminal law is based on the perception that no individual should be convicted of a crime if his actions were involuntary.⁶⁴¹ Automatism arises to prevent this perceived injustice under the criminal law in most jurisdictions. In England, the defence of automatism is available for a special verdict or an absolute acquittal under the insane and non-insane automatism defences, whereas in many states in the US, the defendant can expect an absolute acquittal on the basis of automatism, which does not provide for an insane version of the defence.

⁶³⁸ Law Reform Commission (n344) 20.

⁶³⁹ *ibid*.

⁶⁴⁰ *ibid*.

⁶⁴¹ Yeo, 'Putting Voluntariness Back into Automatism' (n633) 387.

There are two important elements to the defence of automatism: involuntariness and non-consciousness. Moreover, for non-insane automatism, external causes or factors must be responsible for the elements of unconsciousness and involuntariness.⁶⁴² This part of the chapter will examine the external factors and the two important elements of automatism: non-consciousness and involuntariness.

6.3.1. External Factor

The involuntary element of automatism must be linked to external factors, including 'violence, drugs, including anaesthetics, alcohol and hypnotic influences.'⁶⁴³ The point of these requirements is that automatism is a defence that must be proven to have been centered on the defendant's unconsciousness or lack of consciousness.⁶⁴⁴ It is the defendant's non-consciousness that renders his behaviour involuntary (the offender is acting with no control over his actions and is non-conscious and unlikely to recall the episode).

Ultimately, automatism occurs when the defendant's involuntary conduct takes place within a non-conscious state. Such behaviour is not aimed at a purpose, nor is it goal oriented.⁶⁴⁵ This loss of consciousness and involuntary behaviour is often brought about by an external factor, such as a psychological shock which robs defendants of their ability to control their behaviour.⁶⁴⁶

In some cases, automatism from a medical perspective occurs when an individual cannot consciously control his behaviour. To medical practitioners, this means that something is terribly wrong and requires some form of treatment. From a legal perspective, automatism occurs when an unlawful act is carried out by a defendant who does not have control over his

⁶⁴² Patrick Healy, 'Automatism Confined' (2000) 45 McGill Law Journal 87, 90.

⁶⁴³ J. J. Child and Alan Reed, 'Automatism is Never a Defence' (2014) 65 Northern Ireland Legal Quarterly 167, 169.

⁶⁴⁴ Yeo, 'Putting Voluntariness Back into Automatism' (n633) 387.

⁶⁴⁵ Bernadette McSherry, 'It's a Man's World: Claims of Provocation and Automatism in the "Intimate" Homicides' (2005) 29 Melbourne University Law Review 905, 927.

⁶⁴⁶ *ibid* 907.

behaviour.⁶⁴⁷ As we have seen, in England, the control element is divided between internal and external factors to distinguish between insane and non-insane automatism.⁶⁴⁸

The defence of automatism is not a denial of guilt, but rather a claim of a lack of control. As a result, it is possible for just about anyone charged with a crime to claim automatism. This is illustrated by strict liability cases of driving without voluntary control where automatism may be claimed. Recognising this, the courts have developed constraints. For instance, in the defence of automatism, where the defendant claims to have lacked some form of mental control such as blacking out, the court will demand some form of medical evidence.⁶⁴⁹

In other words, there must be some medical or expert proof of an external factor to support a defence of automatism. For instance in *Broome v Perkins*, a 1987 English case, a conviction for driving without due care and attention was affirmed, although the defendant claimed to have been rendered out of control due to hypoglycemia. The appellate court ruled that the defendant could not succeed with an automatism defence without proof that he lacked control.⁶⁵⁰ In this case, the defendant was suffering from diabetes, and was therefore driving in an erratic manner due to low blood sugar.⁶⁵¹

A test similar to the one used in *Broome* was alluded to in the *Attorney-General's Reference* (No 2 of 1992). The case at issue surrounded the claim that the defendant drove without being aware of the fact. However, the court found that this was not enough to support an automatism defence because automatism 'requires a total destruction of voluntary control on the defendant's part,' and the defendant's claims relating to his condition were insufficient.⁶⁵²

⁶⁴⁷ Julio Arboleda-Florez, 'On Automatism' (2002) 15 Current Opinion in Psychiatry 569.

⁶⁴⁸ R. D. Mackay, 'An Anatomy of Automatism' (2015) 55 Medicine, Science and the Law 150, 154.

⁶⁴⁹ Ashworth and Horder (n348) 87.

⁶⁵⁰ *ibid* 88.

⁶⁵¹ *Broome v Perkins* [1987] Crim LR 271.

⁶⁵² Ashworth and Horder (n348) 89.

Only in rare cases might an external factor rob the defendant of total control over his behaviour. The issue is the defendant's level of consciousness as evidenced by his voluntary responses to the external element.⁶⁵³ For instance, a defendant might claim that a bee flew in through the car window and robbed him of all control over his driving.⁶⁵⁴ However, this defence does not explain why the defendant did not stop immediately. In other words, panic in response to an external element will not suffice to support a defence of automatism. The courts are determined that a defence of automatism is not available to anyone seeking simply to escape criminal liability.

6.3.1.1. Self-Induced

Non-insane automatism can take the form of a "brief psychotic" episode.⁶⁵⁵ In other words, self-inflicted/induced is caused through voluntary actions, but the cause of insane automatism is involuntary. All that is required is that the defendant's actions are not deliberate. For example, a defendant is not able to claim automatism on the basis of his going into a panicked state and ignoring moral and ethical values behaving criminally. Such an occasion will not suffice to claim automatism.⁶⁵⁶ Ultimately, the test for distinguishing between sane and insane automatism is determining whether the behaviour was brought about by external (sane) causes or internal (insane) causes.⁶⁵⁷

When the defendant has the *mens rea* for a crime, whether he became intoxicated voluntarily or not is irrelevant.⁶⁵⁸ This state of the law of intoxication is demonstrated in the case of Kingston. In this case, the defendant who had paedophilic tendencies succumbed to a state of non-consciousness after his drink was laced. In the state of non-consciousness, the defendant proceeded to seduce a minor. It was held that the *mens rea* was formed prior to the

⁶⁵³ Child and Reed (n643) 170.

⁶⁵⁴ Ashworth and Horder (n348) 87.

⁶⁵⁵ Mackay (n648) 151.

⁶⁵⁶ Allen, *Textbook on Criminal Law* (n528) 149.

⁶⁵⁷ Steven Yannoulidis, *Mental State Defences in Criminal Law* (Routledge 2016) 39.

⁶⁵⁸ Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) (n314) 355.

intoxication, and therefore intoxication was not a successful defence on the grounds of non-consciousness.⁶⁵⁹ In this case, it was ruled that intention was still intention, regardless of the fact that it was fueled by intoxication.⁶⁶⁰

The reality is, automatism is not much of a problem for a defendant who can prove involuntary non-consciousness that rendered the individual out of control. The problem is always going to be whether voluntary intoxication will stand up to the same test. In *DPP v Majewski*, the House of Lords dealt with the issue of voluntary intoxication. In this case, the defendant was intoxicated by choice, and in the process committed assaults on several police officers.⁶⁶¹

The defendant argued in his defence that his decision to become intoxicated robbed him of the necessary *mens rea* in his subsequent non-conscious state. However, the defendant's conviction was upheld by the House of Lords, where it was ruled that voluntary intoxication would not factor into the subsequent state of non-consciousness, as a means of defeating the necessary *mens rea*.⁶⁶²

Arguably, if the *mens rea* was formed prior to the commission of the crime, the defendant's non-conscious state, due to his own voluntary actions, will not suffice to negate involuntary behaviour. Thus, if the defendant voluntarily takes an intoxicating substance which renders him not conscious and then carries out a criminal act, the resulting non-consciousness will not be enough to defeat *mens rea*. As a result, intoxication will not be an acceptable defence.

Moreover, where an offence requires specific intent to satisfy the elements of the crime, self-inflicted automatism will suffice.⁶⁶³ This is because automatism requires

⁶⁵⁹ *ibid.*

⁶⁶⁰ *R v Kingston* [1994] 3 WLR 519.

⁶⁶¹ Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) (n314) 357.

⁶⁶² *ibid.*

⁶⁶³ *R v Bailey* [1983] 1 WLR 760.

involuntary behaviour. The mind must not know what the body is doing, nor can the mind have control over what the body is doing.⁶⁶⁴ Thus, an individual may naturally intend to misbehave when he knowingly consumes intoxicating substances. On the other hand, an individual who panics and crashes into another vehicle in response to a spontaneous attack by bees is acting involuntarily, and without the benefit of control (these actions are not unconscious or signs of some terrible medical problem, but uncontrollable actions).

As the Law Commission stated, voluntary or self-induced intoxication must carry some responsibility for criminal behaviour, even in cases requiring specific intent. For instance, an individual who kills someone after voluntarily becoming intoxicated, without the specific intent to cause the death of the individual, must be responsible although not to the extent of murder due to the absence of intent.⁶⁶⁵ The obvious exception is where the intent was formed prior to voluntary intoxication. In the US, however, there are mixed results. Some states hold individuals who commit crimes while intentionally intoxicated wholly responsible for their behaviour, while other states will allow a reduced offence and sentence.⁶⁶⁶

A self-induced state of involuntariness or unconsciousness will not necessarily amount to a bar to the intoxication defence. Perhaps, a self-induced automatism can support an intoxication defence to crimes where specific intention is required, but not in cases where basic intent is sufficient.⁶⁶⁷ At the same time, even where a defence of intoxication may suffice in self-induced cases, the defence may only be partial.

In England, *R v Bailey* illustrates the court's reluctance to consider self-inflicted incapacitation due to voluntary intoxication.⁶⁶⁸ The court ruled that self-inflicted automatism

⁶⁶⁴ Arboleda-Florez (n647) 574.

⁶⁶⁵ Law Commission, 'Intoxication and Criminal Liability' (n362) 15.

⁶⁶⁶ Mitchell Keiter, 'Just Say No Excuse: The Rise and Fall of the Intoxication Defense' (1997) 87 *Journal of Criminal Law and Criminology* 482, 483.

⁶⁶⁷ Catherine Elliott and Frances Quinn, *Criminal Law* (11th edn, Pearson 2016) 374.

⁶⁶⁸ *R v Bailey* (n663).

of nor in control of. In other words, there is a total lack of control. As a result, the defendant cannot form the necessary *mens rea* for a conviction in a criminal case.⁶⁷⁴ The California Supreme Court ruled that an individual who is not conscious of his actions is not acting with the necessary volition for a finding of criminal responsibility.⁶⁷⁵

It therefore appears that much controversy surrounds how the defendant found himself of herself in a state of non-consciousness when they committed the crime in question. If the non-conscious state is involuntary, the defendant has a much better chance of acceptance with an automatism defence. However, if the non-conscious state is voluntary, the defendant has an uphill battle in successfully launching a defence of automatism.

6.3.3. Involuntary Action

The defence of automatism follows from the belief that an individual cannot be held criminally responsible unless his behaviour is voluntary. Still, there is some criticism of this requirement in criminal law because it assumes that the mental and physical elements of crime are bounded.⁶⁷⁶ In other words, an individual may perform an act deliberately, but at the same time, lack the mental element necessary to be accountable. Automatism assumes that if the action was involuntary, the defendant did not intend to behave as he did. The offender is not acting voluntarily, and pursuant to an impulse he is unable to resist.⁶⁷⁷

This is borne by the ruling in *Bratty v Attorney-General for Northern Ireland*, where Lord Denning stated that automatism is action that is not consciously and voluntarily undertaken. What happens is ‘an act which is done by the muscles without any control by the

⁶⁷⁴ *ibid.*

⁶⁷⁵ *People v Sedeno* [1974] Cal 518 P 2d 922.

⁶⁷⁶ Keven W. Saunders, ‘Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition’ (1988) 49 *University of Pittsburgh Law Review* 443.

⁶⁷⁷ Dine, Gobert and Wilson (n515) 481.

6.4. War Veterans, PTSD, and Automatism Defence

As illustrated in this chapter, there are three factors that are important for determining whether an individual charged with a crime can reasonably offer automatism as a defence. The main problem is whether it is fair for an individual who is seemingly non-conscious to claim that what might seem like otherwise agency-directed actions were not conscious decisions.⁶⁹³ The defence of automatism is therefore contentious and controversial. As a result, the question for consideration is not so much whether war veterans with PTSD can succeed in offering automatism as a defence to a crime, but rather whether the circumstances and conditions exist for war veterans with PTSD to offer automatism as a defence for a crime.

The three factors are external elements (fundamentally in England, but not in the US), non-consciousness (not essential in England, but essential in California as well as important for war veterans with PTSD who experience dissociative states to claim/succeed with the automatism defence) and involuntariness (total loss of control). Essentially, this means that an individual claiming a defence of automatism would have to prove that he acted involuntarily due to an external factor. One example that ties the three factors together is the individual who is shot and reacts automatically, so that he is non-consciously making decisions, and as a result acting involuntarily due to an external factor (however, in some cases, an individual cannot act voluntarily even if he is consciously making decisions such as sneezing while driving).

The main issue for consideration is whether, and to what extent, PTSD symptoms when triggered, can amount to the necessary external factor preceding non-conscious and involuntary acts. PTSD has been described as a mental condition induced by fear that

⁶⁹³ Stephen J. Morse and Morris B. Hoffman, 'The Uneasy Entente between Legal Insanity and Mens Rea: Beyond *Clark v Arizona*' (2007) 97 *Journal of Criminal Law and Criminology* 1071, 1085.

generates automatic reactions that hinder a rationalised approach to the analysis of information.⁶⁹⁴

For the war veteran with PTSD, the brain can become programmed, so that the veteran immediately responds to triggers with the options of fighting or fleeing. Rational and reasonable assessments of the triggers are delayed while the flight or fight response takes over.⁶⁹⁵ Therefore, an individual with PTSD may respond to a trigger in ways that are consistent with automatism. The war veteran with PTSD is more likely to have automatic responses that are consistent with automatism when his flight or fight instincts are aroused.

6.4.1. External Factor

Determining where PTSD fits within the sphere of automatism can be complicated. PTSD is listed in the DSM as a mental disorder, which necessarily raises the question of whether a crime committed by an individual is more suited to a claim of insanity. Yet, at the same time, PTSD symptoms are often triggered by an external factor or trauma. In this regard, PTSD may not necessarily meet the legal standard of an internal factor, such as schizophrenia, hyperglycaemic episodes, sleepwalking, epilepsy, and arteriosclerosis.⁶⁹⁶ In such a case, insanity is the appropriate defence.⁶⁹⁷

The problem with PTSD is that it is neither a straightforward psychotic state nor a straightforward personality disorder, but rather exists somewhere in between.⁶⁹⁸ This means that PTSD has an uneasy co-existence with both insane and sane automatism. While psychosis can establish the legal definition of insanity, a personality disorder may not. Therefore, PTSD occupies a tenuous position for the purpose of satisfying insane and non-insane automatism.

⁶⁹⁴ Hamilton (n619) 372.

⁶⁹⁵ *ibid* 373.

⁶⁹⁶ Nicola Monaghan, *Criminal Law: Directions* (4th edn, Oxford University Press 2016) 357.

⁶⁹⁷ *ibid*.

⁶⁹⁸ Stone (n185) 25.

External factors serve to distinguish non-insane automatism from insanity. The court has distinguished between internal and external causes as a means of avoiding stigmatising diabetes as a mental malady.⁶⁹⁹ The medicine, and failure to take the medicine, are external causes and as such, are factors establishing non-insane automatism. For the war veteran with PTSD, the question for consideration is whether or not the veteran can rely on PTSD to establish a defence of external influences, and thus non-insane automatism, when PTSD is officially listed as a psychological disorder.

Still, there are lists of personality disorders in the DSM that are not accepted as mental defects or diseases of the mind for the purpose of establishing an insanity defence.⁷⁰⁰ For the most part, an insanity defence is usually available only to those who suffer from some form of psychosis or mental disability.⁷⁰¹ This is not the case for PTSD, because it is not listed as a psychosis. Yet, some of its symptoms can be so serious that a psychosis is possible.⁷⁰² The psychological trauma, which is the external factor, is the reason for the tenuous position of PTSD in law and in medicine. For the war veteran with PTSD, where the war experience is the external factor, it is difficult to assign a label of insanity.

External factors such as the ingestion of intoxicating substances, reflexes, convulsions, concussion, blackouts, and so on will support a claim of non-insane automatism.⁷⁰³ Blackouts are an important external factor when considering the feasibility of a war veteran with PTSD claiming non-insane automatism as a defence. Blackouts occur when the war veteran with PTSD has flashbacks and goes into a dissociative state. Losing complete consciousness, and then all of his decisions and actions are involuntary. During a blackout, the same level of consciousness and involuntariness will also arise, so that the war

⁶⁹⁹ Mackay (n648) 151.

⁷⁰⁰ Sally C. Johnson and Eric B. Elbogen, 'Personality Disorders at the Interface of Psychiatry and the Law: Legal Use and Clinical Classification' (2013) 15 *Dialogues in Clinical Neuroscience* 203.

⁷⁰¹ Zepinic, 'Posttraumatic Stress Disorder in Courtroom: Insanity Defence' (n199) 22.

⁷⁰² *ibid.*

⁷⁰³ Monaghan, *Criminal Law: Directions* (4th edn, Oxford University Press 2016) (n696) 357.

veteran with PTSD loses connection with the real world and is unable to control their behaviour. The dissociative state is described as ‘an altered state of consciousness’ where ‘an alternate mental system’ takes over.⁷⁰⁴

For war veterans with PTSD, the experiences of war might act as the external factor necessary for establishing a defence of automatism. To satisfy the elements of automatism, the war veteran with PTSD can argue that the crime occurred during a dissociative state which, in fact, gave way to unconscious and involuntary actions. This is especially possible because psychological automatism is described as a situation in which the conscious mind is entirely taken over by “past experiences.”⁷⁰⁵ These past experiences are external factors for the war veteran with PTSD who becomes submerged in a dissociative state where he relives the combat experience.

The experience of war is especially traumatic and therefore could be regarded as an external factor for establishing the necessary elements of automatism. However, the issue would be whether the cause of the conduct was the current state of having PTSD, or the cause of that current state. Combat experience is so traumatic that it is difficult to identify individuals who have experienced it, and in particular, those who have been injured during combat who have not developed PTSD.⁷⁰⁶ Therefore, PTSD is an anticipated consequence of war.⁷⁰⁷

There are a number of variables that can act as external elements for the purpose of establishing a defence of automatism by veterans with war-related PTSD. The variables include the actual combat experience in terms of front line battles against the enemies;

⁷⁰⁴ Louis Tinnin, ‘Mental Unity, Altered States of Consciousness and Dissociation’ (1990) 111 *Dissociation* 154, 157.

⁷⁰⁵ Petr Bob, ‘Dissociation, Epileptiform Discharges and Chaos in the Brain: Toward a Neuroscientific Theory of Dissociation’ (2012) 54 *Activitas Nervosa Superior* 84, 85.

⁷⁰⁶ Irit Keynan and Jakob N. Keynan, ‘War Trauma, Politics of Recognition and Purple Heart: PTSD or PTSI?’ (2016) 5 *Social Sciences* 1, 2.

⁷⁰⁷ *ibid.*

triggers precede the crime.⁷¹⁶ Therefore, in order to appropriately claim automatism, the PTSD sufferer must establish a strong correlation between the initial trauma and the dissociative event.⁷¹⁷

As the Law Reform Commission explains, automatism takes place when the individual loses absolute control of the self, due to an external factor, ‘such as being hit in the head and then losing all awareness’ of one’s acts.⁷¹⁸ Here, it is easy to reconcile this explanation of automatism with the case of the war veteran with PTSD who is triggered by stimuli and relives the trauma of war, and in doing so, loses all sense of reality.

There is no fixed law for determining whether or not war veterans or any other defendant with PTSD can set out a defence identifying external factors. This means that the fate of the PTSD sufferer is in the hands of a jury of his peers. In North Carolina, in *State v Connell*, it was established that whether an individual has acted unconsciously or involuntarily while in a dissociative state is a question of fact for the jury. In this case, it was determined that when there is evidence of unconsciousness or dissociation, the defence of automatism is a question of fact best left to the jury.⁷¹⁹

In England, it was determined that a traumatic event giving rise to PTSD symptoms of dissociation can support a defence of automatism. In *R v T*, a rape victim with PTSD produced medical evidence showing that she was in a dissociative state when her subsequent alleged crimes were committed, and as such was in an altered state of consciousness lacking control. The court ruled that the automatism defence could be put to the jury because rape could traumatise its victims and could satisfy the external factor requirement.⁷²⁰

⁷¹⁶ *ibid.*

⁷¹⁷ *ibid.*

⁷¹⁸ Law Reform Commission (n344) 20.

⁷¹⁹ *State v Connell* [1997] 127 NC 685.

⁷²⁰ *R v T* (n572).

6.4.1.1. Self-Induced

When an individual voluntarily becomes intoxicated, they cannot expect to successfully claim intoxication, since voluntary intoxication assumes that the individual knew in advance that he can lose control.⁷²¹ Therefore, when considering whether intoxication is an appropriate defence for veterans with PTSD, it is important to consider whether abuse of drugs or alcohol, or other intoxicating substances, is voluntary or involuntary.

Voluntary intoxication is obviously a question of reckless intent. This is because the individual who voluntarily becomes intoxicated assumes the risk of carrying out involuntary actions. Indeed, driving while there is a risk of becoming unconscious due to diabetes is considered to be reckless intent, because the individual is deemed to have reasonable foresight of the risk of becoming unconscious, but takes the risk nevertheless.⁷²² This may raise some concerns for war veterans with PTSD who resort to substance abuse as a means for soothing the unpleasant symptoms of PTSD. Substance abuse is recognised as being a serious problem among the military.⁷²³

When an individual deliberately and consciously becomes intoxicated, he assumes the risk that comes with intoxication. Therefore, purposeful voluntary self-intoxication is not a sustainable defence (for basic intent crimes, but a sustainable defence for specific intent crimes). In the case of *Coley*, the defendant had been convicted of attempted murder, and had consumed cannabis. The problem for the defendant in *Coley* is that he had voluntarily become intoxicated through the use of cannabis. As a result, his temporary state of psychosis was self-induced, and therefore insufficient to support a claim of automatism.⁷²⁴ However, returning war veterans may abuse substances to alleviate the symptoms of PTSD, and such

⁷²¹ Susan Dimock, 'What are Intoxicated Offenders Responsible for? The "Intoxication Defense" Re-examined' (2011) 5 *Criminal Law and Philosophy* 1, 4.

⁷²² Noel Cross, *Criminal Law and Criminal Justice: An Introduction* (Sage 2009) 53.

⁷²³ Jenni B. Teeters, and others, 'Substance Use Disorders in Military Veterans: Prevalence and Challenges' (2017) 8 *Substance Abuse and Rehabilitation* 69.

⁷²⁴ *Coley & Others v R* (n580).

intoxication may be considered involuntary. It is hardly a coincidence that those returning from Iraq and Afghanistan with PTSD were at higher risk for alcohol abuse and violence.⁷²⁵

The US takes a similar approach to England in voluntary and involuntary intoxication. For example, in *Schlatter v Indiana*, the defendant could not claim automatism due to voluntary intoxication.⁷²⁶ The difficulty for war veterans with PTSD who go undiagnosed and, therefore, untreated, is that they may not claim automatism when their altered states of non-consciousness are brought on by intoxicating substances as a method of self-treatment.

6.4.2. Non-Conscious

A chain reaction occurs in the defence of automatism, which starts with an external factor which brings about an involuntary response action by a defendant who is in an altered state of non-consciousness. In this regard, one must consider that the involuntary response action is carried out in a state of altered consciousness, which is all brought about by an external factor. As Morse points out, however, when an individual is in an unconscious state, he will rarely carry out criminal activities, and if he does carry out a crime, he will not incur criminal responsibility.⁷²⁷ Morse's observation sheds some light on why it is difficult to identify the appropriate circumstances and conditions in which it is feasible for an automatism defence to be proffered.

Automatism arises when the defendant is unconscious, or not conscious of his behaviour.⁷²⁸ In many states of the USA, "unconsciousness" is used interchangeably with the defence of automatism (however, in England, the emphasis is on complete loss of control). The individual is in a state of unconsciousness because the individual is able to act, but is not

⁷²⁵ Eric B. Elbogen and others, 'Violent Behaviour and Post-Traumatic Stress Disorder in US Iraq and Afghanistan Veterans' (2014) 204 *British Journal of Psychiatry* 368.

⁷²⁶ *Schlatter v Indiana* [2008] Ind Ct App 17A05-PC-61.

⁷²⁷ Morse, 'Brain and Blame' (n290) 535-536.

⁷²⁸ Matthew Lippman, *Contemporary Criminal Law: Concepts, Cases, and Controversies* (Sage 2007) 92.

The appropriateness of automatism for the PTSD sufferer in a dissociative state was validated in a North Carolina case, *State v Fields*, where the defendant was considered to be in a state of unconsciousness, although temporary, but such that his mind and body were disconnected. The Court of Appeals ruled that the judge, in the first instance, was incorrect when he did not instruct the jury that they could take account of the fact that the defendant with PTSD was in a dissociative state.⁷⁴³ When there is evidence of an unconscious or dissociative state, the question of whether it is enough to support automatism is a question of fact for the jury.⁷⁴⁴ It has been clearly established throughout this dissertation that the dissociative state has a strong correlation with PTSD. Dissociative states and veterans with PTSD have also been well documented in the literature.⁷⁴⁵

It is, therefore, hardly surprising that a Vietnam veteran with PTSD succeeded in his appeal against a conviction, where automatism could have been established due to dissociative state. The case in question was *People v Lisnow* (California) which determined that a defence of automatism on a charge of battery could succeed where a defendant was in a state of unconsciousness due to a dissociative or fugue state at the relevant time.⁷⁴⁶ This ruling established that automatism is an acceptable defence where the individual with PTSD has a flashback due to a dissociative state.⁷⁴⁷

However, in some cases, automatism in connection with PTSD may be not enough to succeed. The defence of automatism may be unsuccessful because the defendant is unable to prove that the trauma incurred during combat, which then that caused the PTSD. There is an obvious necessity for the proof requirement. If individuals were able to simply claim that

⁷⁴³ *State v Fields* [1989] NC 376 S E 2d 740.

⁷⁴⁴ *State v Connell* (n719).

⁷⁴⁵ Gadi Zerach and others, ‘The Relations between Posttraumatic Stress Disorder and Persistent Dissociation among Ex-Prisoners of War: A Longitudinal Study’ (2014) 6 *Psychological Trauma: Theory, Research, Practice and Policy* 99.

⁷⁴⁶ *People v Lisnow* (n206).

⁷⁴⁷ *Gover* (n20) 579.

PTSD comes face to face with a triggering event and make a hasty decision, the trigger is a threat that the consequential dissociative state will intervene to take over the conscious mind of the veteran (the veteran is left in an automatic state).⁷⁵³

In the US, a defence of automatism will generally succeed for PTSD sufferers, where there is a reflex action over which the individual has no control and a dissociative state, since some US courts agree that automatism does not always require a total “state of unconsciousness.”⁷⁵⁴ However, in California, the unconsciousness element is an essential condition to succeed in the automatism defence due to the fact that people are supposed to be conscious.⁷⁵⁵ This is included in the US MPC, as previously mentioned, which goes on to state that involuntary action occurs when the body moves during unconsciousness or while asleep.

6.4.4. Rejection and Acceptance of the Automatism Defence

The controversies regarding the defence of automatism have been discussed in this chapter. The main concern is the possibility of defendants exploiting this defence as a means of excusing criminal behaviour. Still, automatism together with insanity establishes the constraints around which an individual may be excused for criminal behaviour.⁷⁵⁶ It is, therefore, not a surprise that some judges have shown “scepticism” toward some of the claims of automatism where the actions have appeared to be “purposive.” This section is concerned with the rejection and acceptance of the automatism defence. In considering the rejection of the automatism defence, it is necessary to examine the weakness of automatism.

The primary weakness of automatism as a defence for PTSD sufferers is linked to controversies over the defence. This main weakness for England is that the defendant is only in a state of automatism if he has lost absolute control of his actions. There must be an

⁷⁵³ *ibid.*

⁷⁵⁴ *ibid.* 359.

⁷⁵⁵ Gould (n733) 849.

⁷⁵⁶ Lisa Claydon, ‘Reforming Automatism and Insanity: Neuroscience and Claims of Lack of Capacity for Control’ (2015) 55 *Medicine, Science and the Law* 162.

absolute disconnect between the mind and the body.⁷⁵⁷ On the other hand, the jurisdiction in California relies on the state of unconsciousness to support the automatism defence, as we have seen in the Lisnow case. This means that the defendant must deal with the very difficult task of proving automatism when he is seemingly able to function and control his actions.⁷⁵⁸ This has been a main controversy for the automatism defence because an individual who commits a crime in this state is seen to be making a number of apparent conscious decisions. However, in some jurisdictions, such as North Carolina, which require unconsciousness, in the Fields case, the court insisted on a state of unconsciousness.

With regard to acceptance, it is clear that external factors, such as the trauma of war, may be available for a non-insane defence of automatism by a war veteran with PTSD (precisely in England, but in the US they could use the trauma as insanity or automatism). The triggered war veteran with PTSD who falls into a dissociative state through reliving the PTSD inducing trauma can claim the involuntary and unconscious elements of non-insane automatism. It is not difficult to imagine a war veteran with PTSD responding to triggers that lead to a dissociative state. For example, many films about veterans, or featuring veterans or active duty soldiers, usually include soldiers or veterans with PTSD who are triggered by light or sounds that immediately cause flashbacks. In these flashbacks, the veterans or soldiers are reliving their war experiences, and are automatically carrying out war functions. There is a total disconnect with reality.

The involuntary actions required to support defences of automatism are different from the insanity defence because they do not require a mental defect or a disease of the mind.⁷⁵⁹ Dissociation will usually take place when a PTSD sufferer is triggered by a stimulus.⁷⁶⁰ It is an external factor rather than an internal factor that drives a mental defect or a disease of the

⁷⁵⁷ *Bratty v Attorney-General for Northern Ireland* [1963] (n341).

⁷⁵⁸ Yeo, 'Putting Voluntariness Back into Automatism' (n633) 388.

⁷⁵⁹ Colin Howard, 'Automatism and Insanity' (1962) 4 *Sydney Law Review* 37.

⁷⁶⁰ Martin M. Antony and Murray B. Stein (eds), *Oxford Handbook of Anxiety and Related Disorders* (Oxford University Press 2009) 67.

mind. This is essentially a dissociative case, which is tantamount to unconsciousness or automatism. The individual with PTSD is often out of touch with reality, and is actually taken back, in their mind, to the traumatic episode that caused PTSD.⁷⁶¹

Unlike in England, the US makes no real distinction between sane and insane automatism. In the US, where a defendant seeks to rely on any element in support of automatism that can fit under an insanity defence, the defendant is more likely to claim insanity. This is because experience informs us that US jurors are more inclined to return a verdict that is not amenable to a defence of “temporary insanity.”⁷⁶²

However, in the US, where automatism is not divided into insane and non-insane, a Chinese woman was found guilty of manslaughter instead of murder in the case of *People v Wu* (California). In this case, the woman was put on trial for the strangulation of her son. In her defence, she argued automatism on the grounds that her actions came about as a result of a fugue state, due to her humiliation over being rejected by her lover. The judge ruled that the jury was permitted to take account for the culture of the defendant (so, by extension, combat experience could be accepted for the automatism defence). This was an important element for establishing the defendant’s claim of automatism, and whether it was reasonable to accept that she would be so impacted by her status as a rejected lover, that she would fall into a state of automatism.⁷⁶³

In the US and England, war veterans with PTSD confront the difficulty of uncertainty when offering automatism as a defence, because automatism is a common law defence. This means that there is no statute regulating and fixing the elements of the automatism defence. Therefore, predicting the outcome of an automatism defence for war veterans with PTSD is

⁷⁶¹ Institute of Network Cultures, *Victims's Symptom: PTSD and Culture* (3rd edn, Institute of Network Cultures 2009) 126.

⁷⁶² Kathleen M. Heide, *Understanding Parricide: When Sons and Daughters Kill Parents* (Oxford University Press 2013) 165.

⁷⁶³ *People v Wu* [1991] Cal App No E007993.

problematic. This is especially complicated when one considers the tenuous position of PTSD as a psychosis, placing it precariously between insanity and automatism.

The problem with the automatism was discussed by Loveless, Allen and Derry, when they argued that intoxication produces various problems. For example, when intoxication gives rise to insane behaviour and the defendant is unaware of his actions, the case is more appropriately tried on the basis of insanity, because the M’Naghten rules will be applicable. Yet, where the defendant already has a disease of the mind and becomes intoxicated, it is not altogether clear whether his crime will fall under insanity or simple intoxication.⁷⁶⁴

The availability of automatism is also unclear in such circumstances, which obviously presents a problem for war veterans with PTSD who are reliving their symptoms. The problem is that automatism can easily coincide with a dissociative state which can lead to an identification of PTSD, with attention on the need for treatment. However, the lack of clarity surrounding automatism leaves it as an uncertain defence.

It is clear that in both the US and England, the defence of intoxication is unlikely to be accepted in instances where automatism is allegedly brought on by voluntary intoxication, because *mens rea* can be established prior to intoxication. An individual is expected to know in advance what sort of behaviour he is likely to manifest following intoxication, and therefore, the decision to become intoxicated shows a consciousness of guilt beforehand. It is important to recognise that there is no acceptable defence in self-induced or voluntary intoxication for crimes that require basic/general intent (for example, manslaughter and reckless criminal damage), but in involuntary intoxication, there is a defence of intoxication, and for crimes that require specific intent (for example, murder and grievous bodily harm (GBH) with intent), and there is also a defence of intoxication.

⁷⁶⁴ Loveless, Allen and Derry (n534) 373.

Still, it may be feasible to argue that war veterans with PTSD are left in an uncertain condition when it comes to automatism in the criminal law. According to Schopp, the English explanation of automatism and its correlation with insanity renders automatism a difficult defence to lodge.⁷⁶⁵ As established previously in this chapter, the issues tend to surround what distinguishes non-insane automatism from sane automatism.

6.4.5. Automatism or Insanity

It is quite simple to illustrate this chain reaction through a war veteran with PTSD. The war veteran with PTSD can be suddenly startled by a helicopter flying overhead and immediately lose all connection to reality, believing that he is back in combat and reliving the traumatic event that caused the PTSD. Therefore, the trigger places the war veteran with PTSD in an altered state of consciousness, and in this altered state, the war veteran involuntarily shoots at a passerby, thinking that he is the enemy in a war zone. In such a case, the shooting is not directed by a conscious mind, and is therefore involuntary.

In such a case as the one above, whether the war veteran pleads insanity, non-insane automatism, or indeed something else entirely, will depend on the jurisdiction in which the event occurred, the precise legal rules, and the details of the case. However, it is possible to draw together some strands.

In jurisdictions with narrow insanity rules, such as M’Naughten, the issue identified in Chapter Five on insanity, is whether PTSD is a “disease of the mind,” and if it is, then the defendant may be able to plead insanity. In jurisdictions with wider tests, such as the MPC or Durham tests, this is even more plausible.

If PTSD is not a “disease of the mind,” and the relevant insanity rule requires this, then insanity will not be applicable. The question addressed in this chapter, therefore, is whether non-insane automatism is available and, if so, on what grounds. Here the issues are

⁷⁶⁵ Robert F. Schopp, *Automatism, Insanity, and the Psychology of Criminal Responsibility: A Philosophical Inquiry* (Cambridge University Press 1991) 75.

more complex, but will depend on whether the initial violence or the “trigger” are regarded as “external” and, if so, whether the veteran can show that the external factor caused his conduct, such that it was completely out of his control. If he can do this, then he ought to have the option of a defence of non-insane automatism to put to the jury.

6.5. Conclusion

The most controversial aspect of the defence of automatism is that it permits an absolute acquittal for otherwise criminal behaviour on the grounds of non-consciousness and involuntariness, brought on by an external factor. There is a problem accepting that an individual can carry out a series of acts and not have any conscious awareness or direction with regards to the acts. The more serious the crime, the more difficult this line of reasoning becomes. For instance, in the *Bratty* case, a defence of automatism as a basis for an outright acquittal was denied by the House of Lords.⁷⁶⁶

It is, therefore, hardly surprising as this chapter has demonstrated, that there are very few cases where automatism has been used by defendants suffering from PTSD, partly because PTSD sufferers have been more amenable to offering insanity as a defence. This is particularly true for war veterans with PTSD. This is unfortunate because automatism can apply to a dissociative state which is common among war veterans with PTSD who are easily triggered into experiencing flashbacks, and as a result, slip into blackouts/non-consciousness.

In England, there has been an obvious hesitancy about permitting a defence of automatism where a defendant is charged with serious offences, such as murder. This is understandable because the end result is an absolute acquittal. When a defendant receives a special verdict on the basis of insanity, they will receive treatment for the disease of the mind established. For war veterans with PTSD, court ordered treatment is necessary for diagnosing

⁷⁶⁶ *Bratty v Attorney-General for Northern Ireland* [1963] (n341).

and treating war veterans who have somehow managed to confront delayed PTSD, or to escape recognition and treatment.

It appears that the US and England are hesitant to permit an absolute acquittal in cases of serious crimes, such as murder, based on a claim of a temporary mental condition. As long as the charge is murder, the PTSD sufferer hoping to establish a dissociative state would have the best chance for an acceptable defence by using insanity. For lesser charges, the PTSD sufferer hoping to rely on a dissociative state in support of an automatism defence will have better chance.

Chapter Seven: Self-Defence

7.1. Introduction

The 17th century English poet and statesman, John Milton, introduced a theory of natural law which held that mankind had a natural right to self-defence.⁷⁶⁷ In the US, the right to self-defence is accepted as a significant element of natural law (at least by those scholars inclined to that perspective).⁷⁶⁸ Natural law has played a significant role in the US's castle doctrine (the right to protect the home from invaders) upon which contemporary self-defence is founded.⁷⁶⁹ In fact, under the common law which also applies in England, persons have the inalienable right to defend life, liberty, and property. However, this is not merely a common law right, it is also a constitutional right in the US.⁷⁷⁰ In many states, self-defence is a constitutional right applicable to the criminal law.⁷⁷¹

The greatest difficulty encountered with self-defence is attempting to determine whether the act of self-defence is justified or just an excuse for criminal behaviour.⁷⁷² For example, the individual must have reasonable grounds to believe such force is necessary to prevent an urgent threat to life or an immediate threat of physical injury.⁷⁷³ Generally, self-defence requires an objective test, but the lack of a precise definition of threat to life and

⁷⁶⁷ R. S. White, *Natural Law in English Renaissance Literature* (Cambridge University Press 1996) 220.

⁷⁶⁸ David B. Kopel, 'The Natural Right of Self-Defense: Heller's Lesson for the World' (2008) 59 *Syracuse Law Review* 235.

⁷⁶⁹ Denise Paquette Boots, Jayshree Bihari and Euel Elliott, 'The State of the Castle: An Overview of Recent Trends in State Castle Doctrine Legislation and Public Policy' (2009) 34 *Criminal Justice Review* 515, 516.

⁷⁷⁰ Kopel (n768) 241.

⁷⁷¹ Eugene Volokh, 'State Constitutional Rights of Self-Defense and Defense of Property' (2007) 11 *Texas Review of Law & Politics* 400, 409.

⁷⁷² John Gardner, 'In Defence of Offences and Defences' (2012) 4 *Jerusalem Review of Legal Studies* 110, 114.

⁷⁷³ Kimberly Kessler Ferzan, 'Self-Defense and the State' (2008) 5 *Ohio State Journal of Criminal Law* 449, 451.

immediacy leaves open the possibility of a subjective test, which has caused significant debate over the opportunities this presents for abusing and exploiting self-defence.⁷⁷⁴

Essentially, a reasonable perception of a threat forms the grounds for justifying self-defence. This can be entirely tenuous and subjective because the perceived threat requires an examination of the surrounding circumstances, and of how the defendant perceives his safety.⁷⁷⁵ Self-defence, therefore, promises to at least aide war veterans with PTSD in their defence of criminal behaviour. This is because the state of hyper-vigilance, that often haunts PTSD sufferers, will undoubtedly have a significant impact on their perceptions of danger. This part of the chapter will analyse and discuss the strengths and weaknesses of self-defence, and how it may or may not have a satisfactory outcome in a criminal trial.

7.2. Controversies over Self-Defence

Self-defence as a defence in criminal law is premised on the distinction between justifiable behaviour (examining whether the behaviour is wrong or not, focusing on the act), and behaviour that is merely an excuse (the behaviour is wrong, but examining the responsibility of the defendant, focusing on the actor). Justification theory holds that killing in self-defence is justified in specific conditions and circumstances. Those conditions are that killing is necessary, and proportional to the threat invoking a defensive response, otherwise the homicide may not be “tolerated or excused.”⁷⁷⁶

Ultimately, the theory of justification argues that when a defendant carries out a justified act, it is not criminal behaviour.⁷⁷⁷ However, when an individual carries out an act that is excusable, the individual still acts criminally, but is not punished for the behaviour.⁷⁷⁸

⁷⁷⁴ V. F. Nourse, ‘Self-Defense and Subjectivity’ (2001) 68 University of Chicago Law Review 1235-1237.

⁷⁷⁵ Lacey, Wells and Quick (n310) 800.

⁷⁷⁶ Claire Finkelstein, ‘Self-Defense as a Rational Excuse’ (1996) 57 University of Pittsburgh Law Review 621, 625-626.

⁷⁷⁷ Mitchell N. Berman, ‘Justification and Excuse, Law and Morality’ (2003) 53 Duke Law Journal 1, 2.

⁷⁷⁸ *ibid.*

When self-defence is justified, it would therefore not be expected to create controversy. For example, a man who uses a weapon to kill a home invader whom he believed was about to kill his children will be justified in the defence of his children. For those who suspect that self-defence is used as an excuse for the killing, controversy is expected.

Such controversy relates to the fact that when it is concluded that the defendant committed a crime, but should not be convicted nor punished, this is tantamount to permitting a criminal to go free.⁷⁷⁹ In fact, such an outcome is regarded as an “injustice” and ‘a magnanimous, but gratuitous, and entirely insulting gesture’ or rather offensive.⁷⁸⁰

One of the most controversial cases in which self-defence can be seen as an excuse for murder was the killing of Trayvon Martin by George Zimmerman. This particular case resulted in significant research on “the stand your ground law” (meaning the right to defend oneself in a confrontation outside of the home when one could otherwise retreat).⁷⁸¹ The public generally doubted that Zimmerman had a genuine reason to believe that killing Martin was necessary or proportional. This was evidenced by the public outrage that ensued.⁷⁸² After all, Martin was an unarmed teenager, lawfully taking a stroll in the neighbourhood where his father lived.⁷⁸³ Yet, self-defence under the State of Florida’s “stand your ground law” permitted Zimmerman to use this law as an excuse for what would have otherwise been regarded as first degree murder.

The Trayvon Martin and George Zimmerman case attracted significant media attention, and great controversy over whether or not it is feasible to permit a person to use

⁷⁷⁹ Kyron Huigens ‘The Continuity of Justification Defenses’ (2009) 2009 University of Illinois Law Review 627, 633.

⁷⁸⁰ *ibid.*

⁷⁸¹ Andrea Headley and Mohamad G. Alkadry, ‘The Fight or Flight Response: A Look at Stand Your Ground’ (2016) 5 *Ralph Bunche Journal of Public Affairs* 1.

⁷⁸² Tamara F. Lawson, ‘A Fresh Cut in an Old Wound – A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors’ Discretion, and the Stand your Ground Law’ (2012) 23 *University of Florida Journal of Law and Public Policy* 271, 290.

⁷⁸³ Charles M. Blow, ‘The Curious Case of Trayvon Martin’ (The New York Times, 16 March 2012) <<https://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html>> accessed 30 April 2019.

deadly force outside of one's home under the guise of self-defence. Attention was also drawn to the absence of a duty to retreat first. These shortcomings drew significantly more attention to self-defence.⁷⁸⁴

There are always going to be cases where self-defence was an obvious response to a grave situation. For instance, when a home invader enters a home at night, armed and dangerous. At the same time, when there are young children in the home, an attack on the home invader to prevent an attack on the young children, with no other resource available, will be perceived as justified. However, an attack on an individual based on a groundless suspicion will be perceived as unjustified, although possibly excused. The latter will draw significant controversy.

In England, even where one's home is invaded, there are restrictions on the use of force that can be legitimately used against the intruder.⁷⁸⁵ One thing is certain, in England, the use of excessive force in the death of someone in self-defence will ultimately lead to a conviction for homicide; an absolute acquittal will not be the outcome.⁷⁸⁶ Essentially, if action in defence of oneself or another leads to the unintentional death of an attacker, self-defence has a better chance of succeeding than a situation in which the attacker was intentionally killed.⁷⁸⁷

7.3. Self-Defence

Pursuant to criminal law, self-defence has a good chance of succeeding if the defendants are able to demonstrate that they responded as they did because they reasonably feared that their lives or limbs were threatened (standard of reasonable behaviour). Two tests are applied to self-defence – the first test is subjective, and the defendant must discharge the

⁷⁸⁴ Adam M. Butz, Michael P. Fix and Joshua L. Mitchell, 'Policy Learning and the Diffusion of Stand-Your-Ground Laws' (2015) 43 *Politics and Policy* 347, 348.

⁷⁸⁵ Law Reform Commission (n344) 30.

⁷⁸⁶ Loveless, Allen and Derry (n534) 443.

⁷⁸⁷ Anthony Hooper and David Ormerod (eds), *Blackstone's Criminal Practice 2012* (Oxford University Press 2011) 58.

burden of proving that he actually felt that there was danger (looking at the mental state of the defendant). Under the second test, which is objective, the defendant must also discharge the burden of proving that his response was what one might expect of anyone else confronting the same conditions, circumstances, and facts (looking at ordinary reasonable response of someone in the same circumstances).⁷⁸⁸

The common law self-defence relies on the perception of fear. An individual need only fear that he was about to be attacked, and even when the defendant makes a mistake of judgment, self-defence will suffice to absolve the defendant of culpability, provided the defendant's fear is not unreasonable.⁷⁸⁹ It is also important to note that within the realm of common law, self-defence is not confined to murder. Self-defence can be claimed for other crimes.⁷⁹⁰

Like loss of control, self-defence requires the concept of "reasonableness."⁷⁹¹ Moreover, under common law, self-defence is not merely a partial defence, but rather an absolute defence. If a defendant succeeds in claiming self-defence (private defence or public defence) he will be acquitted. This is because the defendant is essentially arguing that his behaviour was necessary and justified. This is especially true because self-defence is about 'the common law right to defend oneself against invasion of person and property.'⁷⁹²

Under the Criminal Law Act 1967 (in England, self-defence is derived from statutes and common law), self-defence is illustrated as using force while executing an arrest or the use of reasonable force in preventing crime or helping make a legal arrest, whereby such force is justified in the circumstances.⁷⁹³ In addition, section 5 of the Criminal Damage Act

⁷⁸⁸ R. D. Yadav, *Law of Crime and Self-Defence* (Mittal Publications 1993) 179-180.

⁷⁸⁹ Jonathan Herring, *Criminal Law: Text, Cases and Materials* (7th edn, Oxford University Press 2016) 725.

⁷⁹⁰ Oliver Quick and Celia Wells, *Lacey, Wells and Quick, Reconstructing Criminal Law: Text and Materials* (4th edn, Cambridge University Press 2010) 810.

⁷⁹¹ *ibid.*

⁷⁹² *ibid.*

⁷⁹³ Criminal Law Act 1967, s 3.

1971 clarifies the protection of property.⁷⁹⁴ More recently, section 76 of the Criminal Justice and Immigration Act 2008 permits the use of reasonable force for common law self-defence, common law defence of one's property, and the Criminal Law Act 1967 (explains subjective and objective elements in detail).⁷⁹⁵ The following three essential sections will investigate each of these parts.

7.3.1. Imminence of Harm

Under criminal law, self-defence is a formal claim in which the *actus reus* and *mens rea* are typically undisputed elements.⁷⁹⁶ Basically, the defendant must prove that his self-defence is rooted on the belief that harm was imminent. In this regard, imminent means immediate.⁷⁹⁷ Imminent peril permits the use of force in order to avoid an attack.

The imminent rule requirement for self-defence can be problematic because an abused woman, who has been abused over a period of time, will not successfully plead self-defence. The difficulty for an abused individual is that they may always fear that they could confront imminent harm, when in legal reality, harm may not be imminent during intervals of peace. Therefore, the issue for consideration would be whether an individual experiencing continuous domestic violence can claim self-defence if such a person attacked their abuser at a time when the abuser was asleep. Obviously, the sleeping abuser would present the abused person with an opportunity to defend themselves in the future, but that would not be the case when they are asleep.

Another area of the law that may run afoul of the imminence rule is known as the human trap. For example, someone living in a neighbourhood where home invasions are constant and frequent may feel the need to set a human trap for preventing a similar attack in

⁷⁹⁴ Criminal Damage Act 1971, s 5.

⁷⁹⁵ Criminal Justice and Immigration Act 2008, s 76.

⁷⁹⁶ Ormerod and Laird, *Smith and Hogan's Text, Cases, and Materials on Criminal Law* (11th edn, Oxford University Press 2014) (n300) 18.

⁷⁹⁷ Janet Loveless, *Complete Criminal Law: Text, Cases and Materials* (5th edn, Oxford University Press 2016) 395.

his home. Such a trap is actually “pre-emptive” and “premature.”⁷⁹⁸ Therefore, it would be especially difficult for the defendant to satisfy the court that the premature trap was in response to the threat of imminent harm.

In England, the duty to retreat does not exist (this obliges the defender to withdraw/retreat, if this possible, before using any force). The omitted rule was discussed in *R v Bird*, where the presiding judge ruled that unless the defendant showed an unwillingness to fight, he would not be able to use self-defence.⁷⁹⁹ On appeal, the conviction was quashed on the grounds that while a willingness to retreat would show good faith, there was no duty to retreat.⁸⁰⁰ The duty to retreat is a common law rule that remains the law in a few states in the US. This duty raises some questions about imminent harm.⁸⁰¹ By virtue of the rule, if an individual feels threatened at all, and there is an opportunity to escape the threat, the individual then has a duty to escape.⁸⁰² However, the question that remains unanswered is whether the imminent harm relieves the individual of the duty to retreat in states where the duty still exists.

7.3.2. Reasonableness of Belief

Self-defence is founded on the belief that it is human nature to impulsively protect the self.⁸⁰³ Regardless, the defendant must show that he had a “genuine” belief that using force was necessary.⁸⁰⁴ Mainly, the defendant has no duty to prove that using force was actually necessary, he will only have to prove that he had reasonable belief that force would be necessary.

⁷⁹⁸ Boaz Sangero, *Self-Defence in Criminal Law* (Hart Publishing 2006) 163-164.

⁷⁹⁹ *R v Bird* [1985] 1 WLR 816.

⁸⁰⁰ *ibid.*

⁸⁰¹ Samaha (n353) 176.

⁸⁰² *ibid.*

⁸⁰³ Allen, *Textbook on Criminal Law* (n528) 209.

⁸⁰⁴ Ormerod and Laird, *Smith and Hogan’s Text, Cases, and Materials on Criminal Law* (11th edn, Oxford University Press 2014) (n300) 416.

It is interesting to observe that reasonable belief is paired with honest belief, in that an honest and reasonable belief in harm is enough to substantiate self-defence.⁸⁰⁵ Thus, a threat may not actually be real. As long as the defendant reasonably believes that the threat exists, this will be enough to obtain an acquittal. Where a defendant's belief that he faces a threat or harm is unreasonable, the defendant will not be entitled to an acquittal.⁸⁰⁶

Where a defendant is mistaken, negligent, or reckless in coming to the conclusion about a threat to himself or others, any reasonable belief will be much harder to prove. However, not impossible, because the defendant's honest perception of a threat whether reasonable or not can suffice.⁸⁰⁷ The defendant's circumstances, conditions, and facts will determine whether the defendant's genuine belief that there was a threat to his life, limb, and/or liberty was genuine enough to warrant a self-defence claim.

In England, threat assessment is very important in a self-defence claim in response to a criminal charge. For example, cases such as *Harvey* have established that authentically believing in the circumstance, if real, may substantiate a claim of self-defence and will therefore defeat the element on intention necessary for establishing the crime that the defendant is charged with.⁸⁰⁸

The question for consideration in self-defence is whether the behaviour justifiably responded to dangers to the self or others.⁸⁰⁹ Justification of one's behaviour is therefore not based on actuality, but rather the perceptions or beliefs of the actor, provided they are reasonable in the circumstances.⁸¹⁰ An individual might actually err in the belief that he or another is in imminent danger, and still the belief may be justified to substantiate a self-

⁸⁰⁵ Loveless, Allen and Derry (n534) 449.

⁸⁰⁶ Fiona Leverick, *Killing in Self-Defence* (Oxford University Press 2006) 163.

⁸⁰⁷ *ibid* 188.

⁸⁰⁸ *Harvey* [2009] EWCA Crim 469.

⁸⁰⁹ J. C. Smith, 'Justification and Excuse in the Criminal Law' (1989) 12.

⁸¹⁰ Baron (n392) 387.

defence claim in criminal law.⁸¹¹ Essentially, the defendant will have to prove that he honestly and reasonably believed that the use of force was necessary.⁸¹²

7.3.3. Reasonable Force

Under common law, self-defence refers to the use of reasonable force for defending the self, another or property.⁸¹³ Reasonable force must align with the prevention of a breach of the safety of another ‘for the sake of protecting some minor harm.’⁸¹⁴ However, some courts will allow an unjustifiable defence of the use of deadly force in circumstances where the individual could have retreated.⁸¹⁵

In practice, the use of force is justified if the force used is matched by the force of the assailant, or threatened by the assailant.⁸¹⁶ If force is threatened, the defendant is justified in using force similar to the force threatened in order to prevent the use of force against him. If force is used once a threat has passed, or as an act of revenge, or with a degree of unreasonable force, it will not be justified (if self-defence does not meet this requirement, this is known as incomplete self-defence, which in some jurisdictions leads to a change in the charge or mitigation in sentencing).

The courts in England have already made it clear what the force must be to be reasonable, that does not require the defendant to calculate the response that would be exactly commensurate with the force of the attack, while he is under attack.⁸¹⁷ In *R v Scarlett*, the defendant’s conviction for manslaughter was quashed on appeal, and it was held that the amount of force used was purely a subjective test. All that mattered was what the defendant

⁸¹¹ *ibid.*

⁸¹² Ormerod and Laird, *Smith, Hogan, and Ormerod's Text, Cases, and Materials on Criminal Law* (12th edn, Oxford University Press 2017) (n552) 666.

⁸¹³ David C. Brody, James R. Acker and Wayne A. Logan, *Criminal Law* (Aspen Publication 2001) 267.

⁸¹⁴ Janet Loveless, *Complete Criminal Law: Text, Cases, and Materials* (3rd edn, Oxford University Press 2012) 498.

⁸¹⁵ Berman (n777) 14-15.

⁸¹⁶ *ibid* 40.

⁸¹⁷ *Palmer v R* [1971] AC 814.

thought was necessary in the circumstances. If he thought that the amount of force used was necessary to prevent the threat, or to protect the self or property, the defendant should not be convicted if the force used was excessive.⁸¹⁸

Generally, the determination of the defendant's use of reasonable force requires an examination of the totality of facts and circumstances. This includes the level of force used, the severity of the threat, and how one might have been able to avoid the threat by methods that did not include the use of force.⁸¹⁹ Ultimately, reasonable force will not be substantiated unless it was necessary for preventing harm, and the outcome from the threat would have been so serious that a reasonable person would believe that he were justified in responding the same way that the defendant responded.⁸²⁰

In summary, the level of force necessary depends on the degree of force used or threatened by the attacker. If the degree of force used by the defendant is greater than the level of force used or threatened by an attacker, then the force used by the defendant is not reasonable. In such a case, what one might think is a reasonable case for self defence, can turn into a case of assault and battery. This is likely to be the case when the defendant continues with the use of force when the assailant is no longer a threat. Therefore, reasonable force is not about the degree or type of physical force used, but the facts and circumstances surrounding the use of force. The court is interested in the events and circumstances that gave the defendant the idea that the use and type of force used were necessary in order to avoid a severe outcome.

⁸¹⁸ *R v Scarlett* [1994] Crim LR 288.

⁸¹⁹ Ormerod and Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th edn, Oxford University Press 2018) (n530) 397.

⁸²⁰ *ibid.*

7.4. War Veterans, PTSD, and Self-Defence

In England, as noted above, both common law and statutory law provide an escape from prosecution for those who intentionally inflict harm on others in self-defence.⁸²¹ What distinguishes deliberate and intentional self-defence harm from other forms of harm is the fact that self-defence offenders are not inflicting harm as an end in itself. Rather, the self-defence claimant is inflicting harm on a threat in order to avoid further potential harm to himself.⁸²²

What makes self-defence appealing when thinking about war veterans suffering from PTSD is that it is a complete defence for murder.⁸²³ This gives rise to two important questions for the defendant who is a war veteran with PTSD. First, where the defendant uses deadly force in a claim of self defence, the first question for consideration is whether the force used was necessary. The second question is whether the force used was proportional to the threat or the situation giving rise to self-defence.⁸²⁴ As previously discussed, the third element of self-defence is reasonableness of belief.

When considering whether the use of force was necessary, and whether it was proportional to the threat, a subjective test is used which is beneficial to war veterans suffering from PTSD. In *R v Gladstone Williams*, the court ruled that when considering these questions, one must look at the facts and circumstances specific to the defendant.⁸²⁵ Hence, a war veteran with PTSD will be accorded the opportunity to be judged according to his own perception of the threat before him. It is irrelevant whether a reasonable person might have interpreted the threat differently. Obviously, a war veteran with PTSD who is triggered by a

⁸²¹ De Than and Heaton, *Criminal Law* (4th edn, Oxford University Press 2013) (n285) 271.

⁸²² Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press 2011) 266.

⁸²³ Herring, *Criminal Law: Text, Cases and Materials* (8th edn, Oxford University Press 2018) (n529) 232.

⁸²⁴ ‘Self-Defence and the Prevention of Crime’ (The Crown Prosecution Service)

<http://www.cps.gov.uk/legal/s_to_u/self_defence/#The_Law_and> accessed 1 March 2017.

⁸²⁵ *R v Williams* [1984] 78 Cr App R 276.

sight or sound will have a very different perception of threats than a reasonable person with no psychological trauma to contend with. Thus, this part of the chapter analyses how the elements of self-defence can be applicable to a war veteran with PTSD.

7.4.1. Imminence of Harm

According to the DSM-IV, PTSD is brought on by a traumatic event that causes significant fear.⁸²⁶ The PTSD symptom that will most likely give way to an action that can be consistent with self-defence is hyper-vigilance. This symptom is linked to the PTSD sufferer's altered sense of reaction. Therefore, in a situation where the defendant is a PTSD sufferer, and is triggered to the extent that he re-experiences his trauma, the perception of imminent harm is very different from the ordinary individual (in such a case, the perceived threat of harm can be expected to be exaggerated).

The main requirement is that the defendant perceives imminent harm (subjective test). This term has been used interchangeably with the term "immediacy," indicating that the imminent harm is immediate.⁸²⁷ In such a case where the defendant has an opportunity to alert law enforcement, but nevertheless takes the law into his own hands, self-defence is not likely to be a successful claim.⁸²⁸ When a PTSD sufferer, particularly a war veteran, experiences flashbacks and relives the combat-related trauma that caused PTSD, he is likely to perceive each episode as a situation in which immediate or imminent harm is threatened.

However, PTSD brought on by violence might result in hyper-vigilance associated with feelings of revenge and anger.⁸²⁹ Thus, for this category of PTSD sufferers, a self-defence claim may be difficult to substantiate. In such a case, the defendant who is motivated

⁸²⁶ Ross G. White, 'A Cross-Sectional Examination of Candidate Psychological Factors Associated with Post-Psychotic PTSD & Research Portfolio' (PhD Thesis, University of Glasgow 2007) 55-56.

⁸²⁷ Loveless, *Complete Criminal Law: Text, Cases and Materials* (5th edn, Oxford University Press 2016) (n797) 395.

⁸²⁸ *ibid.*

⁸²⁹ Ulrich Orth, Leo Montada and Andreas Maercker, 'Feelings of Revenge, Retaliation Motive, and Posttraumatic Stress Reactions in Crime Victims' (2006) 21 *Journal of Interpersonal Violence* 229-231.

by a feeling of revenge and anger due to PTSD will have difficulty proving a claim that the force used was necessary because of a perception of imminent or immediate harm. For example, battered woman's syndrome (BWS) is a subset of PTSD.⁸³⁰ BWS is prone to hyper-vigilant responses to perceptions of looming danger.⁸³¹

Faust states that "subsets" of PTSD may lead to a successful self-defence claim in a criminal trial. This is most commonly observed in cases involving BWS.⁸³² In such cases, a woman who has a history of spousal abuse kills her abuser at a time where a threat is not imminent, and in fact, at the relevant time, she could have escaped. The defence will typically call an expert witness to explain the defendant's behaviour. The defence will use expert testimony to substitute the reasonable person test with a subjective test of how a person suffering from the subset of PTSD would reasonably respond in these circumstances.⁸³³ The idea is to introduce an "imperfect self-defence" calculated to exonerate a defendant's culpability in a criminal offence.⁸³⁴

PTSD is relevant to self-defence claims in BWS cases, where the wife attacks the husband at a time when she might have escaped. Her self-defence claim is that due to repeated abuse, she developed PTSD. As a result of her PTSD, she had a heightened and exaggerated fear of a threat of attack, and acted accordingly.⁸³⁵ From the perspective of an individual who has not been traumatised by domestic violence, the battered woman who kills her abuser based on a fear that an attack in the future is imminent did not act reasonably. However, from the perspective of an individual traumatised by domestic violence, her threat

⁸³⁰ Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1993) 21 Hofstra Law Review 1191, 1198.

⁸³¹ Lenore E. A. Walker, 'Battered Women Syndrome and Self-Defense' (1992) 6 Notre Dame Journal of Law, Ethics & Public Policy 321, 324.

⁸³² David Faust, *Ziskin's Coping with Psychiatric and Psychological Testimony* (Oxford University Press 2012) 628.

⁸³³ *ibid.*

⁸³⁴ *ibid.*

⁸³⁵ Friedman, Keane and Resick (n164) 541.

assessment and reaction are reasonable.⁸³⁶ This perceptive might exist with war veterans with PTSD.

Gover argues that a self-defence claim is quite viable for a war veteran.⁸³⁷ For example, in the US, the MPC describes self-defence as the use of force in circumstances where the defendant believes that he is in immediate danger of being harmed.⁸³⁸ For PTSD war veterans, the experience of war that brings on PTSD can establish a persistent pattern of exaggerated fear in the post-deployment phase.⁸³⁹ Stimuli can re-awaken those traumatic fears that brought on PTSD. The problem may be in convincing a tribunal of the fact that an assailant induced a real threat of danger warranting self-defence.⁸⁴⁰ Regardless, PTSD does induce a threat that the victim perceives is real, and therefore acts accordingly.⁸⁴¹ It is also important to note that PTSD victims often feel vulnerable, and are generally worried about their personal safety.⁸⁴²

Threat perception is also pronounced among military personnel due to the stressors associated with “warzone” deployment.⁸⁴³ It is expected that military veterans who have been at the frontlines of war, will return with a persistent fear of threats. It is also expected that military veterans with PTSD are far more prone to hyper-vigilance and startled reactions due to the fact that the trauma of war was not a one-off event. Persistent war trauma is expected to increase the level and repetition of PTSD symptoms, which includes those symptoms that

⁸³⁶ Ormerod and Laird, *Smith, Hogan, and Ormerod's Text, Cases, and Materials on Criminal Law* (12th edn, Oxford University Press 2017) (n552) 178.

⁸³⁷ Gover (n20) 580.

⁸³⁸ *ibid* 580-581.

⁸³⁹ ‘PTSD in Military Veterans: Causes, Symptoms and Steps to recovery’ (help guide.ORG) < <https://www.helpguide.org/articles/ptsd-trauma/ptsd-in-military-veterans.htm> > accessed 5 January 2018.

⁸⁴⁰ Gover (n20) 581.

⁸⁴¹ *ibid*.

⁸⁴² Wendy S. David and others, ‘Making a Case for Personal Safety Perceptions of Vulnerability and Desire for Self-Defense Training among Female Veterans’ (2004) *Journal of International Violence* 991.

⁸⁴³ Cynthia L. Lancaster and others, ‘The Role of Perceived Threat in the Emergence of PTSD and Depression during Warzone Deployment’ (2016) 8 *Psychological Trauma: Theory, Research, Practice and Policy* 528.

are relevant to a self-defence claim: threat perception and negative alterations of cognition. Studies have shown that combat exposure increases PTSD symptoms.⁸⁴⁴

In *State v Janes*, Janes a 17-year-old male was charged in the shooting death of his mother's boyfriend. Janes claimed that his mother's boyfriend had abused him, his siblings, and his mother for a decade. As a result, he developed PTSD. On the night in question, there were no confrontations or incidents involving the victim. Nevertheless, the defendant felt that his life or the life of his siblings or mother were in imminent danger. The shooting actually occurred a night after the victim had argued with his mother.⁸⁴⁵

The defendant called expert testimony to prove that he suffered from PTSD and his fear of imminent danger was induced by his PTSD. Since the presiding judge did not think that the defendant was in imminent danger, he did not instruct the jury on the issue of self-defence. The defendant was convicted of second degree murder. On appeal to the Washington Supreme Court, it was held that the PTSD and battered child syndrome were perfectly admissible, and that the lower court erred, and the case was returned for a new trial. The appellate court ruled that PTSD was admissible to demonstrate how the condition interacted with threat perceptions causing the defendant to act as he did in the circumstances of the case.⁸⁴⁶

In *State v Mizell*, the defendant claimed self-defence in response to an attempted murder charge. On the facts of the case, the defendant, who was a Vietnam veteran, had a fight with a man at the home of another man. The defendant argued that the victim posed an immediate threat to him and confirmed this threat by indicating through gestures that he had a concealed weapon. This indicated to the defendant that the victim intended to make good on his threat. He therefore repeatedly hit the victim with a stick. The defendant applied to call

⁸⁴⁴ Eve B. Carlson and others, 'Traumatic Stressor Exposure and Post-Traumatic Symptoms in Homeless Veterans' (2013) 178 *Military Medicine* 970.

⁸⁴⁵ *State v Janes* [1993] Wash 850 P 2d 495.

⁸⁴⁶ *ibid.*

appellate court ruled that she should have been permitted to call expert testimony to support her self-defence claim on the basis of PTSD. The appellate court therefore ordered a retrial.⁸⁵³

A similar situation arose in the case of *Rogers v State*, where the defendant went on trial and was convicted of first degree murder in respect of her boyfriend's death. At her trial, she tried to present evidence of battered spouse syndrome on the basis of PTSD. The court of first instance denied her attempts on the grounds that the expert testimony that she was attempting to proffer fell short of the admission standards. The appellate court did not agree, and ruled that the evidence not only met admissibility standards, but was also relevant, since PTSD is popularly acknowledged among health professionals, and expertise on PTSD has long since been acknowledged by Florida's courts. Therefore, a new trial was ordered.⁸⁵⁴

The PTSD sufferer who is triggered to believe that there is an imminent threat is usually unaware that his fear or threat perception is irrational.⁸⁵⁵ Irrational fear may lead to irrational responses, that the force used in self-defence by a PTSD sufferer may be excessive in the circumstances (excessive force because of revenge may lead to conviction, but excessive because of mistake may lead to mitigation of the sentence).

When a defendant successfully establishes that he believes that he was acting in self-defence, if the force used was unreasonable he will not be absolutely absolved. Instead, he could receive a mitigated sentence.⁸⁵⁶ For instance, Matthew Sepi (Nevada-2005), a war veteran who had served in Iraq, pulled out a firearm and shot two men who approached him with a weapon, killing one man and injuring the other. At his trial he raised self-defence on the basis of PTSD. He was sentenced to probation for having a concealed weapon.⁸⁵⁷ According to his public defender, Sepi agreed to treatment for substance abuse and PTSD in

⁸⁵³ *State v Hines* [1997] NJ Super Ct App Div 696 A 2d 780.

⁸⁵⁴ *Rogers v State* [1993] Fla Dist Ct App 616 So 2d 1098.

⁸⁵⁵ Zepinic, 'Posttraumatic Stress Disorder in Courtroom: Insanity Defence' (n199) 27.

⁸⁵⁶ Grey (n24) 79.

⁸⁵⁷ Cathy Ho Hartsfield, 'Deportation of Veterans: The Silent Battle for Naturalization' (2012) 64 Rutgers Law Review 835, 851-852.

exchange for the charges being dropped once his treatment was completed.⁸⁵⁸ Sepi's self-defence claim was supported by his combat language when talking to investigators about the shooting. He spoke of breaking contact with the enemy and engaging the targets.⁸⁵⁹

For the PTSD sufferer this element of self-defence is helpful, because although this part of self-defence requires reasonableness in the belief of threats and harm, it is judged relative to the perspective of the defendant. A defendant could therefore be mistaken as to the threat of harm, but as long as he honestly believed in the threat at the relevant time, he will not be barred from claiming self-defence.⁸⁶⁰ This part of self-defence is well-suited to the war veteran with PTSD who honestly believes that he is back in the war zone after a triggering event.

7.4.3. Reasonable Force

The statutory provisions cleared up what is meant by reasonable force in a claim of self-defence.⁸⁶¹ Ultimately, the question for consideration is whether the quantity or quality of force used by the defendant in a specific situation was supported by the facts and circumstances of the case. The facts and circumstances surrounding the use of force, and the question of whether the amount of force used was reasonable, will depend on a construction of the facts and circumstances from the perspective of the defendant.⁸⁶²

In other words, the question of reasonable force is a subjective issue (the degree of force in accordance with defendant's perspective). Yet, there is some confusion because only reasonable force may be used in self-defence. This leaves open the question as to what

⁸⁵⁸ Deborah Sontag and Lizette Alvarez, 'Iraq Veterans Leave a Trail of Death and Heartbreak in U.S.' (The New York Times, 13 January 2008)
<<http://www.nytimes.com/2008/01/13/world/americas/13ihtvets.1.9171147.html?pagewanted=all>>
accessed 3 January 2018.

⁸⁵⁹ Jerry Lembcke, *PTSD: Diagnosis and Identity in Post-Empire America* (Lexington Books 2013) 3.

⁸⁶⁰ Nicola Monaghan, *Criminal Law: Directions* (2nd edn, Oxford University Press 2012) 315.

⁸⁶¹ Ormerod and Laird, *Smith and Hogan's Text, Cases, and Materials on Criminal Law* (11th edn, Oxford University Press 2014) (n300) 417.

⁸⁶² *ibid.*

whom threat appraisals become sustained during combat and follow the PTSD sufferer in the aftermath of a war as they attempt to rejoin civilian life.

The difficulty that the PTSD sufferer faces in this case is that generally the law permits the use of the amount of force that is “objectively reasonable in the circumstances,” in terms of the defendant’s genuine belief of what the threat is.⁸⁶⁹ For the PTSD sufferer, this can mean that his perception of the amount of force may not be reasonably tenable. However, the law does state that it does not matter whether the defendant is mistaken, provided he is genuinely mistaken.⁸⁷⁰

What this actually means is that the PTSD sufferer will be objectively judged according to his own subjective belief in the quality of the threat, and his corresponding belief in the amount of force that he should be employing in self-defence (what is reasonable force depends on the circumstances in play at the time). In other words, the test of the reasonableness of force will only be judged in accordance with what the PTSD sufferer believed in relation to the threat of harm. For instance, if a war veteran with PTSD was triggered by an episode that led to a flashback in which he genuinely believed that a passerby was a combat enemy, it would be objectively reasonable to expect him to shoot at a combat enemy, and intentionally cause death.

7.4.4. Rejection and Acceptance of Self-Defence

The Anglo-American theory of criminal law focuses on the difference between justification and excuses for criminal offending.⁸⁷¹ In this regard, a criminal behaviour can be justified, or an excuse is based on the fact that the offender can avoid personal “blame” for

⁸⁶⁹ Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) (n314) 429.

⁸⁷⁰ *ibid.*

⁸⁷¹ Berman (n777) 3.

the behaviour.⁸⁷² A triggered PTSD sufferer may feel justified in their hallucinatory episodes where they believe they are once again in the combat zone.

A war veteran with PTSD may feel that his crime was justifiable since he was genuinely mistaken as to his whereabouts, believing that he was in a combat zone once again. Ultimately, the killing will be acceptable because the veteran with PTSD is suffering from a war-related trauma. However, there is an argument to be made that self-defence is a “justification” and not an “excuse,” so that killing is only justified where there is a real threat to life, and not where the defendant wrongly perceives this to be the case. This reasoning would exclude PTSD from the defence, if the defence is understood as a justification rather than an excuse, and push veterans with PTSD towards a defence of diminished responsibility or insanity.

Still, there are concerns that the idea of self-defence can be used as an excuse to intentionally kill another human being. Obviously, when a person acts in self-defence, he deliberately and intentionally kills or causes harm to another. However, the intentional infliction of harm or death is not always justified. That is why the law is crafted to dictate the circumstances in which the use of force, or the degree of force used, is reasonable. Other elements of self-defence, such as the imminence of the harm, are also designed to prevent the use of force as an excuse to commit a crime of violence against another. However, these limitations on self-defence can be exploited and used as excuses.

The defendant might not be in a dissociative state at the time of the commission of the crime. However, a war veteran with PTSD can ‘overreact to surrounding events and stimuli because of their PTSD.’⁸⁷³ Because of PTSD, the war veteran may see a threat, and the danger associated with another, to be a lot worse than it actually is.⁸⁷⁴ Therefore, in

⁸⁷² *ibid.*

⁸⁷³ Hafemeister and Stockey (n21) 125.

⁸⁷⁴ *ibid.*

jurisdictions where the test for self-defence can be satisfied with subjective analyses of threat perception, the war veteran with PTSD is likely to successfully claim self-defence.⁸⁷⁵

In Texas, self-defence on the grounds of PTSD has also been successful in reducing the original charge to a lesser offence. For example, in *Harwood v State*, the appellant, a 16-year-old male, was tried for murder. The victim was a man who had molested the appellant. The appellant claimed he acted in self-defence, and that he suffered from PTSD. The appellant was convicted of manslaughter and appealed the verdict. The appellate court affirmed the manslaughter verdict and stated that the jurors appeared to have believed the appellant's defence, but concluded that an absolute discharge was unfair.⁸⁷⁶

However, in *Perryman v State*, the court did not see the relevance of PTSD to a self-defence claim in response to a first-degree murder charge. In this case, the defendant claimed that he suffered from PTSD due to childhood sexual abuse. He killed the victim in self-defence when the victim attempted to sexually assault him and threatened to shoot him if he resisted. The court of first instance failed to see the relevance of the testimony regarding trauma inducing PTSD and excluded it. Upon appeal, the appellate court upheld the conviction and the exclusion of evidence relative to PTSD.⁸⁷⁷

In *State v Sullivan*, the defendant, a Vietnam War veteran, was charged with attempted murder, as well as aggravated assault. The charges arose from the defendant shooting into a crowd that was assembled at a bar. The shooting followed an altercation with a patron at the bar. The defendant claimed that he acted in self-defence, and that his actions were directly linked to PTSD. The court of first instance did not instruct the jury on self-defence. The defendant was subsequently convicted. The verdicts were appealed to the superior court and upheld. However, upon appeal to the Maine Supreme Judicial Court, it

⁸⁷⁵ *ibid.*

⁸⁷⁶ *Harwood v State* [1997] Tex Ct App 961 S W 2d 532.

⁸⁷⁷ *Perryman v State* [1999] Okla Crim App 990 P 2d 900.

was ruled that a jury properly advised, could have decided a different fate for the defendant and may have found him not guilty on the basis of PTSD induced self-defence. Therefore, the judgment of the superior courts was vacated.⁸⁷⁸

A relatively recent English case considered a self-defence claim by a British war veteran with PTSD, in an incident in which an attack on another soldier resulted in GBH.⁸⁷⁹ In this case, the defendant who was charged with others, claimed that he attacked the victims in self-defence during a confrontation in the early hours of the morning after a night out drinking. He also argued that his perception of threat warranting self-defence was induced by PTSD. The expert witness, however, testified to only a mild form of PTSD. Moreover, the defendant in question had given two separate and contradictory accounts of the incident on the relevant night, and explained his discrepancies by stating he suffered memory loss due to a blow to his head on the night in question.⁸⁸⁰

The presiding judge left it to the jury to decide, explaining that it was up to them to determine whether the defendant was manufacturing his testimony or did in fact suffer from memory loss. The presiding judge also instructed the jury that it was up to them to decide whether PTSD had an effect on the defendant's interpretation of the events of the night that caused him to respond in what he thought was self-defence. The jury returned a guilty verdict and the defendant appealed claiming that the trial judge had not fairly instructed the jury. The appellate court reviewed the trial transcript and disagreed, ruling that the jury's verdict was safe, and therefore affirmed it.⁸⁸¹

This case is important because it confirms that self-defence on the basis of PTSD is a viable defence in England. The defendant's contradictory statements, and the fact that this defendant's PTSD was only a mild form, did not help his claim. The results might have been

⁸⁷⁸ *State v Sullivan* [1997] Me 695 A 2d 115.

⁸⁷⁹ *R v Press and Another* [2013] EWCA Crim 1849.

⁸⁸⁰ *ibid.*

⁸⁸¹ *ibid.*

different if the defendant's evidence had been consistent and he was suffering from a more serious level of PTSD. After all, it was decided in *Martin v R* that the jury may take into account a defendant's psychiatric condition when determining whether or not excessive force in self-defence was reasonable.⁸⁸² However, it was ruled in *So v The Crown*, that the rule in *Martin* is the exception rather than the rule.⁸⁸³

Common law self-defence is more broadly applied in England, and extends to a manifestation of a mistaken but honest belief. Under the Crime and Courts Act 2013, self-defence in property or on residential property carries the same standard of honest belief.⁸⁸⁴ In any self-defence claim in England, the defendant can succeed if he proves that his belief was genuine, although he erred on the interpretation of the facts.⁸⁸⁵ However, such a defence will fail if the defendant was voluntarily intoxicated,⁸⁸⁶ since the lines between reasonable and unreasonable belief are blurred when intoxication is involved.

It is also important to note that there is a paucity of documented cases of war veterans with PTSD using self-defence in criminal courts. This indicates that there is a lack of confidence among war veterans with PTSD in the success of this defence. The paucity of self-defence claims among war veterans with PTSD may also reflect an aversion to claiming self-defence, and ignoring the way that self-defence was an unnatural response to a misconceived situation. One has to remember that the cases where self-defence is used are those where a defendant is actually in danger, and not under fear of a mistaken attack as one might assume when PTSD symptoms are triggered, so that the sufferer has flashbacks.

⁸⁸² *Martin v R* [2001] EWCA Crim 2245, para 67-68.

⁸⁸³ *So v The Crown* [2013] EWCA Crim 1725, para 51.

⁸⁸⁴ Crime and Courts Act 2013, s 43.

⁸⁸⁵ *R v Williams* (n825).

⁸⁸⁶ *R v O'Grady* [1987] QB 995.

7.4.5. Self-Defence and War Veterans Suffering from PTSD

The discussion of abuse victims could be linked more clearly to the case of veterans. Is there a moral difference between an abuse victim with PTSD who kills their abuser, and a war veteran with PTSD who kills a stranger? In both cases, the killing may be due to a wrongly perceived threat, but the context is very different. Should these cases be treated the same or differently? Should it be the PTSD that matters, or the moral status of the offender as a victim?

For the war veteran suffering from PTSD, the trauma of war follows him once their deployment comes into play. Hafemeister and Stockey argue that for a war veteran living in the civilian world following their return from war, the haunting effect of war trauma can provide incidents of fear and violence, and at the same time, a self-defence claim to criminal charges. The war veteran may be confronted with a situation very similar to the one that triggered the onset of PTSD. In such a case, the veteran can be transported back in time and relive those feelings that he had to confront at the time. This can very likely lead to a feeling and impulse to defend himself or someone else.⁸⁸⁷

Self-defence is also well-suited to PTSD because of the sufferer's propensity to relive the event. Certain events or places can act as a trigger which may set the PTSD sufferer off and heighten PTSD symptoms to a point where he might believe his life is in imminent danger. These kinds of threat perceptions are common among PTSD sufferers, especially war veterans. War veterans with PTSD are more prone to suspect danger and threats due to the sustained nature of combat stress (however, self-defence requires necessity and reasonableness).

The subjectivity of the use of force and the belief in the immediacy of harm will help to protect a war veteran with PTSD from a conviction in circumstances where a defence of

⁸⁸⁷ Hafemeister and Stockey (n21) 125.

insanity or automatism or diminished responsibility will not succeed. This is because subjectivity does not require proof of psychosis, or the kind of mental illness that will usually support defences of insanity, automatism, and diminished responsibility.

In using self-defence, the defendant war veteran with PTSD is essentially claiming that he was triggered by an event which brought on the symptoms of PTSD. These symptoms subsequently led the defendant to genuinely believe that his life, or the life of another, was in imminent danger of being harmed. Such a defence will not require proof of psychosis which is difficult to substantiate when one is suffering from PTSD (however, there is no real predictability for defendants who seek to launch a self-defence claim).

7.5. Conclusion

Self-defence has been described as both a means by which a deliberate criminal act can be excused and justified. Still, the strength of self-defence is that it can provide for a complete acquittal of the defendant who successfully uses it. In other words, even where a defendant is charged with murder, the defendant can escape liability altogether if he claims self-defence successfully. A review of the literature on self-defence has also revealed that where a defendant with PTSD launches a defence of self-defence, and the jury believes that the force used was excessive, yet they believe the defendant's claim of self-defence, the jury will return a verdict on the lesser included offence, indicating that self-defence can also provide a framework for, in effect, mitigating sentences.

This chapter has reviewed the literature on self-defence. The research findings suggest that self-defence is a valid and viable defence to a criminal charge. The primary element establishing self-defence is the threat perception. Since PTSD sufferers are often hyper-vigilant, have flashbacks, and revisit the event, they have the traits to succeed. Under these circumstances, PTSD sufferers will often have exaggerated fear assessments and misinterpret events that might not be a threat in circumstances.

It can, therefore, be concluded that self-defence can be helpful to PTSD sufferers in two ways (in some jurisdictions): a complete dismissal of the case, or a mitigation of sentence. There is always the risk that PTSD might not work at all, but as observed in Sepi's case, PTSD can mitigate sentences for war veterans with PTSD. Essentially, the PTSD sufferer will not have to satisfy the court that he is suffering from a mental defect and that the mental defect is linked to the behaviour giving rise to the criminal offence.

The PTSD sufferer will merely have to argue that he was labouring under a genuine belief that there was an imminent threat of harm to the defendant or someone else. This belief can be substantiated by triggers that induce PTSD symptoms which impact the defendant's ability to adequately assess threats. Regardless, what is important is the defendant's belief and not what a reasonable person may would believe in the circumstances. All that is important is whether the defendant with PTSD genuinely perceived a threat, and whether it was reasonable for him to respond as he did. In other words, self-defence helps PTSD sufferers to get around the strenuous requirements associated with diseased and defected minds in the other defences such as insanity, automatism, and diminished responsibility. It thus perhaps offers an effective route for the state to put into practice its commitment to the special status of war veterans with PTSD.

Chapter Eight: Diminished Responsibility

8.1. Introduction

Diminished responsibility as a defence in criminal law is based on the idea that an individual who is incapable of rational judgment or reasoning is not criminally responsible.⁸⁸⁸ It is an important to remember that diminished responsibility is not a complete defence, but rather a partial defence that acts as a mitigating factor in the distribution of criminal responsibility. The defendant who demonstrates diminished responsibility is essentially stating that he committed the crime in question, but due to some degree of mental incapacity the defendant is not wholly responsible. In common law, in many states in the US (diminished capacity), and in England (diminished responsibility), diminished will usually only mitigate a charge of murder which can be reduced to a less culpable homicide.⁸⁸⁹ In some states in the US, however, diminished capacity will be permitted to challenge the element of any crime, and can therefore result in a complete acquittal or a partial defence.⁸⁹⁰

In England, diminished responsibility, like absolute loss of control, permits murder to be reduced to manslaughter in circumstances where the defendant may appear to have the necessary intention, but can escape the insanity label.⁸⁹¹ Defences based on an impaired or abnormal mind usually state that the elements were present that at the time of the offence, at which time, the defendant did not understand his behaviour, nor was he able to take control of

⁸⁸⁸ Stephen J. Morse, 'Diminished Rationality, Diminished Responsibility' (2003) 1 *Ohio State Journal of Criminal Law* 289.

⁸⁸⁹ Carl-Friedrich Stuckenberg, 'Comparing Legal Approaches: Mental Disorders as Grounds for Excluding Criminal Responsibility' (2016) 4 *Bergen Journal of Criminal Law and Criminal Justice* 48, 63.

⁸⁹⁰ Morse, 'Criminal Law: Undiminished Confusion in Diminished Capacity' (n379) 1.

⁸⁹¹ Oliver Quick and Celia Wells, 'Partial Reform of Partial Defences: Developments in England and Wales' (2012) 45 *Australian & New Zealand Journal of Criminology* 337, 338-339.

his behaviour.⁸⁹² The links between PTSD and violence, and factors related to PTSD that mediate this link, have drawn significantly more attention over time.⁸⁹³

This chapter is connected with whether diminished responsibility can offer a partial defence for war veterans with PTSD who commit fatal violence. In other words, this chapter explores whether diminished responsibility can be used as a valid defence for criminal behaviour where a war veteran defendant was suffering from PTSD.

8.2. Controversies over Diminished Responsibility Defence

In England, diminished responsibility as a partial defence is consistent with the assumption that it is impractical and unfair to impose full criminal responsibility for murder on an individual who is with diminished “powers of self-control or self-restraint.”⁸⁹⁴ This way of thinking comes from the choice theory. According to the choice theory, when an individual makes the decision to take a certain course of action, and has the ability and a reasonable opportunity to take another course of action, that person is a “moral agent.”⁸⁹⁵ In such a situation, an individual is able to make the moral choice, but instead chooses to make the immoral choice. Such an individual, being of free choice capabilities, can be held criminally responsible.

The most popular choice theory is capacity theory which was promoted by Hart. Capacity theory basically sets the stage for diminished responsibility because it states that when an individual has free choice, the individual is criminally culpable.⁸⁹⁶ Therefore, according to capacity theory, an individual can claim diminished responsibility if he does not have the capability to make a choice, nor does the defendant have a fair opportunity to choose

⁸⁹² Glenn Saxe, ‘Dissociation and Criminal Responsibility: A Developmental Perspective’ (2001) 10 Southern California Interdisciplinary Law Journal 243, 251.

⁸⁹³ Friel, White and Hull (n2) 64.

⁸⁹⁴ Horder, *Ashworth’s Principles of Criminal Law* (8th edn, Oxford University Press 2016) (n532) 71.

⁸⁹⁵ Helen Howard, *Diminished Responsibility, Culpability and Moral Agency: the Importance of Distinguishing the Terms* (Cambridge Scholars Publishing 2019) 3
<<https://tees.openrepository.com/tees/bitstream/10149/621165/2/621165.pdf>> accessed 10 March 2019.

⁸⁹⁶ *ibid.*

a healthier cause of action. Therefore, under capacity theory and choice theory in general, where an individual lacks the ability to exercise free choice, such an individual should not be criminally responsible.⁸⁹⁷

According to choice theory, an individual may make the decision to commit murder. However, in this case, this individual suffers from diminished mentality because this individual does not have the presence of mind, nor the wherewithal to consider other better options, nor is he able to rationalise restraint. In such a case, this individual lacks the capacity, opportunity, and the freedom to choose between the moral and immoral courses of action. Therefore, diminished responsibility is a viable option.

Character theory of criminal responsibility draws attention to the link between criminal responsibility and the moral norms of society, as well as among cultures.⁸⁹⁸ The purpose of criminal law is to take action against those who stray too far away from normative morals and values. The criminal law's action is an expression of society's disenchantment with those who stray too far away from normative values and morals.⁸⁹⁹

Character theory therefore conveys the message that when an individual is convicted of criminal acts, punishment for those acts is an expression, by society, of its indictment of the individual's moral character. In other words, it is only punishable when the criminal act is a reflection of the moral flaws in the character of the wrongdoer.⁹⁰⁰ In other words, character theory does not judge a person solely by his acts. Instead, character theory judges the person behind those acts.⁹⁰¹

⁸⁹⁷ *ibid.*

⁸⁹⁸ George Mousourakis, 'Character, Choice and Criminal Responsibility' (1998) 39 *Les Cahiers de Droit* 51, 53.

⁸⁹⁹ *ibid* 54.

⁹⁰⁰ *ibid.*

⁹⁰¹ *ibid.*

Character theory would ultimately expect that the actor is acting voluntarily when carrying out a criminal act.⁹⁰² If an individual is suffering from an abnormality of mental functioning, then such an individual is not acting voluntarily, and neither is the individual's character flawed to the extent that any mental shortcomings are a reflection of immoral character. Rather, mental shortcomings explain why the individual is not morally flawed.

The controversy arising out of the application of character theory is the fact that murder is the most serious criminal act. When a defendant claims diminished responsibility, they can have their murder charges replaced by a voluntary manslaughter charge which recognises that the defendant did have the necessary intention for a murder charge.⁹⁰³ Murder is then reduced based on a character flaw that prevents sound and rational judgment. Character theory argues that this is the correct cause of action because the law ought to look at the character of the individual rather than the act. Society would beg to differ if the defendant has the necessary *mens rea*. This is one of the problems that exists with the defence of provocation. This was demonstrated in the case of *R v Ahluwalia*, where it was ruled that the character traits of the individual were necessary for determining how certain words and deeds affected her reactions.⁹⁰⁴

Between choice/capacity theory and character theory, diminished responsibility can be rationalised and explained as a reasonable and rational defence to murder. Choice/capacity theory draws attention to the fact that actions must be guided by free choice, and where an individual is unable to rationalise and make choices, they can claim diminished responsibility in response to criminal behaviour.

Character theory focuses attention on the character and traits of the individual actor. The main issue is whether the defendant is acting voluntarily. If the defendant suffers from an

⁹⁰² *ibid* 56.

⁹⁰³ Andrew Cornford, 'Mitigating Murder' (2016) 10 *Criminal Law and Philosophy* 31, 32.

⁹⁰⁴ *R v Ahluwalia* [1992] 4 All ER 889, 890.

abnormality of mental functioning, the defendant is not acting voluntarily. As such, the defendant cannot be judged or punished as if he acted in ways that offended the moral values and norms of society.

The defence of diminished responsibility is intended to fill a gap left by the defence of insanity. The Law Commission felt that the issue of insanity and sanity was not straightforward and that there was a lengthy gap between the two.⁹⁰⁵ The Law Commission pointed out that there were different degrees of the mind between insanity and sanity, and there should also be different corresponding degrees of criminal responsibility. The Homicide Act, and its provision for diminished responsibility, were intended to provide different levels of criminal responsibility.⁹⁰⁶ This is obviously very important for war veterans suffering with PTSD who experience flashbacks and other combat induced trauma.

The stricter definition of diminished responsibility under the Coroners and Justice Act 2009 raises concerns that judges are limited in their ability to exercise discretion in sentencing an individual who should not be labelled a murderer.⁹⁰⁷ Still, the defendant bears the burden of proving diminished responsibility and the prosecution is at liberty to consider a plea bargain, which must be approved by the trial judge in the event that the defendant's lawyer and the prosecution arrive at an amicable solution.⁹⁰⁸

The UK Supreme Court explained the difference between the statutory definition of diminished responsibility under the Homicide Act and the Coroners and Justice Act. Under the Homicide Act, prior to its amendment by the Coroners and Justice Act, the jury was required to apply a "global" interpretation of mental capacity.⁹⁰⁹ Under the amendment, proffered by the Coroners and Justice Act, the jury now evaluates three elements: the

⁹⁰⁵ J. Higgins, 'The Origins of the Homicide Act 1957' (1986) 12 *Journal of Medical Ethics* 8, 11.

⁹⁰⁶ *ibid* 10.

⁹⁰⁷ Rudi Forston, 'The Modern Partial Defence of Diminished Responsibility' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) 27.

⁹⁰⁸ *ibid*.

⁹⁰⁹ *R v Golds* [2016] UKSC 61, para 7.

defendant’s understanding of the nature of crime; the ability to “form rational judgment,” and the ability to “exercise self-control.”⁹¹⁰ The three elements can be discharged on a “balance of probabilities.”⁹¹¹

8.3. Diminished Responsibility as a Defence

The revised section 2 of the Homicide Act 1957 refers to diminished responsibility as a condition in which the defendant is suffering from an abnormal mental functioning which is linked to a medically recognised condition, and substantially impairs the defendant’s rational judgment capabilities and the ability to understand the nature of his behaviour, as well as the ability to control himself.⁹¹² The condition must explain the defendant’s behaviour or omission in carrying out homicide or participating in a homicide.⁹¹³ Therefore, the key elements of diminished responsibility are an impaired ability to understand the nature of one’s conduct, or to form a rational judgment, or to exercise self-control – all due to a medically recognised mental condition.

The elements of diminished responsibility have narrowed previous law, and medical experts have now been brought in to have an impact on the success of the defence of diminished responsibility.⁹¹⁴ To this end, the defence of diminished responsibility recognises that an individual may not be so hampered by a mental illness that they are able to escape liability altogether.

Diminished responsibility, as a defence to murder, indirectly confers upon the judge a wide discretion as to punishment. This is because diminished responsibility will function to reduce a charge of murder to manslaughter. When a defendant is convicted of murder, there

⁹¹⁰ *ibid*, para 50.

⁹¹¹ Nicola Wake, ‘Recognising Acute Intoxication as Diminished Responsibility? A Comparative Analysis?’ (2012) *Journal of Criminal Law* 1, 2.

⁹¹² De Than and Heaton, *Criminal law* (3rd edn, Oxford University Press 2011) (n691) 194.

⁹¹³ *ibid*.

⁹¹⁴ David Ormerod, John Cyril Smith and Brian Hogan, *Smith and Hogan’s Criminal Law* (13th edn, Oxford University Press 2011) 529.

It is important to note that abnormality of the mind will not typically apply to an individual who commits a crime after voluntarily becoming intoxicated.⁹²⁰ However, if the defendant has suffered from a mental abnormality that was further complicated by the consumption of alcohol, the defence of diminished responsibility will be available to him.⁹²¹ However, in *R v Tandy*, the court ruled that where an individual is so addicted to alcohol or drugs that he suffers with significant cravings, the consumption of those substances cannot be categorised as voluntary (although it did not find that this applied to Tandy).⁹²² In such a case, the defendant would be able to avail himself of the diminished responsibility defence on the grounds of abnormality of mental functioning (the defendant can also offer intoxication defence).

Essentially, abnormality of mental functioning is not established by assessing the effects of alcohol mentally, but rather by how alcohol interacts with, or impacts, a pre-existing abnormality of the mind.⁹²³ Ultimately, the defendant must suffer from some abnormality of mental functioning, which must be a medically recognised condition, and this requirement basically makes it more difficult to apply the defence of diminished responsibility broadly.⁹²⁴

8.3.2. Recognised Medical Condition

It must be remembered that the recognised medical condition requirement is only one element of the defence of diminished responsibility.⁹²⁵ However, legal and medical terms always tend to have an uneasy co-existence.⁹²⁶ For instance, a malfunctioning mind might be very easily identified in a court of law by a tribunal of fact. However, when attempting to

⁹²⁰ Dine, Gobert and Wilson (n515) 209.

⁹²¹ *R v Dietschmann* [2003] UKHL 10, Para 41.

⁹²² *R v Tandy* [1987] EWCA Crim 5.

⁹²³ Michael Molan, *Cases & Materials on Criminal Law* (3rd edn, Cavendish Publishing 2005) 155.

⁹²⁴ Louise Kennefick, ‘Introduction a New Diminished Responsibility Defence for England and Wales’ (2011) 74 *Modern Law Review* 757-758.

⁹²⁵ Ashworth and Horder (n348) 272.

⁹²⁶ *ibid.*

couple that finding with a medically recognised condition, the court will encounter problems. Medically recognised conditions that give rise to a malfunctioning mind might qualify as insanity, therefore, the gap filling role of diminished responsibility may suffer from various shortfalls. With the medically recognised condition requirement, the defendant will ultimately have to produce a medical expert to testify that he has suffered from a recognised medical condition.⁹²⁷

The difference between medical and legal terms is demonstrated by the fact that the DSM includes diagnostic terms such as “unhappiness,” “irritability,” “anger,” and “paedophilia.”⁹²⁸ None of these recognised medical conditions will amount to a satisfactory element for establishing diminished responsibility on the grounds of a mental malfunctioning in a court of law.⁹²⁹ Still, the Crown Court substituted a murder conviction for manslaughter in the case of a woman who produced evidence of pre-menstrual problems and post-natal depression as influential factors in her criminal conduct.⁹³⁰

Voluntary intoxication can be accepted by the courts as a recognised medical condition. At the same time, not every medically recognised condition will satisfy the diminished responsibility defence. Still, it is up to the judge as to whether to put forward the issue of voluntary intoxication in relation to diminished responsibility to the jury.⁹³¹ The flexibility and broadness of this element leaves it bereft of certainty and predictability.

At the end of the day, it would appear that any medically recognised condition may be proffered in support of a defence of diminished responsibility. However, it is the defendant’s responsibility to satisfy the court that his medical condition is linked to an abnormality of

⁹²⁷ Loveless, *Complete Criminal Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2016) (n797) 263.

⁹²⁸ Ashworth and Horder (n348) 272.

⁹²⁹ *ibid.*

⁹³⁰ *R v Reynolds* [1988] Crim LR 679.

⁹³¹ Ashworth and Horder (n348) 272.

mental functioning that has resulted in the criminal act. The prosecution must then prove otherwise.⁹³²

8.3.3. Substantially Impaired

As previously discussed, the defendant seeking to prove diminished responsibility must show that the medically recognised condition is linked to a mental abnormality that substantially impairs rational judgment, as well as the ability to exercise self-control, and the ability to understand the nature of their behaviour. Chambers (1983) demonstrates the sentencing options for the court where there is substantial impairment (the medical evidence must relate to a condition that must be treated, and is covered by the Mental Health Act (MHA)). The judge can either make an order for hospitalisation with no fixed time, or the court may make an order for a fixed period of incarceration if the defendant is found to be a danger to society.⁹³³ In Chambers, the defendant's responsibility was reduced, evidenced by an 8 year sentence.⁹³⁴

Substantial impairment still refers to less than total, but more than trivial, as established under the case of Lloyd (1967).⁹³⁵ In fact, the Court of Appeal ruled in Ramchurn (2010) that the word substantially, in the context of diminished responsibility, will mean not insignificant, or go beyond “extinguished,” and will not mean more than that which is “required.”⁹³⁶ Essentially, the individual must have a substantially impaired ability (as

⁹³² *ibid.*

⁹³³ Andrew Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge University Press 2010) 120-121.

⁹³⁴ E. Griew, ‘Reducing Murder to Manslaughter: Whose Job?’ (1986) 12 *Journal of Medical Ethics* 18, 21.

⁹³⁵ Loveless, Allen and Derry (n534) 262-263.

⁹³⁶ John Stanton-Ife, ‘Total Incapacity’ in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing 2015) 146.

opposed to a trivially impaired ability) to “understand the nature of his or her conduct,” in order to “form a rational judgment,” or to “control him or herself.”⁹³⁷

In considering these three aspects of being substantially impaired, it was determined that the defendant’s reliance on the defence of diminished responsibility will depend on the level of impairment advanced.⁹³⁸ The issue is a question of fact for the jury to consider.⁹³⁹ Therefore, whether or not a defendant can prove a substantial impairment in terms of forming a rational judgment, understanding the nature of his behaviour or controlling himself is not specifically defined. Ultimately, it is up to a jury to determine the veracity of the defendant’s claim that he suffered from substantial impairment.

Although the success of a diminished responsibility defence will largely depend on medical evidence, it is difficult to sustain. This is because experts may be able to show that the defendant did indeed suffer from some malfunctioning mentality, but it is much more difficult for experts to show that the defendant had a substantial impairment to his ability to assume responsibility.⁹⁴⁰ This is because substantial impairment is a legal term, and is not a medically recognised condition.⁹⁴¹

The inability to understand the nature of one’s conduct is not much different from the first part of the insanity test. One example of this element of being substantially impaired is the 10-year-old who plays violent video games and has no understanding that if he killed a human being, then they would not be able to come back to life, as they do in his video games.⁹⁴² The problem with this example, however, is that the 10-year-old may actually have this substantial impairment, due to his immaturity. At this stage of his development, he

⁹³⁷ Richard Card and Jill Molloy, *Card, Cross & Jones: Criminal Law* (22nd edn, Oxford University Press 2016) 235-236.

⁹³⁸ Martin and Storey (n917) 311.

⁹³⁹ *ibid.*

⁹⁴⁰ Herring, *Criminal Law: Text, Cases and Materials* (7th edn, Oxford University Press 2016) (n789) 312.

⁹⁴¹ *ibid.*

⁹⁴² Ormerod and Laird, *Smith, Hogan, and Ormerod's Text, Cases, and Materials on Criminal Law* (12th edn, Oxford University Press 2017) (n552) 199-200.

cannot understand the nature of his act, but it does not have to be a medically recognised condition within the meaning of the MHA.

As Ormerod and Laird explain, when a judge is faced with explaining the nature of the defendant's conduct, the task can be very difficult.⁹⁴³ This is understandable, because as the example above has demonstrated, the inability to understand the nature of one's act can be broadly applied. However, there is a problem when one attempts to link it to a medically recognised condition, which may not always be possible. At the same time, the defendant may legitimately suffer from a mental malfunctioning.

The second element of being substantially impaired is the inability to form a rational judgment, which is an appropriate way of explaining this element of the defence of diminished responsibility. This element of the defence should be described as the inability 'to rationally form a judgment which must be impaired.'⁹⁴⁴ For instance, a woman with a mental disability known as "learned helplessness" comes to the conclusion that the only way to save the world from her husband who abused her is to set him on fire.⁹⁴⁵ The judgment here is impaired, and is based on a medically recognised condition.

The third aspect of the inability to exercise control is very broad and can open the diminished defence to a wide range of circumstances and conditions.⁹⁴⁶ Morse argues that the inability to form rational judgment would automatically indicate that the defendant is unable to exercise control. Having both requirements must mean that only if the defendant cannot satisfy the court that he is irrational, can the defendant attempt to illustrate that he lacked control over the situation.⁹⁴⁷ Essentially, the defendant relying on the loss of self-control must be able to convince the court that he lacked "mental responsibility."⁹⁴⁸ This is because the loss of

⁹⁴³ *ibid* 200.

⁹⁴⁴ *ibid*.

⁹⁴⁵ *ibid*.

⁹⁴⁶ *ibid*.

⁹⁴⁷ Morse, 'Diminished Rationality, Diminished Responsibility' (n888) 295.

⁹⁴⁸ Clarkson (n299) 108.

control, like all aspects of the substantially impaired, are not always recognisable medical conditions.

8.3.4. Explanation for Conduct

The explanation for the conduct forming the basis of the criminal offence must be linked to the recognised medical condition (causal link between criminal conduct and defendant's condition). As previously established, the recognised medical condition can be listed, or not, as long as it is recognised by law. The only requirement following this is that this condition is capable of explaining the behaviour of the defendant, specifically, the defendant's abnormality of mental functioning must be able to explain his criminal behaviour.⁹⁴⁹ It is insufficient for the defendant to claim that he suffered from an abnormality of mental functioning, but instead, the defendant must be able to link the killing to the abnormality of mental functioning.⁹⁵⁰

In Dowds (2012), the Court of Appeal ruled that the condition can be temporary, as long as it explains the behaviour of the defendant.⁹⁵¹ Ultimately, the main purpose of establishing a recognised medical condition to explain the behaviour of the defendant is to narrow the opportunities for defendants proposing that any trivial condition can explain their behaviour and warrant a lesser offence or a partial defence on the basis of diminished responsibility.⁹⁵²

The Court of Appeals in Dowds also ruled that the recognised medical condition need not necessarily be included in a diagnostic list of medically recognised conditions.⁹⁵³ It is a question of law as to whether a condition is a recognised medical condition.⁹⁵⁴ It would certainly not be a case of diminished responsibility if the defendant were to argue that they

⁹⁴⁹ Martin and Storey (n917) 314.

⁹⁵⁰ Allen, *Criminal Law* (n863) 356.

⁹⁵¹ Ormerod and Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) (n314) 609.

⁹⁵² *ibid.*

⁹⁵³ *ibid.* 610.

⁹⁵⁴ *ibid.*

committed murder because they had defective reasoning due to irritability. This would not be a recognised medical condition capable of explaining why and how the defendant was irrational and mentally malfunctioning. In fact, the condition would not be a sufficient explanation for murder that could reasonably and legitimately amount to diminished responsibility.

The medical condition must be capable of explaining the necessary elements of the offence. This means that the diminished responsibility defence will only be available if the elements are connected. The defendant will not be successful if he simply shows that he suffered from abnormal mental functioning, or a recognised medical condition. The defendant must be able to show that the combined effect of these elements explains the killing.⁹⁵⁵ If the recognised medical condition which results in the abnormality of mental functioning cannot explain the behaviour, it will not likely support a defence of diminished responsibility.

8.4. War Veterans, PTSD, and the Diminished Responsibility Defence

In England, the Law Commission has reviewed the offences of murder and manslaughter several times.⁹⁵⁶ The primary problem with respect to murder is that it carries a mandatory sentence, and is often impossible to establish criminal responsibility on the specific intent element, ‘intention to cause death or serious bodily harm.’⁹⁵⁷ This means that some form of variation is necessary. England has sought to introduce and apply partial defences to murder in response to the gaps left by the existing law. One of these partial defences is diminished responsibility.⁹⁵⁸

⁹⁵⁵ Child and Ormerod, *Smith & Hogan’s Essentials of Criminal Law* (Oxford University Press 2015) (n849) 180.

⁹⁵⁶ Quick and Wells, ‘Partial Reform of Partial Defences: Developments in England and Wales’ (n891) 337.

⁹⁵⁷ *ibid.*

⁹⁵⁸ *ibid.*

The origin of diminished responsibility indicates that the defence was necessitated by the mandatory death sentence attached to murder. It is therefore understandable that partial defences were part of the legislator's attempts to reform murder.⁹⁵⁹ Therefore, the partial defence of diminished responsibility was subsequently introduced to allow more flexibility in reducing murder to manslaughter. Thus, in England, diminished responsibility will therefore function to reduce a criminal charge.⁹⁶⁰ However, the only crime that can be the subject of a diminished responsibility defence is murder (recently, in England, there have been other partial defences to reduce a charge of murder; e.g., loss of control, and suicide pacts).

In order to substantiate a defence of diminished responsibility, the defendant must prove the statutory elements contained in section 2 of the Homicide Act 1957, as amended. The statutory elements present are structured around the defendant's killing. The defendant must suffer from an abnormality of mental functioning which must be linked to a recognised medical condition, must substantially impair the defendant's ability to understand the nature of his behaviour, or form a rational judgment or control himself/herself.⁹⁶¹

It is important to recognise that there are really quite different ways in which to reduce the culpability of the defendant in the US and England in the realm of diminished responsibility/capacity. In England, a distinct partial defence reduces the offence from murder to manslaughter as a way of recognising reduced culpability. In various states of the USA, diminished capacity is used to challenge the claim that the defendant has the specific intent required by the crime for which he is charged. For this reason, diminished capacity can be a full defence to any crime with specific intent. For example, to be guilty of theft, one has permanently to have the specific intent to deprive the owner of the objects' use. If someone

⁹⁵⁹ Kennefick (n924) 751.

⁹⁶⁰ Loveless, *Complete Criminal Law: Text, Cases and Materials* (5th edn, Oxford University Press 2016) (n797) 255.

⁹⁶¹ Nicola Monaghan, *Criminal Law: Directions* (5th edn, Oxford University Press 2018) 123.

can show that their diminished capacity means they do not really understand the idea of permanent deprivation, then they may not have the intent needed to prove theft.

Diminished responsibility is undoubtedly relevant as a defence for war veterans with PTSD. In an appropriate case, the war veteran with PTSD has an opportunity to have his PTSD condition diagnosed and treated, rather than enduring a mandatory sentence for murder. The war veteran with PTSD may also receive treatment for their medically recognised condition. As Morse points out, an individual convicted of manslaughter under the provisions of section 2 of the Homicide Act 1957 can be sentenced to prison or hospitalisation.⁹⁶² Consequently, a defendant who is a war veteran with PTSD can make an appropriate plea in mitigation of sentence seeking hospitalisation, and therefore treatment, for his condition. In order to understand how the partial defence of diminished responsibility may be successfully argued by the war veterans with PTSD, this part of the chapter will analyse each of the elements of the defence, as well as the likelihood of acceptance and rejection.

8.4.1. Abnormality of Mental Functioning

Morse points out just how complicated distinguishing diverse forms of mental instability from insanity can be. According to Morse, the court is bound to look at these different terms describing the behaviour of the individual, and accept that the legal question is related to behaviour. The question for consideration is whether the individual at stake can satisfy ‘the law’s rationality standard in the context in question?’⁹⁶³ Abnormality of mental functioning performs the task of distinguishing irrational behaviour from insanity. Ultimately, the law seeks to grade the extent to which the defendant’s psychological state of mind should reduce his culpability or criminal responsibility (it is important to recognise that insanity

⁹⁶² Morse, ‘Criminal Law: Undiminished Confusion in Diminished Capacity’ (n379) 22.

⁹⁶³ Morse, ‘Mental Disorder and Criminal Law’ (n263) 894.

requires full impairment, but diminished responsibility/capacity requires substantial impairment).⁹⁶⁴

Attempts by the court to define what amounts to abnormality of mental functioning have demonstrated just how difficult the element of defence of diminished responsibility is. This difficulty stems from the fact that abnormalities of the mind are not contemplated by disease of the mind or mental defect, which establishes the standard for insanity.⁹⁶⁵ The complexity of the element of abnormality of mental functioning is evidenced by the ruling in *R v Golds*. In that case, the court indicated that diminished responsibility was available for those who suffered from conditions other than pure mental illnesses. Other conditions, such as PTSD and learned helplessness, can fall within the realm of the diminished responsibility. The defendant must be suffering from something that is quite abnormal. Whatever is wrong with the defendant must have impacted on the way that he behaved.⁹⁶⁶

Thus, it is clear that the abnormality of mental functioning permits flexibility in its interpretation and application. This flexibility renders this essential element of the defence of diminished responsibility open to interpretation, and as a result, can include or exclude mental conditions that might otherwise be expected to be included or excluded. Therefore, identifying and proving abnormality of mental functioning is uncertain and unpredictable. For the time being, however, those suffering from PTSD are most likely to be able to argue that their PTSD is an abnormality of mental functioning.

This can be very helpful for war veterans with PTSD who by virtue of their PTSD symptoms, commit homicide due to an abnormality of mental functioning directly linked to PTSD symptoms. Consider, for example, a war veteran with PTSD having serious flashbacks

⁹⁶⁴ George E. Dix, 'Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like' (1971) 62 *Journal of Criminal Law, Criminology and Police Science* 313, 314.

⁹⁶⁵ Herbert Fingarette, 'The Concept of Mental Disease in Criminal Law Insanity Tests' (1966) 33 *University of Chicago Law Review* 229, 231.

⁹⁶⁶ *R v Golds* (n864), para 25.

of the war experience, and committing homicide under the mistaken belief that he is at war. These kinds of symptoms and reactions may not always be accepted as legal insanity, although PTSD is a recognised medical condition. The flexibility of the meaning of abnormality of mental functioning leaves the door open for PTSD to establish a defence of diminished responsibility.

That fact is that even the medically recognised version of PTSD is consistent with the abnormality of mental functioning limbs of diminished responsibility. PTSD is medically recognised as a cognition difficulty. The PTSD sufferer has difficulty processing information which is directed toward threat assessments, in which non-threatening events are threatening, and as a result the attention span of the PTSD sufferer is impaired leaving other thinking abilities impaired.⁹⁶⁷

The flashback experience of the veteran with PTSD was played out in *Commonwealth v Mulcahy*. In this case, a court in Philadelphia accepted diminished capacity as a partial defence for a Vietnam veteran with PTSD who had been charged with murder. In his case, the defendant thought that he was re-experiencing an episode of war when he murdered a barmaid. This allowed Mulcahy, who was charged with murder, to be convicted of a lesser offence.⁹⁶⁸ In other words, Mulcahy was not totally excused for his crime. In another jurisdiction, such as Philadelphia, the partial excuse under diminished capacity is established if the defendant is able to show that, due to a mental defect, he was unable to form the necessary *mens rea*. Thus, war veterans with PTSD can escape partial responsibility due to this mental defect.

The case of *Commonwealth v Mulcahy* demonstrates that there is a clear link between PTSD symptoms and the medically recognised understanding of this mental condition. All

⁹⁶⁷ Jasmeet P. Hayes, Michael B. VanElzakker and Lisa M. Shin, 'Emotion and Cognition Interactions in PTSD: A Review of Neurocognitive and Neuroimaging Studies' (2012) 6 *Frontiers in Integrative Neuroscience* 1.

⁹⁶⁸ *Commonwealth v Mulcahy* [1978] Phila Ct C P Crim Trial Div No 460-464.

medically recognised manifestations of PTSD clearly establish that its symptoms result in abnormality of mental functioning. This aspect of PTSD is unambiguously accepted by the medical community, especially in terms of its impact on cognition.

The consistency of the medically recognised version of PTSD, and the requirements set forth by section 2 of the Homicide Act 1957, makes diminished responsibility a viable option for war veterans with PTSD who commit homicide. For example, section 2 of the 1957 Act, provides that the defendant could successfully launch diminished responsibility if he could prove the abnormality of the mental functioning was so significant that he could not form the necessary *mens rea*. These two interconnected elements have been found to be consistent with a number of conditions, including many mental maladies such as alcoholism, volitional insanity, and psychopathy.⁹⁶⁹ Returning war veterans are therefore expected to be good candidates for the diminished responsibility defence, since substance abuse has been found to be secondary or comorbid with PTSD, both of which are prevalent among war veterans.⁹⁷⁰

In addition, the impaired cognition sets PTSD sufferers up to successfully utilise the mental functioning aspect of diminished responsibility. Obviously, when a war veteran with PTSD is experiencing a flashback, the most unthreatening events appear to be threatening, because the PTSD sufferer is reliving the combat experience. When this happens there is little doubt that PTSD causes an abnormality of mental functioning. It also helps that PTSD is a recognised medical condition.

In fact, in the Washington, USA case of *State v Warden*, the usability of abnormality of mental functioning was a successful part of the defence by a PTSD sufferer claiming diminished capacity. In this case, a woman was charged with the murder of her former employer. In her defence to the murder charge, the female claimed diminished capacity on

⁹⁶⁹ Kennefick (n924) 755.

⁹⁷⁰ Meisler (n45) 1.

the grounds of PTSD which was due to abuse by her son. The defendant called expert testimony on her state of mind and how she lacked capacity at the requisite time, due to PTSD.

However, when the presiding judge delivered the jury instructions, he only instructed the jury on lesser degrees of murder, and failed to offer instructions on manslaughter. When the case came before the Washington Supreme Court, the court ruled that the presiding judge erred because there was sufficient expert testimony on the mental defect in support of a defence of diminished capacity to put forward an option of manslaughter to the jury.⁹⁷¹ Furthermore, in *State v Bottrell*, the Washington Court of Appeals confirmed that PTSD can defeat the *mens rea* of defendant and lead to acquittal.⁹⁷² Therefore, in the State of Washington, PTSD can form the basis of a partial defence of diminished capacity to murder, just as it is used in England.

8.4.2. Recognised Medical Condition

The introduction of a recognised medical condition as an element of diminished responsibility by the amendments to the Homicide Act 1957, via the Coroners and Justice Act 2009, will no doubt focus the court's attention on medical or expert evidence. In this regard, the recognised medical condition will undoubtedly require that the defendant present expert evidence establishing that he suffers from a recognised medical condition.⁹⁷³ In such a case, a person who commits homicide, such as a mercy killing, may be barred from establishing diminished responsibility on the basis of a recognised medical condition.⁹⁷⁴

The obvious unanswered question is – what can one expect of the diminished responsibility defence if the mercy killing was compassionate, but the compassion was

⁹⁷¹ *State v Warden* [1997] Wash 947 P 2d 708.

⁹⁷² *State v Bottrell* [2000] Wash Ct App No 23757-1-II.

⁹⁷³ Quick and Wells, 'Partial Reform of Partial Defences: Developments in England and Wales' (n891) 347.

⁹⁷⁴ *ibid.*

aroused by an abnormality of mental functioning due to a recognised medical condition? Suppose that the defendant was a war veteran who was traumatised by his mercy killing of another soldier when the other was so seriously injured in a combat situation, where no help was possible. When triggered in the post-combat stage, the war veteran has a flashback in which he misinterprets the fate of another, and erroneously and irrationally carries out what he thinks is a mercy killing. This will likely be a situation in which a recognised medical condition will be used to establish that the war veteran with PTSD irrationally came to the conclusion that he was carrying out a mercy killing.

It is important to note that the Coroners and Justice Act 2009 does not apply to mental competency. Rather, the 2009 Act applies to individuals with a mental defect that basically renders the individual incapable of consciously and deliberately committing a crime. Therefore, a child's undeveloped mind is not applicable. Rather, the individual must be suffering from some mental defect that impedes his ability to function normally. This can be clearly demonstrated in the case of the war veteran with PTSD who misinterprets information related to triggering events.

While this definition/recognised medical condition complicates the defence of diminished responsibility, it does provide a means for veterans with PTSD to avoid full responsibility for a crime. The operative words in the Act of 2009 are that the mental defect must be medically recognised. Since PTSD is an official medically recognised mental disorder, war veterans would be able to amount a defence of diminished responsibility if they are able to link PTSD to the crime for which they are charged.

Still, section 52 of the Coroners and Justice Act 2009 alters the previous requirements. The essential elements of diminished responsibility under section 52 require that the defendant is suffering from an abnormality in the functioning of his mentality due to

a medically recognised condition.⁹⁷⁵ PTSD is still capable of supporting a defence of diminished responsibility because, since 1980, it has been listed as a medically recognised condition in the DSM by the APA.⁹⁷⁶

Former soldier David Bradley of England was charged with four counts of murder in the shooting death of four of his family members. At the start of his trial, Bradley pleaded guilty to manslaughter on the basis of diminished responsibility brought on by PTSD.⁹⁷⁷ There was evidence of Bradley's declining health due to PTSD prior to the killing. He had visited a psychiatrist during the preceding month who prescribed treatment for his symptoms.⁹⁷⁸ Bradley pleaded guilty to manslaughter based on diminished responsibility (and succeeded). His reliance on PTSD was instrumental because it was clear that during the commission of the offences, Bradley suffered from a medically recognised condition that would have been backed up by medical experts treating him.

8.4.3. Substantially Impaired

Substantial impairment comes with three dimensions. The individual seeking to establish that he was not wholly responsible for the murder he is charged with must prove that his substantial impairment impacted on his ability to understand the nature of his behaviour, in order to make rational judgment and control the self.⁹⁷⁹ The defendant seeking to have a murder conviction replaced by manslaughter in both the US and England will therefore be faced with a mammoth task to confront. In both jurisdictions, the defendant will not be able to simply claim that he was substantially impaired due to a mental abnormality resulting from a recognised medical condition.

⁹⁷⁵ Coroners and Justice Act 2009, s 52 (1) (1).

⁹⁷⁶ *Pai, Suris and North* (n94) 1.

⁹⁷⁷ 'Former Soldier Admits Family Shootings' (The Guardian, 29 January 2007) <<https://www.theguardian.com/uk/2007/jan/29/ukguns.military>> accessed 1 December 2017.

⁹⁷⁸ *ibid.*

⁹⁷⁹ Rajan Nathan and Simon Medland, 'Psychiatric Expert Evidence and the New Partial Defences of Diminished Responsibility and Loss of Control' (2016) 22 *British Journal of Psychiatric Advances* 277-278.

In England, the defendant is tasked with proving that his substantial impairment damaged his ability in the three ways described in the preceding paragraph. In fact, a learning disability which affects an adult's cognition, so that he thinks like a child, can be sufficient to secure a murder conviction on the basis of a substantial impairment to understand the nature of one's behaviour.⁹⁸⁰ In California, a defendant can be acquitted of first degree murder which requires deliberation or premeditation if he suffered from impairment due to mental inabilities.⁹⁸¹ However, the diminished capacity defence was abolished under section 25 of California Penal Code.⁹⁸² This defence was replaced by *mens rea* or actuality defence. Still, the defendant with mental inabilities could give evidence under section 28 of the California Penal Code, but to negate *mens rea*, not capacity.⁹⁸³

The inability to form a rational judgment can also be established for an individual with PTSD. For example, an individual who suffered from PTSD due to spousal abuse may successfully claim that due to her substantial impairment she came to the conclusion that there was only one way to stop the abuse, and that was, for example, through burning the abuser. According to Morse's critique of US law, it can be argued that the defendant only needs to show that due to impairment she experienced a loss of self-control, and irrationality is not altogether necessary.⁹⁸⁴ The same can be argued in favour of PTSD, in which the defendant is taken over by the dissociative state when experiencing a flashback, which would cause a loss of self-control because it is not voluntary.⁹⁸⁵

Diminished capacity, like diminished responsibility, is not a question of insanity, but rather a question of a temporary loss of consciousness due to a more serious mental

⁹⁸⁰ Richard Card, *Card, Cross & Jones: Criminal Law* (21st edn, Oxford University Press 2014) 252.

⁹⁸¹ Robert Weinstock, Gregory B. Leong and J. Arturo Silva, 'California's Diminished Capacity Defense: Evolution and Transformation' (1996) 24 *Bulletin of the American Academy of Psychiatry and Law* 347, 355.

⁹⁸² California Penal Code, s 25 (a).

⁹⁸³ *ibid*, s 28 (a).

⁹⁸⁴ Morse, 'Diminished Rationality, Diminished Responsibility' (n888) 295.

⁹⁸⁵ Jones and others (n74) 158.

condition. A defendant suffering from PTSD may find himself losing consciousness and control of his behaviour when suffering from triggers or flashbacks or substance abuse or when he simply goes into a dissociative state, which is common in PTSD sufferers.⁹⁸⁶

Van der Kolk, McFarlane, and Weisaeth's claim that there are three specific symptoms of PTSD that give rise to diminished responsibility requires further examination. The three symptoms stated by Van der Kolk, et al., are trauma addiction, which is manifested by sensation seeking behaviour; self-punishment, due to survivor's guilt or guilt over the trauma itself; and self-numbing, through substance abuse (these symptoms will be discussed in detail in the following section).⁹⁸⁷

None of these symptoms require nor indicate that the offender is unable to tell the difference between right and wrong. All that is required is that he is unable to fully acknowledge or appreciate the nature of his actions, and is unable to control his behaviour. Obviously, the legal test for diminished responsibility is lighter than the test for insanity, and therefore, what might appear to be inconsequential PTSD symptoms are in fact, capable of supporting a defence of diminished responsibility.

Trauma addiction leads to sensation seeking which may on the surface seem inconsequential. However, according to James, Strom, and Leskela, sensation seeking due to PTSD among military personnel is linked to risky behaviour.⁹⁸⁸ Thus, one might argue that PTSD is an impairment of the mind which leads to irrational decisions, such as sensation seeking due to trauma addiction. Blinded by trauma addiction and the propensity for sensation seeking, the risky behaviour that follows is a consequence of an inability to make rational decisions and control one's behaviour.

⁹⁸⁶ Matthew Tull, 'Coping with Flashbacks and Dissociation in PTSD' (Very Well, 15 October 2017) <<https://www.verywell.com/coping-with-flashbacks-2797574>> accessed 19 November 2017.

⁹⁸⁷ Van der Kolk, McFarlane and Weisaeth (n257) 385.

⁹⁸⁸ Lisa M. James, Thad Q. Strom and Jennie Leskela, 'Risk-Taking Behaviors and Impulsivity among Veterans with and without PTSD and Mild TBI' (2014) 179 *Military Medicine* 357.

Self-punishment may only really serve to support a defence of diminished responsibility in the event that the defendant harms others while attempting to cause self-harm. In such a case, the requisite *mens rea* is difficult to substantiate since the defendant may have harmed others, but his intention was to cause self-harm. For instance, a defendant may decide to drive his truck over a cliff, and in doing so, inadvertently run over a pedestrian in his path. Thus, self-punishment may amount to diminished responsibility because the defendant clearly only intended to cause self-harm. It is also clear that the defendant was unaware of the nature of his actions since he failed to take into account the possibility that he may harm others, and was therefore unaware of the nature of his crime.

Ultimately, one would expect that diminished responsibility requires some level of consciousness on the part of the offender. After all, diminished responsibility suggests that as a partial defence, the offender is somewhat capable of understanding the nature of the crime. This might occur among war veterans with trauma or combat addiction who seek to relive the war experience. They might very well be aware of the nature of their crimes, but are entitled to a diminished responsibility defence since the sensation seeking proclivity is connected to PTSD symptoms, a trauma contracted during exposure to war.

8.4.4. Explanation for Conduct

The amended section 2 of the Homicide Act 1957 states that when the individual claiming diminished responsibility alleges that he was suffering from an abnormality of mental functioning, that abnormality must be an explanation for the crime, either causatively or contributory. These sorts of reformations are intended to clarify when and how diminished responsibility may be established.⁹⁸⁹ In other words, there must be a direct link between the abnormality of mental functioning and the behaviour.

⁹⁸⁹ Horder, *Ashworth's Principles of Criminal Law* (8th edn, Oxford University Press 2016) (n532) 275.

This is definitely an improvement on the old law where responsibility could have been evaded simply because the defendant was labouring under a mental condition at the time of committing the offence in question. The legislators installed the explanation link as a means of eliminating “random coincidence” defences, where there is no association between the crime and the mental dysfunction.⁹⁹⁰

In other words, it would not be sufficient for a defendant suffering from PTSD to claim diminished responsibility simply because he suffered from PTSD. The condition, although medically recognised, may be under control and in no way connected to the murder in question. In fact, just because a defendant suffers from PTSD does not mean that he always makes irrational decisions and cannot understand the nature of his behaviour or always loses self-control. Similarly, just because an individual suffers from PTSD does not mean that they always suffer from an abnormality of mental function. Therefore, the requirement that one links the mental abnormality to a medically recognised requirement can act as a safeguard against using PTSD and other mental abnormalities as an excuse for criminal behaviour.

Still, Pittman and Sparr caution that even where there is compatibility between PTSD symptoms and diminished responsibility, the defendant still has an uphill battle.⁹⁹¹ This is because it is very difficult to illustrate that there is a connection between the criminal conduct and PTSD.⁹⁹² In the first place, the defendant claiming PTSD and diminished responsibility must establish a connection between the psychiatric symptoms and the traumatic stressor, and secondly, the defendant must establish a connection between the criminal conduct and psychiatric symptoms.⁹⁹³

In the US case of *United States v Cebian*, the court’s ruling indicated that a defendant with PTSD suffering from battered woman’s syndrome could avail herself of the defence of

⁹⁹⁰ Loveless, Allen and Derry (n534) 265.

⁹⁹¹ Pitman and Sparr (n200) 2.

⁹⁹² *ibid.*

⁹⁹³ *ibid.*

diminished capacity on a drug offence where specific intent is negated.⁹⁹⁴ This is a very different use of the explanatory clause in England's diminished responsibility defence, as the defendant may only use diminished responsibility in murder cases. It is indeed difficult to understand how one might be able to prove that a mental dysfunction explains how and why the defendant had resorted to crimes involving illicit drugs, but lacked the requisite specific intent. This is because most of the criminal explanations offered with respect to medically recognised offences are violence oriented.

It is also interesting to see how far the courts in the US will go to allow a defence of diminished capacity in order to offer an explanation for the crime. Linda Cebian claimed diminished capacity on the basis of PTSD in respect of a cocaine offence. The defendant argued that she did not have the capacity to form the specific intent needed for the crime. The defendant went further to argue that her husband was a drug dealer, and she was unable to form an independent decision. An expert was called to testify as to her PTSD. The defendant was convicted, but appealed her conviction. At the appellate court, the defendant did not have her conviction overturned. However, the appellate court did not rule against the admissibility of the expert testimony, and therefore implicitly confirmed that the defendant's defence of diminished capacity was admissible on an illicit drug charge.⁹⁹⁵

In *Gray v Thames Trains and Others*, the defendant's explanation for his crime was also that he suffered from PTSD due to a train wreck that he experienced. Subsequently, he became involved in an altercation with a man, and then left the altercation, went to his girlfriend's house, retrieved a kitchen knife, returned to the location where he had the altercation, and stabbed the man with whom he had been arguing. Based on the evidence of this PTSD, a plea of manslaughter was negotiated and accepted.⁹⁹⁶

⁹⁹⁴ *United States v Cebian* [1985] 11 USCA 774 F 2d 446.

⁹⁹⁵ *ibid.*

⁹⁹⁶ *Gray v Thames Trains and Others* [2009] UKHL 33.

It is very difficult to understand how diminished responsibility can be sustained for an offence that takes time, planning, and thinking in order to carry out. It is not as if the effects of drugs diminished Cebian's capacity during the commission of a crime. Diminished responsibility is not a permanent unstable defect of the mind. The image of flashes of irrationality comes to mind. The individual was usually quite normal, save for triggering events and other out of the ordinary experiences that brought on the symptoms of PTSD.

8.4.5. Rejection and Acceptance of the Diminished Responsibility Defence

Diminished responsibility/capacity provides a defence for individuals suffering from a mental impairment that would not necessarily suffice to support a defence of insanity. For example, an individual may suffer from a mental defect that impairs his judgment, but the defect is not serious enough to completely absolve the individual's criminal intent. When considering murder, diminished responsibility is an entirely acceptable solution. This is because the Law Commission in England had tried to divide responsibility for murder into reasonable structures. The rationale for this attempt is to divide up responsibility so that all offenders are not lumped together as one type of killer. This is especially important when murder requires a mandatory sentence applicable to all convicted of the offence.⁹⁹⁷

In other words, diminished responsibility in England is intended to recognise that there are diverse levels of criminal responsibility in the case of murder. For example, a fully sane individual who commits a crime is responsible for the crime. An individual who is legally insane would be totally absolved of criminal responsibility. Somewhere in between, an individual will have diminished responsibility. Take the example of a child under the age of 10 who commits a serious crime. The child is not insane, but at the same time, the child lacks the mental capacity to form the necessary intention for the commission of the crime. Likewise, the individual who suffers a flashback due to combat-related PTSD, although he

⁹⁹⁷ Jeremy Horder, *Homicide and the Politics of Law Reform* (Oxford University Press 2012) 95.

suffers from a medically recognised condition, he may not be regarded as legally insane. Such an individual should not be convicted on the same level as a legally sane individual who sets out to commit a murder and carries it out completely. Fortunately, diminished responsibility allows for this gap to be filled in the criminal justice system.

The gap-filling intention of diminished responsibility on the basis of structuring liability for murder is observed in England in the case of Aaron Wilkinson. Wilkinson, a former soldier deployed to Afghanistan who returned to England with PTSD, successfully pleaded diminished responsibility.⁹⁹⁸ Wilkinson's case was resolved at the trial of first instance because his plea of diminished responsibility was accepted by a jury who convicted him of manslaughter rather than the original charge of murder.⁹⁹⁹ Wilkinson's defence of diminished responsibility also resulted in an indefinite sentence with an opportunity for parole within five years, provided he was no longer a threat to public safety.¹⁰⁰⁰

While reports on the Wilkinson case do not cover the details of the plea in mitigation, it is more likely than not that his plea took into account each of the elements of the diminished responsibility defence. No doubt Wilkinson's defence centered on the abnormality of the mental functioning which is linked to PTSD (a recognised medical condition) and substantially impaired Wilkinson's ability to understand the nature of his behaviour or to form a rational judgment or to control oneself (with the lack of detail available about Wilkinson's defence it can only be concluded that PTSD was shown to be able to establish the requisite medically recognised condition that is linked to substantial impairment).

⁹⁹⁸ 'Calendar Aaron Wilkinson' (ITV News, 6 July 2012)

<<http://www.itv.com/news/calendar/topic/aaron-wilkinson/>> accessed 30 November 2017.

⁹⁹⁹ Emma Kasprzak, 'Aaron Wilkinson Trial: Stress Defence Accepted' (BBC News, 3 April 2012) <[BBC News. http://www.bbc.com/news/uk-england-leeds-17598391](http://www.bbc.com/news/uk-england-leeds-17598391)> accessed 30 November 2017.

¹⁰⁰⁰ Arj Singh, 'Ex-Soldier Aaron Wilkinson Sentenced for Killing Women' (The Independent, 6 July 2012) <<http://www.independent.co.uk/news/uk/crime/ex-soldier-aaron-wilkinson-sentenced-for-killing-woman-7920263.html>> accessed 30 November 2017.

Savla reports that in England, diminished responsibility is usually helpful for PTSD sufferers claiming battered women’s syndrome.¹⁰⁰¹ In the US, Berger, McNiel and Binder observed that ‘courts have not always found the presentation of PTSD testimony to be relevant, admissible, or compelling,’ especially where expert testimony falls short of demonstrating how PTSD has satisfied the standards for the defence.¹⁰⁰² Where the standards falls short, the defendant has the option to raise the partial defence of diminished capacity or other defences, which are also not always successful.¹⁰⁰³ Therefore, it would appear that where the defendant’s PTSD is not sufficient for establishing insanity, it can also fall when it comes to the defence of diminished responsibility. This means that diminished responsibility is not always a solution or an acceptable defence, even in cases where it might be justifiably used.

In the US, diminished capacity is typically used to counter the prosecution’s claim that the defendant had the requisite *mens rea*.¹⁰⁰⁴ Yet, the US provides for the defence to be used as partial or absolute.¹⁰⁰⁵ In the meantime, the US MPC is very specific about the impact of the mental condition on criminal intent as the basis for substantiating a defence of diminished capacity. For instance, the US MPC has simplified its language to leave no doubt as to the criminal mental element. Phrases such as “conscious object” and “knowledge” serve to clarify the mental element within the Penal Code.¹⁰⁰⁶

In California, diminished capacity was replaced by what is now called “diminished actuality.”¹⁰⁰⁷ Rather than seek to prove that the defendant suffers from a mental infraction, the issue for consideration at trial is whether the defendant has actually formed the necessary intent to commit a crime. The best that a defendant can hope for is a conviction on a lesser

¹⁰⁰¹ Savla (n253) 13.

¹⁰⁰² Berger, McNiel and Binder (n165) 509.

¹⁰⁰³ *ibid*.

¹⁰⁰⁴ Gansel (n18)162.

¹⁰⁰⁵ Morse, ‘Criminal Law: Undiminished Confusion in Diminished Capacity’ (n379) 1.

¹⁰⁰⁶ Robinson and Dubber (n603) 335.

¹⁰⁰⁷ Weinstock, Leong and Silva (n981) 350.

included offence.¹⁰⁰⁸ Therefore, diminished actuality is a partial defence in California. Other states also offer diminished capacity as a partial defence.

As with California, in Washington, diminished capacity can be successful if the defendant is suffering from a mental malady or voluntary intoxication at the time of the offence. Moreover, in Washington, the defendant can either benefit from a conviction of a lesser included offence, or from an outright acquittal.¹⁰⁰⁹

England's statutory provision under the Coroners and Justice Act 2009 is broader, requiring abnormally of mental function that forestalls rational judgment, and so on. The broad-based definition of diminished responsibility, however, creates problems with satisfying each of the pivotal elements while attempting to draw a line between insane and non-insane criminal responsibility.

In England, diminished responsibility is a partial defence which can result in a verdict on a lesser included offence, specifically, a successful defence of diminished responsibility can reduce murder to manslaughter. The defence is only available on a charge of murder, but in other jurisdictions, such as the US, diminished capacity is not restricted to a murder charge and has also acted as a complete defence in the US.

8.4.6. Diminished and Individuals Suffering from PTSD

As mentioned earlier, Van der Kolk, McFarlane and Weisaeth have stated that PTSD is quite compatible with the partial defence of diminished capacity.¹⁰¹⁰ Three specific areas of PTSD may bring on diminished capacity:

- 1- The “addiction to trauma” which is characterised by “sensation seeking.”
- 2- The desire for self-punishment as a means of quelling the “guilt connected with the traumatic event.”

¹⁰⁰⁸ *ibid.*

¹⁰⁰⁹ John Q. LaFond and Kimberly A. Gaddis, ‘Washington’s Diminished Capacity Defense Under Attack’ (1989) 13 *University of Puget Sound Law Review* 1.

¹⁰¹⁰ Van der Kolk, McFarlane and Weisaeth (n257) 385.

3- The abuse of substances as a means of numbing reflection on trauma and the “resultant disinhibited actions.”¹⁰¹¹

The three symptoms above are prevalent among individuals with PTSD, and as a result, are more consistent with diminished capacity (as opposed to insanity).¹⁰¹² For instance, sensation seeking is the result of PTSD, an impairment of the mind, and can lead to risky behaviour which can lead to criminal offending. This kind of behaviour may not be capable of substantiating the disease of the mind requirement of insanity, but can fulfill the abnormality of mental functioning requirement of the diminished responsibility defence. This may amount to diminished responsibility/capacity because the sensation seeking aspect of PTSD may be uncontrollable.

Self-punishment may also impair the ability to recognise the nature of the crime since the desired outcome is punishment to the self. Moreover, self-medicating through the abuse of substances can certainly impair the mind and lead to irrational decision-making (however, self-punishment does not rise to the level of psychosis frequently required to substantiate an insanity defence). Self-punishment is far more compatible with the abnormality of mental functioning of diminished responsibility and the inability to form rational judgment, or to control the self or to understand the nature of one’s behaviour, because the defendant is so focused on self-harm.

Similarly, substance abuse will not permit a defendant to claim insanity, whether the abuse is voluntary or involuntary. Diminished responsibility is more likely to be successful for the war veteran with PTSD who is not receiving treatment, and is trying to ease the symptoms of PTSD through self-medicating via abuse of substances. In such a case, the defendant will be able to argue impairment much more convincingly than disease of the mind

¹⁰¹¹ *ibid.*

¹⁰¹² *ibid.*

(this symptom may apply in the realm of diminished capacity in the USA, but not in England, where the acceptable defence is intoxication).

8.4.7. Diminished or Insanity

Diminished responsibility provides a defence for individuals who might otherwise seek an insanity defence. Many of the requirements for proving diminished responsibility are similar to the insanity defence, with the only difference being that the former defence will apply if the defendant is incapable of forming rational decisions, controlling his behaviour, or understanding the nature of his crime, as the defence of insanity requires that the defendant lacks these elements altogether. Diminished responsibility only requires that these elements are diminished or impaired due to mental impairment.

While insanity warrants a complete absolution, diminished responsibility permits a reduced charge, however, both defences rely on a defence that involves a medical condition. The issue for consideration in this section is when and how does one decide that the medical condition is more appropriate for diminished responsibility as opposed to insanity. To begin with, as discussed throughout the insanity chapter, the defendant seeking to rely on the insanity defence must prove that his mental malfunctioning occurred due to a disease of the mind. This would, therefore, limit the opportunities for launching an insanity defence.

Proving a disease of the mind can be difficult to substantiate because not all diseases of the mind recognised by science are accepted in law. As a result, the defence of diminished responsibility arises to reduce responsibility rather than remove it altogether. Ultimately, criminal responsibility is built around the belief that not all people who commit crimes are absolutely responsible, due to some mental incapacity.¹⁰¹³

When considering which option is more appropriate, one may pause with regard to the requirement for both defences to show that the defendant did not have the ability to

¹⁰¹³ Grachek (n597) 1481.

understand the nature of his offence. One might argue that if the defendant is unable to understand the nature of his offence, he can launch an insanity defence and accept full absolution. However, the problem for the defendant is the low success rate of the insanity defence, and the likelihood of spending a number of years in prison untreated for a condition such as PTSD. PTSD has a significant risk of recidivism.¹⁰¹⁴ This means that while in prison, the absence of treatment for PTSD will only heighten the risk.

When the defendant, who is a war veteran suffering from PTSD, is sent to prison because he was untreated and undiagnosed, but was self-medicating and therefore abusing substances, the insanity defence will not be available. However, diminished responsibility may be a more viable option since the defendant may have a dependency on substances (not meaning the consumption of a substance at the particular time of the crime, but rather substance abuse as a condition which might lead to the abnormality of mental functioning). This is a medically recognised condition which can cause abnormalities of mental functioning, thus, diminished responsibility/capacity would be a more fitting defence for the war veteran with PTSD. At the very least, the defendant will spend fewer years in prison as opposed to the life sentence when an insanity defence fails. In such a case, the defendant is at a lower risk of recidivism.

8.5. Conclusion

Diminished responsibility is a seemingly straightforward concept indicating that in certain circumstances, an individual should not expect to be entirely bereft of the responsibility for the crime. Rather, the individual may receive some sort of partial waiver on responsibility as he is not altogether capable of forming criminal intent. This is because

¹⁰¹⁴ Vittoria Ardino, Luca Milani and Paola Di Blasio, 'PTSD and Re-offending Risk: The Mediating Role of Worry and a Negative Perception of Other People's Support' (2013) *European Journal of Psychotraumatology* 1.

diminished responsibility upholds the theoretical assumption that not all individuals who commit crimes are equally blameworthy or responsible.

In some jurisdictions, diminished responsibility takes on a higher level of importance because murder is the only offence for which this defence is available. This is an important defence because not all killers are murderers of the same degree. For example, in England, everyone convicted of murder will receive the same mandatory sentence. This is not a fair outcome when some individuals suffer from a mental defect that does not give rise to insanity. As a result, diminished responsibility is an important defence for individuals who are not entirely sane, but also not entirely insane. This is especially important for war veterans with PTSD who suffer from a debilitating mental malady, but are not able to convince a jury that they are insane. Diminished responsibility provides the defendant with the opportunity to present lesser included offences of murder to the jury.

Diminished responsibility is a partial defence for the most part, meaning that war veterans with PTSD do not necessarily obtain redemptive relief. In fact, there is no vindication if the defendant war veteran with PTSD obtains a reduced crime. This is because war veterans with PTSD are not getting treatment for the disease as an alternative response to offending, and will be imprisoned and released as any convicted criminal would. The only difference is that they will not receive the maximum punishment due to diminished responsibility.

In England, the fact that diminished responsibility is only available for a charge of murder is problematic, and suggests that only the worst crime can be mitigated. This is especially true for war veterans with PTSD who return from battle with this mental condition, and go on to commit violent crimes, and abuse substances. When the insanity defence is unavailable, the defendant really has to confront incarceration, with little treatment, and most likely recidivism. The outcome is harmful to the veteran with PTSD, as well as to society.

Chapter Nine: Sentencing and Mitigation

9.1. Sentence Stage

9.1.1. Introduction

The sentence is a penal remedy issued by the court upon the conviction of a criminal. Sentencing may include imprisonment, penal fines, both of these, or another alternative remedy.¹⁰¹⁵ Unlike conviction, which is (in the main) a binary matter – the defendant is either guilty or not guilty – sentencing offers a variety of outcomes. Moreover, as we have seen, the legal rules governing defences are complex and, of necessity, general. In contrast, sentencing, other than in cases of mandatory outcomes, is individualistic and can take into account far more background factors than are allowed in the determination of guilt. It might be thought therefore that sentencing offers the best chance of responding to the arguments of Chapter Four and the “special status” of war veterans with PTSD. As will be shown below, to an extent this is true, but sentencing, and diversions from the criminal justice system, are complicated matters and their application to war veterans with PTSD is not always consistent.

This is a complex issue because the appropriate sentence depends on mitigating and aggravating factors. Moreover, sentencing is required to coincide with the penal policy in operation. Penal policies may be aligned with deterrence, incapacitation, retribution and rehabilitation (or restorative justice). In addition, the extent to which mitigating factors may apply will depend on the significance of aggravating factors. In other words, sentencing is not as simple as meting out culpability or just deserts. What is just will depend on the mitigating and aggravating factors.

¹⁰¹⁵ Dean John Champion, *The American Dictionary of Criminal Justice: Key Terms and Major Court Case* (3rd edn, Scarecrow Press 2005) 229.

This part of Chapter Nine addresses the issue of sentencing for war veterans with PTSD. The main concern is whether sentencing should be an opportunity for diagnosis and treatment, or whether war veterans with PTSD should be incarcerated and punished like any other criminal offender. This part of chapter critically examines the possibility of an alternative to incarceration for war veterans with PTSD.

The main issue for consideration here is whether war veterans with PTSD can claim both service, and PTSD which was inflicted during service, as mitigating factors in sentencing. After all, it is almost certain that the war veteran would not have PTSD and it is possible, even probable, that he would not have committed an offence had he not been risking his life in service for his country. In addition, it is also likely that the war veteran with PTSD would not overcome his condition without treatment, thereby, leaving society in an unsafe position.

This part of the chapter will therefore critically examine what sentencing is and what it aims to achieve. Moreover, this part of the chapter will look at what amount to aggravating factors and what amount to mitigating factors. Thus, a thorough understanding of sentencing will help to establish just how and why war veterans with PTSD and society at large can benefit from a more lenient approach to the sentencing of service members whose war-related injuries are linked to their criminal offending.

Once we have a better understanding of what sentencing is, and what it aims to achieve, we are in a better position to determine just when and how PTSD in war veterans is a mitigating factor. Or perhaps we are positioned to argue that because the war veteran incurred PTSD, his war experience is a mitigating factor.

9.1.2. Brief Introduction to the Sentence

The history of sentencing in the US is very interesting. During the colonial era, and prior to the construction of prisons in the 1700s, the power of sentencing was vested in the

hands of jurors.¹⁰¹⁶ The majority of offences were capital, so that if convicted the defendant received the death penalty. Ultimately, due to the absence of prisons, the defendant was either put to death or freed.¹⁰¹⁷ It was therefore understandable why the death penalty drew little or no criticism, because there were no alternative sentences for serious offenders.¹⁰¹⁸

By the time of the American uprising, England and various European countries were already imprisoning serious offenders.¹⁰¹⁹ Therefore, unlike the US, England had alternative sentences for serious offenders, and the question of abandoning the death penalty was seriously debated, even back then.¹⁰²⁰ The alternative sentencing was imprisonment and corporal punishment. In fact, in 1947, the British government debated the abolition of both corporal punishment and the death penalty.¹⁰²¹

It was as early as the 19th century that England's government set about reforming its laws, with old sentencing laws and practices being targeted.¹⁰²² Sentences such as hard labour, the widespread use of the death penalty, and corporal punishment were high on the list for reform. These reforms were necessitated by England's desire to modernise its legal system under the pressure of humanitarianism.¹⁰²³

Sentencing originated out of a desire to avenge bad and harmful behaviour.¹⁰²⁴ Punishment was "savage" and marked by instinctive retaliation.¹⁰²⁵ Eventually, the penal

¹⁰¹⁶ Nancy Gertner, 'A Short History of American Sentencing, Too Little Law, Too Much Law, or Just Right' (2010) 100 *Journal of Criminal Law and Criminology* 691, 692.

¹⁰¹⁷ *ibid.*

¹⁰¹⁸ John H. Langbein, 'The Historical Origins of the Sanction of Imprisonment for Serious Crime' (1976) 5 *J Journal of Legal Studies* 35.

¹⁰¹⁹ *ibid.*

¹⁰²⁰ *ibid.*

¹⁰²¹ Victor Bailey, 'The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945-51' (2000) 18 *Law and History Review* 305, 323.

¹⁰²² Richard I. Blanco, 'Attempts to Abolish Branding and Flogging in the Army of Victorian England before 1881' (1968) 46 *Journal of the Society for Army Historical Research* 137.

¹⁰²³ *ibid.*

¹⁰²⁴ Raed SA Faqir, 'The Philosophy of Punishment: A Study to the History of Classical and Positive Schools of Penology' (2015) 1 *Forensic Research & Criminology International Journal* 1.

¹⁰²⁵ *ibid.*

systems were reformed and modernised. However, arguably penal systems today are still reflective of human instincts toward retaliatory justice.¹⁰²⁶

9.1.3. Controversies over the Sentence

The presumptive theory of sentencing and penology believes that for some crimes, there is a fixed penalty. From there, the judge can go up or down, depending on aggravating and mitigating factors.¹⁰²⁷ This can be controversial because it leaves discretion to the judge and as a result, sentencing for the same offence can differ, depending on the mitigating and aggravating factors. Although this may be a fair method of sentencing, it creates “unpredictability” and “uncertainty” in the criminal justice system.

Until the 1970s, in the US, the rehabilitative theory guided sentencing, so that judges exercised broad discretion to impose wide-ranging sentences based on the offender’s rehabilitative capabilities.¹⁰²⁸ In the meantime, the parole board had equally broad discretion in releasing prisoners.¹⁰²⁹ During the 1970s, state and federal statutes and guidelines in the US turned away from mitigation and the rehabilitative theory of sentencing towards developing determinate sentences for offences.¹⁰³⁰ In more recent times, a concern about prison overcrowding has resulted in some states returning to more judicial discretion in the mitigation of criminal sentencing. Now, based on legislative acts or lack of action in the context of sentencing guidance, there is a mix between judges who look for aggravating factors and those who look for mitigating factors. To this end, a retribution-minded judge is likely to view a defendant with diminished criminal responsibility as less criminally culpable, and will therefore mitigate the sentence.¹⁰³¹

¹⁰²⁶ *ibid.*

¹⁰²⁷ Stanley A. Cohen, ‘An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment’ (1981) 27 *McGill Law Journal* 73, 86.

¹⁰²⁸ Carissa Byrne Hessick and Douglas A. Berman, ‘Towards a Theory of Mitigation’ (2016) 96 *Boston University Law Review* 161, 162.

¹⁰²⁹ *ibid* 168.

¹⁰³⁰ *ibid* 162-163.

¹⁰³¹ *ibid* 163.

The rehabilitative theory became controversial because it produced a number of models and frameworks for punishment. It was also not entirely clear which frameworks and models actually worked.¹⁰³² As a result, it was never clear as to which principles guide rehabilitation, nor was it clear who was eligible for rehabilitation. The main choices were the risk-need-responsivity model and the good-lives-model (introduced in 1990).¹⁰³³ Still, it was never clear who would fit within the ambit of which model, nor how to rehabilitate prisoners under each model.¹⁰³⁴

Retribution theory holds that an individual should be punished according to the severity of the crime and criminal responsibility.¹⁰³⁵ Utilitarian theory holds that criminals should be punished in order to deter other criminal behaviour and to prevent recidivism.¹⁰³⁶ Disease theory holds that while an individual's hardship and disturbed social environment should not excuse a crime, it should be considered when punishing the individual.¹⁰³⁷ Such an individual should be helped and not merely punished. The disease theory supports mitigation in sentencing more so than utilitarian and retributive theories of sentencing.¹⁰³⁸

The controversy over the retributive justice theory is that it is an assertion of power over the prisoner.¹⁰³⁹ Moreover, it is a one-way approach to sentencing. Punishing the offender is perceived as simply imposing a sanction on him. This is quite different from restorative justice, which actually brings the victim and the offender together.¹⁰⁴⁰

¹⁰³² Yanique A. Anderson and Linda Groning, 'Rehabilitation in Principle and Practice: Perspectives of Inmates and Officers' (2016) 4 *Bergen Journal of Criminal Law and Criminal Justice* 220, 221.

¹⁰³³ *ibid.*

¹⁰³⁴ *ibid.*

¹⁰³⁵ Jeffrey L. Kirchmeier, 'A Tear in the Eye of the Law: Mitigating Factors and the Progression toward a Disease Theory of Criminal Justice' (2004) 83 *Oregon Law Review* 631, 642.

¹⁰³⁶ *ibid.*

¹⁰³⁷ *ibid.* 643.

¹⁰³⁸ *ibid.*

¹⁰³⁹ Michael Wenzel and others, 'Retributive and Restorative Justice' (2007) 32 *Law and Human Behaviour* 375.

¹⁰⁴⁰ *ibid.*

In Baier's examination of the pure theory of retribution, he points out that sentencing is inherently wrong because it requires two undesirable and unhealthy motives. First, the punisher must deliberately hand out a sentence that the recipient does not want, and even if he does want it, the punishment is meted out irrespective of that. Secondly, the punishment is deliberately aimed at imposing a suffering outcome, and this too is inherently wrong.¹⁰⁴¹

9.1.4. Sentencing

In England, sentencing guidelines establish aggravating factors that will increase the sentence of criminals, and mitigating factors that can reduce the sentence.¹⁰⁴² For instance, a burglary sentence can be reduced or increased, on the basis of the value of property stolen, the harm done, and the mental ability or disability of the offender.¹⁰⁴³

Essentially, courts have the authority to exercise discretion in considering both mitigating and aggravating factors in determining how to appropriately sentence a criminal offender.¹⁰⁴⁴ For example, remorse or a display of guilt can mitigate a sentence, and a lack of remorse may aggravate a sentence.¹⁰⁴⁵ This tendency toward mitigating the sentence of a remorseful criminal is consistent with Yamada, et al.'s contention, that sentences are mitigated in circumstances where the defendant's background and demeanor activates sympathy on the part of his judge or jury.¹⁰⁴⁶

¹⁰⁴¹ Kurt Baier, 'The Strengths and Limits of the Theory of Retributive Punishment' (1977) 8 *Philosophic Exchange* 1, 38-39.

¹⁰⁴² Andrew Ashworth, *Sentencing and Criminal Justice* (6th edn, Cambridge University Press 2015) 176.

¹⁰⁴³ *ibid.*

¹⁰⁴⁴ Bryan H. Ward, 'Sentencing without Remorse' (2006) 38 *Loyola University Chicago Law Journal* 131.

¹⁰⁴⁵ *ibid.*

¹⁰⁴⁶ Makiko Yamada and others, 'Neural Circuits in the Brain that are Activated when Mitigating Criminal Sentences' (2012) *Nature Communications*, 1
<https://www.researchgate.net/publication/221978788_Neural_circuits_in_the_brain_that_are_activated_when_mitigating_criminal_sentences> accessed 1 February 2018.

Still, Hessick argues that for the most part, the majority of jurisdictions emphasise the aggravating factors for sentencing.¹⁰⁴⁷ Few jurisdictions place significant emphasis on mitigating factors, so that donations to charity and military service will make little or no difference in a sentencing decision.¹⁰⁴⁸ In other words, where there are aggravating factors, there is a tendency to allow those aggravating factors to prevail over mitigating factors, and not the other way around.

There is also a concern that convicts from a disadvantaged background are treated unfairly, compared to those from advantaged backgrounds.¹⁰⁴⁹ This explains in part why there are far more underprivileged persons in prison than privileged persons. The reality is that individuals from disadvantaged backgrounds are given custodial sentences far more often than their advantaged cohorts.¹⁰⁵⁰

9.1.4.1. Purpose of Sentencing

The purpose of sentencing depends largely on policies and practices for imposing law and order, and in turn, crime control. For example, if there is a high level of violent crime in one neighbourhood, one might see a tough stance of this particular kind of crime to reduce offending. Therefore, over time, the purposes of sentencing have changed with four main goals emerging: retributory justice, rehabilitation of offenders, incapacitation, and deterrence.¹⁰⁵¹ Each of these main goals will be discussed in the context of the purpose of sentencing.

Retribution (from one version of retributivism) is based on the theoretical perspective of just deserts, and argues that criminals deserve to feel the pain and suffering that they

¹⁰⁴⁷ Carissa Byrne Hessick, 'Why are Only Bad Acts Good Sentencing Factors?' (2008) 88 Boston University Law Review 1109.

¹⁰⁴⁸ *ibid.*

¹⁰⁴⁹ Mirko Bagaric, 'Rich Offender, Poor Offender: Why it (Sometimes) Matters in Sentencing' (2015) 33 Law and Inequality 1.

¹⁰⁵⁰ *ibid.*

¹⁰⁵¹ Doris Layton MacKenzie, 'Sentencing and Corrections in the 21st Century: Setting the Stage for the Future' (July 2001) 1 <<https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>> accessed 2 April 2018.

inflicted on their victims.¹⁰⁵² Rehabilitation is a sentencing approach designed to help the defendant re-enter society as a productive member.¹⁰⁵³ Incapacitation is a sentencing policy that follows the assumption that imprisoning offenders who are most likely to re-offend is the best insurance against re-offending.¹⁰⁵⁴ Deterrence, which is geared toward the prevention of crime and follows on from new sentencing objectives to “get tough on crime” guides most sentencing decisions today.¹⁰⁵⁵

One conventional theory of criminal punishment deriving from the social contract theory states that punishment is a necessary response to those who break the law. Within the social contract, individuals necessarily agree to concede some rights in order to co-exist peacefully within society. Therefore, the state has acquired the right to identify and enforce certain punishments for certain crimes.¹⁰⁵⁶

This is where the proportionality principle comes in. It is the most popular guiding principle in sentencing. Under the proportionality principle, criminal justice systems attempt to pass a sentence that is consistent with the gravity of the crime committed.¹⁰⁵⁷ This might explain why aggravating factors can outweigh or offset mitigating factors for sentencing judges.

¹⁰⁵² Claire Finkelstein, ‘Death and Retribution’ (2002) 21 *Criminal Justice Ethics* 12, 13.

¹⁰⁵³ Clare-Ann Fortune, Tony Ward and Gwenda M. Willis, ‘The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives’ (2012) 19 *Psychiatry, Psychology and Law* 646, 647.

¹⁰⁵⁴ Andrew D. Leipold, ‘Recidivism, Incapacitation, and Criminal Sentencing Policy’ (2006) 3 *University of St. Thomas Law Journal* 536, 541.

¹⁰⁵⁵ Valerie Wright, ‘Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment’ (The Sentencing Project, November 2010) 1 <<https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>> accessed 2 April 2018.

¹⁰⁵⁶ Joel Goh, ‘Proportionality – An Unattainable Ideal in the Criminal Justice System’ (2013) 2 *Manchester Student Law Review* 41, 42.

¹⁰⁵⁷ *ibid* 43.

9.1.4.1.1. Just Deserts

With consistent harsh sentences over the last few decades, there has been a shift in attention toward the efficacy of just deserts.¹⁰⁵⁸ The philosophy of just deserts argues that a criminal does not deserve a sentence that is greater than the severity of his crime. Obviously, there is no disputing that a criminal who commits theft should not receive a sentence similar to one who commits murder. The disparity arises in considering just how much punishment one should give a thief to achieve just deserts.¹⁰⁵⁹

In England, it has become increasingly clear that just deserts is the primary purpose of sentencing policies and practices. Sentencing is based on the retributive standards which came into play with the introduction of the Criminal Justice Act 1991, which adopts the White Paper Crime, Justice, and Protecting the Public 1990. This paper specifically suggests sentencing policies aimed at ensuring that the offender receives his just deserts.¹⁰⁶⁰

9.1.4.1.2. Incapacitation

Incapacitation is an individualised outcome in England's criminal justice system, aimed at the most dangerous criminals.¹⁰⁶¹ Thus, incapacitation explains the existence of maximum security prisons where criminals who have committed the most serious crimes are typically housed. Otherwise, there is nothing in the sentencing system reflective of a distinction between modes of incapacitation for the most serious crimes and less serious crimes.

Incapacitation is also used in connection with deterrence. For example, Frelberg and Gelb state that one of the main reasons for a US 1978 sentencing law was to succeed in

¹⁰⁵⁸ Alice Ristorph, 'Desert, Democracy, and Sentencing Reform' (2006) 96 *Journal of Criminal Law and Criminology* 1293, 1294.

¹⁰⁵⁹ *ibid.*

¹⁰⁶⁰ Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (3rd edn, Oxford University Press 2012) 22.

¹⁰⁶¹ Andrew Ashworth and Julian V. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013) 192.

achieving “retribution, deterrence, and incapacitation.”¹⁰⁶² It can therefore be assumed that sentencing policies and practices believe in incapacitation insofar as they ensure that the criminal will not commit further crimes outside of prison after conviction for a crime.

9.1.4.1.3. Deterrence

In England, sentencing is described as a method for purposely reducing crime through the medium of deterrence, in addition to other objectives such as retribution, offender rehabilitation, public protection, and victim reparation.¹⁰⁶³ Deterrence is founded on the belief that a person contemplating a crime will reflect on the penal consequences of committing a crime. However, the majority of crimes are conducted spontaneously with little or no time to reflect on the outcomes. Still, there are two types of deterrence: general and individual.¹⁰⁶⁴

9.1.4.1.3.1. General Deterrence

Christie uses the term “general prevention” to describe deterrence and states that it is aimed at the general population.¹⁰⁶⁵ The idea is to take action that would change criminal behaviour in the future. However, it is not certain what effect deterrent policies will have on the general population. They may decide to actually commit a different crime, or they may just move to another jurisdiction.¹⁰⁶⁶

Unlike individual deterrence, the sentencing policy behind general deterrence is not concerned with how the sentencing strategy will affect the individual. Rather, the individual is used as a scapegoat because ultimately general deterrence is only concerned with deterring other potential criminals. Therefore, the sentence for the individual under a general deterrence policy will be strenuous.¹⁰⁶⁷ In this regard, the individual punished is actually a

¹⁰⁶² Arie Freilberg and Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Routledge 2013) 89.

¹⁰⁶³ Ozgur Sevdiren, *Alternatives to Imprisonment in England and Wales, Germany and Turkey: A Comparative Study* (Springer 2011) 95.

¹⁰⁶⁴ Jacqueline Martin, *English Legal System* (Routledge 2014) 138.

¹⁰⁶⁵ Nils Christie, *Limits to Pain: The Role of Punishment in Penal Policy* (Wipf and Stock 2007) 29.

¹⁰⁶⁶ *ibid.*

¹⁰⁶⁷ Martin, *English Legal System* (n1064) 138.

scapegoat because it is hoped that by handing out a tough sentence, others would be mindful of the consequences of a crime, and will be guided accordingly.

9.1.4.1.3.2. Individual Deterrence

Individual deterrence is much like retribution because it focuses on penalising the criminal while seeking a future outcome of no re-offending.¹⁰⁶⁸ Individual deterrence refers to specific interventions in respect of a specific defendant, rather than the entire population.¹⁰⁶⁹ The goal of sentencing in this instance is obviously to deter the individual from future offending. One would, therefore, expect the sentencing court to consider the individual's own specific aggravating and mitigating factors as a means of establishing the appropriate sentence for achieving individual deterrence.

In a sentencing system where an individual is a repeat offender, individual deterrence would result in custodial sentences where none was used before. Where custodial sentences had been used in the past, the individual would then receive longer custodial sentences in the future. However, there is evidence that longer custodial sentences do not reduce re-offending.¹⁰⁷⁰ It is, therefore, difficult to come to terms with individual deterrence policies, such as the three strikes policy, that see long-term incarceration as a means of deterring an individual's risk of recidivism.¹⁰⁷¹

9.1.4.1.4. Rehabilitation

Rehabilitation relies on the criminal's ability to do some soul searching and invoke his conscience in order to rehabilitate his thinking, to where he is determined not to re-offend. The original belief was that punishment, to the extent that the criminal was forced to sit in prison with his own thoughts haunting him, his conscience would automatically come

¹⁰⁶⁸ Bob Roshier and Harvey Teff (eds), *Law and Society in England* (Tavistock Publications 1980) 131.

¹⁰⁶⁹ James Q. Wilson, *Thinking about Crime* (Basic Books 2013) 161.

¹⁰⁷⁰ Ashworth, *Sentencing and Criminal Justice* (6th edn, Cambridge University Press 2015) (n1042) 83.

¹⁰⁷¹ Jennifer Edwards Walsh, *Three Strikes Laws* (Greenwood Press 2007) Xvii.

alive.¹⁰⁷² The idea is that the individual's conscience will guide his future behaviour once released from prison.

Rehabilitation refers to the reformation of the criminal mind and behaviour, and therefore, the idea of rehabilitation has always been guided by a general desire to reform criminals.¹⁰⁷³ During the early part of the 1900s, this was a well-woven theme in criminal justice as well as guided corrections institutes and practices.¹⁰⁷⁴ However, by the 1970s, it had fallen out of favour due to the belief that it was only used as a means of unleashing unjust levels of punishment on offenders.¹⁰⁷⁵

9.1.4.2. Aggravating Factors

Under section 3 of the Criminal Justice Act 1991, judges must take into consideration 'all such information about the circumstances of the offence (including aggravating and mitigating factors) as is available.'¹⁰⁷⁶ There are a number of factors than can constitute aggravating factors, such as, if the victim is deaf or somehow disabled this will likely amount to an aggravating factor.

Under the Criminal Justice Act 2003, the concept of "dangerousness" is an aggravating factor.¹⁰⁷⁷ Here the court may impose a custodial sentence on an offender based on the seriousness of the crime and obviously the offender's antecedents. In addition, the judge is also required to consider whether the offender poses a significant risk of harm to the public.¹⁰⁷⁸ It is also important to note that the Criminal Justice Act 2003 contains five

¹⁰⁷² Michel Foucault, *Discipline and Punish: The Birth of Prison* (Random House 1977) 238.

¹⁰⁷³ Francis T. Cullen and Paul Gendreau, 'Assessing Correctional Rehabilitation: Policy, Practice, and Prospects' (2000) 3 Criminal Justice 109.

¹⁰⁷⁴ *ibid.*

¹⁰⁷⁵ *ibid.*

¹⁰⁷⁶ Nigel Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (Blackstone Press Limited 1999) 39.

¹⁰⁷⁷ Andrew Ashworth and Elaine Player, 'Criminal Justice Act 2003: The Sentencing Provisions' (2005) 68 *Modern Law Review* 822, 834.

¹⁰⁷⁸ *ibid* 834-835.

sentencing purposes which are – ‘deserved punishment, reduction of crime, rehabilitation, public protection, and reparation to the victim.’¹⁰⁷⁹

These five factors put the aggravating factors into context because among the purposes is an attempt to take into consideration the interest of the victim, society and the punishment of the offender. The community is also at the heart of considering aggravating factors which are lined up with sentencing purposes of reducing crime, rehabilitation, and the protection of the public. Deserved punishment also points toward the seriousness of the crime acting as an aggravating factor. However, mitigating factors may offset aggravating factors.

9.1.4.3. Mitigating Factors

Although the rules differ in different jurisdictions, several applicable general factors that judges may take into account in the mitigation of sentences can be identified, which include the offender’s acknowledgement of responsibility for the crime, remorse, victim forgiveness, a low degree of culpability, good character, no antecedents/capable of rehabilitation, good deeds, hardship, and so on.¹⁰⁸⁰

In England, unlike aggravating factors, there is only one statutorily directed mitigating factor that courts may take into account when sentencing a criminal, which is that the defendant pleads guilty to the offence.¹⁰⁸¹ However, the Criminal Justice Act 2003 does confer discretionary powers on the court to take into account any other mitigating factors that the court deems appropriate.¹⁰⁸² Therefore, the court has wide discretionary powers that

¹⁰⁷⁹ *ibid* 825.

¹⁰⁸⁰ Paul H. Robinson, Sean E. Jackowitz and Daniel M. Bartels, ‘Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good-Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment’ Penn Law University of Pennsylvania Law School, Public Law and Legal Theory Research Paper Series, Research Paper No 11-12, 1-67
<https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/5664/extralegal_punishment_factors.pdf> accessed 1 February 2018.

¹⁰⁸¹ Andrew Ashworth, *Sentencing and Criminal Justice* (4th edn, Cambridge University Press 2005) 160.

¹⁰⁸² *ibid*.

enable the use of alternatives to incarceration. These discretionary powers are now covered by the Sentencing Council's Sentencing Guidelines for use in Crown Court.

By virtue of section 166 (1) of the Criminal Justice Act 2003, the court has a wide discretion. Section 166 (1) says that nothing in the Act itself will deprive the court of the power to take into account any factor it deems capable of acting as mitigation.¹⁰⁸³ This means that the court might consider something mitigating, although it has not been considered mitigating by a previous court. What makes this wide discretion important is that there is nothing of a similar nature according to courts when considering aggravating factors.¹⁰⁸⁴ This means that the court's leverage with regard to mitigating factors is more promising for a defendant. If the court had the same leverage with regard to aggravating factors, a plea in mitigation of sentence would be far more difficult to make.

When a defendant pleads guilty, this is automatically treated as a mitigating factor. This is because not only does a guilty plea save taxpayers and the court the time and expense associated with a trial, but it is also demonstrative of the defendant taking responsibility for his crime, and in addition, the defendant is arguably showing remorse. It is also clear that by pleading guilty, the defendant is sparing the victim the pain of having to testify and relive the crime.

9.1.5. War Veterans, PTSD, and Sentence

This section examines how PTSD is used in practice to mitigate the sentences of individuals with PTSD who have been convicted of a crime. Although PTSD has not been particularly successful as a defence, nor historically as a mitigating factor in sentencing, it has been more recently recognised as such due to its medical diagnosis and familiarity.¹⁰⁸⁵

¹⁰⁸³ Criminal Justice Act 2003, s 166 (1).

¹⁰⁸⁴ Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (n1076) 39.

¹⁰⁸⁵ Grey (n24) 62.

Therefore, it is not surprising that over time, PTSD has been successfully used as a mitigating factor in criminal trials.¹⁰⁸⁶

The main problem for anyone with PTSD is that there is a stigma associated with this mental illness. This stigma often prevents the individual from seeking proper treatment until such time that he finds himself in trouble in the criminal justice system.¹⁰⁸⁷ Unfortunately, a plea in mitigation of sentence appears to be the best option for PTSD sufferers who have failed to seek treatment.

In several jurisdictions, there are case laws and/or statutory laws that provide for PTSD to act as a mitigating factor in sentencing convicted criminals. For those convicted of capital offences, PTSD can be used to commute a death penalty to a life sentence or to shorten an otherwise lengthy sentence.¹⁰⁸⁸ When considering war veterans with PTSD, the commutation of the death penalty, or the shortening of a lengthy sentence, may not be a viable solution when these sentences do not include treatment for PTSD. Therefore, this part of the chapter is really concerned with alternative sentences as opposed to incarceration.

The main issue, however, is the extent to which the judge may use his discretion to allow the PTSD of a war veteran to mitigate sentencing, so that it allows for an alternative sentence as opposed to incarceration. This part of the chapter considers this broader issue in the context of the purpose of sentencing, mitigating and aggravating factors, the rejection and acceptance of sentencing, as well as PTSD as a mitigating factor in the sentencing of war veterans.

9.1.5.1. Purpose of Sentencing

Sentencing is designed to prevent the convicted individual from re-offending and possibly to rehabilitate him, so that he becomes a productive, law-abiding citizen. This is of

¹⁰⁸⁶ Smith, 'Impact of Veteran Status and Timing of PTSD Diagnosis on Criminal Justice Outcomes' (n495) 1.

¹⁰⁸⁷ *ibid.*

¹⁰⁸⁸ Gansel (n18) 164.

course very important when it comes to war veterans with war-related PTSD who have not received treatment for their condition. Custodial sentences will increase the risk of these individuals emerging as non-productive recidivist criminals.

Sentencing is also intended to prevent others from offending. When we think of war veterans with war-related PTSD, an alternative to custodial sentencing may be called for because untreated PTSD almost guarantees recidivism. In other words, to the degree that the purposes of sentencing are rehabilitation, deterrence (both generally and individually) then rehabilitation and deterrence cannot actually occur when a war veteran with PTSD is imprisoned and not treated.

Sentencing is also aimed at achieving just deserts under the proportionality principle.¹⁰⁸⁹ Moreover, sentencing functions to condemn the crime and the criminal who commits the crime.¹⁰⁹⁰ It seems unfair and inconsistent with the ends of justice to condemn a war veteran with PTSD with a sentence that does not accept war-related PTSD as a mitigating factor.

It has also been argued that the purpose of sentencing is punishment via incapacitation.¹⁰⁹¹ Obviously, when an individual such as a war veteran with PTSD is incapacitated, he will not be able to exercise the right to freedom of movement. Ultimately, the purpose of sentencing will correspond with the ends of justice intended by the criminal justice system at any given time. This in itself is punishment, and does nothing to address the root cause of an offender with PTSD. Placing a war veteran with PTSD in prison does nothing to meet the ends of justice, which is primarily to reduce re-offending.

In this section, the purposes of sentencing will be discussed: just deserts, incapacitation, deterrence (general and individual), and rehabilitation. The discussion that

¹⁰⁸⁹ Richard S. Frase, 'Punishment Purposes' (2005) 58 Stanford Law Review 67, 68.

¹⁰⁹⁰ *ibid.*

¹⁰⁹¹ Guyora Binder and Ben Nottnerman, 'Penal Incapacitation: A Situationist Critique' (2017) 54 American Criminal Law Review 1, 3.

follows is primarily concerned with how the purpose of sentencing impacts war veterans with PTSD who have been convicted.

9.1.5.1.1. Just Deserts

Just deserts refers to the understanding that the criminal justice system should be structured so as to ensure that criminals receive the punishment that they deserve. Just deserts walks a fine line when it comes to the war veteran with PTSD who commits a crime solely due to PTSD, which was in turn is caused by war-induced trauma. It is difficult to measure proportionality in a conventional sense. It is also difficult to imagine how the imposition of a sentence that is proportionate with the crime is fair when considering that the war veteran may not have turned to crime had it not been for his sacrifices for the protection of the state.

Arguably, war veterans with PTSD are a special class of criminals (as discussed in Chapter Four), and just deserts would imply an unconventional outcome. The punishment for this class of criminals was accomplished before the commission of the offence when they were exposed to trauma and developed PTSD. It is, in turn, the PTSD that created the conditions for criminal conduct. Thus, a fair process seeking to mete out just deserts would recognise the special position of war veterans with PTSD.

The special court for the treatment of veterans who have been exposed to trauma is an example of the kind of special treatment just deserts demands for war veterans with PTSD (this kind of court will be discussed in a subsequent section). The special court connects war veterans who are caught up in the criminal justice system with treatment services. Returns on this kind of court have shown rehabilitation success.¹⁰⁹²

¹⁰⁹² Kraig J. Knudsen and Scott Wingefeld, 'A Specialized Treatment Court for Veterans with Trauma Exposure: Implications for the Field' (2015) *Community Mental Health J*, 2 <<http://www.mctx.org/knudsen.pdf>> accessed 10 April 2018.

9.1.5.1.2. Incapacitation

Incapacitation is justified on the basis of a special necessity for constraining a dangerous criminal, or for the purpose of preventing future offending.¹⁰⁹³ Thus, incapacitation is either special or general. Special incapacitation assumes that the individual in question is a dangerous criminal who will commit crimes if given the opportunity.¹⁰⁹⁴ This would be the outcome for war veterans with PTSD who are imprisoned and not treated for PTSD. General incapacitation purposes arise for deterrence purposes when the individual in question is a repeat offender and it is predicted that rehabilitation is not an option, and that the individual is prone to commit future offences.¹⁰⁹⁵ The war veteran with PTSD will be a persistent offender until he is treated for PTSD, and therefore alternatives to incapacitation should be considered for war veterans with PTSD.

Regardless of whether incapacitation is justified on special or general grounds, it does not appear to be a viable option for those with PTSD, especially the war veteran who commits a crime, or a series of crimes, while triggered by untreated, and in some cases, undiagnosed PTSD. Obviously, incapacitation through incarceration without treatment is not justified in the case of any offender with PTSD, yet, society owes it to war veterans with PTSD to at least ensure that incapacitation through incarceration comes with treatment for the worst offenders. When simply incapacitated without treatment, such an individual will only re-offend if their PTSD goes untreated. In fact, according to the results of a study by Sadeh and McNiel, PTSD is linked to the risk of recidivism, and appropriate interventions can reduce this risk.¹⁰⁹⁶ In other words, simply imprisoning an offender with PTSD will not

¹⁰⁹³ Franklin E. Zimring and Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* (Oxford University Press 1995) 60.

¹⁰⁹⁴ *ibid* 61.

¹⁰⁹⁵ *ibid*.

¹⁰⁹⁶ Sadeh and McNiel (n150) 573.

improve his risk of re-offending, and only interventions/treatment can reduce the risk of re-offending.

In addition, incapacitation can only work to prevent an offender from re-offending for the period of time that the offender is restrained (and many offenders re-offend in prison). Still, the problem is always going to be predicting who is a candidate for re-offending. Incapacitation is not meant to act as a method to change the individual, but merely to ensure that the public is safe from a particular offender for the duration of incarceration.¹⁰⁹⁷ Where an offender has PTSD and is incarcerated for a period of time without treatment for his condition, how safe can society be knowing that this individual will be released with PTSD at some time in the future?

9.1.5.1.3. Deterrence

Historically, deterrence has always been associated with sentencing aims.¹⁰⁹⁸ Ideally, sentencing should be structured so that it is either a warning to other would be offenders, or the offender himself of the consequences of offending. Such a warning should cause the individual to think twice about committing crimes, and in doing so, should prevent offending. Thus, there are two types of deterrence policies: general and individual. With the war veteran with PTSD, the purpose of sentencing should be to inform the veteran that if they do not get help, then they will be forced into treatment if they commit crimes due to their condition. This should act as an incentive to seek treatment before committing crimes and being forced into treatment.

In the context of PTSD, it is very difficult to imagine how a veteran who has responded to triggers due to undiagnosed and untreated PTSD will be cautioned by the threat of punishment. War veterans with untreated PTSD are always on the look-out for threats

¹⁰⁹⁷ Julian V. Roberts and David P. Cole, 'Introduction to Sentencing and Parole' in Julian V. Roberts and David P. Cole (eds), *Making Sense of Sentencing* (University of Toronto Press 1999) 9.

¹⁰⁹⁸ Aaron Chalfin and Justin McCrary, 'Criminal Deterrence: A Review of the Literature' (2017) 55 *Journal of Economic Literature* 5, 6.

which are interpreted as war-related threats that trigger symptoms that may lead to offending behaviour. Take for example, war veteran Jessie Bratcher, who would always carry out his gardening with his firearm hanging from his shoulder. He shot and killed a man who he mistakenly thought was attacking his girlfriend.¹⁰⁹⁹ It shows that individual deterrence through sentencing is not a viable solution.

A war veteran with untreated PTSD will not respond to the threat of punishment in the same way a person who is not suffering from war-related trauma or traumatic mental illnesses will respond. Therefore, deterrence theories are not expected to have an impact on recidivism rates among PTSD sufferers, especially war veterans who interpret threats to be war-zone related. In fact, it can be argued that deterrence policies are likely to have the unintended opposite impact on war veterans with PTSD. According to Pratt, war veterans who have been treated for mental disorders rarely go on to re-offend. This indicates that war veterans can be rehabilitated, and would benefit from a reduced sentence and treatment.¹¹⁰⁰ Obviously, war veterans with PTSD will benefit from reduced prison sentences combined with treatment.

9.1.5.1.3.1. General Deterrence

General deterrence and deterrence theory in general is akin to the rational choice theory since both assume that the individual will make a rational choice before taking action or refusing to take action.¹¹⁰¹ To assume that an individual who is already thinking about committing a crime, or who has already committed a crime, is likely to make rational choices is erroneous to start with. While there will always be individuals who will make rational choices, it is unrealistic to expect this kind of behaviour from one predisposed to criminal behaviour.

¹⁰⁹⁹ Gansel (n18) 147.

¹¹⁰⁰ Melissa Pratt, 'New Courts on the Block: Specialized Criminal Courts for Veterans in the United States' (2010) 15 *Appeal* 39, 41.

¹¹⁰¹ Akers (n274) 654.

The idea of an individual with PTSD making rational choices and thinking about the consequences of his behaviour as a means of deciding not to respond to PTSD symptoms and triggers, is even more unrealistic. Imagine the triggered war veteran with PTSD who is in the throes of reliving combat-related trauma, pausing for a moment to consider that he might end up in prison if they carry on in a dissociative state. This is not going to happen because individuals in a dissociative state are out of touch with reality. Therefore, general deterrence is not going to have much of an effect on the PTSD sufferer who is responding to symptoms, and especially one who is in a dissociative state. The PTSD sufferer who is triggered is only concerned with the consequences of the traumatic event that caused PTSD in the first place.

9.1.5.1.3.2. Individual Deterrence

Specific or individual deterrence occurs when general deterrence has failed to deter the offender.¹¹⁰² In this case, despite general deterrence policies and practices, the individual is found to be a repeat offender. Individual deterrence, therefore, turns to imposing the experience of actual punishment on the repeat offender.¹¹⁰³ It is not possible to accept that individual deterrence will work on a PTSD sufferer who is unmoved by general deterrence, which is the same reason that the individual who may be unaffected by general deterrence is expected to persist with individual deterrence.

Individual deterrence is expected to fail when relying on a PTSD sufferer who responds to symptoms such as hyper-vigilance, dissociative states, panic attacks, nightmares, flashbacks, and so on. Such a person is not in a position to think about the consequences of his behaviour, beyond thinking that they are in danger and must act immediately. This is especially likely for a war veteran having war-related traumatic flashbacks or a dissociative state, or any other symptom.

¹¹⁰² Daniel S. Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 *Crime and Justice in American* 199, 200.

¹¹⁰³ *ibid.*

Specific or individual deterrence is not going to have a better deterrent effect on an individual who is suffering from PTSD and commits an act due to the PTSD which results in a criminal conviction. When a person carries out a criminal act due to PTSD, he is arguably not entirely guilty of a crime in the conventional sense. Therefore, imposing specific deterrence punishment on a mentally ill individual is tantamount to punishing someone who is not guilty of a crime per se. The deterrent values promoted by general and individual deterrence cannot be accomplished through the incarceration of individuals who are not exactly guilty of a crime.¹¹⁰⁴ Moreover, where a defendant suffers from a mental disorder of some sort, he will not be representative of the population that sentencing is aimed at deterring.¹¹⁰⁵

9.1.5.1.4. Rehabilitation

Rehabilitation differs from deterrence and the protection of the community, as these sentencing purposes are focused on incapacitation and punishment. Thus, deterrence and community protection are sentencing objectives aimed at prioritising the safety of the community.¹¹⁰⁶ Rehabilitation, on the other hand, is more concerned with altering the way the convict thinks with a view to decreasing the risk of recidivism.¹¹⁰⁷ As a result, rehabilitation is focused on the offender rather the community, although the community gains when a criminal is rehabilitated.

In *United States v Krutschewski*, a former Vietnam veteran with PTSD tried to have his sentence for a drug related offence reduced because of PTSD, but was denied. The crime itself was difficult to link to PTSD because it involved drug possession for importing and

¹¹⁰⁴ Amanda C. Pustlinik, 'Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness' (2005) 96 *Journal of Criminal Law and Criminology* 217, 219.

¹¹⁰⁵ Cara Feiner, 'Mental Health and Sentencing' (Western Zone Legal Service NSW/ACT Conference, Rydal, March 2013) 2.

¹¹⁰⁶ Mirko Bagaric, Gabrielle Wolf and William Rininger, 'Mitigating America's Mass Incarceration Crisis without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing' (2018) 22 *Lewis & Clark Law Review* 1, 4.

¹¹⁰⁷ *ibid.*

distributing.¹¹⁰⁸ Moreover, smuggling marijuana is not the type of crime readily linked to the trauma of war or trauma that can cause PTSD. The judge also felt that an alternative sentence would not necessarily have a predictable outcome.¹¹⁰⁹

Still, Seamone argues in favour of a rehabilitative approach to sentencing war veterans with PTSD, as well as other forms of head trauma, which is manifested in mental illness. Seamone argues that war veterans who suffer from PTSD will usually be prone to criminal behaviour as a result.¹¹¹⁰ A rehabilitative approach to sentencing would provide these veterans with an opportunity to become involved in a very serious treatment programme. Hence, the obvious concern is that when war veterans with PTSD are sentenced to terms of imprisonment, they will not receive the treatment necessary for controlling the symptoms of PTSD that lead to criminal behaviour (sentencing options which take account of rehabilitation outcomes for war veterans with PTSD will treat the cause of criminal behaviour).

9.1.5.2. Aggravating Factors

Aggravating factors can be something as simple as the age of the victim. Aggravating factors can also be more complex, such as the severity of the offence.¹¹¹¹ A PTSD sufferer who unknowingly commits a serious crime because he believes he is reliving the trauma that caused his PTSD, is not going to actually appreciate the nature of the crime, nor the age of the victim. Failure to consider the various aggravating factors is not a personal or voluntary choice, and therefore they are not really aggravating factors, but rather, the age of the victim, the seriousness of the offence, and so on, may just be collateral damage in relation to PTSD.

¹¹⁰⁸ *United States v Krutschewski* [1981] Dist Mass 509 F Supp 1186.

¹¹⁰⁹ *ibid.*

¹¹¹⁰ Seamone, 'Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism' (n225) 2.

¹¹¹¹ Joanna Shapland, 'Personal Mitigation and Assumptions about Offending and Desistance' in Julian V. Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 60.

The PTSD sufferer who is triggered by a light or sound that takes him back to the combat zone, where he believes a passerby is an enemy who is about to attack him, will not know that the passerby is actually an elderly person or a child. While the PTSD sufferer's reaction is to shoot and kill the passerby is tragic, and all the more so because the victim could be either a child or an elderly citizen, the intention to commit a crime is not present. The PTSD sufferer cannot be held accountable for the aggravating factors of age and severity of the crime (however, PTSD sufferers could be perceived as being a danger if they are thought to be more likely to commit offences due to their PTSD, so PTSD could be seen as an aggravating factor).

In *Rollingcloud v State of Indiana*, Indiana's Court of Appeal refused to reduce the sentence of a repeat offender with diagnosed PTSD.¹¹¹² In this case, the defendant pleaded guilty to possession of cocaine and drug paraphernalia, and invasion of privacy. It would appear that at the trial of first instance, the defendant's PTSD and other mental health disorders were considered, as his sentence was suspended conditionally upon his completion of a drug rehabilitation programme. However, he fled the programme housing arrangement and violated the court order in other ways, and was therefore sentenced to a jail term for his offences. The defendant appealed on the grounds that the sentencing judge did not take his mitigating circumstances into consideration. The appellate court ruled that the defendant's PTSD, and other mental health diagnosis, were not described, and their connection to his crimes was unknown. Moreover, the aggravating factors outweighed the mitigating factors.¹¹¹³

The case of Kenneth Rollingcloud indicates that in the US, the defendant may succeed in reducing sentencing if he has PTSD which is connected to the crime, and does not have a history revealing that treatment will not lead to rehabilitation. In Rollingcloud's case, it was obvious that the alternative programme accorded to him did nothing to rehabilitate him as he

¹¹¹² *Rollingcloud v State* [2016] Ind Ct App 02A03-1604-CR-993.

¹¹¹³ *ibid.*

continued to disobey the court's orders. Moreover, despite the previous alternative sentencing, the defendant was a repeat offender. In addition, the possession of unlawful drugs and drug paraphernalia were difficult to connect to PTSD symptoms. Certainly, it might have been possible for the defendant to be self-medicating due to his symptoms, but still, it is difficult to connect these kinds of crimes to trauma, and thus any repeat offences or failure to comply with a court order will be considered as aggravating factors.

A repeat offender unsuccessfully entered a plea in mitigation of the sentence on the grounds of PTSD in *United States v McDonald*.¹¹¹⁴ In this case, the defendant was 18 years old and acted together with another. Although diagnosed with PTSD and other mental disorders, the defendant did not receive a mitigated sentence since there was an aggravating factor in terms of premeditation.¹¹¹⁵ Premeditation makes it difficult to link the crime to the trauma, as there would have been cooling off periods. If PTSD was found to be a mitigating factor in the McDonald and Rollingcloud cases, it would have been tantamount to excusing criminal behaviour because of PTSD when there are no established links between PTSD and the crimes committed.

In England, a trial judge ruled that PTSD induced as a result of an attempted murder was an aggravating factor in sentencing a 14-year-old defendant.¹¹¹⁶ In this case, the victim incurred minimal physical injuries. However, the judge emphasised that PTSD was a significant psychological injury and would typically invoke a life sentence. However, due to the defendant's youth, the culpability would be reduced.¹¹¹⁷ This case is important because the victim's consequent PTSD was perceived to be an aggravating factor against the perpetrator. This indicates that PTSD is grave enough to invoke sympathy for the victim. Likewise, in

¹¹¹⁴ *United States v McDonald* [2017] USCA 11 Cir 16-12318.

¹¹¹⁵ *ibid.*

¹¹¹⁶ *R v Z* [2016] Winchester Crown Court Sentencing Remarks of Honourable Mr Justice Fraser, Judiciary of England and Wales.

¹¹¹⁷ *ibid.*

England, one can expect that where the defendant has PTSD, his condition will invoke sympathy, and therefore serve as a mitigating factor in sentencing.

9.1.5.3. Mitigating Factors

It is frequently correct to assume that aggravating factors in sentencing are the opposite of mitigating factors.¹¹¹⁸ For example, premeditation is an aggravating factor and acting on impulse is a mitigating factor. Premeditation and impulse are polar opposites.¹¹¹⁹ The impulse and premeditation comparisons provide an accurate explanation for how PTSD can be a mitigating factor. When the PTSD sufferer is triggered by an unforeseen event, and responds due to flashbacks or the sudden onset of a dissociative state, there is no time to premeditate and in fact, the PTSD sufferer is then acting purely on instinct and impulse.

Perlin argues that the expansion of the symptoms of PTSD by the APA in the DSM-5 highlights the utility of this disorder in criminal law practices, especially at the sentencing stage.¹¹²⁰ Although DSM-5 has been expanded to prevent malingering through the primacy of traumatic stressors, it continues to highlight hyper-vigilance. This symptom of PTSD can support sentence mitigation and/or a claim of diminished responsibility.¹¹²¹ The PTSD offender can claim that the aggression was a reckless outcome of hyper-vigilance due to PTSD and resulting traumatic stressors.¹¹²²

At a conference in the Western Zone Aboriginal Legal Service NSW/Act in Rydal, Australia in March 2013, Barrister Feiner explained why mental disorders are mitigating factors.¹¹²³ The explanation is relevant to this chapter since PTSD is also a mental disorder.¹¹²⁴

¹¹¹⁸ Ashworth, *Sentencing and Criminal Justice* (4th edn, Cambridge University Press 2005) (n1081) 152.

¹¹¹⁹ *ibid.*

¹¹²⁰ Michael L. Perlin, “‘I Expected it to Happen/I Knew He’d Lost Control’: The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5” (2015) 4 *Utah Law Review* 881, 884.

¹¹²¹ Levin, Kleinman and Adler (n95) 153.

¹¹²² *ibid* 154.

¹¹²³ Feiner (n1105) 2-3.

Citing two Australian judges, Feiner explained that when a mental disorder is partially or wholly responsible for the criminal conduct, the defendant may not be as culpable as an average, mentally fit defendant.¹¹²⁵ In such circumstances, the need to denounce and punish is not as important as ordinary cases with mentally fit defendants.¹¹²⁶

In addition, sentencing individuals with mental disorders may be more harmful than helpful to the individual.¹¹²⁷ In such a case, the length of a prison sentence may be more stressful for the individual with a mental condition and thus, a reduction of the sentence may be appropriate.¹¹²⁸ When an offender is found to have a mental illness that is significantly linked to the crime in question, the mental illness will mitigate sentence because it reduces criminal responsibility.¹¹²⁹

In other words, unless the mental illness is connected to the crime in question, it will not be a mitigating factor. For example, a PTSD victim, independent of the condition, may decide to commit theft, where the decision to commit theft is not brought on by PTSD symptoms, or is not committed while suffering from a PTSD symptom. In such a case, the PTSD sufferer cannot simply receive a reduced sentence just because he happens to also have PTSD. Still, PTSD can cause the victim of this condition to lose touch with reality, and in those states the commission of a crime linked to the traumatic event that caused PTSD can be a mitigating factor at sentencing.

¹¹²⁴ Katherine Blakeley and Don J. Jansen, 'Post-Traumatic Stress Disorder and Other Mental Health Problems in the Military: Oversight Issues for Congress' (Congressional Research Service, CRS Report for Congress, 8 August 2013) 2.

¹¹²⁵ Feiner (n1105) 2-3.

¹¹²⁶ *ibid* 2.

¹¹²⁷ *ibid*.

¹¹²⁸ *ibid* 3.

¹¹²⁹ Ellie A. Page, 'The Criminal Mind: Neuroscientific Evidence as a Mitigating Factor in Sentencing in New South Wales, Australia' (2017) 26 *Washington International Law Journal* 659, 666.

According to Wayland, trauma related mental illnesses are very important mitigating factors, because trauma related incidents can render the sufferer “disabled.”¹¹³⁰ Then again, many veterans dealing with PTSD resort to self-medicating their symptoms, which can lead to drug or alcohol abuse and related offences. In fact, a national survey conducted by Harris and Edlund found that substance abuse was linked to attempts to alleviate mental health issues that were left untreated.¹¹³¹

There are two reasons that self-medication which is found to be linked to criminal behaviour can be a mitigating factor in a trial of a PTSD sufferer. First, mitigation is evidence of an empathetic factor.¹¹³² It is easy to feel empathy for a defendant whose crime is induced by substance abuse brought on by attempts to ease the symptoms of a trauma induced mental disorder. Secondly, by merely punishing the offender who has PTSD, the criminal justice system is not responding to the condition that contributed to criminal behaviour, but is rather simply responding to the criminal behaviour. This is why there are currently programmes within the adjudication process that mitigate the sentences of the mentally ill by focusing on the root cause of the problem.¹¹³³

When the offender is found to be suffering with substance abuse due to PTSD, there is always the risk that the court will focus on substance abuse if the crime is related to unlawful substances. In this kind of situation, the offender may be ordered to enter a drug or alcohol rehabilitation programme, and no order for PTSD treatment may be made. This leaves the drug or alcohol treatment programme with tenuous value since the root cause of

¹¹³⁰ Kathleen Wayland, ‘The Importance of Recognizing Trauma throughout Capital Mitigation Investigations and Presentations’ (2008) 36 Hofstra Law Review 923-924.

¹¹³¹ Katherine M. Harris and Mark J. Edlund, ‘Self-Medication of Mental Health Problems: New Evidence from a National Survey’ (2005) 40 Health Services Research 117.

¹¹³² Russell Stetler, ‘The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing’ (2007-2008) 11 University of Pennsylvania Journal of Law and Social Change 237.

¹¹³³ Evan R. Seamone, ‘Dismantling America’s Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces’ (2013) 37 Nova Law Review 480, 481.

substance abuse is PTSD. Therefore, substance abuse may not be a valuable mitigating factor when the offender's primary problem is untreated PTSD. The best approach here is the combination of PTSD and substance abuse as mitigating factors.

A convicted kidnapper was able to successfully have his life sentence overturned by the Court of Appeal, Fourth District of California, when PTSD was submitted in combination with age as mitigating factors.¹¹³⁴ The Court of Appeal considered the fact that the offence was committed when the convict was only 14 years old, and suffering from PTSD. The Court of Appeal ruled that life without the possibility of parole in the case of a minor amounted to cruel and unusual treatment and punishment. In addition, the appellant's background in which he grew up in fear of violence in the surrounding neighborhood and his exposure to the abuse of his alcoholic father, were all sentence mitigating factors.¹¹³⁵ Therefore, a case could be made for the mitigation of combat exposure for veterans with PTSD who go on to commit serious crimes.

Still, the discretion accorded to the judges, together with the lack of clarity in sentencing guidelines and statutes worldwide, leaves the status of mitigation in a disorganised state.¹¹³⁶ While sentencing guidelines typically inform courts what factors might mitigate sentences, there is no clarity as to when those factors might be applicable or not. There is vagueness as to how those factors may be "weighted" in a particular case.¹¹³⁷

Throughout the criminal trials in death penalty cases in the US, competent defence attorneys are focused on mitigation.¹¹³⁸ The defence attorney starts out by gathering and using evidence of the defendant's life, including information about his education, vocation, medical

¹¹³⁴ *Antonia De Jesus Nunez* [2009] Cal Ct App Dist 4 Div 3 No Go40377.

¹¹³⁵ *ibid.*

¹¹³⁶ Keven Kwok-yin Cheng, 'Aggravating and Mitigating Factors in Context: Culture, Sentencing, and Plea Mitigation in Hong Kong' (2017) 20 *New Criminal Law Review: An International and Interdisciplinary Journal* 506, 507.

¹¹³⁷ *ibid.*

¹¹³⁸ Jesse Cheng, "'Mitigate from Day One': Why Effective Defense Advocates Do Not Prioritize Liberty Over Life in Death Penalty Cases' (2016) 14 *Ohio State Journal of Criminal Law* 231, 232.

background, legal background, and so forth. The idea here is to not only identify a defence, but to also develop and prepare for mitigation of sentencing.¹¹³⁹

In fact, the US Supreme Court pointed out in *Porter v McCollum, Attorney General of Florida, et al.* that a veteran who fought on the frontlines of the Korean War and suffered from PTSD was entitled to leniency in his conviction for double homicide.¹¹⁴⁰ In this case, the appellant was sentenced to death for one of his murder convictions, and in his sentencing the judge found that the aggravating factors outweighed the mitigating factors. The appeals did not go well for the appellant, and he finally appealed to the US Supreme Court. The US Supreme Court decided that where a veteran served on the frontlines, and endured the kind of stress that the appellant endured, he was entitled to mitigation if he suffered from PTSD as a result. The US Supreme Court therefore reversed the appellate court's rejection of the appeal and sent the case back for sentencing, in accordance with the opinion expressed by the US Supreme Court (the researcher was unable to locate the subsequent sentencing, but has no reason to suspect the ruling of the US Supreme Court did not factor into the sentencing if it has already occurred).¹¹⁴¹

PTSD will not only help in the reduction of death sentences for military veterans, but also in the reduction of sentences for lesser offences. For example, in *Brown v State of Alaska*, the defendant's sentence for possession of pornography was withdrawn and the matter passed on to the lower court for resentencing.¹¹⁴² The appellate court took account of Brown's defence, that his combat-related PTSD negatively impacted his daily functioning and in the process fractured his ability to make sound decisions. The appellate court agreed that these were mitigating factors.¹¹⁴³

¹¹³⁹ *ibid.*

¹¹⁴⁰ *Porter v McCollum* (n1).

¹¹⁴¹ *ibid.*

¹¹⁴² *Brown v State* [2017] Alaska Ct App A-12068.

¹¹⁴³ *ibid.*

The presiding judge's sentencing of Jonathan Dunne illustrates that the courts in England take a similar approach to the sentencing of war veterans with PTSD as that taken in the US. The presiding judge sentenced Dunne to one year of community service, and 100 hours of supervision and work without pay. Dunne had been convicted of an assault which occurred during a flashback, and was a war veteran with PTSD. The presiding Judge emphasised that the community service in lieu of jail was intended to ensure that Dunne seek treatment for war related PTSD. The judge expressed a concern that more and more veterans are appearing before his court with PTSD, and called for more assistance to veterans.¹¹⁴⁴ The next section considers where PTSD fits in with the broad range of mitigating factors for war veterans.

9.1.5.4. Rejection and Acceptance in a Sentence

This chapter establishes that sentencing policies, practices and purposes will depend on the overarching theory of the sentencing guiding the criminal justice system. Theories of sentencing are therefore primarily based on conceptualisations of rehabilitation, retribution, deterrence, and restorative practices. Regardless of which theory guides punishment and sentencing, there are yet two overarching theories used to justify approaches. The two overarching theories are deontological and utilitarian theories, or a combination of the two theories.¹¹⁴⁵

Utilitarian theories of sentencing and penology take the view that moral choices are defined by the consequences of one's conduct. Utilitarianism also argues that it is always best to act in ways that will produce the best outcome.¹¹⁴⁶ In other words, utilitarian justifications for sentencing will call for doing that which will produce the best outcome for all when an

¹¹⁴⁴ 'Judge Calls for Action to Help Soldiers Suffering PTSD as he Spares Veterans' (The Telegraph, 19 May 2014) <<http://www.telegraph.co.uk/news/uknews/crime/10840515/Judge-calls-for-action-to-help-soldiers-suffering-PTSD-as-he-spare-veteran.html>> accessed 22 February 2018.

¹¹⁴⁵ Mike C. Materni, 'Criminal Punishment and the Pursuit of Justice' (2013) 2 *British Journal of American Legal Studies* 263.

¹¹⁴⁶ John Bronsteen, 'Retribution's Role' (2009) 84 *Indiana Law Journal* 1129, 1130.

offender is brought before the court. In such a case, the right thing to do will usually be identifying and meting out culpability. When considering whether and how to sentence a PTSD sufferer who has committed a crime because of PTSD, the right thing/utilitarian thing to do would be to submit the offender to a treatment programme, which would be the best outcome for everyone. This is especially true when the PTSD sufferer's condition has been induced by war-related trauma.

The deontological approach looks at moral factors separately from consequential factors, and assumes that moral conduct is carried out for its 'own sake rather than in order to achieve any particular end.'¹¹⁴⁷ Therefore, deontological approaches to sentencing will not necessarily be carried out for deterrence, restoration, or rehabilitation. Sentencing will be carried out because it is simply the right thing to do when someone breaks the law. Similarly, it can be argued that when a war veteran with PTSD commits a crime, the right thing to do would be to submit the offender to a PTSD treatment programme, especially since PTSD has been induced by the offender's service to this country, and in turn, linked to the criminal offence.

When considering the war veteran with PTSD who commits an offence in response to his PTSD symptoms, the theories justifying punishment should not apply. It does not serve the ends of justice to punish the war veteran with PTSD because it is the right thing to do or because it is necessary for the sake of dealing with crime. The war veteran with PTSD can be rehabilitated by simply sentencing him to treatment for PTSD. Neither the community nor the offender with PTSD benefits when such an individual is punished for the sake of doing so. It is certainly not thought of as the right thing to do.

¹¹⁴⁷ *ibid.*

9.1.5.5. PTSD as a Sentencing Mitigating Factor for Convicted War Veterans

When the court is presented with a war veteran with PTSD which is linked to the commission of the crime, there are two primary mitigating factors: war service, and a traumatic condition induced by war service. This might be a simple exercise for the court. Yet, the court must ensure that criminal offences are not excused based on irrelevant mitigating circumstances. For instance, a veteran with PTSD may have committed a crime independent of his PTSD.

In other words, although PTSD and war service are both mitigating factors, PTSD must be linked to the crime, otherwise, when a criminal offence is committed independently of PTSD, the defendant will not be rehabilitated if he is excused for an unrelated condition. For instance, a PTSD sufferer robs a bank because he wanted to get wealthy quickly and could not find a legitimate means of accomplishing this goal – this decision was not made while suffering from a PTSD symptom, and therefore, it would be illogical and unjust to reduce the offender’s sentence just because he happened to have PTSD.

Still, a strong case can be made for PTSD to serve as a mitigating factor in the sentencing of convicted war veterans. The effects of war can be debilitating and are common.¹¹⁴⁸ The problem for veterans is that they incur these consequences when serving their country.¹¹⁴⁹ Making matters worse, many war veterans end up with this debilitating disease without proper diagnosis and treatment.¹¹⁵⁰ As a mitigating factor, war veterans can be properly diagnosed and treated via a sentencing order.¹¹⁵¹

In the context of criminal defences and sentencing, PTSD is distinguished from other mental conditions. With other mental disorders, a defendant is only required to prove that he

¹¹⁴⁸ Kathleen A. Tarr, ‘Above and Beyond: Veterans Disabled by Military Service’ (1997) V Georgetown Journal on Fighting Poverty 39, 43.

¹¹⁴⁹ Litz and others (n25) 696.

¹¹⁵⁰ Charles R. Marmar, ‘Mental Health Impact of Afghanistan and Iraq Deployment: Meeting the Challenge of a New Generation of Veterans’ (2009) 26 Depression and Anxiety 493, 494.

¹¹⁵¹ Scott Albright, *Veteran's Notes: Bloggery of an Iraq War Vet* (ISBN 2013) 69.

has a diagnosed mental disorder, and that the disorder is connected to the criminal conduct.¹¹⁵² With PTSD, the defendant is required to prove a diagnosis as well as the trauma that triggered PTSD symptoms, and that those symptoms are linked to the crime.¹¹⁵³ Thus, it is not surprising that courts tend to be more amenable to mitigating the sentences of returning veterans who claim that PTSD caused the criminal conduct, and was triggered by combat experiences.¹¹⁵⁴

According to Giardino, combat veterans who incurred PTSD or traumatic brain injuries during their service should be exempt from capital punishment.¹¹⁵⁵ The combination of military training, service, and PTSD should serve as mitigating factors during the sentencing phase of a capital trial.¹¹⁵⁶ According to Giardino, a model for mitigating a death sentence for war veterans can be found in two US Supreme Court Cases: *Atkins v Virginia* and *Roper v Simmons*.¹¹⁵⁷

In *Atkins v Virginia*, the US Supreme Court ruled that the death penalty for a mildly retarded convict amounted to cruel and abnormal punishment and treatment. The death penalty for the mentally incapacitated was, therefore, a violation of the Eighth Amendment to the US Constitution.¹¹⁵⁸ The case of *Roper v Simmons* similarly involves the contravention of the Eighth Amendment in the execution of any capital offender under the age of 18.¹¹⁵⁹

The *Atkins* case looks at the constitutionality of executing a mentally disabled person, and the same standard can be applied in a plea of mitigation in respect of a war veteran suffering from PTSD at the time of the commission of the crime. This is because when

¹¹⁵² Grey (n24) 55.

¹¹⁵³ *ibid.*

¹¹⁵⁴ *ibid.*

¹¹⁵⁵ Giardino (n184) 2955.

¹¹⁵⁶ *ibid.*

¹¹⁵⁷ *ibid.*

¹¹⁵⁸ *Atkins v Virginia* [2002] 536 US 304.

¹¹⁵⁹ *Roper v Simmons* [2005] 125 US 1183.

military veterans are diagnosed with PTSD, they qualify for disability benefits.¹¹⁶⁰ Indicating that PTSD is mentally disabling, Giardino argues, however, both cases establish grounds for military veterans with PTSD to argue for a waiver of the death penalty.¹¹⁶¹ Mitigation can occur through the production of evidence of their PTSD symptoms and the fact that the trauma inducing PTSD occurred while exposed to combat in service of the country.

Similarly, in *State v Gregory*, a Vietnam veteran suffering from PTSD was able to negotiate a light sentence due to his service-related mental illness.¹¹⁶² In Gregory's case, he had been exposed to significant combat action during his service in the Vietnam War. Gregory had experienced flashbacks during his crime in which he held individuals hostage at a bank in Maryland for several hours. The court sentenced him to a probationary period, so that he could be treated for PTSD.¹¹⁶³

Therefore, there is no doubt that military veterans and active duty service members might be accorded leniency when there is proof of PTSD that is linked to the crime. For instance, in the case of Thomas Dennis, a possible three-year jail term was avoided for a traffic fatality in which Dennis was found to be at fault. Dennis, a war veteran with PTSD, was intoxicated.¹¹⁶⁴ His alcohol consumption was linked to his PTSD which was in turn linked to his military service. Rather than sentencing Dennis to a jail term, the presiding judge placed him on probation. In the meantime, Dennis was scheduled for treatment provided by the VA.¹¹⁶⁵

In another case, in Ohio, the appellant appealed against a felony sentence on the grounds that the judge did not understand nor give sufficient weight to his combat-related

¹¹⁶⁰ Michele R. Spont and others, 'Does Filing a Post-Traumatic Stress Disorder Disability Claim Promote Mental Health Care Participation among Veterans' (2007) 172 *Military Medicine* 572.

¹¹⁶¹ Giardino (n184) 2957.

¹¹⁶² *State v Gregory* [1995] NC 459 S E 2d 638 No 232A93.

¹¹⁶³ John P. Wilson, *Trauma, Transformation and Healing* (Routledge 2014) 221.

¹¹⁶⁴ Jack Moran, 'No Prison for Veteran Guilty in DUII Fatality' (The Register-Guard, 21 December 2016) <<http://projects.registerguard.com/rg/news/local/35108508-75/no-prison-for-veteran-with-ptsd-found-guilty-in-duii-death-of-friend.html.csp>> accessed 15 February 2018.

¹¹⁶⁵ *ibid.*

PTSD.¹¹⁶⁶ The Supreme Court of Ohio dismissed the appeal without going into detail about the service-related PTSD.¹¹⁶⁷ In a dissenting opinion, Lanziger J. expressed disappointment with his colleagues, arguing that they had squandered an opportunity to establish standards of review for accepting and applying service-related PTSD as a mitigating factor during the sentencing phase.¹¹⁶⁸ Justice O’Neill also dissented, and in doing so, said that the majority of the Ohio Supreme Court did “not get it,” and that PTSD is not “an excuse,” but rather “an explanation.”¹¹⁶⁹

The proper diagnosis and treatment of convicted war veterans was demonstrated in the sentencing of John Brownfield.¹¹⁷⁰ Brownfield pleaded guilty to bribery of a public official in connection with the smuggling of contraband into a correctional institute where he was a staff member in his post-deployment days. The maximum sentence for this offence was 15 years imprisonment. The United States District Court for the District of Colorado was satisfied that Brownfield, who had joined the military when he was 17 and was deployed to combat zones three times, was suffering from combat-related PTSD or some other service-related, mental illness. The court therefore ordered a psychiatric evaluation. However, the psychiatrists evaluating Brownfield stated that while they suspected PTSD, they were unable to make a full diagnosis unless and until Brownfield overcame alcoholism. The court therefore ordered a 5-year probationary period, conditional upon the achievement of sobriety, psychiatric evaluation, and submission to treatment. The court emphasised that it had the

¹¹⁶⁶ *State v Belew* [2014] 140 Ohio St 3d 221.

¹¹⁶⁷ *ibid.*

¹¹⁶⁸ *ibid.*

¹¹⁶⁹ Marianna Bettman, ‘Court Dismisses Appeal over Proper Consideration of Military-Service Related Disabilities when Sentencing Veterans. *State v Belew*’ (Legally Speaking Ohio, 11 July 2014) <<http://www.legallyspeakingohio.com/2014/07/court-dismisses-appeal-over-proper-consideration-of-military-service-related-disabilities-when-sentencing-veterans-state-v-belew/>> accessed 15 February 2018.

¹¹⁷⁰ *United States v Brownfield* [2009] Dist of Colo No 08-cr-OO452-JLK.

authority to decrease the sentence for war veterans suffering from combat-related psychiatric conditions, including PTSD.¹¹⁷¹

9.1.5.6. Evaluation of PTSD as a Sentencing Mitigating Factor

The main strength of PTSD as a mitigating factor is its ability to allow for the diagnosis and treatment of war veterans. In the absence of mitigation, war veterans would go untreated and merely be incarcerated. Its availability for US war veterans through the criminal justice systems ensures that they receive the treatment that they need, and that society is safer because of it. In England, a similar trend is apparent as politicians, and at least one judge who has dealt with many cases involving veterans with PTSD, have expressed concerns about the lack of treatment.

The weakness of PTSD as a mitigating factor is that there are no strict universal rules for identifying and applying the appropriate PTSD symptoms for veterans. It would appear that service and PTSD should be enough in most states. The US Supreme Court's ruling also fails to provide sufficient details of applicability. In addition, the broad possibilities for using PTSD as a mitigating factor widens the risk for malingering, making it more difficult for those who are genuinely afflicted with PTSD to prove their cases when attempting to use it in mitigation of sentence.

Ultimately, the ability to use PTSD symptoms in mitigation of sentence is fair and just, especially for war veterans who were inflicted with PTSD during their service at war. However, it is only fair and just to use PTSD as a mitigating factor in sentencing when the crime is committed due to PTSD symptoms. For example, the PTSD victim is triggered by an incident or object, and as a result enters into a dissociative state where he begins to relive the trauma that induced the PTSD. In the dissociative state, the PTSD offender loses touch with reality, and unknowingly commits a crime. While unable to convince a jury of the connection

¹¹⁷¹ *ibid.*

between PTSD and the crime, the offender has an opportunity to do so in sentencing. This is especially fair and just for PTSD sufferers, who are also war veterans, having a very difficult time adjusting to civilian life after deployment.

9.1.6. Conclusion

This chapter has so far examined the role of PTSD in mitigation of sentencing. The next sections will explore systems or statutes and VTCs in greater detail. The main focus of this chapter is the military veteran. This chapter has found that PTSD can be, and has been, used as a sentence reduction legal technique, yet it appears that the sentencing procedures and practices have been inconsistently applied, so that war veterans with PTSD have been sentenced to death.

The death sentence of military references does not appear to be appropriate for men who have sacrificed great deal for their country. With respect to other offences, war veterans have been more successful in having sentences reduced, and in fact, PTSD has been found to be a suitable mitigation factor for veterans, as this group of cohorts appears to harvest sympathy and compassion due to their military service and their need for treatment.

Given the military and its service channels' shortfalls on the diagnosis and treatment of PTSD in respect of both active and past soldiers, a plea in mitigation appears to be the most reasonable method of treatment. Lawyers representing veterans with PTSD are tasked with the role of identifying the symptoms of their clients and bringing those symptoms up in trial in terms of defences and/or sentencing.¹¹⁷²

It would therefore appear that mitigation of sentence for war veterans and active duty soldiers would not only benefit the individual convicted of the crime, but also society at large. This is because at sentencing the individual war veteran with PTSD will be diagnosed

¹¹⁷² Seamone, 'Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process' (n122) 144.

with the mental disorder and if the court accepts the diagnosis, will very likely order some form of treatment for PTSD.

Despite precedents for applying PTSD as a mitigating factor in sentencing for military servicemen, many veterans with PTSD have been executed, and many more remain on death row awaiting this fate. There is a need for further clarification as to whether PTSD is a mitigating factor in all cases in which the defendant is a war veteran or an active duty soldier. For the time being, it is clear that only when PTSD is linked to the crime in question, it will be a mitigating factor in the sentencing of the offender. What is unclear at this point is whether the mere fact that PTSD was contracted during war time service but is not linked to the crime, is also a mitigating factor.

There is no real justification for excluding war-related PTSD as a mitigating factor simply because it cannot be linked to the crime in question. There are many mitigating factors that are not connected to criminal behaviour, but are used in mitigation. For example, the defendant or victim's age can be a mitigating and aggravating factor respectively. Likewise, a mentally or physically disabled offender can use those factors in mitigation whether they are connected to the crime or not. PTSD sufferers, especially war veterans, should be accorded the same leverage.

9.2. Treatment versus Incarceration of War Veterans with PTSD in the Criminal Justice System

9.2.1. Sentencing Statutes

9.2.1.1. Introduction

In the US, each state maintains a criminal code that defines criminal offences and often the appropriate sentence.¹¹⁷³ These sentencing statutes usually designate penal sentences

¹¹⁷³ Alison Lawrence, 'Making Sense of Sentencing: State Systems and Policies' (NCSL, June 2015) 1 <<https://comm.ncsl.org/productfiles/92221791/NCSL-state-sentencing-systems.pdf>> accessed 18 March 2018.

pursuant to the nature of the crime.¹¹⁷⁴ Misdemeanours typically attract fines, and/or incarceration in county jails for relatively short periods of time. Felonies will usually involve custodial sentences in excess of one year.¹¹⁷⁵ Still, courts are at liberty to take into account the defendant's background when determining appropriate sentencing.¹¹⁷⁶ At the federal level, sentencing guidelines are reviewed and published by the United States Sentencing Commission.¹¹⁷⁷

In England, there are several criminal statutes establishing minimum sentences (there is also the Sentencing Council, which carefully works through the list of crimes establishing sentencing guidelines). Some of the statutes include the Prevention of Crime Act 1953 which establishes a minimum sentence for weapons offences; the Criminal Justice Act 1988 which issues a minimum sentence for specific offences in which knives and other similar offensive weapons are used; the Violent Crime Reduction Act 2006 which establishes a minimum sentence for violence involving a weapon, and so on.¹¹⁷⁸ Judges have discretionary powers to increase or reduce statutory sentences based on a variety of mitigating or vitiating factors such as age, possibility of rehabilitation, the interests and safety of the public, and the possibility of reparations.¹¹⁷⁹ However, where a mandatory penalty is fixed by law, mitigating factors are not applicable.¹¹⁸⁰

For the purpose of this dissertation, the main background factor is PTSD with a special emphasis on war veterans with the condition. The issue is whether in exercising their discretion, the courts should benefit returning war veterans suffering from PTSD, and

¹¹⁷⁴ *ibid* 2.

¹¹⁷⁵ *ibid*.

¹¹⁷⁶ Christine Luchok Fallon (ed), *United States Reports Supreme Court Acid Free* (Supreme Court, Judiciary 2010) 477.

¹¹⁷⁷ Max M. Schanzenbach and Emerson H. Tiller, 'Strategic Judging Under the United States Sentencing Guidelines: Positive Political Theory and Evidence' (2007) *Journal of Law, Economics & Organisation* 1, 3.

¹¹⁷⁸ Law Commission, 'Sentencing Law in England and Wales: Legislation Currently in Force' (2015) 2.

¹¹⁷⁹ Criminal Justice Act 2003, s 142.

¹¹⁸⁰ *ibid*.

whether war-related PTSD should receive special leniency on the grounds that exposure to war is very different from any other trauma-related PTSD.¹¹⁸¹

This part of the chapter discusses sentencing statutes, and will therefore discuss the foundations of sentencing statutes, their purpose, how they operate, and barriers to realising their stated purposes. The advantages and disadvantages of sentencing statutes will also be discussed.

9.2.1.2. Foundational Basis of Sentencing Statutes

The United States Sentencing Commission has now been in existence for thirty years.¹¹⁸² During this time it has scrutinised the need for increasing alternatives to incarceration.¹¹⁸³ The Sentencing Commission's main concern is the expansion of the alternatives beyond community service and probation for minor offences.¹¹⁸⁴ Moreover, increasingly, courts have established that sentencing guidelines are guides, and do not fix sentences.¹¹⁸⁵ Rather, the judge is entitled to take into account the convicted person's specific circumstances and the nature of the crime itself. This may also include the extent to which the most serious elements of the crime have been established.¹¹⁸⁶

The move to treat the federal sentencing guidelines as an advisory instrument, and to bestow upon judges a greater flexibility in sentencing, has increased the alternative to incarceration sentencing trends, however, this has resulted in significant differences in

¹¹⁸¹ Rachel Yehuda and others, 'PTSD in the Military: Special Considerations for Understanding Prevalence, Pathophysiology and Treatment Following Deployment' (2014) 5 *European Journal of Psychotraumatology* 1.

¹¹⁸² William H. Pryor and others, 'Federal Alternative-to-Incarceration Court Programs' (United States Sentencing Commission, September 2017) 1 <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf> accessed 19 March 2018.

¹¹⁸³ *ibid.*

¹¹⁸⁴ *ibid.*

¹¹⁸⁵ Douglas B. Bloom, '*United States v Booker and United States v Fanfan*: The Tireless March of Apprendi and the Intracourt Battle to Save Sentencing Reform' (2005) 40 *Harvard Civil Rights-Civil Liberties Law Review* 539, 550.

¹¹⁸⁶ *ibid.* 556.

sentencing for similar offences across the US.¹¹⁸⁷ In the meantime, many federal court districts in the US have created alternative-to-incarceration programmes, but primarily for individuals with substance abuse disorders.¹¹⁸⁸

Some states have introduced alternative-to-incarceration programmes, which vary from state to state. For example, Maine has introduced mental health courts which provide an alternative to the incarceration sentencing protocol.¹¹⁸⁹ Connecticut introduced the alternative-to-incarceration programme in 1987, based on a restorative justice system.¹¹⁹⁰ It therefore appears that some states are increasingly approaching sentencing with a view to rehabilitating those who are candidates for rehabilitation, or who would certainly fail to benefit from imprisonment.

In England, the Criminal Justice Act 2003, the Courts Act 2003, and the Anti-Social Behaviour Act 2003 have been calculated to change criminal justice in support of the community at large and victims of crime.¹¹⁹¹ Further changes were introduced under the Coroners and Justice Act 2009.¹¹⁹² The 2009 Act created the Sentencing Council for England and Wales which is responsible for the creation of sentencing guidelines. As with the US and other common law jurisdictions, judges exercise wide sentencing discretion except for instances where certain serious offences require compulsory custodial sentences.¹¹⁹³

The revamped criminal justice system now increases opportunities for alternative to incarceration outcomes. One such system is the restorative justice programme, which

¹¹⁸⁷ United States Sentencing Commission, Report on the Continuing Impact of *United States v Booker* on Federal Sentencing (Booker Report, 2012) 2.

¹¹⁸⁸ Pryor and others (n1182) 1.

¹¹⁸⁹ Cooper Jones, 'Does Alternative Sentencing Reduce Recidivism?: A Preliminary Analysis' (2014-2015) *V Xavier Journal of Politics* 18, 21-22.

¹¹⁹⁰ *ibid* 22.

¹¹⁹¹ Parliamentary Office of Science and Technology, 'Alternatives to Custodial Sentencing' (2008) Postnote 308, 2 <<http://www.parliament.uk/documents/post/postpn308.pdf>> accessed 25 March 2018.

¹¹⁹² Julian V. Roberts, 'Sentencing Guidelines in England and Wales: Recent Development and Emerging Issues' (2012) Paper for Presentation at Haifa Law School Seminar, 2-3 <<http://weblaw.haifa.ac.il/he/events/punishment/documents/julian%20roberts.pdf>> accessed 25 March 2018.

¹¹⁹³ *ibid* 4.

typically involves in-person communications between the victim and the offender with a mediator present.¹¹⁹⁴ Another alternative to incarceration is community service, which is a programme that can involve electronic monitoring and curfews, community work without pay, participation in a behavioural programme, limits on freedom, mental health treatment, substance abuse treatment, supervision, participation in organised activities and/or approved residence.¹¹⁹⁵

The World Health Organisation and the International Committee of the Red Cross have expressed grave concern about the rate of incarcerating individuals with mental health disorders worldwide.¹¹⁹⁶ Quite possibly, this rate of incarceration is due to the serious nature of offending. However, both organisations point out that the tendency to incarcerate the mentally ill is due to society's intolerance for bad behaviour, and the impulse to dump the mentally ill on the prison system in order to relieve society of the threat associated with their behaviour and/or the costs of proper treatment.¹¹⁹⁷ This behaviour occurs when treatment has not been sought, and is absent. The criminal justice system can help by ordering treatment over incarceration. This is especially important because many mentally ill people find that their condition worsens when incarcerated.¹¹⁹⁸

Where the US has passed individual bills on a state by state basis, recognising the mitigating value of war-related PTSD, there are no similar statutes in England. Last year, Representatives Martin, Reives, Rogers, and Zachary sponsored House Bill 483 in the General Assembly of North Carolina. House Bill 483 is titled Veteran Posttraumatic Stress/Mitigating Factor, and the long title of the Act is 'An Act to Provide that a Court May

¹¹⁹⁴ Parliamentary Office of Science and Technology (n1191) 2.

¹¹⁹⁵ *ibid.*

¹¹⁹⁶ World Health Organisation and International Committee of the Red Cross, 'Information Sheet: Mental Health and Prisons' 1 <http://www.who.int/mental_health/policy/mh_in_prison.pdf> accessed 28 March 2018.

¹¹⁹⁷ *ibid.*

¹¹⁹⁸ *ibid.*

Consider Posttraumatic Stress Disorder as a Mitigating Factor When Sentencing a Person who is a Veteran.¹¹⁹⁹

House Bill 483 does what its title promises. It confers upon the judiciary, the discretionary power to apply PTSD as a mitigating factor in the sentencing of war veterans who have been convicted. The efforts by the North Carolina General Assembly, and the debate over waiving the death penalty for war veterans with PTSD, indicates the debilitating impact of this mental disorder on war veterans.

The debilitating impact of PTSD on veterans has been acknowledged by California's legislators. In a bill similar to North Carolina's House Bill 483, California proposed Assembly Bill 2098 in 2014 (the status of this bill is uncertain because as of 2018, the bill was sent to the governor and no subsequent updates are available).¹²⁰⁰ The California Bill acknowledges that the current law permits the court to accept PTSD as a mitigating factor in the sentencing of war veterans. The bill would amend the Penal Code of California to permit considering PTSD as a mitigating factor for war veterans when considering the eligibility of a convict for probation.¹²⁰¹

Currently, under the California Penal Code, the courts may put off legal action in respect of active military personnel and veterans with PTSD or other mental health issues. The trial will be postponed so that the defendant receives treatment for his condition. However, the diversion programme requires the defendant to waive his right to a trial within a reasonable time, and also requires that the offence is only a misdemeanour.¹²⁰² Judges do have the discretion to reduce a felony offence to a misdemeanour for the purpose of inserting the statutory diversion programme.¹²⁰³ Current military personnel and veterans with PTSD

¹¹⁹⁹ Vet. Posttraumatic Stress/Mitigating Factor, General Assembly of North Carolina Bill (2017) 483.

¹²⁰⁰ An act to amend Section 1170.9 of, and to add Section 1170.91 to, the Penal Code, relating to sentencing, California Legislature, Assembly Bill (2014) 2098.

¹²⁰¹ *ibid.*

¹²⁰² California Penal Code, s 1001-80.

¹²⁰³ *ibid.*, s 17 (b).

convicted of misdemeanours may also receive an alternative to incarceration sentence under California's Penal Code. Such alternative sentences include probation and/or treatment.¹²⁰⁴

Prior to 2008, California was the first state to introduce the veterans with PTSD sentencing mitigation bill (1982). The bill permits a court to order alternatives to imprisonment in respect of past and present military personnel with PTSD.¹²⁰⁵ However, the bill only applies to non-violent crimes, and the veterans must show that their criminal actions were linked to trauma caused by war.¹²⁰⁶ This bill was approved by California and amended the Penal Code as discussed above.¹²⁰⁷

Regardless, state action demonstrates that war-related PTSD is often conceded to be a mitigating factor. In addition, the debilitating effects of PTSD for war veterans are captured by the ruling of the US Court for the Ninth Circuit, which held that Vietnam veterans with PTSD are eligible for reduced sentences under the federal sentencing guidelines.¹²⁰⁸ This ruling demonstrates how the discretionary sentencing authority can be exercised to help veterans with PTSD seek and receive appropriate treatment for their condition.

Organisations such as the Armed Forces provide treatment for war veterans with PTSD.¹²⁰⁹ In an amicus brief on behalf of war veterans, the Armed Forces drew attention to a bill passed in Ohio informing the judiciary of the requirement dictating that the judiciary considers military service and PTSD as mitigating factors when sentencing war veterans.¹²¹⁰ This is necessitated by the fact that war veterans are typically undiagnosed and/or untreated,

¹²⁰⁴ *ibid*, s 1170.9.

¹²⁰⁵ 'Post-Traumatic Stress Disorder Left a Twin Cities Veteran with a Criminal Conviction' (Pioneer Press, 18 June 2008) <<https://www.twincities.com/2008/06/18/post-traumatic-stress-disorder-left-a-twin-cities-veteran-with-a-criminal-conviction/>> accessed 30 March 2018.

¹²⁰⁶ *ibid*.

¹²⁰⁷ 'AB-665 Military personnel: veterans: resentencing: mitigating circumstances' (California Legislative Information, 13 June 2016) <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB665> accessed 30 March 2018.

¹²⁰⁸ Stephanie B. Goldberg, 'You Can't Take it With You: California's High Court Makes New Law on Non-compete Clauses' (1994) 80 ABA Journal 86.

¹²⁰⁹ *State v Jeffrey Belew* [2013] Ohio 2013-0711, 1.

¹²¹⁰ *ibid* 3.

and have a difficult time functioning productively in society.¹²¹¹ Thus, it is not surprising that the US Supreme Court (as previously mentioned in *Porter v McCollum*) requires that injuries and mental difficulties resulting from services in the military count as mitigating factors in the sentencing of offenders.

In England, an alternative to incarceration is a viable option for veterans with war-related PTSD. The Veterans and Reserves Mental Health Programme not only evaluates veterans and reserves, but also provides treatment for war-related mental health conditions.¹²¹² Still, the absence of a statute can be problematic in any jurisdiction. For example, in North Carolina, the sentencing of a veteran with PTSD led to a proposed bill for allowing PTSD in veterans to operate as a mitigating factor. In this particular case, the war veteran's psychiatric team testified that the veteran was suffering from PTSD when he opened fire on police and firefighters. At the time of the offence, the veteran genuinely believed that he was still fighting the war in Afghanistan. Although none of the officers was seriously harmed, the judge still imprisoned the veteran and ordered psychiatric treatment while in jail. This was contrary to the psychiatric team's advice to the court; advice that reflected a shortage of treatment in the state prison.¹²¹³

Judges are clearly occasionally "sympathetic" toward veterans suffering from PTSD, and with or without a sentencing statute specifically aimed at veterans with PTSD, will sometimes exercise their discretion to be "lenient." This discretionary leniency is illustrated in one particular case in North Carolina. In this case, a veteran with PTSD had violated his probation where he was convicted of driving under the influence. Rather than substitute probation for imprisonment, the judge sentenced the veteran with PTSD to one day in the

¹²¹¹ *ibid* 6.

¹²¹² 'Support of War Veterans' (Gov.UK, 12 December 2012) <<https://www.gov.uk/guidance/support-for-war-veterans>> accessed 1 April 2018.

¹²¹³ Associated Press, 'Law Encourage Alternatives to Prison for Veterans with PTSD' (Daily Mail, 30 June 2016) <<http://www.dailymail.co.uk/wires/ap/article-3668088/Laws-encourage-alternatives-prison-veterans-PTSD.html>> accessed 2 April 2018.

county jail, and was involved with his sentence, speaking with him and advising him about his future.¹²¹⁴

In England, a Judge refused to imprison a 26-year-old war veteran with PTSD convicted of assault on a night out when drinking. In this case, the judge publicly called for action so that war veterans can receive treatment rather than punishment.¹²¹⁵ It is therefore obvious that where a statute is lacking, judges may exercise discretion in “favour” of alternatives to imprisonment for war veterans with PTSD (the question of whether war veterans with PTSD are special is examined in Chapter Four).

9.2.1.3. Purpose of Sentencing Statutes

Sentencing statutes are designed to ensure accountability, proportionality, and consistency of treatment. Thus, it is not uncommon to find fixed sentencing, including a minimum and maximum range, for specific crimes. Sentencing statutes are therefore arguably intended to reduce judicial discretion with a view to improving “consistency” and “predictability” in sentencing practices. As it currently stands, the wide discretionary practices of judges have given way to a sentencing practice in which sentencing is both uncertain and unpredictable.¹²¹⁶ Disparity is a natural outcome of sentencing law, because sentencing law confronts a unique paradox. On the one hand, it seeks to issue a fair and just sentence that reflects the severity of the crime, and acknowledges both the vitiating and mitigating circumstances applicable to the offender.¹²¹⁷ On the other hand, sentencing law insists that the same punishment is meted out for the same or similar crimes.¹²¹⁸

¹²¹⁴ Ed Mazza, ‘North Carolina Judge Sends Veteran to Jail...Then Serves the Sentence with Him’ (Huff Post, 25 April 2016) <https://www.huffingtonpost.com/entry/judge-spends-night-in-jail_us_571da333e4b0d4d3f723b7da> accessed 2 April 2018.

¹²¹⁵ Shute (n245).

¹²¹⁶ Mirko Bagaric, ‘Consistency and Fairness in Sentencing – The Splendor of Fixed Penalties’ (2000) 2 Berkeley Journal of Criminal Law 1.

¹²¹⁷ Sarah Krasnostein and Arie Freiberg, ‘Pursuing Consistency in an Individualistic Sentencing Framework: If you know where you’re going, how do you know when you’ve got there?’ (2013) 76 Law and Contemporary Problems 265.

¹²¹⁸ *ibid.*

This disparity in sentencing, however, is consistent with the notion of fairness because two defendants may have committed crimes of a similar nature, but one offender may, for example, be much younger than the other offender. Likewise, one offender may have previous convictions while the other may have none. Therefore, judicial discretion is very important for determining what is fair and appropriate.

This outcome of sentencing laws and policies can only benefit war veterans with PTSD who commit crimes fixed by statutes. Sentencing discretion allows judges to take account of the individual circumstances of veterans with PTSD. Consequently, it can be argued that the purpose of sentencing statutes is to establish a starting framework for punishment aimed at deterrence. Complemented by sentencing guidelines, sentencing statutes allow for discretion so that offenders who could benefit from rehabilitation can be the recipients of leniency. The leniency envisioned by sentencing laws and policies is geared towards taking account of the offender's criminal history, and the likelihood of recidivism.¹²¹⁹

Sentencing statutes are not focused on forgiving the defendant or having mercy.¹²²⁰ However, sentencing law allows for the judiciary to take account of the good and the bad "deeds" of offenders.¹²²¹ As a result of this approach to sentencing, the mere fact that a war veteran served in the military and was exposed to combat can be a mitigating factor for veterans. In addition, a veteran whose exposure to combat caused PTSD can have that taken into account by sentencing judges. This is because the overarching purpose of the sentencing statute is to achieve fairness and justice for all involved.

Studies have shown that treatment for veterans is capable of both improving their PTSD symptoms and reducing the risk of recidivism. As was mentioned in the preceding

¹²¹⁹ Nora V. Demleitner, 'Implementing Change in Sentencing and Corrections: The Need for Broad-Based Research' (2016) 28 Federal Sentencing Reporter 303.

¹²²⁰ Bibas (n436) 329.

¹²²¹ Robinson, Jackowitz and Bartels (n1080) 3.

chapters, PTSD is a major risk factor for recidivism. It is therefore reasonable to conclude that treatment for PTSD is beneficial to the defendant and his family.

9.2.1.4. Sentencing Statutes in Practice

As established thus far, the purpose of sentencing law is to achieve justice and fairness for the offender, the victim, and the community at large. Sentencing statutes often fix mandatory sentences with a view to achieving the objective of deterrence, and to punish rather than seek to rehabilitate offenders.¹²²² These fixed mandatory sentencing regimes produce unfair outcomes for individuals. As a result, legislators will often introduce additional sentencing statutes which will achieve a fairer outcome. For instance, in August 2010, President Barack Obama's administration introduced the Fair Sentencing Act, which addressed any unfairness found in the sentencing of drug offenders under mandatory sentencing protocols.¹²²³

Prior to the introduction of the Fair Sentencing Act 2010, an individual convicted of the possession of five grams of crack cocaine received the same five-year compulsory sentence as an individual convicted of possession of 500 grams of powder cocaine.¹²²⁴ The Fair Sentencing Act 2010 resolved this unfair outcome by addressing the mandatory minimum sentence, and thereby reducing the sentence that a drug offender could receive for mere possession of a dangerous substance.¹²²⁵

The operative outcome of sentencing statutes, particularly those that fix mandatory minimums, appears to be purely punitive and deterrent centred (this practice runs counter to rehabilitative intentions). The rehabilitative intent of sentencing practice in general is to provide the offender with a value-based change of attitude in preparation for re-entry into the

¹²²² Craig Turner, 'Kant's Categorical Imperative and Mandatory Minimum Sentencing' (2016) 8 Washington University Jurisprudence Review 235.

¹²²³ 'Sentencing Reform & Mandatory Minimums' (The Leadership Conference) <<https://civilrights.org/criminal-justice/sentencing-reform-mandatory-minimums/>> accessed 12 April 2018.

¹²²⁴ *ibid.*

¹²²⁵ *ibid.*

community.¹²²⁶ When mandatory minimums are contained in sentencing statutes, the judge's discretion is extremely limited. All offenders are therefore treated the same, despite the fact that one offender may be a good candidate for rehabilitation while another may not. In these circumstances, a defendant will not benefit from mitigating circumstances only in that he will not likely receive the upper limits of the offence.

Mandatory minimums do present an obstacle for offenders who might benefit from treatment for an underlying mental illness. Since judges are not permitted to avoid the mandatory minimum, a mentally ill offender may end up in prison. It is therefore hardly surprising that the Human Rights Watch reported in 2003 that at over 200,000 prisoners in the US prison system were suffering from a severe mental illness.¹²²⁷ Making matters worse, the prison system does not have the facilities to provide adequate care and treatment for its mentally ill prisoners.¹²²⁸

The problem with the removal of sentencing discretion through statutorily mandated fixed minimum sentences is that those with treatable mental conditions are denied treatment in favour of incarceration. This is highly problematic for war veterans with PTSD. A study conducted by Saxon, Davis, Sloan, McKnight, McFall and Kivlahan found that the number of veterans with PTSD in jail increases over time.¹²²⁹ The solution is, therefore, a sentencing system that allows for adequate evaluation and treatment of PTSD in veterans rather than mere incarceration. The lack of treatment and the propensity for incarceration does nothing to prevent re-offending, because a vast majority of incarcerated veterans with PTSD would be better off with treatment.¹²³⁰

¹²²⁶ Fortune, Ward and Willis (n1053) 647.

¹²²⁷ 'Ill-Equipped: U.S. Prisons and Offenders with Mental Illness' (Human Rights Watch, 2003) 16 <<https://www.hrw.org/reports/2003/usa1003/usa1003.pdf>> accessed 13 April 2018.

¹²²⁸ *ibid.*

¹²²⁹ Andrew J. Saxon and others, 'Trauma, Symptoms of Posttraumatic Stress Disorder, and Associated Problems among Incarcerated Veterans' (2001) 52 *Psychiatric Services* 959.

¹²³⁰ *ibid* 960.

Drug statutes are especially problematic for war veterans with PTSD in practice. War veterans return with symptoms of PTSD that are not evaluated and not treated. Many resort to drugs in response to these symptoms.¹²³¹ However, due to strict drug policies and resulting sentencing statutes, war veterans end up in prison for drug offences.¹²³²

Still, there is hope for veterans where state statutes provide for mitigation of sentences for veterans with PTSD. For instance, a lower court refused to apply the Penal Code in respect of a veteran with PTSD who was convicted of a misdemeanor assault. Since the veteran had not been deployed, the court found that he had not been in or near a combat situation, and was not eligible for a mental health evaluation under section 1170.9 of California's Penal Code. However, the California Appeal's Court did not agree and sent the case back for the defendant to be evaluated.¹²³³

In more serious cases, however, veterans will not benefit from sentencing statutes. For instance, in *People v Ferguson*, the defendant was convicted of second-degree murder and driving while under the influence of an intoxicating substance. The veteran was suffering from PTSD and appealed against his sentence on the grounds that the sentencing court failed to give weight to this military service, pursuant to the California Penal Code. However, the Court of Appeal for California's Fourth District did not agree, and affirmed his sentence.¹²³⁴

9.2.1.5. Obstacles to Achieving the Purposes of Sentencing Statutes

As previously established, there are two main purposes of sentencing statutes: "consistency" and "fairness." The obstacles to achieving consistency are well-established in

¹²³¹ 'Healing a Broken System: Veterans and the War on Drugs' (Drug Policy Alliance, November 2012) 3
<https://www.drugpolicy.org/sites/default/files/DPA_Healing%20a%20Broken%20System_Veterans%20and%20the%20War%20on%20Drugs_November%202012_Final_0.pdf> accessed 14 April 2018.

¹²³² *ibid.*

¹²³³ *People v Williams* [2011] Cal Ct App No B224486.

¹²³⁴ *People v Ferguson* [2011] Cal Ct App No G043190.

the literature. Inconsistency is a natural outcome when judges are permitted to exercise discretion on the basis of the factual and circumstantial basis of a crime and an offender.¹²³⁵

At the same time, the notion of fairness is compromised when sentences are fixed by statute, and judicial discretion is either limited or removed. Complicating matters, there are instances in which judicial discretion is trumped by the prosecutor who can use discretion to reduce a charge and allow an offender to avoid the just deserts that he should receive, or to increase the charge and the subsequent punishment.¹²³⁶ Thus, the primary purposes of sentencing statutes are thwarted by both judicial and prosecutorial discretion, as well as the objective of deterrence.

The deterrence objective removes discretion in sentencing, so an individual who is a candidate of rehabilitation will be incarcerated rather than deservedly treated for an underlying condition such as PTSD (imprisonment will only make the condition worse). The problem is evidenced by the fact that there are higher populations of PTSD sufferers in prison than there are in treatment.¹²³⁷ Thus, sentencing statutes that fix mandatory sentencing structures create obstacles for the treatment of PTSD sufferers.

Many war veterans who deserve some form of leniency due to the fact that PTSD was incurred from the trauma of war are denied treatment and further punished by incarceration. Arguably, veterans who have incurred PTSD due to exposure to combat have already been punished (the response to PTSD-related crime should therefore be treated). Unfortunately, sentencing statutes that carry a mandatory sentence systematically deny veterans with PTSD an opportunity to receive treatment. As a result, they may become candidates for recidivism.

¹²³⁵ Krasnostein and Freiberg (n1217) 267.

¹²³⁶ Matthew Robinson and Marian Williams, 'The Myth of a Fair Criminal Justice System' (2009) 6 Justice Policy Journal 1, 6.

¹²³⁷ Ardino (n151) 2.

9.2.1.6. Advantages and Disadvantages of Sentencing Statutes

The obvious advantage of sentencing statutes is consistency in legal practices. As Mallett puts it, consistency in the criminal justice system is very important.¹²³⁸ When sentencing statutes fix a sentence for a specific offence, it creates a benchmark for ensuring that all individuals who commit a specific offence are treated in exactly the same way. However, the disadvantage is that not all offenders are the same. Some offenders can be rehabilitated while others cannot. Some offenders can benefit from treatment for an underlying mental condition such as PTSD, but on the other hand, some are persistent offenders. Therefore, all offenders cannot be treated in exactly the same way. In the states where PTSD is a statutorily mandated mitigating factor for war veterans with PTSD, they can finally get the appropriate help and treatment for their condition.

Sentencing guidelines try to respond to the tensions between consistency and fairness. In some cases, sentencing guidelines provide judicial discretion in taking into account the circumstances of an offence and an offender, and use those facts and circumstances as aggravating or mitigating factors. Therefore, a war veteran with PTSD can be sentenced to treatment rather than incarceration.

One of the most significant disadvantages is that very little leniency is allowed for violent offences (depending on the jurisdiction, for example, in Nevada, the use of violence prohibits eligibility). Where offences are violent, imprisonment is mandated. Although judges may call for treatment, treatment may not be available, and imprisonment is detrimental to individuals with PTSD. On the other hand, one advantage is that sentencing laws permitting alternatives to imprisonment for non-violent offenders (misdemeanors or felonies), allows a veteran with PTSD to receive treatment before his symptoms become out of control.

¹²³⁸ Sean J. Mallett, 'Judicial Discretion in Sentencing: A Justice System that is No Longer Just?' (2015) 46 Victoria University of Wellington Law Review 533.

9.2.1.7. Conclusion

This part of the chapter analysed sentencing statutes, their foundational concepts and purposes, how they are interpreted and applied in practice, the obstacles to achieving their purposes, and the advantages and disadvantages of sentencing statutes. The primary problem is mandatory sentencing statutory provisions which basically remove judicial discretion. The removal of judicial discretion makes it more difficult for offenders to receive treatment over incarceration in appropriate cases. For example, a war veteran with PTSD may become incarcerated for a drug or alcohol related offence, when the circumstances suggest that drugs were used in response to PTSD symptoms.

This part of the chapter also revealed that both the US and England maintain discretionary sentencing systems which are managed by sentencing guidelines. This is obviously helpful to PTSD veterans who get into trouble with the law. While a number of states in the US provide for the statutory sentencing mitigation of veterans with PTSD, England does not have a similar legislative sentencing mitigation system for them.

9.2.2. Veterans Treatment Courts (VTCs)

9.2.2.1. Introduction

The previous chapters have established that military personnel are returning from wars with significant mental health problems, and are in turn experiencing difficulties reintegrating into civilian society, often ending up in trouble with the law. The issue for veterans returning from combat is important. Therefore, VTC were developed as a means of responding to the high rate of returning veterans getting in trouble with the law.¹²³⁹ This part of the chapter discusses and analyses the VTC movement and its intended foundation, purpose, practice, and obstacles to getting treatment, as well as the advantages and disadvantages of the VTC.

¹²³⁹ Alana Frederick, 'Veterans Treatment Courts: Analysis and Recommendations' (2014) 38 Law and Psychology Review 211.

9.2.2.2. Foundational Basis of VTCs

It has been established, so far, that many war veterans return from war zones needing help and treatment (in the US, some states recognise this dilemma by creating VTC). In the present chapter, the establishment of specialised courts for veterans accused of non-violent crimes has been defined. Arguments have been presented regarding the efficiency and appropriateness of the US criminal justice system in managing veterans with PTSD. These veterans are troubled and are suffering, and VTCs may provide them with the opportunity to reconstruct their lives.¹²⁴⁰ The value of VTCs was recognised by President Barack Obama who invested in the system to accommodate the needs of more veterans who were returning from war.¹²⁴¹ The criminal justice system responded by creating VTCs that are designed to offer treatment as opposed to sanctions for war veteran offenders with mental disorders incurred during combat service.¹²⁴² These courts deal with minor offences and are designed to diagnose and treat disorders before they catapult into something more serious.¹²⁴³

The National Center for State Courts reports that the first veterans' court started in 2008, in Buffalo, New York.¹²⁴⁴ The foundational basis of the VTC rests on the recognition that conventional criminal justice is not designed to cope with cases in which the offender's behaviour is caused by a combat-related trauma.¹²⁴⁵ Hawkins explains that the VTCs alleviate this burden on the criminal justice system. This is because the VTC are modelled after drug

¹²⁴⁰ Pratt (n1100) 41.

¹²⁴¹ Gansel (n18) 168.

¹²⁴² Jillian M. Cavanaugh, 'Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans' (2011) 45 *New England Law Review* 463.

¹²⁴³ Steven Berenson, 'The Movement toward Veteran Courts' (2010) 44 *Journal of Poverty Law and Policy* 37, 39.

¹²⁴⁴ 'Veterans Courts Resource Guide' (National Center for State Courts)

<<http://www.ncsc.org/Topics/Alternative-Dockets/Problem-Solving-Courts/Veterans-Court/Resource-Guide.aspx>> accessed 10 May 2018.

¹²⁴⁵ Tabath Renz, 'Veterans Treatment Court: A Hand Up Rather than Lock Up' (2014) XVII *Richmond Journal of Law and the Public Interest* 697, 698.

courts which provide ‘early intervention and intensive supervision protocols.’¹²⁴⁶ VTCs are calculated to respond to the specific needs of veterans with combat-related mental illnesses.¹²⁴⁷

VTCs are set up as a means of rehabilitation, and offer an alternative to incarceration for veterans with combat-related motivations for criminal behaviour.¹²⁴⁸ The court is built on the foundation of rehabilitation of those veterans with combat-related trauma, and mental disorders should be diverted from the conventional criminal justice system and placed in programmes that allow them the treatment that they need.¹²⁴⁹ The appropriate treatment would include, for example, counselling, substance abuse help, and assistance with accommodation.¹²⁵⁰

Judge Robert Russell, the founder of the first VTC, provided a rationale and therefore, the foundational basis for the court system for veterans. According to Judge Russell, many military personnel return to civilian life suffering with a number of issues, including substance abuse, homelessness, mental illness, and so on.¹²⁵¹ The need for VTC is increased by the fact that these issues are not addressed and therefore go untreated, so that the veterans end up in the criminal justice system.¹²⁵² Thus, the reasons that veterans end up in the criminal justice system need to be addressed more urgently than the crimes they commit.

¹²⁴⁶ Hawkins (n223) 563.

¹²⁴⁷ *ibid.*

¹²⁴⁸ Jones, ‘Veterans Treatment Courts: Do Status-Based Problem-Solving Courts Create an Improper Privileged Class of Criminal Defendants?’ (n421) 308.

¹²⁴⁹ Julie Marie Baldwin, ‘Investigating the Programmatic Attack: A National Survey of Veterans Treatment Courts’ (2015) 105 *Journal of Criminal Law and Criminology* 705, 707.

¹²⁵⁰ *ibid.*

¹²⁵¹ Robert T. Russell, ‘Veterans Treatment Court: A Proactive Approach’ (2009) 35 *Criminal and Civil Confinement* 357.

¹²⁵² *ibid.*

The US VTC was found to be important enough for expansion throughout the US, and have also been recommended abroad, including in England.¹²⁵³ In fact, in the UK, the Howard League for Penal Reform travelled to the US and examined the VTC. In its preliminary report, the Howard League stated that it would consider the feasibility of replicating such courts in the UK. The idea was prompted by the similar experiences of the US and UK veterans in adjusting to civilian life after deployment.¹²⁵⁴

There are other foundational arguments in favor of helping rather than punishing veterans who commit crimes. For example, Arno points out that the government is obliged to provide some form of alternative treatment for veterans who commit crimes because the government has already invested significantly in the training of veterans.¹²⁵⁵ In addition, their offences are typically induced by trauma sustained in combat and ‘as a matter of equity, those who have served in defense of the United States may be due special consideration in light of their special sacrifices’ (see, further, Chapter Four).¹²⁵⁶

9.2.2.3. Purpose of VTCs

The increased criminal behaviour of veterans tipped the balance towards the creation of VTCs.¹²⁵⁷ Most of the US judiciary observed that veterans returning from combat regularly appeared in court on charges of criminal behaviour. The judiciary, therefore, began to suggest that returning veterans may be dealing with baggage associated with the war or deployment experience. Thus, the idea for VTCs took shape, and a plan was put into action.

¹²⁵³ Robert T. Russell, ‘Veterans Treatment Courts’ (The Attorney’s Guide to Defending Veterans in Criminal Court) 517 <http://nacmconference.org/wpcontent/uploads/2014/01/Book-CH-23_Russell-Veterans-Treatment-Courts.pdf> accessed 11 May 2018.

¹²⁵⁴ ‘Leave no Veteran Behind: The Inquiry into Former Armed Service Personnel in Prison Visits the United States of America’ (The Howard League for Penal Reform) 14 <<https://howardleague.org/wp-content/uploads/2016/05/Leave-No-Veteran-Behind-.pdf>> accessed 12 May 2018.

¹²⁵⁵ Arno (n456) 1039.

¹²⁵⁶ *ibid.*

¹²⁵⁷ Linda J. Fresneda, ‘The Aftermath of International Conflicts: Veterans Domestic Violence Case and Veterans Treatment Courts’ (2013) 37 *Nova Law Review* 632, 633.

The VTC is a “problem-solving court.” As such, its purpose is to assist returning military personnel in their re-entry into the community.¹²⁵⁸ Veterans that are eligible for the VTCs are those who have been charged with a “nonviolent” offence.¹²⁵⁹ The purpose of the VTC is to provide an alternative to prison or incarceration for service personnel who get into trouble with the law upon return to civilian communities.

In assessing the need for VTCs, the Military and Veterans Affairs Task Force National Conference of State Legislatures emphasised the persistent problem of PTSD among returning veterans.¹²⁶⁰ In addition, The Office of National Drug Control Policy provided some substantive facts about veterans and the VTC indicative of the purpose of those courts. According to the Office, it is important to remember that veterans put their lives and freedom on the line for Americans, and as such, veterans are owed a debt for their military service.¹²⁶¹ Even so, approximately 60% of the 140,000 veterans in prison have either a substance abuse or mental health problems.¹²⁶² Many of these problems originate from combat induced trauma.¹²⁶³

When a veteran returns home from deployment, his struggles with reintegrating also impact his family members. As previously mentioned, some of the returning veterans’ struggles are substance abuse, mental health issues, homelessness, and unemployment (issues which often create tense relations for families). Therefore, the case for treating the underlying causative factors is important for both the veteran, his family, and the wider community.

¹²⁵⁸ Richard L. Wiener and Eve M. Brank (eds), *Problem Solving Courts: Social Science and Legal Perspectives* (Springer 2013) 216.

¹²⁵⁹ *ibid.*

¹²⁶⁰ Military and Veterans Affairs Task Force, ‘Veterans Treatment Court: County Court Law No. 6’ (National Conference of State Legislatures, San Antonio, TX, 8 August 2011) 6
<http://www.ncsl.org/documents/enviro/Bexar_080811.pdf> accessed 20 May 2018.

¹²⁶¹ ‘Veterans Treatment Courts’ (Fact Sheet: Office of National Drug Control Policy, 2010) 1
<https://obamawhitehouse.archives.gov/sites/default/files/ondcp/Fact_Sheets/veterans_treatment_courts_fact_sheet_12-13-10.pdf> accessed 15 May 2018.

¹²⁶² *ibid.*

¹²⁶³ *ibid.*

Moreover, the conventional criminal justice system has been leaning more toward rehabilitative justice.¹²⁶⁴ The rehabilitative approach is especially important for veterans.¹²⁶⁵ In the USA, veterans account for 8% of the prison population and 10% of criminal offences.¹²⁶⁶ These numbers are important because the conventional criminal justice system is not set up to appropriately deal with veterans who commit crimes due to the trauma experienced in combat.¹²⁶⁷

The VTC is, therefore, a means by which returning veterans with mental health and substance abuse issues who commit non-violent offences can get the help they need. It is accepted that combat veterans confront a number of challenges upon returning to civilian life, and as a result the number of arrests have increased with the increase in returning veterans, consequent to the war against terrorism.¹²⁶⁸ Returning veterans' increased contact with the criminal justice system has raised concerns about the "appropriate method" of dealing with servicemen who struggle to reintegrate into civilian life. The primary concern is due to the fact that the challenges are a result of the trauma of combat.

Thus, the VTC is designed to provide returning veterans with 'judicially supervised treatment for justice-involved veterans,' while at the same time providing public security.¹²⁶⁹ The VTC also recognises a need for returning veterans to receive treatment for mental health

¹²⁶⁴ Renz (n1245) 698.

¹²⁶⁵ *ibid.*

¹²⁶⁶ *ibid.*

¹²⁶⁷ *ibid.*

¹²⁶⁸ Taylor Brummett, 'Veterans Treatment Courts: An Experiment in Therapeutic Jurisprudence for Combat Veterans' (2013) Pacific University – Social Work, Social Sciences Capstone Projects, 2 <<https://commons.pacificu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1019&context=cassoc>> accessed 16 May 2018.

¹²⁶⁹ Kerwin Henderson and Kevin Stewart, 'Veterans Treatment Courts' (Justice Programs Office, School of Public Affairs) <<https://www.american.edu/spa/jpo/initiatives/drug-court/upload/VTC-Fact-Sheet.pdf>> accessed 19 May 2018.

problems and substance abuse disorders.¹²⁷⁰ Therefore, VTCs are designed to provide a combination of treatment and criminal responsibility for returning veterans.¹²⁷¹

Another issue necessitating the need for a VTC is the fact that once a soldier confronts disciplinary action for behaviour that is brought on by a mental disorder, he is expelled from the military.¹²⁷² This is because the military has a limited choice. It can keep the person and subject him to treatment or expel him and focus on the readiness of the military. Once the soldier is expelled from the military, the soldier is on his own in terms of seeking treatment for mental disorders.

9.2.2.4. VTCs in Action

According to Slattery, Dugger, Lamb, and Williams, VTCs provide a “circle the wagons” programme, in which veterans receive treatment for mental health issues, connections for housing facilities and work, mentoring, supervision, and accountability.¹²⁷³ The idea is to help veterans get on a better path to living a productive life in civilian society.¹²⁷⁴

For the most part, VTCs deal with veterans from Iraq and Afghanistan who have committed offences.¹²⁷⁵ VTCs expect that veterans have a mental health disorder and/or substance abuse problem prior to their offending. At the same time, some VTCs only require evidence of service.

When a veteran participates in the VTC, they are often subject to a conditional discharge (discharge upon the expiration of a specific time period of good behaviour), a

¹²⁷⁰ *ibid.*

¹²⁷¹ *ibid.*

¹²⁷² Patrick Robinson and Clyde Tate, ‘Veterans Endeavor for Treatment and Support: The Role the Army Judge Advocate General’s Corps Should Play in Establishing Federal Veterans Treatment Courts in and Around Major Army Installations’ (2016) *Army Lawyer, Jag Corps Professional Bulletin* 23.

¹²⁷³ Michelle Slattery and others, ‘Catch, Treat, and Release: Veteran Treatment Courts Address the Challenges of Returning Home’ (2013) 48 *Substance Use & Misuse* 922.

¹²⁷⁴ *ibid.*

¹²⁷⁵ John Furman Wall, ‘The Veterans Treatment Court Program Act: South Carolina’s Opportunity to Provide Services for those who have Served’ (2014) 65 *South Carolina Law Review* 879, 888.

reduced charge, and a sealed criminal record.¹²⁷⁶ A sealed criminal record is important because it basically removes the criminal record from the veteran's history.¹²⁷⁷ Veterans with PTSD are encouraged to receive cognitive processing therapies.¹²⁷⁸ If the veteran participating in the VTC does not adhere to the treatment programme, he can be sanctioned by the court.¹²⁷⁹

In a report on the results of a survey distributed among veterans receiving treatment via California's VTC, Holbrook and Anderson report significant satisfaction among the participants.¹²⁸⁰ The study explains that the programme under the VTC in California is one that places veterans who have had run-ins with the law, under a supervisory programme with a judge, probation office, and case manager linked to the VA.¹²⁸¹ The survey results indicate that veterans under the court's treatment programme who participated in the survey felt that the court's supervision of the programme was a key part of the VTC programme.¹²⁸² A majority of the veterans participating in the survey, and enrolled in a VTC programme, were satisfied with the court regularly monitoring their progress.¹²⁸³

In 2015, the Bureau of Justice Assistance, a part of the Department of Justice in the US, carried out an online survey to determine the operational status of all drug courts, including all VTCs in the US.¹²⁸⁴ At the time over 300 such courts were in operation.¹²⁸⁵ The survey results revealed that approximately one-third of all VTCs do not provide defence

¹²⁷⁶ Slattery and others (n1273) 922.

¹²⁷⁷ *ibid* 922-923.

¹²⁷⁸ *ibid* 923.

¹²⁷⁹ *ibid*.

¹²⁸⁰ Justin Holbrook and Sara Anderson, 'Veterans Courts: Early Outcomes and Key Indicators for Success' (2011) Widener Law School Legal Studies Research Paper Series No 11-25, 1.

¹²⁸¹ *ibid*.

¹²⁸² *ibid* 28.

¹²⁸³ *ibid*.

¹²⁸⁴ 'Veterans Treatment Courts: BJA Drug Court Technical Assistance Project 2015 Survey Results' (School of Public Affairs, 2015) I <<http://www.american.edu/spa/jpo/initiatives/drug-court/upload/Veterans-Treatment-Courts-2015-Survey-Results.pdf>> accessed 28 May 2018.

¹²⁸⁵ *ibid*.

attorneys for those eligible for the VTC.¹²⁸⁶ This is an unfortunate setback for veterans with PTSD, or any other mental disorder. In such a case, the defendant will not have the equality of bargaining position in the negotiated plea process. This is a significant flaw in the system since many returning veterans with PTSD will typically develop a drug or alcohol dependency problem.

In a live report from a VTC in North Carolina, an interview with a representative of the court revealed that the court had referred 21 veterans to treatment.¹²⁸⁷ All of the programmes were completed, and none of the veterans was re-arrested. It was also reported that this kind of outcome is similar for VTCs around the US. It was also uncovered by this live coverage of the North Carolina VTC that the sitting judge listens to and takes into account the veterans' experiences in combat, or overseas during the course of service.¹²⁸⁸

In a case study of the VTC in Colorado, four stages of the treatment are described. The four stages of treatment are comparable to military training, comprising of a "system of incentives and sanctions" calculated to "motivate" and "engagement."¹²⁸⁹ Since veterans, like anyone else, can make progress through the stages of the treatment programme, they can also go backwards.¹²⁹⁰ Hence, the need for incentives and sanctions. In the first stage, the defendant goes through a stabilisation phase.¹²⁹¹ The second stage is geared toward reintegrating into civilian society.¹²⁹² The third stage is an independence stage in which the

¹²⁸⁶ *ibid* III.

¹²⁸⁷ 'Hundreds Of Veterans Courts See Success, But More Are Needed' (Back at Base, 3 January 2017) <<https://www.npr.org/2017/01/03/507983947/special-courts-for-military-veterans-gain-traction>> accessed 29 May 2018.

¹²⁸⁸ *ibid*.

¹²⁸⁹ Karthik A. Venkatraj, 'Colorado's About Face: Mechanics, Progress, and Challenges Facing Veterans Trauma Courts in Colorado' (2017) 88 *University of Colorado Law Review* 385, 407.

¹²⁹⁰ *ibid*.

¹²⁹¹ *ibid*.

¹²⁹² *ibid* 408.

veterans are charged with the responsibility for managing their own treatment plan.¹²⁹³ The final stage is ‘transition, reintegration, and continuity with treatment.’¹²⁹⁴

In one case, Frank Damon, a 33-year-old veteran who had PTSD linked to OIF, was charged with stealing, and faced five years imprisonment, a fine of US\$250,000, and three years of supervision upon release. His case went to a VTC where he was sentenced to probation for four years. He was ordered to undergo treatment for PTSD and substance abuse. However, months after being sentenced by the VTC, he used drugs again, and his probation was therefore revoked, and subsequently modified at least twice. He eventually succeeded in completing his probation.¹²⁹⁵

In another case, James Sosh, a veteran who returned from Iraq, and Mike Jones who returned from Afghanistan, were suffering from PTSD and subsequently committed felonies. Jones had threatened to kill someone, and Sosh sold illegal drugs in order to pay for his own habit. Jones was tried in a VTC and received therapy and is said to be recovering and living a normal life. Sosh was tried in a traditional court and sentenced to 20 years in jail with a ten-year suspended sentence.¹²⁹⁶ The difference is access to a VTC and an opportunity to negotiate a guilty plea to a lesser charge to bring the offence within the jurisdiction of the VTC.

It would therefore appear that so far, the VTCs throughout the US successfully treat eligible veterans. Peak reports that the VTCs have helped to reduce veteran recidivism.¹²⁹⁷ The problem might be the limitations on access created by the eligibility of veterans

¹²⁹³ *ibid* 409.

¹²⁹⁴ *ibid* 410.

¹²⁹⁵ Gregory G. Pinski and Michael W. Cotter, ‘Federal Court Collaboration with State Veterans Treatment Courts’ <<http://www.nadcpconference.org/wp-content/uploads/2017/06/VCC-C-4.pdf>> accessed 30 May 2018.

¹²⁹⁶ Elliot Blair Smith, ‘War Heroes Gone Bad Divided by Courts Favoring Prison or Healing’ (1 November 2012) <http://www.courts.ca.gov/documents/Orange-VeteransTreatmentCourt-Publicity_ikc.pdf> accessed 30 May 2018.

¹²⁹⁷ Chris Peak, ‘All it Took was One Judge and Two Veterans to Provide another Chance to Countless Soldiers’ (National Swell, 23 April 2015) <<http://nationswell.com/veterans-courts-restorative-justice-reduce-recidivism/>> accessed 30 May 2018.

(eligibility is based on the nature of the charge and the availability of the VTC in the jurisdiction of the criminal charge). If veterans are only eligible for treatment if they are accused of a non-violent offence (felony and/or misdemeanor, depending on the jurisdiction), this can mean that veterans with more serious strains of PTSD who go on to commit more serious crimes are not receiving treatment for their condition, and are unable to obtain the successful treatment plan offered by the VTCs. Moreover, if a veteran with PTSD is arrested and charged in a state that does not have a VTC, he will not be eligible for referral to that court and will be tried in a conventional court. Therefore, the eligibility for treatment in the VTC is denied to some veterans with PTSD.

9.2.2.5. Obstacles to Access to VTCs

Merriam considered the exclusion basis of the VTC system, and why it may not be a fair programme. To begin with, Merriam points out that the veterans treatment plan not only organises and activates treatment for veterans with substance abuse problems and mental disorders such as PTSD.¹²⁹⁸ The VTC also makes it possible for the offending veteran to avoid incarceration.¹²⁹⁹ The problem is that this programme establishes qualifications that exclude non-veterans and other veterans.¹³⁰⁰

Therefore, a problem is created in terms of barring some veterans from the programme, and the fact that the programme excludes non-veterans.¹³⁰¹ The fact that the programme excludes non-veterans should not be a problem for the VTC, since there are many other problem-solving courts available to assist non-veteran offenders with substance abuse and mental health issues.¹³⁰²

¹²⁹⁸ Eric Merriam, 'Non-Uniform Justice: An Equal Protection Analysis of Veterans Treatment Courts' Exclusionary Qualification Requirements' (2015) 84 Mississippi Law Journal 685, 687.

¹²⁹⁹ *ibid.*

¹³⁰⁰ *ibid.*

¹³⁰¹ *ibid.*

¹³⁰² Richard C. Boldt, 'Problem-Solving Courts' (Reforming Criminal Justice) 274 <http://academyforjustice.org/wp-content/uploads/2017/10/13_Reforming-Criminal-Justice_Vol_3_Problem-Solving-Courts.pdf> accessed 31 May 2018.

Eligibility for referral to the VTC suggests that the defining issue is one's status in military service.¹³⁰³ Eligibility emphasises that the defendant is a veteran, indicating that his condition requiring treatment is only secondary to the mitigating factors constituting grounds for an alternative sentence.¹³⁰⁴ The problems associated with combat-related trauma can lead to a dishonourable discharge which affects the status of the veteran (as discussed further in Chapter Four). Unfortunately, the dishonourably discharged veterans are likely to need treatment more often than the veteran that was honourably discharged. Therefore, the main concern should be the nature of the trauma, and its effect on the veteran.

At its First Veterans Treatment Court Summit, Illinois pointed out that while there are several VTCs in the US, there was a lack of harmony in terms of regulatory regimes and operational mandates.¹³⁰⁵ This indicates that the application of veteran treatment programmes is inconsistent across the US. This can create obstacles when it comes to trust and confidence in their ability to rehabilitate or help veterans. Trust and confidence in any democratic institution is built on certainty and consistency. With irregular laws and procedures across states, it is difficult to imagine certainty and consistency in the manner in which justice is served in the VTCs. The lack of consistency is, therefore, a barrier to fair and equitable access to the VTC.

9.2.2.6. Advantages and Disadvantages of VTCs

There are several advantages to VTCs. First, the veteran with PTSD has an opportunity to obtain the treatment he missed out on upon his return from deployment. In the event that the veteran is homeless and jobless, he has the opportunity to resolve both issues with the help of personnel from the VTC.

¹³⁰³ Jones, 'Veterans Treatment Courts: Do Status-Based Problem-Solving Courts Create an Improper Privileged Class of Criminal Defendants?' (n421) 310.

¹³⁰⁴ *ibid.*

¹³⁰⁵ 'Illinois Holds First Veteran Treatment Court Summit' (M2 Press Wire, 18 May 2015) 2.

From the offending veteran's perspective, however, the greatest advantage is the opportunity to escape imprisonment and/or a fine. Upon the completion of the VTC programme, the veteran's charges will either be reduced or withdrawn altogether. This likely outcome is an incentive for the veteran with PTSD to follow through with the treatment for their condition.

Overall, the treatment programmes administered within the various VTCs are advantageous because they are aimed at truly rehabilitating veterans who offend, putting them on the path to recovery. If the veteran complies with the programme, he is expected to be a productive member of society, and in turn, recidivism rates are reduced.

The greatest disadvantage for veterans who may require treatment and help from the VTC is that it is only available for veterans who have committed minor/non-violent criminal offences. Moreover, it is only available to veterans if they are charged with an offence in a jurisdiction with a VTC. This means that veterans with more serious mental illness, and are prone commit more serious offences, will be exempt from the VTC. The irony is, the veteran with a more serious form of PTSD is more likely to commit a violent crime. It is also likely that the veteran with the more serious form of PTSD has been exposed to greater trauma. This veteran is likely to need treatment more than the veteran who commits a mere misdemeanor.

9.2.2.7. Conclusion

This part of the chapter has covered the VTCs. The court itself is a novel idea, and reflects the idea that combat veterans deserve some degree of "mercy." Therefore, VTCs serve to rehabilitate, aid, treat, and at the same time enforce some degree of accountability. While a novel idea, the VTC can benefit from greater consistency in regulation across the US. There is also a need to expand the reach of the VTC beyond veterans with non-violent offences. In addition, countries such as England, whose veterans have shared similar

experiences with the US veterans, and suffer from the same coping and re-entry problems due to service-related PTSD, should also have access to VTCs.

Chapter Ten: Conclusion and Recommendations

10.1. Summary of the Findings

This thesis has revealed that a significant number of war veterans return to civilian life with PTSD, and the number of veterans with PTSD is ever-increasing. Moreover, the research findings have revealed that PTSD is among the most contracted psychological disorders of war veterans, indicating that it is the most likely injury of war. This combined with the argument from Chapter Four that war veterans are in some sense special, suggests that a war veteran with PTSD who goes on to commit a crime due to war-related PTSD is entitled to some degree of leniency.

The findings indicate that, for the vast majority, war veterans with PTSD would not have PTSD had it not been for the trauma of war. The case for leniency is strengthened when combined with military training. It is hardly surprising that war veterans with PTSD go on to commit crimes upon returning to civilian life. Research findings also suggest that it is very unlikely that these war veterans would have committed crimes if they did not have war-related PTSD. Moreover, the findings discussed in preceding chapters signify that PTSD is not only intricately linked to offending, but also to re-offending.

The thesis also points to the fact that many of the war veterans with PTSD that go on to commit crimes are not diagnosed with this condition, nor treated for it at the time of the commission of the crime. When we consider the sacrifices that war veterans make when joining the war effort, it makes sense that we might consider criminal justice responses that open the door for the diagnosis and treatment of PTSD, rather than for punishment.

Complicating matters further for war veterans is the fact that many lawyers are not sufficiently familiar with the effects of PTSD in order to identify it in their clients. However, lawyers have made use of the concept of PTSD to manage criminal cases against veterans.

They have attained limited success for defendants (crucially, they may be able to offer various defences, and may be able to mitigate sentences as discussed in previous chapters).

The primary method of obtaining diagnosis and treatment for PTSD in the criminal justice system is through defence and mitigation, which can then lead to treatment. The most important defence and sentencing mitigation factors for PTSD sufferers, war veterans in particular, are insanity, automatism, self-defence, and diminished responsibility.

Insanity, automatism, self-defence, and diminished responsibility open up opportunities for war veterans with PTSD to receive treatment over punishment. The research findings reveal that treatment over punishment is very important for lowering the risk of recidivism. As discovered in the research, this is the main task of VTCs and sentencing statutes, rehabilitation/treatment of the war veterans with a war-related mental deficit. The research findings also show that when a war veteran with PTSD is unable or unsuccessful in an attempt to obtain an excuse or a conviction of a lesser offence, he might be able to submit PTSD in mitigation of sentencing.

10.2. Conclusion

This thesis set out to address the question of how ought a liberal democratic state treat war veterans with PTSD who commit crimes as a result of their PTSD? In answer to this, the argument of the thesis is that war veterans with PTSD – whose PTSD has resulted from their service – are owed special regard, and, in most instances, should be diverted from the criminal justice system, and into treatment as an alternative. What we have seen in this thesis is that this does occasionally take place, but the approach is inconsistent and haphazard, not only as a matter of policy, but even in the application of individual defences. The thesis, therefore, concludes with various thoughts about how to make the approach more consistent.

Cases such as Bratcher (as we have seen formerly), a war veteran with PTSD who successfully pleaded insanity due to war-related PTSD (found GBMI) gives us hope that war

veterans can, in appropriate cases, seek alternative outcomes to incarceration (other examples are the cases of Wood and Heads). Still, there are war veterans with PTSD currently on death row. These war veterans should not be executed because, as Giardino argues, (as previously mentioned), the mere trauma of war should automatically exempt such defendants from execution due to the fact that their condition naturally alters their criminal responsibility.

Like Bratcher's case, there are bound to be situations in which the defendant war veteran with PTSD is completely out of touch with reality, and as such cannot appreciate the nature of his crime. Moreover, as clarified in Chapter Five, a war veteran with PTSD can be in a position where he does not know that what he is doing is wrong, because he genuinely believes that he is still fighting the enemy in battle. Such a defendant is entitled to a defence of insanity. When such a verdict is delivered, the war veteran with PTSD will be treated for his condition rather than punished for it. However, another defence may be seen as fit, such as automatism, as discussed in Chapter Six, in which case the war veteran might be discharged altogether, and as a result, will be freed without treatment or punishment.

A war veteran with PTSD may not always satisfy the jury that he was insane when carrying out the crime. In such a case, there are other feasible options that can allow the war veteran with PTSD to receive acquittal, rather than punishment. For example, as explained in Chapter Seven, the research findings indicate that defendants with PTSD are actually in a position to claim self-defence, in that their altered state of mind, brought on by the PTSD symptoms, can leave them with the genuine belief that their life is in immediate danger.

Other defences, such as diminished responsibility, can also lead to a conditional discharge and an order for treatment, together with a suspended sentence. In the English case of Aaron Wilkinson, as we saw in Chapter Eight, the defendant's plea of diminished responsibility on the basis of PTSD successfully achieved a reduction of the offence of murder to manslaughter, with parole within five years. Essentially, the defendant becomes

able to defend himself on the basis of his mental disorder.¹³⁰⁶

It must be noted that the most important finding in this research is that war veterans with PTSD who are convicted of criminal offences deserve some form of leniency due to their service. As examined in Chapter Four, it is therefore important that the state accepts a level of complicity for the war veteran's injury, and the resulting crime, therefore, should treat the war veteran with PTSD some degree of leniency. Conventional wisdom dictates that if PTSD was caused due to military service, and PTSD is linked to criminal violence, then a war veteran with PTSD deserves some form of leniency when he commits a crime. After all, there is a good chance that the war veteran would have never broken the law if he did not have PTSD, and they would not have PTSD had it not been their duty carried out during their military service. Therefore, there is a strong argument here that war veterans with PTSD deserve to be included in a special category of defendants.

Making a case for the special status of war veterans is not a difficult task. War veterans have made courageous and significant sacrifices for their countries. In return, many of these veterans were traumatised by their training and war experiences, to a point where they develop PTSD, which is linked to their offending. As illustrated in Chapter Four, this puts the war veteran in a special status compared to other defendants.

Once incarcerated with untreated PTSD, and released into the general population later on, many war veterans will be on the path to re-offending. There is no reason why war veterans with PTSD cannot file tort suits against the state or apply their conditions to criminal offences as a defence. Incarcerating war veterans is not fair or justifiable because imprisoning anyone who is mentally damaged can be considered as inhumane in the first place. This is because the issue of criminal responsibility is challenged. After all, as discussed in Chapter Three, criminal law establishes criminal responsibility by asserting the concept of free choice.

¹³⁰⁶ Hafemeister and Stockey (n21) 108.

When a war veteran with PTSD responds to the symptoms of PTSD, including a series of forced recollections while reliving the trauma of war, his ability to act freely and willfully is called into question. The war veteran becomes submerged in a world that is separated from reality. Or, as discussed in Chapter Six, this might explain why the war veteran with PTSD is “able” to claim automatism and obtain an absolute discharge/acquittal (see, for instance, the case of Lisnow).

The state’s responsibility for the veteran’s current post-war condition is also called into question. When the two factors, “traumatic consequences of war” and “the state’s complicity,” are knitted together, there is no doubt that war veterans with PTSD are entitled to “special treatment,” in that they are entitled to some degree of mercy or leniency. Hence, from Chapter Five to Chapter Eight, defences such as insanity, automatism, self-defence and diminished responsibility should be extended in order to war veterans with PTSD to ensure that they receive their required treatment, and in turn reduce re-offending rates among prisoners with mental disorders (however, the question still remains as to which criminal law defence is appropriate in each instance).

As pointed out in Chapter Four, we certainly owe a debt of gratitude to returning and injured war veterans by offering subsidies and aid for assistance and support for resettling back into civilian life. Again, this puts the war veteran with PTSD in a special category of criminal defendants. Yet, when it comes to war veterans with PTSD who commit crimes, we are quick to treat them as if they were ordinary citizens. By doing so, society dismisses the fact that PTSD is an injury of war, and it is this injury that is linked to the crime committed by the war veteran with PTSD.

Yet, jurors tend to have some reservations regarding PTSD claims from war veterans. The greatest concern is the risk of malingering. As mentioned in Chapter Four, Smith’s study revealed that in most cases, jurors are apt to discount a PTSD claim by a war veteran who

was diagnosed with PTSD after his arrest, and more likely to accept a PTSD claim if the diagnosis preceded the arrest. We can, therefore, gather from Smith's study that if the war veteran was diagnosed before getting into trouble, he would have a better chance of convincing a jury to return a verdict that would result in treatment for PTSD (the major obstacle is convincing a jury, but experts' testimonies may help in such a situation).

The results of Smith's study present a dilemma, because there will always be cases where veterans only discover that they have PTSD after their arrest. This is exacerbated by the research findings reported in this dissertation indicating that many war veterans do not seek diagnosis and treatment, or they have been dishonourably discharged and do not have the resources for obtaining a diagnosis nor treatment.

Obviously, there will always be those who malingering with the intention of getting away with criminal behaviour. However, the reality is war veterans who commit crimes are often first offenders with one glaring difference between their pre-war status and post-war status. The difference is that the war veteran did not have PTSD until after his war experience, at which time he committed his first crime. This fact alone should present reasonable doubt about the risk of malingering.

While some war veterans and ordinary citizens with PTSD have been "able" to claim insanity or automatism, self-defence or diminished responsibility, just as many have not. This means that some war veterans with PTSD will get the treatment that they need when their PTSD comes to light after criminal responses to the symptoms, and other war veterans with PTSD will not receive treatment at all and will continue to commit crimes. It benefits no one to punish an offender when crime can be prevented, or recidivism avoided, by the treatment of the offender rather than punishment. This is especially true for war veterans suffering from war-related PTSD. In other words, any prisoner with PTSD that is connected to any war

experience should be accorded special status, so that the prisoner can be treated in or outside of prison.

A successful defence also goes a long way to satisfying the needs of the victims and/or the victim's family. Victims and their families are at least satisfied that the war veteran will suffer at least some form of consequence for the committing crime. On the other hand, the war veteran is able to claim some level of excuse due to the fact that his crime is a direct result of a mental defect contracted during service to his country. However, to get the most out of the defence, as analysed in Chapter Nine, war veterans with PTSD should receive mitigated sentences that include treatment for PTSD. Therefore, while the outcome of defence can be helpful in the conviction and mitigation of sentencing, it can be more productive should the sentence passed not only acknowledge the veteran's services to his country, but also ensure treatment for his PTSD that was incurred during the war.

The research indicates that there is a need for a uniform approach to war veterans with PTSD. We owe it to our war veterans to help them adjust to civilian life after returning from war broken, and injured, often both mentally and physically. Thus, a uniform approach means providing treatment when it comes to our attention that it is needed. This should be the first area attempted when our war veterans with PTSD find themselves in trouble. Therefore, the neo-rehabilitation theory of criminal justice guides this conclusion.

Finally, there is much work to do to in order to ensure that war veterans with PTSD receive treatment and leniency, as opposed to incarceration and punishment, when they go through the criminal justice system. To ensure that the interaction is productive, there is a need for cooperation between the legal and medical communities, which are considered in following sections.

10.3. Recommendations

Since it is very easy for prosecutors to plant the seeds of suspicion in the jury's mind about the authenticity of the war veteran's PTSD claim, the burden of proof should be amended. In fact, just as a war veteran is required to prove through scientific evidence that he is suffering from PTSD, the prosecutor should be put to scientific proof any claimed malingering, as it is listed in the DSM.

Jurors should be instructed not to consider the risk of malingering, unless there is proof by experts that malingering was established or reasonably established, since such a condition can be tested for by therapists. The burden of proof should therefore be the same for the defendant claiming PTSD and the prosecutor who is claiming malingering. Moreover, it is perhaps now time for a new universal defence tailored to PTSD, as suggested by Gover. Such a defence should be made "available to veterans with PTSD."¹³⁰⁷

The VTCs should be altered in order to ensure that all veterans are provided with an opportunity for treatment. In other words, existing barriers should be modified in order to allow for a larger population of war veterans to obtain treatment. This would mean expanding the list of crimes that are permitted for consideration in VTC.

In addition, statutory laws should be implemented that permit courts to automatically consider military service as a mitigating factor. Furthermore, war-related PTSD should be listed as a "special circumstance." Therefore, in addition to military service acting as a mitigating factor, war-related PTSD should also be added. What this means is that the war veteran with PTSD will receive "special treatment," and that such a defendant should not be treated as an ordinary citizen with PTSD.

Ultimately, in the criminal trial there are many ways to assess criminal responsibility,

¹³⁰⁷ Gover (n20) 587.

and the defendant's psychological abnormalities are among them.¹³⁰⁸ There is no reason that PTSD, in particular war-related PTSD, should not factor into an assessment of criminal responsibility. War-related PTSD raises a number of mitigating factors and call upon our conscience, as we are all responsible for the outcome since the veteran's service benefits us all, but apparently damages the war veteran in the process.

In England (or other countries), there is a need for statutory laws to empower courts to accept a PTSD defence or to accept PTSD as a plea in mitigation of sentencing (in the US, some states, such as California, have adopted laws regarding mitigating in a sentence). As it currently stands, the decision to mitigate sentencing, or to discharge war veterans with PTSD, is left to judicial discretion and sentencing guidelines that basically apply to all citizens.

It is also recommended that for war veterans with PTSD, sentencing laws are passed that permit the court to order treatment-based on conditional discharges. This is similar to the English conditional discharge, where the case is eventually dismissed if the offender completes a set amount of community service or social work hours and does not get in trouble with the law during a specified period. Rather than sentence a war veteran with PTSD to prison, the veteran should be sentenced to a treatment programme, after which he may receive a suspended sentence or a conditional discharge for a fixed period of time for good behaviour, after which his conviction is discharged. Such sentencing should take place in an organised court system similar to that of the US VTCs.

10.3.1. Legal Communities

Ideally, legal practices should be in a position to identify and respond to PTSD sufferers immediately upon accepting their case. Katz and Haldar refer to "trauma-informed lawyering."¹³⁰⁹ In this kind of practice, the lawyer is trained to identify signs of trauma

¹³⁰⁸ Dix (n964) 315.

¹³⁰⁹ Sarah Katz and Deeya Haldar, 'The Pedagogy of Trauma-Informed Lawyering' (2016) 22 Clinical Law Review 359.

symptoms.¹³¹⁰ This is important because many war veterans with PTSD go without diagnosis and treatment, and may have also been discharged for behaviour which was more than likely linked to PTSD. As a result, the war veteran with PTSD lacks the facilities to have his condition diagnosed and treated. This would obviously impede the ability of the defendant to offer his defence regarding war-related PTSD.

When the war veteran with PTSD commits a crime and then comes into contact with a lawyer, it is the first opportunity for many to be diagnosed and treated, and to actually offer a defence. Therefore, having a lawyer who is trauma informed is important. A legal community that automatically refers the war veteran to a trauma informed lawyer would go a long way towards ensuring that war veterans with PTSD are not placed into the prison system, where they would end up undiagnosed and untreated. Thus, the ability to identify PTSD as a defence, and to use it, starts with a lawyer who can help the war veteran with PTSD argue for mitigation of sentence or offence, on the basis of his previous service and his resulting PTSD. With PTSD and military service, the defendant can argue for leniency and/or a partial or absolute discharge of criminal responsibility.

In fact, the research findings indicate that when a war veteran with PTSD is placed in prison without treatment, his PTSD symptoms will become increasingly worse. As a result, the defendant is more likely to re-offend upon release. Therefore, punishing a war veteran with PTSD serves no real useful purpose, as it does not act as a deterrence, nor will it achieve retributive justice, and the offences will likely become worse as time goes on. It is, therefore, important for the legal community to become involved in the identification and treatment of war veterans with PTSD, and to improve the definition and conditions of obtaining the status of a veteran. Advocacy for this class of offenders will begin in the courtroom (the community at large must recognise that PTSD is a phenomenon that deserves attention and protection for

¹³¹⁰ *ibid.*

war veterans).

10.3.2. Medical Communities

Medical communities alone cannot help war veterans with PTSD. Medical communities can diagnose and treat PTSD sufferers only if they voluntarily seek treatment. As the research findings indicate, there are stigma obstacles to diagnosis and treatment-seeking behaviour. Many individuals with PTSD are afraid of the label associated with a mental illness, and will opt out of treatment even after diagnosis. The medical community cannot compel these individuals to seek treatment (however, a mandatory screening process could be useful).

War veterans have also been found to be very averse to seeking treatment for PTSD. Stecker, Shiner, Watts, Jones, and Conner, carried out a study on 143 veterans from OEF and OIF who had PTSD but had not received treatment for their condition. The results of the study showed that these veterans did not seek treatment due to the fact that they were not emotionally ready for such treatment, could not afford it, or were not confident of the effectiveness of treatment.¹³¹¹

It therefore follows that medical communities should become more involved in the effort to ensure that war veterans with PTSD seek treatment before they end up coming into contact with the criminal justice system. To start with, the medical community can heighten awareness of the effectiveness of treatment. This effort would help war veterans with PTSD to come to terms with the need for treatment, and at the same time, it would help the veteran to prepare emotionally for such treatment.

10.4. Suggestions for Future Research

The results of this study have identified a number of areas where there are gaps in the literature requiring further research. One such gap that should attract further research is the

¹³¹¹ Stecker and others (n494) 280.

effect of treatment on PTSD offenders, especially war veterans. What we were able to discern in this research study is that when a war veteran or an ordinary defendant with PTSD goes untreated, he will be more likely to commit a criminal offence than someone in the general population. We have also learned through this research that when the untreated PTSD sufferer commits a crime and is incarcerated, rather than submitted to treatment, he will be at a higher risk of re-offending.

What is lacking in the literature is evidence of what happens to a PTSD patient who is treated, and his relationship with the criminal justice system. Further research will indicate whether treatment for PTSD avoids future offending. Further research will also reveal whether or not treatment after an initial arrest will lower the risk of recidivism.

Further research should be conducted on the philosophical contention of the complicity of states in the case of a war veteran with war-related PTSD who goes on to commit a crime. Research should be aimed at examining the practical implications of theories of criminal responsibility in the case of war veterans with PTSD, and the state's complicity when one examines how crime is a result of war-related PTSD. The underlying research question should be whether or not criminal responsibility for war veterans with PTSD should be lowered due to the state's complicity in the person having war-related PTSD.

Another philosophical question that should be further researched is whether or not society's gratitude toward war veterans with PTSD, expressed through reduced criminal responsibility, increases the risk of malingering. The philosophical and practical arguments that war veterans with PTSD should receive treatment as opposed to punishment, should be researched in order to determine whether meaningful outcomes can be predicted. The research topic should focus on whether society's debt of gratitude toward war veterans should be converted to leniency in the criminal justice system, and whether this gratitude should be manifested in the recognition that war veterans deserve treatment as opposed to punishment.

The research findings indicate that there is a need for further research on the success/ability rate of war veterans with PTSD who use insanity, automatism, self-defence, and diminished responsibility as defences, or in mitigation of sentence. It is also recommended that research on the VTCs and statutes aimed at leniency for war veterans with PTSD in countries other than the US be carried out. As it now stands, research on this area is primarily limited to the US.

Abbreviations

APA	American Psychiatric Association
BRD	Beyond a Reasonable Doubt
BWS	Battered Women Syndrome
CBT	Cognitive Behavioural Therapy
DSM	Diagnostic and Statistical Manual of Mental Disorders
GBH	Grievous Bodily Harm
GBMI	Guilty But Mentally Ill
MHA	Mental Health Act
MPC	Model Penal Code
NGRI	Not Guilty by Reason of Insanity
NHS	National Health Service
OEF	Operation Enduring Freedom
OIF	Operation Iraqi Freedom
PTSD	Post-Traumatic Stress Disorder
UK	United Kingdom
US	United States of America
VA	The United States Department of Veterans Affairs
VTC	Veterans Treatment Court

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