

Home Free: Combatting Veteran Prosecution and Incarceration



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Abstract

After nearly 13 years of warfare, hundreds of thousands of U.S. veterans face social problems such as unemployment, homelessness, and suicide. But from the perspective of a criminal-defense practitioner, the most pressing disorder is the one that historical antecedents foretold: veterans facing prosecution and incarceration for various sorts of conduct that may be classified as criminal.

So often these social disorders are symptoms of training and experience in the military, particularly for those who saw combat and suffer from post-traumatic stress disorder, traumatic brain injury, or both. Moreover, strategic miscalculations in the war effort exacerbated these disorders, as have the facts that virtually the entire nation decided to excuse itself from physically participating in the war effort, and the nation decided that the effort was not even worth paying for.

As a result of these miscalculations and decisions, the agency charged with reintegrating veterans into civilian society—the Department of Veterans Affairs—is inadequately funded. That lack of funding, coupled with the agency's own forms of mismanagement, have left it incapable of providing hundreds of thousands of veterans the rehabilitative services that a moral society would demand.

Were the nation now to accept its obligations as a moral society, it would accord the proper respect to and understanding of the demands and consequences of military

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service. It would find compassion, instead of antipathy, for its beleaguered veterans. Following that, the nation would provide the resources necessary to meet the demands of a moral society that is committed to aiding its beleaguered veterans in reclaiming their civilian lives.

Introduction

In recent years, much has been written about the social problems confronting substantial numbers of veterans of the nation's nearly 13-year-old Global War on Terror (GWOT). The problems getting the most attention are unemployment, homelessness, and suicide. But from the perspective of a criminal-defense practitioner, the most pressing social problem is veterans who have found themselves on the wrong side of the law, facing criminal prosecution and imprisonment.

Part of the difficulty with addressing this problem is that too often, the public concludes that the disorder stems from a failure of individual character having nothing to do with military service. The public assumes that veterans of other wars—specifically, World War II veterans—returned home from war and resumed their civilian lives without difficulty. This assumption enables the public to spurn the current generation's veterans who find themselves entangled in the criminal-justice system.

Historical antecedents show that this sort of public conclusion is based on a false assumption. The antecedents show instead that veterans of past wars were afflicted with the same sorts of disorders as today's veterans. The difference is that today's veterans are more likely to be prosecuted and punished for conduct that World War II veterans of past wars would not have been.

Preceding the question of why so many of the current generation's veterans face criminal prosecution and imprisonment is the question of whether such numbers actually exist. Proof is found in state prison populations themselves.

Consider Oregon. The federal Office of Justice Programs Bureau of Justice Statistics estimated that as of 2004, veterans comprised 10% of the nation's total prison population. Individual state's imprisonment rates in 2004 are not available. But presumably the nationwide rate held true in Oregon, which now has the nation's highest known veteran imprisonment rate (Brown, et al. 2013, p. 11). Its top ranking is a relatively recent development. According to Oregon Department of Corrections (ODOC) public records and research manager Anita Nelson, in 2012 the state's prison system held 2,682 veterans (Nelson 2013). As of July 2012, Oregon

imprisoned a total of 14,187 inmates (ODOC 7/1/2012), so veterans comprised 18.9% of the state's prison population. Assuming 2004's nationwide rate applied in Oregon, over the next eight years the state's veteran-imprisonment rate increased by 89%.

From there the statistical analysis gets worse. When veterans comprised 18.9% of the Oregon's prison population in July 2012, the state's total population stood at 3,899,353 (United States Census Bureau: Oregon). Oregon's total veteran population then stood at 328,138 (Oregon Dept. of Veterans' Affairs: Veteran Statistics), making veterans 8.4% of the state total. Veterans having an 8.4% share of the total state population, but an 18.9% share of the state's prison population, meant that veterans were overrepresented in Oregon prisons by a factor of 125%.²

Historical antecedents explain the predictability of the problem of veterans enmeshed in the criminal-justice system. In her analysis of the subject of 87 years ago, Edith Abbott explained: "The effect of war on crime conditions was much discussed throughout the period of the Great War [World War I], and there has been a post-war interest in many countries as to the effect of war in producing an aftermath of crime" (Abbott 1927, p. 71). Indeed, Abbott found other commentators on the subject "of war producing an aftermath of crime" dating to as far back as Sir Thomas More's 1516 work, *Utopia*.

Based on a public perception stemming from political promises, the nation anticipates that its nearly 13-year-long GWOT finally is coming to an end. Following that, the nation then might expect to enjoy a sustained reduction in the number of veterans facing these problems. But given the nature of war generally, and of the GWOT in particular, neither event is likely to happen anytime soon.

The Nation's March to War

The U.S. began its march to war on September 14, 2001, when Congress approved a modern version of a declaration of war, euphemistically called an Authorization for Use of Military Force (AUMF). It came as Senate Joint Resolution 23, whose Section 2 authorized the President to use all necessary and appropriate force

² Most shocking is that in 2012, women veterans were overrepresented in Oregon prisons by the incredible factor of 657% (Barton 2014). Sadly, no veteran-service organization—not even those that are dedicated to serving women veterans—has expressed more than a passing concern with this statistic.

against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons (U.S. Senate, 2001).

Combat operations formally began on October 7, 2001, when the U.S., joined by the United Kingdom and, a bit later, by the now all-but-forgotten Afghan military front called the Northern Alliance, launched Operation Enduring Freedom (OEF)-Afghanistan. Conventional wisdom holds that those military operations finally will end in 2014.

But in all likelihood they won't. Although current Afghan President Hamid Karzai has steadfastly refused to sign a bilateral security agreement that would allow a residual U.S. military presence after 2014, Karzai is a "lame duck." His successor almost certainly will sign an agreement. According to a May 27, 2014 White House statement, the eventual agreement should permit a multi-brigade-sized U.S. military force to remain and "continue supporting Afghan forces . . . and continuing to support counter terrorism operations against the remnants of al Qaeda" (Kaplan 2014).

Moreover, even the complete withdrawal of U.S. military forces from Afghanistan would not mean the end of the GWOT. Although OEF primarily has involved military operations in Afghanistan, it has other components. These include: OEF-Philippines, OEF-Horn of Africa, OEF-Pankisi Gorge, OEF-Trans Sahara, and OEF-Caribbean & Central America. Many of these smaller components are and will remain operational after 2014. No matter what happens in Afghanistan, the GWOT will endure beyond 2014. And as history attests, that endurance ensures a continued growth in the veteran portion of prison populations.

Societal Forces Contribute to Veteran Prison Population Growth

Understanding the historical predictability of the current problem of, to use Abbott's phrase, "war producing an aftermath of crime," requires a review of various societal forces. These include both political and economic forces that influenced the nation, its war effort, and its veterans.

Consider the assertion of retired Army colonel Jack Jacobs: “We love the troops, and you know why we love the troops? Because we don’t have to be the troops” (Thompson 2011, p. 34). Not “having to be the troops” has enabled a couple of things. One is the astonishing degree to which the American public is detached from the nation’s war effort. The other is a profound lack of public understanding of military service. As veterans’ advocates repeatedly have seen, this public obliviousness to the attributes and effects of military service can have serious, deleterious effects on veterans’ ability to reenter civilian society successfully. These deleterious effects include conduct that can end with the prosecution and imprisonment of veterans.

Viscerally, the number of US service members who have been deployed into combat zones during the GWOT seems large. According to the Department of Defense (DoD), by 2013 around 2.5 million U.S. service members had been deployed (Adams 2013).

Although the sheer number is large, relative to the nation’s population the number is small—less than 1% of the American public.³ Impressing military service on the 1% freed the other 99% of Americans to lead peace-time lives when their nation was in a global war. To paraphrase Bertolt Brecht, it was almost as if the U.S. gave a war and no Americans came.⁴ As Adrian R. Lewis put it, “The most significant development in the conduct of war in the twentieth century was the [near total] elimination of the American people from the conduct of the wars of the United States” (Lewis 2012, p. 486).

What made this near total elimination possible also is why Americans “don’t have to be the troops.” More than four decades ago, the nation committed to relying on volunteers, rather than conscription—a “draft,” with “draftees” being what some call “the conscience of the military” (Brown 2014)—to meet its military’s manpower needs. The nation reaffirmed that commitment when it decided to rely on a volunteer force to conduct the GWOT.

³ The 1% statistic should include not only those who actually served in the military, but also “Blue Star” families—i.e., families with loved ones serving in the military. Traditionally, those families display blue stars in such places as the front windows of their homes, to mark their status until the safe return of their men and women in uniform. The statistic also includes “Gold Star” families. They display gold stars to mark the fact that although they once were Blue Star families, their loved ones did return home, dead.

⁴ During the Vietnam War, “doves” used the first line of a Brecht poem as an anti-war slogan: “What if they gave a war and nobody came?” This was strangely ironic. As shown by the poem’s very next line, “Then the war will come to you!” Brecht’s poem urged engaging in war, not avoiding it.

But if, for the sake of the war effort, the nation had chosen to use a conscripted military to supplement the preexisting volunteer force, that decision undoubtedly would have compelled the nation to far more closely scrutinize the war's necessity. That closer scrutiny could have changed both the scope and duration of the war effort.

For example, the party responsible for the 9/11 attacks, al-Qaeda, largely was headquartered in Afghanistan. With a conscripted military, the nation very well might have chosen to launch the GWOT's initial component, OEF-Afghanistan, after the prior legal government of Afghanistan, the Taliban, rejected U.S. demands to extradite key al-Qaeda leaders (e.g., Osama bin Laden).

On the other hand, with a conscripted military the nation very well may have objected to an OEF-Afghanistan that extended years after military operations essentially contained al-Qaeda, and that, so far, has seen about 2,500 Americans killed in action.

With a conscripted military, it is even less likely that the nation would have embraced the GWOT's second component, Operation Iraqi Freedom. The legal basis for that component was a second AUMF, which Congress approved on October 11, 2002. This AUMF authorized the federal government's executive branch to use military force if Sadaam Hussein's Iraqi government failed to comply with United Nations Security Council Resolution 1441. That resolution required cooperation with U.N. weapon inspectors to verify that Iraq did not possess weapons of mass destruction (WMDs). But the second AUMF has been characterized "as so open-ended as to abdicate up front all congressional responsibility for subsequent oversight" (Milburn 2010). Chances are good that with a conscripted military, the nation would have insisted on an AUMF that demanded much more oversight than the one that allowed the war effort to extend into 2011—which was about eight years after confirming that Iraq had no WMDs, and during which time nearly 4,500 U.S. service members were killed in action.

By comparison, consider the nation's war effort during World War II. The necessity of that war effort was clear, and the national commitment to it essentially was universal. With that commitment, the nation waged a two-theater war that, by most metrics, was far more complex than the GWOT. And the nation successfully completed that war effort in fewer than four years.

Also during World War II, military service essentially was universal. Conscripted service was used, but not to meet the nation's manpower needs. It was used instead to

regulate an orderly influx of volunteers so massive that, for example, 500 major leaguers left their ball clubs to serve in the military (Baseball in Wartime).⁵

In truth, if the national commitment to the GWOT resembled that of World War II, the GWOT's manpower needs might have been met without conscription (regulate an orderly influx of volunteers). But a short while into the war effort, the nation's commitment dwindled off until now it barely exceeds such things as the occasional bumper sticker, feel-good television ads showing soldiers returning to their home towns and being greeted with mugs of beer, and American flags atop the "pins" used on the greens in golf tournaments. The national commitment certainly did not generate anything like professional athletes *en masse* exchanging team uniforms for military ones. Instead, the national commitment became so nominal that it necessitated a type of *de facto* conscription that then U.S. Senator and now Secretary of State John Kerry called the "backdoor draft" (White 2004).

The backdoor draft is comprised of two components. One is "stop loss," which, under Title 10, section 12305(a) of the U.S. Code, allows the retention of military personnel beyond the lengths of their enlistments. Along with the code provision is Paragraph 10(c) of the Armed Forces Enlistment Contract, which states: "In the event of war, my enlistment in the Armed Forces continues until six (6) months after the war ends, unless the enlistment is ended sooner by the President of the United States." From 2002 through April 2008 alone, stop loss was used to extend the lengths of 58,300 service members' terms of enlistment (Brook 2008).⁶

The backdoor draft's second component is the repeated deployments of active duty, reserve, and National Guard personnel. For example, of the approximately 2.5 million service members who had been deployed by 2013, "a third were deployed more than once," and, of them, "37,000 . . . had been deployed more than five times" (Adams 2013).

Compare this with the Vietnam War, when the nation used conscription. Service members served 12- or 13-month tours (depending on their military branch). After their first tours, service members were not deployed again unless they volunteered. This means that compared with the Vietnam policy, a GWOT service member who was deployed five times essentially did the duty of **five** service members during the Vietnam War.

⁵ This mass exodus of major leaguers had salutary benefits. For example, it spawned the All-American Girls Professional Baseball League, as popularly dramatized in the Penny Marshall film, *A League of Their Own*.

⁶ The Kimberly Peirce film, *Stop Loss*, dramatically portrays both the injustice of stop-loss, and the futility in opposing it.

President Obama's guest at the 2014 State of the Union Address, Sgt. 1st Class Cory Remsburg, epitomizes the backdoor draft's repeated-deployment component. Sgt. Remsburg served 10 combat tours in the GWOT. During his final deployment he suffered nearly fatal wounds that left him comatose for three months, and ended with his honorable discharge for medical reasons.

Of great interest is Sgt. Remsburg's adamant statement that "hands down," he has no regrets about his military service (Sunday Morning 2014). The fact that despite all that he suffered, Sgt. Remsburg would, if he had the chance, do it all over again is something that a civilian public, oblivious to military service, cannot readily comprehend.

But many veterans can. Consider what Civil War combat veteran Oliver Wendell Holmes, Jr. said in his "The Soldier's Faith":

Who is there who would not like to be thought a gentleman? Yet what has that name been built on but the soldier's choice of honor rather than life? To be a soldier or descended from soldiers, in time of peace to be ready to give one's life rather than suffer disgrace, that is what the word has meant; and if we try to claim it at less cost than a splendid carelessness for life, we are trying to steal the good will without the responsibilities of the place (Holmes 1895).

Viewed through Justice Holmes's prism, Sgt. Remsburg based his adamancy on a matter of personal honor, and on his belief in the righteousness of his cause. But his adamancy also could be viewed through a different prism—for example, through that of war correspondent Chris Hedges. Like Hedges, Sgt. Remsburg might have based his statement on something that would have been beyond his control: "The rush of battle is a potent and often lethal addiction, for war is a drug, one I ingested for many years" (Hedges 2002, p. 3).⁷

But war itself is not the addictive force. Instead, it is the bonding of soldiers, as Kennedy described in *They Fought for Each Other* (2010), which documents an infantry company's life-and-death struggle to secure the city of Adhamiya, Iraq. The addictive force is as OEF-Afghanistan veteran Derric Winters explained: that what he "missed—the only thing, really—were the soldiers"—his buddies—"the men he fought for and fought with. Eighty or so men in total. That was his war. The incentives and consequences; the love and loss. They were all of it, right there" (Saslow 2014).

⁷ For reasons that become clear by the film's end, the first frame of the Academy Award-winning Kathryn Bigelow film, *The Hurt Locker*, quotes Hedges' statement.

These anecdotes are mirrored by the findings of the Washington Post and the Kaiser Family Foundation poll of 819 Iraq and Afghanistan veterans, conducted from August 1 to December 15, 2013. Like Sgt. Remsburg and Derric Winters, most of today's veterans find no cause to regret their decision to join. Nearly nine out of 10 would do so again. Indeed, a majority of those who participated in the Iraq and Afghanistan wars profess to "miss" something they experienced there.

What they miss is not the chance to kill jihadists, pursuant to spreading democracy and the American way of life, but comradeship experienced in the midst of trying circumstances. In that regard, of course, today's veterans do not differ greatly from prior generations. However mystifying to those who have never spent any appreciable time in uniform, the bonds formed between soldiers in the course of wartime service—and even on occasion in service other than in wartime—have an immediacy and intimacy seldom found in other walks of life (Bacevich 2014).

Surely Bacevich is right—that if civilians who "never spent any appreciable time in uniform" were asked, they could not to explain (except perhaps through platitudes or derogatorily) why Sgt. Remsburg and nearly 90% of his fellow war veterans would do it again if given the chance. The intimate comradeship in the face of mortal peril is what gives war its addictive quality—which makes Robert E. Lee's admonition so profound: "It is well that war is so terrible, or we would grow too fond of it" (quoted in Porter 1907, p. 302).

Attendees at the State of the Union Address gave Sgt. Remsburg a standing ovation—a richly deserved approbation, to be sure. But his presence was much less a cause for national celebration than it was a cause for national shame: Shame in the fact that the nation would choose to impress its war effort on such a small part of its population that one person would do 10 different times what 99% did not do at all.

There is one other remarkable aspect of the nation's lack of commitment to the GWOT: Its decision to force someone else to pay for the war. For the first time since the War of 1812, the nation chose to finance a war effort by borrowing, instead of by paying for it through a war surtax (Pincus undated).

From 1812 to 1815, while it was fighting "the second revolution to prove the first" (Nevin 1996), the nation was so young that it could not possibly have financed its war effort through a surtax. But during the GWOT, when it had the largest

economy in planetary history, the nation not only declined to impose upon itself a war surtax, it did the exact opposite: It rewarded itself with a tax cut (Pincus).⁸

The irony of the nation's decision to cut taxes, rather than to self-impose a war surtax, is inescapable. The founders of this nation declared independence and fought a bloody, eight-year war of independence because of the mother country's "abuses and usurpations." These included "imposing Taxes on us without our Consent" (American Declaration of Independence).

The nation's rejection of a surtax to finance the GWOT, in favor of a tax cut, will require future generations of Americans to pay for a war effort undertaken without their consent. Surely this resounds as a repudiation of a key reason for why the nation sought and fought for independence more than two centuries ago: taxation without representation.

Finally, by the end of 2014 GWOT combat deaths will total around 7,000 Americans. This may seem small given the war's length and relative to other of the nation's wars. But the size is misleading. During the Vietnam War, the wounded-to-killed ratio was 2.4-to-1 (Kitfield 2011). Owing to tremendous advances in such things as combat medicine and body armor, some estimates put the GWOT's ratio at as high as 16-to-1 (Kitfield).

The reduction in the wounded-to-killed ratio is remarkable for a second reason, that being the change in the "tooth-to-tail" ratio. This "refers to the number of troops in a military organization employed in combat duties"—the "tooth"—"versus the number functioning in noncombat roles"—the "tail" (McGrath 2007, p. 2). Historically, the ratio of American military forces was 10-to-1 (Evans 2008), meaning ten noncombatant service members for each member in combat. Owing to such things as the privatization of functions previously filled by service members (Isenberg 2009), the ratio of the GWOT shrank to 3-to-1 (Evans). This means, for example, that compared to the Vietnam War, a GWOT veteran is three times more likely to have seen combat than is a Vietnam veteran.

If the wounded-to-killed ratio still were 2.4-to-1, combat deaths in the GWOT likely would exceed 30,000 Americans by year's end. Moreover, this shift in casualties, from killed to wounded, when combined with hopelessly optimistic casualty projections at the front end of the U.S. military effort in Iraq, go far in explaining why the federal VA and the veterans it serves suffer from such an horrific backlog of disability claims.

⁸ Not that this self-indulgence is surprising. After all, in the early days of the GWOT, the president told the nation that its proper patriotic response was to go shopping (Bacevish 2008).

A pair of statements issued by former executive branch officials epitomize these hopelessly optimistic casualty projections. The first was former Vice-President Cheney's March 16, 2003 statement assuring the nation that American forces had little to fear in Iraq, for they would "be greeted as liberators" (Informationclearinghouse). The second was a statement former President Bush made in a July 2, 2003 news conference, in which he said that Iraqi insurgents planning attacks on U.S. forces could "Bring'em on" (Johnson 2010).⁹

These statements capture what then was administration doctrine—that military operations in Iraq would go smoothly with few casualties; that it essentially would be a replay of 1991's eminently successful, 100-hour-long Operation Desert Storm. Indeed, as former Army chief of staff Gen. Eric Shinseki learned, questioning the doctrine by more accurately predicting the challenges U.S. troops would face in Iraq would get you fired (Ricks 2012, pp. 402-03).

In sum, the nation has engaged in nearly a 13-year-long strategically misguided war that it did not see fit to finance, and that 99% could blissfully ignore while the other 1% carried the entire burden. Perfectly correlated to these policy decisions is a VA that seems incapable of providing to hundreds of thousands of veterans the level of rehabilitative services that a moral society would demand (Hicks 2014).¹⁰

A not infrequent response to this type of criticism is that because those who served in the war were not drafted, they served by choice. If they now suffer from physical or psychological wounds, or even if they were killed, they have only themselves to blame.

Besides ignoring the fact that thanks to the backdoor draft, upward of a million GWOT veterans had no real choice about whether they would return repeatedly to combat zones, the attitude voiced by this response is cavalier to the point of immorality. Moreover, this immoral attitude is a definite component of the lack of

⁹ This statement may be the only time a sitting president publicly baited the nation's enemies to attack American service members. One month after making it, and out of solidarity with service members and veterans (and perhaps as a sort of penance), Pres. Bush gave up playing golf (Pilkington 2008). Five years after making the statement, Pres. Bush expressed his regret for making it (Mooney 2008).

¹⁰ If the administration had heeded Gen. Shinseki's warnings, it might also have prepared for the onslaught of cases the war would send the VA's way. Ironically, Gen. Shinseki, who later served as secretary of the VA, became the scapegoat for the VA's maladministration. As Hugh Gusterson, explained, "The problem [with the VA] was not one of leadership or integrity . . . but of simple arithmetic. In the words of the *Washington Post's* David Farenthold, 'there were too many of the veterans. There were too few of the doctors.' Even a General Eisenhower or a General MacArthur would not have prevailed against those odds" (Gusterson 2014).

commitment that allowed virtually the entire nation to avoid physical and financial participation in the GWOT. The general public's avoidance of meaningful participation is a foundation of the war effort, for without it, the war would not have been fought as it was.¹¹

Meanwhile, no one should think that GWOT veterans are fools and ignorant of the war effort's lack of meaningful public support. The public must recognize that veterans are aware, and that their awareness plays a role in the array of societal problems that confront so many veterans, including those that lead to criminal prosecution and imprisonment.

The War Will End, But the Casualties Won't

As explained in Brown, et al. (2013, pp. 4-7), the nation's lack of commitment to and understanding of military service enables the acceptance of a key aspect of the "Greatest Generation" myth: That, like the legend of Cincinnatus, every World War II veteran came home, went back to work, raised a family, helped turn America into the greatest nation in planetary history, and did all that without a hitch.

But Cincinnatus is not a realistic model for how post-war veterans should live their lives. Cincinnatus was a Roman aristocrat who left his farm when called to serve as dictator to defend Rome against foreign invasion. Fifteen days later, after leading a defeat of the invaders, Cincinnatus resigned as dictator and returned to his farm. But Cincinnatus's involvement in the war not was very short-lived. Moreover, it was strategic rather than tactical, so Cincinnatus did not engage in combat.

Compare this with those who do engage in combat:

*For many veterans, **particularly those veterans who have participated in combat**, their military total institution experiences are embedded for life. Similar to PTSD, for which there is no cure, the experiences acquired in the military total institution become[] part of the baggage that many veterans will carry as they navigate through their reintegration process back into the civilian culture. Many*

¹¹ To be sure, domestic programs that were designed to counteract terrorism, such as the Patriot Act and spying by the National Security Agency, qualify as public participation in the war effort. But for the "average" American, physical participation in those programs is intangible, and the financing of those programs will be billed forward for payment by future generations.

On the other hand, an immediate and tangible form of participation in the war effort—particularly for the nation's underclass—is the on-going militarization of civilian police agencies (abetted by a federal program, which authorizes the DoD to transfer surplus weapons and vehicles to police agencies). But that is the subject for an analysis separate from this article.

veterans are not aware of that baggage until they become homeless, involved in a domestic violence situation, or a defendant in the criminal justice system (Brown 2010, pp. 610-11 (emphasis added)).

But because of the everyone-was-a-Cincinnatus “Greatest Generation” myth, the modern American public has limited compassion for veterans who find themselves on the wrong side of the law, facing criminal prosecution.

Ironically, immediately after World War II, post-war American society was too well versed in military service to have embraced its own myth. For example, Time magazine published an article that described World War II veterans facing societal problems that mirrored those that GWOT veterans now face. The article compelled Samuel Goldwyn to commission a book that later was made into a film, *The Best Years of Our Lives*. Directed by World War II veteran William Wyler, and featuring an all-star cast that won multiple Academy Awards, including for Best Picture in 1946, the film depicts World War II veterans suffering from physical disabilities; emotional detachment, isolation, and abandonment; infidelity and divorce; alcoholism; unemployment; and debilitating post-traumatic stress disorder (PTSD).

In a criminal-law context, the film’s most poignant scene involves the Dana Andrews character, Fred Derry. He was a bombardier during the war and suffered terribly from PTSD. While at work one day in his dead-end job, Derry wrongly thought he saw a man assaulting a friend who was a physically disabled veteran. Acting on, in Holmes’s words, a “choice of honor . . . rather than suffer disgrace,” Derry attacked the man in a manner that modernly very well would end in Derry’s arrest, prosecution, and imprisonment.

As a consequence of the attack, Derry lost his dead-end job, but that was it. He was not arrested, let alone prosecuted and imprisoned. This was to no one’s surprise or dissatisfaction in 1946 America, because the everyone-was-a-Cincinnatus “Greatest Generation” myth did not then exist. What existed instead was an informed public that understood the realities of military service—how it can change people into what they otherwise would not be.

For example, that generation well understood that service members “are conditioned to select the fight option, as opposed to the flight option, when confronted with dangerous or stressful circumstances” (Brown 2010, p. 610), and that this conditioning cannot just be “switched off” after veterans come home from war. That generation recognized that although Derry was no longer in a war zone physically, he still was psychologically. When Derry thought he saw someone assault a friend and disabled veteran, he was “confronted with dangerous or

stressful circumstances” and did exactly as he was conditioned to: He “selected the fight option.”

Owing to immediate post-World War II American society’s compassion toward veterans, and its implicit understanding that service-connected PTSD (then called “battle fatigue”) so “often leads to . . . criminal behavior” (Seamone 2009, p. 155), that society recognized that given Derry’s psychological makeup, what he did was reasonable. Indeed, that society might even have seen fit to conclude that Derry’s actions fit within laws stating that “conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by” separate laws that govern “the military services and conduct of war” (Oregon Revised Statutes §§ 161.195(1) and (2)(d)).¹² This is why in 1946, no one was surprised or dissatisfied when the sole penalty Derry suffered was losing his dead-end job.

Another example of Hollywood’s portrayal of the societal problems veterans face when trying to reenter civilian society is a 1990 episode of the television series *Star Trek: The Next Generation*, “The Hunted.” As the Internet Movie Database explains, in that episode, Jean Luc Picard, played by British actor Patrick Stewart, on behalf of his planetary federation, went on a diplomatic mission to a planet that recently had found peace after a brutal civil war, and which now sought admission into the federation. By a turn of events, Picard was forced to deal with Roga Danar, played by Jeff McCarthy, who had escaped from the planet’s penal colony. Picard eventually learned that Danar was a decorated civil war veteran. But the vast majority of the planet’s citizens were committed to “pacifism and intellectualism.” They almost universally avoided military service, leaving the war to be fought by a small number of citizens, such as Danar, who, through a combination of “chemical and mind programming,” had been transformed into “perfect soldiers.” At war’s end the soldiers no longer were needed. Although they had committed no crimes, they were considered threats to society. Rather than use medical and psychological therapies to restore the veterans to their pre-war selves, planetary officials ordered them transported to a penal colony to live out their days. In light of the planet’s immoral treatment of its veterans, Picard deemed the planet unfit for federation membership. He rejected its request for admission, and left the planet to its own devices.

¹² Whether Derry’s use of physical force in defense of his friend was legally allowed “depends on [his] **own** reasonable belief in the necessity for such action” (*State v. Oliphant* 2009, at 191 (emphasis in original)). In other words, if everyone besides Derry would have personally believed that the use of force was **not** reasonably necessary, but the PTSD-afflicted combat-experienced Derry personally believed that the action **was** reasonably necessary, Derry could legitimately use force.

As were so many episodes of the *Star Trek* television franchise, "The Hunted" was allegory. It examined the mistreatment of veterans by post-war societies—a topic frequently explored in poetry, such as Rudyard Kipling's "Tommy" and "The Last of the Light Brigade," Wilfred Owen's "*Dulce Et Decorum Est*," and Steve Hassna's "#68."

But consider the remarkable parallels between "The Hunted" and the GWOT. Both involved wars fought by small portions of their nations' populations, so the vast majority could enjoy peacetime lives. Both involved post-war societies that, instead of providing sufficient rehabilitative services that could restore their veterans to their pre-war selves, imprisoned them as threats to society.

Interestingly, a question that perhaps only Patrick Stewart can answer is whether he considers "The Hunted" a science-fictional dramatization of his family's post-World War II experience. When Stewart was born, his father, Arthur, was in the British army (Grant 2014, p. 50). Stewart did not meet his father until after the war ended in 1945, when Stewart was five years old. Arthur "was a weekend alcoholic who beat up [Stewart's] mother and terrorized the house" (p. 50). Stewart and his brothers urged their mother to leave their father, "But she never would" (p. 51).

In 2012, while researching his family's genealogy for the BBS program "Who Do You Think You Are," Stewart finally learned the source of his father's conduct (Grant, p. 77). He learned that Arthur was a regimental sergeant major in a paratroop regiment that saw combat and human suffering to a degree unseen even by most military veterans, and that certainly is far beyond the comprehension of a civilian population oblivious to military service and the realities of combat. And, Stewart learned, his father suffered terribly from PTSD.

Until he conducted this research, Stewart knew nothing about his father's military service, let alone his PTSD. After learning of it:

Stewart quickly consulted PTSD experts and gained an appreciation for his father's travails. "Civilian slaughter, his life endangered, the possibility of being captured and in a prisoner of war camp for who knows how long," Stewart explains. "He never got treatment. He was told to pull himself together and be a man." The discovery, Stewart says, has allowed him to "reassess" who his father was, but not excuse the behavior. And it has propelled his efforts to help prevent others from suffering. He has signed on as a patron of Combat Stress, a British charity that supports veterans struggling with mental health problems (Grant, p. 77).¹³

¹³ The fact that Arthur never received treatment is particularly heartbreaking for a separate reason. During World War I, British medical services made significant strides in the treatment of veterans who suffered from PTSD, which then was called "emotional shell shock" (as opposed to

It would be wonderful if modern civilian society understood such things as military service-connected PTSD and consistently found room to give it full consideration in veteran-defendant cases. Unfortunately, that is not the case.

Consider the Washington County, Oregon prosecution of Robert Helmick. As Reese explained (2011), Helmick is a veteran of both Afghanistan and Iraq. He suffered terribly from PTSD, anxiety disorder, and a long-standing sleep disorder. Without benefit of proper medical supervision, he was prescribed Ambien to induce sleep. One night, while sleeping under the influence of Ambien, Helmick attacked his girlfriend. He became suicidal after he awoke and learned what he had done. Helmick's girlfriend, a veteran herself, was not concerned for her own safety. But she was concerned for Helmick's, so she called for help. Police responded. But instead of addressing Helmick's suicide threats, they arrested him. He was prosecuted for domestic-violence charges.

Later, two different judges implored the prosecution to exercise its discretion under the 2010 Oregon Legislature's Senate Bill 999 to divert Helmick to a treatment program instead of prosecution. Both times the prosecution declined. On the other hand, Helmick's lawyer, Kathleen Bergland, recognizing both the military's "unique culture and sub-cultures" and Helmick's training and experience in the military, assembled a culturally competent, multi-disciplinary team (Brown, et al. 2013) and presented a diminished-capacity defense. Helmick's jury then "diverted" the case, by acquitting him on all counts.

Admittedly, fairness to the prosecution requires recognizing that Bergland was not Helmick's first lawyer. Case law precedents, such as the U.S. Supreme Court's 2009 decision in *Porter v. McCollum*, make clear that when the facts support a defense theory grounded on the defendant's military service, constitutional standards of effective representation require defense counsel to present the theory.¹⁴ But Helmick's first lawyer declined to do so.¹⁵ Helmick then replaced that

"commotional shell shock," which now is called traumatic brain injury) (Alexander 2010). But by "a savage twist of fate, an estimated 60 percent of British military records from World War I were destroyed in the Blitz of World War II" (Alexander). Had those records not been destroyed, perhaps Britain would have had a better grasp of how to treat its PTSD-afflicted World War II veterans. And perhaps Arthur Stewart would have received the treatment he so desperately needed.

¹⁴ In *Porter*, the Court reversed a death sentence after holding that trial counsel provided ineffective assistance by failing to present mitigating evidence grounded on, *inter alia*, "(1) Porter's heroic military service in two of the most critical—and horrific—battles of the Korean War, [and] (2) his struggles to regain normality upon his return from war" (130 S. Ct. at 454).

¹⁵ *Lichau v. Baldwin* (2002) involves a somewhat similar failure. In that case, the veteran-defendant's trial counsel, through a failure of investigation and a lack of understanding of military protocols,

lawyer with Bergland, who successfully prepared and presented the diminished-capacity defense.

If Robert Helmick's case had arisen in shortly after World War II, in all likelihood he no more would have been arrested and prosecuted than was the fictional Fred Derry portrayed in *The Best Years of Our Lives*, or the non-fictional Louie Zamperini.

Laura Hillenbrand recounts Zamperini's life in *Unbroken: A World War II Story of Survival, Resilience, and Redemption*.¹⁶ Zamperini served in the Pacific Theater during World War II. In 1943, he was a crew member in a bomber that was sent on a search and rescue mission for a missing bomber. But Zamperini's bomber itself fell apart and crashed into the sea. He and a fellow crew member survived a horrifying ordeal until they were rescued by Japanese sailors. Eventually Zamperini landed in a Japanese prisoner of war camp where he endured unimaginable brutality, particularly at the hands of a sadistic guard nicknamed "the Bird."

Hillenbrand explains the tremendous challenges that Zamperini faced after his to civilian life, including his struggle for a healthy marriage with his wife, Cynthia. One incident starkly resembled Robert Helmick's somnambulistic strangling of his girlfriend:

One night in late 1948, Louie lay in bed with Cynthia beside him, He descended into a dream, and the Bird rose up over him. The belt unfurled, and Louie felt the buckle cracking into his head, pain like lightning over his temple. Around and around the belt whirled, lashing Louie's skull. Louie raised his hands to the Bird's throat, his hands clenching around it. Now Louie was on top of the Bird, and the two thrashed.

There was a scream, perhaps Louie's, perhaps the Bird's. Louis fought on, trying to crush the life out of the Bird. Then everything began to alter. Louie, on his knees with the Bird under him, looked down. The Bird's shape shifted.

Louie was straddling Cynthia's chest, his hands locked around her neck. Through her closing throat, she was screaming. Louie was strangling his pregnant wife.

He let go and leapt off Cynthia. She recoiled, gasping, crying out. He sat in the dark beside her, horrified, his nightclothes heavy with sweat. The sheets were twisted into ropes around him (Hillenbrand, ch. 37).

withdrew a meritorious alibi defense. The Oregon court ruled that counsel's performance was constitutionally deficient and ordered a new trial (333 Or. at 362).

¹⁶ A film version of Hillenbrand's book, directed by Angelina Jolie, is scheduled to be released on Christmas Day, 2014.

Given that this incident occurred so shortly after World War II, not surprisingly, there is no record of Zamperini being prosecuted for his somnambulistic strangling of Cynthia. In all likelihood, Robert Helmick would not have been prosecuted for his somnambulistic act, either, if his case had arisen back then.

But Helmick's case arose modernly, so at a time when so much of American society embraces the everyone-was-a-Cincinnatus "Greatest Generation" myth and is oblivious to the realities of military service. As a consequence, Helmick found himself on the wrong side of the law, facing criminal prosecution. Fortunately for Helmick, he avoided the conviction and imprisonment that has befallen so many of his fellow veterans. But he avoided it only because he had the foresight to replace his first attorney with the one who was committed to presenting his case effectively to his jury.

Veteran-Defendants Are Casualties of the War

The list of American casualties won't end when the war ends. Its aftermath will plague the nation for at least a generation. It will constantly remind us of a war that started long ago and that, because it could avoid the war both physically and financially, the nation largely did not question. The aftermath will include veterans suffering from physical and mental disabilities (including suicidal behavior), unemployment, and homelessness, which will generate public compassion and support services. The aftermath also will include veterans facing criminal prosecution, which will generate little or no public compassion even if their conduct is causally connected to military service.

Veterans like Robert Helmick, who face prosecution for domestic-violence charges, will have it even worse. Instead of facing limited public compassion, they can expect to face public antipathy, and to receive punishment instead of support services.

There are those who have done what they can to inform modern American society of the realities of military service. For example, Brown has provided expert services on military culture—the military total institution—multiple times in multiple jurisdictions on behalf of veteran-defendants (including Robert Helmick), and has written extensively on the subject. In "From War Zones to Jail: Veteran Reintegration Problems" (2011), Brown describes his study, conducted over a 15-month period across 16 states, of the pre- and post-military lives of 162 veterans of the GWOT whose demographics reasonably reflect those of GWOT veterans generally (pp. 13-17). The study's results reflect the lives of the veterans portrayed in *The Best Years of Our Lives*, and of Arthur Stewart and Robert Helmick, but

certainly not the everyone-was-a-Cincinnatus “Greatest Generation” myth. For example, the results disclose that post-military, the 162 veterans:

- Abuse alcohol at sharply higher levels than they did during their pre-military lives. This alcohol abuse includes using it as self-medication, to alleviate the PTSD symptom of difficulty in initiating and maintaining sleep (pp. 20-25).
- Compared to their pre-military lives, were significantly less able to develop and maintain healthy, interpersonal relationships (pp. 17-20).

Although Brown found that the 162 veterans’ pre-military unemployment rate was about the same as their post-military rate, in their post-military lives “[n]early 47% were unemployed (p. 14).” Consider that by war’s end, hundreds of thousands of GWOT veterans will suffer from PTSD and from the war’s “signature” injury, traumatic brain injury (TBI). Countless numbers of veterans will receive inadequate treatment, or maybe none at all, for their PTSD and TBI. Combining those afflictions with the high unemployment rate is ominous:

The potential consequences of nontreatment or inadequate treatment of veterans with PTSD [and TBI] . . . are actually latent precursors that increase the probability for veterans becoming entangled in the criminal justice system (e.g., Drug and alcohol abuse may result in a DUI charges. Marital problems and unemployment problems may evolve into domestic violence charges) (p. 10).

A report commissioned by the Institute of Medicine indicates that this probability is further increased by the fact that services for the afflictions are inadequate both in terms of quantity and quality. Acting under a congressional mandate, the institute convened a Committee on the Assessment of Readjustment Needs of Military Personnel, Veterans, and Their Families. In March 2013, the committee issued its report: “Returning Home from Iraq & Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, & Their Families.”

After recognizing the importance of supportive families in veterans’ successful reintegration into civilian society, the committee acknowledged an increase in domestic violence. Although the DoD provides family support services that are intended to facilitate successful reintegration, the services’ primary focus is on traditional families—i.e., married, heterosexual couples and their children. Moreover, the efficacy of these programs has been tested only on civilian families, so little is known of their effectiveness on veterans’ families. In addition to recommending that the DoD expand its definition to include nontraditional as well as traditional families, the committee recommends the development of services specifically designed for veterans’ families.

These recommendations would count as a positive, except for one thing: The types of services the committee envisions do not yet exist and may not exist for some time (if ever).¹⁷ Meanwhile, the committee's findings reflect the risks about which Brown warned, and demonstrate that immediate steps must be taken to reverse the increase in domestic violence.

Lurking in the shadows of Brown's warning and the committee's findings is the fact that so often, military families—their children in particular—suffer isolation and despair while their loved ones serve in combat. For example, the findings of a 2011 California Healthy Kids Survey “suggest that military-connected adolescents have much higher rates of feeling sad or hopeless than found in other national studies,” and show that

[r]ates of suicidal ideation . . . were also higher than reported in other studies. Whereas the 2011 [Youth Risk Behavior Surveillance System] data reported a rate of 15%, [the survey] found that 24.8% (parent in military) and 26.1% (sibling in the military) of youth reported seriously considered attempting suicide (Cederbaum, et al. 2013).

The problem then may be summed up as follows: Upon their return home, veterans of the longest war in the nation's history, in which so many veterans chose to participate as a matter of honor and brotherhood greater than their lives, and in which they had to participate repeatedly, because 99% of the nation did not participate at all, faced a public that loves them because they do not have to be them, that does not understand them, and that did not even see fit to pay for the war effort in which the veterans were willing to give their lives and even to sacrifice the well-being of their families.

On top of all that, hundreds of thousands of those veterans suffer from PTSD or TBI or both, and the numbers of veterans suffering from PTSD will continue to grow for years after the war's end.¹⁸ For reasons that epigenetics might explain, many of the veterans' family members also suffer from PTSD (Brown, et al., pp. 29, 30), and vast numbers of whoever suffers will receive inadequate treatment for their PTSD. This creates a “perfect storm,” which inevitably is a recipe for isolation and even

¹⁷ A 2014 report of the Institute of Medicine identifies yet another problem. Similar to its 2012 report, the institute's 2014 report explains that the DoD and the VA do virtually no tracking of the outcomes of PTSD treatment for service members and veterans. As a result, neither the DoD nor the VA knows if its provision of PTSD care is effective or adequate (Institute of Medicine 2014).

¹⁸ In 1929, the number of British World War I veterans suffering from emotional shellshock (i.e., PTSD) was 18.3% higher than it was when the war ended in 1918 (Alexander 2010, p. 66).

koyaanisqatsi—life out of balance—that leads to the sort of despair where criminal behavior finds a home.

Which begs the question: In the all-too-frequent event that veterans find themselves on the wrong side of the law, how will society treat them? With compassion reflective of an immediate post-World War II American society, which never so much as thought to question why Fred Derry was not arrested? Or with antipathy and neglect of the sort that Robert Helmick faced?

The proper approach rejects the everyone-was-a-Cincinnatus “Greatest Generation” myth. Instead, it recognizes the distinct possibility that but for their decision to join “the other 1%” by entering the military, veterans—in particular, those who saw combat—very well might not be the people who now find themselves on the wrong side of the law. It involves sociological evaluations to measure the extent to which veterans who, after reentering civilian society, face social problems that were foreign to them before their training and experience in the military (Brown 2011, p. 7). And it involves providing PTSD- and/or TBI-afflicted veterans’ quality medical treatment, rather than declaring them unfit for civilian society and consigning them to prison. But these things will be possible only with a civilian society that accords its veterans the sort respect for and understanding of military service found in Vietnam combat veteran Hassna’s plea in “#68”—that the nation must recognize that as one of its veterans, “I am your only son.”

Through that respect and understanding, the nation could meet its moral obligation “to bind up the nation’s wounds; to care for him who shall have borne the battle, and for his widow, and his orphan” (Lincoln 1865). With that the nation could attain compassion toward those veterans who struggle to reclaim their civilian lives. It then would treat each of its beleaguered veterans as its “only son,” and transform each of them into a Cincinnatus.

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