# CONDITIONED TO KILL: VOLITION, COMBAT RELATED PTSD, AND THE INSANITY DEFENSE – PROVIDING A UNIFORM TEST FOR UNIFORMED TRAUMA

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## Introduction

Oregon National Guardsman Jessie Bratcher shot and killed Jose Ceja Medina with six hollow-point bullets as Medina stood on his porch on a Saturday morning.[1] Bratcher, who served as a machine gunner in Iraq, would tell his attorney that during the shooting he felt like he was in Kirkuk, Iraq, and that the screams of Medina's fourteen-year-old nephew, were to Bratcher, the screams of an Iraqi woman.[2] At his trial, Bratcher was found guilty-but-insane due to Posttraumatic Stress Disorder (PTSD)[3] under Oregon's test for lack of mental capacity, which like the Model Penal Code (MPC) test, assesses both cognitive and volitional mental capacity.[4] Bratcher was sentenced to life under the supervision of the Oregon Psychiatric

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[1] Kim Murphy, *Did the war make him do it?*, L.A. TIMES (Nov. 28, 2009), http://articles.latimes.com/2009/nov/28/nation/la-na-soldier28-2009nov28 (last visited May 19, 2019).

[2] JAMSHID A. MARVASTI, WAR TRAUMA IN VETERANS AND THEIR FAMILIES: DIAGNOSIS AND MANAGEMENT OF PTSD, TBI, AND COMORBIDITIES OF COMBAT TRAUMA 165-66 (2012).

[3] Murphy, *supra* note 1.

[4] OR. REV. STAT. § 161.295 (West 2018).

Security Review Board[5] (PSRB), where he was evaluated and given a treatment program.[6]

Bratcher's defense was one of the few successful uses of PTSD as an insanity defense by an Iraqi war veteran in the United States.[7] Combat related PTSD[8] defenses will fare better under the MPC test for lack of mental capacity at the time of the offense (MPC-T), which allows jurors to consider both cognitive and volitional mental capacity, rather than under the more commonly used M'Naghten test which focuses only on cognitive mental capacity.[9] The MPC-T makes a finding of insanity possible even where veterans appreciate the wrongfulness of their conduct because that test provides an alternative insanity defense – one focusing on volitional capacities – for those who

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[5] Psychiatric Sec. Review Bd., PSRB Snapshot (2018), https://www.oregon.gov/prb/Documents/PSRB%20FAQ-Snapshot%201-2018.pdf. (In Oregon, when someone is found guilty but insane, she is placed under the care of the PSRB which determines treatment. The mission of the PSRB is to treat people who are insane while prioritizing public safety. From 2011 to 2016, only 14 of the 835 people on conditional release based on the progress of their treatment have been convicted of new crimes, and the PSRB has a markedly better recidivism rate than the Oregon Department of Corrections.).

[6] Julie Sullivan, *Iraq Veteran Sentenced to State Hospital in PTSD Murder Case*, THE OREGONIAN (Dec. 8, 2009), http://www.oregonlive.com/news/index.ssf/2009/12/post_34.html (last visited May 19, 2019).

[7] *Id.*

[8] This article will use the abbreviation PTSD to describe combat related PTSD.

[9] *See* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, *MAPPING AMERICAN CRIMINAL LAW Variations Across the 50 States: Ch. 14 Insanity Defense*, at 6 (2017). Faculty Scholarship. 1718 (explaining that a second "control prong" only exists in seventeen U.S. jurisdictions, and that a control prong offers an insanity defense even if the offender knew her conduct was wrong but was not able to control that conduct).

cannot conform their conduct to the requirements of law.[10] Considering this difference in focus and given the difference in testing for lack of mental capacity across the U.S., this article asserts that state and federal legislatures should treat veterans with PTSD differently in mounting an insanity defense in jurisdictions that do not already provide an MPC-T based test. Specifically, veterans accused of crimes involving violence against others should be afforded the MPC-T when asserting an insanity defense due to PTSD because the question of volitional capacity is particularly appropriate to veterans, especially those who have experienced combat.

Convincing legislatures to institute a special test or exception for veterans requires those bodies to understand the defense of insanity, the effects of PTSD, and the nature of military training and combat. After a brief overview of Bratcher and PTSD in Part I, this article explores in Part II the importance and purpose of the insanity defense, and whether the MPC-T is better than the M'Naghten test in general. The insanity defense has a long history in Anglo-American law. For centuries, societies have been reticent to punish people who lacked the mental capacity required to be guilty of a crime.[11] The MPC-T represents efforts by legal scholars and judges to elucidate a test encompassing modern knowledge of psychiatry and the human mind.[12] In fact, the American Legal Institute

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[10] Landy F. Sparr, *Mental Defenses and Posttraumatic Stress Disorder: Assessment of Criminal Intent*, 9 J. OF TRAUMATIC STRESS 405, 407 (1996).

[11] *See* Powell v. Texas, 392 U.S. 514, 536 (1968) ("[T]he doctrine[] of…insanity… 'ha[s] historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing…medical views of the nature of man."); Morissette v. United States, 342 U.S. 246, 251 (1952) ("Crime, as a compound concept, generally constituted only from occurrence of an evil-meaning mind with an evil-doing hand…").

[12] *See* WAYNE LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.1, at 393 (5th ed. 2010). ("[T]he A.L.I. test has drawn praise from the commentators…[t]he Model Penal Code formulation has rightly been praised as achieving two important objectives of a test of

(ALI) wrote the MPC to bring substantive criminal law to some level of uniformity and modernity.[13]

Part III of this article explains how the symptoms and effects of PTSD necessitate veterans' access to the MPC-T and analyzes the impact of military training, the traumatic nature of combat, and how they combine to reinforce the application of violence in response to threats. The American Psychiatric Association (APA) recognized PTSD as a mental disorder 39 years ago.[14] The symptoms and effects of PTSD from exposure to war include hormonal processes that reinforce the feeling of threat brought about by stressors,[15] such as other threats, memories, dreams, or noises.[16] In some cases, dissociative states can cause a person suffering from PTSD to re-experience and react to threats as though they were experiencing combat,[17] presenting a situation where a veteran with PTSD may be aware

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responsibility: (1) giving expression to an intelligible principle; and (2) fully disclosing that principle to the jury").

[13] *See id.* at 5 ("In the realm of substantive criminal law, by far the most significant development has been the completion of the American Law Institute's Model Penal Code…[which] represents a systematic re-examination of the substantive criminal law.").

[14] Thomas L. Hafemeister & Nicole A.Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 119 (2010).

[15] *See* Daniel Burgess, et al., *Reviving the "Vietnam Defense:" Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 64 (2010) ("The significance of a psychologically traumatic event is that is creates a stress response….trigger[ing] a 'chain reaction of hormone activity'…repeated within his body every time the person reexperiences the trauma.").

[16] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 274–75 (5TH ED. 2014).

[17] *Id.* at 272.

of what they are doing but be unable to control their behavior, thus suffering from volitional impairment.[18] Further, the military is very effective at training Soldiers[19] to fire weapons and kill the enemy, and in some cases the intensity and chaos of combat can pressure Soldiers to err towards the application of violence when facing uncertainty about the intent of an actor on the battlefield.[20]

Part IV of this article discusses the need for legislatures to provide veterans suffering from PTSD with the MPC-T when facing charges involving violence against another person. This change would accurately reflect an understanding of the importance of the insanity defense for such veterans, the effects of PTSD on the physiology and behavior of such veterans, and the training soldiers receive that is subsequently applied in combat, all of which result in uniquely volitional impairments.

## I. Bratcher and the PTSD Defense

The story of Jessie Bratcher provides a clear example of a combat veteran who could not conform his conduct to the law due to PTSD, but received treatment in lieu of being sent to prison because he had access to an MPC-T based test. In remanding Bratcher to the custody of the PSRB, the jury recognized that the Army had trained Bratcher to kill in

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[18] *See* Hafemeister & Stockey, *supra* note 14, at 111 ("When individuals [with PTSD] psychologically relive a traumatic situation, they may be cognitively aware of their actions but unable to control their behavior.").

[19] In Army writing, the word "Soldier" is capitalized in recognition of the hard work and sacrifice required of each person who joins the military, completes their initial training, and serves their country. In short, "Soldier" is a title. Similarly, "Marine," "Sailor," and "Airman" are also capitalized.

[20] Lupe Laguna, *To Be Judged by Twelve or Carried by Six? Quasi-Involuntariness and the Criminal Prosecution of Service Members for the Use of Force in Combat – a Grunt's Perspective*, 105 J. CRIM. L. & CRIMINOLOGY 431, 452-53 (2015).

response to threats in a combat environment, creating what his lawyer called "a walking time bomb,"[21]; in short, Bratcher could not conform his conduct to the law. Two days before the shooting, Bratcher's fiancé told him she had been raped by a man named Jose Medina, and the baby she was carrying might not be Bratcher's.[22] Bratcher grabbed his AK-47 and told his fiancé that she would not be getting much sleep that night.[23] Bratcher's fiancé recalled that when Bratcher walked back into the room with his AK-47, he also had scissors, which he used to cut off all her hair.[24] Two days later, Bratcher drove to a hardware store with his fiancé and bought a handgun.[25] Bratcher and his fiancé then drove to Medina's home, where Bratcher confronted Medina.[26] After initially denying the allegation, Medina admitted to having sex with Bratcher's fiancé, but insisted it was consensual and offered to take care of the baby; that is when Bratcher shot him.[27]

Jessie Bratcher is not alone in his experience in combat – where he watched a friend die and lived through a roadside bomb – or in his struggle with PTSD.[28] More than two million U.S. service-members have served in Iraq and Afghanistan since

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[21] Murphy, *supra* note 1.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Murphy, *supra* note 1.

[28] Jenny Westberg, *Jessie Bratcher, Iraq War vet ruled guilty but insane in 2008 murder, is freed from hospital*, PORTLAND MENTAL HEALTH EXAMINER (Feb. 9, 2014, 10:00 AM), http://www.mentalhealthportland.org/iraq-war-vet-with-ptsd-guilty-but-insane-in-2008-murder-freed-from-hospital/ (last visited May 20, 2019).

the wars began.[29] Of those, 750,000 have served multiple tours[30] in high-stress combat areas. A 2017 study by the Rand Corporation suggests that as many as twenty-percent of service-members who served in Iraq and Afghanistan have PTSD.[31] In fact, the impact of PTSD on the actions of war veterans has drawn the attention of the U.S. Supreme Court. In a 2009 case, the Supreme Court affirmed a lower court's ineffective assistance of counsel ruling based on the counsel's failure to present evidence of the defendant's PTSD and military service at sentencing.[32]

In light of this startling information, it should come as no surprise that criminal defense attorneys representing veterans have been more willing to present PTSD as a defense,[33] and because modern psychiatry has an increased understanding of the effects PTSD has on a person's thoughts and actions, the PTSD defense seems to be faring better in courtrooms.[34] Legislatures and the legal system should be doing all they can to determine whether these veterans are guilty of a crime, or

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[29] Melody Finnemore, *Firestorm on the Horizon: Specialists say Legal Professionals ill-prepared to help growing population of U.S. Military Members with Post-Traumatic Stress Disorder*, 70 OR. ST. B. BULL. 19, 20 (2010).

[30] *Id.*

[31] KIMBERLY A. HEPNER, ET. AL., QUALITY OF CARE FOR PTSD AND DEPRESSION IN THE MILITARY HEALTH SYSTEM: FINAL REPORT. Santa Monica, CA: RAND Corporation, at 3 (2017), https://www.rand.org/pubs/research_reports/RR1542.html.

[32] *See* Porter v. McCollum, 558 U.S. 30, 35, 40 (2009) ("When Porter returned to the United States ... he suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night"; "Counsel thus failed to uncover and present any evidence of Porter's mental health, mental impairment ... or his military service ... [t]he decision did not reflect reasonable professional judgment.").

[33] Finnemore, *supra* note 29.

[34] *See id.*

whether they are in need of treatment after suffering extreme trauma while serving their nation.

## II. The Insanity Defense

The long-standing tenets behind the insanity defense – rehabilitating a person with an illness and withholding punishment from those who are not morally culpable[35] – are not in conflict with the theories of punishment: rehabilitation, retribution, deterrence, and protection.[36] Modern formulations generally express the insanity defense in four different ways,[37] and this article will focus on the M'Naghten test and the MPC-T[38] because forty one jurisdictions[39] and the U.S. military[40] use

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[35] *See* Robinson & Williams, *supra* note 9, at 1 (explaining that the criminal law only imposes liability and punishment on offenders who are morally blameworthy).

[36] *See* LAFAVE & SCOTT, *supra* note 12, at 393 ("Another helpful way of looking at the defense of insanity is in relation to the various theories of punishment, for the philosophical reasons for allowing the defense are tied up with these theories.").

[37] *Id.* at 390.

[38] *See* Robinson & Williams, *supra* note 9, at 6 (The other two formulations of the insanity defense are the "product of disease" test and the "irresistible impulse" test. The former, used by New Hampshire, requires only that the defendant prove that she would not have committed the offense but for her mental disease or defect. The latter is used in New Mexico, Ohio, and Virginia and requires the defendant to show that at the time of the offense she had lost all ability to control the offense conduct.).

[39] *See id.* at 2, 4, 6 (explaining that six states have abolished the insanity defense, while New Hampshire, New Mexico, Ohio, and Virginia use alternative tests).

[40] Rules for Courts-Martial 916(k) (2019 Edition) [hereinafter R.C.M.] ("It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a

one of these two tests. Understanding the history and status of these two tests helps support the claim that the insanity defense is necessary due to volitional impairment as well as the need for a proper test to determine mental capacity in veterans with PTSD.

### *A. The Insanity Defense and the Theories of Punishment*

The insanity defense has a long history as a part of the administration of criminal justice.[41] Anglo-American law and legal traditions have long concluded that criminal punishment is only necessary when a guilty mind motivates a guilty act.[42] American legal tradition similarly reflects a belief in the will of a person, and that a sane person has a duty to choose between right and wrong.[43] A person who is insane cannot form a will or intent to commit a crime, and thus ought not to be put in prison.[44]

The tenets underlying the insanity defense tie into the ideas inherent in the various theories of punishment.[45] To

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result of a severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his or her acts.").

[41] *See* Powell, *supra* note 11, at 536 ("[T]he doctrine…of…insanity… 'ha[s] historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing…medical views of the nature of man.").

[42] *See* Morissette, *supra* note 11, at 251 ("Crime, as a compound concept, generally constituted only from occurrence of an evil-meaning mind with an evil-doing hand…").

[43] *See id.* at 250 (explaining that the normal individual has a duty to choose between good and evil).

[44] *See id.* at 250-51 ("A relation between some mental element and punishment for a harmful act … has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance.").

[45] *See* LAFAVE & SCOTT, *supra* note 12, at 393 ("Another helpful way of looking at the defense of insanity is in relation to the various theories

begin, the theory of rehabilitation rests on a community's sanctions altering a criminal's behavior so that the criminal emerges a more productive member of the community.[46] Rehabilitation is the main thrust of the insanity defense and the person may not rejoin the community until determined to be sane.[47] Rehabilitation of an insane person, however, requires hospitalization and treatment, not incarceration and isolation.[48] The prison system generally causes symptoms of mental disease to worsen, directly contravening the theory of rehabilitation.[49] Thus, the insanity defense and the theory of rehabilitation support curing a person's illness to make her a more useful member of society.[50]

Next, the theory of retribution rests on the idea that the criminal owes the community some level of suffering because the criminal's actions went against the rules of the community.[51] However, if a person is insane, and thus lacks the mental capacity to form the guilty mind necessary to commit a crime, she will not understand why she is being punished.[52]

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of punishment, for the philosophical reasons for allowing the defense are tied up with these theories.").

[46] *Id.*

[47] *Id.* at 391.

[48] *Id.*

[49] *See id.* at 390 (explaining that the purpose of the insanity defense is to separate people who should not be in the criminal justice system and instead "subject…[them] to a medical-custodial disposition.").

[50] *Id.* at 393.

[51] *See* Robinson & Williams, *supra* note 9, at 1 (explaining that punishment is only appropriate for those who are morally blameworthy, and if an offender's conduct is the result of serious mental illness, she likely does not possess sufficient moral responsibility to be punished).

[52] *Id.*

Consequently, punishment would not serve the purpose of the community's retribution.[53]

Third, the theory of deterrence supports the idea that punishment of criminals serves two preventative roles: specific deterrence and general deterrence.[54] Specific deterrence is the idea that punishment causes suffering, and that suffering will dissuade the specific criminal, punished for committing the crime, from perpetrating again because that person hopes to avoid further suffering.[55] Specific deterrence cannot be achieved with an insane person because an insane person does not understand why society is punishing her; the punishment is unlikely to serve as a deterrent to future criminal behavior.[56]

General deterrence works on a societal level where a potential criminal decides against criminal behavior because she has seen others punished for that behavior and wants to avoid similar suffering. Here, too, punishment of the insane is not likely to dissuade a sane person who does not identify with the insane criminal.[57] Most importantly, few things could be crueler than punishing people who are not responsible for their acts simply to deter others.[58] Withholding punishment of the insane

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[53] *See* LAFAVE & SCOTT, *supra* note 12, at 394 ("Indeed, the insanity defense developed as a means of saving from retributive punishment those individuals who were so different from others that they could not be blamed for what they had done.").

[54] *Id.* at 393.

[55] *Id.*

[56] *See id.* at 393 (explaining that specific deterrence "would be widely regarded as . . . cruel . . . [if] just to incarcerate [people] who are not personally responsible.").

[57] *Id.*

[58] *Id.*

when they are not morally responsible for their acts does not conflict with the theory of deterrence.[59]

Finally, the theory of protection links a criminal's punishment to securing the public by isolating the criminal.[60] In most jurisdictions, the state commits to an appropriate facility a defendant who successfully uses the insanity defense until that person is no longer dangerous;[61] often, an insane criminal's commitment exceeds the fixed period of incarceration for the crime originally charged.[62] Thus, the insanity defense and its supporting tenets tie into the theory of protection, and are not in conflict with any of the theories of punishment.[63]

*B. The M'Naghten Test*

The tenets of the insanity defense played out in the case that gave the M'Naghten test its name. In 1843, Daniel M'Naghten killed Edward Drummond in England.[64] Drummond was the private secretary of M'Naghten's intended target, Sir Robert Peel.[65] At his trial, M'Naghten argued that he was insane and could not be held accountable for Drummond's death; he claimed that he was having delusions about a plot

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[59] LAFAVE & SCOTT, *supra* note 12, at 393.

[60] *Id.*

[61] *See id.* at 390 (explaining that the purpose of the insanity defense is to separate people who should not be in the criminal justice system and instead "subject[] [them] to a medical-custodial disposition.").

[62] *See id.* ("in every other case, a successful defense results in acquittal and outright release of the defendant, but with the insanity defense the probable result is commitment of the defendant to a mental institution *until he has recovered his sanity"* (emphasis added)).

[63] *Id.*

[64] Bageshree v. Ranade, Note and Comment, *Conceptual Ambiguities in the Insanity Defense: State v. Wilson and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377, 1379 (1998).

[65] *Id.*

against him by Peel that motivated his action.[66] The jury agreed with M'Naghten and found him not guilty.[67] The decision was widely debated and very unpopular, and shortly afterward the House of Lords submitted questions about the trial to the Queen's Bench for clarification.[68] The answers to some of the questions became the basis for the M'Naghten test,[69] now used in the majority of U.S. jurisdictions,[70] including federal courts[71] and the U.S. military:[72]

> To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring 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.[73]

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[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See* Robinson and Williams, *supra* note 9, at 2, 3 (explaining that twenty-eight states apply the M'Naghten test, or something essentially the same).

[71] 18 U.S.C. § 17 (1986) ("It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.").

[72] R.C.M. 916(k).

[73] LAFAVE & SCOTT, *supra* note 12, at 398.

A few of the criticisms of the M'Naghten test[74] bear mentioning because they strike at the heart of the test's inadequacy vis-à-vis PTSD. First, the language of the M'Naghten test focuses only on an ability for cognitive processes, or "knowing" something.[75] However, this narrow language ignores most contemporary knowledge of psychiatry: a person's reason, will, and emotions are all connected.[76] Next, the judges in the M'Naghten case were not setting out a new test for a person suffering from delusions, but merely stating the law as it already existed at that time in England; courts had applied the M'Naghten test prior to the decision that gave it the name it has today.[77] Thus, jurisdictions that still use the M'Naghten test apply the test in a way that is largely unchanged in the face of nearly 175 years of advancement in the field of psychiatry.[78]

*C. The MPC Test*

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[74] *See id.* at 408 ("The M'Naghten test has long been the subject of controversy…"; "[M'Naghten] is not sufficient to exclude all insane nondeterrables because it only takes account of impairment of cognition and ignores impairment of volitional capacity.").

[75] *See id.* at 404 ("it is the word 'know' in the test that has been the source of most of the criticism of M'Naghten…").

[76] *See id.* at 409 ("The criticism most frequently heard is that [M'Naghten] is 'based on an entirely obsolete and misleading conception of the nature of insanity, since insanity…affects the whole personality of the patient, including both the will and the emotions'").

[77] *Id.* at 398.

[78] *See* Durham v. United States, 214 F.2d 862, 871 (D.C. Cir. 1954) ("The science of psychiatry now recognizes that a man is an integrated personality and that reason … is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior…'[i]t is evident that the knowledge tests unscientifically abstract out of the mental-makeup but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct…'").

The MPC was written in the early 1960s by the ALI, an organization composed of lawyers, judges, and academics, and represented a significant development in the realm of substantive criminal law.[79] Prior to the MPC, the criminal codes of many states were "fragmentary, old, disorganized," and "a combination of enactment and of common law that only history explains."[80] As part of this process of seeking to 'update' criminal law, the ALI rejected the outdated and narrow cognitive focus of the M'Naghten test and instead presented a broader statement of both cognitive impairments and volitional impairments.[81] Volitional impairment results when a defendant's mental defect prevents her awareness of the wrongfulness of her conduct from restraining her action.[82] The language of the MPC-T can be found in § 4.01(1) of the MPC:

> A person is not responsible for criminal conduct if at the time of such conduct
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> 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 the law.[83]

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[79] *See* RICHARD J. BONNIE, ET. AL., A CASE STUDY IN THE INSANITY DEFENSE 18 (3D ED. 2008). ("[The Model Penal Code] was written by the American Legal Institute…composed of lawyers, judges, and academics…[and] had an enormous impact on the development of American criminal law.)

[80] LAFAVE & SCOTT, *supra* note 12, at 5.

[81] *See id.* at 420 (explaining that the ALI's test is a modernized version).

[82] AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES pt. I, §§ 3.01-5.07 at 166 (1985).

[83] *Id.* at 163.

The MPC-T was the most important development in the history of the insanity defense in the 20th century for a few reasons.[84] Significantly, the test only required a lack of "substantial capacity."[85] This requirement was a departure from the M'Naghten test's implied requirement for a complete lack of cognition: "...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."[86] The MPC-T reflected the understanding that because the test is legal in nature, a lack of *substantial capacity* to appreciate wrongfulness or conform conduct to the law is all that honest witnesses and jurors should, and can be, called on to infer about a situation.[87] Further, the formulation of the volitional part of the MPC-T to focus on the substantial lack of capacity to conform conduct to the law clarified that a loss of volition can be more than a sudden or spontaneous occurrence.[88] It is a distinction that ends up having significance in the case of PTSD.

Currently, a significant minority of U.S. jurisdictions use the MPC-T.[89] After the completion of the MPC in 1962, states and the federal government largely adopted the test. By 1980, it was the test in more than half of states and all of the federal courts of appeal.[90] Despite this early acceptance, debate about the proper test for lack of mental capacity continued and came to the attention of the nation in reaction to the acquittal of John W. Hinckley, Jr.[91] In 1982, Hinckley was found to be insane,

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[84] BONNIE, *supra* note 79.

[85] LAFAVE & SCOTT, *supra* note 12, at 421.

[86] Robinson & Williams, *supra* note 9, at 7.

[87] LAFAVE & SCOTT, *supra* note 12, at 421.

[88] *Id.* at 422.

[89] *Id.*

[90] BONNIE, *supra* note 79, at 18.

[91] *Id.* at 21; Robinson & Williams, *supra* note 9, at 8.

using the MPC-T as a defense, and was acquitted at trial for attempting to assassinate President Ronald Reagan.[92] In 1984, following the verdict that many saw as too lenient – indeed, the Hinckley verdict is mentioned twenty-five times in just three congressional statements in support of the IDRA[93] - the federal government abandoned the MPC-T, formulated by American legal scholars with the input of psychiatrists,[94] for a test formulated by the Queen's Bench in 1843, taking the majority of the country with them.

## III. PTSD, Military Training, and Combat.

A. *PTSD*

The American Psychiatric Association first recognized PTSD in the DSM-III[95] in 1980.[96] This marked the first time the medical community officially recognized PTSD as a true mental disorder with associated diagnostic criteria. However, post-traumatic symptoms have been recorded as early as the 17th century, and more recently, post-traumatic symptoms were commonly seen in people who experienced combat and were variously known as "shell-shock," "combat-neurosis," and the

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[92] BONNIE, *supra* note 79, at 1-21.

[93] 128 CONG. REC. S9, 225-26 (daily ed. July 27, 1982) (statement of Sen. Cochran);129 CONG. REC. H327-28 (daily ed. Feb. 7, 1983) (statement of Rep. Conyers); 129 CONG. REC. H381-82 (daily ed. Feb. 8, 1983) (statement of Rep. Gekas).

[94] LAFAVE & SCOTT, *supra* note 12, at 420.

[95] The Diagnostic and Statistical Manual was first published by the American Psychiatric Association in 1952, and the most recent edition, the DSM V, was published in 2013. The DSM is used by clinicians and doctors to diagnose psychiatric illnesses. Its primary focus is on describing symptoms and providing statistics regarding common treatment approaches, which gender is more affected by a particular illness, at what age an illness usually sets in, etc.

[96] Hafemeister & Stockey, *supra* note 14, at 119.

"irritable heart of the soldiers."[97] In the newest edition of the DSM, the DSM-V, PTSD moved from the chapter of Anxiety Disorders to a new chapter of Trauma and Stressor Related Disorders.[98] This move came along with a recognition of new causes, symptoms, and manifestations inherent in PTSD.[99]

One of the primary reasons the APA reclassified PTSD was due to PTSD's common etiology with other disorders in that chapter: specifically, exposure to a traumatic event.[100] The DSM-V lists traumatic events likely to lead to PTSD, including exposure to war, unnatural death, disaster, or observing threatened or actual serious injury.[101] A qualifying traumatic event may also include an event that involved a close friend or family member, and repeated or extreme exposure to details of the traumatic event can also constitute qualifying exposure.[102] These last two types of traumatic events no doubt encompass many service-members' experiences in combat areas.

Traumatic events or stressors, like those mentioned above, have physiological effects.[103] First, when a Soldier is confronted with a stressor in combat, such as a real or perceived threat to his life or the life of a friend, the adrenal glands secrete

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[97] Andrea Friel, et al., *Posttraumatic Stress Disorder and Criminal Responsibility*, 19 J. FORENSIC PSYCHIATRY AND PSYCHOL. 64 (2008).

[98] Ashley A Houston, et al., *From DSM-IV-TR to DSM-5: Changes in Posttraumatic Stress Disorder*, NAVAL CTR. FOR COMBAT & OPERATIONAL STRESS CONTROL 1 (2013).

[99] *See id.* ("The DSM-5 also reflects many changes to PTSD criteria.").

[100] *Id.*

[101] AM. PSYCHIATRIC ASS'N, *supra* note 16, at 274.

[102] *Id.* at 271.

[103] *See* Burgess, *supra* note 15, at 59 ("[E]xtraordinary brutality, committed both by the enemy and sometimes even by their own comrades…combined to result in a staggering amount of psychological trauma.").

two classes of hormones, adrenaline and glucocorticoids, increasing heartbeat, alertness, and muscle function.[104] Soldiers who have developed PTSD due to repeated exposure to stressors or threats on the battlefield, have experienced this hormonal process over and over.[105] This repetition pre-disposes the brain to release such hormones each time a soldier is threatened, creating a link to the original trauma(s)."[106] Therefore, when a soldier later experiences a stressor, such as a threat, memory, dream, situation, noise, or other reminder that causes the veteran to recall the original trauma:[107] combat. A pre-disposed hormonal reaction then occurs in the brain, and the veteran reverts to conditioned skills and functions learned prior to the event that caused the stressor,[108] such as their conditioned violent response to threats. Veterans with PTSD have experienced this hormonal reaction to stress often enough that it has altered the chemical composition of their brains.[109]

The hormonal reaction associated with PTSD leads to different symptoms and manifestations. More immediate and direct symptoms include violent flashbacks, nightmares, anxiety attacks, and insomnia.[110] These symptoms can be chronic,[111] are generally very intrusive, and include sensory, emotional, and

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[104] *Id.* at 64.

[105] *See id.* (explaining that each time a PTSD sufferer experiences a stressor, or is reminded of a stressor, the hormonal process repeats itself in her body).

[106] *Id.*

[107] AM. PSYCHIATRIC ASS'N, *supra* note 16 at 275.

[108] Burgess, *supra* note 15, at 64. ("In addition, a PTSD sufferer in [a dissociative state] will revert back to the use of conditioned skills … learned before the stressful event…").

[109] *Id* at 59.

[110] Finnemore, *supra* note 29, at 19.

[111] Friel, *supra* note 97, at 65.

physiological behavioral components.[112] Beyond immediate presentations of PTSD, symptoms can also manifest as dissociative states that last from a few seconds to several days during which the individual behaves as if the event were occurring at that moment.[113] The dissociative states, or "flashbacks," that veterans suffer as a result of PTSD fall into the category of mental defects wherein cognitive knowledge of right or wrong is not always enough for the veteran to conform their conduct to the law; these veterans understand their actions but the weight of their experiences coupled with PTSD render them unable to conform their conduct to the law.[114] Most critically to the claim this article makes regarding the MPC-T and volitional capacity, these sometimes days-long dissociative events can occur without a total loss of reality orientation.[115]

For example, a Marine who participated in reconnaissance patrols in Vietnam fatally shot his brother-in-law.[116] The Marine testified that he looked across a foggy field and perceived himself as being back in Vietnam; indeed, the field reminded him of a battle and he told police he had a flashback to the experience before the crime occurred.[117] In another example, a veteran with PTSD was found not-guilty of attempted murder after he shot his foreman during an argument

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[112] AM. PSYCHIATRIC ASS'N, *supra* note 16, at 275.

[113] *Id.*

[114] *See* Hafemeister & Stockey, *supra* note 14, at 111 ("When individuals [with PTSD] psychologically relive a traumatic situation, they may be cognitively aware of their actions but unable to control their behavior.").

[115] *See* AM. PSYCHIATRIC ASS'N, *supra* note 16, at 275 ("Such events occur on a continuum from brief visual or other sensory intrusions about part of the traumatic event without loss of reality orientation, to complete loss of awareness of present surroundings.").

[116] Hafemeister & Stockey, *supra* note 14, at 120.

[117] *Id.*

at work.[118] Critical to the verdict, besides his diagnosis in general, the defense used audio recordings to demonstrate the similarity between the noises of war and the noises of the factory; using this similarity and its resulting effect on the defendant to argue that the defendant was in a dissociative state at the time of the shooting.[119] Bratcher's story is a prime example of a violent crime perpetrated due to a substantial lack of capacity to conform to the law. That lack of capacity stemmed from a partial loss of reality, and was followed by a verdict, under an MPC-T based test, resulting in treatment. Bratcher had not lost all orientation of reality; indeed, he heard Medina's nephew screaming and he knew he was shooting Medina.[120] However, because of the threat Bratcher perceived to his relationship from a man who allegedly raped his wife and was trying to claim his child, his altered brain chemistry caused him to recall the trauma; he thought he was in Iraq, and the screaming was that of an Iraqi woman.[121] On perceiving this threat, and hearing the screams of an Iraqi woman, Bratcher "eliminate[d] [the] threat. Eliminate[d] it [immediately] without thinking . . . with overwhelming force," just as he was trained to do.[122]

*A. Military Training and Combat*

Military training and its application in combat can, in some cases, combine to create and reinforce the swift, and only quasi-volitional, application of violence by Soldiers to achieve a goal or complete a mission. First, the U.S. military must be, and

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[118] *Id.* at 121.

[119] *See id.* at 120-21(giving multiple examples, including this one, of veterans suffering dissociative states or altered states of consciousness due to their PTSD).

[120] MARVASTI, *supra* note 2, at 165.

[121] *See id.* at 165-66 ("[Bratcher] was more than just '[a] furiously jealous boyfriend.' He was a trained killer taught by the Army to mow down threats unhesitatingly.").

[122] *Id.*

is, very effective at training its Soldiers to fire their weapons reflexively[123]. Soldiers experience trauma on the battlefield during violent combat; thus, a Soldiers' training becomes a quasi-volitional reaction to threats due to battlefield trauma.

The U.S. military is very effective at training its Soldiers to fire their weapons and kill the enemy, but that was not always the case.[124] During World War II, General S.L.A. Marshall conducted a study that found that 75 to 80-percent of riflemen did not fire their weapons in combat.[125] This restraint – only a twenty to twenty-five percent firing rate – was cause for alarm because it was compromising the mission and the lives of the riflemen and other Soldiers.[126] The military quickly instituted new training techniques to correct the problem.[127] Initially, the results were mixed: General Marshall's study of the Korean War found the firing rate was 55-percent.[128] However, by the time the Vietnam War began, the military had largely perfected training techniques, still used today, and the result appeared to be a 95-percent firing rate.[129]

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[123] *See* LT. COL. DAVE GROSSMAN, ON KILLING, at 258-59 (1ST PAPERBACK ED. 1996) ("[T]his superior training and killing ability in Vietnam, Panama, Argentina, and Rhodesia amounts to nothing less than a…revolution on the battlefield.")

[124] *See Id.* at 250 (1ST PAPERBACK ED. 1996) (explaining that during World War II most riflemen did not fire their weapons at the enemy, but by the Vietnam War the non-firing rate was down to five percent).

[125] Hafemeister & Stockey, *supra* note 14, at 103.

[126] *See* GROSSMAN, *supra* note 123, at 250.

[127] *See id.* ("At the end of World War II the problem became obvious: Johnny can't kill. A firing rate of 15 to 20 percent among Soldiers is like having a literacy rate of 15 to 20 percent among proofreaders.").

[128] *Id.* at 251.

[129] Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress*

The military's success in developing such a high firing rate is due to training – still in use today – designed to develop a reflexive "quick shoot" ability.[130] In rifle marksmanship training, person-shaped targets pop up in Soldiers' fields of view at ranges varying from 50 to 300 meters.[131] Soldiers, while wearing all of their combat gear and either lying or kneeling, have a limited amount of time to acquire and engage their target, and they receive immediate, positive feedback from the target if they successfully hit it: the target drops.[132] Furthering positive reinforcement, in the vein of operant conditioning,[133] comes through a kind of token economy, where Soldiers are given badges indicating their level of weapons proficiency as well as being treated more favorably for promotion.[134] This reflexive "quick shoot" training is achieved through the effective application of classical conditioning by the military.[135]

While it is possible no one in military leadership did so intentionally, service-members are trained to develop the aforementioned reflexive ability to fire their weapons through application of classical conditioning methods.[136] Classical conditioning consists of pairing a neutral stimulus with a

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*Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2963 (2009).

[130] GROSSMAN, *supra* note 123, at 253.

[131] *See id.* ("At periodic intervals one or two olive-drab, man-shaped targets at varying ranges will pop up…").

[132] *Id.*

[133] Hafemeister & Stockey, *supra* note 14, at 104.

[134] GROSSMAN, *supra* note 123, at 254.

[135] *See id.* at 253 (explaining that the marksmanship training method used to train U.S. Army and U.S. Marine Corps members is an application of conditioning techniques geared to develop a reflexive "quick shoot" ability.)

[136] *Id.*

particular response as a consequence of being paired with an unconditioned stimulus.[137] A prime example of classical conditioning in the military is basic rifle marksmanship training.[138] In rifle marksmanship training the targets are the unconditioned stimulus, and pulling the trigger *after* a target comes up is the unconditioned response. But similar to Pavlov's metronome,[139] the military pairs a neutral stimulus in the form of commands like "scan your lane," "watch your field of fire," and "stay alert," with the soon-to-follow unconditioned stimulus of targets popping up to be fired upon.[140] As a consequence, soldiers are ready to pull the trigger simply because they are told to be alert, prior to a target presenting itself.[141]

The reflexive engagement conditioning that soldiers experience in training informs their behavior in combat where conditioned behaviors become quasi-volitional reactions to threats due to trauma on the battlefield. The application of military training in combat is best described by the Army Manual for the Infantry: "[c]haracterized by extreme violence

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[137] Merav Rabinovich & Lea Kacen, *Transference in View of a Classical Conditioning Model,* 125 AM. J. PSY. No. 2, 209, 210 (2012); AM. COLMAN, OXFORD DICTIONARY OF PSYCHOLOGY 137 (2D ED. 2006).

[138] *See* GROSSMAN, *supra* note 123, at 253 ("The method used to train today's…[s]oldiers is nothing more than an application of conditioning techniques…").

[139] *See* Rabinovich &Kacen, *supra* note 137, at 210 (explaining the methods used by Pavlov to cause dogs to salivate at the sound of a metronome through classical conditioning).

[140] *See generally,* GROSSMAN, *supra* note 123, at 253-54.

[141] *See* Hafemeister & Stockey, *supra* note 14, at 104 ("[T]he objective [of combining stimulus response training and psychological inoculation] is to develop instant, unhesitating obedience to a superior's orders…"); *See also* GROSSMAN, *supra* note 123, at 255 ("What makes [this training to achieve a reflexive 'quick-shoot' ability] work is the single most powerful and reliable behavior modification process yet discovered by the field of psychology, and now applied to the field of warfare: operant condition.").

and physiological shock, close combat is callous and unforgiving."[142] The manual further describes the ground-combatant's role as "the point of decision."[143] Combat forces soldiers who are already conditioned to fire to make split-second decisions regarding whether a person is acting with hostile intent.[144]

Determining hostile intent on the contemporary battlefield is especially fraught for individual soldiers.[145] Enemy combatants on the battlefields of the last 13 years look like civilians, forcing the U.S. military to move from "status-based" targeting, or targeting people based on their membership in an opposing military, to "conduct-based" targeting, or targeting based on a person's behaviors.[146] Often, with no more than a split second, a Soldier must engage in a complex factors test to determine a person's intent.[147] Some of these factors include the location of the person's hands, "nervous" or "aggressive" behaviors, whether the person has weapons and the posture of those weapons, and specific criteria included in the mission brief.[148] The definition of intent is something that lawyers struggle with from the classroom to the courtroom, despite working with little or no time constraint; it should come as no surprise then that soldiers struggle with determining a person's

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[142] Dep't of Army, Field Manual 3-21.8, The Infantry Rifle Platoon and Squad, 1-1 (2007) [hereinafter FM 3-21.8].

[143] *Id.*

[144] Laguna, *supra* note 20, at 438–39.

[145] *Id.* at 441.

[146] *Id.*

[147] *Id.* at 443.

[148] *Id.*

hostile intent in a split second on the battlefield and often second guess that decision later.[149]

Next, the split-second decision informed by the factors named above does not begin with a neutral balance between the choice to fire or not to; other outside factors pressure the soldier to err on the side of firing the weapon.[150] First, the "conduct-based" targeting rules create an obligation to exercise self-defense in response to a hostile threat: responding to a threat without violence is not optional.[151] Next, the Army Manual for the Infantry, which largely governs individual soldiers and small unit tactics on the battlefield, leaves little doubt about what a properly trained soldier ought to do after deciding that a person's hostile conduct marks them as an enemy, calling the Infantry's primary role "to close with and destroy the enemy."[152] Thus, each time a soldier goes on a combat patrol, both explicit and implied orders, combined with intense training, work to override a soldier's volition and compel a soldier to respond to threats with violence.

## IV. Conclusion

Through the application of highly effective military training, combat veterans have been conditioned to kill and respond to threats with violence. Military training conditions a reflexive "quick-shoot" response through the application of methods that mirror classical conditioning. Next, society places veterans in high stress and traumatic combat environments. These combat environments often require split-second decisions about a person's intent based on their actions, with pressure from the targeting rules and stated mission to respond to perceived threats with violence. The perception of threats to their lives and the lives of their friends, accompanied by the

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[149] *Id.* at 435.

[150] Laguna, *supra* note 20, at 452–53.

[151] *Id.*

[152] FM 3-21.8, *supra* note 142, at 1-1.

application of violence during exposure to war, causes PTSD in many veterans.

Veterans who develop PTSD on deployment return home with altered brain chemistry, predisposing some to respond to threats with violence, and this altered brain chemistry is sensitive to many stimuli. When a veteran with PTSD encounters these stimuli, or stressors, the veteran may recall the original trauma – combat – causing the brain to release chemicals which can lead the veteran to revert to skills and functions conditioned during training.

Thus, for soldiers like Bratcher, the threats of civilian life, while much different, are nonetheless capable of triggering the physiological effects that lead to the dissociative states and flashbacks inherent in PTSD.[153] As the evidence at Bratcher's trial showed, Bratcher returned from Iraq a "hair-trigger killing machine" who "spent days in the woods sleeping, setting up perimeters, and designing fields of fire."[154] Short of extreme and immoral measures – sociologist and former drill sergeant William Brower, who testified at Bratcher's trial, suggested "only . . . one cure for the experiences from these wars . . . lobotomy"[155] – soldiers suffering from PTSD are often left to grapple with a completely altered existence.[156] In some cases, threats in civilian life – like the one Bratcher perceived to his

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[153] *See* Burgess, *supra* note 15, at 65-66 ("A dissociative reaction is typically triggered by…stimuli that mimic the environment in which the original stressors were experienced…[o]nce the sufferer encounters the stimuli…a PTSD sufferer…will revert back to the use of conditioned skills and…learned before the stressful event).

[154] MARVASTI, *supra* note 2, at 165–66.

[155] *Id.* at 166.

[156] *See* Hafemeister & Stockey. *Supra* note 14, at 105 ("In light of their training and psychological orientation, as well as the horrors of war…it is no wonder that some veterans undergo significant psychological problems when they return home.").

relationship and child[157] – may trigger violent behavior. But punishing soldiers for reacting as they were trained serves no theory of justice, because their military conditioning and altered brain chemistry substantially impair their volitional capacity to stop what they are doing, and therefore does not serve society. Legislatures, then, have a moral duty to ensure that veterans with PTSD[158] are treated fairly by the criminal justice system and treated rather than punished whenever possible. Juries need to be able to consider whether an altered brain chemistry substantially impairs an accused veteran's volitional capacity.

During Bratcher's trial, Oregon law allowed the jury to consider Bratcher's volitional incapacity.[159] The jury heard that because of his training in the Army and experiences in Iraq, Bratcher came home a "walking time bomb."[160] Sadly, time ran out when Bratcher experienced a threat: a man who had allegedly raped his wife and was claiming his child. Bratcher responded to the threat the way he had been trained: he killed.[161] We will likely never know how many Soldiers and veterans like Jessie Bratcher walk the streets every day, but because an Oregon jury was able to ask the right question using an MPC-T based statute, it was also able to find the right answer: Bratcher got treatment.[162] As a society, we owe all

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[157] Murphy, *supra* note 1.

[158] The author recognizes that the arguments made in this section probably apply to police officers, paramedics, and other people who serve in professions for the benefit of society where trauma is also likely. However, as a Soldier with combat experience, the author sought to address this article and its arguments specifically to Soldiers and veterans, for now.

[159] OR. REV. STAT. § 161.295 (1971).

[160] MARVASTI, *supra* note 2, at 166.

[161] *Id.* at 165.

[162] Sullivan, *supra* note 6.

veterans a chance for the right question to lead to the right answer.