

# Fallen Soldier: Military (In)justice and the Criminalization of Attempted Suicide After *U.S. v. Caldwell*

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## I. INTRODUCTION

While military leadership has moved aggressively and with informed compassion to combat its unprecedented suicide rate, the military justice system has lagged tragically behind. In July 2012, the same month the Defense Department declared a “suicide epidemic” was afflicting the U.S. Armed Forces,<sup>1</sup> the military’s highest court granted review of the following question in *United States v. Caldwell*: whether a bona fide suicide attempt remained criminally punishable under military law.<sup>2</sup> Two years earlier, a military trial judge had sentenced Marine Corps Private Lazzaric Caldwell to prison on a charge of “wrongful self-injury” after he gashed his wrists in his barracks. “You were thinking selfishly,” the judge told him, “because you were depressed.”<sup>3</sup> Though American civilian courts had derided the criminalization of attempted suicide as archaic and abusive even before the invention of the automobile, Private Caldwell’s 21<sup>st</sup> century prosecutors still argued for “unfettered discretion” to deal with the kind of “leadership challenge” posed by a Marine who wanted, in sickness, to die.<sup>4</sup> In a vague and narrow 3-2 decision last year, the Court of Appeals for the Armed Forces invalidated Private Caldwell’s guilty plea when it found insufficient evidence that his suicidal conduct had any “direct and palpable effect on good order and discipline.”<sup>5</sup> However, the court still failed to decriminalize attempted suicide outright and declined to “determine whether, as a general matter, a bona fide suicide attempt alone may be service discrediting [and therefore criminally punishable], or is more properly considered a noncriminal matter requiring treatment not prosecution.”<sup>6</sup> In doing so, the majority dodged the granted issue entirely and left roughly 3,500 active duty suicide survivors each year<sup>7</sup>

<sup>1</sup> See Kathleen Miller, *Military Faces Suicide ‘Epidemic,’ Panetta Tells Congress*, BLOOMBERG NEWS (July 25, 2012, 1:58 PM), <http://www.bloomberg.com/news/2012-07-25/military-faces-suicide-epidemic-panetta-tells-u-s-lawmakers.html>.

<sup>2</sup> *United States v. Caldwell*, 72 M.J. 137, 138 (C.A.A.F. 2013).

<sup>3</sup> See Appellant’s Brief at 25, *United States v. Caldwell*, 72 M.J. 137 (C.A.A.F. 2013) (No. 12-0353/MC).<sup>7</sup>

<sup>4</sup> *United States v. Caldwell*, 70 M.J. 630, 633 (N-M. Ct. Crim. App. 2011) (en banc).

<sup>5</sup> *Caldwell*, 72 M.J. 137 at 141.

<sup>6</sup> *Id.* at 142.

<sup>7</sup> The Defense Department Suicide Prevention Office estimates that the ratio of attempted suicides to completed suicides is roughly 10:1. *About Suicide – Facts*,

subject to prosecution and jail time for “wrongful self-injury,” no matter their intent.” Alarming, the Government’s strict liability viewpoint lost by a single vote: two of the court’s five judges suggested Private Caldwell could be lawfully convicted and ‘imprisoned’ for “needlessly” exposing another Marine to his bodily fluids and causing the expenditure of medical resources like bandages and gauze.<sup>8</sup> These judges concluded, Caldwell’s case “cannot hinge on [the] Court’s diagnosis that the [suicidal] conduct at issue is a ‘matter requiring treatment,’ . . . rather than a crime—many of our cases, including this one, are both.”<sup>9</sup> That language is deeply out of step with our modern consensus and the modern military’s own language and rehabilitative approach to the tragedy of suicide.

This article will begin to fill a dearth of legal scholarship on the military’s suicide policy by analyzing the development of both civilian and military court precedents regarding the criminalization of attempted suicide as well as more recent military policy efforts to discourage suicide in the ranks. Ultimately, it will call for amendment or repeal of the Uniform Code of Military Justice’s self-injury codes to make certain that mentally injured servicemembers receive treatment, not punishment. Decriminalization of attempted suicide is necessary to bring military justice in line with modern American legal norms’, to encourage mental health treatment and strengthen the fighting forces, to protect servicemembers from arbitrary, pretextual, and discriminatory punishment, and to more justly treat those who sacrificed and suffered in service to our country.

## II. BACKGROUND

The Army called Daniel Hernandez an exemplary soldier.<sup>10</sup> A

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DEFENSE SUICIDE PREVENTION OFFICE,

<http://www.suicideoutreach.org/AboutSuicide/Facts.aspx> (last visited Apr. 17, 2014).

Three hundred forty-nine active duty servicemembers completed suicide in 2012.

Barbara Starr, *Pentagon Reports Record Number of Suicides*, CNN.COM (Jan. 16, 2013, 10:44 AM), <http://www.cnn.com/2013/01/15/us/military-suicides/>.

<sup>8</sup> Prosecutor’s Brief at 16, *United States v. Caldwell*, 72 M.J. 137 (C.A.A.F. 2013) (No. 12-0353/MC).

<sup>9</sup> *Caldwell*, 72 M.J. 137 at 147 (Ryan, J., dissenting).

<sup>10</sup> Specialist Hernandez’s name has been changed for the purposes of this article. All other facts and details in his case are cited from affidavits submitted on his behalf to the Army Board for Correction of Military Records. The author represented SPC Hernandez to challenge the circumstances of his discharge as a pro bono attorney with the AMVETS Legal Clinic in Orange, California.

“natural leader” and “big-brother type” to those who served with him, the young Army Specialist promoted quickly toward a commission in the officer corps and served bravely in routine, deadly combat operations at the height of the Iraq War. However, after twelve months patrolling “a ready-made shooting gallery” along “the world’s most dangerous road,”<sup>11</sup> Daniel returned home injured and unwell, decorated with combat medals but harrowed with mental anguish, his wounds of war. Veterans’ Affairs (VA) psychiatrists documented his “extensive exposure to psychosocial stressors in combat,” but experiences out of combat scarred him deeply too. On his first week in Iraq, he sat in the safety of a base communications office while in radio communication with a squadron ambushed in the desert; he tried to calm two friends, aged nineteen, as they sustained wounds from small arms fire and then drove their Humvee into lethal roadside explosives. Days later, he guarded medics and clean-up crews attending to the gory aftermath of a bombing outside his base’s compound. This was the pace of war.

Daniel was ordered to keep a 50-foot distance from all civilians for a year and saw threats around every corner, an improvised explosive device in every scrap of litter by the road. His paranoia and anxiety were trained and ingrained. They kept him alive. When Daniel returned home from Iraq, memories of the dead and dying triggered severe anxiety attacks, paranoia, and depression. A sense of hopelessness and survivor’s guilt kept him up at night, “blacked out” and sobbing, cutting or bruising himself or pressing a loaded gun to his head. One night went differently. But for his roommate and medical professionals’ prompt attention, Daniel would have been one more tragic casualty of the modern military’s “suicide epidemic.”<sup>12</sup>

Had Daniel died that day, his military records would have stated that he served honorably; his family would have received full benefits from the military and a letter of condolence from the President.<sup>13</sup> His

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<sup>11</sup> See Paul McGeough, *The World’s Most Dangerous Road*, SYDNEY MORNING HERALD, June 8, 2005, <http://www.smh.com.au/news/World/The-worlds-most-dangerous-road/2005/06/07/1118123840061.html>.

<sup>12</sup> See Miller, *supra* note 1; Dennis J. Reimer & Peter W. Chiarelli, *The Military’s Epidemic of Suicide*, WASH. POST, Dec. 7, 2012, [http://articles.washingtonpost.com/2012-12-07/opinions/35701653\\_1\\_suicide-prevention-military-weapons-service-member](http://articles.washingtonpost.com/2012-12-07/opinions/35701653_1_suicide-prevention-military-weapons-service-member).

<sup>13</sup> See Shirley S. Wang, *President Reverses Military Suicide Condolence Letter Policy*, WALL ST. J. HEALTH BLOG (July 6, 2011, 1:40 PM), <http://blogs.wsj.com/health/2011/07/06/president-reverses-military-suicide-condolence-letter-policy/>.

death would have been considered “in the line of duty,” a casualty of mental injury and military service.<sup>14</sup> But Daniel survived. He woke to learn he was a criminal.

Army medical professionals judged him “a clear suicide risk” requiring “psychotropic medication,” “intensive therapeutic effort,” and “a great deal of emotional support” for “severe tension, anxiety, depression,” and “suicidal ideation.” They stapled his gashed wrist four times and hospitalized him for five weeks, placed him on round-the-clock suicide watch and restricted duty, and then recommended his separation from service due to persistent and impairing diagnosed mental injuries. But one day after his release from the psychiatric ward, Daniel’s command threatened him with court-martial and up to ten years’ confinement before involuntarily separating him from service for “malingering,” military parlance for fraudulently shirking duty. The Army punished him as a coward and a fraud for attempting, in sickness, to die. He was not alone.

Army Sergeant Kristofer Goldsmith lay next door, handcuffed to his hospital bed just months before, after he attempted suicide with a dozen Percocet pills washed down with a liter of vodka.<sup>15</sup> His company commander and platoon leader had recommended him for a Bronze Star for heroism at the end of his tour in Iraq but he too was involuntarily discharged for misconduct after he attempted to take his own life.<sup>16</sup> Veterans Affairs psychiatrists diagnosed both Daniel and Kristofer with combat-related Post-Traumatic Stress Disorder (PTSD) after they were separated from the Army; the military never screened either of them for PTSD before their discharge.<sup>17</sup> The Army Discharge Review Board curtly summarized the Army’s position that acts of self-injury “diminished the quality of [their] service.” It is a matter of official record that Daniel Hernandez and Kristofer Goldsmith served this nation less than honorably.

The medic attached to Daniel’s unit completed suicide by poisoning himself one day before his scheduled redeployment. Military justice calls him a casualty of service and a fallen hero. The military’s unmistakable message: if you attempt suicide, you had best succeed.

These soldiers’ stories were not isolated incidents but the

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<sup>14</sup> *Id.*

<sup>15</sup> See Aamer Madhani, *Mental Health and the Military Mindset*, L.A. TIMES, June 15, 2008, <http://articles.latimes.com/2008/jun/15/nation/na-gisuicide15>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

predictable, all too common consequence of an antiquated bad policy. As the Armed Services confront a still worsening “epidemic of suicide”<sup>18</sup> and develop a greater and “evolved” understanding<sup>19</sup> of mental injuries, they have moved aggressively to expand access to mental health services and to reduce a culture of stigmatization around mental health issues, identified as the greatest barrier to suicide prevention efforts.<sup>20</sup> As discussed below, military courts have interpreted statutes broadly to criminalize conduct that American civilian courts have generally treated as unpunishable since the end of the horse and buggy era. The military has continued to involuntarily separate or prosecute its sick and injured under criminal codes—Articles 115 and 134 of the Uniform Code of Military Justice (UCMJ)—that penalize attempted suicide and self-injury. Article 115 criminalizes “malingering,” which includes “intentional infliction of self-injury for the purpose of avoiding work, duty, or service.”<sup>21</sup> Article 134, called “the general article,” is an extraordinarily broad and unusual catch-all, criminalizing “all disorders and neglects to the prejudice of good order and discipline in the Armed Forces” and “all conduct of a nature to bring discredit upon the Armed Forces.”<sup>22</sup> The Manual for Courts-Martial lists “self-injury without intent to avoid service” as a paradigmatic example of conduct punishable under this code.

The criminalization of these behaviors is a sorry outrage, perpetuating archaic punishment of the military’s most vulnerable. For at least a century, the prevailing view in American law has been that suicidal behavior is a symptom of illness deserving treatment, not moral opprobrium or the jailhouse. Given our evolved understanding of suicide and mental injury and legal trends disfavoring the

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<sup>18</sup> Tom Watkins & Maggie Schneider, *325 Army Suicides in 2012 a Record*, CNN.COM (Feb. 2, 2013, 12:16 PM), <http://www.cnn.com/2013/02/02/us/army-suicides>.

<sup>19</sup> See, e.g., F. Don Nidiffer & Spencer Leach, “*To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*,” 29 DEV. MENTAL HEALTH L. 1 (2010); Morgan T. Sammons & Sonja V. Batten, “*Psychological Services for Returning Veterans and Their Families: Evolving Conceptualizations of the Sequelae of War-Zone Experiences*,” 64 J. CLINICAL PSYCHOL. 921, 921-27 (2008).

<sup>20</sup> “The continuing social stigma attached to mental illness is the biggest obstacle mental health experts face in helping patients, reducing suicide rates — and in the military, improving the fighting force.” Kathleen T. Rhem, *Reducing Stigma of Mental Illnesses Could Reduce Suicides*, AM. FORCES PRESS SERVICE (May 8, 2000), <http://www.defense.gov/News/NewsArticle.aspx?ID=45215>.

<sup>21</sup> Art. 115, Uniform Code of Military Justice, 10 U.S.C. § 915 (2012).

<sup>22</sup> Art. 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2012).

criminalization of private behaviors on moral grounds, it is time for military justice to catch up to the modern view shared by every state's criminal code that suicidal acts are not properly punished. Criminalization of these acts harms the military's mission while furthering no legitimate military purpose. It abandons military medicine and military justice's rehabilitative ethic, institutionalizes a harmful culture of stigma around mental injury, and thereby reduces the readiness of the fighting force. It is also "singularly inefficacious as a deterrent"<sup>23</sup> for the suicidal, although it does, tragically, deter servicemembers from seeking help before they reach that point.

Military commands have a legitimate need to discipline those who fraudulently evade duty for personal gain or self-preservation, but punishing those who seek their own harm or death is inconsistent with those goals. Other UCMJ Articles, like those punishing "fraudulent separation"<sup>24</sup> or "frauds against the United States,"<sup>25</sup> effectively deal with those fraudulently injuring themselves for personal gain without criminalizing bona fide suicidal acts.

Moreover, punishment of suicidal acts is abusive of due process and violates federal statutes and military regulations protecting servicemembers' rights. Perversely, these criminal codes turn treating physicians and psychiatrists into investigating informants while entrusting essentially diagnostic assessments about a servicemember's mental health to non-medical command personnel. They irrationally grant commands unfettered discretion to punish those presumed to be medically impaired and mentally unsound under the military's own regulations,<sup>26</sup> imposing cruel penalties on those in need of treatment. And because these laws' elements are so vague or, in the case of Article 134, explicitly subjective, they sanction arbitrary enforcement in violation of due process.

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<sup>23</sup> MODEL PENAL CODE § 210.5, cmt. 2 at 94 (Official Draft & Revised Commentaries 1980).

<sup>24</sup> Art. 83, Uniform Code of Military Justice, 10 U.S.C. § 883 (2012).

<sup>25</sup> Art. 132, Uniform Code of Military Justice, 10 U.S.C. § 932 (2012).

<sup>26</sup> See, e.g., U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS 23 (2008) ("The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until overcome by substantial evidence and a great weight of the evidence that supports any different conclusion."); U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0218(c) (2012) ("In view of the strong human instinct for self-preservation . . . a bona fide suicide attempt . . . creates a strong inference of lack of mental responsibility.")

### III. THE CRIMINALIZATION OF SELF-INJURY AMID A SUICIDE EPIDEMIC

The criminalization of suicidal behavior has not occurred in a vacuum and deserves particular scrutiny in light of the staggering scale of the modern military's suicide problem. Though fraudulent self-injury to avoid combat is as old as war itself, it has become clear in recent years that mental injuries and suicidal behavior are an occupational hazard in the modern military.

In July 2012, Defense Secretary Leon Panetta declared in testimony to Congress that a "suicide epidemic" was afflicting the Armed Forces.<sup>27</sup> "Something" he said, "is wrong."<sup>28</sup> A record 350 active duty servicemembers took their own lives that year, more than double the number from ten years before.<sup>29</sup> Army suicide rates doubled even faster, in the span of just five years, to become the leading cause of death among Army forces.<sup>30</sup> An Army soldier is now more likely to die by suicide than behind the wheel of a car or at the hands of the enemy.<sup>31</sup> Across all the services, hundreds more have died of suicide this decade than in twelve bloody years of war in Afghanistan.<sup>32</sup>

The military's attempted suicide rate is even higher. The Department of Defense Suicide Prevention Office estimates that for every active duty suicide, 10 more active duty servicemembers attempt to take their lives each year, with at least half of those requiring hospitalization for their self-injuries.<sup>33</sup> A Defense Department survey of nearly 30,000 active duty servicemembers from every branch revealed that 2 percent of Army, 2.3 percent of Marines, and 3 percent of Navy respondents had attempted suicide at some point in their career.<sup>34</sup> Those numbers do not include veterans who attempted suicide after leaving the

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<sup>27</sup> See Miller, *supra* note 1.

<sup>28</sup> *Id.*

<sup>29</sup> See James Dao & Andrew W. Lehren, *Baffling Rise in Suicides Plagues the U.S. Military*, N.Y. TIMES, May 15, 2013, <http://www.nytimes.com/2013/05/16/us/baffling-rise-in-suicides-plagues-us-military.html>.

<sup>30</sup> Anna Mulrine, *Suicide 'Epidemic' in Army: July was Worst Month, Pentagon Says*, CHRISTIAN SCI. MONITOR, Aug. 17, 2012, <http://www.csmonitor.com/USA/Military/2012/0817/Suicide-epidemic-in-Army-July-was-worst-month-Pentagon-says>.

<sup>31</sup> *Id.*

<sup>32</sup> See IRAQ COALITION CASUALTY COUNT, <http://icasualties.org/> (last visited Apr. 18, 2014).

<sup>33</sup> DEFENSE SUICIDE PREVENTION OFFICE, *supra* note 7.

<sup>34</sup> *Id.*

service; the Pentagon estimated that an additional 950 veterans under VA care attempted suicide *each month* between October 2008 and December 2010.<sup>35</sup>

This tide of suicides has baffled the military<sup>36</sup> because, historically, the military's suicide rate was significantly lower than the civilian rate.<sup>37</sup> Military suicide rates began trending upward in 2004 and crested above the national average in 2008.<sup>38</sup> That year, veterans aged 20 through 24, those who have served during the war on terror, had the highest suicide rate among all veterans, estimated at between two and four times higher than civilians of the same age and up to four times the national average.<sup>39</sup> Those rates have continued to increase at an alarming rate even though the military has initiated nearly 900 suicide prevention programs worldwide.<sup>40</sup> Military physicians have also documented a rising trend in non-suicidal self-injuries like habitual self-cutting, attributed to "long, repeated combat tours" and "strong feelings of desperation."<sup>41</sup>

Though congressionally mandated record keeping about military suicides has improved our understanding of the demographics of the epidemic,<sup>42</sup> no easy fixes have emerged. We know the modal military suicide casualty is a 21 year-old, junior enlisted, white male.<sup>43</sup> He is likely to have served one or more deployments, served in an Active

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<sup>35</sup> Mulrine, *supra* note 30.

<sup>36</sup> See Dao & Lehren, *supra* note 29.

<sup>37</sup> DEFENSE SUICIDE PREVENTION OFFICE, *supra* note 7.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See ALAN BERMAN ET AL., THE CHALLENGE AND THE PROMISE: STRENGTHENING THE FORCE, PREVENTING SUICIDE, AND SAVING LIVES 42 (2010).

<sup>41</sup> PATRICIA A. ADLER & PETER ADLER, THE TENDER CUT: INSIDE THE HIDDEN WORLD OF SELF-INJURY 37 (2011).

<sup>42</sup> In the Army, The Army Suicide Event Report, or ASER, has replaced the psychological autopsy. Implementation of the ASER, which began in 2003, gradually grew more robust, collecting data not only about the manner of death but also about events and factors thought to be involved with the suicide. The ASER is a Web-based quantifiable instrument, with data fields including demographic and clinical information, as well as information about the cause and manner of death. The ASER later expanded its scope to include suicides from all the services, and was re-named the DoD Suicide Event Report, or DODSER, implemented in 2005. Similar to the former composite ASER Report, data on all known active-duty suicides from all the services are entered into an automated system and published as a composite report. Elspeth Cameron Ritchie, *Suicide and the United States Army*, THE DANA FOUNDATION (Jan. 25, 2012), <http://www.dana.org/news/cerebrum/detail.aspx?id=35150>.

<sup>43</sup> DEFENSE SUICIDE PREVENTION OFFICE, *supra* note 7.

Component, and died by self-directed gunshot in a non-deployed setting.<sup>44</sup> He is unlikely to have communicated any plan or potential for self-harm prior to his suicide and likely had no documented history of mental or substance use disorders.<sup>45</sup> Thirty to forty percent of the military's suicide casualties attempted suicide at least once before completion.<sup>46</sup> Though most suicide casualties served at least one deployment, surprisingly, the vast majority never saw direct combat.<sup>47</sup> As Daniel Hernandez's experience indicates, though, traumas out of combat may be just as scarring.

It is known that record rates of PTSD have been a leading contributor to the suicide epidemic. Along with rising suicide rates, diagnosed cases of PTSD have steadily increased in the military since 2003.<sup>48</sup> Roughly one in five veterans of the Iraq and Afghanistan wars have now been diagnosed with PTSD, totaling more than nearly 300,000 men and women.<sup>49</sup> Their mental injury from war, PTSD, is "strongly linked to suicidal behavior and it is a major predictor of who transitions from suicidal ideation to attempting suicide."<sup>50</sup> Researchers have found that veterans of Iraq and Afghanistan who screened positively for PTSD were more than four times as likely to experience suicidal ideation as veterans who did not.<sup>51</sup> Veterans reporting "sub-threshold PTSD" (i.e., displaying some symptoms of PTSD without meeting all the criteria for the diagnosis) were still three times more likely to experience suicidal

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; see also NAT'L CTR. FOR TELEHEALTH AND TECH., DEPARTMENT OF DEFENSE SUICIDE EVENT REPORT: CALENDAR YEAR 2010 ANNUAL REPORT (2011).

<sup>46</sup> DEFENSE SUICIDE PREVENTION OFFICE, *supra* note 7.

<sup>47</sup> *Id.*

<sup>48</sup> See *Shocking PTSD, Suicide Rates for Vets*, FACE THE FACTS USA (June 5, 2013), <http://www.facethefactsusa.org/facts/the-true-price-of-war-in-human-terms>; see also HANNAH FISCHER, CONG. RESEARCH SERV., RS 22452, A GUIDE TO U.S. MILITARY CASUALTY STATISTICS: OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM 2-3 (2014), available at <http://www.fas.org/sgp/crs/natsec/RS22452.pdf>.

<sup>49</sup> FACE THE FACTS USA, *supra* note 48.

<sup>50</sup> Edward A. Selby et al., *Overcoming the Fear of Lethal Injury: Evaluating Suicidal Behavior in the Military Through the Lens of the Interpersonal-Psychological Theory of Suicide*, 30 CLINICAL PSYCHOL. REV. 298, 301 (2010); William Hudenko et al., *The Relationship Between PTSD and Suicide*, U.S. DEP'T VETERANS AFF., <http://www.ptsd.va.gov/professional/co-occurring/ptsd-suicide.asp> (last updated Jan. 3, 2014) (citing studies that find a "robust relationship" between PTSD and suicide).

<sup>51</sup> Matthew Jakupcak et al., *Posttraumatic Stress Disorder as a Risk Factor for Suicidal Ideation in Iraq and Afghanistan War Veterans*, 22 J. TRAUMATIC STRESS 303, 303 (2009).

ideation than veterans without PTSD.<sup>52</sup>

This body of evidence demonstrates that military service is now a unique risk factor for mental injuries known to cause suicidal behaviors. Those same mental injuries often go unrecognized and untreated.<sup>53</sup> American military health providers have struggled with proper identification of PTSD, and the military has had to institute procedural safeguards in recent years to discourage military physicians from giving adverse psychiatric diagnoses like “malingering” and “personality disorder” in cases where servicemembers’ symptoms may be associated with trauma.<sup>54</sup>

The result is that military justice criminally punishes conduct that is a leading symptom of a psychiatric illness, often untreated, which is now incurred in service by more than one fifth of the deployed fighting force.

#### IV. THE LEGAL HISTORY OF SUICIDAL BEHAVIOR IN AMERICAN CIVILIAN COURTS

Amid this suicide epidemic, the military’s criminalization of suicidal conduct stands out as deeply anachronistic and “contrary to modern penal and psychological theory.”<sup>55</sup> Its paternalistic and

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<sup>52</sup> Matthew Jakupcak et al., *Hopelessness and Suicidal Ideation in Iraq and Afghanistan War Veterans Reporting Subthreshold and Threshold Posttraumatic Stress Disorder*, 199 J. NERVOUS & MENTAL DISEASE 272, 272-75 (2011).

<sup>53</sup> L. Sher, *Recognizing Post-Traumatic Stress Disorder*, 97 QJM 1, 1 (2004); O. Taubman-Ben-Ari et al., *Post-Traumatic Stress Disorder in Primary-Care Settings: Prevalence and Physicians’ Detection*, 31 PSYCHOL. MED. 555, 555-60 (2001); see also *Oversight Hearing on Systemic Indifference to Invisible Wounds: Hearing Before the S. Comm. on Veterans’ Affairs*, 110th Cong. (2008) (statement of Dr. Norma J. Perez, Mental Health Integration Psychologist, Texas Veterans Health Care System) (“Many individuals with symptoms of combat stress are not ready to discuss the details of their experiences, but they can describe their symptoms and their levels of distress. An accurate diagnosis of PTSD, however, would require a veteran [to] fully disclose the details and feelings associated with a traumatic event, and in my clinical experience, many have been unwilling to do this without a strong sense of safety and trust, which can only be developed over time.”).

<sup>54</sup> See, e.g., U.S. DEP’T OF ARMY, OTSG/MEDCOM POLICY MEMO 12-035, POLICY GUIDANCE ON THE ASSESSMENT AND TREATMENT OF POST-TRAUMATIC STRESS DISORDER (PTSD) 7 (2012) (requiring “substantial and definitive evidence from collateral or objective sources” and two credentialed care providers’ signatures to substantiate a diagnosis of malingering, adjustment disorder, or personality disorder by Army mental health providers in order to safeguard the diagnoses’ integrity).

<sup>55</sup> VICTOR M. VICTOROFF, *THE SUICIDAL PATIENT: RECOGNITION, INTERVENTION, MANAGEMENT* 173-74 (1982).

moralistic underpinnings are inconsistent with modern American law and conceptions of fairness. The modern view, as the California Supreme Court stated more than thirty years ago, is that “attempted suicide is a symptom of mental illness and, as such, it makes no more sense to affix criminal liability to it than to any other symptom of any other illness.”<sup>56</sup> The federal Ninth Circuit Court of Appeals likewise took notice of the “modern consensus” that suicide is a medical or psychological problem, not one fit for criminal penalty.<sup>57</sup> That view is not a novel development based on just-discovered principles, but a long-standing view generally accepted in American civilian law for at least a hundred years.<sup>58</sup>

Criminal punishment of the suicidal has unmistakably religious and feudal origins. Historically, suicide was a felony at common law, punished by forfeiture of goods and property to the English king and ignominious burial on the highway with a stake impaling the deceased’s body.<sup>59</sup> Judge Blackstone’s Commentaries explained that the law “wisely and religiously” ranked suicide “among the highest crimes” because it was “a double offence; one spiritual, in invading the prerogative of the Almighty . . . the other temporal, against the king, who hath an interest in the preservation of all his subjects.”<sup>60</sup> The common law considered attempted suicide a condemnable misdemeanor for these reasons.<sup>61</sup>

Rather than classifying suicide as criminal, the United States has “continued to consider [suicide] an expression of mental illness”<sup>62</sup> and since independence, no American jurisdiction has ever punished completed suicide.<sup>63</sup> For at least a century, the prevailing view in American law has been that attempted suicide is therefore deserving of

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<sup>56</sup> In re Joseph G., 34 Cal. 3d 429, 434 (1983) (quoting David S. Markson, *The Punishment of Suicide - A Need for Change*, 14 VILL. L. REV. 463, 469 (1969)).

<sup>57</sup> *Compassion in Dying v. Washington*, 79 F.3d 790, 847 (9th Cir. 1996).

<sup>58</sup> *Id.* at 809 (“The majority of states have not criminalized suicide or attempted suicide since the turn of the [20th] century.”).

<sup>59</sup> Markson, *supra* note 56, at 465.

<sup>60</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*189; *accord, e.g.*, *Hales v. Petit*, (1816) 75 Eng. Rep. 387, 400 (K.B.).

<sup>61</sup> Markson, *supra* note 56, at 466; *see, e.g.*, *R v. Mann*, [1914] 2 K.B. 107 (Crim. App.); *R v. Burgess*, (1862) 169 Eng. Rep. 1387 (Crim. App.); *R v. Moore*, [1852] 175 Eng. Rep. 571.

<sup>62</sup> HERBERT HENDIN, *SUICIDE IN AMERICA* 23 (1982).

<sup>63</sup> Markson, *supra* note 56, at 465.

treatment, not penalty.<sup>64</sup> Most jurisdictions decriminalized attempted suicide by the latter part of the nineteenth century or in the early years of the twentieth.<sup>65</sup> Typical of this trend was the decision of a Pennsylvania court in 1902 refusing to apply criminal penalties to an attempted suicide.<sup>66</sup> One hundred ten years before the military's highest court heard arguments to consider whether a bona fide suicide attempt was criminally punishable, the Pennsylvania court took note of "the strong public opinion against treating attempted suicide as a crime, rather than as the manifestation of mental illness,"<sup>67</sup> and wrote that it could not justify "indictment and trial of an unfortunate person who has not the fortitude to bear any more of the ills of this life."<sup>68</sup> "His act may be a sin," the court concluded, "but it is not a crime; it is the result of disease. He should be taken to a hospital and not sent to a prison."<sup>69</sup>

In the early 20th Century, psychiatric professionals helped build the case against the criminalization of suicide attempts in the few American jurisdictions still punishing such behavior. In 1921, the noted psychoanalyst, Abraham Brill, argued that, "categorically all suicides" should be considered the result of mental illness, because "only those afflicted with a mental disease . . . embody the utter rejection of the basic law of self-preservation."<sup>70</sup> In 1948, psychoanalyst and lecturer, Edmund Bergler asserted: "All suicides are under the pressure of unconscious forces and are, psychiatrically speaking, no more responsible for the act than is a person for having cancer."<sup>71</sup> By 1953, legal observers confidently stated, "it is pretty generally recognized by the law, as it is of course by psychiatrists and by the general public, that the presumption in the case of a suicide or attempted suicide is that the person is suffering from a serious mental disturbance."<sup>72</sup>

The drafters of the Model Penal Code shared that view and

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<sup>64</sup> See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790, 809 (9th Cir. 1996) ("The majority of states have not criminalized suicide or attempted suicide since the turn of the [20th] century.").

<sup>65</sup> *Id.*; Thomas J. Marzen et al., "Suicide: A Constitutional Right?" — *Reflections Eleven Years Later*, 35 DUQ. L. REV. 261, 265 (1996).

<sup>66</sup> See *Commonwealth v. Wright*, 26 Pa. C. 666 (1902).

<sup>67</sup> Markson, *supra* note 56, at 466-67 (citing *Wright*, 26 Pa. C. at 669).

<sup>68</sup> *Wright*, 26 Pa. C. at 669.

<sup>69</sup> *Id.*

<sup>70</sup> Markson, *supra* note 56, at 472 n.71.

<sup>71</sup> Edmund Bergler, *Suicide: Psychoanalytic and Medicolegal Aspects*, 8 LA. L. REV. 504, 533 (1948).

<sup>72</sup> WINFRED OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 46-47 (1953).

strongly rejected the criminalization of attempted suicide. In the 1959 Tentative Draft, Model Penal Code drafters wrote, “we think it clear that this is not an area in which the penal law can be effective and that its intrusion on such tragedies is an abuse.”<sup>73</sup> The drafters also rejected the criminalization of non-suicidal self-injury.<sup>74</sup> This tracked the drafters’ stated opposition to criminal prohibitions where: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced.<sup>75</sup> Subsequent Model Penal Code drafters went even further in opposing criminal punishment for the suicidal. Commentaries in the 1980 Model Penal Code draft declared:

[C]riminal punishment is singularly inefficacious to deter attempts to commit suicide . . . It seems preposterous to argue that the visitation of criminal sanctions upon one who fails in the effort is likely to inhibit persons from undertaking a serious attempt to take their own lives. Moreover, it is clear that the intrusion of the criminal law into such tragedies is an abuse. There is a certain moral extravagance in imposing criminal punishment on a person who has sought his own self-destruction, who has not attempted direct injury to anyone else, and who more properly requires medical or psychiatric attention.<sup>76</sup>

Only two states still had criminal statutes punishing attempted suicide when the Model Code was introduced in 1959 and every subsequent recodification effort to address the subject has followed the Model Code in *not* criminalizing attempted suicide or self-injury.<sup>77</sup> No American jurisdiction has criminally punished a suicide attempt since 1961<sup>78</sup> and today no state has any law criminalizing attempted suicide.<sup>79</sup>

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<sup>73</sup> MODEL PENAL CODE § 201.5, cmt. 1 (Tentative Draft No. 9 1959).

<sup>74</sup> See MODEL PENAL CODE § 211.1 (1985) (defining “assault” to include both assault and battery, where one “attempts to cause or purposefully, knowingly, or recklessly causes bodily injury to *another*”) (emphasis added).

<sup>75</sup> MODEL PENAL CODE § 207.5 (Tentative Draft No. 4 1955).

<sup>76</sup> MODEL PENAL CODE § 210.5, cmt. 2 at 94 (Official Draft & Revised Commentaries 1980).

<sup>77</sup> See *id.* at 94 n.10.

<sup>78</sup> *Id.* at 94; *Compassion in Dying v. Washington*, 79 F.3d 790, 859 n.14 (referencing *State v. Willis*, 255 N.C. 473 (1961)) (“Research indicates that the last prosecution in the U.S. for attempted suicide probably occurred in 1961. The North Carolina Supreme Court relied on the English common law to determine that attempted suicide was punishable as a misdemeanor.”)

<sup>79</sup> *Compassion in Dying*, 79 F.3d at 810.

As the California Supreme Court wrote, “all modern research points to one conclusion about the problem of suicide—the irrelevance of the criminal law to its solution.”<sup>80</sup>

## V. THE LEGAL HISTORY OF THE SELF-INJURY OFFENSES IN MILITARY LAW

Sadly, military justice remains woefully and uncharacteristically behind on this subject. Suicide and self-injury were never directly addressed in testimony or statements before the UCMJ drafting committee or in the congressional Armed Service Committees’ records in considering enactment of the UCMJ in 1951,<sup>81</sup> but military law had long punished self-injury as a violation of “the general article.”<sup>82</sup> After the adoption of the UCMJ, military courts were, like their civilian counterparts, at first hostile to the notion of punishing the suicidal. In the 1955 case of *United States v. Jacobs*, the Army Board of Review held that “intentional self-injury,” without more, was not a cognizable offense under military law.<sup>83</sup> The Board stated that the UCMJ made the design to avoid work, duty, or service “the essence” of any self-injury offense and pointed out that before codification of the UCMJ, the *Manual for Courts-Martial* of 1928 and 1949 required a showing that a servicemember’s self-injury impaired his ability to perform military duties in order to justify criminal punishment.<sup>84</sup> Without a specification that the accused acted with the purpose of shirking duty, the Board would not validate punishment or prosecution of his suicide attempt.<sup>85</sup>

The Air Force Court of Military Review followed the Army Board’s approach one week later in *United States v. Walker*, and explicitly invalidated prosecutions for attempted suicide where there was no proof of fraudulent intent.<sup>86</sup> In that case, the accused was charged with and convicted of a charge of “wrongfully and willfully attempt[ing] to commit suicide” under the General Article 134 after he consumed 100

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<sup>80</sup> In re Joseph G., 34 Cal. 3d 429, 434 (1983) (quoting Markson, *supra* note 56, at 473).

<sup>81</sup> See Raymond G. Lande, *Suicide and the Military Justice System*, 22 SUICIDE & LIFE-THREATENING BEHAV. 341, 342-43 (1992) (discussing *United States v. Walker*, 20 C.M.R. 931 (A.F.B.R. 1955)).

<sup>82</sup> Richard L. Dunn, *Aspects of Malingering*, 17 A.F. L. REV. 1, 1-2 (1975).

<sup>83</sup> *United States v. Jacobs*, 20 C.M.R. 458, 458 (A.B.R. 1955).

<sup>84</sup> Dunn, *supra* note 82, at 5.

<sup>85</sup> *Jacobs*, 20 C.M.R. at 460.

<sup>86</sup> *United States v. Walker*, 20 C.M.R. 931, 931 (A.F.B.R. 1955).

sleeping pills following his assault on a fellow airman.<sup>87</sup> Like the Army board in *Jacobs*, the *Walker* court concluded that “attempted suicide” was not, without more, a cognizable offense under military law.<sup>88</sup> The court attempted to limit commands’ unfettered discretion to prosecute crimes under Article 134, stating that the courts “cannot grant to the services unlimited authority to eliminate vital elements from . . . offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under [the general article].”<sup>89</sup> The court considered whether attempted suicide could instead be punished under UCMJ Article 80, governing attempt crimes generally, but concluded that the UCMJ could not criminalize “a mere attempted act” unless that act would, “if consummated, be a violation of and punishable” by law.<sup>90</sup> Because suicide “cannot be punished in the United States” due to “the ‘cruel and unusual punishment’ provisions of both the Constitution of the United States and the Uniform Code of Military Justice,” attempted suicide could not be properly punished under any UCMJ article.<sup>91</sup> After the *Walker* case, no further litigation of attempted suicide cases was reported for over a decade.<sup>92</sup>

But this measured consensus did not hold. In the 1968 case of *United States v. Taylor*, the military’s highest court—the Court of Appeals for the Armed Forces—signaled a shift when it approved the Article 134 conviction of a Seaman Recruit who superficially slashed his arms with a razor blade in order to “outdo the performance” of another serviceman who had engaged in the same conduct.<sup>93</sup> Though it was never alleged that Taylor had sought to evade duty (or that he had genuinely attempted suicide either), the US Court of Military Appeals declared that the accused’s mental state and purpose were essentially irrelevant in Article 134 prosecutions. While noting “a distinct lack of legislative history” concerning the self-injury offenses in the UCMJ, the court wrote that Article 134 had “an objective orientation . . . calculated to preserve good order and discipline, without necessarily considering [the accused’s] particular mental attitude.”<sup>94</sup> So long as the accused’s

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<sup>87</sup> *Id.* at 933.

<sup>88</sup> *Id.* at 934.

<sup>89</sup> *Id.* at 935 (citing *United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953)).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Dunn*, *supra* note 82, at 5.

<sup>93</sup> *United States v. Taylor*, 38 C.M.R. 393, 393-95 (C.M.A. 1968).

<sup>94</sup> *Id.* at 395.

self-injury was found to have a direct prejudicial effect upon the good order and discipline of the Armed Forces, he could be prosecuted for self-injury whether his purpose was wrongful or not.<sup>95</sup> Where government prosecutors lacked sufficient evidence to discharge the suicidal under Article 115 as duty-shirking malingerers, they could now cite the external effects of a failed suicide attempt to successfully punish and prosecute the sick and suicidal.

The Court of Military Appeals faced just that situation in the 1994 case of *United States v. Ramsey* where the court, citing *Taylor*, upheld the Article 134 conviction of an Army Specialist who shot himself in the shoulder while serving in Operation Desert Storm.<sup>96</sup> Ramsey was arguably not genuinely suicidal; the accused had shot himself with a single round in a nonlethal area just after arriving in a combat zone and his explanation for that conduct shifted multiple times.<sup>97</sup> But the *Ramsey* court conducted no inquiry into Ramsey's intent and sanctioned his criminal punishment under Article 134 on the premise that he was in fact genuinely suicidal.<sup>98</sup> Because Ramsey admitted that his suicide attempt had "killed the morale of his unit" and made his colleagues "work a little harder to try to fill the position that he was supposed to be filling," the court ruled that he could be criminally punished for prejudicing good order and discipline.<sup>99</sup> That was a notably low bar to criminal prosecution. Commands could allege that almost any suicide attempt affected the morale of those who knew and nearly lost a friend and colleague; necessary treatment and hospitalization for survivors would also almost inevitably leave their duty stations at least temporarily unfilled. News that a service member had come down with measles or survived a car wreck might have the same prejudicial effect. But under Article 134, attempted suicide was increasingly approaching a strict liability offense.

In addition to these ever-broadening interpretations of the General Article 134, military courts also continued to broaden the scope of suicidal conduct punishable under Article 115 too, for "wrongful self-injury for the purpose of avoiding work, duty, or service." In the 1988 case of *United States v. Johnson*, the US Court of Military Appeals approved the Article 115 prosecution of an Army Staff Sergeant who,

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<sup>95</sup> *Id.*

<sup>96</sup> *United States v. Ramsey*, 40 M.J. 71, 75 (C.M.A. 1994).

<sup>97</sup> See Appellant's Brief, *supra* note 3, at 33 n.99.

<sup>98</sup> *Ramsey*, 40 M.J. at 75.

<sup>99</sup> *Id.* at 74.

instead of facing a possible court-martial trial on other charges, attempted to hang himself and then injected himself with a near-fatal dose of heroin to attempt suicide.<sup>100</sup> The court accepted Johnson's suicide attempt as genuine but held that he could be prosecuted for fraudulently attempting to avoid work, duty, or service because he admitted that he attempted suicide in order to avoid the shame and embarrassment of a possible trial.<sup>101</sup> The court stated that Johnson's work, duty, and service included his "availability for prosecution" by military authorities; his desire to escape that general "availability" amounted to criminally punishable duty-shirking.<sup>102</sup> "Usually attempts to commit suicide are not thought of in connection with malingering," the court acknowledged.<sup>103</sup> The court reasoned:

"Probably this is because malingering has often been a tactic employed to extend, rather than shorten, life expectancy—and especially so in a combat situation. However, we perceive nothing in the definition of malingering which precludes prosecution for attempted suicide if the 'purpose' of the attempt is avoidance of 'duty or service.'"<sup>104</sup>

The court approvingly cited even broader language from its opinion decades earlier in *United States v. Mamaluy*, stating that Article 115 "unquestionably . . . intended to proscribe False . . . a self-inflicted injury which would prevent the injured party from being available for the performance of all military tasks."<sup>105</sup> The *Mamaluy* court had found that a suicidal servicemember's hospitalization itself proved his purpose to shirk military duty: "If by injuring himself he forces the Government to confine him in a hospital, he has breached his obligation to the service and successfully escaped the performance of many military duties assigned."<sup>106</sup>

The *Johnson* court clarified that attempted suicide, without more, was still not criminally punishable. "Although the inevitable result of success in an attempted suicide will be the inability to perform any further 'work, duty, or service' . . . the foreseeability of this outcome is not equivalent to a 'purpose' within the meaning of Article 115" because "many attempts to commit suicide are undertaken for the

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<sup>100</sup> *United States v. Johnson*, 26 M.J. 415, 417 (C.M.A. 1988).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 418.

<sup>103</sup> *Id.* at 417.

<sup>104</sup> *Id.*

<sup>105</sup> *United States v. Mamaluy*, 27 C.M.R. 176, 178 (C.M.A. 1959).

<sup>106</sup> *Id.*

purpose of self-destruction, rather than for avoiding duty.”<sup>107</sup> Prosecutors had to allege some evidence that the accused’s purpose was to avoid some aspect of military life. But the court’s holding interpreted the purpose element very broadly to encompass suicidal conduct motivated by a desire to evade *availability* for *any* “unpleasant situation” peripherally tied to military service.<sup>108</sup> If prosecutors could allege that any element of military service motivated a servicemember’s attempt at death, Article 115’s “purpose” element would now be satisfied; he could be charged with and convicted of a crime imposing a decade-long prison term and other penalties. That interpretation made the intent-based Article 115 a nearly strict liability offense, especially for those driven to suicide by mental stressors incurred in the military. Servicemembers with PTSD who attempt suicide to escape combat traumas are especially vulnerable under this jurisprudence. Anecdotal evidence suggests that in administrative separations, where commands serve as prosecutor, judge, and jury, the separation authority has had little trouble satisfying Article 115’s purpose element to involuntarily discharge the suicidal.

## VI. PROSECUTING THE SUICIDAL IN 2013: THE MILITARY COURTS PUNT IN *UNITED STATES V. CALDWELL*

The Court of Appeals for the Armed Forces’ (CAAF) cautious 2013 opinion in *United States v. Caldwell* represented the first time in decades that military courts had placed any effective curbs on commands’ discretion to punish the suicidal.<sup>109</sup> Dicta from that opinion may lay the groundwork for future military courts to invalidate the UCMJ self-injury offenses outright. But on the central question before it about the legality of punishing the genuinely and medically suicidal, the court dodged. And a remarkably harsh, nearly strict liability interpretation of Article 134 lost by just one vote.

Two years earlier, Marine Corps Private Lazzaric Caldwell was convicted at special court-martial pursuant to his guilty plea on a charge of “wrongful self-injury” under Article 134, for slitting his wrists in “a genuine suicide attempt.”<sup>110</sup> The trial judge acknowledged the self-injury offense was an “odd charge because . . . it is basically

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<sup>107</sup> *United States v. Johnson*, 26 M.J. 415, 417-18 (C.M.A. 1988).

<sup>108</sup> *See id.*

<sup>109</sup> *United States v. Caldwell*, 72 M.J. 137, 138 (C.A.A.F. 2013).

<sup>110</sup> *Id.* at 139 (citing *United States v. Caldwell*, 70 M.J. 630, 631-32 (N-M. Ct. Crim. App. 2011) (en banc)).

criminalizing an attempted suicide,<sup>111</sup> but he approved a court-martial sentence including confinement for six months and a punitive misconduct discharge<sup>112</sup> despite evidence that the Marine suffered diagnosed depression and PTSD.<sup>113</sup> “You were thinking selfishly,” he told Private Caldwell, “because you were depressed.”<sup>114</sup> After a three-judge panel initially set aside the self-injury charge, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) then affirmed Private Caldwell’s conviction in an *en banc* opinion endorsing commands’ “unfettered discretion” to prosecute the suicidal.<sup>115</sup> The NMCAA spoke of “suicide acts” as a “type of leadership challenge” and rejected any prohibition against “criminal prosecutions of genuine suicide attempts,”<sup>116</sup> even though the Navy and Marines’ administrative regulations state that “[i]n view of the strong human instinct for self-preservation . . . a bona fide suicide attempt . . . creates a strong inference of lack of mental responsibility.”<sup>117</sup> The Government asserted that *Taylor* had “settled definitively” the criminality of bona fide suicide attempts to the prejudice of good order or discipline<sup>118</sup> and the NMCAA found that case “dispositive” of the issue too.<sup>119</sup>

When the Court of Appeals for the Armed Forces granted review of the legality of punishing bona fide suicide attempts, senior Judge Walter Cox III pressed the Government’s attorney to explain why criminal penalties for the suicidal were not trying “to fit a square peg in a round hole.”<sup>120</sup> At oral argument, other judges voiced similar doubts about the wisdom and legality of punishing psychiatrically afflicted service members<sup>121</sup> after Caldwell’s attorneys pointed out that the

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<sup>111</sup> *Id.*

<sup>112</sup> *See id.* at 138.

<sup>113</sup> *Id.* at 139.

<sup>114</sup> Appellant’s Brief, *supra* note 3, at 25.’

<sup>115</sup> *United States v. Caldwell*, 70 M.J. 630, 633 (N-M. Ct. Crim. App. 2011) (*en banc*).

<sup>116</sup> *Id.*

<sup>117</sup> MANUAL OF THE JUDGE ADVOCATE GENERAL, *supra* note 26, § 0218(c). In the version of this instruction in effect from 2007-2012 (5800.7E), the same language was located in § 225.

<sup>118</sup> *See* Prosecutor’s Brief, *supra* note 8, at 9 (citing *United States v. Ramsey*, 40 M.J. 71, 75 (C.M.A. 1994)).

<sup>119</sup> *See* Appellant’s Brief, *supra* note 3, at 9.’

<sup>120</sup> *See* Andrew Tilghman, *Court Wrestles with Punishing Suicide Attempts*, ARMY TIMES (Nov. 27, 2012, 3:28 PM), <http://www.armytimes.com/article/20121127/NEWS/211270309/Court-wrestles-punishing-suicide-attempts>.

<sup>121</sup> *See id.*

military courts had never explicitly sanctioned prosecution of suicide attempts induced by mental illness.<sup>122</sup> The Government countered that no precedent in military justice or in the legislative history of the UCMJ justified any “suicide exception” to military crimes;<sup>123</sup> military law already provided for Sanity Boards to evaluate individual defendants’ mental capacity and responsibility where defendants reasonably asserted the possibility of mental insanity on a case-by-case basis.<sup>124</sup> The Government found no basis for a blanket prohibition on prosecutions of the suicidal where the Sanity Board process could satisfactorily protect the mentally ill or injured.<sup>125</sup> Caldwell’s defense countered that the military’s administrative regulations treated attempted suicide as evidence of mental infirmity as a matter of course absent significant evidence to the contrary. On April 23, 2013, the Court of Appeals vacated and remanded Private Caldwell’s conviction on case-specific grounds, failing to end the military’s criminalization and punishment of attempted suicide.

Though *Caldwell* did not end the criminalization of suicidal behavior in the military, its narrow 3-2 majority cabined the scope of Article 134 and halted the military courts’ decades-long trend toward an increasingly strict liability interpretation of the UCMJ self-injury offenses. Dicta from that opinion may well lay the groundwork for future courts to invalidate the self-injury offenses. The Chief Judge’s opinion distinguished Caldwell’s “bona fide suicide attempt” from the non-suicidal self-injuries charged in the major Article 134 precedents, *Taylor* and *Ramsey*, discussed above.<sup>126</sup> His opinion then discounted the Government’s evidence that Caldwell’s suicide attempt prejudiced good order and discipline. As indicia of that prejudice, the Government (and the NMCAA) had pointed to Caldwell’s admission that his attempt had exposed a gunnery sergeant to his bodily fluids, caused the “expenditure of medical resources and reaction of emergency personnel,” delayed his pretrial confinement for other charges as a result of his hospitalization, and made things “weird” in the weeks after.<sup>127</sup> But the *Caldwell*

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<sup>122</sup> See Appellant’s Brief, *supra* note 3, at 31-32.’

<sup>123</sup> See Prosecutor’s Brief, *supra* note 8, at 17.’

<sup>124</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706(a) (2012) (governing the process inquiring into the mental capacity or mental responsibility of an accused).

<sup>125</sup> See Prosecutor’s Brief, *supra* note 8, at 17.’

<sup>126</sup> United States v. Caldwell, 72 M.J. 137, 140-41 (C.A.A.F. 2013).

<sup>127</sup> Caldwell conceded that he needlessly exposed others to his bodily fluids and caused corpsmen to respond with their medical kits; he also admitted that after his attempted

majority refused to interpret Article 134 so broadly. The court recognized that under such a rule, “every bona fide suicide attempt requiring medical attention would be per se prejudicial to good order and discipline and on that basis alone could be subject to prosecution.”<sup>128</sup> The court found that Caldwell’s attempt had “no significant impact” on good order and discipline in his unit because he had merely caused emergency personnel to act “as they would have in response to any other injury . . . as they were trained to do.”<sup>129</sup> Evidence that his hospitalization delayed his availability for all military tasks was also not sufficient to uphold a prosecution under Article 134; neither was Caldwell’s mere “impression” that his attempt had made members in his unit feel “uneasy.”<sup>130</sup> Such an admission did not prove any “direct and palpable effect on good order and discipline.”<sup>131</sup>

The *Caldwell* majority also rejected the Government’s interpretation of the second element under Article 134, criminalizing conduct of a nature to bring discredit upon the Armed Forces, which had been rarely charged in self-injury cases and had received scant attention in the military courts. In his guilty plea, Caldwell admitted that his conduct was service discrediting because it might cause the public to look less favorably toward the Marine Corps: “It would actually cause a badder [sic] outlook on the superiors,” he said, because news of a military suicide might make the public “look at them as not doing their job.”<sup>132</sup> The *Caldwell* majority said that a servicemember could not be penalized for conduct that merely caused the public to think poorly of his command; by that logic after all, “it would appear to be discrediting for the whistleblower to disclose fraud or the victim of an offense to report a crime by a member of the military.”<sup>133</sup> Caldwell’s speculation about bad publicity did not establish that his conduct had a tendency to bring the service into disrepute or to lower it in the public esteem, particularly in light of the Pentagon’s view that “suicide prevention is first and foremost a leadership responsibility.”<sup>134</sup> Because the

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suicide, “[a] lot of people didn’t know how to react towards it . . . they would kind of talk to me a little bit and then back away . . . . It was just really weird for a couple weeks after that.” *See id.* at 139, 141.

<sup>128</sup> *Id.* at 141.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 142.

<sup>134</sup> *Id.* at 141-42 n.3.

Government had not offered, and Caldwell had not admitted to facts that would make his conduct discrediting, the court declined to “determine whether, as a general matter, a bona fide suicide attempt alone may be service discrediting, or is more properly considered a noncriminal matter requiring treatment not prosecution.”<sup>135</sup> In doing so, the majority entirely avoided the granted issue.

In writing for the dissent, Judge Ryan questioned the wisdom and fairness of punishing suicide attempts and even non-suicidal self-injury, but she wrote that, “however counterintuitive,” there was no basis for the court to carve out an exception to Article 134’s criminal prohibitions for bona fide suicidal behavior.<sup>136</sup> She found that “distinction . . . unsupported by the statutory elements of Article 134 or any of the elements of self-injury without intent to avoid service, as defined by the President.”<sup>137</sup> She disagreed with the majority’s “unsupported assertion” that the expenditure of medical resources, without more, did not undermine good order and discipline<sup>138</sup> and noted that Caldwell had pleaded to facts that “demonstrate *his belief* that his conduct was service discrediting” and prejudicial.<sup>139</sup> His admission that his conduct was service-discrediting and prejudicial alone satisfied the Article 134 standard, whether anyone else learned of his conduct or not.<sup>140</sup> In addition, “by not reaching out to his command for help,” she concluded, “Appellant precluded the command’s help” and brought discredit upon them.<sup>141</sup> The dissent apparently saw no irony in castigating the suicidal for failing to seek mental health help while still endorsing criminal investigation and punishment of their suicidal symptoms. Had Private Caldwell sought help and admitted to an earlier suicide attempt or self-injury, he could of course have been prosecuted anyway under the minority’s jurisprudence.

In November 2012, public outcry over the *Caldwell* case<sup>142</sup>

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<sup>135</sup> *Id.* at 142.

<sup>136</sup> *Id.* at 142-43 (Ryan, J., dissenting).

<sup>137</sup> *Id.* at 142.

<sup>138</sup> *Id.* at 145 n.6.

<sup>139</sup> *Id.* at 146.

<sup>140</sup> *Id.* at 145 n.6.

<sup>141</sup> *Id.* at 146.

<sup>142</sup> See, e.g., Wesley J. Smith, *Don't Criminalize Military Suicide Attempts*, NATIONAL REVIEW ONLINE (Nov. 28, 2012, 12:23 PM), <http://www.nationalreview.com/human-exceptionalism/334282/dont-criminalize-military-suicide-attempts>; *Legion: Re-Examine Suicide Attempt Policies*, AMERICAN LEGION (Nov. 28, 2012), <http://www.legion.org/security/213032/legion-re-examine-suicide-attempt-policies>;

prompted the Defense Department's General Counsel to direct the Joint Service Committee on Military Justice, an internal Pentagon group, to consider recommendations for amending the Manual for Courts-Martial with respect to the UCMJ self-injury offenses.<sup>143</sup> He asked that as part of the Defense Department's "ongoing efforts to be sensitive to and address the rising levels of suicide within the military," the MCM should consider whether a "genuine attempt at suicide" should be a "factor relevant to the consideration of disciplinary action."<sup>144</sup> He also instructed the group to consult the Pentagon's mental health experts and Suicide Prevention Office in formulating recommendations for reform.<sup>145</sup> Their recommendations cannot come too soon. Instead of waiting for military courts to chip away at generations of precedent justifying punishment and prosecution of those in need of treatment, Congress and the President should act quickly to protect, heal, and strengthen a fighting force at its "breaking point."<sup>146</sup>

**VII. CRIMINALIZATION OF SUICIDAL CONDUCT IS FUNDAMENTALLY HARMFUL TO THE MILITARY MISSION AND SERVICEMEMBERS WHILE FURTHERING NO LEGITIMATE MILITARY PURPOSE**

**A. Criminalization of Suicidal Conduct is Inconsistent with the Military's Comprehensive Policy Efforts to Combat Suicide and Reduce Stigma Around Mental Injury**

The military's continued criminalization of suicidal conduct abandons military medicine and military justice's rehabilitative ethic, institutionalizes a harmful culture of stigma around mental injury, and reduces the health and readiness of the fighting force. It is uniquely harmful to the military's mission, with little benefit to show for it.

In direct contrast with the UCMJ's criminal penalties, military

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Beth Pennington, *Should Failed Suicide Attempts Result in Punishment*, VOICE OF WARRIORS BLOG TALK RADIO (Nov. 30, 2012), <http://www.blogtalkradio.com/voiceofwarriors/2012/12/05/should-failed-suicide-attempts-result-in-punishment>.

<sup>143</sup> See Andrew Tilghman, *Pentagon to Review Suicide Law in UCMJ*, MARINE CORPS TIMES (Nov. 9, 2012, 9:21 AM), <http://www.marinecorpstimes.com/article/20121109/NEWS/211090313/Pentagon-review-suicide-law-UCMJ>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See Philip Ewing, *Chuck Hagel Warns: Troops are Close to the Breaking Point*, POLITICO (July 15, 2013, 5:02 AM), <http://www.politico.com/story/2013/07/chuck-hagel-troops-close-breaking-point-94584.html>.

leadership has in almost every regard embraced the modern consensus and moved to replace a punitive approach to the mentally injured with a rehabilitative ethic. When a senior Army general wrote a blog entry in January 2012 telling suicidal soldiers to “act like an adult” and “deal with your real-life problems like the rest of us” instead of resorting to the “absolutely selfish act” of suicide, his remarks drew a public rebuke from the Department of the Army, which called his views “clearly wrong.”<sup>147</sup> The Chairman of the Joint Chiefs of Staff also stated that he disagreed with such shaming views about suicide “in the strongest possible terms.”<sup>148</sup> He reiterated the Pentagon’s view that to effectively prevent suicides, the military had to ensure that suicidal servicemembers felt they could trust their commanders to help them.<sup>149</sup> The Secretary of Defense warned that he would not “tolerate actions that belittle, haze, or ostracize” the mentally injured or suicidal.<sup>150</sup>

The military branches have also sought to effectively combat a culture of stigmatization around mental health issues and suicidal behaviors. Declaring that a “healthy force is a ready force,” the Army released a 2020 Strategy for Suicide Prevention in October 2012 which stressed the need to “reduce stigma associated with seeking help for suicidal ideations and behaviors.”<sup>151</sup> The Strategy called for “safe and positive messages addressing mental illness and suicide . . . to help reduce prejudice and promote help seeking.”<sup>152</sup> The service branches have taken that “positive messaging” directive seriously. An anti-stigma campaign called “Real Warriors. Real Battles. Real Strength” aims to bring successfully treated servicemembers “out of the shadows” to share

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<sup>147</sup> See Robert Burns, *As Suicides Rise, Military Struggles to Respond*, AIR FORCE TIMES (June 8, 2012, 9:50 AM), <http://www.airforcetimes.com/article/20120608/NEWS/206080308/As-suicides-rise-military-struggles-respond>.

<sup>148</sup> *Id.*

<sup>149</sup> See Claudette Roulo, *Dempsey: Leadership, Trust Essential to Battling Suicide*, AMERICAN FORCES PRESS SERVICE (Sept. 25, 2012), <http://www.defense.gov/news/newsarticle.aspx?id=118006>.

<sup>150</sup> Secretary of Defense Leon E. Panetta, Remarks As Delivered at the DoD/VA Suicide Prevention Conference, June 22, 2012, *available at* <http://www.defense.gov/speeches/speech.aspx?speechid=1686>.

<sup>151</sup> *2020 Army Strategy for Suicide Prevention*, Objective 3.2, ARMY G-1 HUMAN RESOURCES DEPARTMENT 26 (2012), *available at* [http://www.armyg1.army.mil/hr/suicide/docs/2020%20Army%20Strategy%20for%20Suicide%20Prevention\\_1%20Oct%202012.pdf](http://www.armyg1.army.mil/hr/suicide/docs/2020%20Army%20Strategy%20for%20Suicide%20Prevention_1%20Oct%202012.pdf).

<sup>152</sup> *Id.* at 13.

their experiences.<sup>153</sup> The Defense Department's own website featured the story of an Army surgeon sharing her struggles with PTSD and her attempted suicide after returning from two tours in Iraq.<sup>154</sup> The page highlighted her record of service, the traumas of war, and the positive example she set for helping others cope with similar troubles.<sup>155</sup>

Leaders in Washington have followed suit. After a concerted effort by mental health advocacy groups and a bipartisan group of 57 Congressmen,<sup>156</sup> the President announced in 2011 that he would reverse a longstanding policy against sending condolence letters to the families of military suicide casualties.<sup>157</sup> "These Americans served our nation bravely," he said. "They didn't die because they were weak. And the fact that they didn't get the help they needed must change."<sup>158</sup> The bipartisan Congressional group recognized that "members of the Armed Forces sacrifice their physical, mental, and emotional well-being for the freedoms Americans hold dear," and wrote that the previous condolence letter policy was discriminatory, "only serv[ing] to perpetuate the stigma of mental illness."<sup>159</sup> The continued criminalization of those behaviors is clearly even more discriminatory and stigmatizing.

### **B. Criminalization of Suicidal Conduct is Unnecessary and Redundant**

Military commands have a legitimate need to discipline those seeking to evade duties for personal gain or self-preservation. The military context is unique and military justice is intended to aid in the preservation of order and discipline in the ranks first and foremost. But toward that end, the military's self-injury offenses are, at best, needless and redundant. Criminalization of attempted suicide is "singularly inefficacious as a deterrent" for the genuinely suicidal and mentally injured whether they are civilians or in uniform. Shaming the suicidal, unsurprisingly, tends to discourage treatment seeking and exacerbates

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<sup>153</sup> Sadie F. Dingfelder, *The Military's War on Stigma*, MONITOR ON PSYCHOL., June 2009, at 52, available at <http://www.apa.org/monitor/2009/06/stigma-war.aspx>.

<sup>154</sup> See Lisa Daniel, *Army Surgeon Shares PTSD Struggles to Help Others*, AM. FORCES PRESS SERVICE (Sept. 27, 2012), <http://www.defense.gov/news/newsarticle.aspx?id=118034>.

<sup>155</sup> *Id.*

<sup>156</sup> See H.R. Res. 1229, 111th Cong. (2010).

<sup>157</sup> Wang, *supra* note 13.

<sup>158</sup> *Id.*

<sup>159</sup> H.R. Res. 1229, 111th Cong. (2010).

the suicide epidemic. And those aping the suicidal by self-injuring to shirk military duty may already be more appropriately punished (and deterred) by a number of alternative UCMJ articles. For instance, a servicemember who fraudulently seeks to shirk military duty may be more properly and fairly punished under Article 132, punishing “Frauds against the United States,” and Article 83, punishing “Fraudulent Separation,” when a servicemember procures his own separation from the armed forces by knowingly false representation. That way, the essential criminal element of the servicemember’s misconduct is not the self-injury but the fraud a faked or grossly exaggerated self-injury perpetrated against the military. Those whose self-injury causes serious harm to a wartime military mission may more appropriately be charged under Article 99, punishing “Misbehavior Before the Enemy,” which includes “cowardly conduct,” other disobedience, neglect, or intentional misconduct endangering the safety of any military place, person, or property *in a combat zone*, and willfully failing “to do [one’s] utmost” to encounter, engage, capture, or destroy enemy troops, combatants, vessels, aircraft, or any other thing which is the servicemember’s duty to encounter, engage, capture, or destroy. This would give the military more discretion in the exigent circumstances of war and would again make the self-injury a secondary element of the crime instead of the sole basis for punishment. These alternative measures show that the military has no legitimate basis for continuing to criminalize self-injury itself.

**C. Criminalization of Suicidal Conduct Interferes With the Mentally Injured Patient’s Therapeutic Process and Reduces the Readiness of the Military’s Fighting Force:**

Articles 115 and 134 make the suicidal act itself the focus of investigation and the primary element of a serious crime, even though military regulations consider suicide attempts presumptive evidence of a lack of mental responsibility.<sup>160</sup> Because military courts have interpreted the self-injury offenses so broadly, commands have still nearly unfettered discretion to separate or punish the suicidal without evidence of wrongful motive or significant external effects. The effect

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<sup>160</sup> See, e.g., LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS, *supra* note 26, at 23 (“The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until overcome by substantial evidence and a great weight of the evidence that supports any different conclusion.”); MANUAL OF THE JUDGE ADVOCATE GENERAL, *supra* note 26, § 0218(c) (“In view of the strong human instinct for self-preservation . . . a bona fide suicide attempt . . . creates a strong inference of lack of mental responsibility.”).

of the *Johnson* decision is that suicidal servicemembers may be charged under Article 115 based on almost any evidence that leaving any aspect of military life was a motivating factor in their desire for death. That is a much broader prohibition than prosecutions for evasion of specific orders or duties; it makes even the purpose-oriented malingering charge virtually a strict liability offense punishing the suicidal for their lack of general availability for military assignment. After the *Caldwell* decision, Article 134 remains even broader than Article 115; the majority suggested that a suicidal servicemember's hospitalization itself would satisfy the element of "prejudice to good order and discipline" in more atypical circumstances. Private Caldwell's hospitalization did not prejudice good order and discipline because it merely caused medical responders to act "as they would have in response to any other injury . . . as they were trained to do."<sup>161</sup> But suicide attempts resulting in a more panicked medical response may still render any self-injury punishable under Article 134, regardless of the accused's intent, which means attempted suicide remains a strict liability offense limited only by the nature or conduct of those responding to the act.

In practice, if a servicemember tells his psychiatrist that he attempted suicide, that psychiatrist would, without knowing anything more, have significant reason to believe her patient had committed a serious crime under military law; the psychiatrist would, if properly following military regulations, be compelled to stop the session on the spot to warn her patient of his rights against self-incrimination under Article 31.<sup>162</sup> The psychiatrist's subsequent questions about her patient's suicidal ideation and intent would be an essential part of the diagnostic process and crucial to arriving at a prescribed course of treatment, therapy, and rehabilitation. But those same questions would be indistinguishable from the military police interrogators' and might be used against the suicidal serviceman in a criminal court-martial. Because the suicidal are by definition a danger to themselves, health record privacy protections do not apply to these questions and psychiatrists may routinely inform commands of their patients' suicidal acts and ideation. They may do so to enlist the command in helping to protect and heal one of its own but they are also exposing their fraught and vulnerable patient to harsh penalties including separation from

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<sup>161</sup> United States v. Caldwell, 72 M.J. 137, 141 (C.A.A.F. 2013).

<sup>162</sup> See United States v. Calandrino, 12 C.M.R. 689, 692 (A.F.B.R. 1953) (finding that a psychiatrist who suspected his patient of malingering should have warned him of his testimonial rights prior to initiating the interview).

service or prosecution and jail time.

Treatment for PTSD and other mental injuries usually requires extended, intensive therapeutic effort, trust and rapport with psychiatric professionals, and an emotionally supportive environment.<sup>163</sup> Punishment of the suicidal reinforces negative self-perceptions, shames the sick, interferes with the therapeutic process, and discourages treatment seeking at the outset. Because those discharged for attempted suicide are usually denied honorable service characterizations, they are also stripped of their ability to seek military medical care and possibly VA services as well. As a result, criminalization of suicidal conduct allows the military to release sick and injured veterans with possibly violent and self-injurious tendencies into the community at large *and*, one step farther, denies them their means of rehabilitation and recovery.

These self-injury offenses are not merely redundant then, but especially harmful to the military's objectives. The military identifies stigma to accessing mental care as one of the greatest obstacles it faces in confronting the deadliest foe it now has. And yet, its criminal code gives its mental health professionals a dual role, entrusting them with treatment and rehabilitation while conscripting them into investigating informants. The better those professionals are at one of those roles, surely the worse they are at the other. While the military leadership is practically begging its forces to seek mental care and has stressed the need for "a relationship of trust" between patients and caregivers,<sup>164</sup> the military justice system has, at the same time, unhelpfully propagated the "bias, prejudice, stigma, and discrimination" exacerbating the modern suicide epidemic.<sup>165</sup> As a consequence, stigma surrounding mental

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<sup>163</sup> According to a VA official's testimony before a June 2008 Senate Oversight Hearing "On Systemic Indifference to Invisible Wounds," many individuals with symptoms of combat stress are not ready to discuss the details of their experiences, but they can describe their symptoms and their levels of distress. "An accurate diagnosis of PTSD, however, would require a veteran fully disclose the details and feelings associated with a traumatic event, and in my clinical experience, many have been unwilling to do this without a strong sense of safety and trust, which can only be developed over time." *Oversight Hearing on Systemic Indifference to Invisible Wounds*, *supra* note 53 (statement of Dr. Norma J. Perez, Mental Health Integration Psychologist, Texas Veterans Health Care System).

<sup>164</sup> David Vergun, *SMA on Suicide: It's Okay to Seek Help*, U.S. ARMY (Sept. 26, 2012), <http://www.army.mil/article/87975/>.

<sup>165</sup> See U.S. DEP'T OF ARMY, G-1 HUMAN RESOURCES DEPARTMENT, 2020 ARMY STRATEGY FOR SUICIDE PREVENTION, STIGMA REDUCTION CAMPAIGN PLAN 19-20, 26 (2012), *available at* <http://www.armyg1.army.mil/hr/suicide/docs/2020%20Army%20Strategy%20for%20S>

health care remains “a major issue in the willingness of service members to seek care . . . This is fueled by a perception that seeking behavioral healthcare is ‘shamming’ or attempting to avoid duty.”<sup>166</sup> In 2008, surveyors found that 60 percent of service members believed seeking mental health treatment would negatively affect their careers because they believed mental injuries were “often equated with cowardice or lack of resilience or, even worse, with malingering to escape service.”<sup>167</sup> The American Psychological Association declared that stigma against the mentally injured remained alive and well in the military and that servicemembers’ silent suffering was taking a toll on military readiness.<sup>168</sup> And so the fighting force grows sicker without treatment and less prepared for the battles of tomorrow. And the suicide epidemic claims more and more.

#### **D. Criminalization of Suicidal Conduct Gives Commands An Unlawful Pretext for Quickly and Cheaply Separating the Military’s Sick and Injured**

The only military purpose effectively served by the continued criminalization of suicidal conduct is to give commands a pretext for quickly and cheaply ridding themselves of their sick and injured. There is disturbing evidence to support the notion that the self-injury offenses are being used for just that purpose. In the decade after 9/11, the military routinely discharged mentally injured soldiers by finding they had a pre-existing mental condition, often called a “personality disorder”: an estimated 31,000 veterans were involuntarily discharged on that basis between 2001 and 2010.<sup>169</sup> After Congressional hearings in 2007, the military issued new regulations limiting command discretion and erecting procedural safeguards to make personality disorder discharges increasingly slow and difficult.<sup>170</sup> The decrease in

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uicide%20Prevention\_1%20Oct%202012.pdf.

<sup>166</sup> Elspeth Cameron Ritchie et al., *Suicide Prevention in the US Army: Lessons Learned and Future Directions*, in *COMBAT AND OPERATIONAL BEHAVIORAL HEALTH* 403, 411 (Elspeth Cameron Ritchie et al. eds., 2011).

<sup>167</sup> *Id.*

<sup>168</sup> See Dingfelder, *supra* note 153.

<sup>169</sup> Dave Phillips, *Disposable: Surge in Discharges Includes Wounded Soldiers*, *COLORADO SPRINGS GAZETTE*, May 19, 2013, <http://cdn.csgazette.biz/soldiers/day1.html>.

<sup>170</sup> *Id.*; MELISSA ALDER ET AL., *VIETNAM VETERANS OF AM., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY’S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM* (2013), available at <http://www.vva.org/PPD-Documents/WhitePaper.pdf>.

those discharges, however, has been matched by an increase in discharges for other mental disorders<sup>171</sup> and for alleged misconduct.<sup>172</sup> The rate of misconduct discharges in the Army, for instance, rose 67% between 2009 and 2013 at posts with the most combat troops and by 25% service-wide.<sup>173</sup> This is the highest rate of misconduct discharges ever on record.<sup>174</sup> As the troops return now from a decade at war, and with congressional budget battles “sequestering” the Pentagon budget, the Army alone is looking to reduce its ranks in the coming decade by up to 180,000.<sup>175</sup> Much of that drawdown may come from the mentally injured; the military has “a bunch of worn-out, used-up troops. The easiest thing to do is get rid of them.”<sup>176</sup>

Ordinarily, a servicemember’s PTSD or major depressive disorders would warrant an expensive medical disability separation if, in general terms, they are severe enough to interfere significantly with his performance of duties, require continuing psychiatric support, seriously endanger the servicemember’s health or well-being, or prejudice the best interests of the military.<sup>177</sup> Such disability processing is more expensive and laborious for the military but would ordinarily take precedence over any adverse administrative separation action.<sup>178</sup> But when a servicemember faces involuntary separation for commission of an offense punishable by the UCMJ, medical disability processing does not take precedence;<sup>179</sup> it is within a convening authority’s discretion to separate him for misconduct even where a Medical Evaluation Board has determined him psychiatrically unfit for service.<sup>180</sup> The criminalization of suicidal conduct thus gives commands unfettered discretion to administratively separate the suicidal quickly and cheaply as offenders, instead of offering them the care and treatment they would

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<sup>171</sup> *Id.* at 3.

<sup>172</sup> *Disposable*, *supra* note 169; Dave Phillips, *Congress Eyes Changes to Military Discipline*, COLORADO SPRINGS GAZETTE, June 6, 2013, <http://gazette.com/congress-eyes-changes-to-military-discipline/article/1501862>.

<sup>173</sup> *Congress Eyes Changes to Military Discipline*, *supra* note 172.

<sup>174</sup> *Id.*

<sup>175</sup> *Disposable*, *supra* note 169.

<sup>176</sup> *Id.*

<sup>177</sup> See U.S. DEP’T OF DEF., INSTR. 1332.38, PHYSICAL DISABILITY EVALUATION 44 (1996).

<sup>178</sup> See, e.g., U.S. DEP’T OF ARMY, REG. 40-400, PATIENT ADMINISTRATION ¶ 7-5(b)(8) (2010).

<sup>179</sup> *Id.*

<sup>180</sup> See, e.g., U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATION SEPARATIONS ¶ 1-33(b) (2005).

otherwise be entitled to for their years of service.

It should be clear that expeditious separation of the sick and injured is *not* a legitimate military purpose and shirks the military's obligations to those who served and sacrificed. Such pretextual separations also harm the strength and cohesion of our fighting force, further harming the military's objectives. George Washington said, "The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive the Veterans of earlier wars were treated and appreciated by the nation."<sup>181</sup> This respect for the military and care for those who have served is essential to maintaining morale as well and ensuring a continued stream of qualified recruits into the all-volunteer force.<sup>182</sup>

#### **VI. CRIMINALIZATION OF SUICIDAL CONDUCT IS IRRATIONAL AND ABUSIVE OF RIGHTS PROTECTED BY DUE PROCESS OF LAW**

Finally, punishment of suicidal acts is irrationally abusive of due process and necessarily violates federal statutes and military regulations protecting servicemembers' rights. Criminalization irrationally grants commands unfettered discretion to punish those presumed to be medically impaired and "mentally unsound" under the military's own regulations,<sup>183</sup> imposing severe, even cruel and unusual penalties,<sup>184</sup> on those in need of treatment, while furthering no legitimate military purpose. Because these laws' elements are so vague or, in the case of Article 134, explicitly subjective, they necessarily invite arbitrary and pretextual enforcement in violation of servicemembers' procedural rights. For these reasons, the self-injury offenses should be ripe for review in the federal courts, despite the civilian courts' traditional

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<sup>181</sup> Susan Blumenthal, *Stopping the Surge of Military Suicides: How to Win This Preventable War*, HUFFINGTON POST (Sept. 14, 2012, 2:19 PM), [http://www.huffingtonpost.com/susan-blumenthal/military-suicide\\_b\\_1884083.html](http://www.huffingtonpost.com/susan-blumenthal/military-suicide_b_1884083.html).

<sup>182</sup> *Id.*

<sup>183</sup> See, e.g., LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS, *supra* note 26, at 23 ("The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until overcome by substantial evidence and a great weight of the evidence that supports any different conclusion."); MANUAL OF THE JUDGE ADVOCATE GENERAL, *supra* note 26, § 0218(c) ("In view of the strong human instinct for self-preservation . . . a bona fide suicide attempt . . . creates a strong inference of lack of mental responsibility.") " " . . . . . "

<sup>184</sup> The use of confinement as an alternative to effective mental health care has been found to violate inmates' right to be free from cruel and unusual punishment. *Casey v. Lewis*, 834 F. Supp. 1477 (D. Ariz. 1993); see also *Brown v. Plata*, 131 S. Ct. 1910 (2011).

deference to the military and the political branches in prescribing standards of discipline in the armed forces.

Vague and overbroad statutes like the military self-injury offenses suffer from at least two fatal constitutional defects. First, by failing to provide fair notice of precisely what acts are forbidden, a vague statute “violates the first essential of due process of law.”<sup>185</sup> As the Supreme Court said in *Lanzetta v. New Jersey*, “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”<sup>186</sup> Second, vague statutes offend due process by failing to provide explicit standards for those who enforce them, allowing discriminatory and arbitrary enforcement;<sup>187</sup> “[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis[.]”<sup>188</sup> The absence of specificity in a criminal statute invites abuse on the part of prosecuting officials, who are left free to harass any individuals or groups who may be the object of official displeasure.<sup>189</sup>

Article 134’s unusual “objective orientation” inquiry was already the subject of important litigation after two federal circuits ruled it unconstitutional for vagueness. The Supreme Court had expressed doubts as to the article’s constitutionality in *O’Callahan v. Parker*, where it asked the open question: “Does this [article] satisfy the standards of vagueness as developed by the civil courts?”<sup>190</sup> The Third and DC Circuit Courts both answered with a resounding “no” during the 1970’s. The Third Circuit found “the history of prosecutions under [Article 134] shows that it has served as an unwritten criminal code, a catchall receptacle designed as a statutory basis for prosecutions that run the gamut[.]”<sup>191</sup> The D.C. Circuit similarly concluded, “The General Article must fall”<sup>192</sup> because “[it] gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities.”<sup>193</sup> The court

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<sup>185</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>186</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

<sup>187</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-71 (1972).

<sup>188</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

<sup>189</sup> *Parker v. Levy*, 417 U.S. 733, 775 (1974) (Stewart, J., dissenting).

<sup>190</sup> *O’Callahan v. Parker*, 395 U.S. 258, 266 (1968).

<sup>191</sup> *Levy v. Parker*, 478 F.2d 772, 790 (3d Cir. 1973), *rev’d*, 417 U.S. 733 (1974).

<sup>192</sup> *Avrech v. Sec’y of the Navy*, 477 F.2d 1237, 1244 (D.C. Cir. 1973), *rev’d*, *Sec’y of Navy v. Avrech*, 418 U.S. 676 (1974).

<sup>193</sup> *Id.* at 1241.

took judicial notice that the Chief Judge of the US Army Court of Military Review had publicly called for abolition of Article 134 because “we can’t defend our use of it in this modern world. It probably could not withstand a ‘vague and indefinite’ attack in the Supreme Court.”<sup>194</sup> Judge Hodson had also recognized that a number of alternative UCMJ Articles were available to punish those who committed offenses prejudicial to good order and discipline or discrediting to the armed services.<sup>195</sup>

These arguments failed to convince the Supreme Court, which narrowly upheld Article 134’s application in convictions for two “disloyal speech acts” the following year.<sup>196</sup> But those decisions relied in good measure on the Court’s finding that the accused in both cases “could have had no reasonable doubt” that their pronouncements were prejudicial to good order and discipline.<sup>197</sup> The accused in *Avrech v. Secretary of the Navy*, for instance, encouraged African-American draftees to dodge the draft and avoid serving in Vietnam during the war. “The fundamental necessity for obedience, and the consequent necessity for imposition of discipline” were found to “render permissible within the military that which would be constitutionally impermissible outside it,”<sup>198</sup> given the military’s obvious need to discourage conduct harmful to the military mission like draft-dodging.

The military’s need to criminalize attempted suicide, though, is not so obvious, especially considering the fact that civilian courts have decriminalized suicidal conduct for over a century. Despite the military courts’ best efforts to broaden the UCMJ self-injury offenses into strict liability crimes, attempted suicide is still not per se prejudicial to good order and discipline or per se service-discrediting. The suicide survivor’s criminal culpability instead depends on the unknowable reaction of others after the fact. This provides for an unusually arbitrary form of mob justice—Article 134 permits criminal punishment of the suicidal by acclaim, a potential prison term if a stigmatizing community reacts poorly to servicemembers’ private, darkest, medically symptomatic impulses. That arbitrariness’ is dangerous and abusive of

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<sup>194</sup> *Id.* at 1242 (quoting Kenneth J. Hodson, *The Manual for Courts-Martial - 1984*, 57 MIL. L. REV. 1, 12 (1972)).

<sup>195</sup> *Id.*

<sup>196</sup> See *Sec’y of Navy v. Avrech*, 418 U.S. 676 (1974); *Parker v. Levy*, 417 U.S. 733 (1974).

<sup>197</sup> *Parker*, 417 U.S. at 758.

<sup>198</sup> *Id.*

due process, and it invites pretextual punishment and administrative separations like those which have mislabeled thousands of mentally injured veterans as behavioral deviants and misconduct offenders in the last decade.

By providing for punishment for acts symptomatic of injury and disease, the self-injury offenses are doubly offensive to due process. The Supreme Court has held that the emotional toll that war takes on veterans deserves leniency in the courts, particularly in light of the causal effect between PTSD and violent or antisocial behaviors.<sup>199</sup> In the 2009 case of *Porter v. McCollum*, the Court held that defense counsel must present mitigating evidence of defendant's mental health as a result of military service during the penalty phase of trial. The Court held:

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . . . Moreover, the relevance of [the defendant's] extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [him].<sup>200</sup>

Criminal penalties for those pushed to suicide by that "intense stress and mental and emotional toll" are inconsistent with the Supreme Court's view that Due Process requires leniency and consideration for the effect of mental injury on those who have served. Outside the penalty phase of trial, courts have permitted criminally accused veterans to use the insanity defense when suffering from PTSD<sup>201</sup> and have endorsed the largely successful rehabilitative ethic of 'Veterans Treatment Courts, a legal system that has emerged in response to the special needs of servicemembers who have sustained mental injuries in combat.<sup>202</sup>

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<sup>199</sup> See *Porter v. McCollum*, 558 U.S. 30, 43 (2009).

<sup>200</sup> *Id.* at 43-44.

<sup>201</sup> See generally Tracey Kaplan, *Ex-Army Officer Found Not Guilty by Reason of Insanity in Robbery*, SAN JOSE MERCURY NEWS, Jan. 13, 2009, [http://www.mercurynews.com/ci\\_11444149?i=ADID](http://www.mercurynews.com/ci_11444149?i=ADID) (concluding that Army Captain convicted of robbery and diagnosed with PTSD may use insanity defense); Julie Sullivan, *Iraq Veteran Sentenced to State Hospital in PTSD Murder Case*, THE OREGONIAN, Dec. 7, 2009, [http://www.oregonlive.com/news/index.ssf/2009/12/post\\_34.html](http://www.oregonlive.com/news/index.ssf/2009/12/post_34.html) (concluding that Iraqi veteran convicted of murder and diagnosed with PTSD may use insanity defense).

<sup>202</sup> See Evan R. Seamone, *Claiming the Rehabilitative Ethic in Military Justice: The*

But the military justice system's punishment of self-injury ignores these developments and explicitly targets those who may have suffered the most and harmed others the least as a direct result of the mental toll of military service. Because Article 115 provides for criminal penalties of attempted suicide motivated by a desire to avoid availability for any military task, it particularly targets those driven to suicide by extreme stressors in military service. Using the ALI's framework from the Model Penal Code, it is clear that criminal prohibition of suicide attempts undermines respect for the law by penalizing all-too-common, private conduct which is, by definition, not directly harmful to others and which is likely to be arbitrarily and abusively enforced.

## VII. CONCLUSION

The legal history of suicidal behavior in our country demonstrates that military justice has fallen woefully out of step with developments in civilian courts and with the military's own stated policies and regulations concerning mental injury. In the wake of an unprecedented "suicide epidemic," the military's anachronistic approach has done real harm to the military's mission, to its fighting readiness, and to the health and welfare of those who served, sacrificed, and suffered to protect us. Year 2013 is on pace to be among the deadliest years on record for military suicides.<sup>203</sup> Rates of misconduct discharges, which include involuntary separation for wrongful self-injuries, are also at an historic high.<sup>204</sup> Given our evolved understanding of suicide and mental health and movement toward a universal "modern consensus" disfavoring the criminalization of attempted suicide, it is time for military justice to catch up with civilian courts' longstanding view that suicidal acts are symptomatic of illness and deserving of treatment. Thus, the suicidal are not properly punished. The military's own rhetoric on suicide and mental injury indicates that it has, in nearly all respects, already adopted that view (UCMJ criminal penalties notwithstanding). Decriminalizing suicidal behaviors is therefore

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*Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 2-3 (2011).

<sup>203</sup> See Bill Briggs, *One Every 18 Hours: Military Suicide Rates Still High Despite Hard Fight to Stem Deaths*, NBC NEWS (May 23, 2013, 9:51 AM), [http://usnews.nbcnews.com/\\_news/2013/05/23/18447439-one-every-18-hours-military-suicide-rate-still-high-despite-hard-fight-to-stem-deaths?lite](http://usnews.nbcnews.com/_news/2013/05/23/18447439-one-every-18-hours-military-suicide-rate-still-high-despite-hard-fight-to-stem-deaths?lite).

<sup>204</sup> *Disposable*, *supra* note 169.

consistent with military objectives and ethics. In the modern age, the *prosecution* of a suicidal veteran is far more likely to be service discrediting or prejudicial to unit cohesion and morale than the suicide attempt itself.

The young Army recruit's first task is to learn the Soldier's Creed by heart, promising "never to leave a fallen comrade." He is no longer an "Army of One," but a member of a fighting force devoted to caring for its own as well as, and as a core part of, the military mission. To uphold that creed, it will be up to Congress and the President to make certain that in the modern American military no fallen comrade is abandoned, prosecuted, or untreated for his attempt, in sickness, at death.