

**MORAL INJURY AND PREVENTIVE LAW: A FRAMEWORK
FOR THE FUTURE**

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The evidence for the existence of moral injury is overwhelming. Moral injury causes mental torture to the very troops whose care is entrusted to American leaders. It leads soldiers to try to drown their sorrows in alcohol or the euphoria of drugs, to be involuntarily separated from the service due to disciplinary action, or to voluntarily leave the service—or the world, by killing themselves—because they feel they cannot cope anymore. It greatly burdens the U.S. military and civilian healthcare systems. It hurts the ability of veterans to positively contribute to society. It distresses and sometimes leads to the physical harm of those who interact with afflicted soldiers. Of all these adverse effects of moral injury, it is the role that moral injury may play in the U.S. military's high suicide rate that has attracted the most attention.¹

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I. Introduction

What if a root cause of misconduct, self-harm, and soldier suicide could be traced to one terrifying phenomenon in the ranks? The concept of a moral injury² is as provocative as it is controversial, as ubiquitous as it is ancient, and as seemingly nebulous as it is seemingly simple. A rapidly growing community of scholars, clinicians, and organizations assert that moral injury is a signature wound of the combat veteran, and can lead to potentially devastating issues in the ranks if left unnoticed, or unaddressed. The notion that an underlying phenomenon can cause or contribute to legal issues is a paradigm not unfamiliar to the military legal practitioner. Moral injury is the emerging chapter in that “book,” and one that could very soon become a household name. The intent of this article is to explore the phenomenon, contemplate potential applications, and stimulate academic discourse for this new and emerging field in the law of the armed forces.

This article begins by introducing the phenomenon of moral injury and its potentially devastating effects to the military legal practitioner. Here, the salient themes from the interdisciplinary community are synthesized into a workable framework to assist judge advocates seeking to apply the phenomenon in practice. With that foundation, some of the potential scenarios in which the phenomenon might rear its head, or become a priority to a commander are explored. The article then looks at some of the ways judge advocates can prepare for moral injury to appear on the scene through expanded and innovative preventive law strategies. Under this paradigm of preventive law, this article recommends some specific steps that can be taken now to get ahead of this phenomenon—one which could soon be knocking on the courthouse door, be a key factor for analysis, or be a priority for a commander or a client.

injury. I would like to also thank Lieutenant Colonel Doug Pryer, Professor Evan Seamone, the incredible staff and faculty of the Judge Advocate General’s Legal Center and School, and the vast community of scholars and experts for the countless hours of mentorship, assistance, and feedback that made this article possible. Most importantly, I would like to thank my wife Erin for her unwavering support and encouragement during many long nights and weekends.

¹ Lieutenant Colonel Douglas A. Pryer, *Moral Injury and the American Soldier*, CICERO MAG. (Nov. 23, 2014, 1:12 PM), <http://ciceromagazine.com/features/moral-injury-and-the-american-soldier/>.

² See generally *infra* section II.

II. The Phenomenon of Moral Injury

Imagine a transgression of core beliefs, values, or morals so severe and traumatic that a soldier's very concept of right and wrong is fundamentally transformed. This provocative and potentially devastating notion is a moral injury,³ a phenomenon that a large

³ This definition is offered to orient readers to the phenomenon.

Military personnel serving in war are confronted with ethical and moral challenges, most of which are navigated successfully because of effective rules of engagement, training, leadership, and the purposefulness and coherence that arise in cohesive units during and after various challenges. However, even in optimal operational contexts, some combat and operational experiences can inevitably transgress deeply held beliefs that undergird a service member's humanity. Transgressions can arise from individual acts of commission or omission, the behavior of others, or by bearing witness to intense human suffering or the grotesque aftermath of battle. An act of serious transgression that leads to serious inner conflict because the experience is at odds with core ethical and moral beliefs is called *moral injury*.

Shira Maguen & Brett Litz, *Moral Injury in Veterans of War*, 23 PTSD RES. QUART. 1 (2012). See *infra* section II(B) for the thematic elements being offered to define moral injury.

Moral injury is a kind of psychological anguish that can be mild or intense and isn't specific to war but does often come as part of the aftermath of war. It has to do with the reaction to doing wrong, being wronged or witnessing wrongs. For the thinking soldier, war delivers up spades of moral conundrums: Is the fight just? Is calling in this airstrike the right thing to do? Did I protect my troops enough? Did I harm civilians? But it's not just questioning. It's anguish, sometimes crippling shame or guilt. This is not new, it's ancient. Moral rage and anguish goes far back. We see it in Homer, when Achilles, angry over the death of his friend, drags Hector's body around from the back of his chariot. In clinical medicine, moral injury often gets ignored in favor of the slimmer notion of psychological trauma, which primarily is fear-based. This goes beyond the medical model; it's the spiritual and mental anguish some experience when they go to war.

Patricia Clime, *5 Questions: Philosopher Explores Warriors' Moral Anguish*, MIL. TIMES (Nov. 11, 2015), <http://www.militarytimes.com/story/military/benefits/health-care/2015/11/16/questions-philosopher-explores-warriors-moral-anguish/75709512/>.

population of interdisciplinary⁴ scholars and clinicians now confront.⁵ In essence, “Moral [i]njury is the complex effects from moral reasoning processes that gnaw at the heart, and darken the soul of combat veterans.”⁶ The phenomenon, minus the name,⁷ is at least as old as the written word,⁸ with literary references appearing all the way back to antiquity.⁹ The

⁴ Moral injury is increasingly a focus of discussion and study across disciplines and settings. “Within the last decade, there have been several experts who have addressed the realities of moral injury Each of these scholars and behavior health professionals have researched the effects of moral injury from a psychological, cultural, and spiritual perspective.” Chaplain David Smith, *Understanding the Elephant in the Room—Moral Injury* JUSTPEACE (Mar. 11, 2015), <http://justpeaceumc.org/understanding-the-elephant-in-the-room-moral-injury/>; see also THE MORAL INJURY PROJECT, Syracuse Univ., <http://moralinjuryproject.syr.edu/about-moral-injury/> (last visited June 7, 2016). This project was formed after “a gathering of academics, administrators, researchers, religious scholars, veterans, professors, chaplains, and mental health providers” met to address the question “What are we doing about moral injury among U.S. military veterans.” *Id.* As another example, the 2015 *Moral Injury and Veterans Symposium*, was held “for educators, students, primary and behavioral health providers, faith-based communities, advocates and veterans to examine this multi-layered framework; through presentations, panels, and facilitated discussions.” *Swords to Plowshares*, <https://www.swords-to-plowshares.org/event/20160127/moral-injury-and-veterans-symposium> (last visited June 7, 2016).

⁵ See generally Smith, *supra* note 4, at 2.

⁶ Jeff Zust, *The Two-Mirrors of Moral Injury: A Concept for Interpreting the Effects of Moral Injury* 1, COMM. AND GEN. STAFF COLLEGE FOUND., <http://www.cgscfoundation.org/wp-content/uploads/2015/06/Zust-TwoMirrorModel-final.pdf> (last visited June 7, 2016).

⁷ “Moral Injury, though not widely known by that term, has been in existence for thousands of years. It is becoming relevant in today’s world as a result of research from academia, the medical profession and other organizations.” *What Is Moral Injury?*, MIL. OUTREACH USA, <http://www.militaryoutreachusa.org/what-is-moral-injury/> (last visited June 7, 2015).

⁸ “In this essay, I describe what moral injury is and argue that its validity as a mental health condition is supported, not just by a plethora of psychological studies but by a literary tradition that is probably older than the written word.” Douglas A. Pryer, *Moral Injury and the American Service Member: What Leaders Don’t Talk about When They Talk About War*, COMM. AND GEN. STAFF COLL. FOUND. 10, <http://www.cgscfoundation.org/wp-content/uploads/2014/05/PryerMoralInjuryandtheAmericanServiceMember-1May14.pdf> (last visited June 7, 2016).

⁹ *What is Moral Injury*, *supra* note 7.

Although some have proclaimed it the “signature wound of today’s veterans,” moral injury has been around for as long as war itself. Ajax, the titular warrior in Sophocles’s tragedy, ultimately commits suicide after spiraling into shame for slaughtering innocent animals. Soldiers’ diaries from the Civil War expressed guilt and paranoia for feeling responsible for atrocities, and World War II airmen wrote in their journals about their remorse for bombing civilians. In Tim O’Brien’s iconic book about the Vietnam War, *The Things They Carried*, the

notion that trauma can manifest in a soldier from transgressed ethics and morals¹⁰ is thus “far from new.”¹¹

In fact all that *is* new is the clinical term, “moral injury,”¹² coined by Dr. Jonathan Shay¹³ after his groundbreaking and comprehensive work

narrator confessed: “I watched a man die on a trail near the village of My Khe. I did not kill him. But I was present, you see, and my presence was guilt enough.”

Maggie Puniewska, *Healing a Wounded Sense of Morality*, The Atlantic (Jul. 3, 2015), <http://www.theatlantic.com/health/archive/2015/07/healing-a-wounded-sense-of-morality/396770/>.

¹⁰ Ethics and morals are often taught from a litigation risk-management perspective. John D. Willis, *Moral Injury—Insights into Executive Morality and Toxic Organizations*, LEADERSHIP ETHICS ONLINE (Nov. 27 2012), <http://www.leadershipethicsonline.com/2012/11/27/moral-injury-executive-morality-toxic-organizations/>; “Morals are defined as the personal and shared familial, cultural, societal, and legal rules for social behavior, either tacit or explicit.” Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLIN. PSYCH. REV. 695, 699 (2009); “Military ethics can be defined as the art of observing those ethical obligations and precepts that are appropriate to the soldier’s role within the profession of arms.” RICHARD A. GABRIEL, *THE WARRIOR’S WAY: A TREATISE ON MILITARY ETHICS* 16 (2007).

¹¹ William P. Nash et al., *Psychometric Evaluation of the Moral Injury Events Scale*, 178 MIL. MED. 646 (2013). Moral injuries are contemplated by some experts as a common denominator in armed conflicts. “Like physical injuries, moral injuries of the kind described by Litz, Nash, Maguen, and others in their now numerous publications on moral injury strike in every war.” Jonathan Shay, *Moral Injury*, 31 PSYCHOANALYTICAL PSYCH. 182, 184 (2014). This notion has been around since antiquity, if not by name.

Both *Achilles in Vietnam* and Shay’s 2002 follow-up, *Odysseus in America: Combat Trauma and the Trials of Homecoming*, show that, while the term “moral injury” may be new, there is nothing new about the idea that a warrior’s sense of shattered honor can lead to profound mental distress. The idea is, in fact, an ancient one. To illustrate, Shay draws upon Homer’s 2800 year-old poems, *The Iliad* and *The Odyssey*, comparing the causes and symptoms of psychological distress in Homer’s heroes with those of his own patients.

Pryer, *supra* note 8, at 15; *see also* JONATHAN SHAY, *ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING* (2003).

¹² ROBERT EMMET MEAGHER, *KILLING FROM THE INSIDE OUT: MORAL INJURY AND JUST WAR* 3 (2014). “While the term is a relatively recent addition to discussions of the psychological surround of military missions . . . it is clear that moral injury is an experience that echoes throughout the history of armed conflict” Megan M. Thompson, *Moral Injury in Military Operations: A Review of the Literature and Key Considerations for the Canadian Armed Forces*, TORONTO RESEARCH CENT. 2 (Mar. 2015), <https://cimvhr.ca/documents/DRDC-RDDC-2015-R029.pdf>.

¹³ “Dr. Shay was a staff psychiatrist at the Department of Veterans Affairs Outpatient Clinic, Boson, 1987–2008, where his only patients were combat veterans with severe

with combat veterans.¹⁴ The extended military campaigns in Iraq and Afghanistan have piqued interest in moral injury.¹⁵ “Today we find it in wide circulation among veterans and their professional caregivers, as well as in psychiatric journals, government reports, church pulpits, and the national media,”¹⁶ along with veterans organizations,¹⁷ and the military.¹⁸

psychological injuries He is currently retired from clinical practice and he describes himself as a missionary to the Armed Forces on prevention of psychological and moral injury from the veterans he has served.” JONATHAN SHAY, *THE ATTORNEY’S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT* 57 (Brockton D. Hunter & Ryan C. Else eds., 2014).

¹⁴ “My game for decades has been *prevention* of psychological and moral injury in military service.” *Id.* at 64. See generally Shay, *Moral Injury*, *supra* note 11, at 182.

¹⁵ Jacob K. Farnsworth, *Dialogical Tensions in Heroic Military and Military-Related Moral Injury*, 8 INT’L J. FOR DIAL. SCI. 1, 13 (2014). Consider this abstract on a study done on the phenomenon of moral injury in the Canadian Armed Forces:

As the Canadian Armed Forces (CAF) regroup from its largest deployment since Korea and the longest combat deployment since the Second World War, emerging mental health data suggests that approximately 14% of CAF personnel who had been deployed to Afghanistan had a mental health disorder that was linked to the Afghan mission. This paper focuses on a particular psychological aftermath of military operations, that which may be associated with the moral and ethical challenges that personnel face in military missions. More specifically, in this paper I provide an introduction to the concept of *moral injury*.

Thompson, *supra* note 12, at i.

¹⁶ MEAGHER, *supra* note 12, at 3–4.

¹⁷ Tyler Boudreau, *The Morally Injured*, THE MASS. REV. 746, 748 (2011).

¹⁸ *Id.* “The term has been revived in clinical circles, and though not exclusive to veteran populations, it is gaining currency in the military behavioral health arena.” NANCY SHERMAN, *AFTERWAR: HEALING THE MORAL WOUNDS OF OUR SOLDIERS* 8 (2015). For example, in soliciting bids to study the “pressing needs” in soldier health and welfare; one of pressing needs the Department of Defense (DoD) isolated was, in part, moral injury. The solicitation stated, “The goal of the [Department] is to advance the state of medical science in those areas of most pressing need and relevance to today’s battlefield experience.” *Program Announcement: Psychological Health/Traumatic Brain Injury Research Program*, CONGRESSIONALLY DIRECTED MEDICAL RESEARCH PROGRAMS 3, http://cdmnp.army.mil/funding/pa/14phtbiphra_pa.pdf. (last visited June 7, 2016). The intent portion of the solicitation expounded on “most pressing need and relevance to today’s battlefield experience.” *Id.* at 4. “To meet the intent of the [Fiscal Year 2014] . . . mechanism, all applications *must* specifically address one or more of the Topic Areas listed below,” listing as one of four possible categories; “[m]ilitary-related grief, guilt, or loss issues, moral injury, and/or anger, rage or aggression issues.” *Id.* Interestingly, of particular interest in the solicitation was the heightened risk for maladaptive coping, or even misconduct: “Of particular interest are universal and selective interventions that are aimed at equipping leaders, units, [servicemembers] and/or [f]amilies to handle situations

The phenomenon is considered by some to be “a signature wound of the wars in Iraq and Afghanistan but with roots as old as war itself.”¹⁹ Some even contemplate it as the crucial missing link in the lexicon of combat trauma.²⁰ A substantial interdisciplinary community is in agreement with this assertion.²¹ In a 2011 interdisciplinary study, the *Drescher Study*,²² “there was universal agreement”²³ that moral injury needs to be included in the lexicon of combat trauma.²⁴ The Department

that invoke grief, guilt or anger and prevent the development of a negative trajectory.” *Id.* One way to be awarded the “Fiscal Year 2014 Defense Medical Research and Development Program” was to conduct a thorough study on “military-related grief, guilt, or loss issues, moral injury, and/or anger, rage or aggression issues.” *Id.* at 3–4.

¹⁹ *Swords to Plowshares*, *supra* note 4. “Distinct from possible physical and psychological trauma, witnessing and/or participating in violence can injure one’s moral core, resulting in spiritual crisis and intense shame Modern training and combat conditions have made this moral injury increasingly likely, so moral conflict may now be considered a normal response to war.” Jeremy Jinkerson, *Moral Injury as a New Normal in Modern Wars*, 29 MIL. PSYCH. 3, 16–17(2014).

²⁰ “Pure PTSD, as officially defined, with no complications, such as substance abuse or danger seeking, is rarely what wrecks veterans’ lives, crushes them to suicide, or promotes domestic and/or criminal violence. Moral injury—both flavors—does.” Shay, *supra* note 11, at 184; *see generally* Laura Copland, *Staff Perspective: On Moral Injury*, CENT. FOR DEPLOY. PSYCH. (Oct. 30, 2015, 12 PM), <http://www.deploymentpsych.org/blog/staff-perspective-moral-injury/>. “Moral injury is increasingly acknowledged as the signature wound of this generation of veterans, with lasting impact on the individual and on their families.” RANDALL G. SHELDEN ET AL., CRIME AND CRIMINAL JUSTICE IN AMERICAN SOCIETY 418 (2d ed. 2008).

²¹ *Moral Injury Project*, *supra* note 4.

To understand moral injury and address its effects, we need to recognize that it exists. If we don’t, if we continue to categorize moral injury under the same umbrella we have for centuries, those who have borne our wars will have to carry their own wounded. Those faceless few with draped arms over slouched shoulders will still be trudging across the terrain of battles fought long ago.

Thomas Gibbons-Neff, *Haunted by Their Decisions in War*, WASH. POST (Mar. 6, 2015), https://www.washingtonpost.com/opinions/haunted-by-their-decisions-in-war/2015/03/06/db1cc404-c129-11e4-9271-610273846239_story.html

²² The *Drescher Study* involved twenty-three health care and ministry professionals from the Department of Defense (DoD) and Department of Veteran’s Affairs (DVA). William P. Nash & Brett T. Litz, *Moral Injury: A Mechanism for War-Related Psychological Trauma in Military Family Members*, 16 CLIN. CHILD AND FAM. PSYCH. REV. 365, 368 (2013).

²³ The study was called *An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans*. Copland, *supra* note 20.

²⁴ *Id.*

of Defense (DoD) also moved toward data collection and analysis, and funded a significant clinical trial to study marines afflicted with moral injury.²⁵ The study of moral injury is clearly gaining momentum.

A. Defining Moral Injury

The first step in defining the phenomenon of moral injury is agreeing on what the correct name is, or should be. While moral injury is an ancient phenomenon, it is an emerging field of research.²⁶ The field right now is still in “its infancy,”²⁷ and “there are more unanswered questions than definitive answers at this point.”²⁸ Voluminous research is being done,

²⁵ David Wood, *Healing: Can We Treat Moral Wounds?*, HUFF. POST (Dec. 9, 2014, 8:26 PM), <http://projects.huffingtonpost.com/moral-injury/healing>.

²⁶ Nash et al., *supra* note 11, at 647.

Emerging empirical evidence confirms that military personnel confront a range of moral challenges in the course of military operations. How these operational moral challenges are processed can lead to moral injuries, which in turn, are associated with a wide range of damaging psychological, interpersonal, occupational, and life threatening outcomes for military personnel.

Thompson, *supra* note 12, at i.

²⁷ Litz et al., *supra* note 10, at 696. “Discussions concerning moral injury are relatively recent.” Thompson, *supra* note 12, at 10.

²⁸ Maguen & Litz *supra* note 3, at 1. “Although moral injury, per se, has not been systematically studied, there has been some research on acts of perpetration such as atrocities (i.e., unnecessary, cruel, and abusive harm to others or lethal violence) and killing.” Litz et al., *supra* note 10, at 697.

However, we believe that the clinical and research dialogue is very limited at present because questions about moral injury are not being addressed. In addition, clinicians who observe moral injury and are motivated to target these problems are at a loss because existing evidence-based strategies fail to provide sufficient guidance. Consequently, our goal is two-fold: We want to stimulate discourse and empirical research and, because we are sorely aware of the clinical care vacuum and need (especially in the Department of Defense), we offer specific treatment recommendations based on our conceptual model and a pilot study we are conducting in the Marine Corps.

Litz et al., *supra* note 10, at 696. The following is from the draft version of the joint Navy-Marine Corps Combat and Operational Stress Control Doctrine: “A moral injury is a stress injury ‘about which medical and psychological scientists know the least, even though it has been part of human experience for as long as humans have existed.’” *A Life Given Back*, MED. NAVY., <http://www.med.navy.mil/sites/nmcscd/nccosc/item/a-life-given-back/index>.

most crucially by the medical community,²⁹ but it is “still in its nascent stages.”³⁰ Enough is known, however, to at least stimulate academic discourse and address the phenomenon directly.³¹ While the phenomenon is being addressed, there is reluctance by some to arrive at a definition, or even to agree on a name.³²

While moral injury has been popularized³³ as the name for the phenomenon, it is not yet universally accepted. “In an era of complex medical diagnoses and legal terminology, a new definition for this ancient wound is required.”³⁴ In the *Drescher Study*, more than one-third of twenty-three participants thought moral injury was not the best name for the phenomenon, and that one or both of the words should be replaced.³⁵ This sentiment extends to portions of the interdisciplinary community, where “some believe the term ‘moral’ should be eliminated, while others want to replace the term ‘injury.’”³⁶

aspx (last visited Apr. 14, 2016).

²⁹ Joseph M. Palmer, *Moral Injury: A Guide for Clergy and Lay Ministries*, MIL. OUTREACH U.S.A. iv (2014), <http://www.militaryoutreachusa.org/wp-content/uploads/2015/06/Moral-Injury-Guide-for-Clergy-and-Lay-Ministries.pdf>. Referring to a study being done by the Naval Center for Combat and Operational Stress Control (NCCOSC):

We are also partnering with a clinical psychologist at [Naval Medical Center San Diego’s (NMCS D)] Overcoming Adversity and Stress Injury Support (OASIS) program for a study on moral injury (the internal conflict that may arise in the context of deployment and combat)—specifically, the causes and consequences of moral injury. We will be conducting focus groups at NMCS D and Camp Pendleton with active-duty [s]ailors and [m]arines, Navy mental health providers, and Navy chaplains to gain insight into the concept of moral injury. Our hope is that we can learn more about the best way to treat moral injury in a clinical setting.

Steven Van Der Werff, *NCCOSC Contributes to Medical Research*, NAVY MED. (Aug. 13, 2015), <http://navymedicine.navylive.dodlive.mil/archives/9342>.

³⁰ Farnsworth, *supra* note 15, at 13.

³¹ “To summarize, the scientific discourse about moral injury is nascent, yet it provides an excellent springboard for future investigations.” Maguen & Litz, *supra* note 3, at 3.

³² MEAGHER, *supra* note 12, at 3.

³³ Pryer, *supra* note 8, at 14. “The term *moral injury* has recently begun to circulate in the literature on psychological trauma.” Shay, *Moral Injury*, *supra* note 11, at 182

³⁴ Paul W. Fritts, *Adaptive Disclosure: Critique of a Descriptive Intervention Modified for the Normative Problem of Moral Injury in Combat Veterans*, COMM. AND GEN. STAFF COLL. <http://www.cgscfoundation.org/events/ethics-symposium/ethics-symposium-arc-hive/> (last visited Apr. 14, 2015).

³⁵ Nash et al., *supra* note 11, at 647.

³⁶ Copland, *supra* note 20.

Initially reluctant to address moral injury,³⁷ the various services are generally making progress.³⁸ For example, the Army's Comprehensive Soldier and Family Fitness Program now makes reference to moral

³⁷ "Difficult problems might arise from official recognition of moral injury: how to measure the intensity of the pain, for instance, and whether the government should offer compensation, as it does for [Post Traumatic Stress Disorder, or] PTSD." Wood, *supra* note 25.

³⁸

While moral injury is not clinically defined, nor captured as a formal diagnosis, it is recognized as real. The Defense Department provides a wide range of medical and non-medical resources for servicemembers seeking assistance in addressing moral injuries. From a medical perspective, there are no clinical practice guidelines specifically for moral injury. However, DoD mental health providers often address moral injury in combination with treating psychiatric disorders. For example, during treatment for PTSD, depression or other mental health conditions, patients may disclose information that suggests they have experienced a moral injury (e.g., guilt from accidentally killing a civilian during a combat operation or some other dilemma) and clinicians will help patients explore their feelings of guilt, anguish or other troubling thoughts/feelings they have about the incident.

Jayne Davis, *Is there an Answer to Your Mental Health Question? Ask DcoE*, DEF. CENT. OF EXC. FOR PSYCH. HEALTH & TRAUM. BRAIN INJ. (May 1, 2014), http://www.dcoe.mil/blog/14-05_01/Is_There_an_Answer_to_Your_Mental_Health_Question_Ask_DCoE.aspx (quoting an answer provided by Navy Captain Anthony Arita, Deployment Health Clinical Center director).

Moral injury is as old as war itself, but the tools and strategies to aid recovery are continuing to evolve. The military has therefore focused significant resources to better understand moral injury and the context for healing. Military medicine, Chaplain Corps, [the] research community, and leadership at all levels have joined in this effort. New forms of therapy for moral injury are being explored, and moral injury as a concept is increasingly being discussed in military treatment facilities. For example, Naval Medical Center Portsmouth has a specific Warrior Recovery Division with an array of treatment options to help service members better understand and resolve their unique post-deployment conflicts. Additionally, Naval Medical Center San Diego has programs that include complementary/alternative medicines and a variety of recreational therapies.

Id. See also Miller Kerr & Mathew Rariden, *Navy Medicine Perspective: Moral Injury*, NAVY MED. (Apr. 2, 2015), <http://navymedicine.navylive.dodlive.mil/archives/8437>.

injuries.³⁹ The Navy and the Marine Corps⁴⁰ prefer the name “inner conflict,”⁴¹ in part “because the potential synonym, moral injury, is perceived by some to be pejorative.”⁴² Other practitioners think inner

³⁹ “Resilience in soldiers helps prevent moral injuries in the complex environment of combat.” U.S. DEP’T OF ARMY, REG. 350-53, COMPREHENSIVE SOLDIER AND FAMILY FITNESS para. 2-3 (19 June 2014) [hereinafter AR 350-53]. “The term ‘moral injury’ is increasingly used in military behavioral health units.” Sherman, *supra* note 18, at 174.

⁴⁰ Megan McCloskey, *Combat Stress as ‘Moral Injury’ Offends Marines*, STARS AND STRIPES (Apr. 28, 2011), <http://www.stripes.com/blogs/strikes-central/strikes-central-1.8040/combat-stress-as-moral-injury-offends-marines-1.142177>.

⁴¹ Wood, *supra* note 25.

The third event that can cause Orange Zone stress injuries—inner conflict—is the one about which medical and psychological scientists know the least, even though it has been part of human experience for as long as humans have existed. Inner conflict has also been called “moral injury,” “betrayal of what’s right,” or “shattered assumptions” and is caused by events that violate deeply held beliefs, especially codes of conduct and moral codes regarding right and wrong. Inner conflict stress injuries can result when individuals either act or fail to act in ways that violate their own deeply held beliefs and moral codes. It can also occur when trusted others—especially spouses, close friends, or trusted leaders—either act or fail to act in ways that violate these same core beliefs and moral codes. The distress and changes in functioning that can result from an inner conflict stress injury can be just as profound and long-lasting as those resulting from a life-threat or loss.

U.S. DEP’T OF NAVY, NAVAL TACTICS, TECHNIQUES, PROCEDURES 1-15M, AND MARINE CORPS REFERENCE PUBLICATION, 6-11C, COMBAT AND OPERATIONAL STRESS CONTROL, 4-16 (Dec. 2010) [hereinafter COMBAT AND OPERATIONAL STRESS CONTROL].

⁴² Nash et al., *supra* note 11, at 647.

In short, the marines have adopted the concept, but renamed it “inner conflict.” Marines would tell Smith, “I understand I can get injured while I’m doing the thing I’m trained to do, but when you say the thing I’m trained to do injures me, some of them at least struggle with that. So we avoided [the struggle] by sticking with inner conflict.” Changing the name makes the concept more acceptable for marines who need help, says Navy commander and clinical psychologist Andrew Martin.

Martha Bebinger, *Moral Injury: Gaining Traction, but Still Controversial*, WBUR, BOST. NPR NEWS STATION (June 25, 2013), <http://www.wbur.org/2013/06/25/moral-injury-research>. Dr. Patricia Resick, Professor of Psychology at Duke University, therapist, and former Director of the Women’s Health Sciences Division of the National Center for PTSD finds the term “limiting” and “somewhat judgmental.” Amanda Taub, *How This*

conflict is not specific enough, and that the name implies a collective term that includes a wide variety of combat trauma.⁴³

If naming the phenomenon is a challenge, agreeing on a technical definition is a herculean endeavor.⁴⁴ For example, when the DoD was once asked to comment on the definition of moral injury, the response was denial that a definition even exists,⁴⁵ simply asserting that it is “not clinically defined,”⁴⁶ and that no formal diagnosis exists.⁴⁷ The truth to this assertion is that, at this stage, there are actually several competing definitions emanating from various disciplines,⁴⁸ none of which constitute the universally agreed-upon clinical definition.⁴⁹ Today there is a tremendous effort underway to define moral injury, specifically in the context of military service, and the potentially negative outcome residual in the lingering effects of combat.⁵⁰

Psychologist Treats Soldiers who Can't Let Go of What They Did at War, VOX.COM (May 25, 2015), <http://www.vox.com/2015/5/7/8553091/soldiers-trauma-treatment>.

⁴³ McCloskey, *supra* note 40.

⁴⁴ Copland, *supra* note 20.

⁴⁵ Wood, *supra* note 25.

⁴⁶ *Id.*

⁴⁷ *Id.* The Military Health System and the Defense Health Agency, however, try to help servicemembers understand the phenomenon. “Moral injury occurs when one experiences an act that conflicts with or violates a core moral value, or deeply held belief, and leads to an internal moral conflict.” *Understanding Moral Injury*, HEALTH.MIL (May 4, 2015), <http://www.health.mil/News/Articles/2015/05/04/Understanding-Moral-Injury>.

⁴⁸ For example, Jeff Zust recently synthesized elements of definitions from Jonathan Shay, Edward Tick, Rita Nakashima-Brock, Gabriella Lettini, and Brett Litz to arrive at the following working definition of moral injury: “Moral Injury is a complex “soul” wound that results from soldiers’ conscientious inability to reconcile the moral dissonance between their idealized values and their perceived experiences. This wound produces a continuum of exiling behaviors that damage soldiers’ ability to reconnect with their lives.” Zust, *supra* note 6, at 2.

⁴⁹ Boudreau, *supra* note 17, at 748.

⁵⁰ Consider this training announcement from the International Society for Traumatic Stress Studies, “Preventing Psychological & Moral Injury in Military Service.” Here the charter is to, among other things, define moral injury, teach others to spot it, and in one learning objective, “define moral injury in the context of military service and misconduct during combat.” Shay et al., *Preventing Psychological & Moral Injury in Military Service*, INT’L SOC. FOR TRAUM. STRESS STUD., <http://www.istss.org/education-research/online-learning/expert-trainings/preventing-psychological-moral-injury-in-military.aspx> (last visited June 13, 2016).

B. Thematic Elements

The challenge for judge advocates applying the concept of moral injury to any kind of legal practice is to first synthesize the working definitions to arrive at a definition that captures the most salient themes from the interdisciplinary community.⁵¹ For now and until the Pentagon releases one official definition, the best way to conceptualize moral injury is as three thematic elements. These elements are the common denominators, or themes, that can be synthesized from the interdisciplinary community. The three elements are: (1) an act; (2) a transgression; and (3) a harm.

1. Element 1: The Act

The first thematic element of moral injury is an act of transgression (act).⁵² The act can be a commission or its inverse, an omission.⁵³ The act can be carried out by an individual soldier, or collectively as a unit.⁵⁴ One popular modification contemplates an act that is “caused by doing, failing to prevent, or observing acts that go against deeply held moral beliefs and expectations.”⁵⁵ In this modification, the commission or omission can be

⁵¹ Synthesis of the working definitions is not intended as a medical diagnosis, psychological diagnosis, or therapeutic assessment criteria of any kind. This synthesis is intended only to help judge advocates navigate working definitions, and does not serve as a substitute for medical diagnosis.

⁵² Willis, *supra* note 10. “The key precondition for moral injury is an act of transgression.” Shira Maguen & Brett Litz, *Moral Injury in the Context of War*, U.S. DEP’T OF VET. AFF., http://www.ptsd.va.gov/professional/co-occurring/moral_injury_at_war.asp (last visited Apr. 14, 2016).

⁵³ Maguen & Litz, *supra* note 3, at 1.

Professor Sherman has interviewed hundreds of veterans to try to understand the damage caused by war. “A moral injury is not a threat to one’s life,” she explains, “and doesn’t always rise to the level of paralysis or suicidal proportion.” She describes a moral injury as one where “a soldier is holding onto incidents where they feel they’ve somehow transgressed, where they omitted to do more.” This can be something that a soldier did or didn’t do, and even something over which he or she had no control.

Gail Bosario, *The Untold Cost of Moral Injuries in War*, ABC.COM (Apr. 24, 2013, 5:36 PM), <http://www.abc.net.au/radionational/programs/latenightlive/anzac-day/4648634>.

⁵⁴ Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

⁵⁵ *Problems Associated With Combat Trauma*, THE WOUND. WARR. PROJ., <http://www>.

an act of another⁵⁶ that is merely witnessed,⁵⁷ regardless of any control the observer had on the event.⁵⁸ “William Nash, M.D., a leading researcher, educator, and clinical consultant in military and veteran psychological health defines moral injury as ‘stress resulting from perpetrating, or merely witnessing, acts—or failures to act.’”⁵⁹ Thus “seeing someone else violate core moral values”⁶⁰ is enough to satisfy the element under this construction.

Another modification is even more permissive, and contemplates an act manifesting by just learning about the immoral conduct of others, meaning no first-hand knowledge is required. “Near the end of 2009, U.S. Department of Veterans Affairs clinicians offered this definition of moral injury: Moral injury is perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations.”⁶¹ Under this broad construction, “witnessing or learning

woundedwarriorproject.org/programs/combat-stress-recovery-program/problems-associated-with-combatoperational-stress-trauma.aspx (last visited Apr. 14, 2016).

⁵⁶ In one definition, the “act of another” adds another modification, and specifically states that the act of another must be “by someone who holds legitimate authority.” SHAY, *DEFENDING VETRANS*, *supra* note 13, at 63.

⁵⁷ Farnsworth, *supra* note 15, at 13; *see also* Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

⁵⁸ “Nancy Sherman . . . similarly describes moral injury as resulting when “a soldier is holding onto incidents where they feel they’ve somehow transgressed, where they omitted to do more. This can be something that a soldier did or didn’t do, and even something over which he or she had no control.” Thompson, *supra* note 12, at 6.

⁵⁹ Copland, *supra* note 20.

⁶⁰ RITA NAKASHIMA BROCK & GABRIELLA LETTINI, *SOUL REPAIR: RECOVERING FROM MORAL INJURY AFTER WAR* xv (2013).

⁶¹

To stimulate a dialogue about moral injury, we offer the following working definition of potentially morally injurious experiences: *Perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held beliefs and expectations*. This may entail participating in or witnessing inhumane or cruel actions, failing to prevent the immoral acts of others, as well as engaging in subtle acts or experiencing reactions that, upon reflection, transgress a moral code.

Litz et al, *supra* note 10, at 700.

Near the end of 2009, U.S. [DVA] Affairs clinicians offered this definition of moral injury: “Moral injury is perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations. This may entail participating in or witnessing inhumane or cruel actions, failing to

about such an event⁶² is very permissive, and contemplates a wide variety of scenarios in which an act may manifest even without first-hand knowledge. A variation on this theme are definitions that make special mention of a soldier being “required or coerced to accept or cover up”⁶³ the act of another.

Some argue that the risk-exposure to an act under this broad construction increases in combat,⁶⁴ contemplated by some definitions as “a high stakes situation.”⁶⁵ Some of this risk might emanate from just proximity to violence and bearing witness to killing.⁶⁶ The act, however,

prevent the immoral acts of others, as well as engaging in subtle acts or experiencing reactions that, upon reflection, transgress a moral code.”

Nash et al., *supra* note 11, at 647; *see also* Copland, *supra* note 20.

⁶² Litz et al., *supra* note 10, at 700.

⁶³ Willis, *supra* note 10.

⁶⁴ *See, e.g.*, Maguen & Litz, *supra* note 3, at 1–3; “Sending people to fight necessarily sends them into situations where moral injury will result.” Sherman, *supra* note 18, at xvi. “The moments for moral injury, for a sense of grievous transgression and falling short, are all too abundant in war.” *Id.* at 17.

Examples of moral injury in war include, [u]sing deadly force in combat and causing the harm or death of civilians, knowingly but without alternatives, or accidentally, giving orders in combat that result in the injury or death of a fellow servicemember, failing to provide medical aid to an injured civilian or servicemember, returning home from deployment and hearing of the executions of cooperating local nationals, failing to report knowledge of a sexual assault or rape committed against oneself, a fellow servicemember, or civilians, following orders that were illegal, immoral, and/or against the Rules of Engagement (ROE) or Geneva Convention, [a] change in believe about the necessity or justification for war, during or after ones service,’ and countless others.

Moral Injury Project, *supra* note 4 (internal quotations and citations omitted). “Moral Injury is a testimony to the destructive power of the perceived present in combat.” Züst, *supra* note 6, at 10.

⁶⁵ SHAY, DEFENDING VETERANS, *supra* note 13, at 63.

⁶⁶ Litz et al., *supra* note 10, at 700. “Several studies demonstrate an association between killing in war and mental and behavioral health problems, which may be proxies for moral injury.” Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. One important disclaimer here is that exposure to violence is not, in itself, inherently traumatizing. Rather it is potentially traumatizing event (PTE). E-mail from Dr. Brett T. Litz, (May 10, 2015, 13:01 EST) [hereinafter Dr. Litz E-mail] (on file with author).

can manifest in the most routine of scenarios,⁶⁷ even when a soldier is following a lawful order, or is in an unavoidable situation.⁶⁸ “A common example used by the psychiatrist who coined the term is the [m]arine who acted on orders to shoot a sniper who was using an infant serving as a human shield.”⁶⁹

Although killing may be a precursor to moral injury, it is important to note that not all killing in war results in adverse outcomes for military personnel. As noted earlier, certain elements need to be present for moral injury to occur, including a perceived transgression that goes against individual or shared moral expectations. For example, a military member who kills an enemy combatant in self-defense may perceive that the death was justified. If however, a civilian was perceived to be armed and consequently killed, with military personnel later discovering that the individual was in fact unarmed, this may set the stage for the development of moral injury.

Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. Inherently traumatizing events require “some kind of per or near-per-traumatic response the impact is felt and there is harm done.” Dr. Litz E-mail, *supra*. “A loss in a unit is a PTE. The impact depends on proximity, closeness to the person lost, culpability, etc.” *Id.* In other words, proximity violence still requires the other two elements; transgression and a harm. *Id.*

⁶⁷ MEAGHER, *supra* note 12, at 45. “Military personnel are well trained in the rules of engagement and do a remarkable job making life or death decisions in war; however, sometimes unintentional error leads to the loss of life of non-combatants, setting the stage for moral injury.” Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

Although moral injury is most often associated with violence and aggression within the context of combat, military personnel can also experience inner turmoil secondary to nonviolent events, such as exposure to dead bodies or human remains, reported by 65% of Iraq and Afghanistan veterans . . . and/or seeing wounded civilians and being unable to assist, reported by 60% of Iraq and Afghanistan veterans The potential conflicts between these experiences and a service member’s moral standards can lead to lasting emotional distress and inner turmoil for military personnel, a situation that has been termed *moral injury*

Craig J. Bryan et al., *Measuring Moral Injury: Psychometric Properties of the Moral Injury Events Scale in Two Military Samples*, SAGE J. (June 19, 2015), <http://asm.sagepub.com/content/early/2015/06/18/1073191115590855.full.pdf+html> (citations omitted).

⁶⁸ “Moral injury results from a traumatic event in which a veteran felt authorized or required by the circumstances in combat to act in conflict with his or her conscience and sense of values.” John W. Brooker et al., *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 254 (2012); see also Brock & Lettini, *supra* note 60, at xv–xvi.

⁶⁹ Brooker et al., *supra* note 68, at 251.

The first thematic element then is an act; defined as an act of commission or omission, by oneself or another, that can be either witnessed or learned about, in real time or upon reflection.⁷⁰ While this is a broadly constructed synthesis, in the absence of one official definition it is prudent to synthesize permissively and consider a wide variety of scenarios where an act might manifest.

2. *Element 2: The Transgression*

The second thematic element is the transgression that is caused by the act,⁷¹ often later in time and upon reflection.⁷² “It comes from having

By contrast, here is a combat incident alone that might cause moral injury This was told to me at a Marine Corps Combat and Operational Stress Control conference in San Diego as an incident that happened at Fallujah. A Marine scout-sniper team was supporting a marine infantry unit that had taken several casualties from a well-hidden and effective enemy sniper. My understanding is that the typical marine team is two: the shooter and the spotter; they have different roles at given moments of engagement, but both marines are trained to perform both functions, and often swap. The marine sniper eventually found and identified the enemy sniper in his scope and could see that he had a baby strapped to his front in a sling we would call a *Snuggly*. The marine believed that the enemy was using this baby as a “human shield,” although other interpretations were possible (for example, “I want my son to join me in Paradise,” that is, martyr thinking, or “If I am dead, there will be nobody to protect and look after him—if I die, he will die”). However, the point here is not the enemy sniper’s thinking, but the marine’s. The marine sniper’s understanding of the then-current Rules of Engagement and of the Law of Land Warfare was that shooting the enemy sniper was permissible, even if the baby could be foreseen to die unintentionally in the process. His understanding of his job description and his duty to the marines he was supporting was to make the shot, which he did. He saw the round land, and will probably live with that memory the rest of his life.

Shay, *Moral Injury*, *supra* note 11, at 185–86; *cf.* Hector/Astyanax in the *Iliad* or Odysseus/Telemachus in *The Odyssey*, *supra* note 11 and accompanying discussion.

⁷⁰ The modifier “on reflection” is added to illustrate that this element may not be immediately apparent. Brock & Lettini, *supra* note 60, at xiv.

⁷¹ The act must lead to a transgression of some kind, and ultimately a harm, to constitute a moral injury. Dr. Litz E-mail, *supra* note 66.

⁷² Copland, *supra* note 20.

transgressed one's basic moral identity and violated core moral beliefs."⁷³ Definitions of this element vary widely as to what the basic moral identity and core moral beliefs that are referenced actually mean, or should mean.⁷⁴ For some scholars, the transgression must be against the soldier's personal moral identity, and personal set of values⁷⁵ (personal moral code). Some

⁷³ Brock & Lettini, *supra* note 60, at xiv.

Whether a moral transgression is the result of one's own actions or omissions, or those of others, it is not the event itself that appears to be crucial to the etiology of moral injury. Rather, it is the extent to which the person makes sense of the event and its associated actions (or lack of actions) that is key. That is, can the person create any reasonable causal explanation for the event at all? Should such a rationale be out of reach, the person may devote an inordinate amount of energy in trying to understand, make sense of, and derive meaning regarding the event. This experience will be among the first indications that one's moral standards have been betrayed or violated and opens the potential for moral injury to occur.

Thompson, *supra* note 12, at 6.

⁷⁴ To have a moral injury implies the existence of a moral code, or basic moral identity as a condition-precedent. "Moral injury is a question of conscience and implies the existence of moral health, moral service, and the possibility for moral healing." Züst, *supra* note 6, at 2.

[Moral injury] begins in the moral development of responsible agency. In the profession of arms, responsible agency entwines personal character and professional ethos to empower those who conscientiously accept military service to serve honorably under difficult conditions and to return home successfully. In combat, responsible agency doesn't guarantee acceptable actions. Reasoned choices and planned actions fail; character and ethos fragment, and moral injuries occur as participants live with the consequences. [Moral Injury] grows out of a moral reasoning conscience, trying to reconcile the dissonance between "idealized" standards against perceptions of "real" behaviors and events during combat. The idealized standards, perceived behaviors, and the resulting dissonance reflect the outcomes of moral development, morals judgment and moral reconciliation processes occurring within a [s]oldier's conscience.

Id.

⁷⁵ MEAGHER, *supra* note 12, at xvi-xvii. "A number of clinician-researchers, among them Brett Litz, Shira Maguen, and William Nash, have done an excellent job of describing an equally devastating second form of moral injury that arises when a servicemember does something in war that violates their own ideals, ethics, or attachments." Shay, *Moral Injury*, *supra* note 11, at 184.

even assert that this construction of the element: “the violation, by oneself or another, of a personally embedded moral code,”⁷⁶ is the most common.⁷⁷ On the other end of the spectrum are constructions of the element that contemplate transgressions of “communally shared moral beliefs and expectations”⁷⁸ (communal moral code). This will be an interesting distinction as the Army moves toward codifying the professional ethic,⁷⁹ and gives additional guidance on what those communal expectations are.

Most definitions fall in the middle of spectrum or are silent as to whether the transgression is against a personal or a communal moral code. These definitions refer generally to “betrayals of ‘what’s right,’”⁸⁰ and acts “that transgress deeply held beliefs and expectations.”⁸¹ Some definitions contemplate both personal and communal moral code transgressions. One example refers to these as “moral and ethical expectations that are rooted in religious or spiritual beliefs, or culture-based, organizational, and group-based rules about fairness, the value of life, and so forth.”⁸² Some definitions even assert that while the soldier enters military service with a

Separate to physical injuries, or even symptoms of PTSD, moral injury is able to destroy a soldier’s deeply held personal beliefs about right and wrong. It can disrupt an individual’s confidence about his or her own moral behaviour or others’ capacity to behave in a just and ethical manner.

Bosario, *supra* note 53.

⁷⁶ MEAGHER, *supra* note 12, at xvi.

⁷⁷ *Id.* at xvi–xvii.

⁷⁸ Copland, *supra* note 20.

⁷⁹ “The goal is an articulated, accessible, commonly understood, and universally applicable Army Ethic—motivating *Honorable Service*, guiding, and inspiring right decisions and actions. In turn, the Army Ethic will drive the *Concept and Strategy for Character Development*.” *The Army Ethic White Paper*, CENT. FOR THE ARMY PRO. ETH. (July 11, 2014), <http://cape.army.mil/army-ethic-white-paper/>.

⁸⁰ Nash et al., *supra* note 11, at 647.

⁸¹

Near the end of 2009, U.S. [DVA] clinicians offered this definition of moral injury: *Moral injury is perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations. This may entail participating in or witnessing inhumane or cruel actions, failing to prevent the immoral acts of others, as well as engaging in subtle acts or experiencing reactions that, upon reflection, transgress a moral code.*

Litz et Al., *supra* note 10, at 700 (emphasis added); see also Copland, *supra* note 20.

⁸² Willis, *supra* note 10.

subjective moral code,⁸³ “within months this moral code is replaced with the warrior code.”⁸⁴

The second thematic element thus is the transgression caused by the act, defined as betraying or violating deeply held beliefs in either a personal or a communal moral code.

3. *Element 3: The Harm*

The third thematic element is the harm, or damage caused by the act of transgression. This definition also presents a wide spectrum as to what is actually damaged, and what the damage really means to the soldier and to the unit. Some definitions speak nebulously to a “disruption of the self on a number of different levels,”⁸⁵ or a transgression that generally “leads

⁸³ Zust, *supra* note 6, at 5–6 (discussing the “pre-wired” personal values that civilians enter the armed forces with and the altruistic motives of many recruits).

David Wood, *The Grunts: Damned if They Kill, Damned if They Don’t*, HUFF. POST (Dec. 11, 2014, 10:42 PM), <http://projects.huffingtonpost.com/moral-injury/the-grunts>.

⁸⁴ Palmer, *supra* note 29, at 1. Jacob K. Farnsworth et al., *The Role of Emotions in Military Trauma: Implications for the Study and Treatment of Moral Injury*, 18 REV. OF GEN. PSYCH. 249, 249–252 (2014) (discussing the intense assimilation of a “new moral system” at basic training; “reorienting a recruit’s moral emotions and judgments to the social context of their military branch). “From the time a recruit takes their oath of military service they will learn about their Service’s code of ethics. While every [s]ervice has their own [c]ode reflecting on the particular mission of that [s]ervice there is commonality in such values as honor, service and sacrifice.” JOSEPH M. PALMER, A GUIDE TO AN UNDERSTANDING AND RESOLUTION OF THE INVISIBLE WOUND OF WAR KNOWN AS MORAL INJURY (2015). “Soldiers and Army [c]ivilians enter the Army with personal values developed in childhood and nurtured over years of personal experience. By taking an oath to serve the nation and the institution, one agrees to live and act by a new set of values—Army Values.” DEP’T OF ARMY, ADP 6-22, ARMY LEADERSHIP para 3-3 (1 Aug. 2012) [hereinafter ADRP 6-22].

⁸⁵ Farnsworth, *supra* note 15, at 22. The following account is from Captain Josh Mantz, who reports having died and been resuscitated on the battlefield in Baghdad on April 21, 2007, and is now crushed with survivor’s guilt. “‘It’s the moral injury over time that really kills people. Soldiers lose their identity. They don’t understand who they are anymore . . . Most people don’t appreciate the awful weight of that moral injury.’” Sherman, *supra* note 18, at 7. For a complete account of this moral injury, see Sherman, *supra* note 18, at ch. 1. “Josh Mantz experiences *moral* anguish, in part, because he feels transgressed and fell short. He wasn’t all he thought he should be as a commander. He let his soldier go without help while he was saved.” *Id.* at 18. The various levels can be physical, mental, and emotional. “Not surprisingly, the effects of severe violations of one’s basic beliefs concerning what is right, just, and fair involve an array of intense emotional, cognitive and even physical reactions.” Thomspson, *supra* note 12, at 7.

to serious inner conflict.”⁸⁶ Alternate definitions specifically enumerate how that inner conflict manifests. One category of definitions refers generally to moral and ethical harm, and contemplates transgressions that “shatters moral and ethical expectations,”⁸⁷ and leaves “enduring negative emotional distress related to moral injury.”⁸⁸ Other categories of definitions focus on spiritual harm⁸⁹ and contemplate transgressions “resulting in deep injury to the psyche or soul.”⁹⁰ Still others focus on the psychological aspect, and contemplate a lifelong,⁹¹ or “lasting and powerful psychological wound.”⁹² The most expansive definitions attempt to enumerate exhaustive lists of how the harm might manifest, ranging from the spiritual, to the psychological.⁹³

⁸⁶ Maguen & Litz, *supra* note 3, at 1.

⁸⁷ Willis, *supra* note 10.

On the other hand, research on the mental and spiritual components of psychological trauma, loss, and moral injury has shown that one of the defining features of such stress injuries is that they shatter existing assumptions about God, goodness, and the moral order in a way that leaves a void in understanding and meaning.

COMBAT AND OPERATIONAL STRESS CONTROL, *supra* note 41, at 3-27–3-28.

⁸⁸ Litz et al., *supra* note 10, at 698.

⁸⁹

Moral injury is damage to the soul of the individual. War is one of, but not the only thing that can cause this damage. Abuse, rape, and violence cause the same type of damage. “Soul repair” and “soul wound” are terms already in use by researchers and institutions in the United States who are exploring moral injury and paths to recovery.

Moral Injury Project, *supra* note 4.

⁹⁰ MEAGHER, *supra* note 12, at xvi–xvii.

Moral [i]njury is best understood as an invisible soul wound resulting from a desire for responsible agency (moral development). In the profession of arms, responsible agency integrates personal character and professional ethos to empower those who conscientiously accept military service to serve honorably under difficult conditions and successfully return home. In combat, responsible agency doesn’t guarantee acceptable actions (moral judgment). Reasoned choices and planned actions fail; character and ethos fragment; and moral injuries occur as participants live with the consequences (moral dissonance).

Zust, *supra* note 6, abstract.

⁹¹ JONATHAN SHAY, ODYSSEUS IN AMERICA, *supra* note 11.

⁹² Litz et al., *supra* note 10, at 697.

⁹³ *Id.*

Some argue that the risk exposure to a harm, like the risk-exposure to an act, increases in combat.⁹⁴ Numerous studies document the lingering detrimental effects of the violence of direct combat.⁹⁵ Part of this might emanate from sheer proximity to or participation in the violence, similar to the first element.⁹⁶ Similar as well to the first element, the risk can be acute even when the soldier acted within the rules of engagement, and pursuant to a lawful order.⁹⁷ The harm can manifest in a multitude of ways, and includes anxiety,⁹⁸ “feelings of worthlessness, remorse, and despair,”⁹⁹ “shame and guilt and anger,”¹⁰⁰ or even a feeling “as if they lost their souls in combat and are no longer who they were.”¹⁰¹

⁹⁴ See generally *supra* notes 66–69.

⁹⁵ Farnsworth, *supra* note 15, at 14.

Former Army Reserve Capt. Josh Grenard thought the anguish of losing men in combat would eventually wane in the years after a deployment to Iraq. But when soldiers from his unit began committing suicide, the wounds reopened—fresh, raw and painful. “It’s almost two sets of injuries—but having your men kill themselves is wholly different,” Grenard said. “Was there something I could have done? Was there a way we could have gotten them help? Should I have seen it?” He found himself slipping into isolation, going to his law office each day but questioning his very existence. He drank from 7 a.m. to 10 p.m. daily—“very metered, all day.” “You don’t want to think about anything. You don’t want to answer those questions,” he said. Grenard was not suffering from post-traumatic stress disorder, the psychiatric condition normally associated with combat. Rather, his feelings which included helplessness, emotional pain, guilt and frustration, are often described as “moral injury,” a psychological condition related to having done something wrong, being wronged by others, or even witnessing a wrongdoing, argues Georgetown University philosophy professor Nancy Sherman.

Patricia Kime, *Moral Injury: Troops Talk of How War Assaults Conscience*, MIL. TIMES (Nov. 19, 2015), <http://www.militarytimes.com/story/military/2015/11/19/moral-injury-troops-talk-how-war-assaults-conscience/76000632/>.

⁹⁶ *Id.* Readers are reminded of the same disclaimers offered in note 66, that proximity to violence is not inherently morally-injurious. See generally *supra* note 66 and accompanying discussion.

⁹⁷ Brooker et al., *supra* note 68, at 254.

⁹⁸ Willis, *supra* note 10.

⁹⁹ Brock & Lettini, *supra* note 60, at xv–xvi.

¹⁰⁰ David Wood, *The Recruits: When Right and Wrong are Hard to Tell Apart*, HUFF. POST (Jan. 12, 2015, 9:38 AM), <http://projects.huffingtonpost.com/moral-injury/the-recruits>.

¹⁰¹ Brock & Lettini, *supra* note 60, at xv–xvi. “A moral injury is not established by a formal diagnosis and there is no set threshold to mark its presence.” *Understanding Moral*

The third thematic element then is the harm—defined as the damage caused by an act of transgression—that causes substantial inner conflict, manifesting as psychological, emotional, moral, or spiritual and dimensional harm.

4. *Satisfaction of all three elements*

A synthesis of the salient considerations from the interdisciplinary community thus reveals three thematic elements. The first thematic element is an act; defined as an act of commission or omission, by oneself or another, that can be either witnessed or learned about, in real time or upon reflection. The second thematic element is the transgression caused by the act, defined as betraying or violating deeply held beliefs in either a personal or a communal moral code. The third thematic element is the harm, defined as the damage caused by an act of transgression; that causes substantial inner conflict, manifesting as psychological, emotional, moral, or spiritual and dimensional harm. When all three elements are satisfied, the result is a “Potentially Morally Injurious Event” (PMIE).¹⁰² It is potential because “there is no threshold for establishing the presence of moral injury.”¹⁰³ In other words, every case is different¹⁰⁴ and leaders should be cognizant of the elements, and why their satisfaction could be significant for good order and discipline, readiness, and soldier health and welfare.

C. The Potential Effects

The implications of a PMIE are thought by many to be significant, as some assert that it can form a contributing cause, or be associated with¹⁰⁵

Injury, REAL WARRIORS, <http://www.realwarriors.net/active/treatment/moralinjury.php> (last visited Nov. 12, 2015).

¹⁰² Dr. Litz E-mail, *supra* note 66.

¹⁰³ Maguen & Litz, *supra* note 3, at 1.

¹⁰⁴ *See infra* Section III.

¹⁰⁵ “Others have similarly concluded that moral injuries are associated with a range of social problems, spiritual/existential issues, risk-taking and emotional distress.” Thompson, *supra* note 12, at 7.

a heightened risk of misconduct,¹⁰⁶ self-harm,¹⁰⁷ and even soldier suicide.¹⁰⁸ One Navy psychiatrist even asserts that moral injury is a predominant harbinger of significant negative outcomes.¹⁰⁹ “Nash, the retired Navy psychiatrist, believes that if research were available, it would reveal that moral injury underlies veteran suicide, homelessness, and criminal behavior.”¹¹⁰ The damage¹¹¹ that can manifest is referred to as a shrinking of “the moral and social horizon.”¹¹² Herein lies the red star cluster.

1. *Shrinking of the Moral Horizon*

When a soldier is morally injured, many scholars assert that his¹¹³ paradigm of what constitutes ethical and moral conduct can change and diminish.¹¹⁴ “All potentially morally injurious experiences create risk for

¹⁰⁶ “Overall, many violations of the *Uniform Code of Military Justice* may be further explained by the specific symptom clusters, stress triggers, or environmental stimuli addressed below.” Brooker et al., *supra* note 68, at 252. Moral injury is one of those addressed. “Moral injury can result in criminal offenses, especially those involving domestic violence, through the veteran’s effort to ‘strike first,’ one of three common maladaptive responses to the lack of ability to trust others.” *Id.* at 254.

¹⁰⁷ Litz et al., *supra* note 10, at 701.

¹⁰⁸ SHAY, *DEFENDING VETERANS*, *supra* note 13, at 62.

¹⁰⁹ Wood, *The Grunts*, *supra* note 83.

¹¹⁰ Sheldon et al., *supra* note 20, at 419.

¹¹¹ “Moral injury damages the unit, can damage the nation, and chronically damages the [s]oldier when he or she returns to [h]ome [s]tation or to civilian life.” Jonathan Shay, *Moral Leadership Prevents Moral Injury*, COMM. AND GEN. STAFF COLL. (Mar. 2014), <http://www.cgscfoundation.org/wpcontent/uploads/2014/03/FtLvnEthicsSymposiumReport-2010.pdf#page=333>.

¹¹² See generally JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* 23–39 (1995). “What they feel is profound moral dislocation and a consequent slipping sense of connectedness with family they love.” Sherman, *supra* note 18, at 26–27. “This ‘shrinkage of the social and moral horizon,’ as psychologist Jonathan Shay puts it in *Achilles in Vietnam*, is a common phenomenon for small groups of soldiers in prolonged combat settings.” JIM FREDERICK, *BLACK HEARTS: ONE PLATOON’S DESCENT INTO MADNESS IN IRAQ’S TRIANGLE OF DEATH* 173 (2011).

¹¹³ References to “his” in this article are intended to be gender-neutral, and refer generically to the entire population of morally injured combat soldiers. “Although moral injury is by no means restricted to male [s]ervicemembers, the vast majority of military personnel are male. Therefore, the vast majority of [v]eterans experiencing and seeking treatment for military-related psychological complaints are likewise male.” Farnsworth, *supra* note 15, at 14.

¹¹⁴ Litz et al., *supra* note 10, at 701; see generally SHAY, *ODYSSEUS IN AMERICA*, *supra* note 11, at 64–71; “All potentially morally injurious experiences create risk for

demoralization and alienation, as well as altered moral expectations (informally termed a ‘broken moral compass’).”¹¹⁵ One naval-psychotherapist calls this “an erosion of moral certainty, or the confidence in their sense of right and wrong,” or “the transformative capacity of what happens when we send our children into a war zone and say, ‘Kill like a champion.’”¹¹⁶ The operative modifier is “transformative.”

While some in the psychiatric community assert that trauma cannot transform a person’s character,¹¹⁷ others assert that traumatic combat experiences can damage good character,¹¹⁸ relying on the ancient presumption that character is malleable into adulthood.¹¹⁹ This character change¹²⁰ is called the “shrinking of the moral horizon,” and with the

demoralization and alienation, as well as altered moral expectations (informally termed a ‘broken moral compass’).” Dr. Litz E-mail, *supra* note 66.

¹¹⁵ Dr. Litz E-mail, *supra* note 66.

¹¹⁶ Wood, *The Recruits*, *supra* note 100.

¹¹⁷ Shay, *Moral Injury*, *supra* note 11, at 65.

We have been carefully taught to believe that good character cannot change in adulthood. This belief has a brilliant pedigree. It starts with Plato and runs through the Stoics, Kant, and Freud. It says, if you make it out of childhood with “good breeding” (Plato’s term; today we would say “good genes”) and good upbringing, then your good character is set by the end of childhood. No bad experience can break it. The trouble with this idea is that it is bunk.

SHAY, *DEFENDING VETERANS*, *supra* note 13, at 184. This notion of character, or moral foundation, is a crucial paradigm in a moral injury analysis.

Morals are the fundamental rules that we hold about what is good or bad, right or wrong, just or unjust, and often have implications for the well-being of others Our moral foundation is important as it is a central basis of “our expectations about and understanding of ourselves, others and the world around us . . . [that is,] how things should work and how one should behave in the world”. As such, morals are instrumental in our belief systems and behavioral sanctions regarding how we, and how others, should behave.

Thompson, *supra* note 12, at 1-1 (citations omitted).

¹¹⁸ W.D. EHRHART, *THE MADNESS OF IT ALL: ESSAYS ON WAR, LITERATURE, AND THE AMERICAN LIFE* 80 (2002). Referring specifically to moral injuries, “They deteriorate character.” Shay, *Moral Injury*, *supra* note 11, at 182.

¹¹⁹ “Homer and the Greek tragic poets held the terrifying view that apparently stable adult character *continues* to be dependent and vulnerable, even after it has been established by good nurturing in childhood.” SHAY, *ACHILLES IN VIETNAM*, *supra* note 112, at 37.

¹²⁰

shrinking goes “a person’s ideals and attachments and ambitions,”¹²¹ and the subsequent “regressive over-accommodation of moral violation, culpability, or expectations of injustice.”¹²² Another term for this transformation is “the undoing of character.”¹²³

In other words, many scholars assert that moral injury can result in “maladaptive coping,”¹²⁴ which may manifest as a diminished capacity or willingness¹²⁵ to adhere to laws or values,¹²⁶ and “can result in behavior

How does moral injury change someone? It deteriorates their character; their ideals, ambitions, and attachments begin to change and shrink. Both flavors of moral injury impair and sometimes destroy the capacity for trust. When social trust is destroyed, it is replaced by the settled expectancy of harm, exploitation, and humiliation from others.

Shay, *Moral Injury*, *supra* note 11, at 186. “When ruptures are too violent between the social realization of ‘what’s right’ and the inner *themis* of ideals, ambitions, and affiliations, the inner *themis* can collapse.” SHAY, ACHILLES IN VIETNAM, *supra* note 112, at 37.

¹²¹ Copland, *supra* note 20.

¹²² Litz et al., *supra* note 10, at 701.

¹²³

Before the psychological injuries recorded in *The Iliad*, Achilles’ habit was to respect enemy dead rather than kill them. Achilles loses his humanity in two stages: He ceases of care about his fellow Greeks after betrayal by his commander, and then he loses all compassion for any human being after the death of Patroklos. *The Iliad* is the story of the undoing of Achilles’ character.”

SHAY, ACHILLES IN VIETNAM, *supra* note 112, at 26.

¹²⁴ See generally Thompson, *supra* note 12, at 6–7 (discussing the association with maladaptive coping in the morally-injured veteran).

Thus . . . in order to protect themselves from future harm, moral injury can cause a veteran to invoke at least one of three maladaptive ways of coping: striking out, retreating and thus becoming isolated, or developing “effective deception and concealment” strategies. While such behavioral strategies may reduce symptomology temporarily, they are usually extremely destructive in the long run. Importantly, they also preclude the possibility of engaging in activities and being open to experiences that might tend to disprove this maladaptive view of oneself and/or the world.

¹²⁵ This is what Dr. Nash refers to as “trouble pumping the brakes.” Telephonic interview with Dr. William Nash at Fort Gordon, Georgia (Nov. 13, 2015) (notes on file with the author) [hereinafter Dr. Nash Interview].

¹²⁶ Brooker et al., *supra* note 68, at 254.

that is simultaneously symptomatic and criminal.”¹²⁷ This most extreme negative outcome, the connection between combat-trauma and criminal behavior,¹²⁸ is contemplated by some as a form of “staying in combat

Inadequate treatment (or no treatment) of veterans with PTSD, [traumatic brain injury], and/or moral injury increases the probability that they will become entangled in the criminal justice system.

Shelden et al., *supra* note 20, at 419 (Discussing the revolving-door nature of individuals with behavioral health conditions with the criminal justice system. “Inadequate treatment (or no treatment) of veterans with PTSD, [traumatic brain injury], and/or moral injury increases the probability that they will become entangled in the criminal justice system.”). Thompson, *supra* note 12, at 8 (citations omitted) (discussing some of the behavioral problems associated with a the breakdown in trust as a result of a moral injury stemming from a betrayal of someone in power; along a broad spectrum from “loss of motivation” to the more catastrophic and criminal).

It may be that for some vulnerable individuals, combat-induced psychological trauma leads to breakdowns in personality, ethics, and self-control, a phenomenon that may be related to Shay’s concept of moral injury in individuals who have experienced the horrors of war. More research is clearly needed to more fully understand the causal pathways from combat exposure to misconduct.

Stephanie Booth-Kewly et al., *Psychosocial Predictors of Military Misconduct*, 198 J. OF NERVOUS AND MENT. DIS. 91, 97(2010).

¹²⁷

Invisible wounds of war, including a range of mental health conditions and symptoms that fall below the threshold of a diagnosable disorder, are predictable occupational hazards of military service. In a small number of cases, these inevitable byproducts of loyal and faithful performance of one’s duties manifest in behavior that is simultaneously symptomatic and criminal. Even though the great majority of [v]eterans (both with and without mental health conditions) do not engage in violent or criminal behavior, the small group of outliers with service-related misconduct is hardly insignificant and collectively represents a public health and public safety concern given the group’s tactical and combat training and experience.

Evan R. Seamone, *Active Duty Service as the Ultimate Intercept for Diversion of Veterans from Incarceration and Recidivism in the Civilian Criminal Justice System*, UNIV. PENN. (Dec. 2015), <https://www.law.upenn.edu/institutes/cerl/conferences/Legaethicalinvisiblewounds/required-readings.php>.

¹²⁸ “[V]arious [operational stress injury] symptoms can contribute to criminal offending in veteran populations, such as . . . ‘shattered assumptions of moral order,’ . . . [and] ‘moral injury.’” Evan R. Seamone & David L. Albright, *Veterans in the Criminal Justice System*, in *CIVILIAN LIVES OF U.S. VETERANS: ISSUES AND IDENTITIES ISSUES AND IDENTITIES* (Louis Hicks et al. eds., 2016) (forthcoming). “Operational Stress Injury,” or OSI, is a term used by the Canadian Armed Forces to mean “any psychological difficulty resulting from

mode,”¹²⁹ meaning a residual by-product of the survival-mode of combat.¹³⁰ “War itself does this, because the skills, instincts and other valid adaptations essential to survive combat have few civilian equivalents *that are not illegal.*”¹³¹ Consider the third thematic element, the harm. The residual harm from combat can cause the morally-injured soldier to “animalize human nature, thereby questioning the legitimacy of human morality as a whole.”¹³² Experts assess the risk of these potentially devastating outcomes as significantly increased when the soldier recluses himself to deal with the pain on his own.¹³³

Operational duties.” *What Is an Operational Stress Injury*, VETERANS AFFAIRS CANADA, <http://www.veterans.gc.ca/eng/services/health/mental-health/understanding-mental-health> (last visited 15 Jun 2016)

¹²⁹ Dr. Shay illustrates the notion of “staying in combat mode” using Odysseus.

A career that war exactly prepares veterans for upon return to civilian life is a *criminal* career, symbolized here by Odysseus’ pirate raid on Ismarus In his writing, he points out that the first adventure of Odysseus after the Trojan War was to sack the city of Ismarus—essentially a pirate raid where the soldiers applied their hard-earned wartime skills to a civilian environment. If this kind of behavior is common, should the courts consider combat service when a veteran has been charged with criminal activity?

Deborah Sontag & Amy O’Leary, *Dr. Jonathan Shay on Returning Veterans and Combat Trauma*, N. Y. TIMES (Dec. 22, 2014, 7:34 PM), http://www.nytimes.com/2008/01/13/us/13shay-interview.html?_r=0 [hereinafter *Interview with Dr. Shay*]. See generally Seamone & Albright, *supra* note 128 (discussing how staying in combat-mode might be associated with legal issues).

¹³⁰ SHAY, DEFENDING VETERANS, *supra* note 13, at 57.

¹³¹ *Id.* (emphasis added).

¹³² Farnsworth, *supra* note 15, at 22.

¹³³

War alienates and separates. Much of what those who fight wars experience or do is simply alien to any sense of “normality.” Those left behind soldiers often say, “have no clue.” This feeling is not just an experiential difference, it is a moral dislocation. It is a separation of individuals from the important and necessary ties with friends, spouses, families, and communities. None of us is the fully autonomous individual that stereotypes like to project. Each of us is part of multiple important networks of relationships and communities. War separates soldiers from these networks of relationships and communities. War separates soldiers from these networks, not only physically because they leave, but morally because of the alien territory war creates. Disengagement upon return from war widens the separation, expands the moral dislocation, and thereby increases the moral injury already present.

Sherman, *supra* note 18, at xv–xvi.

2. *Shrinking of the Social Horizon*

When a soldier is morally injured, the response is often withdrawal and an inability to connect with others,¹³⁴ otherwise referred to as the shrinking of the social horizon.¹³⁵ “Veterans who experience moral injury may experience a reluctance to get close to other people, difficulty trusting others or themselves.”¹³⁶ Erosion of trust, confidence, and the ability to connect means diminished unit cohesion.¹³⁷ This erosion of the unit at the seams, particularly the “destruction of the capacity for trust,”¹³⁸ “may be the single most important ‘criminogenic’ feature of moral injury.”¹³⁹

When the social horizon shrinks, the soldier will often withdraw to reflect and compartmentalize¹⁴⁰ the “turmoil in the human mind.”¹⁴¹ The catastrophic effect is that the festering turmoil and pain can “work their way out in dysfunctional behaviors.”¹⁴² This list includes not just increased risk for maladaptive behaviors, but also “self-harming

¹³⁴ Brock & Lettini, *supra* note 60, at xv–xvi “A morally injurious event may severely impact self-esteem if not lead to self-loathing, which would also be manifest in the PTSD symptoms of emotional numbing (i.e., disinterest, detachment, and restricted range of affect).” Dr. Litz E-mail, *supra* note 66.

¹³⁵ Copland, *supra* note 20.

¹³⁶ SHAY, DEFENDING VETERANS, *supra* note 13, at 64.

¹³⁷ U.S. DEP’T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP, COMPETENT, CONFIDENT, AGILE paras. 3-20, 4-54, 4-62, 7-71 (12 Oct. 2006). *See infra* section C.3 for a discussion on cohesion.

¹³⁸ SHAY, DEFENDING VETERANS, *supra* note 13, at 64. A moral injury can “impair the capacity for trust and elevate despair, suicidality, and interpersonal violence.” Shay, *Moral Injury*, *supra* note 11, at 182.

¹³⁹ SHAY, DEFENDING VETERANS, *supra* note 13, at 64.

¹⁴⁰

However, given the extreme challenges to the self-posed by moral injury, it is likely that many [v]eterans may resort to extreme measures in order to preserve stability amongst their internal and external repertoires. For some [v]eterans, the divergence of their actions in combat and their preferred civilian discourses may lead them to compartmentalize their behavior during deployment and non-deployment periods among entirely different selves.

Farnsworth, *supra* note 15, at 22.

¹⁴¹ Willis, *supra* note 10.

¹⁴² *Id.*

behaviors,”¹⁴³ and “self-handicapping behaviors.”¹⁴⁴ The most heartbreaking potential consequence of the underlying moral injury, and a soldier suffering in silence, is losing a soldier to suicide.¹⁴⁵ “When the consequences become overwhelming, the only relief may seem to be to leave this life behind.”¹⁴⁶ The military already has an intolerably-high suicide rate,¹⁴⁷ and “of the adverse effects of moral injury, the role that moral injury may play in the U.S. military’s high suicide rate has attracted the most attention.”¹⁴⁸ Moral injury and suicide risk are unequivocally connected.¹⁴⁹ While it’s attracted attention, however, “the reporting on military and veteran suicides mostly fails to explore the role of moral injury.”¹⁵⁰ The prevention of moral injury is a missing link in the

¹⁴³ Self-harm “such as poor self-care, alcohol and drug abuse, severe recklessness, and parasuicidal behavior.” Litz et al, *supra* note 10, at 701; “Some will self-medicate with alcohol or drugs.” Sherman, *supra* note 18, at 11.

¹⁴⁴ Self-handicapping “such as retreating in the face of success or good feelings, and *demoralization*, which may entail confusion, bewilderment, futility, hopelessness, and self-loathing.” Litz et al., *supra* note 10, at 701.

¹⁴⁵ SHAY, DEFENDING VETERANS, *supra* note 13, at 62.

¹⁴⁶ Brock & Lettini, *supra* note 60, at xv–xvi.

¹⁴⁷ *Id.* at xii (discussing veteran suicide statistics, which according to one statistic averages “one every thirty minutes, an unprecedented eighteen a day or six thousand a year”).

¹⁴⁸ Pryer, *supra* note 8, at 34.

¹⁴⁹

The link between guilt and suicide, a putative outcome stemming from moral injury, is also an important area of inquiry. [Researchers] highlighted how different trauma types can lead to diverse mental health and functional outcomes. They found that being the target of killing or injuring in war was associated with PTSD and being the agent of killing or failing to prevent death or injury was associated with general psychological distress and suicide attempts. In a related study, [researchers] found that combat guilt was the most significant predictor of both suicide attempts and preoccupation with suicide, suggesting that guilt may be an important mediator. [F]or a significant percentage of the suicidal [v]eterans, the killing of women and children occurred while feeling emotionally out of control due to fear or rage. This suggests that killing of women and children—arguably morally injurious events—may be associated with guilt feelings. A more recent study of service members who have recently returned from war suggests that the relationship between killing and suicide may be mediated by PTSD and depression

Maguen & Litz, *supra* note 3, at 2.

¹⁵⁰

The reporting on military and veteran suicides mostly fails to explore the role of moral injury. When a suicide occurs years after a soldier returns from war, combat experience is often disregarded as a primary cause of the suicide. Yet, as Karl Marlantes, a Vietnam veteran,

military's fight for suicide prevention,¹⁵¹ and one that should be obvious.¹⁵²

The shrinking of the social horizon also means diminished relationships, which have been demonstrated to be a leading cause of soldier suicide.¹⁵³ Shifting the aperture to recovering the social horizon, and thereby recovering relationships, could protect soldiers from suicidal ideations. "So if we address the moral injury that causes someone to withdraw from relationships . . . it may give us the capacity to drive down the number of completed suicides annually."¹⁵⁴ Consider also the

reports in *What it is Like to Go to War*, he was fine for a decade, and then, he crashed. Often, such delays are used to deny DVA services or are regarded as a family problem, rather than as a consequence of service in combat. The alarming rates of reported suicides are squishy statistics and do not reflect the true numbers of soldiers who take their own lives. Many combat veterans tell stories of comrades who shot themselves, but who were reported as "non-combat" or "accidental" casualties. Soldiers who deliberately place themselves in harm's way in hopes of dying are reported as casualties, not suicides. Since many life-insurance policies will not pay benefits to families if suicide is the cause of death, the need to disguise suicide may mean some apparently accidental deaths were, in actuality, planned. We will never know the true suicide numbers, but we do know moral injury causes intense inner anguish.

Brock & Lettini, *supra* note 60, at 115.

¹⁵¹

According to the [DVA] the suicide rate among veterans of all wars averages almost one per hour. This is an underreported figure given that many veterans' deaths are reported as accidental. Military Outreach U.S.A. believes that many of these suicides, of which almost 70% are committed by men and women over the age of 50, are either directly or partially attributable to the invisible wound of war known as *moral injury*.

Palmer, *supra* note 29, at iv.

¹⁵² "Military suicide today is not some undecipherable, modern or even postmodern, aberration, without deep roots in our shared human past. Rather, it is the lamentable legacy of a long tradition of justified war and inevitable moral injury." MEAGHER, *supra* note 12, at xvi.

¹⁵³ *Moral Injury: Unseen Wounds*, ARMY.MIL, http://www.army.mil/article/139776/Moral_Injury_Unseen_wounds/ (last visited Apr. 14, 2016). "Nancy Sherman is a professor at Georgetown University and an expert on resilience, trauma, military ethics, and moral philosophy. She is convinced that the moral injuries suffered by soldiers continue to go unreported and play a large role in the alarming suicide statistics for military veterans." Bosario, *supra* note 53.

¹⁵⁴ *Unseen Wounds*, *supra* note 153.

“Interpersonal-Psychological Theory of Suicide”¹⁵⁵ (ITS), which “fits well with the model of moral injury.”¹⁵⁶ Under this theory, “feelings that one does not belong,” and “feelings that one is a burden to others,” coupled with the “acquired capability to overcome” fear one can acquire in the military, can put morally injured soldiers at risk for suicide.¹⁵⁷

3. *Moral Injury and Post Traumatic Stress Disorder*

Beyond the shrinking of the moral and social horizons, there is always the risk that the PMIE will crystalize into Post-traumatic Stress Disorder (PTSD). Under this paradigm, the relationship of moral injury to PTSD is one of potential-cause and potential-effect,¹⁵⁸ meaning a PMIE can form

¹⁵⁵ Maguen & Litz, *supra* note 3, at 2.

¹⁵⁶ *Id.*

¹⁵⁷

According to the theory, three factors are associated with suicide: feelings that one does not belong with other people, feelings that one is a burden on others or society, and an acquired capability to overcome the fear and pain associated with suicide. . . . [O]f all factors, acquired capability may be the most associated with military experience because combat exposure and training may cause habituation to fear of painful experiences, including suicide. Consequently, killing behaviors, through a series of other mediators, result in more easily being able to turn the weapon of destruction onto oneself. Interestingly, findings . . . suggest that suicide is not the only high-risk outcome of concern; indeed a variety of arguably morally injurious combat actions can lead to multiple risky behaviors. More specifically, greater exposure to violent combat, killing another person, and contact with high levels of human trauma were associated with greater post-deployment risk-taking in a number of different domains.

Id.

¹⁵⁸ “Because moral injury transgression poses a threat to social bonds and social-schemas, and because these events are uniquely aversive to remember, PTSD represents, at the current state of our knowledge, the principal (not sole) psychiatric outcome from exposure to morally injurious warzone events.” Dr. Litz E-mail, *supra* note 66. “As we see from our stories and these analyses, moral pain, with its incumbent harm to the soul, is a root cause of PTSD. If we do not address the moral issues, we cannot alleviate it, no matter how many medications we apply.” EDWARD TICK, WAR AND THE SOUL: HEALING OUR NATION’S VETERANS FROM POST-TRAUMATIC STRESS DISORDER 117 (2005). “We know that when someone suffers from moral injury and nothing is done to address that, at some point in time it will become PTSD. So the compelling question is what are we doing to address this collaboratively on the continuum of care?” *Unseen Wounds*, *supra* note 153.

the “index event” that is used to evaluate potential PTSD in a patient.¹⁵⁹ Some in the international psychiatric community might characterize this relationship as “complex PTSD.”¹⁶⁰ Moral injury and PTSD, however,

¹⁵⁹ “The science right now supports MI as what I call a principal harm, namely, the index event that is used to evaluate PTSD symptoms, the worst and most currently distressing war experience.” Dr. Litz E-mail, *supra* note 66.

The prevalence of moral injury as a principal harm among service members, relative to life-threat trauma and traumatic loss, is also unknown at the population level. However, we conducted a study of soldiers with PTSD at Fort Hood seeking treatment for PTSD in garrison in the context of South Texas Research Organizational Network Guiding Studies on Trauma and Resilience (STRONG STAR) research consortium to begin to answer this question. We created a reliable coding scheme that categorized the Criterion-A index events chosen by these soldiers as their worst and most currently haunting war-zone event and reported the prevalence of event-types. In the original study, we evaluated 127 patients. The revised figures from more recent STRONG STAR data show that of the 648 treatment-seeking soldiers who had PTSD according to a clinical interview, 26% reported a life-threat to themselves (19% endorsed an event that entailed life threat to others), 17% reported a traumatic loss, and 37% reported a morally injurious event (broken down into bearing witness to the aftermath of violence [19%], witnessing the transgressions of others [12%], and personal transgression [6%]). These results should be considered conservative estimates of moral injury because [Diagnostic and Statistical Manual IV (DSM)] instructions for determining a Criterion-A event *require* some kind of life-threat to self or others or loss of life [for diagnosis]. In other words, the patient is, for the most part, asked to endorse their worst and most currently distressing *danger-based* event. We also assume that rates of moral injury as the principal harm in the form of perpetration, especially extralegal acts, are low due to understandable reporting biases.

Id.

In the aftermath of more than a decade of war, and in light of revisions to the criteria for PTSD in the *DSM-5*, it is now accepted that PTSD, symptoms of PTSD that fall below the diagnostic threshold for PTSD, and other mental health conditions may also arise from exposure to other types of traumatic events. “Moral injury” characterizes a traumatic event in which the service member is forced by circumstances of military service to take action or refrain from intervening to stop a behavior that challenges his or her deeply held moral beliefs.

Seamone & Albright, *supra* note 128, at 13.

¹⁶⁰

have a nuanced relationship,¹⁶¹ and it is easy for non-medical personnel to get lost in the terminology.¹⁶² While the intent of this analysis is not to

The American Psychiatric Association (APA) has rejected two attempts to get such phenomena recognized in the nosology: “Persistent Personality Change after Catastrophic Experience” and “Disorders of Extreme Stress, Not Otherwise Categorized.” The former is part of the world Health Organization nosology; the latter, under the less opaque label “complex PTSD,” is very widely accepted by clinicians who work with morally injured populations, such as survivors of incest or political torture, despite its lack of official blessing.

SHAY, DEFENDING VETERANS, *supra* note 13, at 65.

Over the years, the American Psychiatric Association (APA) has rejected every diagnostic concept that even hints at the possibility that bad experience in adulthood can damage good character. It has rejected what numerous clinicians . . . call “[c]omplex PTSD,” but which the APA atrociously named in its field trials, “Disorders of Extreme Stress Not Otherwise Specified” (DESNOS). It has rejected “Enduring Personality Change after Catastrophic Experience,” which is a current diagnosis in the WHO International Classification of Diseases, and “Post Traumatic Embitterment Disorder” I believe the stubborn APA opposition comes from American attachment to this old philosophic position with its brilliant pedigree, not from empirical facts, which abundantly show the opposite.

Shay, *Moral Injury*, *supra* note 11, at 184.

¹⁶¹ Bebinger, *supra* note 42 (describing marines at Camp Pendleton who request therapy; only one-third are describing PTSD, another one-third are describing moral injury).

¹⁶² Brock & Lettini, *supra* note 60, at xiii. When non-medical personnel reference PTSD, they often misuse the term in a much broader sense to refer to the entire potential spectrum of combat trauma. SHAY, DEFENDING VETERANS, *supra* note 13, at 60. A contributing factor is certainly the emerging state of the research on the correlation between moral injury and PTSD.

Although the notion of moral injury certainly is not new, it is only recently that attempts have been made to operationalize and measure it as a distinct psychological construct. Given the relative early stage of conceptual development and empirical investigation of moral injury, however, it is not yet fully known how moral injury is related to PTSD.

Craig J. Bryan et al., *Measuring Moral Injury: Psychometric Properties of the Moral Injury Events Scale in Two Military Samples*, SAGE PUB. (June 18, 2015), <http://asm.sagepub.com/content/early/2015/06/18/1073191115590855.full.pdf+html>.

Moral injury is discussed in academia but is rarely talked about—and is often misunderstood—among those who suffer from it. It isn’t really

comprehensively analyze the clinical differences,¹⁶³ it is helpful for judge advocates to be cognizant of some key considerations.¹⁶⁴

While PTSD symptoms might manifest immediately, moral injury symptoms¹⁶⁵ generally have a “slow burn quality.”¹⁶⁶ One theory for this,

a part of the “returning veteran” lexicon; instead, veterans use PTSD as a convenient catchall. Yet there is a danger in conflating post-traumatic stress and moral injury.

Gibbons-Neff, *supra* note 21.

¹⁶³ “According to Maguen and Litz . . . PTSD and moral injury should be distinguished in clinical settings.” Sherman, *supra* note 18, at 174. “Consequently, it is important to assess mental health symptoms and moral injury as separate manifestations of war trauma to form a comprehensive clinical picture, and provide the most relevant treatment. One example of a moral injury specific measure is the Moral Injury Events Scale.” Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

¹⁶⁴ Readers are reminded that this article does not purport to give medical advice, or serve as a substitute for medical or psychiatric care. The purpose of this analysis is to help judge advocates navigate the salient considerations, distinctions, and overlaps, and is not intended as a medical-substitute.

¹⁶⁵ Referring to the symptoms of moral injury, Dr. Shay generally categories the symptoms as falling into one of more of the following three categories. “The ‘re-experiencing’ or ‘intrusive’ cluster of symptoms, such as repetitive nightmares, intrusive thoughts and images, flashbacks of combat are evolutionary ancient forms of remembering what moral danger looks like, so as not to be taken by surprise.” SHAY, DEFENDING VETERANS, *supra* note 13, at 61. “The ‘avoidant’ or numbing cluster of symptoms represents adaptive shutting down of all emotional outlays that do not directly support survival in a fight.” *Id.* “The ‘increased arousal’ cluster of symptoms represents the mobilization of the mind and body for instant response to mortal danger.” *Id.*

¹⁶⁶

Moral injury is not PTSD. The latter is a dysfunction of brain areas that suppress fear and integrate feeling with coherent memory; symptoms include flashbacks, nightmares, dissociative episodes and hyper-vigilance. PTSD is an immediate injury of trauma. Moral injury has a slow burn quality that often takes time to sink in. To be morally injured requires a healthy brain that can experience empathy, create a coherent memory narrative, understand moral reasoning and evaluate behavior. Moral injury is a negative self-judgment based on having transgressed core moral beliefs and values or on feeling betrayed by authorities.

Rita Nakashima Brock, *Moral Injury: The Crucial Missing Piece in Understanding Soldier Suicides*, HUFF. POST (Dec. 9, 2014, 1:44 PM), http://www.huffingtonpost.com/ritanakashima-brock-ph-d/moral-injury-the-crucial-missing-piece-in-understanding-soldier-suicides_b_1686674.html. Recall the lack of a threshold for the presence of a moral injury. “There is no threshold for the presence of moral injury; rather, at a given point in time, a [v]eteran may have none, or mild to extreme manifestations.” Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. Symptoms might manifest “upon reflection.”

with respect to combat soldiers, is that “[s]oldiers desensitize themselves in war.”¹⁶⁷ The purpose of this might be to preserve combat effectiveness,¹⁶⁸ “in order to survive, to push through the killing and to accomplish the mission, whatever the mission may be,”¹⁶⁹ only to discover upon reflection that their humanity is difficult to recover “once it’s been evicted.”¹⁷⁰

Brock & Lettini, *supra* note 60, at xiv. “Moral injury does not, by its nature, present itself immediately. Some will experience questions of moral injury days after an incident; for many others, difficulties will not surface for years. An experience with potential for moral injury is typically realized after a change in personal moral codes or belief systems.” *Moral Injury Project*, *supra* note 4.

Shay argued that these feelings of betrayal could surface during or soon after the betrayal, but could also surface years after the event(s) took place. Subsequent empirical research . . . also supports Shay’s clinical experience, in fact finding that moral injuries are more strongly associated with delayed—than immediate-onset traumatic reactions.

Thompson, *supra* note 12, at 5.

¹⁶⁷ MEAGHER, *supra* note 12, at 142. “Killing the enemy in combat is state-sanctioned, militarily justified and the focus of intense training. Nonetheless, research shows that it can be fraught with moral conflict and have significant psychological consequences for many soldiers. Moreover, this research also shows that these psychological costs increase when the moral sanctioning associated with the killing is lost.” Thompson, *supra* note 12, at 3. “One of the basic conundrums remains that during the training process, a soldier needs to learn how to desensitize themselves to killing. This includes learning that killing an enemy in a battle zone isn’t murder.” Bosario, *supra* note 53.

¹⁶⁸ See generally note 84 for a discussion of Josh Mantz.

In Josh Mantz’s case, the real psychological recovery began only after he realized that he was physically alive but emotionally dead. The emotional withdrawal was killing him. Downrange, a version of it made for survival—it allowed him to operate with fearlessness, with a stoic indifference to whether he lived or died. He didn’t become reckless, but simply was freed from unproductive worry about whether he would make it home. “The moment you stop caring about living, there is a great sense of freedom,” he tells me. It’s that liberation, “operating as above life and death” that allows you to “operate in and control chaos.”

Sherman, *supra* note 18, at 11.

¹⁶⁹ MEAGHER, *supra* note 12, at 142.

¹⁷⁰ *Id.*

While PTSD and moral injury do share some symptoms,¹⁷¹ others are unique to moral injury.¹⁷² As a result there is always the chance that the diagnostic-construct¹⁷³ for PTSD might not capture a diagnosis of moral

¹⁷¹ Maguen & Litz, *supra* note 3, at 1.

¹⁷² Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52.

The moral injury framework posed by Litz et al. suggests that although moral injury is manifested as PTSD-like symptoms (e.g., intrusions, avoidance, numbing), other outcomes are unique and include shame, guilt, demoralization, self-handicapping behaviors (e.g., self-sabotaging relationships), and self-harm (e.g., parasuicidal behaviors).” *Id.* at 1. In answering the question “Are moral injury and PTSD the same?” “More research is needed to answer this question. At present, although the constructs of PTSD and moral injury overlap, each has unique components that make them separable consequences of war and other traumatic contexts.” Specifically; “PTSD is a mental disorder that requires a diagnosis. Moral injury is a dimensional problem—there is no threshold for the presence of moral injury, rather, at a given point in time, a [v]eteran may have none, or mild to extreme manifestations. Transgression is not necessary for PTSD to develop nor does the PTSD diagnosis sufficiently capture moral injury (shame, self-handicapping, guilt, etc.).”

Id.

¹⁷³ The diagnostic-construct refers to the one found in the *Diagnostic and Statistical Manual of Mental Disorder* (DSM), a heavily-relied upon resource in the psychiatric community. “Since its first publication in 1952, the DSM has gained increasing importance in the field of psychiatry and, since the 1980s, has been considered the bible of mental health disorder diagnostics.” *Saving Normal: An Insider’s Revolt Against Out-of-Control Psychiatric Diagnosis, DSM-5, Big Pharma, and the Medicalization of Ordinary Life*, Reviewed by Michael E. Jones, ARMY LAW., Oct. 2014, at 54, 54. A diagnosis of PTSD must conform to the DSM.

If the diagnosis of a mental disorder does not conform to [the] DSM-5 or is not supported by the findings on the examination report, the rating agency shall return the report to the examiner to substantiate the diagnosis. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, American Psychiatric Association (2013), is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51.” 38 C.F.R. §4.125. It’s not always the case that the PTSD construct captures the underlying moral injury. What caused me to suffer some symptoms associated with posttraumatic stress disorder (PTSD) does not actually meet the criteria in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* for this condition.

Pryer, *supra* note 8, at 34. “The DSM diagnosis, Posttraumatic Stress Disorder, does not capture either form of moral injury.” Shay, *Moral Injury*, *supra* note 11, at 184. Some

injury,¹⁷⁴ as some argue that the two phenomena are “separable consequences of war and other traumatic contexts.”¹⁷⁵ The *Drescher Study*, for example, asserted that moral injury is and should be considered an independent phenomenon,¹⁷⁶ as the current PTSD conceptions may not adequately capture “the morally injurious aspects of combat.”¹⁷⁷ Even a soldier seeking self-help through “The Wounded Warrior Project”¹⁷⁸ will

caregivers may then be in the position of having to “question whether they truly grasp the source and extent or even the nature of their patients’ suffering,” and could be stuck having to just “acknowledge the obvious suffering of others and to just be there to listen.” MEAGHER, *supra* note 12, at 3.

¹⁷⁴ Copland, *supra* note 20. This assertion acknowledges the possibility, not the probability. “It is true that PTSD fails to capture the diverse hypothesized outcomes of exposure to [Potentially Morally Injurious Events] (PMIEs), but it is also true that PTSD is the best proxy outcome and in fact service members can have PTSD from MI. Dr. Litz E-mail, *supra* note 66. “In our experience, servicemembers and veterans can suffer long-term scars that are not well captured by the current conceptualizations of PTSD or other adjustment difficulties.” Litz et al., *supra* note 10, at 696; “This framework highlights the importance of thinking in a multi or inter-disciplinary fashion about helping repair the moral wounds of war. Litz et al. argue that existing PTSD treatment frameworks may not sufficiently target moral injury.” Maguen & Litz, *supra* note 3, at 1.

Moral injury is not explicitly addressed in the evidence-based treatments (EBTs) for PTSD supported by VA, namely prolonged exposure therapy (PE) and cognitive processing therapy (CPT). This is in part due to the fact that extant EBTs were primarily developed to target life-threat or danger-based posttraumatic memories and beliefs among victims of trauma. As such, they may not be sufficient for [s]ervicemembers and [v]eterans who suffer from the moral injuries of war, especially killing-based transgressions. Although the PE and CPT manuals do not mention moral injury, recently, these approaches have suggested strategies for addressing guilt and shame, and helping the patient to contextualize, rather than over accommodate perceived culpability. Whether these strategies can sufficiently reduce the sequelae of war-related moral injury is unknown.

Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. “While the physical injuries of war are well-studied, mental conditions like PTSD and combat-related depression are less understood and moral injury is even more elusive.” Kime, *supra* note 95.

¹⁷⁵ Maguen & Litz, *Moral Injury in the Context of War*, *supra* note 52. See also Kime, *supra* note 95.

¹⁷⁶ Copland, *supra* note 20.

¹⁷⁷ Nash et al., *supra* note 11, at 647. “So what is the distinction between PTSD and a moral injury? Professor Sherman says, ‘PTSD is not so much separate, as not specifically focused on the moral dimensions of many of those psychological injuries.’” Bosario, *supra* note 53.

¹⁷⁸ The Wounded Warrior Project is a Veterans Service Organization whose purpose is: (1) “to raise awareness and enlist the public’s aid for the needs of injured service

find moral injury and PTSD appearing as independent phenomena.¹⁷⁹ The relationship of moral injury to PTSD is one that is still developing in the interdisciplinary community.¹⁸⁰

III. Moral Injury and Preventive Law

The momentum and volume of scholarship, coupled with the impact to soldiers that many experts identify, suggests that moral injury is an emerging chapter in the notion that an underlying phenomenon might cause or contribute to legal issues. Judge advocates could contemplate countless scenarios, particularly in criminal litigation and administrative separation, where a phenomenon purportedly effecting moral decision-making might apply. Judge advocates in the field might soon encounter, or maybe even seek to apply, the phenomenon in practice. To get ahead of the phenomenon, this article proposes an expanded preventive law focus that postures judge advocates to assist the commander in decisively engaging potential legal risk-areas at the embryo stage.

In the broadest sense, preventive law practice seeks to reduce, or manage,¹⁸¹ the risk of litigation.¹⁸² For a military commander, this effort to proactively¹⁸³ identify risk-areas and prevent legal problems before they manifest is perhaps the most valuable service a judge advocate can

members;” (2) “to help injured service members aid and assist each other;” and (3) “to provide unique, direct programs and services to meet the needs of injured service members.” *Problems Associated With Combat Trauma*, WOUNDED WARRIOR PROJ. (last visited Apr. 14, 2015).

¹⁷⁹ *Id.*

¹⁸⁰ For example, at a recent conference on preventing and treating combat trauma, scholars were asked to contemplate, among other things: “Should moral injury be recognized as a mental health concern that is distinct from PTSD?” *Preventing and Treating the Invisible Wounds of War: Combat Trauma and Psychological Injury*, UNIV. OF PENN., <https://www.law.upenn.edu/institutes/cerl/conferences/legaethicalinvisiblewounds/> (last visited Apr. 14, 2016).

¹⁸¹ Willis, *supra* note 10.

¹⁸² Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CA. WEST. L. REV. 1, 15, 16 (1997). For most judge advocates, the client is the Army, acting through its officials. “Except when representing an individual client pursuant to (g) below, an Army lawyer represents the Department of the Army acting through its authorized officials.” U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, comment to Rule 1.13(a) (1 May 1992) [hereinafter AR 27-26].

¹⁸³ “In essence, preventive law is a proactive approach to lawyering.” Stolle et al., *supra* note 182.

provide.¹⁸⁴ A robustly-planned and executed preventive law program enhances readiness, good order and discipline, and morale, as well as reduces the overall time and effort judge advocates ultimately spend on resolving legal issues.¹⁸⁵ While commanders and soldiers have long received preventive legal counsel,¹⁸⁶ the Army's formal preventive law program was first developed by regulation in 1963.¹⁸⁷

In its inception, the Secretary of the Army's goal for preventive law was quite broad,¹⁸⁸ with the intent of reducing the "countless man-hours now used in remedial counseling and the processing of courts-martial and administrative actions."¹⁸⁹ When it was implemented, the preventive law program had a noticeably positive impact on morale, readiness, and "contribut[ed] substantially to the reduction of the courts-martial rate of the Army."¹⁹⁰ Good order and discipline issues decreased¹⁹¹ because of

¹⁸⁴ "One of the most valuable services a [j]udge [a]dvocate can provide to a [c]ommander is eliminating problems before they ever occur through a robust preventive law program." JAGCNET, <https://www.jagcnet2.army.mil/Sites/crimlaw.nsf/document.xsp?documentId=a0bbfd9214f536f885257be30046eab9&action=openDocument> (last visited June 15, 2015).

¹⁸⁵ U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 5-3 (30 Sept. 1996) (RAR 13 Sept. 2011) [hereinafter AR 27-1].

¹⁸⁶ Carl E. Winkler, *Legal Assistance for the Armed Forces*, 50 AMER. BAR ASSOC. J., 451 (1964).

¹⁸⁷ Evan M. Seamone, *The Relationship-Centered Lawyering Perspective in Legal Services for Active and Separated Military Personnel who Suffer from Posttraumatic Stress Disorder* 1, ARIZ. LAW (2012), <http://www.law.arizona.edu/depts/uprintj/Seamone%20Guest%20Column.pdf>. "Observing the adage, '[a]n ounce of prevention is worth a pound of cure,' The Judge Advocate General of the Army has sponsored a preventive law program which has had notable success." Dugald W. Hudson, *The Army's Preventive Law Program*, 3 AMER. BUS. LA. J. 229 (1965).

¹⁸⁸ Winkler, *supra* note 186, at 452.

¹⁸⁹ U.S. DEP'T OF ARMY, REG. 600-14, PREVENTIVE LAW SERVICES para. 1 (30 Sept. 1965).

¹⁹⁰ Hudson, *supra* note 187, at 229.

¹⁹¹ Referring to the period of July 1, 1959 through June 30, 1964, Professor Hudson highlights the apparent correlation during this period between an increase in preventive law efforts, and a decrease in courts-martial rates stating,

In this five-year period it is noteworthy that the court-martial rate dropped approximately one-third while the legal assistance rendered almost doubled. This significant drop in the crime rate of army personnel is even more impressive when compared to an increasing crime rate for civilian personnel in similar age groups. While it is not possible to establish with scientific precision the casual relationship between the Preventive Law Program and reduction in crime, it is fair to conclude that concern for the soldier's welfare the systematic assistance given the individual have substantially contributed to the

the preventive law program's "notable success in eliminating legal problems before they arise,"¹⁹² and "in solving legal difficulties in the embryo stage."¹⁹³ After the Vietnam War the preventive law program appears to have eroded and later had to be recommended for revitalization.¹⁹⁴ During this time the program went through some regulatory changes. While it was once its own regulation,¹⁹⁵ preventive law guidance was subsequently absorbed into legal assistance regulations that emerged in the 1980s and early 1990s.¹⁹⁶ The program was intended to prevent legal issues across all the core disciplines.¹⁹⁷

Under the modern contemplation, commanders and judge advocates play key roles in preventive law. Commanders ultimately own the

improvement of discipline and morals. It is safe to conclude that a *positive* trend can be found.

Id. at 233–34.

¹⁹² *Id.* at 229.

¹⁹³ *Id.*

¹⁹⁴ "It is recommended that consideration be given to the revitalization of preventive law programs within the present structure of Army Regulation 600-14." Mack Borgen, *The Management and Administration of Military Legal Assistance Offices*, ARMY LAW., Apr. 1975, at 6.

¹⁹⁵ Alfred F. Arquilla, *The New Legal Assistance Regulation*, ARMY LAW, May 1993, at 3, 34.

¹⁹⁶ *Id.* at 34–35.

¹⁹⁷ During this time the Legal Assistance Policy Division reminded judge advocates not to unnecessarily limit the scope of preventive law practice to standard legal assistance issues, and stated that the practice should cover all the core disciplines. "For government practitioners, preventive law is an effective method to practice law, whether the area of law is legal assistance, contract law, environmental law, claims, administrative law, or criminal prosecution." *Id.* at 35. The core disciplines are today enumerated in the JAG Corps' Operational Support to the Operational Army guidance. "They include military justice, international and operational law, administrative and civil law, contract and fiscal law, claims, and legal assistance." U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 5-1 (18 Mar. 2013) [hereinafter FM 1-04].

preventive law program,¹⁹⁸ which is a regulatory requirement,¹⁹⁹ and one that should be allocated its fair share of resources and command emphasis.²⁰⁰ Commanders that specifically oversee a legal assistance mission hold primary responsibility for ensuring establishment of preventive law services.²⁰¹ While the preventive law program ultimately belongs to the commander, the responsibility to plan and implement the program in accordance with the commander's intent belongs to supervisory²⁰² judge advocates.²⁰³ Supervisory judge advocates, in turn, must ensure preventive law practice happens across all the core disciplines, not just inside of the legal assistance function.²⁰⁴ In other

¹⁹⁸

Your objective as a [c]ommander should be to develop solid systems and a command climate that prevents legal issues, rather than just reacting to them. In sum, it is every bit as important to train your [s]oldiers to maintain a high level of discipline and compliance with law, policy, and military standards, as it is to train them to perform your Mission Essential Task List. In legal circles, we call this effort to prevent legal problems before they arise by properly training [s]oldiers, "preventive law." The responsibility to practice preventive law belongs to the Commander."

THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK 1 (2013) [hereinafter *COMMANDER'S LEGAL HANDBOOK*].

¹⁹⁹ THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CLIENT SERVICES DESKBOOK para III(a)(3), (2014) [hereinafter *CLIENT SERVICES DESKBOOK*]. "Commanders are responsible for ensuring that preventive law services are provided within their commands." U.S. DEP'T OF ARMY, REG. 27-3, THE LEGAL ASSISTANCE PROGRAM para. 3-3(a) (21 Feb. 1996) (RAR 13 Sept. 2011) [hereinafter *AR 27-3*].

²⁰⁰ Borgen, *supra* note 194, at 6.

²⁰¹ "Commanders responsible for legal assistance services will sponsor preventive law initiatives and establish preventive law services that meet the needs of their commands." *Id.* para. 1-4(f)(3). This population of commanders would include brigade-level commanders who have a judge advocate on staff. Referring to the brigade judge advocate: "This officer plans, coordinates, and oversees client services, [s]oldier readiness programs, and preventive law programs for the brigade." FM 1-04, *supra* note 197, para. 4-12. In some organizations, preventive law general practice exists even at battalion-level. Charles C. McLeod, Jr., *Preventive Law at the Battalion Level: Exploiting Successful Command Relationships*, AMER. BAR ORG. (14 Jan. 2015, 10:15 PM), http://www.americanbar.org/content/newsletter/publications/dialogue_home/dialogue_archive/ls_dial_fa12_lamp1.html.

²⁰² Whether or not a judge advocate is "supervisory" is a question of fact. *AR 27-26*, *supra* note 182, comment to Rule 5.1(c)(2).

²⁰³ *CLIENT SERVICES DESKBOOK*, *supra* note 199, para. III(a)(3); *see also* Arquilla, *supra* note 195, at 10.

²⁰⁴ While commanders with a legal assistance hold primary responsibility for the preventive law program, the Judge Advocate General's Corps expands this requirement to all attorneys. "Supervising attorneys will ensure that preventive law services are provided

words, the intent is that judge advocates far and wide practice preventive law routinely.

Beyond what some might consider a purely legal assistance function,²⁰⁵ the preventive law mission is broadly construed as a readiness tool,²⁰⁶ should be “aggressive and innovative,”²⁰⁷ and should draw upon the multiple and dynamic roles expected of judge advocates. In the broadest sense, judge advocates are both officers and attorneys,²⁰⁸ and incur the unique obligations that come with being a staff officer.²⁰⁹ While

by attorneys performing legal assistance duties, as well as by others under their supervision.” AR 27-3, *supra* note 199, para. 3-3(b).

²⁰⁵

While preventive law is often contemplated in the context of the legal assistance program, e.g., a class on avoiding unscrupulous payday lenders or auto dealers using bait and switch schemes, the concept of preventive law is central to good order and discipline as well. For example, proper training and emphasis on the standards contained in a General Order #1 prior to entering a Theater of Operations can go a long way toward avoiding the types problems mentioned above. Your [j]udge [a]dvocate can help you to properly emphasize these standards in a number of ways.

COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 1.

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Preventing legal problems is a readiness issue. Attorneys must ensure that commanders see the program in this way. More importantly, attorneys must plan their preventive law campaigns with readiness in mind. Aim at the issues that will cause readiness problems. Use forums that will maximize benefit to the unit’s readiness. Then use these facts to demonstrate to the commander that the program is well worth the resources he is putting toward it.

ADMINISTRATIVE & CIVIL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 265 ch. 2, para. 1(d), CONSUMER LAW GUIDE (1999).

²⁰⁷ AR 27-1, *supra* note 185, para. 5-3.

²⁰⁸ MEMORANDUM FROM THE JUDGE ADVOCATE GENERAL, U.S. ARMY, SUBJECT: LOCATION, SUPERVISION, EVALUATION AND ASSIGNMENT OF JUDGE ADVOCATES IN BRIGADES –POLICY MEMORANDUM 14-08 (25 Aug. 2014).

²⁰⁹ Judge advocates are generally considered staff officers. U.S. DEP’T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 2-113 (May 2014) [hereinafter FM 6-0]; “Judge advocates serve at all levels in today’s area of operations and advise commanders on a wide variety of operational legal issues They also serve as staff officers and on boards, centers, cells, and working groups, where they fully participate in the planning process within their respective headquarters.” *Id.* para. 1-4; AR 27-1, *supra* note 185, para. 5-2(b).

all staff officers engage in risk management²¹⁰ of varying types and degrees,²¹¹ judge advocates are specifically expected to analyze trends and vulnerable areas that could potentially lead to legal issues.²¹² Another term for this function is the “legal autopsy.”²¹³

This preventive law mandate to “look at weak points and behaviors in your organization that, while not violating the law now, might lead to legal issues”²¹⁴ is certainly an area where moral injury could be a relevant factor

²¹⁰ “Risk management is the process of identifying, assessing, and controlling risks arising from operational factors and making decisions that balance risk cost with mission benefits.” JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS para. 2(j)(4)(d)(k) (11 Aug. 2011).

²¹¹ Staff officers practice risk management (RM). “Staff officers must incorporate RM in their planning and assessments.” U.S. DEP’T OF ARMY, TECHNICAL PUBLICATION 5-19, RISK MANAGEMENT para. 2-2 (Aug. 2014). The duty to continually assess and incorporate risk management is a recurring requirement, and part of the “running estimate” that all staff functions perform. “Staffs should integrate RM into the steps and products of mission analysis. As they maintain running estimates and other assessments, they should continuously integrate RM considerations. They should continue to apply RM throughout operations, during planning, preparation, and execution.” *Id.* para. 4-13. Judge advocates, as key members of the commander’s staff, also conduct running estimates.

Judge advocates at all echelons utilize running estimates to assess their section’s ability to support the command in each of the core legal disciplines; identify personnel and equipment requirements; anticipate and resolve potential legal issues in current and future operations; and prepare recommendations to the commander. The running estimate is a valuable tool for judge advocates to record their assessments, considerations, and assumptions related to the delivery of legal support to the command in support of operations.

FM 1-04, *supra* note 197, para. 2-40.

²¹² “Your [j]udge [a]dvocate can help you to properly emphasize these standards in a number of ways. For example . . . [t]hey can also help you to analyze systems and look at weak points and behaviors in your organization that, while not violating the law now, might lead to legal issues.” COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 2. “Rather than adopt a ‘sit back and wait’ approach, [judge advocates] should track operations and plans for future operations and practice preventive law.” Center for Military Law and Operations, *Combat Training Centers: Lessons Learned for Judge Advocates*, ARMY LAW., Jun. 1999, at 52, 54.

²¹³ In a legal autopsy, “records of trial, administrative proceedings, and even accident-investigations” are analyzed to “determine the fundamental causes of the individual’s difficulties.” Winkler, *supra* note 186, at 452–53. When a “causative or contributing factor” becomes apparent and significant, educating the command about the root causes, and potential consequences of inaction, become crucial. *Id.* at 452.

²¹⁴ COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 2.

in an effective preventive law strategy. If the specified task²¹⁵ is to decisively-engage risk areas at the embryo stage, certainly an implied task²¹⁶ is to take cognizance of phenomenon that might lead to legal issues if left unaddressed.²¹⁷ Some commanders might want this level of analysis from judge advocates, both as staff officers, and in their capacities as advisors and counselors²¹⁸ to the commander. “Military education is thin on the psychological dynamics of combat. This is something [that as] a judge advocate and an advisor to a commander . . . you can emphasize.”²¹⁹ As advisors and counselors, commanders expect advice to look beyond the law at other “relevant factors”²²⁰ which affect the overall analysis.

²¹⁵ “A specified task is a task specifically assigned to a unit by its higher headquarters.” FM 6-0, *supra* note 209, at 9–33.

²¹⁶ “An implied task is a task that must be performed to accomplish a specified task or mission but is not stated in the higher headquarters’ order.” *Id.*

²¹⁷ This will depend on how far left of the event the commander intends to move the focus. Consider, for example, that one of the potential behavioral outcomes of moral injury is alcohol abuse. *Understanding Moral Injury*, REAL WARRIORS, <http://www.realwarriors.net/active/treatment/moralinjury.php> (last visited Apr. 14, 2016). Referring to the judge advocate: “For example, they can help you to craft policies for . . . curbing abuse of alcohol.” COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 2. Should a policy intending to curb the abuse of alcohol be an interdisciplinary effort that attempts to focus on the underlying issues as well as their contemplated effect? This will be entirely up to the intent of the commander, how narrowly or broadly the focus of such a policy would be, and the interdisciplinary ingenuity of the commander’s staff. “Substance abuse is an area where people are in a recovery process, they can’t be cured, so when you look at the moral injury constructs and it seems like you have an environment rich with the possibility to do something constructive.” *Unseen Wounds*, *supra* note 153.

²¹⁸ Risk-management and the role of counselor-advisor is crucial to effective preventive law practice. “The emergence of preventive law has created yet another facet to the “counselor” role, risk management. Incumbent on the lawyer-risk-manager is a pro-active, preventive approach to the client’s legal health.” Stephen F. Black & Roger F. Witten, *Introduction to the Theory of Preventive Law*, in BUSINESS LAW MONOGRAPHS, ch. 3 §1.01 (1999). “As we get more senior, the role of counselor and advisor to the commander becomes more and more important.” Remarks of Brigadier General Paul S. Wilson, Fort Gordon, Georgia, February 17, 2016. “For a Staff Judge Advocate to be effective there are two roles, both equally important. The first is that of lawyer, or technical expert. The second is that of advisor and counselor.” Remarks of Major General Stephen G. Fogarty, Fort Gordon, Georgia, Apr. 1, 2016.

²¹⁹ Brigadier General H.R. McMaster, *Lecture to the U.S. Army 58th Judge Advocate Officer Graduate Course: The Role of the Judge Advocate in Contemporary Operations: Ensuring Moral and Ethical Conduct During War*, ARMY LAW., May 2011 at 35, 40 [hereinafter General McMaster Lecture].

²²⁰ “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client’s situation, but not in conflict with the law.” AR 27-26, *supra* note 182, rule 2.1. The comment to rule 2.1 expands on the latitude judge advocates have in their capacity as advisors and counselors to consider relevant moral and ethical considerations. “It is proper

For a commander that expects this type of counsel, one can imagine numerous examples where the other “relevant factors,” in this case phenomena like moral injury, might be instructive. Consider the example of the General Court-Martial Convening Authority (GCMCA) who must decide whether a soldier will be separated from the service pursuant to an administrative separation, or pursuant to medical evaluation board process.²²¹ Here the GCMCA must decide whether the “disability is the cause, or a substantial contributing cause, of the misconduct that might result in a discharge under other than honorable conditions.”²²² The

for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” *Id.* rule 2.1 comment.

²²¹

The [general court-martial convening authority] may direct, in writing, that the [s]oldier be processed through the physical disability system when action under the [uniform code of military justice] has not been initiated, and one of the following has been determined: (a) The [s]oldier’s medical condition is the direct or substantial contributing cause of the conduct that led to the recommendation for administrative elimination. (b) Other circumstances of the individual case warrant disability processing instead of further processing for administrative separation.

U.S. DEP’T OF ARMY, REG. 635-200 para. 1-33(b)(1) (6 Jun. 2005) (RAR 6 Sept. 2011). “Except as provided below, an enlisted [s]oldier may not be referred for, or continue, physical disability processing when action has been started under any regulatory provision which authorizes a characterization of service of under other than honorable conditions.” U.S. DEP’T OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION para. 4-3(a) (8 Feb. 2006) (RAR 20 Mar. 2012). “If the case comes within the limitations above, the commander exercising general court-martial jurisdiction over the [s]oldier may abate the administrative separation. This authority may not be delegated. A copy of the decision, signed by the General Court-Martial Convening Authority must be forwarded with the disability case file to the [Physical Evaluation Board].” *Id.* para. 4-3(b).

²²² *Id.* para. 4-3(b)(1).

Aside from the efforts of individual commanders to create options for offenders in need of treatment, institutional responses exist for individuals who qualify for Disability Evaluation System processing for a mental health condition. If they are simultaneously facing separation for misconduct, the commander acting as the separation authority must evaluate the circumstances surrounding the misconduct and address whether the mental health condition was the “direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation.”

requirement for GCMCAs to make this consideration “suggests special sensitivity toward and recognition of the connection between mental health conditions and criminal conduct.”²²³ It is certainly a decision-point with Congressional interest.²²⁴

With some scholars associating moral injury with legal risk, particularly the risk of misconduct,²²⁵ the argument that a moral injury “is the cause, or a substantial contributing cause, of the misconduct”²²⁶ may not be far away. Of the 22,000 soldiers separated in 2009 for misconduct, one leading scholar suspects a correlation with an underlying moral injury for part of this population.²²⁷ To other scholars, moral injury might not

Brooker et al., *supra* note 68, at 257.

²²³ *Id.*

²²⁴ Congress spoke directly to this decision-point in, among other places, the 2010 National Defense Authorization Act. “(2) A member covered by paragraph (1) shall not be administratively separated under conditions other than honorable until the results of the medical examination have been reviewed by appropriate authorities responsible for evaluating, reviewing, and approving the separation case, as determined by the Secretary concerned.” National Defense Authorization Act for 2010, 10 U.S.C. § 1177 (2010). In 2010, Congress addressed PTSD and Traumatic Brain Injury (TBI) as potential matters in extenuation. “(b) *Purpose of Medical Examination*—The medical examination required by subsection (a) shall assess whether the effects of post-traumatic stress disorder or traumatic brain injury constitute matters in extenuation that relate to the basis for administrative separation under conditions other than honorable or the overall characterization of service of the member as other than honorable.” *Id.* Implementing DoD instructions also speak to PTSD and TBI as potential matters in extenuation. “To comply with section 1177 . . . an enlisted [s]ervicemember must receive a medical examination to assess whether the effects of PTSD or traumatic brain injury (TBI) constitute matters in extenuation that relate to the basis for administrative separation if the member meets all of the following criteria.” U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS para. 9(1) (4 Dec. 2014).

²²⁵ See generally Seamone & Albright, *supra* note 128, part 1.

²²⁶ See generally *supra* note 222 and accompanying sources.

²²⁷ A National Public Radio article recently asserted:

The U.S. Army has kicked out more than 22,000 soldiers since 2009 for “misconduct,” after they returned from Iraq and Afghanistan and were diagnosed with mental health disorders and traumatic brain injuries. That means many of those soldiers are not receiving the crucial treatment or retirement and health care benefits they would have received with an honorable discharge.

Daniel Zerdling, *Missed Treatment: Soldiers with Mental Health Issues Dismissed for ‘Misconduct’*, NAT’L PUB. RADIO (Oct. 28, 2015), <http://www.npr.org/2015/10/28/4511>

rise to the level of a disability,²²⁸ but might “render a servicemember unsuitable for military service and can lead to an administrative separation.”²²⁹ Either way, judge advocates can envision fascinating arguments, and potentially-contentious battles of experts.²³⁰

46230/missed-treatment-soldiers-with-mental-health-issues-dismissed-for-misconduct; *see also* Letter from The Honorable Eric Fanning, Acting Under Secretary of the Army to General Mark A. Milley, Chief of Staff of the U.S. Army, Nov. 4, 2015, <http://ec.militarytimes.com/static/pdfs/11-4-15-Letter-to-Army-on-Misconduct-Discharges.pdf> (last visited June 16, 2016). Dr. Nash believes many of these were moral injury related. Interview, *supra* note 125.

²²⁸ The Fiscal Year 2014 National Defense Authorization Act directed the Comptroller General to submit the following report:

Not later than one year after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report evaluating—(1) the use by the Secretaries of the military departments, since 2007, of the authority to separate members of the Armed Forces from the Armed Forces due to unfitness for duty because of a mental condition not amounting to disability, including separation on the bases of a personality disorder or adjustment disorder and the total number of members separate on such basis; (2) the extent to which the Secretaries failed to comply with regulatory requirements in separating members of the Armed Forces on the basis of a personality or adjustment disorder; and (3) the impact of such a separation on the ability of veterans so separated to access service-connected disability compensation, disability severance pay, and disability retirement pay.

National Defense Authorization Act for 2014, 10 U.S.C. § 574 (2014)

²²⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-266, REPORT TO CONGRESSIONAL COMMITTEES, DEFENSE HEALTH CARE, BETTER TRACKING AND OVERSIGHT NEEDED FOR SERVICEMEMBER SEPARATIONS FOR NON-DISABILITY MENTAL CONDITIONS I (Feb. 2015).

²³⁰ “I think in a year or two we will see calls for experts.” Dr. Nash Interview, *supra* note 125. When asked whether moral injury experts may soon be asked to participate in legal proceedings, Dr. Nash responded with: “Yes, absolutely this will happen . . . any conceptual framework that can help a court better understand motivations and behaviors, however imprecise and subjective, belongs in the courtroom.” E-mail from Dr. William P. Nash, to author (Nov 16, 2015, 12:51 AM) (on file with author). Curriculum Vitae’s are starting to reflect moral injury as a field of study. For example, the Curriculum Vitae of Joseph Mason Currier, Ph.D., Assistant Professor, Director of Clinical Training Psychology Department/Clinical Counseling Doctoral Program, University of South Alabama states: “At present, many of my projects are devoted to testing/validating the construct of moral injury as it relates to military Veterans and other trauma-exposed professional groups.” <http://www.southalabama.edu/colleges/artsandsci/psychology/faculty/currier.html>. In another example, the Curriculum Vitae of Elizabeth Margaret Bounds, Ph.D., states that from 2014 to present, she has served as co-chair of the “Moral Injury and Recovery in Religion, Society, and Culture Group” at the American Academy of Religion. *Curriculum Vitae Elizabeth Bounds*, EMORY UNIV., <http://candler.emory.edu/>

Perhaps with a similar perspective as Congress, the Secretary of Defense recently directed service secretaries to consider discharge upgrade petitions for veterans with other-than-honorable discharges that had an underlying PTSD or PTSD-related diagnosis. Here one finds an interesting juxtaposition of PTSD with “related conditions that they believe mitigated the misconduct that led to the discharge.”²³¹ This

faculty/profiles/cv-files/bounds-elizabeth_cv.pdf.

²³¹

This guidance applies to veterans whose characterization of discharge was under other than honorable conditions and who assert that they suffered PTSD or related conditions that they believe mitigated the misconduct that led to the discharge. This memorandum focuses on those veterans who served before PTSD was a recognized diagnosis; however, the guidance will be applied to all veterans.

“*New*” *Discharge Upgrades and PTSD*, ARMY REVIEW BOARDS AGENCY, <http://arba.army.pentagon.mil/adrb-ptsd.cfm> (last visited Apr. 14, 2016). The guidance makes reference to PTSD *or related* conditions. “Liberal consideration will be given in petitions for changes in characterization of service to [s]ervice treatment record entries which document one or more symptoms which meet the diagnostic criteria for Post-Traumatic Stress Disorder (PTSD) or related conditions.” MEMORANDUM FROM THE SECRETARY OF DEFENSE, U.S. DEP’T OF DEF. TO THE SERVICE SECRETARIES, SUBJECT: SUPPLEMENTAL GUIDANCE TO MILITARY BOARDS FOR CORRECTION OF MILITARY/NAVAL RECORDS CONSIDERING DISCHARGE UPGRADE REQUESTS BY VETERANS CLAIMING POST TRAUMATIC STRESS DISORDER (3 Sept. 2014). The Secretary of Defense’s directive casts a wide net, and invokes not just diagnosis, but evidence of symptomology.

Liberal consideration will also be given in cases where civilian providers confer diagnoses of PTSD or PTSD-related conditions, when case records contain narratives that support symptomatology at the time of service, or when any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct that caused the under other than honorable conditions characterization of service. In cases in which PTSD or PTSD-related conditions may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.

Id. Specifically, the Army Review Boards Agency (ARBA) is instructed to carefully weigh the evidence of the diagnosis against the severity of the misconduct.

Corrections Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a characterization of service of under other than

framework seems to invoke the argument that a moral injury, as a PTSD-related phenomenon, might form a mitigating factor. Here again, one can envision interesting arguments to be made that moral injury is, or is not, a PTSD-related,²³² or perhaps even a “sub-threshold” condition.²³³

Regardless of what it is labeled, a sizable community of interdisciplinary scholars associate moral injury with risk to the military formation, potentially even legal risks if left unaddressed. That suggests commanders will soon be interested in prevention efforts, particularly now that moral injury is being discussed in places like the Command and General Staff College.²³⁴ Dr. Shay, perhaps the most preeminent moral injury scholar, advocates a comprehensive plan uniquely-tailored to the armed forces revolving around three concurrent lines-of-effort;²³⁵

honorable conditions. Potentially mitigating evidence of the existence of undiagnosed combat-related PTSD or PTSD-related conditions as a causative factor in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct.

Id. The ARBA is instructed that PTSD is not normally a cause, but hints at a connection between symptoms and the misconduct. “PTSD is not a likely cause of premeditated misconduct. Corrections Boards will also exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct.” *Id.*

²³² “These moral injuries can result in problems that mimic PTSD but are not necessarily treatable in the same way. They can also result in behaviors leading to discharge characterizations that limit access to care.” Policy Statement, American Public Health Association, *Removing Barriers to Mental Health Services for Veterans*, ALPHA.ORG (Jan. 28, 2015), <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/01/28/14/51/removing-barriers-to-mental-health-services-for-veterans>.

²³³ See Brooker et al., *supra* note 106

²³⁴ “The Fort Leavenworth Ethics Symposium is an annual symposium co-sponsored and hosted by the U.S. Army Command and General Staff College (CGSC) and the Command and General Staff College Foundation, Inc.” COMM AND GEN. STAFF COLL. FOUND. INC., <http://www.cgscfoundation.org/events/ethics-symposium/> (last visited Apr. 14, 2016). For example, three of the twenty-two papers presented (Paul D. Fritts, *Adaptive Disclosure: Critique of a Descriptive Intervention Modified for the Normative Problem of Moral Injury in Combat Veterans*, Douglas A. Pryer, *Moral Injury and the American Service Member: What Leaders Don’t Talk About When They Talk About War*, Rhonda Quillin, *The Importance of Unit Climate in Effecting Moral Injury*), and one of the five presentations (Dr. George E. Reed, *Religion & Moral Injury*) directly addressed moral injury during the 2014 Ethics Symposium directly addressed moral injury. At the 2015 Ethics Symposium, two of the twenty-five papers presented directly addressed moral injury (Chaplain (Major) Seth George, *Moral Injury and the Problem of Facing Religious Authority*, Chaplain (Colonel) Jeff Zust). *Id.*

²³⁵ “A line of effort is a line that links multiple tasks using the logic of purpose rather than geographical reference to focus efforts toward establishing operational and strategic

cohesion, leadership, and training.²³⁶ A preventive law strategy informed by these lines of effort produces a useful framework for judge advocates to assist the commander in decisively engaging moral injury, and targeting legal risk at the embryonic stage.

Consider the first proposed line-of-effort; leadership. “Leaders, not mental health professionals, play the key role in reducing moral injury.”²³⁷ Here, judge advocates can orient leaders to the nuanced statutory obligations associated with assertions like these; legal obligations that many leaders are unaware exist in statute.²³⁸ The foundational and somewhat nebulous mandate directs all those in authority to lead by example through exemplary conduct.²³⁹ Specifically, the mandate states that “All commanding officers and others in authority . . . are required to show in themselves a good example of virtue, honor, patriotism, and subordination.”²⁴⁰ It is a duty “to advance and preserve an internal norm of ‘exemplary conduct.’”²⁴¹ To this duty the Senate Armed Services Committee said, “. . . the nation deserves complete integrity, moral courage, and the highest moral and ethical conduct.”²⁴²

conditions.” U.S. DEP’T OF ARMY, DOCTRINE REFERENCE PUBLICATION 3-0, UNIFIED LAND OPERATIONS para. 4-23 (16 May 2012).

²³⁶ Dr. Shay’s three suggested focus areas for the military to confront moral injury are leadership, training, and cohesion. SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 6. “My mantra is over and over: cohesion, leadership, training; cohesion, leadership, training, as the keys to preventing psychological and moral injury.” *A Call to Arms: A Review of Benefits for Deployed Federal Employees: Hearing Before the Subcommittee on Federal Workforce, Postal Service, and the District of Columbia of the Committee on Oversight and Government Reform*, 111th Congress. 77 (2009) (Statement of Jonathan Shay, M.D., PH.D.) [hereinafter *Subcommittee Hearing*].

²³⁷ Pryer, *supra* note 8, at 34.

²³⁸ “The senior officers in my Air War College ethics class looked at me in mild astonishment. I had just informed them that, by law, they were to be ‘a good example of virtue,’ to be ‘vigilant in inspecting the conduct of all persons who are placed under their command,’ and to ‘guard against and suppress all dissolute and immoral practices.’” James H. Toner, *Educating for “Exemplary Conduct”*, 20 AIR & SPACE POWER J. 18, 18 (2006).

²³⁹ The “Exemplary Conduct Statute” 10 U.S.C. § 3583 (1956) [hereinafter *Exemplary Conduct Statute*].

²⁴⁰ U.S. DEP’T OF DEF., THE ARMED FORCES OFFICER 26 (2006).

²⁴¹ Kevin Govern, *Military Laws on Exemplary Conduct: What Remains After “Don’t Ask Don’t Tell” Rulings*, JURIST (Jan. 28, 2015, 11:25 AM), <http://jurist.org/forum/2010/10/military-laws-on-exemplary-conduct-what-remains-after-dont-ask-dont-tell.php>

²⁴²

John Adams understood the concept of “exemplary conduct,” when in 1775 he drafted such standards for Continental Navy and Army forces. In its efforts to create modern “exemplary conduct” statutes, now Title 10, U.S.C. sections 3583 (for the Army), 8583.58 (for the Air Force),

A leader's statutory duty to lead by example is obviously crucial for innumerable reasons, but particularly so in a moral injury prevention paradigm. Consider the civilian illustration of a corporate officer who aggressively fosters a climate of profits over people.²⁴³ "Some very fine corporations, with great humane traditions built into their profit-making methods, have been put on the path to [morally injurious] ruin by . . . individuals appointed as [Chief Executive Officers]."²⁴⁴ Here, some argue that one toxic leader, left unchecked, could infect the whole organization. "A single powerful individual can seed, water, and harvest [moral injury] within a shockingly short time. 'It is easier to tear down than build up.'"²⁴⁵ A term for that leader, in the corporate world is "Moral Injury Perpetrator."²⁴⁶ In the military context, a moral injury perpetrator could be devastating, partly because soldiers are forever watching and gauging the trustworthiness²⁴⁷ of leaders.²⁴⁸ In one definition of moral injury the first thematic element is modified such that the act must be "by someone

and 5947 (for the Navy and Marine Corps), the Senate Armed Services Committee said, ". . . [T]he nation deserves complete integrity, moral courage, and the highest moral and ethical conduct."

Id.

²⁴³ The Army's definition of "toxic leadership" is similar to how the corporate officer, in this example, might be framed. U.S. DEP'T OF ARMY, DOCTRINE PUBLICATION 6-22., ARMY LEADERSHIP para. 11 (1 Aug. 2012) (C1, 10 Sept. 2012) (defining "toxic leadership").

²⁴⁴ Willis, *supra* note 10.

²⁴⁵ *Id.*

²⁴⁶ "A steady line of career moves where profits were more important than people, where other executives were pawns for abuse, where organizational personnel were exploitable and expendable, create these reputations." Willis, *supra* note 10.

²⁴⁷ "Trust is the bedrock upon which the United States Army grounds its relationship with the American people. Trust reflects the confidence and faith that the American people have in the Army to effectively and ethically serve the Nation, while resting assured that the Army poses no threat to them." U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 1, THE ARMY PROFESSION para. 2-1 (14 June 2013) [hereinafter ADRP 1]. "Within the Army, trust serves as a vital organizing principle that establishes the conditions necessary for effective and ethical mission command and a profession that continues to earn the trust of the American people. Such trust develops and sustains confidence among all Army professionals as they fulfill their duties and responsibilities." *Id.* para. 2-3. Mutual trust is the foundation of the 'Mission Command' operating concept. "Mission command is based on mutual trust and shared understanding and purpose. It demands every [s]oldier be prepared to assume responsibility, maintain unity of effort, take prudent action, and act resourcefully within the commander's intent." U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUBLICATION 6-0, MISSION COMMAND para. 1-9 (17 May 2012); "Mutual trust is shared confidence among commanders, subordinates, and partners." *Id.* para. 2-4.

²⁴⁸ SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 224.

who holds legitimate authority.”²⁴⁹ Leaders who fail to do what is right might then risk seeding moral injury in the formation,²⁵⁰ or even potentially the entire service.²⁵¹ “*There are no private wrongs in the abuse of military authority.* In some instances the moral fabric of the whole service is damaged, and the trust and respect of the nation are impaired.”²⁵² Soldiers sometimes do not know what to make of the devastating effect a toxic leader can have, and experience the “fear of bringing the ‘toxicity’ they feel to others.”²⁵³

Along with the foundational mandate to lead by example through exemplary conduct, there is the robust statutory mandate to “guard against and suppress all dissolute and immoral practices and to correct, according to the laws and regulations of the Army, all persons who are guilty of them.”²⁵⁴ This mandate to “guard against and suppress all dissolute and immoral practices” suggests a proactive (suppress) and preventive law (guard against) intent. Recall that some scholars associate moral injury with a diminished moral horizon, and a moral compass in need of

²⁴⁹ SHAY, DEFENDING VETERANS, *supra* note 13, at 63. “By someone who holds legitimate authority (e.g., in the military—a leader).” Shay, *Moral Injury*, *supra* note 11, at 183.

²⁵⁰ At the Combined Arms Center (CAC) at Fort Leavenworth Kansas, the recommended reading list contains a section in organizational culture and climate. The CAC recommends Dr. Shay’s work, *Achilles in Vietnam*, with this quoted language, recommending it for all Army leaders. “Using the paradigm of Homer’s Iliad, Shay relates that the roots of combat stress and PTSD can lie in the betrayal of duty by senior officers who failed to do ‘what’s right,’ creating moral injury in their [s]oldiers.” *Recommended Reading List*, U.S. ARMY COMBINED ARMS CENTER, <http://usacac.army.mil/organizations/cace/cgsc/dcl/reading> (last visited Apr. 14, 2016).

²⁵¹ SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 224.

²⁵² *Id.* (emphasis added).

²⁵³ Copland, *supra* note 20.

²⁵⁴

Title 10, Section 3583, requires exemplary conduct by all commanding officers and others in authority in the Army. All commanders are required to—*a.* Present themselves as examples of virtue, honor, patriotism, and subordination; *b.* Be vigilant in inspecting the conduct of all persons who are placed under their command; *c.* Guard against and suppress all dissolute and immoral practices and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and *d.* Take all necessary and proper measures under the laws, regulations, and customs of the Army to promote and safeguard the morale, physical wellbeing, and the general welfare of officers and enlisted personnel under their command or charge.

U.S. DEP’T OF ARMY, REG. 600-100, ARMY LEADERSHIP section II (8 Mar. 2007) [hereinafter AR 600-100].

calibration. Under that paradigm, recognizing and identifying moral injury in the ranks should be a leader's tool to properly guard against and suppress immoral conduct. To this end, part of the focus should be on educating first-line leaders of their crucial role specific to moral injury prevention.²⁵⁵

Recall that when a morally-injured soldier's social horizon shrinks, feelings of hopelessness and isolation can cause soldiers to "suffer in isolation."²⁵⁶ It is likely that the soldier has not told his comrades or his command about the soul-crushing pain that has overtaken him, perhaps due to fear of ostracizing or shaming.²⁵⁷ The moral injury could lay dormant²⁵⁸ until it potentially manifests as maladaptive-coping, self-harm, misconduct, or suicide, unless and until a proactive leader identifies the thematic elements of moral injury in the soldier. In this way, first-line leaders are like first responders, similar to legal assistance attorneys who might be the first to notice PTSD in a client.²⁵⁹ With knowledge of

²⁵⁵ "Health professionals may often be able to stop injuries from becoming fatal, disabling, or permanent, once they've happened. Preventing the injuries in the first place is beyond their power. That is in the hands of the line leaders and trainers and of the policymakers." SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 6.

²⁵⁶ Litz et al., *supra* note 10, at 701.

²⁵⁷ *Id.* at 702.

²⁵⁸

Unlike lost legs and missing eyes, these wounds can often go unnoticed. And soldiers may keep them that way. For one year, for two, with stone silence. In some cases, for forty or fifty years, buried deep inside, untouchable, until perhaps another group of vets come home from war and they see themselves, now at sixty or seventy, in the faces of those twenty-year-olds.

Sherman, *supra* note 18, at 10.

²⁵⁹ Here the analogy is drawn to the legal assistance attorney who may be the first person in a position to respond to a client with PTSD. Evan R. Seamone, *Attorneys as First Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 145-46 (2009).

As the campaigns in Iraq and Afghanistan continue, both military and civilian lawyers will encounter an increasing number of clients with Posttraumatic Stress Disorder (PTSD). Some of these clients will still need clinical diagnosis and treatment at the time they visit the attorney's office. Whether the lack of clinical involvement stems from the problems of an overtaxed medical system, or the veterans own reluctance to seek treatment, or systemic failures are transforming attorneys into PTSD "first responders."

thematic elements, first-line leaders should then invest time to talk informally²⁶⁰ with their personnel, and get to know²⁶¹ their natural state, so they can properly identify deviations from that state.²⁶² Each moral injury manifestation will be different based on the individual soldier,²⁶³ and may not be immediately evident.²⁶⁴ The individual best suited to identify the moral injury, with the unique knowledge of the soldier's natural state, is the first-line leader.²⁶⁵

Talking informally with soldiers is a key component in gauging unit climate, another statutory mandate. Leaders by statute must “be vigilant in inspecting the conduct of all persons who are placed under their

Evan R. Seamone, *The Veteran's Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Post-traumatic Stress*, 202 MIL. L. REV. 185, 185 (2009). Of particular interest in the solicitation for the grant was (recall the Program Announcement for the Psychological Health Research Award) special interest is given in equipping leaders and other populations with the right knowledge: “Of particular interest are universal and selective interventions that are aimed at equipping leaders, units, [s]ervicemembers and/or [f]amilies with skills to handle situations that may invoke grief, guilt or anger and prevent the development of a negative trajectory.” *Supra* note 18 and accompanying sources.

²⁶⁰ U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUBLICATION 6-22, ARMY LEADERSHIP para. 7-45 (1 Aug. 2012) (C1, 10 Sept. 2012) (discussing the role of informal communication with Soldiers).

²⁶¹ See generally John Wayne Troxell et al., *Ethical Dilemmas that Erode the Army Profession*, CENT. FOR THE ARMY PROF. AND ETHIC (2014), <http://cape.army.mil/army-profession-symposium/repository/2014/Ethical-Dilemmas-That-Erode-The-Army-Profession.pdf>. (PowerPoint presentation).

²⁶² “We have to watch [s]oldier behavior carefully and identify warning signs.” McMaster, *supra* note 219, at 40. Sherman, *supra* note 18, at 10 (discussing a number of factors thought to influence susceptibility and response to moral injury in servicemembers). See generally Clime, *supra* note 3.

²⁶³

No single moral injury fits all. There is no easy diagnosis and code number. Scientific research models can belie both the variety of suffering felt and the centrality of a sense of responsibility that underlies much of the suffering. For the individual soldier, acknowledging moral injury often requires coming to feel the fine grain of the emotions and conceptualizing the moral implications for honor and dignity.

Id. at 8. “We favor the tenet that ‘treatment’ of moral injury must be defined by the individual according to their beliefs and needs.” *Moral Injury Project*, *supra* note 4.

²⁶⁴ Wood, *supra* note 25.

²⁶⁵ “This is relevant to moral injury big-time,” said Nash. “It’s on-the-spot help from compassionate and wise mentors, the people who know Marines the best.” Wood, *The Recruits*, *supra* note 100.

command.”²⁶⁶ The Army’s regulatory expectations of leaders and unit climate mirror the overall statutory expectations, and vest leaders with a variety of responsibilities.²⁶⁷ Here the preventive law strategy should seek to translate the significance of unit climate to susceptibility to moral injury.²⁶⁸ To that end, special emphasis can be placed on encouraging soldiers to openly discuss PMIEs and the potentially catastrophic consequences,²⁶⁹ in an environment free of judgment and stigma.²⁷⁰ “Although the importance of empathy, interpersonal warmth and non-judgment are well-documented conditions for psychological growth generally, these elements take on special importance in the context of moral injury.”²⁷¹ The unit climate should be used as an opportunity, and as a leadership-tool to break-down stigmas and barriers, enhance trust and

²⁶⁶ “To be vigilant in inspecting the conduct of all persons who are placed under their command.” *Supra* note 239 and accompanying sources.

²⁶⁷ Climate is “The state of morale and level of satisfaction of members of an organization.” ADRP 1, *supra* note 247, section II. Leaders are expected to set the example for a positive unit climate, in keeping with the statutory mandate for exemplary conduct. “Leaders set the right example, live by and uphold the Army Ethic, establish a positive climate, and inspire the team.” *Id.* para. 2-27. The obligations towards establishment, maintenance, and improvement of unit climate contemplate several implied tasks. “Leaders are responsible for establishing and maintaining positive expectations and attitudes, which produce the setting for positive attitudes and effective work behaviors.” AR 600-100, *supra* note 254, para. 1-6(B)(5). Senior commanders obviously have a lot at stake with respect to climate. General McMaster Lecture, *supra* note 219, at 40 (discussing the tactical importance of a strong ethical climate). Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court Martial Process*, 220 MIL. L. REV. 129, 136–37 (discussing the Commander’s robust caretaker responsibilities regarding physical, material, mental, and spiritual health of the organization). “In practice, however, the establishment, maintenance, and improvement of positive and productive unit climate is a regulatory responsibility of leaders at all levels. Every leader will . . . foster a healthy command climate.” AR 600-100, *supra* note 254, para. 2-1(I). “Every leader will . . . ensure the physical, moral, personal, and professional wellbeing of subordinates.” *Id.* para. 2-1.

²⁶⁸ “Army unit leaders develop an organizational climate that may or may not emphasize Army values. Climate, subject to change based upon the unit’s current leaders, is the basic attitude and daily functioning of unit members When a unit’s climate is not congruent with Army values and the member’s personal values, then a [s]oldier is strongly susceptible to moral injury.” Thompson, *supra* note 12, at 13, (citing R. Quillen, *The Importance of Unit Climate in Effecting Moral Injury*, ARMY MAG. (Apr. 20, 2015), <http://www.army-magazine.org/2015/04/20/army-values-keep-moral-injury-at-bay/>).

²⁶⁹ Wood, *The Recruits*, *supra* note 100.

²⁷⁰ Bosario, *supra* note 53 (discussing the “zero-defect” culture, whereby psychological injury can be mistaken for moral weakness). *See generally* Sherman, *supra* note 18, at 3.

²⁷¹ Farnsworth, *supra* note 15, at 22.

interdependence,²⁷² and get soldiers talking about their experiences²⁷³ openly to recover the social horizon. One regulatory requirement for command climate is to “use initiative to assess risk and exploit opportunities.”²⁷⁴ Building a healthy climate that fosters trust helps set conditions for positive cohesion, a crucial factor in moral injury mitigation.²⁷⁵

Strong unit-cohesion is critical in preventing and mitigating combat stress and trauma.²⁷⁶ “What a returning soldier needs most when leaving war is not a mental health professional, but a living community to whom his experience matters.”²⁷⁷ Judge advocates engaged in risk analysis should consider periods immediately following re-deployment as higher risk.²⁷⁸ The living community is the soldier’s social horizon,²⁷⁹ where the cohesive strength and fabric of the unit play a key role in moral injury prevention.²⁸⁰ “Treating moral injury in combat veterans, Dr. Shay said in a *Public Broadcast Service* interview, happens not in the clinic, but in the community.”²⁸¹ Some argue that the reason for this is that “moral injury is not a clinical condition that can be medicated or cured by psychology,” it takes a cohesive unit where soldiers can reconstruct²⁸² their humanity

²⁷² Litz et al., *supra* note 10, at 702.

²⁷³ “Moral injury, then, is a burden carried by very few, until the “outsiders” become aware of, and interested in sharing it. Listening and witnessing to moral injury outside the confines of a clinical setting can be a way to break the silence that so often surrounds moral injury.” *Moral Injury Project*, *supra* note 4.

²⁷⁴ AR 600-100, *supra* note 254, para. 2-1(J).

²⁷⁵ Dan Maurer, *Military Mediation as Military Justice? Conjectures on Repairing Unit Cohesion in the Wake of Relational Misconduct*, 8 OHIO ST. J. ON DISPUTE RES. 419, 432 (2013).

²⁷⁶ McMaster, *supra* note 219, at 40.

²⁷⁷ *Id.*

²⁷⁸ See generally Booth-Kewley et al., *supra* note 126. Jacob K. Farnsworth et al., *The Role of Emotions in Military Trauma: Implications for the Study and Treatment of Moral Injury*, 18 REV. OF GEN. PSYCH. 249, 249–62 (2014) (discussing the theory that periods following deployment might generate heightened risk for moral injury manifestation).

²⁷⁹ “The social horizon of the unscarred soldier encompasses not only his family and other civilian ties but also those military formations to which his unit belongs and with which it cooperates.” Shay, *supra* note 112, at 23.

²⁸⁰ SHAY, ODYSSEUS IN AMERICA, *supra* note 11, at 33.

²⁸¹ Copland, *supra* note 20. “A sense of community and stability are key, he says, in preventing further damage.” Interview with Dr. Shay, *supra* note 129.

²⁸² See Sherman, *supra* note 18, at 32 (discussing the processing of moral responsibility, and its restorative potential).

with trusting comrades.²⁸³ With respect to moral injury then, unit cohesion should be built upon a foundation of community responsibility.²⁸⁴ “We are all, by the way, responsible for whatever transgression that he or she is involved in. That is our transgression, too.”²⁸⁵ This is not responsibility in the legal culpability sense, but responsibility to recover the social and moral horizons for comrades in arms.

Community responsibility hinges upon community-understanding, meaning the shaping of preventive law strategies to decisively engage the phenomenon based through local initiative.²⁸⁶ “The big challenge in effective preventive law is getting the word to the person who really needs it.”²⁸⁷ Information dissemination can take many forms²⁸⁸ including the traditional preventive law mediums of “publishing articles in military legal

²⁸³ *Id.*; see generally *Subcommittee Hearing*, *supra* note 236; moral injury healing requires “spiritual and social elements.” Farnsworth, *supra* note 15, at 14. See generally Clime, *supra* note 3.

²⁸⁴ “We have to understand how to communalize grief so we can get through difficult times together These include social disconnection, distractibility, suspiciousness of friends, irrationality, and inconsistency.” McMaster, *supra* note 219, at 40.

Experts in military and veteran mental health are now trying to articulate just what that healing would like and how treatments overlap or are critically different from those routinely used in treating posttraumatic stress. But the general issue or moral healing from moral combat injury is not just for experts and clinicians. It is something we all need to understand as part of the reentry of the largest number of service members into society since Vietnam.

Sherman, *supra* note 18, at 10.

²⁸⁵ Copland, *supra* note 20.

²⁸⁶ With mission-sets and unit needs varying widely organization to organization, successful preventive law programs have always relied heavily on local-level initiative to develop programs that work best for that particular set of needs. “The use of local initiative has been well demonstrated in the many and varied preventive law programs developed at base level.” Brigadier General Walter D. Reed, *Directorate of Civil Law*, JAG. L. REV. 23, 29 (1973). “Supervising Attorneys should be aggressive and innovative in disseminating information.” CLIENT SERVICES DESKBOOK, *supra* note 199, para. VII(A).

²⁸⁷ COMMANDER’S LEGAL HANDBOOK, *supra* note 198, at 1; see generally Reed, *supra* note 287, at 39. In 2014, preventive law practitioners taught 2810 preventive law courses to 275,557 students. See *infra* Appendix A. In one proposed moral injury treatment model, education and information-dissemination figured prominently as step two of eight in that model. Litz et al., *supra* note 10, at 703; Boudreau, *supra* note 17, at 754. See generally Borgen, *supra* note 194, at 6 (discussing the challenge in getting preventive law services to the end-user).

²⁸⁸ The methods available include, but are not limited to “installation newspaper[s], command bulletin, radio, TV, [and] Internet websites.” See generally CLIENT SERVICES DESKBOOK, *supra* note 199, para. C. See generally Borgen, *supra* note 194, at 6.

publications of general circulation and placing information on the electronic bulletin board,”²⁸⁹ or “fact sheets, handouts, and pamphlets,”²⁹⁰ etc. Here, the thematic elements section of this analysis should serve as a useful tool. This, however, is just a starting point, as preventive law practitioners should capitalize on the wealth of information now in circulation on moral injury.²⁹¹ In the near future, moral injury training packages will be available to the Army, and judge advocates should capitalize on these.²⁹² The expanded Comprehensive Soldier and Family Fitness program,²⁹³ for example, will soon offer “moral injury on the battlefield”²⁹⁴ training. Beyond that, preventive law practitioners should even get collaborative and think jointly. For example, there are sister-service training concepts available for use.²⁹⁵ Sharing training ideas between units and services is in fact a regulatory expectation of the preventive law program, specifically to “share innovative measures.”²⁹⁶ Although referred to as “inner conflict” training by the Navy and Marine Corps, they are available concepts for use.²⁹⁷

Perhaps another effective medium is to integrate moral injury vignettes into existing training packages. Commanders are accustomed to

²⁸⁹ AR 27-3, *supra* note 199, para. 3-4(a)(5).

²⁹⁰ Colonel Mark E. Sullivan, *The Legal Assistance Chief's Handbook*, ARMY LAW, Sept 2004, 1, 18.

²⁹¹ Countless websites provide resources on moral injury, and give trainers an endless menu of available training tools. *See, e.g., Resources for Moral Injury Project*, WHEATON COLL., <http://www.wheaton.edu/HDI/Training-and-Education/Offerings/Moral-Injury-Project/Resources-for-Moral-Injury-Project> (last visited Mar. 5, 2015).

²⁹² Wood, *The Recruits*, *supra* note 100.

The Army is also producing a series of videos to get troops to think about moral injury before they are sent into battle. In four of these [thirty]-minute videos, to be completed later this spring, combat veterans talk about their experiences and how they dealt with the psychological damage One of the videos focuses on killing.

Id.

²⁹³ Referring to Brigadier General Rhonda Cornum and the original purpose of Comprehensive Soldier and Family Fitness as being preventive in nature: “It’s focus, as Cornum and her deputy described it to me, is not ‘post-adversity,’ but ‘preventive,’ ‘to teach everyone to better thrive.’” Sherman, *supra* note 18, at 13.

²⁹⁴ COMPREHENSIVE SOLDIER & FAMILY FITNESS, ARMY FIT: ONLINE ASSESSMENT AND SELF-DEVELOPMENT, <http://csf2.army.mil/downloads/ArmyFitOne-Pagerv2.pdf> (last visited Mar. 9, 2015).

²⁹⁵ Nash et al., *supra* note 11, at 647.

²⁹⁶ AR 27-3, *supra* note 199, para. 3-4(a)(5).

²⁹⁷ Nash et al., *supra* note 11, at 647.

incorporating a moral dimension in training scenarios²⁹⁸ as part of the overall moral preparation for the battlefield.²⁹⁹ Considering the robust preventive law effort the Army already has in place across the core disciplines,³⁰⁰ adding a new dimension³⁰¹ of moral injury would be a seamless and highly-relevant addition to training. For example, the annual

²⁹⁸ “Commanders insist on realistic and tough performance-oriented training that focuses on the physical, moral, personal, and professional well-being and growth of their [s]oldiers.” AR 350-53, *supra* note 39, para. 4-1.

²⁹⁹

Preparing soldiers for war is not just a matter of technical and tactical training, not just a matter of building confidence and cohesion in units. Preparing soldiers for war also includes—or should include—helping soldiers figure out what war will do to them morally, and thereby to the network of relationships and communities within each of them lives. This dimension of *jus post bellum* is—or should be—as much a subject of professional military education and training for combat as any other.

Sherman, *supra* note 18, at xvii. Consider the following remarks by General Mattis:

The task is so grim, and I’m a [m]arine [i]nfantry [o]fficer, we’re people who close with and destroy the enemy in what we could call intimate killing, you cannot go into something like that and not be changed. So at times a sense of humor is almost like body armor on your body, this is armor around your spirit, as you keep your spirit from going so grim with some of these situations that it actually deals damage to your spirit. I think too that when you look at this sort of aspect, the only way you can return young men . . . to civilian society as better citizens is to make certain you don’t allow the grim aspects to basically define them. They’ve got to be able to do very bad things without becoming bad or evil in the process. That is a tough line and it takes constant nurturing of the young men, who are so young, you’re often in the role of loco parentis, you’re acting really as their parent.

Conversations with History presents Reflections a Conversation with General James Mattis, USMC Ret., UNIV. OF CA. BERKELY, INST. OF INT’L STUD. UNIV. OF CA. TEL. (June 11, 2014), <http://www.uctv.tv/shows/Reflections-with-General-James-Mattis-Conversations-with-History-28135>. “Flourishing after war is also connected to how well those who fight on our behalf are prepared for the moral ambiguity, the havoc on the conscience, and the torments that come to even the most conscientious soldier.” Sherman, *supra* note 18, at xvii. “War’s hurts linger, and there is no easy way to understand healing without taking seriously the moral wounds that need healing and that can crack soldiers wide open.” *Id.* at 17. See generally Wood, *supra* note 25.

³⁰⁰ See *infra* Appendix A (depicting the number of classes and number of students, by subject, trained in 2014 through the Army’s Preventive Law Program).

³⁰¹ “An emphasis upon preventive law could be taken as a major structural change in the legal assistance program, but it is better seen as adding a further dimension to the existing program.” Borgen, *supra* note 194, at 6.

law of armed conflict training³⁰² is a target of opportunity where moral injury vignettes could be highly instructive.³⁰³ Preventive law practitioners could easily and seamlessly discuss the thematic elements in a rules-of-engagement vignette, for example,³⁰⁴ particularly one with

³⁰² Richard P. DiMeglio, *Training Army Judge Advocates to Advise Commanders as Operational Law Attorneys*, 54 BOST. COLL. L. REV. 1185, 1191 (2013). U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT TABLE G-1 (Aug. 19, 2014).

³⁰³ Wood, *The Recruits*, *supra* note 100.

³⁰⁴ Recall this example from the discussion of the thematic elements, which would be highly illustrative in a rules-of-engagement vignette: “[a] common example used by the psychiatrist who coined the term is the [m]arine who acted on orders to shoot a sniper who was using an infant serving as a human shield.” Brooker et al., *supra* note 68, at 251.

counterinsurgency³⁰⁵ training conditions.³⁰⁶ Another selling point³⁰⁷ is the effectiveness of adding new dimensions to existing training, rather than

³⁰⁵ One suggestion to capitalize on the wealth of resources now and soon-to-be available is to apply the “train-the-trainer” approach. CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994-2008, 266 (1 Sept. 2008). “This method requires units to nominate a representative to receive a period of instruction and return to the unit to conduct further instruction.” *Id.* In this sense preventive law practitioners would self-study to gain expertise, rather than attend a formal Army training course, an expectation which is not foreign to Army officers. “Self-aware Army leaders build a personal frame of reference from schooling, experience, self-study, and assessment while reflecting on current events, history, and geography.” ADRP 6-22, *supra* note 84, para. 11-45.

³⁰⁶ Litz et al., *supra* note 10, at 696 (discussing the argument that that counter-insurgency operations and guerilla warfare, particularly in urban environments, expose troops to an increased frequency of morally challenging situations). Some servicemembers see these as environments ripe for risk for moral harm. “Anyone who comes to close to that environment is going to come away maybe not ruined but tarnished, dirtied, sullied.” Sherman, *supra* note 18, at 27. “In these types of operations, violence, immorality, distrust, and deceit are intentionally used by the insurgent. So the [counterinsurgency (COIN)] manual directs leaders to work proactively to establish and maintain the proper ethical climate in their organizations and to ensure violence does not undermine our institutional values.” McMaster, *supra* note 219, at 37–38; COIN operations involve “unconventional features . . . that produce greater uncertainty, greater danger for non-combat troops, and generally greater risk of harm among non-combatants.” Litz et al., *supra* note 10, at 696. “Indeed, it seems that many recent conflicts actually involve additional psychological challenges for service personnel.” Thompson, *supra* note 12, at 1. *See generally* Jacob K. Farnsworth et al., *The Role of Emotions in Military Trauma: Implications for the Study and Treatment of Moral Injury*, 18 REV. OF GEN. PSYCH. 249, 249–62 (2014) (discussing the association between insurgent terror tactics in Iraq and the frequency with which troops encountered morally-troubling events, necessitating another look at the moral injury paradigm).

Even when armed with a set of rigid values and discipline, warriors in combat can be caught in situations where they have no opportunity to choose between right and wrong. In the often chaotic fighting in Iraq and Afghanistan, where there was no clear distinction between enemy insurgent and innocent civilian, young Americans could act in good conscience, and in accordance with a strict moral code, and still suffer moral injury.

Wood, *The Recruits*, *supra* note 100.

³⁰⁷ Preventive law efforts often take some salesmanship to implement. “Effort must be made to ‘sell’ the program.” CLIENT SERVICES DESKBOOK, *supra* note 199, para. III(a)(3). This may emanate, at least in part, from an understandable reluctance by commanders to dedicate precious time, energy, and resources to a program where metrics and success may be difficult to measure. *Id.* para. III(a)(2). To this end, Staff Judge Advocates are required to “seek command support and involvement on preventive law.” AR 27-3, *supra* note 199, para. 1-4 (g)(2)(h). One way to market the program is as an investment in readiness.

creating standalone requirements.³⁰⁸ Ethics training programs provide a good illustration,³⁰⁹ as the goals are quite similar to a moral injury mitigation program.³¹⁰ “Some researchers have suggested that ethics instruction is more effective when it is included within professional training rather than taught as separate courses.”³¹¹

IV. Conclusion

The purpose of this article was to introduce a new and provocative field of research, and contemplate some of the potential applications that judge advocates might soon be grappling with. Specifically, this article was developed with two populations in mind. First is the judge advocate in the field who will likely soon encounter the phenomenon in one way or another. This could be the commander recently returning from Fort Leavenworth, who is now asking for counsel on a separation. This might also be the creative defense attorney seeking to make mitigation arguments. One can contemplate limitless potential legal applications for

“Preventing legal problems is a readiness issue. Attorneys must ensure that commanders see the program in this way.” CLIENT SERVICES DESKBOOK, *supra* note 199, para III(a)(4). In other words, “Attorneys must plan their preventive law campaigns with readiness in mind. Aim at the issues that will cause readiness problems.” *Id.*

³⁰⁸ See generally Leonard Wong, & Stephen J. Gerras, *Lying to Ourselves: Dishonesty in the Army Profession*, STRAT. STUD. INST. AND U.S. ARMY WAR COLL. PRESS (2015) (discussing the cumulative effect of the multiplication of standalone training requirements to the point of diminishing returns, and the propensity to “check the box”).

³⁰⁹ Peter Bradley et al., *Assessing and Managing Ethical Risk in Defence*, 13 CAN. MIL. J., 6, 10–12 (2013).

³¹⁰ “The *primary, fundamental* motive for teaching ethics in the military is neither to clean up the act of military operations under the gaze of the media, nor to make military operations more efficient. We teach ethics in the military because we want to *promote good and prevent evil*.” Tor Arne Berntsen & Raag Rolfsen, *Ethics Training in the Norwegian Defence Forces*, in ETHICS EDUCATION IN THE MILITARY 96 (Paul Robinson et al. eds., 2008). Ethical instruction, like moral injury prevention, share the goal of reducing exposure to ethical and legal risk. See generally George B. Rowell IV, *Marine Corps Value-Based Ethics Training: A Recipe to Reduce Misconduct*, MARINES (2013), http://r.search.yahoo.com/_ylt=A0LEVjE6I1hX0YIAJE4nnIIQ;_ylu=X3oDMTEyYzI5MG1xBGNvbG8DYmYxBHBvcwMxBHZ0aWQDQjIwNDRfMQRzZWMDc3I-/RV=2/RE=1465422778/RO=10/RU=http%3a%2f%2fwww.dtic.mil%2fcgi-bin%2fGetTRDoc%3fAD%3dADA590670/RK=0/RS=UC2XPz9PbGTMe.92Nd8kQOIIXI-. This illustration is offered in part because of the similarity in purposes of managing ethical risk, and mitigating moral injury. “Managing ethical risk is about anticipating, preventing, mitigating, and surviving ethical failures.” Bradley, *supra* note 309, at 8.

³¹¹ *Id.* at 9.

a scenario that experts assert can fundamentally alter a soldier's sense of right and wrong.

The second population is the institution at large, the Judge Advocate General's Corps should be cognizant of this approaching phenomenon. Stimulating academic discourse is a good start. To that end, hopefully this article will serve as a catalyst of sorts. The way ahead should be ultimately be toward the development of institutional positions, frameworks, and applications. The effort should be to posture the institution for a phenomenon that is rapidly growing in cognizance, and only logic dictates that legal applications are around the corner. The sheer energy and volume of the emerging scholarship strongly suggests that this phenomenon is sprinting toward the courthouse doors. The way ahead should be through preparation and by getting ahead of the phenomenon. The preventive law paradigm, as contemplated in this article, is a vehicle well-suited to posture judge advocates for success.

Appendix A

Number of Classes and Number of Students—by Subject—Trained in 2014
through the Army's Preventive Law Program³¹²

| Practice Category | # of Classes | # of |
|-------------------------|--------------|--------|
| MEB Outreach | 16 | 1049 |
| PEB Outreach | 0 | 0 |
| Other | 885 | 114127 |
| Estate Planning | 287 | 21234 |
| Taxes | 112 | 24797 |
| Family Law | 736 | 22516 |
| Real Property | 119 | 14276 |
| Economic | 104 | 13265 |
| Personal Property | 111 | 19324 |
| Consumer Protection | 174 | 16197 |
| Civilian Administrative | 112 | 13273 |
| Military Administrative | 461 | 31301 |
| Torts | 74 | 12525 |
| Civilian Criminal | 72 | 11889 |
| Totals | 3263 | 315773 |

³¹² E-mail from Major Brendan R. Cronin, Deputy Chief, Legal Assistance Policy Division Office, Office of the Judge Advocate General (June 21, 2016, 2:32 PM) (on file with author).

Appendix B

The Army's 2014 Informal Preventive Focus by Subject and
Number of Articles Written³¹³

| Practice Category | # of Articles |
|-------------------------|---------------|
| MEB Outreach | 1 |
| PEB Outreach | 0 |
| Other | 54 |
| Estate Planning | 35 |
| Taxes | 150 |
| Family Law | 54 |
| Real Property | 14 |
| Economic | 46 |
| Personal Property | 25 |
| Consumer Protection | 87 |
| Civilian Administrative | 26 |
| Military Administrative | 67 |
| Torts | 6 |
| Civilian Criminal | 3 |
| Totals | 568 |

³¹³ E-mail from Major Brendan R. Cronin, Deputy Chief, Legal Assistance Policy Division Office, Office of the Judge Advocate General (June 21, 2016, 2:32 PM) (on file with author).

Appendix C

Moral Injury Events Scale³¹⁴

MIES

Instructions: Please circle a number to indicate how much you agree or disagree with each of the following statements about your experiences at any time since joining the military.

| | | <u>Strongly Disagree</u> | <u>Moderately Disagree</u> | <u>Slightly Disagree</u> | <u>Slightly Agree</u> | <u>Moderately Agree</u> | <u>Strongly Agree</u> |
|----|--|------------------------------|--------------------------------|------------------------------|---------------------------|-----------------------------|---------------------------|
| 1. | I saw things that were morally wrong. | 1 | 2 | 3 | 4 | 5 | 6 |
| 2. | I am troubled by having witnessed others' immoral acts. | 1 | 2 | 3 | 4 | 5 | 6 |
| 3. | I acted in ways that violated my own moral code or values. | 1 | 2 | 3 | 4 | 5 | 6 |
| 4. | I am troubled by having acted in ways that violated my own morals or values. | 1 | 2 | 3 | 4 | 5 | 6 |
| 5. | I violated my own morals by failing to do something that I felt I should have done. | 1 | 2 | 3 | 4 | 5 | 6 |
| 6. | I am troubled because I violated my morals by failing to do something I felt I should have done. | 1 | 2 | 3 | 4 | 5 | 6 |
| 7. | I feel betrayed by leaders who I once trusted. | 1 | 2 | 3 | 4 | 5 | 6 |
| 8. | I feel betrayed by fellow service members who I once trusted. | 1 | 2 | 3 | 4 | 5 | 6 |
| 9. | I feel betrayed by others outside the U.S. military who I once trusted. | 1 | 2 | 3 | 4 | 5 | 6 |

³¹⁴ Nash et al., *Psychometric evaluation of the Moral Injury Events Scale*, 178 MILITARY MEDICINE 646–52 (2013).