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MAKING THE BEST FROM A MESS: MENTAL HEALTH, MISCONDUCT, AND THE “INSANITY DEFENSE” IN THE VA DISABILITY COMPENSATION SYSTEM

Caleb R. Stone*

The disability compensation system implemented by the Department of Veterans Affairs (“VA”) is highly technical and complex. Before veterans reach questions concerning entitlement to benefits or the amount of compensation, they must first achieve basic eligibility for VA benefits. That involves receiving a discharge that is “honorable” for VA purposes. For some former servicemembers seeking benefits, using the VA’s “insanity defense” to excuse misconduct leading to a less-than-honorable discharge may be the best avenue for obtaining compensation. The VA insanity provision contemplated in 38 U.S.C. § 5303(b) and defined in 38 C.F.R. § 3.354 is the only “defense” that allows a veteran to get around all statutory and regulatory benefits.¹ It reads as follows:

An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.²

A cursory reading shows that the insanity defense is anything but clear and straightforward. This Article will examine this issue in three parts. Part I briefly discusses necessary background information, including military discharges and how they are treated by the VA and the military service branches. Part II then explores the construction and history of the VA insanity defense and how it compares to conceptions in the psychological field and corresponding provisions in the criminal defense system. Finally, Part III explains the regulation’s usefulness to advocacy in the veterans’ benefits system as it is currently constructed.

* Professor of the Practice at William & Mary Law School and Co-Director of the Lewis B. Puller, Jr. Veterans Benefits Clinic. Many thanks are due to the dedicated people in this area of the law that are tirelessly working to make a better system for veterans—some of whom are cited in this Article. I would like to specifically thank my colleagues David Boelzner, Elizabeth Tarloski, Judith Johnson, and Stacey-Rae Simcox for the instructive conversations that we have had about this important topic. I also appreciate the thorough review and intelligent edits from the UMKC Law Review staff. Finally, many thanks to Jeff and Angela Stone for acting as a captive sounding board throughout some of the writing process (among other services rendered).

¹ “[I]f it is established to the satisfaction of the Secretary that, at the time of the commission of an offense leading to a person’s court-martial, discharge, or resignation, that person was insane, such person shall not be precluded from benefits under laws administered by the Secretary based upon the period of service from which such person was separated.” 38 U.S.C. § 5303(b).

² 38 C.F.R. § 3.354(a) (2021).

I. BACKGROUND

A. Basic VA Rules

Eligibility for VA benefits concerns active-duty service and character of discharge;³ the latter is the focus of this Article. Veterans must be discharged under “conditions other than dishonorable” to be considered eligible for disability compensation.⁴ Broadly, there are five levels of military discharge: Honorable, General (Under Honorable Conditions), Other Than Honorable (“OTH”), Bad Conduct Discharge (“BCD”), and Dishonorable.⁵ Of concern to this Article are the third and fourth categorizations, as the first two (very) rarely inhibit a veteran’s ability to obtain disability compensation, while the fifth classification always does.⁶

For veterans with a “bad paper discharge”—specifically an OTH or BCD—the VA makes a “Character of Discharge” determination that decides whether the veteran’s service will count as “honorable” or “dishonorable” for VA purposes. It does this by analyzing a set of statutory and regulatory bars to benefits—if the veteran meets the criteria set forth in any of the bars, that veteran’s discharge is considered dishonorable for VA compensation.⁷ Initial adjudication is made by lay adjudicators at Regional Benefits Offices.⁸ Claimants can then appeal to the Board of Veterans’ Appeals and receive a decision from a Veterans Law Judge.⁹ The process at the Agency is supposed to be non-adversarial and friendly to veterans.¹⁰ A claimant who is unhappy with the Board’s decision can appeal outside the Agency to the Court of Appeals for Veterans’ Claims, then to the Court of Appeals for the Federal Circuit, and finally, petition for certiorari before the Supreme Court.¹¹

The statutory bars to benefits set forth by Congress only ensnare about one percent of veterans who are considered dishonorable for VA purposes, while the remainder are deemed ineligible because of the additional VA regulatory bars.¹²

³ See 38 U.S.C. § 101(2).

⁴ Technically, the VA does not consider those who are ineligible for benefits to be “veterans.” But this Article will make no distinctions in nomenclature between former servicemembers with honorable discharges and those without. See *id.*; see also 38 C.F.R. § 3.12 (2021).

⁵ See, e.g., Evan R. Seamone, *Dismantling America’s Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479, 504 (2013).

⁶ While it is possible for a veteran to receive a general discharge and yet trigger a statutory or regulatory bar to benefits, the occurrence rate is negligible enough to avoid any further discussion. An honorable discharge is better for VA purposes—specifically because it allows GI Bill entitlement to educational benefits where a general discharge does not. See 38 U.S.C. § 3311(c); see also 38 C.F.R. § 21.9520(a) (2021). But the difference generally does not matter for compensation purposes.

⁷ See, e.g., *Robertson v. Shinseki*, 26 Vet. App. 169, 174-75 (2013).

⁸ See Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513, 515-16 (2019).

⁹ See *id.*

¹⁰ See *id.* at 517.

¹¹ See *id.* at 523.

¹² See VETERANS LEGAL CLINIC, LEGAL SERVS. CTR. OF HARVARD L. SCH., UNDERSERVED: HOW THE

Consequently, much of the advocacy for disability compensation for OTH and BCD veterans involves explaining why the regulatory bars are not applicable in a particular case. To this end, a majority of veterans are excluded under two of these regulatory provisions: the willful and persistent misconduct bar and the moral turpitude bar.¹³ The VA made it easier to apply the first bar in 1946, when it issued a regulatory amendment removing the requirement that willful and persistent misconduct could only be established by court-martial convictions.¹⁴ With this safeguard eliminated, misconduct only needs to be “willful and persistent” in the eyes of a VA adjudicator. In practice, that presents “a very low legal standard.”¹⁵ Currently, there are no factors in the regulations that mitigate conduct considered “willful and persistent,” including mental health considerations.¹⁶

B. Current Events

That is why the “insanity” provision that is the focus of this Article is so important—it is the only “defense” that allows a veteran to receive eligibility for VA benefits regardless of whatever bar may apply. Further, as the rules are currently constructed, an insanity determination is really the only way that a veteran’s mental health can be considered as a factor that can mitigate misconduct.

Such consideration is critical—at least in theory—because, unsurprisingly, many of those discharged with bad paper because of misconduct have mental health conditions. In May 2017, the Government Accountability Office reported that “62 percent, or 57,141 of the 91,764 servicemembers separated for misconduct from fiscal years 2011 through 2015 had been diagnosed within the 2 years prior to separation with post-traumatic stress disorder (PTSD),

VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER 9 (2016), <https://www.swords-to-plowshares.org/research-publications/underserved> [hereinafter *UNDERSERVED*]. The six statutory bars to benefits are: (1) discharge as a conscientious objector who refused to perform military duty, wear the uniform, or otherwise comply with lawful orders of a competent military authority; (2) discharge or dismissal by reason of a sentence of a general-court martial; (3) an officer resigning for the good of the service; (4) desertion; (5) discharge as an alien during a time of hostility; and (6) discharge under other than honorable conditions issued as a result of absence without official leave (AWOL) for at least 180 continuous days. 38 U.S.C. § 5303(a). The regulatory bars are (1) acceptance of an undesirable discharge to escape trial by general court-martial; (2) mutiny or spying; (3) an offense involving moral turpitude; (4) willful and persistent misconduct; and (5) “homosexual acts involving aggravating circumstances or factors affecting the performance of duty.” 38 C.F.R. § 3.12(d) (2021). The last item is certain to receive a drastic alteration in the near future. *See infra* notes 22-24 and accompanying text.

¹³ Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from “Veteran” Services*, 122 PENN ST. L. REV. 69, 135 (2017) (citing *UNDERSERVED*, *supra* note 12, at 24). The Court of Appeals for the Federal Circuit recently rejected an argument that the VA went beyond the statutory authority granted by Congress when it created the “willful and persistent misconduct” bar to benefits. *Garvey v. Wilkie*, 972 F.3d 1333, 1341 (Fed. Cir. 2020).

¹⁴ *See Adams & Montalto*, *supra* note 13, at 122-23.

¹⁵ *See id.* at 123 (citing John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *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, 186 (2012)).

¹⁶ *See id.* at 126.

traumatic brain injury (TBI), or certain other conditions that could be associated with misconduct.¹⁷

Troublingly, there is strong evidence that the current numbers of veterans excluded by the statutory and regulatory bars to benefits rate far higher than Congress ever intended. Early congressional reports on the G.I. Bill of Rights—a seminal bill that solidified much of the modern VA benefits system—indicated that benefits should be barred only in the case of severe misconduct that led, or should have led, to dishonorable discharge via court-martial.¹⁸ But there has been a significant rise in the number of veterans adjudged ineligible in recent years¹⁹ without any consistent rhyme or reason to which servicemembers are given bad paper discharges or how the VA treats them after service. One report found, for example, that Marine veterans are almost ten times more likely to be found ineligible for VA benefits than Air Force veterans.²⁰ That same publication also reported that VA Regional Offices “have vast disparities in how they treat veterans with bad paper discharges,” noting that one Regional Benefits Office denied eligibility to every veteran with a bad paper discharge who applied for VA benefits, while another Regional Office denied eligibility to sixty-nine percent of veterans.²¹

Unfortunately, there is also evidence that the insanity defense does not provide much help to most veterans with bad paper discharges who are experiencing mental health problems. An analysis of Board of Veterans’ Appeals decisions shows that “less-than-honorably discharged servicemembers with PTSD were denied eligibility in 91 percent of cases on appeal” between 1992 and 2015.²² For nearly twenty percent of those claimants the insanity exception was not even considered, and when it was considered, judges found that “PTSD mitigated misconduct in only 12 percent of all PTSD-related claims.”²³

The VA is currently in the process of updating its character of discharge regulations.²⁴ The period for comments has concluded, and the VA has not yet issued its final regulation.²⁵ Among the changes are the quantification of what constitutes “willful and persistent misconduct” or an offense involving “moral

¹⁷ Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards’ Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 CAL. L. REV. 1357, 1375 (2020) (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-260, DO D HEALTH: ACTIONS NEEDED TO ENSURE POST-TRAUMATIC STRESS DISORDER AND TRAUMATIC BRAIN INJURY ARE CONSIDERED IN MISCONDUCT SEPARATIONS (2017)).

¹⁸ See Adams & Montalto, *supra* note 13, at 88.

¹⁹ See UNDERSERVED, *supra* note 12, at 9 (noting that the percentage considered “dishonorable” for VA benefits has risen from 1.7% for World War II veterans to 6.5% for those in the post-9/11 era).

²⁰ *Id.* at 3.

²¹ *Id.*

²² Adams & Montalto, *supra* note 13, at 127.

²³ *Id.*

²⁴ See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41471 (proposed July 10, 2020) (to be codified at 38 C.F.R. § 3).

²⁵ In response to the flurry of comments received from the public to the proposed rules, the VA scheduled an October 2021 listening session and requested written responses to a list of questions. See Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 86 Fed. Reg. 50513 (proposed Sept. 9, 2021) (to be codified at 38 C.F.R. § 3).

turpitude.”²⁶ As far as mental health is concerned, the main change proposed was the expansion of a provision that would allow veterans to obtain eligibility for VA benefits if “compelling circumstances” mitigate the misconduct that led to the bad paper discharge.²⁷

C. Discharge Upgrades

Alternatively, going beyond the VA system, a veteran with a bad paper discharge can petition various service branch review boards for a “discharge upgrade” that the VA must honor if granted.²⁸ In recent years, the Department of Defense has acknowledged the role that mental health problems can play in servicemember misconduct, issuing two policy memoranda (commonly known as the Hagel and Kurta Memos) requiring discharge review boards to give “liberal consideration” to “veterans petitioning for discharge relief when the application for relief is based in whole or in part on matters relating to mental health conditions, including PTSD; TBI; sexual assault; or sexual harassment.”²⁹ The 2014 Hagel Memo was later codified in 10 U.S.C. § 1553(d) for military discharge review boards, with the overall point being that those boards “should grant more upgrades to veterans with mental health conditions because those conditions mitigate their misconduct.”³⁰ The 2017 Kurta Memo, which expanded upon the liberal consideration first instituted by the Hagel Memo, was meant to be “veteran-favorable” and “grounded in leniency.”³¹ It explicitly required the boards to give liberal consideration if “the veteran ha[d] a condition or experience that may excuse or mitigate the discharge.”³² It also explained that the boards must consider the “veteran’s testimony alone” in the absence of documentary evidence, and that mental health conditions “inherently affect one’s behaviors and choices causing

²⁶ Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41471, 41476 (proposed July 10, 2020) (to be codified at 38 C.F.R. § 3).

²⁷ *Id.* at 41474. Under the proposed regulation, neither the willful and persistent misconduct, moral turpitude, or aggravated sexual misconduct bars to benefits would be applied if compelling circumstances mitigate the misconduct at issue. *Id.* The VA would consider the length and character of the service besides the misconduct in addition to any legal defense the servicemember may have had to misconduct. *Id.* Additionally, the VA would also consider mental impairment and physical health at the time of the misconduct, combat or overseas-related hardship, sexual abuse and assault, duress, coercion, or desperation, and obligation to family or third parties. *Id.*

²⁸ See 10 U.S.C. § 1553.

²⁹ See Chuck Hagel, SUPPLEMENTAL GUIDANCE TO MILITARY BOARDS FOR CORRECTION OF MILITARY/NAVAL RECORDS CONSIDERING DISCHARGE UPGRADE REQUESTS BY VETERANS CLAIMING POST TRAUMATIC STRESS DISORDER 1 (Sept. 3, 2014), <https://www.secnav.navy.mil/mra/bcni/Documents/HagelMemo.pdf> (hereinafter Hagel Memo); A.M. Kurta, CLARIFYING GUIDANCE TO MILITARY DISCHARGE REVIEW BOARDS AND BOARDS FOR CORRECTION OF MILITARY/NAVAL RECORDS CONSIDERING REQUESTS BY VETERANS FOR MODIFICATION OF THEIR DISCHARGE DUE TO MENTAL HEALTH CONDITIONS, SEXUAL ASSAULT, OR SEXUAL HARASSMENT 25 (Aug. 25, 2017), <https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf> (hereinafter Kurta Memo).

³⁰ Wherry, *supra* note 17, at 1381-82.

³¹ *Id.* at 1384.

³² Kurta Memo, *supra* note 29.

veterans to think and behave differently than might otherwise be expected.”³³ But even with this assistance, one researcher found that:

Despite the liberal consideration policy . . . the [Naval Discharge Review Board] seems to reach decisions not to upgrade in the same way it did before liberal consideration. The [Board] decisions even use the same language as pre-liberal consideration decisions, further suggesting the Board’s lack of engagement with the Kurta Memo’s substantive guidance about evaluating evidence liberally. . . .³⁴

II. THE VA INSANITY DEFENSE

A. “Insanity” In Other Contexts

The VA’s definition of insanity is unusual because it does not require a court or medical adjudication of insanity during service, and it has no real analog to other legal and medical definitions used by military, federal, or state-level justice systems.³⁵ For the medical field, there is no “insanity” diagnosis in the DSM-V.³⁶ Insanity is ultimately “the legal definition of what constitutes mental disorder sufficient to avoid criminal responsibility.”³⁷ In military criminal proceedings, courts examine “the time of the commission of the acts constituting the offense” to determine if “the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts.”³⁸

In the civilian criminal justice system, the insanity defense is typically defined in one of two ways. The traditional *M’Naghten* standard focuses “only on cognitive impairments, excusing the defendant when, by virtue of a mental disease,

³³ *Id.*

³⁴ Wherry, *supra* note 17, at 1388. Professor Wherry went on to suggest a variety of changes to align the discharge review boards’ results with the stated desire for liberal consideration. *See id.* at 1404-18. While not all of them would work in the VA’s character of discharge determination process, of special note is a suggestion that certain types of misconduct are automatically excused without further analysis with the diagnosis of certain mental health conditions. *See id.* at 1412-13 (using the example of excusing drug use or limited unauthorized absence for service if shown to stem from the veteran’s mental health condition).

³⁵ John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *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, 106 (2012).

³⁶ Ryan Howes, *The Definition of Insanity*, PSYCH. TODAY (2009), <https://www.psychologytoday.com/us/blog/in-therapy/200907/the-definition-insanity> (last visited June 25, 2021).

³⁷ Lisa Callahan, Connie Mayer, & Henry J. Steadman, *Insanity Defense Reform in the United States—Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 55 (1987); *see also* Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 110 (2006) (“To be sure, neuropsychological or neuroimaging evidence cannot establish a defendant’s lack of criminal responsibility, which is a legal determination, not a medical one.”).

³⁸ UNITED STATES MANUAL FOR COURTS-MARTIAL, RCM916(k) (2019).

she lacks the capacity to understand the nature or wrongness of her acts.”³⁹ The insanity standard set forth by the Model Penal Code (“MPC”) is slightly more lenient, requiring only that the offender “lack[] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”⁴⁰ Neither test is nearly as expansive as that adopted in *United States v. Durham*,⁴¹ which simply stated that “an accused is not criminally responsible if his unlawful act was the product of mental disease or defect.”⁴² Even the D.C. Circuit that adopted the *Durham* rule eventually abandoned it in favor of the MPC test,⁴³ and the *Durham* test only remains in effect in New Hampshire and the U.S. Virgin Islands.⁴⁴ Current insanity jurisprudence is even further away from *Durham*, as the insanity acquittal of John Hinckley Jr., the attempted assassin of President Ronald Reagan, caused many states to return to the more restrictive *M’Naghten* formulation.⁴⁵

B. Background and Interpretation

The current regulation dates back to 1961 and remains unchanged to present day.⁴⁶ In 2006, the VA proposed to adopt an interpretation similar to the *M’Naghten* rule, though it was never enacted.⁴⁷ Interpretation guidance from the

³⁹ Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 341 (1996) (citing *M’Naghten’s Case*, 8 Eng. Rep. 718 (H.L. 1843)).

⁴⁰ MODEL PENAL CODE § 4.01 (2020).

⁴¹ *United States v. Durham*, 214 F.2d. 862 (D.C. Cir. 1954).

⁴² *Id.* at 874-75.

⁴³ *United States v. Brawner*, 471 F.2d 969, 971 (D.C. Cir. 1972).

⁴⁴ The *Durham* test only remains in effect in New Hampshire and the U.S. Virgin Islands. Stephen P. Garvey, *Agency and Insanity*, 66 BUFF. L. REV. 123, 141 n.45 (2018).

⁴⁵ *Id.* at 141-42.

⁴⁶ See *Gardner v. Shinseki*, 22 Vet. App. 415, 420 n.3 (2009) (citing 26 Fed. Reg. 1589 (Feb. 24, 1961)). There is evidence that some of the language used dates back to at least the 1880s. See *Constitutional Psychopathic Inferior*, APA DICTIONARY OF PSYCH., <https://dictionary.apa.org/constitutional-psychopathic-inferior> (defining the term as a former name for an individual with antisocial personality disorder and dating the term back to the 1880s).

⁴⁷ For context, the M21-1 ADJUDICATION PROCEDURES MANUAL (“M21-1”) is what Regional Office personnel consult when making decisions; it is an amalgamation of all sorts of law as interpreted by VA employees. *Gray v. Sec’y of Veterans Affs.*, 875 F.3d 1102, 1105-06 (Fed. Cir. 2017) (citations omitted). These sources of law include statutes, regulations, cases, and even precedential opinions promulgated by the VA Office of General Counsel. They are not binding on any decisionmaker outside the Regional Benefits Offices. *Id.* The VA proposed to adopt the M21-1 Insanity provision existing at the time, which defined insanity as “whether, at the time of commission of the act(s), the veteran was laboring under such a defect of reason, from disease or mental deficiency, as not to know or understand the nature or consequence of the act(s) or that what he or she was doing was wrong.” Compensation, Pension, Burial and Related Benefits: General Provisions, 71 Fed. Reg. 16464 (proposed Mar. 31, 2006). The VA explicitly noted that this standard was similar to *M’Naghten*. *Id.* The current version of the M21-1 has backed off of this formulation, simply referring adjudicators to consult 38 C.F.R. § 3.354 (2021). M21-1 ADJUDICATION PROCEDURES MANUAL X.IV.2.A, INSANITY DETERMINATIONS (Aug. 19, 2021), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177991/M21-1-Part-X-Subpart-iv-Chapter-2-Section-A-Insanity-Determinations (last visited Dec. 15, 2021).

Agency and the Court of Appeals for Veterans Claims (“CAVC”) on the current regulation has been less than extensive. Indeed, while the CAVC has been critical of the VA’s formulation of the insanity rule in the past,⁴⁸ it has not issued many precedential opinions interpreting it. In 1997, the VA Office of General Counsel issued an advisory opinion purporting to clarify Section 3.354. Among other things, it held that personality disorders, minor episodes of disorderly conduct, and eccentricity do not fall within the VA definition of insanity.⁴⁹ But the opinion mostly seemed to say that VA adjudicators would be free to adjudge insanity as they see fit.⁵⁰

As for the CAVC, one early decision, *Cropper v. Brown*, took a narrow and uncritical view of the insanity defense, ruling that it could not be used to excuse misconduct over which the claimant “ultimately had control but failed, in fact, to control.”⁵¹ Conversely, it stated that “the defense may be used properly where the claimant has received a dishonorable discharge due to some ‘defect of reason, from disease or mental deficiency,’ which is beyond his control.”⁵² In other words, it adopted a standard much closer to *M’Naghten* and the MPC test than *Durham*.⁵³

Other CAVC opinions were more critical of Section 3.354 and made more veteran-friendly findings. One 1995 panel decision, *Zang v. Brown*, noted that reading the regulation precisely as written “would produce an illogical and absurd result that could not have been intended by the Secretary.”⁵⁴ That decision also noted that Section 3.354 is “less than clear given its obvious drafting defects,”⁵⁵ and the judge who authored the opinion even wrote separately to encourage the VA to reevaluate the insanity provision’s “confusing tapestry.”⁵⁶ In *Gardner v.*

⁴⁸ See *infra* notes 54-59 and accompanying text.

⁴⁹ DEP’T OF VETERANS AFFS., OFF. OF GEN. COUNS., VA GENERAL COUNSEL PRECEDENTIAL OPINION NO 20-97 (May 22, 1997), <https://www.va.gov/ogc/docs/1997/Pr20-97.doc> [hereinafter VAOPGCPREC 20-97].

⁵⁰ Until August 2021, the M21-1’s summary of VAOPGCPREC 20-97 stated that determinations of the extent to which a veteran “must deviate from his or her normal method of behavior” or “interfere with the peace of society is “best . . . resolved by adjudicative personnel on a case-by-case basis in light of the authorities defining the scope of the term insanity.” VAOPGCPREC 20-97, May 22, 1997, *Definition of Insanity in 38 CFR 3.354(a)*, M21-1 ADJUDICATION PROCEDURES MANUAL III.V.1.E, DETERMINATIONS OF INSANITY (Aug. 8, 2017), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014223/M21-1,-Part-III,-Subpart-v,-Chapter-1,-Section-E---Determinations-of-Insanity (last visited Dec. 15, 2021). Nothing in the current M21-1 provision contradicts that directive. See M21-1 ADJUDICATION PROCEDURES MANUAL X.IV.2.A, INSANITY DETERMINATIONS (Aug. 19, 2021), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/5544000000177991/M21-1-Part-X-Subpart-iv-Chapter-2-Section-A-Insanity-Determinations (last visited Dec. 15, 2021).

⁵¹ *Cropper v. Brown*, 6 Vet. App. 450, 453 (1994).

⁵² *Id.* at 453.

⁵³ See Garvey, *supra* note 44, at 125 (“The *M’Naghten* Rule, at least in its modern formulations, equates insanity with cognitive incapacity. Sometimes the Rule is combined with a test equating insanity with volitional incapacity, often called the ‘irresistible impulse’ test. Together, these twin incapacities constitute what we might call the law’s traditional test for insanity.”).

⁵⁴ *Zang v. Brown*, 8 Vet. App. 246, 253 (1995).

⁵⁵ *Id.* at 252.

⁵⁶ *Id.* at 255 (Steinberg, J., separate views).

Shinseki, the CAVC found it troubling that “there was no evidence that VA has remedied the confusion” regarding the insanity regulation that was previously discussed in *Zang*.⁵⁷ The *Gardner* opinion found that common components of insanity definitions used in criminal cases have no place in the VA insanity determinations because the VA standard is entirely different.⁵⁸ *Gardner* also held that the VA’s duty to assist claimants in obtaining evidence to substantiate their claims applies in the character of discharge determination process, and that the VA is required to determine if a medical opinion is necessary when a veteran’s sanity is placed at issue.⁵⁹

More recently, in *Bowling v. McDonough*, the CAVC was faced with an attempted class action challenging the validity of the VA’s insanity provision. The veterans in *Bowling* argued that the definition of “insanity” in 38 C.F.R. § 3.354(a) is unconstitutional because it denies claimants due process of law.⁶⁰ Pointing out the wide variety of flaws with the regulation, it asserted that Section 3.354 is narrower than Congress intended, does not have any basis in modern medicine, and results in arbitrary and inconsistent outcomes.⁶¹

The CAVC disagreed. The *Bowling* decision held that the appellants failed to prove Section 3.354(a) denies claimants due process or is constitutionally invalid.⁶² The CAVC first noted that “[f]acial [constitutional] challenges are disfavored” because they often rely on speculation and “run contrary to the fundamental principle of judicial restraint.”⁶³ It then stated that the record evidence presented did not show that the number of servicemembers barred from VA benefits is greater than Congress intended, that VA decision makers are applying the insanity rule arbitrarily and capriciously, or that veterans receive inadequate notice of the evidence needed to prove their claims.⁶⁴ In reaching this conclusion, the CAVC refused to consider much of the evidence provided by the claimants because it was not a part of the record before it.⁶⁵ Consequently, it is fair to question precisely what effect this case may have on future VA insanity determinations, though it may reflect an understandable judicial reluctance to get involved in this issue instead of allowing the rulemaking process to play out

⁵⁷ *Gardner v. Shinseki*, 22 Vet. App. 415, 420 n.3 (2009).

⁵⁸ *Id.* at 420.

⁵⁹ *Id.* at 421-22.

⁶⁰ *Bowling v. McDonough*, 33 Vet. App. 385, 388 (2021).

⁶¹ *Id.* at 394.

⁶² *Id.* at 388.

⁶³ *Id.* at 397 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). The CAVC also stated that facial constitutional challenges are “most difficult” because the claimant must prove that “no set of circumstances exists under which the [challenged action] would be valid.” *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

⁶⁴ *Id.* at 399.

⁶⁵ “But they do not rely on this evidence to establish facts not subject to reasonable dispute. Rather, they ask the Court to take judicial notice of the evidence and then draw inferences from it to support their arguments.” *Bowling v. McDonough*, 33 Vet. App. 385, 399 (2021). This evidence included items like the UNDERSERVED report cited *supra* note 12. *Id.*

normally.⁶⁶

III. THE VA INSANITY DEFENSE IN PRACTICE

A. Regulatory Analysis

The paragraph of seeming nonsense in 38 C.F.R. § 3.354(a) masquerading as a regulation makes little sense.⁶⁷ Still, it is essential to break it down and look closely at its text in search of any meaning. After all, if “the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”⁶⁸ First, the phrase “mentally defective or constitutionally psychopathic” seems to contemplate mental health conditions that are acquired—not innate—in nature.⁶⁹ The regulation also requires that any insanity be “due to disease.” Then, the statute goes on to describe three possible conditions, any of which, if satisfied, would mean that the veteran in question is insane. The latter two are quite extreme. Interfering with “the peace of society” or becoming completely unadaptable to the community seem to parallel standards that might be required by the civil commitment process. For veterans, and their representatives, seeking to avail themselves of the insanity defense, the first condition is far more promising. Further, psychologists and other mental health professionals may be of assistance. “More or less” is an indefinite term that means to a varying or undetermined extent or degree.⁷⁰ “Prolonged” means extended in duration.⁷¹ The phrase “deviation from his normal method of behavior” indicates that this regulation contemplates a subjective, not objective standard.

Therefore, this provision is deserving of focus from a psychologist or mental health professional who is attempting to write a statement on behalf of a

⁶⁶ The decision seemed, for instance, to adopt the VA’s assertion “that the Court’s review is limited to whether the regulation provides fair notice, not whether it is wise.” *Id.* at 396. As of December 2021, the *Bowling* case is on appeal at the Court of Appeals for the Federal Circuit. Federal Circuit Docket Nos.: 2021-1945, 2021-1970. If the Federal Circuit upholds the CAVC’s decision, the insanity regulation is likely to remain as is for the foreseeable future unless the VA changes it.

⁶⁷ See Bd. Vet. App. 1639960 at 4 (“Here, the Board concludes, first, that VA’s definition of insanity is literally gibberish. It is a string of real English-language words that, as constructed, has no meaning. The regulation as it currently exists cannot be applied to modern psychiatric evidence.”). It is notable that this Board opinion was written by esteemed veterans law scholar James Ridgway—the same James Ridgway who is currently representing the appellants in *Bowling v. McDonough*.

⁶⁸ *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929); see also Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 89 (2015); see generally Maxine D. Goodman, *Reconstructing The Plain Language Rule of Statutory Construction*, 65 MONT. L. REV. 229 (2004).

⁶⁹ See *Constitutional Psychopathic Inferior*, APA DICTIONARY OF PSYCH., <https://dictionary.apa.org/constitutional-psychopathic-inferior> (defining the term as a former name for an individual with antisocial personality disorder and dating the term back to the 1880s).

⁷⁰ *More or Less*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/more%20or%20less>.

⁷¹ *Prolonged*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prolonged>. Though this has not been defined by CAVC case law, it is reasonable to assume that this means something beyond a temporary lapse in judgment.

veteran.⁷² It is nearly axiomatic that mental illness causes those afflicted to suffer from a decreased ability to make good decisions—i.e., a deviation from a “normal method of behavior.”⁷³ Further, mental health professionals are equipped to establish baselines and then determine what sort of movements away from those baselines veterans may have made. In making those determinations, mental health professionals are entitled to use the veteran’s lay statements to supplement other documentary evidence that may exist from the time in question.⁷⁴

So, given the current state of the VA insanity regulation, of what value are any changes? Like all legal inquiries, the ultimate answer is “it depends.” Is the VA’s insanity regulation indeed “gibberish,”⁷⁵ or at the very least not a “model of clarity?”⁷⁶ Absolutely. Does the regulation provide enough notice to claimants as to what proof is required for an insanity determination, as is required by due process?⁷⁷ Probably not. Does it have any basis in modern medicine whatsoever?⁷⁸ Likely no. But do these deficiencies mean that the regulation should be revised? Not necessarily.

B. Reflection on the Future of the Insanity Defense & Final Takeaways

Any revision of the insanity regulation—whether imposed by Congressional statute, the VA’s rulemaking process, or judicial fiat—is unlikely to invent something out of thin air. Indeed, any changes would likely look to sources like the criminal justice system or the Hagel and Kurta Memos for inspiration. If the insanity definition were changed to match the *M’Naghten* rule or the Model Penal Code, for example, many veterans with bad paper discharges would lose a viable, albeit difficult, method of obtaining eligibility for VA benefits. It is probably indeterminable how many veterans would be able to meet these new high bars, though the rates that military sanity boards find servicemembers not

⁷² For a discussion of the importance of medical-legal partnerships and private medical evidence in the VA disability compensation system, see, e.g., Stacey-Rae Simcox, *The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships*, 68 S.C.L. REV. 223, 241-43 (2016).

⁷³ “Psychiatric disorders are defined by abnormalities of thought, affect, and impulse control. Arguably, the greatest functional impact of these illnesses on the lives of the mentally ill and society are not related to the symptoms of delusions, hallucinations, or depressed mood, but simply to making poor decisions.” Ricardo Cáceda, Charles B. Nemeroff & Philip D. Harvey, *Toward an Understanding of Decision Making in Severe Mental Illness*, 26 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 196 (2014), <https://neuro.psychiatryonline.org/doi/pdf/10.1176/appi.neuropsych.12110268>. See also Seamone, *supra* note 5, at 518 (“The military has officially recognized the connection between service-connected stress conditions and misconduct—both on the battlefield and in manifestations after troops have returned home—and has urged commanders to at least consider mental conditions before taking disciplinary action.”).

⁷⁴ See, e.g., *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2007); *Barr v. Nicholson*, 21 Vet. App. 303 (2007).

⁷⁵ See Bd. Vet. App. 1639960 at 4.

⁷⁶ See *Bowling v. McDonough*, 33 Vet. App. 385, 394-95 (2021).

⁷⁷ *Id.* at 400.

⁷⁸ *Id.* at 394.

responsible for their actions by reason of mental defect—fewer than 1 in 200—might be an acceptable estimate.⁷⁹

Adopting the *Durham* rule would probably be better for veterans than the *M’Naghten* or MPC formulations, as it would certainly be easier to prove that misconduct leading to a deleterious discharge was the product of a mental disease rather than an irresistible impulse or the like.⁸⁰ But even still, the number of veterans with “bad paper” discharges that can prove that their mental health conditions caused a “prolonged deviation” from a baseline standard of behavior is probably greater. Additionally, and in contrast with *Durham*, the current regulation does not require a veteran to prove that the “insanity” caused the misconduct that ultimately led to discharge.⁸¹ Rather, insanity merely needs to be present during the time of that misconduct.⁸² Therefore, the limited application of the insanity exception is not a problem of regulatory construction; instead, it is a defect in regulatory interpretation. Adjudicators should apply the “prolonged deviation from [a] normal method of behavior” standard as it is written instead of making their own value judgments as to what insanity means to them.⁸³ Even if the VA expands its existing “compelling circumstances” defense beyond AWOL determinations and explicitly considers mental health issues, veterans face a net negative if taking that action also means the imposition of an insanity rule as restrictive as *M’Naghten*.

Further, it is better to keep the possibility of having medical determinations assist veterans instead of relying on VA decision makers to appropriately balance evidence in the favor of veterans,⁸⁴ especially if the final decision will not be overturned unless it is clearly erroneous.⁸⁵ Also, looking to the

⁷⁹ Katie Drummond, *For Military Psych Boards, There Is (Almost) No Insanity Defense*, WIRED.COM (Apr. 5, 2012), <https://www.wired.com/2012/04/bales-sanity-board/>.

⁸⁰ See *supra* notes 35-45 and accompanying text. While *Durham* has fallen out of favor in other contexts, see Callahan et al., *supra* note 37, an adoption of a formulation that is *at least* that generous makes sense in a system that is meant to be friendly to claimants.

⁸¹ See 38 U.S.C. § 5303(b) (“[I]f it is established to the satisfaction of the Secretary that, *at the time of the commission of an offense* leading to a person’s court-martial, discharge, or resignation, *that person was insane*, such person shall not be precluded from benefits under laws administered by the Secretary based upon the period of service from which such person was separated.”) (emphasis added).

⁸² See *id.*

⁸³ See, e.g., Adams & Montalto, *supra* note 13, at 126-27 (“In practice, Veterans Law Judges applying the [insanity rule] have characterized the insanity exception as ‘more or less synonymous with psychosis’ and ‘akin to the level of incompetency generally supporting appointment of a guardian.’”) (citing Bd. Vet. App. No. 1016336, 2010 WL 2807345, at *2 (May 3, 2010); Bd. Vet. App. No. 15-19246, 2015 WL 4154699, at *3 (May 5, 2015)).

⁸⁴ Granted, medical professionals might have too much influence in the disability compensation system might have too much influence in decision-making. See Blair E. Thompson, *The Doctor Will Judge You Now*, 89 U. CIN. L. REV. 963, 963 (2021) (“By adopting the medical opinion as legal reasoning, VA adjudicators rely on Compensation and Pension Examiners . . . to make the ultimate legal decisions on veterans’ disability claims, even when the medical opinion is inadequate.”). Still, many veterans would probably be more likely to receive a favorable result by depending on a medical professional to agree that a prolonged deviation for standard behavior existed than if forced to rely on a VA Regional Office adjudicator to appropriately balance their misconduct with mitigating factors.

⁸⁵ The CAVC reviews the Board’s conclusions concerning servicemember sanity and whether a

shortcomings of liberal consideration in the discharge upgrade system is hardly encouraging for any success coming from an expansion of mitigating circumstances.⁸⁶ Consequently, in the interests of maintaining a veteran-friendly system, the insanity defense should not be further restricted, even if an update would make it infinitely more clear in practice. Private medical opinions, when done well, can lead to successful assertions of insanity as the regulation currently reads.⁸⁷ Furthermore, even if the insanity regulation is clarified, any changes could come as additions—not as replacements. For example, it would be simple enough to dictate that a veteran could prove insanity under *either* the new standard or the old one.

This section ends with the practical takeaways for veterans' advocates with the rules as they currently stand. First, mere knowledge of the existence of VA insanity puts a veteran with a less-than-honorable discharge in a better position because asserting insanity may entitle the veteran to a VA-provided medical opinion.⁸⁸ Second, a private medical opinion, whether solicited by the advocate or provided by a veteran's treating physician, is critical to increasing the chances of success. Third, psychologists should focus on the "prolonged deviation" part of the regulation in most cases, and the rationale for any opinion given must be as thorough and clear as possible.⁸⁹ Finally, advocates should make insanity arguments as forcefully as possible, using all of the evidence available to hold the VA closely to the letter of the law, as VA adjudicators should not be allowed to make the insanity threshold higher than it already is.⁹⁰

claimant's character of discharge is a bar to VA benefits under the "clearly erroneous" standard of review. *See* *Struck v. Brown*, Vet. App. 145, 152 (1996); *Beck v. West*, 13 Vet. App. 535, 539 (2000).

⁸⁶ *See supra* notes 28-34 and related text.

⁸⁷ *See, e.g.*, Bd. Vet. App. No. 21032208 (May 26, 2021); Bd. Vet. App. No. 21012722 (Mar. 5, 2021); Bd. Vet. App. No. 20079849 (Dec. 17, 2020); Bd. Vet. App. No. 20079020 (Dec. 15, 2020); Bd. Vet. App. No. 19183726 (Nov. 5, 2019); Bd. Vet. App. No. 19145834 (June 13, 2019); Bd. Vet. App. No. 19140645 (May 28, 2019); Bd. Vet. App. No. 19132933 (Apr. 26, 2019); Bd. Vet. App. No. 18134105 (Sept. 13, 2018); Bd. Vet. App. No. 18126807 (Aug. 16, 2018) (all finding private medical opinions highly probative in deciding that the veteran met the insanity exception). While it is admittedly anecdotal evidence, Puller Clinic students and attorneys have had a high rate of success of arguing insanity at the Regional Office level. *See* Caleb R. Stone, Elizabeth A. Tarloski & Judith L. Johnson, ATTORNEY-PSYCHOLOGIST PARTNERSHIPS: VETERANS DISABILITY COMPENSATION AND THE INSANITY DEFENSE, Poster Presentation for the 2020 American Psychological Association Conference (July 29, 2020) (on file with author) (documenting the effectiveness of private medical opinions when employing the insanity defense).

⁸⁸ *Gardner v. Shinseki*, 22 Vet. App. 415, 421-23 (2009).

⁸⁹ To be adjudged as valid, a medical opinion must explain its findings well enough to prove "that a medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion," as an opinion's probative value springs from "factually accurate, fully articulated, sound reasoning." *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008).

⁹⁰ For example, advocates must guard against a VA overreliance on the findings of an in-service sanity board or an improper discussion of insanity standards that are not a part of VA's rules. *See supra* notes 50, 79, and accompanying text.

IV. CONCLUSION

The long-standing “gibberish” of the VA insanity defense might be a mess, but managed appropriately, it can be a mess in the veteran’s favor. Given the VA’s past positions, any reform of this clearly deficient regulation without further Congressional involvement may, in fact, lead to worse results for veterans. Sometimes, the confusing devil you know is better than the clear devil you don’t. Awareness of the regulations, assistance from medical professionals, and skillful advocacy by veterans’ advocates can combine to lead to positive results for those with bad paper discharges.