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Timothy E. Lynch

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INTRODUCTION TO SYMPOSIUM ISSUE: MILITARY VETERANS AND THE LAW

Timothy E. Lynch*

The percentage of American adults who are veterans is the lowest it has been since at least immediately prior to World War II.¹ Indeed, the number of active service members is the lowest it has been in the United States since those pre-war years too,² as only about one half of one percent of the American adult population serves in the military at any given time in recent years.³ Nevertheless, as of 2018, eighteen million veterans lived in the United States, representing over seven percent of the American adult population.⁴ Despite the decline of the veteran population in recent decades, these are still sizable numbers.

Additionally, of our current veterans, over one-quarter have a service-connected disability,⁵ over one million live in poverty,⁶ 3.5% are unemployed,⁷ and over 37,000 are homeless.⁸

Upon discharge from the military, veterans must transition from living and working in the military to fully integrating into the civilian world. At a minimum, this means veterans must heal their physical and psychological wounds, find adequate housing, maintain healthy familial relationships, access necessary healthcare, and secure stable civilian employment.⁹ Although these needs are often

* Professor Lynch is an Associate Professor at the UMKC School of Law. Although his teaching and research does not concern veterans' legal issues, he is a proud veteran having served five years on active duty in the U.S. Navy as a Surface Warfare Officer and currently serves as the faculty advisor to the School of Law's Military Veterans Law Association, a student organization composed of veterans and other students who are interested in veterans' issues. Professor Lynch holds an M.B.A. from the Kelley School of Business, Indiana University; a J.D. from Harvard Law School; and a B.A. from The University of Chicago. Please send any correspondence to the author at lynchte@umkc.edu.

¹ Jonathan E. Vespa, *Those Who Served: America's Veterans From World War II to the War on Terror: American Community Survey Report 2* (U.S. Census Bureau, June 2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/acs-43.pdf>.

² *Id.* at 4.

³ *Id.*

⁴ *Id.* at 1, 2.

⁵ *Id.* at 8-10. Notably, post-9/11 veterans appear to have a much greater chance of having a service-connected disability than veterans from other recent eras. *Id.* at 11-12. Additionally, Black, Hispanic, and other race veterans are more likely than white veterans to have a service-connected disability. *Id.* at 12.

⁶ Jesse Bennett, *Veteran Households in U.S. Are Economically Better Off Than Those of Non-Veterans*, PEW RESEARCH CENTER (Dec. 9, 2019), <https://www.pewresearch.org/fact-tank/2019/12/09/veteran-households-in-u-s-are-economically-better-off-than-those-of-non-veterans/> (noting that in 2017, the poverty rate for veteran households was 6.6%). Notably, however, the poverty rate among veterans is lower than the rate among non-veterans. *Id.*

⁷ *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, https://data.bls.gov/timeseries/LNS14049526&series_id=LNS14049601 (last visited Fe. 21, 2022). Notably, the unemployment rate for veterans, at least in the last twenty years, has been slightly lower than the unemployment rate for non-veterans. *Id.*

⁸ U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF COMTY. PLAN. & DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 52-54 (2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf>.

⁹ See Rosemary R. French & Norma Bayes, *Guide to Veterans Legal Issues*, 2d Edition, BENCHMARK

wrought with legal complexities, veterans are often miscategorized and misunderstood by the legal community.¹⁰ This Symposium seeks to understand and address some of these legal issues, and the *UMKC Law Review* is proud to be publishing several pieces from prominent legal scholars with expertise in this area.

In our first article, *Duty to Impair: Failure to Adopt the Federal Rules of Evidence Allows the VA to Rely on Incompetent Examiners and Inadequate Medical Examinations*, Professor Yelena Duterte observes that there are several procedural problems when veterans apply for VA disability benefits. In order to qualify for these benefits, a veteran has to establish that he or she has a disability and that the disability was caused by a service-related event. In order to determine if those things are likely true, when a veteran claimant does not have medical evidence to support their claim, the VA will ask a third-party medical facility to examine the veteran and make the necessary evaluations. However, the VA does not ensure that the medical professional who conducts the examination and makes these evaluations is qualified to make them or that their evaluations are properly conducted. The VA simply presumes the medical examiner is competent and that his or her examination and opinions are adequate. As a result, too often the examination and/or the resulting opinions are inadequate (to the detriment of the veteran applicant). Because of this presumption, the VA will question the examiner's competency and the adequacy of his or her opinions only if the veteran claimant raises these issues. If the examination and/or resulting opinions are then deemed inadequate, the VA must order a new examination from a different medical professional. However, the inadequate examination results are kept in the veteran's file, and, therefore, any later medical examiner may refer to them thus potentially biasing their opinions. Professor Duterte details these VA procedures and recommends that the VA use particular provisions from the Federal Rules of Evidence (which is not currently binding on the VA) to both ensure, upon its own initiative and without the veteran claimant having to first raise the issues, whether the medical examiner is competent and whether their examination was properly done and their opinions justified. Professor Duterte also urges the VA to remove inadequate medical examinations from veterans' files so they cannot be used by future medical examiners. Professor Duterte's recommendations, as she emphasizes, would jibe well with the VA's "duty to assist" veteran claimants.

Judge Willie Epps, Jr. has contributed a wonderful and fascinating article on Judge William H. Hastie, the first Black judge on any federal appellate court. Prior to this particular appointment, however, from 1940 to 1943, Judge Hastie served as a senior advisor to the Secretary of War, Henry L. Stinson, and as such was at the time the "highest ranking Black civilian in government." Judge Epps' article is entitled *Resignation in Protest: Judge William Hastie's Uncompromising Battle Against Discriminatory Treatment of Blacks in the Armed Forces*. In it, Judge Epps tells us the story of how Judge Hastie was expected to advise Stinson and the War Department on policies and issues regarding African Americans in

INSTITUTE (2014),
http://www.benchmarkinstitute.org/t_by_t/substantive/Guide_to_Veterans_Legal_Issues.pdf.

¹⁰ *Id.*

the military. However, after repeatedly being sidelined and ignored, and in the face of continued resistance to fully desegregating the military, Judge Hastie resigned in protest. Judge Hastie's experiences also provide a vehicle for Judge Epps to give a brief history of Black Americans in the U.S. armed forces. As Judge Epps reminds us, President Truman issued an executive order fully desegregating the U.S. armed forces only in 1948, the year before he appointed Judge Hastie to the federal appellate bench.

Veterans treatment courts (VTCs) are relatively recent innovations, and VTCs have been established in numerous jurisdictions around the country in the last decade. As Professor Kristine Huskey informs us in her article, *The Case for Tribal Veterans Healing to Wellness Courts*, VTCs are alternatives to conventional criminal courts. They serve eligible veterans who suffer from some ailment (e.g., a mental health condition, traumatic brain injury, substance use disorder) and find themselves charged with a crime. Modeled on drug and alcohol diversion courts, VTCs emphasize diagnosing and treating the underlying causes of criminal activity and deemphasize punishment, but unlike drug and alcohol courts, VTCs are particularly sensitive to the unique experiences and needs of military veterans, often assigning servicemembers and/or veterans to mentor defendants. After describing VTCs, Professor Huskey discusses how American Indians and Alaska Natives (AIAN) also have a unique set of experiences and needs, particularly those rooted in their native cultural and indigenous practices. In fact, many jurisdictions have diversion courts, generally referred to as Tribal Wellness Courts, that acknowledge the unique experiences and serve the unique needs of Indian people, often attempting to provide indigenous restorative justice for both the AIAN defendant and their communities. Professor Huskey describes the goals and practices of both VTCs and Tribal Wellness Courts and then observes that American Indians and Alaska Natives who are veterans, therefore, exist in an intersectional world of both sets of experiences and needs. As a result, Professor Huskey argues for the creation of specialty treatment courts for AIAN veterans, one that merges the practices and sensitivities of both VTCs and Tribal Wellness Courts.

In his article, *Scam Schools: The Cyclical Abuse of Veterans by For-Profit Institutions*, Professor Robert Muth presents an informative history of veterans' educational benefits in the United States and explains how for-profit schools of higher education, motivated to be the ultimate beneficiaries of government-provided educational funds, have regularly engaged in predatory and abusive recruiting methods towards veterans and often then provide inferior education at high prices. Professor Muth describes how the Post-9/11 GI Bill is particularly generous to veterans and has hence fueled a recent boom in for-profit schools. Although Congress recently enacted a set of federal protections pursuant to the Isakson and Roe Act of 2020, Professor Muth believes those protections have not gone far enough. Veterans are still subject to an undesirable amount of abusive recruiting practices and threats of school closure and still often receive inferior education from for-profit schools. Additional protections are necessary, and Professor Muth recommends that Congress enact a set of them, including expanding federal oversight, expanding provisions to restore education benefits to

veterans whose schools close or lose their accreditation before graduation, and making lump-sum tuition payments directly to veterans to better incentivize them to search more diligently for low-cost, quality education programs.

Lawton R. Nuss, a former Chief Justice of the Kansas Supreme Court and former Marine officer, walks us through several aspects of the Uniform Law Commission's Model Veterans Treatment Court Act. As noted above, Veterans treatment courts are diversion courts that serve eligible veteran criminal defendants and seek primarily to treat and rehabilitate them as opposed to punishing them. Chief Justice Nuss, in his article, *Reflections and Reactions Regarding the Model Veterans Treatment Court Act*, closely examines several provisions of the Model Act (including its provisions defining eligible veterans and its provisions allocating decision responsibilities between prosecutors and courts), discusses some of the ambiguities in these provisions, and makes recommendations to states contemplating enacting the Model Act into their own legislation. In the process, Chief Justice Nuss notes how these Model Act provisions are reflected in Utah, the first state to adopt the Model Act, and how similar provisions are reflected in regulations governing the VTC of Johnson County, Kansas, a court that was created in the absence of a state VTC statute. He also shares some of his own reflections on the positive aspects and promises of VTCs.

As is well known, veterans are ineligible for most veterans' benefits if they were discharged under a dishonorable condition. But the VA provides a regulatory "insanity defense" which, if met, entitles dishonorably discharged veterans to all statutory and regulatory veterans' benefits. This insanity defense, however, is unique; it does not easily map onto any judicial or medical definition of insanity. And it is poorly drafted. In the words of Professor Caleb R. Stone (and others), it is not just poorly drafted, but is "gibberish," "nonsensical" and "a mess." Professor Stone, however, in his article, *Making the Best from a Mess: Mental Health, Misconduct, and the "Insanity Defense" in the VA Disability Compensation System*, suggests that, despite its messiness, the standard should be retained since the use of alternative standards, like those typically found in the criminal law context, would likely be less veteran-friendly, and that veterans' advocates, especially those assisted by medical professionals, should often be able to achieve positive results for their veteran clients pleading the VA's insanity defense.

These articles cover but a handful of legal issues facing our veterans; future veterans' symposiums are in order. Our veterans deserve a heightened level of consideration considering they have volunteered to put themselves in harm's way in defense of this country's interests. I am honored to have played a small role in putting this Symposium together and hope that the legal community can use the information and analysis contained herein to further help them.