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Deirdre M. Smith
University of Maine School of Law, deirdre.smith@maine.edu

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DIAGNOSING LIABILITY: THE LEGAL HISTORY OF POSTTRAUMATIC STRESS DISORDER

Deirdre M. Smith*

This Article examines the origins of the unique relationship between the psychiatric diagnosis Posttraumatic Stress Disorder (PTSD) and the law and considers the implications of that relationship for contemporary uses of the diagnosis in legal settings. PTSD stands apart from all other diagnoses in psychiatry’s standard classification system, the Diagnostic and Statistical Manual of Mental Disorders (DSM), and is the focus of significant controversy within psychiatry, because its diagnostic criteria require a determination of causation. By diagnosing a person with PTSD, a clinician necessarily assigns responsibility to a specific event or agent for causing the person’s symptoms, a practice more commonly associated with law. In short, the diagnosis uniquely medicalizes liability. The law has turned to PTSD, on the erroneous assumption that its location in the DSM signifies that it is well-settled science, to serve as a mechanism to resolve difficult problems in assessing legal responsibility. These uses include determining whether a criminal complainant is credible and when emotional distress from another’s negligence is sufficient in itself to serve as a basis for liability. However, by adopting PTSD’s conceptualization of causation of psychological injury, courts unknowingly delegate normative determinations of liability to psychiatry broadly and to the individual psychiatrists who

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present PTSD evidence at trial. This Article argues that the legal system should consider PTSD’s origins and its persistent controversies as part of a broader reexamination of the role of the diagnosis in the law.

"[A]s soon as you accepted that the man’s break down was a consequence of his war experience rather than of his own innate weakness, then inevitably the war became the issue."^{1}

I. INTRODUCTION

The psychiatric diagnosis Posttraumatic Stress Disorder (PTSD) is powerful on many levels. The term permeates our culture, and the very mention of it can evoke imagery of the horrors of war, genocide, child abuse, and epic disasters. Affixing the label of PTSD to an individual suggests that the person was once mentally healthy and, as a result of a distinct and horrific experience, is now psychologically damaged and scarred. The person “reexperiences” the event through frightening symptoms such as flashbacks, fear, anxiety, avoidance, and nightmares. It is the diagnosis that attaches to psychological injuries—that is, a mental disorder attributable to an external cause. And, for all of these reasons, it is a diagnosis that appears uniquely suited for aiding the determination of liability in court.

PTSD has generated much attention and controversy within both law and psychiatry in large part because it contains elements of two fields that do not always fit together easily. PTSD stands apart from all other diagnoses in the American Psychiatric Association’s (APA) standardized classification, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), because it has a determination of causation built into the definition,\(^2\) whereas other listings are agnostic as to the etiology of disorders. That is, although PTSD’s listing has the typical descriptive cluster of symptoms found in all psychiatric diagnoses, its criteria also require a diagnostician to assign the cause of the symptoms to a specific external event or other source, known as the “A Criterion,”\(^3\) a practice more commonly associated with the law.\(^4\) In short, the diagnosis medicalizes liability.

This Article traces the historical origins of the unique relationship between PTSD and the law and explores the implications of such relationship for contemporary uses of the diagnosis in legal settings. Part II examines the early conceptualizations of psychological injury within medicine and the relationship of those theories to questions of legal responsibility from the late nineteenth to mid-twentieth centuries. It reviews

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3. The name “A Criterion” results from the fact that the requirement of an external traumatic cause appears in subsection A of the DSM’s PTSD criteria. DSM-IV-TR, supra note 2, at 467.
the history of PTSD’s forerunners—railway spine, shell shock, and traumatic
neurosis—and demonstrates that a link to external causes, often with an association
with liability questions, has been a key attribute of these diagnoses, even though the
specific symptomatology and theories of the precise causal mechanisms at work have
differed significantly over time. Part II then considers the parallel developments in the
law regarding liability for psychological injuries during this same period.

Part III recounts the campaign for the inclusion of PTSD in the DSM and the
unusual place of the diagnosis, and specifically the A Criterion, within the APA’s
classification system. The diagnosis first appeared in the third edition of the DSM in
1980 as a result of heavy lobbying by Vietnam veterans’ groups who saw it as a
mechanism to legitimate the extreme symptoms of veterans, enabling them to receive
care and benefits for combat-related mental illnesses. However, the APA subsequently
loosened the diagnostic criteria to reflect use of the diagnosis for people experiencing a
wide range of life experiences, and the diagnosis became ubiquitous in personal injury
litigation and widely used in criminal law as well. Although psychiatry broke away
from the psychoanalytic and other psychodynamic theories of the origins of mental
disorders in the rest of the DSM-III, PTSD represented a rooting in the past, both for
the patients and for the field.

This historical discussion serves as the backdrop for Part IV of this Article, which
explores the uses of PTSD in the legal context and considers how PTSD, as one group
of commentators put it, “acquired [its] own legal currency.” This Part focuses on two
particular uses of the diagnosis to address problems of establishing liability: (1)
proving that a criminal complainant or civil plaintiff was subjected to an alleged trauma
to prove criminal or civil liability for such trauma; and (2) enabling personal injury
plaintiffs to pursue “stand-alone” claims for psychological injuries. Part IV also
examines the minimal evidentiary limitations that courts impose on such uses.

Part V returns to psychiatry and reviews two key controversies concerning PTSD
that challenge many of the core assumptions upon which the APA based its recognition
of the disorder: (1) the validity of the A Criterion and the causal relationship between
events and symptoms; and (2) the extent to which PTSD is a “construct” rather than a
“scientific discovery.” This discussion concludes that the inherent complexities of both
the formation of emotional responses to life events and the development of psychiatric
diagnoses preclude any simple “resolution” of these debates.

Part VI concludes the Article by reviewing the lessons for law from PTSD’s
history and by considering the implications for the role of PTSD evidence in litigation
specifically and for the relationship between the law and psychiatry on a broader level.
Medical diagnoses are largely the result of “negotiations” among various institutions
and stakeholders rather than being pure scientific “discoveries.” The history of PTSD’s
negotiations reveals a particularly prominent role for legal interests. From the late

5. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236,
237 (3d ed. 1980) [hereinafter DSM-III] (showing inclusion of Posttraumatic Stress Disorder in a chapter on
anxiety disorders generally); Wilbur J. Scott, PTSD in DSM-III: A Case in the Politics of Diagnosis and
Disease, 37 SOC. PROBLEMS 294, 309 (1990) (attributing the inclusion of PTSD in DSM-III to the
collaboration between key psychiatrists and the Vietnam veteran community).

nineteenth century to the publication of DSM-III, medicine produced various diagnostic labels for psychological injuries, particularly those for which individuals sought compensation or other legal benefit. Psychiatry thus addressed socio-legal needs as well as medical needs when it established PTSD. The law has turned to PTSD and its unique linking of an identifiable event and psychiatric symptoms to serve as a mechanism to resolve difficult problems in assessing legal responsibility, such as determining whether a criminal complainant is credible and when emotional distress from negligence is sufficient in itself to serve as a basis for liability.

However, most courts that admit evidence of PTSD for such purposes impose minimal scrutiny to the diagnosis. Rather, the fact of PTSD’s location within the DSM (coupled with courts’ misplaced assumptions about the DSM itself) has led most courts to grant PTSD the status of well-settled science. Courts are likely unaware of PTSD’s legal origins, the persistent controversies within psychiatry and psychology about the theoretical underpinnings of the diagnosis, and the complicated notion of “causation” within contemporary psychiatry. All of this suggests that courts should exercise caution before permitting the diagnosis to serve as evidence in a determination of liability.

Accordingly, the legal system should consider PTSD’s historical development and contemporary controversies as part of a broader reexamination of the role of the diagnosis in the law. By adopting PTSD’s particular (and unsettled) conceptualization of the causation of psychological injury, courts may unknowingly delegate the normative determinations of legal responsibility to psychiatry broadly and to the individual psychiatrists who present PTSD evidence at trial. Such uses recast PTSD as essentially a legal tool, potentially undermining its clinical function in aiding those who have experienced the horrors of war, assault, and disaster.

II. THE PSYCHIATRIC FORERUNNERS OF PTSD AND PARALLEL DEVELOPMENTS IN LAW

Although the term “posttraumatic stress disorder” was first coined in the 1970s during the development of the diagnosis that eventually appeared in the third edition of the DSM, the direct lineage of the term extends to at least the late nineteenth century. As PTSD’s history reveals, the link between medical concepts of psychological injury and legal notions of responsibility is not of recent origin but was present from the earliest conceptualizations of such injuries. Thus, it is impossible to talk of PTSD and its forerunners apart from broader socio-political attempts to attach legal responsibility for psychological injuries to identifiable sources.

A. Early Medical Conceptualizations of Psychological Injury

The history of psychiatry reflects a wide range of theories on the origins of mental illness. Some have thought that the symptoms of mental instability originate from spirits, humors, vapors, or demons. The notion that an exogenous event could alter one’s behavior, thinking, and beliefs—that one could sustain a psychological injury—is

of more recent origin, and has always been controversial. Freud and other followers of his theories were significant proponents of the notion that one's prior life experiences, particularly negative ones, can have lasting influence on one's psyche. Although Freud himself later altered these theories to give fantasy a more prominent role, the essential notion of a lasting emotional reaction to a specific event has persisted to this day.

PTSD is often associated with exposure to combat, and indeed military psychiatry is where many of the concepts of PTSD found their origins during the First World War. However, the story of PTSD in fact begins with the railways. Prior to the spread of the railways, and the accompanying spate of railway accidents, traumatic injuries were not commonly the subject of either everyday conversation or litigation. The word “trauma” was, until the late nineteenth century, a term associated exclusively with physical wounds. John Erichsen, a British surgeon and academic, is often credited with being the first to apply the term to psychiatric injuries in his book, On Railway and Other Injuries of the Nervous System, first published in 1866. Erichsen theorized that railway injuries from “Jars, Shakes, Shocks, or Concussions” to the spinal cord could cause injuries (specifically, lesions) that could have several manifestations, including “cerebral” changes affecting memories, thoughts, temper, and sleep. Erichsen did not and could not explain the specific causal mechanism in place leading to so-called “railway spine,” but his work led to that of others who more thoroughly developed the association between railway injuries and nervous system disorders.

9. See Young, supra note 7, at 36-38 (describing Freud's belief that hysterical attacks are caused by the failure to discharge emotion attached to prior traumatic experiences).
10. Two scholars, a historian and an anthropologist, have produced excellent and highly regarded historical analyses of the early development of PTSD. See generally Ben Shephard, A War of Nerves: Soldiers and Psychiatrists in the Twentieth Century (2000), Young, supra note 7.
13. Young, supra note 7, at 13; see also Ruth Leys, Trauma: A Genealogy 19 (2000) (linking psychological “trauma” to the term’s original use to describe a surgical wound); Scott Baldwin et al., The Creation, Expansion, and Embodiment of Posttraumatic Stress Disorder A Case Study In Historical Critical Psychopathology, 3 Sci. Rev. Mental Health Prac. 33, 43 (2004) (explaining psychological trauma as a metaphor for literal physical trauma).
16. Id. at 94, 96-99. Another nineteenth century proponent of the theory of actual physical damage to the nervous system (in his case, lesions) as the cause of traumatic neurasthenia was Berlin neurologist Hermann Oppenheim. See infra notes 36–38 and accompanying text for a discussion of Oppenheim’s study.
17. Erichsen, supra note 15, at 94 (conceding that, how the injuries to the spine “directly influence its action I cannot say”).
Erichsen developed his theory and diagnostic term with litigation specifically in mind.19 At the time, British and American societies were confronting the impact of industrialization, and particularly railways, on society. Railway accidents were “frequent, terrifying and highly publicized instances of the capacity of industrial technology to maim and kill.”20 A significant number of railway accidents led to claims for compensation.21 However, in a number of these cases, railways were able to escape with little or no financial liability where, notwithstanding the presence of negligence, the physical injuries were minimal.22 Accordingly, Erichsen, who testified frequently on behalf of patients in these cases, developed his theory of railway spine to decrease the “discrepancy of surgical opinion” regarding those who exhibited symptoms that arose after the accident, and when it had been assumed that there had been no injury.23 These symptoms included “headache, confusion of thought, loss of memory, disturbance of the organs of sense, [and] irritability of the eyes and ears.”24 His work initially had an enormous impact on litigation against the railways, resulting in large damages awards and settlements.25

Medicine did not uniformly embrace Erichsen’s theories and, given the financial impact on the railways and the lack of empirical basis for railway spine, they provoked swift criticism.26 One of his most prominent critics was Herbert Page, a physician who, not surprisingly, did consulting work for a railway.27 Page immediately challenged the causal assumptions underlying Erichsen’s theory of traumatic railway injuries. He rejected Erichsen’s purely somatic hypothesis in favor of one that included a potential causal role for fear in the mix, thus recharacterizing the symptoms as psychosomatic.28 He referred to the condition as “nervous shock,” and concluded that it arose only in those with a preexisting “nervous temperament.”29

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20. Brown, supra note 14, at 423; see also W E L K E, supra note 18, at 139–46 (describing American society’s fear in reaction to frequent railway accidents and their media coverage in the late nineteenth century).
22. See id (explaining a legal defense that sometimes prevented railway employees from collecting damages against their employers before the advent of workers’ compensation laws).
24. Id at 119.
25. Brown, supra note 14, at 424; see W E L K E, supra note 18, at 162–63 (discussing corporate doctors and lawyers who blamed Erichsen for his pro-plaintiff bias and for huge damage awards in American courts).
26. See W E L K E, supra note 18, at 153 (discussing the mobilization of railway doctors against Erichsen and his conclusions about railway spine); Brown, supra note 14, at 424 (explaining that railway spine theory was vulnerable to criticism because of vague diagnoses and victims who recovered after settled cases).
In his criticism, Page specifically raises the specter of malingering—the exaggeration or falsification of symptoms—in light of the potential for compensation for railway injuries made possible by the passage in England in 1864 of an amendment to the Campbell Act, allowing recovery for railway injuries. Page, among others, suspected that desire for compensation played some role in the development and persistence of symptoms, even in unconscious ways. The resistance by doctors associated with the railways to permitting recovery of compensation for injuries that were not obviously physical was unrelenting, and some turned their criticism specifically to the doctors who diagnosed such conditions, who, they claimed, were responsible for the role of “suggestion” in the persistence of symptoms. Those arguing a purely psychological (or “hysterical”) origin for lasting symptoms also challenged Erichsen and other proponents of such conditions in the courtroom, and had some success in limiting the railways’ exposure for such claims.

The debate regarding diagnoses such as “railway spine” soon spread beyond Britain. In Germany in the 1880s, neurologist Hermann Oppenheim developed the term “traumatic neurosis,” and saw a key role for direct neuropathological injury in its onset. His theory, like Erichsen’s, developed as a result of work treating individuals who developed a range of symptoms after railway and other industrial accidents. Unlike Erichsen, however, he also saw a significant etiological role for “the psyche: terror, emotional shock.”

Across the Channel in France, neurologist Jean-Martin Charcot was also interested in the development of traumatic syndromes. Charcot focused entirely on the causal impact of fear in creating symptoms even in the absence of any spinal injury or

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30. The current edition of the DSM defines malingering as the “intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives” including “obtaining financial compensation,” DSM-IV-TR, supra note 2, at 739.

31. See Young, supra note 7, at 17 (attributing to Page the contention that railway accident victims could not think of injuries in isolation from their monetary significance).

32. See id. at 16; Welke, supra note 18, at 167–68; Young, supra note 7, at 17; see also Brown, supra note 14, at 426–27 (describing the attempts of Erichsen’s critics to define objective symptoms that could distinguish malingering).

33. See id. at 166, 168.

34. See id. at 163–64 (describing the cottage industry that arose among anti-Erichsen expert medical witnesses).

35. See id. at 166.

36. See id. at 98 (discussing the development of Oppenheim’s theory that “actual physical damage to the brain and nervous system” caused victims’ symptoms); Welke, supra note 18, at 156 (attributing to Oppenheim the term “traumatic neurosis,” a phrase indicating chronic nervous system disorders could be “produced by the stresses of modern industrial life itself”); Paul Lerner, From Traumatic Neurosis to Male Hysteria: The Decline and Fall of Hermann Oppenheim, 1889–1919, in Traumatic Pasts: History, Psychiatry, and Trauma in the Modern Age, 1870–1950 140, 144 (Mark S. Micale & Paul Lerner eds., 2001) (hereinafter Traumatic Pasts) (indicating Oppenheim’s theory that “traumatic neurosis” was caused, in part, by minute lesions in the brain or nervous system, which lead a victim’s nervous system to deteriorate).

37. Lerner, supra note 36, at 144.

38. Id. at 145 (translating Hermann Oppenheim, Die traumatischen Neurosen nach den in der Nervenlinik der Charité in den letzten 5 Jahren gesammelten Beobachtungen (1889)).
lesions. This interest grew out of his close study of "hysteria," and he opined that Oppenheim’s descriptions of “traumatic neuroses” were essentially indistinguishable from hysteria, as he had classified it. In an argument that would foreshadow controversies arising a century later about PTSD, Charcot challenged the creation of traumatic neurosis as an “entity” aside from hysteria, distinguished only by having a specific origin, such as fear or fright. The term “traumatic hysteria” soon found use not only to explain the unusual symptoms experienced by those who had been exposed to an event but also to bring more credibility to the concept of “hysteria” generally, which had become a disparaging term by this time, used primarily to describe a “condition” (or perhaps simply malingered) displayed by overdramatic women.

Oppenheim resisted Charcot’s linking of post-traumatic responses with hysteria. He was concerned that Charcot’s use of the term “traumatic hysteria” suggested too strong a role for the individual’s thoughts and ideas and raised the specter of malingered. Oppenheim’s theories were eventually rejected by the German psychiatric establishment, in part because they had been successfully used to support compensation claims brought by railway and factory workers and because (unlike Page, for example) he did not suggest a significant role for individual predisposition in the onset of these neuroses. Although Oppenheim is regarded as only a minor player in the development of modern notions of posttraumatic psychological injury (in fact, his name is nearly forgotten), his conceptualization of “traumatic neurosis” had a more lasting impact than the theories of any of his contemporaries, and, as we shall see, that term played an increasingly important role in personal injury litigation in the twentieth century.

39. See YOUNG, supra note 6, at 19 (detailing Charcot’s theory that fear produced traumatic symptoms during a self-induced hypnotic state).

40. Id at 26; see also WELKE, supra note 18, at 156 (discussing the emergence of labels, including Oppenheimer’s “traumatic neurosis” and Charcot’s “traumatic hysteria,” used to describe the same psychological ailment).

41. See SHEPHARD, supra note 10, at 9 (noting Charcot’s belief that male hysteria was “usually traumatic in origin”); Kinzie & Goetz, supra note 28, at 161 (noting Charcot’s belief that “much of male hysteria was traumatic hysteria”).

42. YOUNG, supra note 7, at 20 (quoting JEAN-MARIN CHARCOT, CLINICAL LECTURES ON DISEASES OF THE NERVOUS SYSTEM DELIVERED AT THE INTRAMURAL OF LA SALPETRIÈRE 224–25 (New Sydenham Soc’y 1899)).


44. Lerner, supra note 36, at 145. Erichsen similarly disagreed with Charcot on this point, in part because he could not fathom the notion that men could be “hysterical.” WELKE, supra note 18, at 173–74.

45. Lerner, supra note 36, at 145.

46. Id at 151–52. Many were also concerned that the application of his theory to war neuroses would have an impact on Germany’s army during World War I. See, e.g., id at 157 (noting Oppenheim’s theory became regarded as “a threat to national health and strength” because its application would create significant pension obligations to soldiers diagnosed with traumatic neurosis).

Work on the psychological impact of accidents continued with a number of researchers in Europe and the United States at the turn of the twentieth century. American neurologist George Miller Beard first suggested the diagnosis of “traumatic neurasthenia,” the symptoms of which resemble those of railway spine. The term “neurasthenia” had been around for a few decades, and it was regarded as being more legitimate than hysteria, although its symptoms were vague and not well defined. It was seen as a condition caused by “the stresses of advanced civilization,” and, for that reason, many readily accepted a causal link with industrial accidents. Beard asserted that neurasthenia had a physical cause (as Erichsen had claimed was true for railway spine) and “defined as ‘disease’ what before had been seen as self-willed, and in the process shifted causation away from the individual to modern civilization.”

Many of those examining these questions of psychological injury turned their focus to the role of memory in the emergence of psychological symptoms—the “pathogenic memory” or “traumatic memory” and such “traumatic remembering” is a core concept of PTSD. Sigmund Freud’s original theories about traumatic memory (developed in conjunction with Josef Breuer) tied pathology to a patient’s memory of a traumatic event. The pathological mechanism was thought to stem from a patient’s inability to “discharge” his emotional reactions to the event, forcing the nervous system to “manage a sudden surge of excitation.” Memories of these events then became isolated from a person’s consciousness and could no longer be reached. The key to treatment, therefore, was to bring such traumatic memories to the surface and verbalize them through “abreaction” to achieve “catharsis,” so that the memories would lose their “pathogenic power.” Freud’s “seduction theory” suggested that psychoneurosis stemmed from early childhood trauma, generally sexual abuse, whereas “actual neurosis” emerged from trauma later in life. He later abandoned the theory to place more emphasis on the role of early fantasy in the development of neuroses.

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49. Welke, supra note 18, at 157–58.
50. Brown, supra note 14, at 427; see also Kinzie & Goetz, supra note 28, at 162 (describing neurasthenia as a common diagnosis in the 1900s for “nonspecific emotional” injuries caused by traumatic events).
51. Brown, supra note 14, at 427; see also Welke, supra note 18, at 157–58 (discussing Beard’s theory that nervousness was caused by “noises that were necessary accompaniments of civilization”).
52. Welke, supra note 18, at 159.
53. Young, supra note 7, at 25, 39.
54. Id. at 34.
55. Lett, supra note 13, at 19–20; Young, supra note 7, at 36.
56. Young, supra note 7, at 36.
57. Id. at 37.
58. Id. at 38.
60. Young, supra note 6, at 37; see also Shepard, supra note 10, at 13 (describing Freud’s treatments resulting in the restoration of a patient’s mental state).
61. Young, supra note 6, at 37–38.
62. Id. at 38. With that shift came the accompanying shift from abreaction to psychoanalysis. Id; see also John F. Wilson, The Historic Evolution of PTSD Diagnostic Criteria: From Freud to DSM-V, 7 J. TRAUMATIC STRESS 681, 688–84 (1994) (explaining the external pressures influencing the underpinnings of
The theories of pathogenic memory advanced by Freud, Breuer, and French psychologist Pierre Janet in the years leading up to the First World War began to displace the approaches to psychological injury described by Erichsen, Page, Beard, and Charcot. Interest in pathogenic memory in particular became strong during the war, when there was horror on a scale (both in terms of frequency and degree) that was previously unfathomable, at a time when clinicians in many countries were exploring these new notions of memory and consciousness. Suddenly, the countries involved in the fighting had thousands of emotionally-wounded soldiers and little plan to address the widespread epidemic.

The British military establishment set a number of distinct labels to diagnosis the psychiatric conditions seen in officers and enlisted men during this time. The most prominent and lasting was “shell shock,” which, like Erichsen’s original conceptualization of railway spine, was based upon an assumption that the symptoms’ primary origin was a neurological injury from a specific event, such as the discharge of an explosive in very close proximity. Shell shock soon became a blanket synonym for all war neuroses, particularly in light of the challenge of differentiating among the various conditions as they appeared in different individuals and a lack of a uniform classification system (or “nosology”) in psychiatry or neurology at that time. There is no indication that military psychiatrists followed anything resembling diagnostic criteria or shared a common understanding of how to differentiate among these various diagnoses.

The controversy continued regarding whether individual disposition played a role in the development of these conditions. Some physicians concluded that “inborn
timidity or neuropathic disposition” explained why some soldiers and not others
developed these conditions. 73 Many army psychiatrists assumed that a combination of
“flawed heredity and constitution” accounted for the cause of most war neuroses. 74 The
issues raised in those debates are echoed in the contemporary controversies about the
interaction of the psychological and physiological (such as the endocrine system) in the
symptoms of PTSD and the role of preexisting psychopathology in those who develop
PTSD. 75 Most physicians at the time were not particularly concerned with identifying
the specific causal mechanisms of these conditions since the treatments employed did
not depend upon such understanding. 76

However, the adoption of shell shock was a considerable change for the military,
which had previously attached a label of “cowardice” to such symptoms. 77 And the fact
that one in six who received the diagnosis was an officer made it a nearly “respectable”
condition. 78 The British military did attempt initially to distinguish between a reaction
properly classified as a “wound” incurred in battle and a mere “breakdown,” which
which carried far more of a stigma. 79 If the shell shock was not linked to a specific shell
explosion, the soldier was labeled as “sick,” not “wounded,” and such designation
precluded a pension award. 80

By 1916, several military doctors concluded that the symptoms classified as shell
shock did not necessarily depend upon a person’s proximity to an explosion for the
cause, but, in fact, may have a gradual onset or cause due largely to “emotions of
extreme and sudden horror and fright”81 or “sudden psychic shock.”82 Furthermore, a
great number of soldiers were claiming to have the condition by name. 83 Thus, the
psychiatrists rejected the label “shell shock” and officially replaced it with “war
neuroses,” or “functional nervous disorders.”84 But the term was not easily discarded,
as it made a lasting impression upon soldiers and the general public as a “neutral,
physical label for a psychological condition.”85

W.H.R. Rivers, who was a Royal Army Medical Corps officer and psychiatrist in
Great Britain who served for a time as a psychiatrist in Craiglockhart Military Hospital

73. YOUNG, note 7, at 54 (quoting Frederick Mott, The Lettsomian Lectures on the Effects of High
Explosives upon the Central Nervous System, 187 THE LANCET 331, 331 (1916)); see also SHEPHARD, supra
note 10, at 30 (discussing Mott’s views that predisposition affected post-war psychological impact).
74. YOUNG, supra note 7, at 55.
75. SHEPHARD, supra note 10, at 111–12, 125.
76. YOUNG, supra note 7, at 55. These conditions were generally treated with rest, hypnosis, diet, and
electricity. Id. at 55–56.
77. SHEPHARD, supra note 10, at 28.
78. Id. at 73–75.
79. Id. at 28–29.
80. Id. at 29.
81. Id. at 31 (quoting CHARLES A. MYERS, SHELL SHOCK IN FRANCE, 1914-1918, at 36 (1940)).
82. Id.; see also YOUNG, supra note 7, at 60 (explaining how one-third of soldiers described symptoms
that appeared gradually and without memorably significant events).
83. SHEPHARD, supra note 10, at 29.
84. Id. at 31.
85. Id.
in Scotland, was one of the early developers of what came to be known as PTSD. He was notable for his “humane treatments” and for his use of abreaction-based treatments resembling what we would now call psychotherapy. He theorized, drawing largely on the work of Freud, that the symptoms of war neuroses, particularly in officers, came from the repression of fear. Thus, the key to treatment was to reverse the repression of traumatic memories by confronting them directly.

Freud revisited the question of traumatic memory himself shortly after the war ended, and it is clear from these writings that he had not entirely abandoned the notion that external events can produce neuroses. He noted similarities between war trauma and others and concluded that all traumatic neuroses were based upon fear (in psychoneurosis, however, the origin of the fear was sexual conflict). In both contexts, repression operated as a psychological defense. He regarded an injury to the “organ of the mind” from trauma that was unexpected as one that was functional, not psychological. His most significant contribution, and one we can see in the development of PTSD specifically, is the notion of an initial “traumatic blow” to the “protective shell of the ego,” which was then followed by psychological consequences. Although Freud’s writings do not, as a whole, provide an entirely coherent theory of traumatic psychological injury, it is his ideas that have made the most significant indelible impact on contemporary psychological conceptualizations of PTSD.

As the war progressed with an unexpectedly high number of apparent psychological casualties, it became particularly important for the military to be able to

86. Young, supra note 7, at 42–44.
87. Id. at 42, 56; see also id. at 69–70 (distinguishing Rivers’s “painless talking cure” from “physical suffering” inflicted by Lewis Yealland’s and others’ electrotherapy treatments).
88. Id. at 65–66; Shephard, supra note 10. at 87–88. Rivers was not strictly a “Freudian,” but he did adopt many of Freud’s ideas and approaches. Shephard, supra note 10, at 87; Young, supra note 7, at 65–66.
89. See Shephard, supra note 10, at 87–88 (noting River’s method of treatment of war neuroses involved allowing the patient to “confront the memories” so that he could “reduce the horror”); Young, supra note 7, at 67 (noting that Freud and Rivers agreed that treating anxiety neurosis required addressing the traumatic memory); see also Scott, supra note 67, at 30 (noting Freud’s suggested method for treating war neurosis was psychoanalysis).
90. Letz, supra note 13, at 21–23; Wilson, supra note 62, at 685.
91. Sigmund Freud, Beyond the Pleasure Principle 6–7 (James Strachey trans., rev. ed. 1961) (1950); Young, supra note 7, at 78–79.
92. Wilson, supra note 62, at 685.
93. Shephard, supra note 10, at 168.
94. Wilson, supra note 62, at 686.
95. Kinzie & Goetz, supra note 28, at 162; see also Letz, supra note 13, at 23 (describing the term “traumatic” as “an experience which within a short period of time presents the mind with an increase of stimuli too powerful to be dealt with or worked off in the normal way”); Shephard, supra note 10, at 107–08 (describing trauma as an outside excitation powerful enough to break through the shield which protects the brain from stimuli that will surely result in exhaustive defensive measures); Wilson, supra note 62, at 686–87 (explaining that “both the traumatic stressors and secondary ones can overwhelm the now depleted ego-defense, thereby setting-up the possibility of long-term post-traumatic stress disorder and other co-morbid conditions”).
96. See Letz, supra note 13, at 18, 25–27 (noting that Freud is “a founding figure in the history of the conceptualization of trauma”).
distinguish those with true war neuroses from those who were malingering.\(^97\) Taking a
cue from the literature developed to weed out individuals with mere “compensation
neurosis” among those filing claims against railways for injuries,\(^98\) military doctors
consulted books that described mechanisms to identify those who might be feigning a
neurosis to avoid further combat duty and to distinguish between true hysteria and mere
malingering.\(^99\)

Once the war was over, concern shifted to reabsorbing these emotionally damaged
soldiers into civilian society. More than 160,000 former British service members had
received an award or were drawing a pension for a psychiatric injury.\(^100\) In the United
States, more than one-third of military hospitalizations at the end of the war were for
psychiatric conditions.\(^101\) Psychiatrists noted that some men recovered quickly upon
return to civilian life, whereas others continued to struggle with symptoms.\(^102\)
Psychiatrists began to draw a distinction between “true” and “false” war neuroses, with
the former appearing only in those who had “a minimal predisposition” and the latter
appearing in those with a predisposition that indicated that the war was not the true
cause of the neurosis.\(^103\) Those with the “false” label were simply neurotics whose
breakdown was inevitable.\(^104\) The British government attempted unsuccessfully to
convince psychiatrists to assign specific veterans to each class for purposes of limiting
the pension awards.\(^105\)

In 1941, Abram Kardiner, an American psychoanalyst, published The Traumatic
Neuroses of War, a detailed study of the long-term psychological impact of combat on
World War I veterans.\(^106\) He noted that there were also soldiers whose breakdowns did
not occur until after they returned home and then persisted for many years.\(^107\) His book
remained a “bible” for those studying war neuroses through the 1970s, when the

\(^{97}\) SHEPHERD, supra note 10, at 113–14.
\(^{98}\) See infra notes 163–67 and accompanying text for a discussion of examples of how feigning a
neurosis had been used to exacerbate legal claims or increase recovery.
\(^{99}\) YOUNG, supra note 7, at 57–59.
\(^{100}\) SHEPHERD, supra note 10, at 144.
\(^{101}\) Id. at 153.
\(^{102}\) Id. at 150–51.
\(^{103}\) Id. at 151.
\(^{104}\) See id. (indicating that those with “false” neuroses had predispositions).
\(^{105}\) Id. at 158. Some raised the concern that the pension awards actually inhibited recovery or
encouraged the reporting of symptoms. Id. at 151. Based upon these assumptions, France did not award any
pensions to those with war neuroses. Id. at 152. Similarly, as the number of psychiatric casualties increased,
German psychiatrists began to attribute the symptoms to malingering to avoid combat or to obtain pensions
and employed “treatments” that were particularly brutal. HERB KUTCHEK & STUART A. KIRK, MAKING US
\(^{106}\) ABRAM KARDINER, THE TRAUMATIC NEUROSSES OF WAR (1941); SHEPHERD, supra note 10, at 154–
55; Kinzie & Geertz, supra note 28, at 165. The other influential works from this period include Roy Grinker
and John Spiegel’s War Neuroses and Men Under Stress, both published in 1945 and also heavily influenced
by Freudian theory. SHEPHERD, supra note 10, at 331. See generally ROY R. GREENER & JOHN P. SPIEGEL,
MEN UNDER STRESS (1945); ROY R. GREENER & JOHN P. SPIEGEL, WAR NEUROSSES (1945).
\(^{107}\) SHEPHERD, supra note 10, at 152.
diagnosis of PTSD was first discussed and formulated. He urged quick intervention after men first exhibited symptoms to prevent the adaptive responses manifested as aversion and avoidance. He theorized that a complex "physio-neurosis," a series of adaptive responses, accounted for the symptoms occurring in war neurotics.

In the late 1930s, with the Second World War looming, the British Ministry of Pensions was the driving force behind the renewed debate on war neuroses. There were still a great number of World War I veterans receiving (or claiming) benefits due to a psychiatric disorder based upon the prior war. The Ministry's resident psychiatrist, Dr. Francis Prideaux, argued that many soldiers had incorrectly received diagnoses linked to exposure to battle, and that the men's predispositions, not traumatic experiences, were the key causal agents for most war neuroses. He was successful in convincing other psychiatrists and bureaucrats of his view, but the debate left unresolved the question of how to differentiate between those very few soldiers who did deserve pensions and the vast majority who would only be encouraged to break down by the availability of a pension. Eventually, the British government decided not to award any pensions for war-related psychoneurosis until after the war had concluded.

Given the assumption that predisposition was the single most significant factor in who ended up with a war neurosis, the British and American armies attempted to screen recruits for psychiatric disorders during World War II. However, by the end of the war, perhaps due to the utter failure of this approach, American military thinking had shifted from an assumption that preselection screening could keep out those men vulnerable to psychoneurosis to the view that "every man has his breaking point" and factors other than predisposition (including leadership) played a role in the cause of some men's breakdowns. However, the military did not remove soldiers with apparent psychological injuries from service. Rather, in 1943, American military leadership determined that all psychiatric casualties should be given an initial diagnosis

108. YOON, supra note 7, at 89 (explaining that Kardiner's book is "routinely cited as a landmark in the history of the posttraumatic disorders" and was used in creating "the symptom list for post-traumatic stress disorder").

109. SHEPARD, supra note 10, at 156.

110. Id. at 165.

111. Id. at 165–66. He also specifically rejected the possibility of a delayed onset of neuroses after seven years had elapsed from the date of exposure. Id. at 166.

112. Id. at 166–67.

113. Id. at 167 (noting that one of the "main legacies of the First World War [was] an official determination that quasi-medical words like 'shell-shock' should never be used, that the whole question of psychoneurosis should be both recognized and played down and that few pensions should be paid").

114. Id. at 187–90, 197–201.

116. Id. at 326; see also Kinzie & Goetz, supra note 28, at 168–69 (indicating that although some individuals had predispositions to mental illness, "even persons with sound personalities would break if the stress was high enough").
Chapter 1: Introduction

Chapter 2: Psychological Injuries

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Chapter 5: Conclusion

References
separating the truly neurotic from the merely malingering so as to not deplete the ranks, legal systems have similarly sought rules and standards that offered a way to distinguish the claims of those seeking compensation through a specious claim.

As the American tort system came under increasing demand to address traumatic injuries from the industrial age, especially railways, courts immediately reacted with skepticism to notions of a “pure” emotional injury.\(^\text{123}\) By the turn of the twentieth century, courts permitted recovery for emotional distress injuries as part of “pain and suffering” or “loss of enjoyment of life” damages in tort claims, but only where such distress was incidental to the primary physical injury,\(^\text{124}\) as so-called “parasitic damages.”\(^\text{125}\) Some courts and commentators simply expanded notions of what constituted “bodily harm” and did not make a specific distinction for injuries that were psychological in nature.\(^\text{126}\)

However, courts were far more reluctant to permit claims to proceed that were based upon assertions of emotional injury alone, particularly for mere negligence.\(^\text{127}\) Courts largely followed the lead of Lord Wensleydale’s 1861 ruling in the House of Lords: “Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.”\(^\text{128}\) American courts expressed their resistance by raising concerns about malingering, a potential explosion of litigation,\(^\text{129}\) or an assumption that people with normal constitutions (and particularly, men) could not be “shocked” into a mental disorder (and tortfeasors should not have to bear responsibility for compensating women’s overemotional reactions)\(^\text{130}\).

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127. Brown, supra note 14, at 428–30, Prosser, supra note 123, at 874 (“Mental anguish has been an orphan child.”).

128. Lynch v. Knight, (1861) 11 Eng. Rep. 577 (H.L.) 598; see also Victorian Rys. Com'mrs v. Coultas, (1888) 13 A.C. 222 (P.C.). 226 (Eng.) (holding that Plaintiff's shock-induced mental and physical injuries caused by a near-collision with a train were too remote to be compensable).


130. See Ward v. W. Jersey & Seashore R.R. Co., 47 A. 561, 562 (N.J. 1900), overruled in part by Falzone v. Besuch, 214 A.2d 12 (N.J. 1965); Chamallas & Wreggin, supra note 125, at 90, WEELSE, supra note 18, at 210, Abel, supra note 123, at 303–04; Martha Chamallas & Linda K. Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814, 829 (1990). Implicit in this skepticism as well is an assumption that emotional harm, as opposed to bodily injury or property damage, was not of sufficient value to warrant legal protection. Chamallas & Wreggin, supra note 125, at 37–38. Tort law generally recognizes a rule that permits a plaintiff to recover for all damages flowing from a tortfeasor's wrongdoing, even if the plaintiff's injury (physical or mental) is far greater than that of the average person with a latent or underlying...
Courts developed a range of “bright-line” rules to control the circumstances under which one could recover for psychic harm as the sole or primary injury.\textsuperscript{131} Some of these rules limited the underlying theory of liability of the particular tort. Assault has traditionally permitted recovery for psychological harm even in the absence of physical contact, but only where the tortfeasor is found to have intentionally put the plaintiff in fear or apprehension of injury.\textsuperscript{132} Intentional infliction of emotional distress was first recognized as a tort in the United Kingdom at the end of the nineteenth century in a case in which the defendant told the plaintiff, as a joke, that her husband had been seriously injured in an accident.\textsuperscript{133} The ensuing shock produced “serious and permanent physical consequences,” and the court permitted recovery on the assumption that this was a claim for physical injury even if the origin was a psychological shock.\textsuperscript{134}

In the United States, the tort of intentional infliction of emotional distress was slow to develop outside of the very specific and narrow context of claims against common carriers, innkeepers, and telegraph companies, or for the mistreatment of dead bodies.\textsuperscript{135} It was not until the middle of the twentieth century that the American Law Institute’s \textit{Restatement of Torts} made reference to the tort,\textsuperscript{136} and some courts interpreted it to limit recovery to instances where the tortfeasor “subjects another to the mental suffering incident to serious threats to his physical well-being.”\textsuperscript{137} In 1965, the \textit{Restatement (Second) of Torts} permitted recovery for intentional conduct that resulted in “bodily harm”; however, such recovery was premised on the plaintiff’s ability to prove that her emotional distress was “severe” and the defendant’s conduct was “extreme and outrageous.”\textsuperscript{138} If the conduct was sufficiently atrocious, a court could assume that there would be some psychological injury, diminishing concerns about malingering or unexpectedly strong reactions.\textsuperscript{139}

\begin{footnotesize}
\begin{enumerate}
\item Abel, \textit{supra} note 123, at 303–04.
\item Kircher, \textit{supra} note 126, at 790.
\item Wilkinson v. Downton, (1897) 2 Q.B. 57 (Eng.); \textit{see also} Kircher, \textit{supra} note 126, at 795 (noting that the theory of intentional infliction of emotional distress can be traced to \textit{Wilkinson v. Downton}, which did not explicitly name the tort but allowed recovery for the emotionally distressed plaintiff).
\item Wilkinson, 2 Q.B. at 58–59; Kircher, \textit{supra} note 126, at 796.
\item Kircher, \textit{supra} note 126, at 796–98.
\item Id. at 797; \textit{see also} Prosser, \textit{supra} note 123, at 874 (acknowledging the creation of a new tort yet to be named).
\item Kircher, \textit{supra} note 126, at 798 (citing \textit{Restatement of Torts} \textsection 46 (Supp. 1948)).
\item \textit{Restatement (Second) of Torts} \textsection 46 cmt. k (1965); Kircher, \textit{supra} note 126, at 800–01; Prosser, \textit{supra} note 123, at 879 (noting that the character of the conduct ensures that genuine harm occurred and warrants redress).
\item \textit{Restatement (Second) of Torts} \textsection 46 cmt. k (explaining a court may assign liability without evidence of bodily harm if conduct is extreme and outrageous); Kircher, \textit{supra} note 126, at 800 (noting “the defendant’s extreme and outrageous conduct alone tends to prove the severity of the distress,” eliminating a need for proof of any physical symptoms).
\end{enumerate}
\end{footnotesize}
Recovery for emotional distress where a negligent, as opposed to intentional, act caused no other injury—the “stand-alone” tort of “Negligent Infliction of Emotional Distress”—has been recognized by courts only within the last fifty years or so.\footnote{140} Courts’ reluctance to permit stand-alone claims for emotional distress can be generally traced, not only to concerns about malingering or exaggeration and the great difficulty in quantifying emotional distress,\footnote{141} but also to an assumption that if the only resulting harm is emotional the defendant’s negligence did not rise to a level that should trigger liability of any kind.\footnote{142} The Restatement also reasoned that any emotional injury that would occur in the absence of physical injury would be “so temporary, so evanescent and so relatively harmless” that the task of compensating for it would unduly burden defendants and the courts.\footnote{143} Some courts thought that an emotional injury itself was “too remote” from the original accident to be compensable.\footnote{144} As a result of these views, a strange body of case law developed, with a significant number of different approaches. One high court referred to this as “one of the most disparate and confusing areas of tort law,” characterized by “inconsistency and incoherence.”\footnote{145}

Although American law generally did not recognize claims based solely on emotional distress damages due to negligence until recently,\footnote{146} courts developed a variety of exceptions and requirements to permit some recovery, while retaining broader limitations on the claims.\footnote{147} The “impact rule” required a plaintiff to show some kind of initial physical contact or injury in order to recover for emotional distress, and denied recovery for the physical consequences of an initial emotional shock.\footnote{148}

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\item 140. Kircher, supra note 126, at 807–08.
\item 142. Payton, 437 N.E.2d at 178–79; see Goodrich, supra note 141, at 504–05 (indicating that when conduct is intentional no impact is necessary for defendant’s liability for emotional distress); Kircher, supra note 126, at 808 (quoting KEETON ET AL., supra note 141) (identifying potential triviality of emotional harm and the potential for an undue burden on defendant points to caution for courts); Prosser, supra note 123, at 878 (“There has been much more readiness to grant a remedy where mental suffering is inflicted intentionally than where it is the result of mere negligence.”).
\item 143. Payton, 437 N.E.2d at 178 (quoting RESTATEMENT (SECOND) OF TORTS § 436A cmt. b).
\item 145. Camper v. Minor, 91 S.W.2d 437, 440 (Tenn. 1936).
\item 146. See, e.g., RESTATEMENT (SECOND) OF TORTS § 313(1) (stating that if an actor’s negligent conduct creates an unreasonable risk of bodily harm or emotional disturbance, but results in only emotional disturbance, the actor is not liable).
\item 147. Kircher, supra note 126, at 810 (stating that these limitation were due to “judicial concern over the genuineness of claims for negligently caused emotional distress”).
\item 148. Chamallas & Wriggins, supra note 125, at 40–45; Kircher, supra note 126, at 810–11; Tibbits, supra note 14, at 86. A handful of states still follow the rule. Kircher, supra note 126, at 810 n.113. In the nineteenth century, some courts recognized limited claims for “fright” or “shock” as a basis to recover for the psychological injuries on a theory of negligence, but only where there was an accompanying physical injury. Chamallas & Kerber, supra note 130, at 819–23. Several scholars have noted that the shaping (and limits) of such legal claims were often gender-based. See, e.g., Chamallas & Wriggins, supra note 125, at 37–47
\end{itemize}
Later, several courts required evidence that the alleged emotional distress had some kind of physical manifestation—such as insomnia, nightmares, weight loss, irritability, fatigue, and extreme nervousness—where the emotional distress itself was severe. This requirement imposed a kind of objective proof on mental distress claims so that they more closely resembled claims for physical injury. The “physical manifestation” rule was an alternate means to recover for emotional distress when there was no accompanying physical injury at the time of the accident. Usually neither of these standards required showing an extensive physical injury or manifestation but both ensured that plaintiffs could not recover for purely psychic injuries (assuming that such a dichotomy could be drawn and understood).

Some states limited negligence-based emotional distress recovery to people who were within the “zone of danger” of the event; that is, someone who was sufficiently close to the accident to be at risk of physical injury, even if none resulted. This requirement limited recovery by “bystanders,” generally family members who learn of the death or serious injury of a loved one, and was sometimes linked with the “impact rule.” And some courts permitted recovery by a bystander who was not in the zone of danger (i.e., fearing for own safety) so long as the person had a “close relationship” with the person actually injured. A few courts eliminated all limitations on negligent infliction of emotional distress claims on the assumption that concerns about severity

(noting that the defendants in the first emotional distress cases were women, forging an early connection between women and fright-based injury); Weikle, supra note 18, at 211-34 (describing the role of miscarriage in the legal recognition of the right to recover for harm resulting from nervous shock).


150. CHAMALLAS & W R I G G INS, supra note 125, at 94; see also Camper, 915 S.W.2d at 442 (compiling cases evidencing such a role); Fortes v. Ramos, No. CIV. A. 96-5813, 2001 WL 1685601, at *4 (R.I. Ct. App. 2001) (detailing Rhode Island’s treatment of the physical manifestation requirement). It is not surprising that nightmares were among the physical manifestations that could serve as a basis for recovery of psychological injuries as they had long been associated with traumatic neurosis. The “battle dream” generated medical interest during World War I, and it was considered the “most characteristic symptom of war neurosis.” SHEPHERD, supra note 10, at 92; see also BARKER, supra note 1, at 26. Freud in particular noted the role of traumatic experience with dreams. Rather than representing the fulfillment of fantasy, which was the case with most dreams, he claimed that the recurring dream of trauma was the result of a fixation with the event leading to a compulsion to repeat the experience. Jonathan Lear, Freud: 154-56 (2005); SHEPHERD, supra note 10, at 107 (citing Freud, supra note 91, at 7, 13).

151. Camper, 915 S.W.2d at 442. In Kaufman v. Western Union Telegraph Co., 224 F.2d 723 (5th Cir. 1955), the Fifth Circuit’s approach was to be flexible regarding whether the “physical injury” that was required in any event preceded or came after the emotional injury. Id. at 731. In that case, the shock from a false death notice came first and led to an increase in the plaintiff’s blood pressure. Id. at 725-26. There were a few cases, however, to the contrary. See Tibbits, supra note 14, at 88-89 (discussing three cases in which plaintiffs were permitted recovery for “nervous shock” in the absence of physical injury causing such shock).

152. See Camper, 915 S.W.2d at 442 (stating that the physical manifestation test was formulated in part to dispel the belief that physical impact requirements block many worthy claims for relief based solely on emotional damages).

153. CHAMALLAS & W R I G G INS, supra note 125, at 113; Kirsch, supra note 126, at 815.


and malingering were best left to be addressed by defendants through the adversarial process.  

Faced with this well-entrenched judicial hostility toward recovery for emotional distress and psychological injuries, many lawyers evoked quasi-medical concepts, such as “traumatic neurosis,” in an attempt to bring legitimacy to their clients’ claims for such injuries. In practice, traumatic neurosis was not a clinical diagnosis per se, but rather a term generally reserved to describe psychological injuries in the context of personal injury litigation or claims for industrial and other occupational accidents. One psychiatrist described the condition in 1959 as being “the total neurotic reaction to a physical injury or, occasionally, near-injury,” which “may take many forms, e.g., conversion hysteria, anxiety reaction, obsessive-compulsive reaction, reactive depression, and other less well-defined symptom complexes.” By the time of the development of the DSM-III in the 1970s, it does not appear that the term was in wide use in litigation. One psychiatrist wrote an article in 1971 calling on attorneys to pursue more claims based upon traumatic neurosis, characterizing such conditions as being “[r]elatively [u]ntried in the [c]ourts.” He attributed the reluctance of attorneys to bring such claims, in part, to their “orientation . . . toward factual proof,” lack of objective tests to confirm such condition, and fear “of treading in the uncharted waters of traumatic neurosis.”

By the middle of the twentieth century, some cases referred to “compensation neurosis.” Like “traumatic neurosis,” it was not a recognized clinical term, but rather was a shorthand label for a subtype of traumatic neurosis that arose when there was the possibility of recovering compensation through a claim or litigation. Although it was

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156. See Kircher, supra note 126, at 816-18 (discussing cases that held no physical injury was required for plaintiffs to recover for emotional distress).

157. The “traumatic” conditions such as “traumatic hysteria,” “traumatic neurasthenia,” and particularly “traumatic neurosis” eclipsed “railway spine” in litigation claims. See supra notes 26-52 and accompanying text for a discussion of the evolution of these terms.

158. Kenneth M. Cole, Jr., Workmen’s Compensation—Damages—Compensation Neurosis Held Compensable—Miller v. United States Fid. & Guar. Co., 99 So. 2d 311 (La. App. 1959); Kinzie & Goetz, supra note 28, at 165-66; see also Hubert Winston Smith, Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli, 30 Va. L. Rev. 193, 304 (1944) (explaining that this term has little relevance given the current state of science); Hubert Winston Smith & Harry C. Solomon, Traumatic Neuroses in Court, 30 Va. L. Rev. 87 (1943) (asserting that the common prerequisites for an official diagnosis are lacking for neuroses); Jay Ziskin, New Terminology for the “Traumatic Neurosis” Case Challenging the Plaintiff’s Psychiatrist, 32 Div. L.J. 72, 73 (1983) (stating that the American Psychiatric Association never recognized traumatic neurosis).


161. Id. at 4 (emphasis omitted).

162. Id. at 6.

163. Kinzie & Goetz, supra note 28, at 171-72; see also Smith & Solomon, supra note 158, at 148 (rejecting the notion of “compensation neurosis” as being medically distinct from traumatic neurosis; it is only one part of the total reaction to the event).

generally a pejorative term, some psychiatrists used it to draw a distinction from true malingering and regarded it as the mechanism through which the possibility of secondary gain could unconsciously aggravate the primary traumatic neurosis, similar to Herbert Page's theories published in the 1880s. In fact, in the workers' compensation realm—which generally permitted a more liberal approach to causation and traumatic neurosis than did tort law—some awards were expressly based upon “compensation neurosis.”

Therefore, in the century prior to PTSD's recognition by the APA, courts permitted individuals to recover for psychological injuries only to a very limited degree. The limitations imposed by courts on such recovery reflected the contemporaneous theories of psychological injuries during this period and raised many of the same debates, such as the distinction between the emotional and the physical, the role of individual predisposition, the impact of litigation on the development and persistence of symptoms, and concerns of malingering. These same themes later emerged during the debate leading to (and resulting after) the recognition of PTSD by the psychiatric establishment.

III. THE DEVELOPMENT OF THE PTSD DIAGNOSIS IN THE DSM

Although some psychologists and psychiatrists advanced theories of psychological injury in the nineteenth century, the notion of psychopathology attributable to a specific external cause did not take root in mainstream psychiatry until it was embodied in the American Psychiatric Association's psychiatric classification system in the Diagnostic and Statistical Manual of Mental Disorders. Early editions of the DSM included some references to psychological reactions to stress. However, it was through the addition of PTSD in the DSM's third edition—with criteria that required a clinician to identify a specific event as a cause of symptoms—that psychiatry unambiguously recognized a particular mental disorder as an injury attributable to exogenous forces, initially the horrors of war and later a wide range of distressing events.

A. The Campaign for PTSD in DSM-III

There is a striking irony in the history of psychiatry and the Vietnam War. In 1967, some in the United States military claimed that the "incidence of neuropsychiatric illness" as compared to prior wars, was markedly lower as compared to prior wars,


166. Brown, supra note 14, at 431–32.

167. See Thompson v. Ry. Exp. Agency, 236 S.W.2d 36, 39 (Mo. Ct. App. 1951) (noting that a psychoneurosis can be the basis of a workers' compensation award so long as a causal link to a workplace accident has been made); Bailey v. Am. Gen. Ins. Co., 279 S.W.2d 315, 316 (Tex. 1955) (sustaining cause of action for "anxiety reaction" in a workers' compensation case); Cole, supra note 158, at 361 (asserting that compensation neurosis was "tolerated" in courts); Ramon A. Von Drehle, Workmen's Compensation-Neurosces Unaccompanied by Physical Trauma Held Compensable, 34 Tex. L. Rev. 496, 497 (1956) (describing awards of workers' compensation for psychoneurosis when there is a direct link with an accident).

168. SHEPHARD, supra note 10, at 340.
and were confident that the problem of combat-induced psychoneurosis had been resolved. However, the war later served as the catalyst for bringing the notion of psychopathology induced by an identifiable external cause into the mainstream of both psychiatry and law. Once the lens of PTSD was in place, those initially optimistic assessments seemed sharply out of focus. The 1990 Vietnam Veterans Study concluded that between twenty-five and thirty-three percent of those who served in Vietnam met the criteria for PTSD at some point, and that, as of the date of the study, fifteen percent still met the criteria.

The formal recognition of PTSD occurred at a time when American psychiatry was particularly concerned with diagnostic labels as it sought to overhaul its classification system. The APA published the first *DSM* in 1952 to create a standardized classification of diagnoses for use by clinicians. Prior to the release of the *DSM*, there were only a limited number of clinical psychiatric labels, which were generally limited to major mental illnesses seen in large public asylums.

After World War II, the spread of psychoanalytically-inclined psychiatry resulted in a great many more people being treated in the community who did not have the severe mental illnesses of those in the hospitals, creating a need for a broader range of diagnostic labels. Although the first edition of the *DSM* made significant strides towards addressing that need, it did not reflect a large consensus of psychiatrists. The notion of “diagnostic criteria” was not in keeping with the psychodynamic approach that dominated American psychiatry at this time.

The *DSM-I* did not include a term such as “traumatic neurosis” to reflect specific trauma-induced disorders. Although it did include the diagnosis of “gross stress reaction,” described as a “transient,” situational personality disorder, this was essentially a short-term reactive disorder and not indicative of any underlying neurosis or psychosis.

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169. See *id* (noting that an Army researcher stated “psychiatric casualties need never again become a major cause of attrition in the United States military in a combat zone”).

170. *Id*.


173. YOUNG, supra note 7, at 98; see also *DSM-III*, supra note 5, at 1 (reporting a new method of peer revision). Many of the labels were either a reflection of Adolf Meyer’s biopsychosocial theory of mental disorder or based upon Freudian psychoanalytic practice. SHORTER, supra note 172, at 299.

174. YOUNG, supra note 7, at 93.

175. The initial diagnostic system established by the military had a category for “psychoneurotic disorders,” but not a disorder specifically linked with exposure to trauma. YOUNG, supra note 7, at 93.

176. YOUNG, supra note 7, at 107; see SCOTT, supra note 67, at 32 (noting that the editors of *DSM-I* thought the disorder was “temporary” and normally disappeared in the absence of combat); SHEPHARD, supra note 10, at 364.

*DSM-I* defined the disorder as follows:

600-x81 Gross stress reaction

Under conditions of great or unusual stress, a normal personality may utilize established patterns of reaction to deal with overwhelming fear. The patterns of such reactions differ from those of
The second edition of the DSM was published in 1968, during the height of the Vietnam War, and its editors aimed to be consistent with the International Classification of Diseases. The edition dropped “gross stress reaction” as a distinct diagnosis, and the editors suggested that the associated symptoms could be subsumed into the category “transient situational disturbances,” which consisted of “acute reaction[s] to overwhelming environmental stress” in adults “without any apparent underlying mental disorders.” The symptoms would “usually recede as the stress diminishes” provided that the patient had “good adaptive capacity.” The subcategory of “[a]djustment reaction of adult life” encompassed “[f]ear associated with military combat and manifested by trembling, running and hiding.” However, reflecting the hold that psychoanalytic schools maintained on American psychiatry, the broad notion of “neurosis,” with its primary symptom being anxiety, remained in the manual in a category separate from the “transient situational disturbances.”

Thus, during the Vietnam War there was no diagnosis specifically tied to either combat or trauma, perhaps because that generation of DSM editors had not treated those with war neurosis. The term “combat fatigue,” a holdover from World War II, was sometimes used to describe the psychological effects of combat on soldiers, but it was not regarded as a true diagnostic label. This lack of a specific term equivalent to “shell shock” or “war neurosis” meant that, as veterans began to seek treatment and compensation for their persistent psychiatric difficulties, there was no diagnosis that
clearly captured their symptomatology. This created a substantial barrier to receiving medical care or benefits from the Veterans Administration (VA), since such care and benefits were available only for “service-connected” injuries. If the symptoms did not appear until at least a year after the veteran’s discharge, the VA would not consider them to indicate a service-connected condition. In the absence of a recognized diagnosis to capture the cluster of symptoms (and delayed onset) exhibited by many soldiers and veterans, military and VA psychiatrists diagnosed them with “character disorders” or schizophrenia, ruling out any “service-connected” disability compensation. Therefore, the veterans and their advocates made it a goal to see that the next edition of the DSM included a diagnosis that would remedy this problem.

The push to introduce a diagnosis that captured combat-related psychopathology began with a small organization called Vietnam Veterans Against the War, which held “rap groups” of veterans in New York City. The organization began working with two prominent psychoanalysts, Chaim Shatan and Robert Jay Lifton. These discussions led to the founding of the National Veterans Resource Project. The successful efforts to alter the listing of homosexuality in the then-draft edition of DSM signaled to the veterans and their supporters that any DSM listing could be the focus of debate and advocacy. One major target of the advocacy for specialized treatment of Vietnam veterans was the VA, which was still oriented towards serving the veterans of World War II, as were other major institutions serving veterans (congressional committees and organizations like the Veterans of Foreign Wars). The advocates'

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187. See id. at 365 (explaining that the VA used the DSM-II nomenclature which contained no diagnoses for “war-related trauma”). In an interview by Wilbur Scott, Chaim Shatan stated that he suspected that gross stress reaction was dropped specifically to reduce the potential financial liability of the VA. Scott, supra note 67, at 32 n.15. However, Scott’s research did not uncover any specific reason for the omission of the diagnosis. Id.

188. Scott, supra note 67, at 52.

189. Shephard, supra note 10, at 350 (discussing abnormal official statistics reflecting increases in diagnoses of character disorders, and noting that the Army did not consider those disorders psychiatric diseases); Scott, supra note 5, at 298 (noting that many VA physicians concluded that veterans who appeared to be “agitated by their war experiences, or who talked repeatedly about them, suffered from a neurosis or psychosis whose origin and dynamics lay outside the realm of combat”).

190. Id. at 365.

191. Shephard, supra note 10, at 355-56; see Scott, supra note 67, at 14-15 (referring to the groups also as “rap sessions”). Sociologist Wilbur Scott’s thoroughly researched history of the efforts of veterans’ rights advocates to gain recognition of PTSD, Vietnam Veterans Since the War (originally published as The Politics of Readjustment), is regarded by many as the leading authority on this episode. See Baldwin et al., supra note 13, at 40 (noting that Scott’s body of work, including Vietnam Veterans Since the War, provides “one of the most detailed examinations” of the subject matter).

192. Scott, supra note 67, at 6; Shephard, supra note 10, at 355-56.

193. Scott, supra note 67, at 46; Shephard, supra note 10, at 357.

194. See Scott, supra note 67, at 58 (indicating the homosexuality entry challenge created a large number of inquiries regarding revisions in DSM-II diagnoses list).

195. See id. at 52-54 (describing initial statutory efforts to introduce treatments specific to Vietnam veterans); Shephard, supra note 10, at 361-62 (detailing how the VA overcame political pressure to help Vietnam veterans and the efforts of advocates to effect change).
primary objective was to ensure that Vietnam veterans with continuing psychological difficulties could obtain health care and benefits from the agency.\footnote{196}{Kutchins & Kirk, supra note 105, at 100, 108-09.}

Shatan initially coined the missing diagnosis as "post-Vietnam syndrome,"\footnote{197}{Scott, supra note 67, at 43.} which he described as cluster of delayed-onset symptoms such as alienation, guilt, rage, the feeling of being scapegoated, and psychic numbing.\footnote{198}{Id. at 43 (referencing Chaim Shatan, Post-Vietnam Syndrome, N.Y. Times, May 6, 1972, at 35).} Shatan made no secret of his political goals with the diagnosis: "This is an opportunity to apply our professional expertise and anti-war sentiments to help some of those Americans who suffered most from the war."\footnote{199}{Ethan Watters, Crazy Like Us: The Globalization of the American Psyche 114 (2010).}

In making the case for Post-Vietnam Syndrome, Shatan and Lifton drew from post-war psychiatric literature about the Holocaust and Hiroshima.\footnote{200}{Shepherd, supra note 10, at 361.} In these contexts as well, the issues of psychological impact and compensation were closely tied. The West German government had a program to compensate concentration camp survivors, but only if a causal nexus could be established between the person's experience and the psychiatric symptoms that persisted.\footnote{201}{Id. at 359-60.} Around this time, Jewish psychoanalysts felt pressure to present research that, contrary to the claims of German psychiatrists, the psychological effects of trauma could last well beyond the traumatic event.\footnote{202}{Id. at 360.} Such persistent symptoms were classified as "survivor syndrome," which was characterized by feelings of guilt as well as "depression, anxiety and nightmares."\footnote{203}{Id. at 360-61.} As with the psychiatrists working with the veterans, those psychiatrists had taken on the dual roles of medical professionals and advocates.\footnote{204}{Id. at 360-61.}

The timing of the campaign for the new diagnosis was significant. The DSM-III, which was finally published in 1980, embodies and reflects a revolution in psychiatry.\footnote{205}{See generally Kutchins & Kirk, supra note 105, at 1-16. See Shorter, supra note 172, at 300-302 (explaining how DSM-III marked the shift from using clinical criteria to using fixed scientific criteria to diagnose psychiatric conditions); Isaac R. Galatzer-Levy & Robert M. Galatzer-Levy, The Revolution in Psychiatric Diagnosis: Problems at the Foundations, 50 Persp. Biol. & Med. 161, 161 (2007) (stating that it represents a power shift within psychiatry from those...
following psychoanalytic theory, which had dominated psychiatry (particularly in the United States for the previous half-century), to those associated with so-called biological psychiatry, which regards all psychiatric illness as having origins in brain chemistry and development.206 The editors of DSM-III aimed to create a common language for not only clinicians but also for researchers to describe mental disorders in a way that did not require one to subscribe to any particular theoretical orientation.207 One of the editors’ key objectives was to address the twin problems of the reliability (the extent to which examiners apply the same diagnosis to a set of symptoms) and validity (the extent to which a diagnosis reflects a “real” condition) in psychiatric diagnosis.208

In a new approach, the editors adopted the basic framework of early twentieth century German psychiatrist Emil Kraepelin, considered to be the father of psychiatric nosology,209 in rejecting any diagnosis that did not have a basis in empirical findings. Each disorder was assigned a set of specific criteria to be used to assess patients and to assign diagnoses. Previously, the DSM had included only vague, brief descriptions of each disorder.210 The classifications and criteria ultimately adopted in the DSM-III would be the result of field trials.211 To underscore the scrubbing of all whiffs of Freudianism, notions of the “unconscious” (and other invisible mechanisms) would be absent from the manual,212 and the editors were careful to note that the term “neurotic disorder” did not implicate any “special etiological process.”213

At first, the lead editor of the DSM-III, Robert Spitzer, rejected the call for the new “post-combat disorder” diagnosis as unnecessary based upon the recommendations of other researchers studying the psychological problems of Vietnam veterans; a campaign to reverse this position was underway soon thereafter.214 The advocates’ key ally within the psychiatric establishment was psychoanalyst Mardi Horowitz, who had by this time developed an extensive theory, based largely upon the work of Freud, 

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206. SHEPHERD, supra note 10, at 363–64 (providing historical examples of biological manifestations of psychological illness); SHORTER, supra note 172, at 239, 300–02 (summarizing trend in 1970s toward biological psychiatry).
207. YOUNG, supra note 7, at 94, 99.
209. See YOUNG, supra note 7, at 95–96, 99 (describing Kraepelin’s pioneering work with psychiatric nosology).
210. See SHORTER, supra note 172, at 301–02 (noting the increased length and detail of DSM-III as compared to previous DSM editions).
211. DSM-III, supra note 5, at 4–5; SHORTER, supra note 172, at 302; YOUNG, supra note 7, at 95.
212. YOUNG, supra note 7, at 100.
213. DSM-III, supra note 5, at 9–10 (emphasis omitted); see also SHORTER, supra note 172, at 304 (explaining that the editors of DSM-III differentiated between “neurosis” and “neurotic process” in order to appease major interest group of psychoanalysts). Apparently, DSM-III retained the term “neurosis” (which Spitzer had attempted to strike out) only as a compromise to the psychoanalytic camp, who otherwise would have refused to approve the new manual. Spiegel, supra note 208, at 60–61.
Kardiner, and others, about "stress response syndromes." Horowitz described a number of different reactions to traumatic stress, including avoidance of things associated with the events (including memories) and "intrusive" effects when the memories nonetheless caused a reexperiencing of the events, both of which Kardiner had described in his studies of World War I veterans. Although the number of acute psychiatric casualties initially appeared to be lower in Vietnam, some officials noted the impact of "stress" on soldiers during their one-year stints. Towards the end of the war, Horowitz predicted a high incidence of delayed-onset psychiatric reactions or "stress response syndromes" by soldiers.

The advocates of the new diagnosis were careful not to limit it to combat reactions, but rather applied it to a broad category of individuals exposed to "trauma." In their work with the APA, they revised the name of the proposed diagnosis to "catastrophic stress disorder," with a sub-type of "post-combat stress reactions." The symptom list for the initial formulation of PTSD developed by Shatan, Lifton, and Horowitz was largely taken from Abram Kardiner's *The Traumatic Neuroses of War*.

Together, these psychiatrists refined a "unitary kind of 'trauma'" that was ultimately embodied in the diagnostic criteria of PTSD. It drew heavily on Freudian theory about the emotional impact of repressed memories of earlier traumatic events and the pathogenic memory. They expressly stated that there were

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219. *See generally Mardi J. Horowitz & George F. Solomon, A Prediction of Delayed Stress Response Syndromes in Vietnam Veterans*, 31 J. Soc. Issues 67 (1975). The delay was attributed to the widespread use of both illicit drugs, such as heroin, as well as tranquilizers, such as chlorpromazine, both widely available. *Shephard*, supra note 10, at 351–53.

220. *See Shephard*, supra note 10, at 366 (noting that "Shafton, Lifton and their allies" began to look at post-combat disorder as a sub-class of a more general phenomenon, and thus began reviewing "literature of catastrophes in general").

221. *Scott*, supra note 67, at 64.


223. *Young*, supra note 7, at 89, 91.


226. *See supra* notes 33–66 and accompanying text for a discussion of theories that indicate the pathogenic memory plays a role in psychoneurosis.
no predisposing factors, other than the exposure to the traumatic event. However, this description contained more etiology than the editors could tolerate. They responded that but for the link with a specified event the symptoms could be found in other conditions, and therefore the diagnosis was unnecessary.

The sole empirical support for the proposed diagnosis that Shatan and Lifton could offer was anecdotal evidence that some VA doctors had been noting “traumatic war neurosis” on patient charts for years in the absence of a recognized diagnosis. Although this was not the type of empirical data that Spitzer aspired to have as the sole basis for the DSM-III diagnoses, these case histories had a significant impact on Nancy Andreasen, the chair of the DSM-III Committee on Reactive Disorders and a psychiatrist within the APA mainstream who had worked on the psychological impact of trauma, specifically with burn victims. However, what was perhaps more convincing for those within the APA was the “moral” case for including the diagnosis. By adopting the diagnosis, the psychiatric establishment would help eliminate one of the key barriers to veterans’ access to compensation and health care for their mental troubles. To do otherwise would leave the responsibility on the shoulders of the veterans themselves.

The final name and criteria for PTSD emerged from the Committee on Reactive Disorders, and it largely followed the recommendation of Lifton, Shatan, and others on the working group that had developed the “catastrophic stress disorder” diagnosis, changing little other than the name of the diagnosis and eliminating the “post-combat” subtype. It was placed within the “Anxiety Disorders,” and its “essential feature” was described as “the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience.” The “characteristic symptoms” were “reexperiencing the traumatic event; numbing of responsiveness to, or reduced involvement with, the external world;...
and a variety of autonomic, dysphoric, or cognitive symptoms. The criteria differentiated between “acute” PTSD, with an onset within six months of the trauma and a duration of less than six months, and “chronic or delayed” PTSD, which had either or both an onset of more than six months or duration longer than six months.

In short, the diagnosis appeared to provide the veterans precisely what they needed to pursue claims for compensation and care.

B. The A Criterion

The publication of the diagnostic criteria for PTSD in the DSM-III marked a significant moment in the history of both psychiatric diagnosis and legal claims for psychological injuries. PTSD provided psychiatry with a means to classify a psychological injury that developed “in normal people . . . following an extremely traumatic event.”

Accordingly, unlike the remainder of DSM-III diagnoses, the criteria for PTSD were not “atheoretical,” as that term is employed in psychiatric nosology. Specifically, the list of diagnostic criteria for the disorder includes the “A Criterion” (also commonly referred to as the “stressor criterion”), which, in DSM-III, is described as “a recognizable stressor that would evoke significant symptoms of distress in almost everyone.”

As described in the explanatory text, the diagnosis required the prior occurrence of a specific etiological event “outside the range of usual human experience” that would create “significant symptoms of distress in most people.” In other words, the diagnosis itself contains a theory of the etiology of the symptoms.

Robert Spitzer has acknowledged this to be the case: “[A] key distinguishing feature of PTSD is that it is not agnostic to etiology. Unlike virtually all diagnoses in the DSM, PTSD rests on the assumption of a specific etiology, whereby a distinct set of events (criterion A) is assumed to be the uniformly most potent contributor to outcome.”

237. Id. The text also states that “[p]reexisting psychopathology apparently predisposes to the development of the disorder.” Id. at 237. This language regarding predisposition seems at variance with Scott’s description of the committee report that was the basis for the final diagnosis, but he provides no explanation for its inclusion in the DSM-III.

238. DSM-III, supra note 5, at 238. There is no reference in the main text to the concept of “traumatic neurosis” or any other similar diagnostic labels that had been used (and were still in use) to describe psychological injuries. Baldwin et al., supra note 13, at 41. This is likely because the term was never accepted as part of any official psychiatric nosology.


240. “Atheoretical” refers to an absence of an assigned specific theory for the cause of a mental disorder. See Dorthe Berntsen et al., Contrasting Models of Posttraumatic Stress Disorder: Reply to Monroe and Mineka, 115 Psychol. Rev. 1099, 1099-1100 (2008) (discussing how the PTSD diagnosis formed an exception to the absence of etiology throughout DSM-III); Young, supra note 7, at 115 (providing a further explanation of the term “atheoretical” in this context and his application of the term to PTSD and the DSM).

241. DSM-III, supra note 5, at 238.

242. Id. at 236.

Similarly, the Institute of Medicine's recent analysis of PTSD observed that “the necessary cause of PTSD is by definition a traumatic event.”

The A Criterion has been described as the “gatekeeper” and the “defining feature” of the diagnosis because the “DSM theory of PTSD” is that “time and causality move from the traumatic event to the other criteria features.” Absent "the event," the symptomatology would be assigned a different diagnosis. Once the event is identified and deemed to fit within the A Criterion definition of “traumatic,” the symptoms are transformed into markers of PTSD. DSM-III also set forth a specific list of symptoms or reactions to the A Criterion event, and it distinguished between reactions that had an onset soon after the event and those that were latent, occurring more than six months after the event. A key feature in the symptom cluster described in DSM-III is the role of memory and dissociative experiences such as “flashbacks.” In other words, the past remains very much in the person’s present and is the subject of “persistent reexperiencing.”

The new diagnosis therefore “violated basic guidelines about theory and research that had been established for the DSM-III,” and, most notably, the editors’ attempts “to eliminate etiology from their description of disorders.” At the time of the first iteration of PTSD, there was a controversy over whether the event, as opposed to a person’s predisposition, should be regarded as the primary cause of the symptoms. PTSD, as it finally appeared, reflected a break from the way traumatic neurosis and

244. Spitzer et al., supra note 243, at 319 (quoting INST. OF MED., POSTTRAUMATIC STRESS DISORDER: DIAGNOSIS AND ASSESSMENT 23 (2006)).


246. YOUNG, supra note 7, at 120.

247. Id. at 115.

248. YOUNG, supra note 7, at 120; Baldwin et al., supra note 13, at 44.


250. Edgar Jones et al., Flashbacks and Post-Traumatic Stress Disorder The Genesis of a 20th-Century Diagnosis, 182 B RIT. J. PSYCHIATRY 158, 160 (2003). The term “flashback” was not directly mentioned in the DSM-III, but was included as a synonym for some PTSD symptoms in the DSM-III-R. Id.

251. AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 250 (3d ed. rev. 1987) [hereinafter DSM-III-R]; see Jones et al., supra note 250, at 160 (stating that soldiers were “reliving episodes from . . . active service”). This is in variance from the notion of the transformation of repressed memories into internal conflicts as a result of subsequent events in the person's life. See Jones et al., supra note 250, at 160 (discussing the idea that “certain experiences, which are neither salient nor meaningful when they occur, acquire an emotional potency or importance by an additional piece of information” and, in a sense, “a normal recollection of an event becomes transformed into a disturbing and highly significant memory.”).

252. KUTCHINS & KIRK, supra note 105, at 114. Strictly speaking, the category of “Substance Use Disorders” could arguably include a link to causation since the category “deals with behavioral changes associated with more or less regular use of substances that affect the central nervous system.” DSM-III, supra note 5, at 165; Correspondence from David Rubin to Deirdre M. Smith, Prof. of Law and Glassman Scholar, University of Maine School of Law (July 29, 2010) (on file with author). However, psychiatry does not appear to regard such association as having a basis in a “theory,” in the same respect as PTSD's link with traumatic events.

253. Bersten et al., supra note 240, at 1100.
similar conditions were viewed in that the persistence of the symptoms was not regarded as being due to an individual's inability to adapt. The drafters of PTSD considered what they assumed to be the legal implications of this debate; as Horowitz later recalled: "If trauma were the main cause of symptoms, the institutions or people responsible for causing or not preventing the traumatic events could be held legally responsible for damage to victims." 

The explanatory text accompanying the original PTSD criteria provided several examples of the kinds of traumatic events that meet the A Criterion (rape, military combat, floods, earthquakes, plane crashes, torture), and notes: "The disorder is apparently more severe and longer lasting when the stressor is of human design." One psychiatrist explained the rationale for this observation as follows: "Stressors caused by man appear to have a greater traumatic impact than natural events. The injured person usually feels that a manmade stressor is preventable, whereas natural disasters are unavoidable acts of God. Feelings of rage, retribution, and vengeance are commonly experienced." In other words, categories of trauma for whom another person (whether natural or corporate) could be held responsible were assumed to be most likely to result in reactions like PTSD.

Notions about legal obligation thus drove the specific criteria of PTSD. In order for the veterans to be able to claim entitlement to "service-connected" benefits the proponents of the diagnosis concluded that such "connection" to military service needed to be built into the diagnosis. By framing the condition as it did, the DSM-III made it unquestionably clear that those who were previously psychiatrically healthy could suffer severe functional limitations as a result of being exposed to traumatic stress that was not of their own making. Thus, we see a diagnosis that embodies a shift of responsibility from one to another, or at least away from the patient. Without such a feature embodied in A Criterion, PTSD would have emerged in 1980 looking like all of the other DSM-III diagnoses, or more likely, it would not have emerged at all since its symptoms overlap with other disorders in the manual.

With a diagnosis built around their experiences, veterans were indeed more successful in obtaining not only health coverage and disability benefits but also validation from the United States Government itself that they had endured an experience that transformed a "normal" person into one who was ill and in need of care and compassion. With PTSD cast as it was, there was little room for debate that its occurrence in Vietnam veterans was "service-connected," and therefore the veterans with such diagnosis would be among those receiving "top priority" care and compensation. Once PTSD was accepted for inclusion in the DSM, the veterans advocacy groups took the next step and successfully lobbied the Senate Veterans Affairs Committee to issue a report authorizing the VA to recognize and compensate PTSD in Vietnam veterans.

254. Id
255. Horowitz, supra note 225, at 1.
256. DSM-III, supra note 5, at 236.
257. Simon, supra note 245, at 57.
258. Young, supra note 7, at 113.
259. Young, supra note 7, at 114.
There have been two revisions to the A Criterion since its initial inclusion in the DSM-III in 1980. In 1987, with the publication of the revised edition of the Third Edition, DSM-III-R, the APA revised the criterion as follows:

The essential feature of this disorder is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience . . . . [and] would be markedly distressing to almost anyone . . . .

The most common traumata involve either a serious threat to one's life or physical integrity; a serious threat or harm to one's children, spouse, or other close relatives and friends; sudden destruction of one's home or community; or seeing another person who has recently been, or is being, seriously injured or killed as the result of an accident or physical violence. In some cases the trauma may be learning about a serious threat or harm to a close friend or relative, e.g., that one's child has been kidnapped, tortured, or killed.

This revision moved some of the explanatory description into the criterion itself (with minor rewording), and provided a list of examples of the kinds of events that would be considered "outside the range of human experience" and "markedly distressing to almost anyone." The aim of this revision was to address the problem of different individuals having different "stress thresholds." The editors had hoped that providing the list of examples would clarify that the A Criterion stressors were "at the extreme end of the stress continuum," since it was assumed that the more "severe and life-threatening" events would be more likely to produce psychopathology such as PTSD.

The APA revised the diagnostic criteria for PTSD for a second time in 1994. For the DSM-IV, the APA divided the A Criterion into two parts:

A. The person has been exposed to a traumatic event in which both of the following were present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

(2) the person's response involved intense fear, helplessness or horror

These changes broadened the criterion to allow a wider range of events and experiences to qualify for the criterion and also introduced a subjective component.

261. Id. at 247.
262. Wilson, supra note 62, at 694.
263. Id. Wilson was on the committee that recommended the revisions.
265. Id. at 427–48. The DSM-IV also added a new disorder, "Acute Stress Disorder," which was also premised on the occurrence of a traumatic event, but, unlike PTSD, could be diagnosed within four weeks after the traumatic event to classify an individual's immediate emotional reaction. Id. at 429–32; see also KUTCHIN & KIRK, supra note 105, at 117–18 (providing an overview of the new Acute Distress Disorder diagnosis).
266. See Naomi Breslau & Ronald C. Kessler, The Stressor Criterion in DSM-IV Posttraumatic Stress Disorder: An Empirical Investigation, 50 BIOLOGICAL PSYCHIATRY 699, 700, 703–704 (2001) (concluding that there was "no doubt that the intent [of the revision of Criteria A in the DSM-IV] was to enlarge the variety
DSM-IV eliminated the "normative criterion of the 'average' person," by removing the reference to "almost anyone." The revisions also removed the reference to the event being "marcally distressing" to the average person without specifying when such distress occurs—whether at the time of the event or in the recollection of it.

There was also no longer a reference to events being "outside the range of usual human experience." This revision ostensibly conformed the language of the criteria to its use in practice. Clinicians frequently disregarded the original phrasing in that they did not attempt to determine the actual frequency of such events or the appropriate context for such analysis. For example, among Vietnam veterans, exposure to death and dismemberment was not unusual. Sexual assault is not infrequent, particularly in certain cultures or locations. And clinicians did not hesitate to diagnose PTSD in war veterans or rape survivors. However, some commentators have claimed that the DSM-IV revision to the A Criterion resulted in a substantial increase in people diagnosed with PTSD.

The revisions to PTSD and the A Criterion did not silence the critics within psychiatry who questioned the validity and utility of having a disorder in the DSM linked categorically to a specific and identifiable cause rather than being no more than a set of frequently coexisting symptoms. In fact, the expanded range of potential stressor events, coupled with the contemporaneous increase in the forensic use of PTSD as discussed in the next Part, only served to fuel the debate.

267. Simon, supra note 245, at 59. Compare DSM-IV, supra note 264, at 427 (requiring "the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others"), with DSM-III, supra note 5, at 238 (requiring "existence of recognizable stressor that would evoke significant symptoms of distress in almost everyone"). Some studies suggest that clinicians generally waived that requirement even prior to the amendment. Young, supra note 7, at 124.

268. Young, supra note 7, at 124–25. Freud and others made a link between the experience of fear at the time of the event and the causation of traumatic neurosis. Id. at 125.


270. See Young, supra note 7, at 127 (comparing DSM-III-R's literal meaning of traumatic event and actual diagnostic practice of PTSD). This revision is somewhat similar to the distinction between intentional infliction of emotional distress and negligent infliction of emotional distress, where the former was more readily accepted by courts because it required a showing of conduct so "extreme and outrageous" that the plaintiff's resulting emotional distress was not suspect. See supra notes 127–56 and accompanying text for a discussion of emotional injury and liability.

271. See Young, supra note 7, at 127.

272. Kutschas & Kiek, supra note 105, at 118.

273. Id. at 121. One study suggested a fifty percent expansion in those diagnosed after this revision. Lisa Appignani, Mad, Bad and Sad: A History of Women and the Mind Doctors 427 (2007); Judith Herman, Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror 427 (rev. ed. 1997) (1992). Harvard psychiatrist Judith Herman, one of the leading figures in the effort to apply the PTSD diagnosis to women who had experienced sexual assault, sexual abuse, domestic violence, and other forms of violence, served on the APA committee that advanced the amendments. Herman, supra, at 426–27.
IV. PTSD AND QUESTIONS OF LIABILITY

Once the psychiatric establishment fully embraced the concept of a psychological injury by adopting PTSD in *DSM-III*, attorneys began to explore potential uses of this diagnosis in a wide range of settings in which the key question was how to assign responsibility, whether civil or criminal. In some respects, this was the continuation of the strategy used with the nonclinical term “traumatic neurosis,” but it came at a time when there was also a turning point in law regarding the role of psychiatric diagnosis in legal proceedings. This change was due in large part to the fact that *DSM-III* was the first edition of the manual to have widespread use beyond the psychiatric profession. Psychiatric diagnosis itself had a new and central role in litigation that touched on mental issues, and the *DSM-III*’s code-like structure and ostensible “scientific” basis eased the way for the diagnoses themselves to be evidence in litigation.

As noted in Part III, the *DSM-III* marked a revolutionary moment in the history of psychiatry.274 Beginning with that edition, the *DSM* had remarkable impact. It is referred to by some as a “bible,”275 by others as a “consensus document.”276 It is used universally throughout the psychiatric profession in the United States and in a great deal of the rest of the world.277 However, its true power comes from its wide adoption outside of the mental health profession, in a range of institutional, educational, and administrative settings. The legal system is one such institution that has widely incorporated use of the *DSM.*278 Philosopher Ian Hacking, who writes about the interactions between science (including psychiatry) and the wider culture, observes that, although we assume that the classifications we create merely reflect what is there, such classifications in fact shape the systems that use them and the people within that system, creating a “looping effect.”279 PTSD’s influence on the legal system serves as an example of this effect.

Although the APA certainly was aware that recognition of PTSD would yield immediate benefits for countless Vietnam veterans, the editors of *DSM-III* apparently anticipated the appeal the manual as a whole would hold for the legal system. Near the

275. Id.
277. *KTCHENS & KIRK*, supra note 105, at 10–12 (remarking that every mental health professional owns a copy of the *DSM*, and the *DSM* has had a broad impact on other sectors of life); *SHORTE*, supra note 172, at 302 (noting that, by the early 1990s, the *DSM* had been translated into more than twenty languages and was being used widely in France and Germany; “[t]he appearance of DSM-III was thus an event of capital importance not just for American but for world psychiatry”).
278. *KTCHENS & KIRK*, supra note 105, at 11–12; see also Greenberg et al., supra note 6, at 7 (noting that the *DSM* has become a forensic mantra).
279. Ian Hacking, *Kinds of People Moving Targets*, 131 Proc. Brit. Acad. 285, 285–86 (2006); see also *YOUNG*, supra note 7, at 107 (explaining that diagnostic technologies like the *DSM-III* “are an integral part of the historical formation of some of the disorders (including PTSD) that they now identify and represent”).
end of his introduction to *DSM-III*, lead editor Robert Spitzer included a brief paragraph titled “Cautions,” which stated:

The purpose of *DSM-III* is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat various mental disorders. The use of this manual for non-clinical purposes, such as determination of legal responsibility, competency or insanity, or justification for third-party payment, must be critically examined in each instance within the appropriate institutional context.\(^{280}\)

However, the nonclinical and nonresearch uses of *DSM-III*, and specifically PTSD, were soon widespread in the legal system with scant little of the critical examination urged by Spitzer. Indeed, perhaps in response to this trend, the editors’ caution has grown more emphatic with each new edition of the *DSM*, to little avail.\(^{281}\)

PTSD has had many applications in the law in a wide range of contexts, including criminal law (with respect to defenses and sentencing)\(^{282}\) and workers’ compensation.\(^{283}\) However, the discussion here will focus on two contexts in which courts have permitted PTSD, and particularly the A Criterion, to take a critical role in establishing liability: (1) to prove that a criminal complainant or civil plaintiff was subjected to a traumatic event, such as child sexual abuse; and (2) in tort cases, to establish liability for stand-alone claims for emotional distress. As one psychiatrist noted, PTSD is particularly powerful in legal settings because it “carries a legal and moral implication that someone else is responsible for an event so overwhelming that anyone could develop a potentially severe psychiatric disorder as a result.”\(^{284}\) Such

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280. DSM-III, supra note 5, at 12.
281. Greenberg et al., supra note 6, at 6.
283. PTSD resulted in an expansion of recovery of workers’ compensation benefits for employees who demonstrated psychological injuries from their workplaces. Much like the veterans who asserted “service-connected” injuries arising from their combat, employees attempted to analogize their workplace to traumatic stressors and to seek compensation for work-related mental injuries. See generally, Izabela Z. Schultz, Psychological Causality Determination in Personal Injury and Workers’ Compensation Contexts, in PSYCHOLOGICAL INJURIES AT TRIAL, supra note 229, at 102. In one remarkable case, the Supreme Court of Arizona permitted a police officer to pursue a workers’ compensation claim for PTSD, resulting from an incident in which he was shot nearly twenty-four years prior to the 1984 filing date. Henry v. Indus. Comm’n of Ariz., 754 P.2d 1342, 1344-45 (Ariz. 1988). The court permitted such a claim on the basis that PTSD was “not diagnosable” in 1960 when the incident occurred. Id.
power is particularly apparent in these two contexts because the fact of the medical diagnosis is assigned a role in the determination of legal liability.

A. The Fact of the Traumatic Event

With the recognition of PTSD by the APA, Vietnam veterans began using the diagnosis in the criminal law as part of defenses or in seeking lighter sentences. However, PTSD's impact in criminal settings attracted more notice when prosecutors began using the diagnosis in criminal trials for sexual assault and child sexual abuse. Prosecutors have long faced "distinctive evidentiary problems" when prosecuting child sexual abuse cases because generally the only witness is the child complainant. The child may be particularly young or inarticulate, either of which could implicate problems of competency or credibility. Similarly, in rape prosecutions, the key factual disputes often turn on the credibility of the complainant. In both cases, there is often little other evidence to corroborate the complainant's allegations. The recognition of PTSD by the APA suggested new potential strategies to address these challenges.

Soon after the release of DSM-III, prosecutors sought to offer testimony through psychological experts centered on the theory and criteria of PTSD to opine that the complainant's behavior was consistent with having been sexually abused or assaulted, and, from that assessment, to opine that the complainant in fact had been sexually abused or assaulted. PTSD and the "traumatic stress model" of child sexual abuse were useful due to "the unequaled etiological significance [PTSD] placed on 'outside' (external to psyche) trauma." Such experts generally employed the criteria or general concept of PTSD, but some also used terms such as "child sexual abuse accommodation syndrome" (CSAAS) or "rape trauma syndrome" (RTS). Such uses of the DSM and PTSD were met with fierce resistance from defense attorneys, and courts struggled with the question of whether to admit such evidence and for what


286. See Richard Klein, An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness, 41 AKRON L. REV. 981, 1016-17 (2008) (explaining that a major reform in rape prosecutions deals with "weaknesses in the prosecutor's case arising from victim conduct which appears to be inconsistent with that of an individual who had just been sexually assaulted").

287. Askowitz & Graham, supra note 285, at 2046; see also Susan A. Clancy, The Trauma Myth: The Truth About the Sexual Abuse of Children—and Its Aftermath 100--101 (2009) (discussing the introduction of sexual abuse as a traumatic event in order to conceptualize the harm endured by a victim as a form of PTSD).


291. People v. Taylor, 552 N.E.2d 131, 132 (N.Y. 1990); Ann Wolbert Burgess, Rape Trauma Syndrome, 1 BEHAV. SCI. & L. 97, 98 (1983); see also State v. Allewalt (Allewalt II), 517 A.2d 741, 754 (Md. 1986) (Eldridge, J., dissenting) (reviewing the origin of the term "rape trauma syndrome" and noting that it is recognized as "a sub-category of post-traumatic stress disorder in which the triggering trauma is rape").
purposes. A significant body of case law, with a wide variety of approaches, developed in the first twenty years after PTSD was recognized.

The least controversial use of such PTSD evidence is on rebuttal to rehabilitate the complainant after impeachment by offering possible alternative reasons (based upon the diagnoses) for the person to have acted in a manner that, on the surface, would appear to be inconsistent with being a victim of rape or sexual abuse. Courts have been significantly more conflicted, however, on the issue of whether to admit during a prosecutor’s case in chief expert testimony that the complainant had PTSD symptoms for the purposes of establishing that the person had been a victim of rape or abuse. The prosecution would offer an expert to testify that the alleged victim displayed “typical” or hallmark symptoms of these syndromes indicating that the victims had experienced trauma consistent with that alleged by the prosecution.

Courts have been sharply divided on the admissibility of such evidence. One court that upheld the admission of such evidence concluded that, since the incidence of PTSD in an individual “indicates that she might have been sexually abused,” such evidence is probative of one of the central questions in these cases, even if the evidence is not being offered in response to an issue raised by the defense. Other courts that have admitted such evidence reasoned that it was not being admitted to prove that a crime had been committed but rather only to help the jury understand the behavior of sexually abused children or to negate suggestions or defenses of consent. The excluding courts’ concern with admitting PTSD testimony for such purposes, even if not articulated precisely this way, essentially stems from the role of the A Criterion—that the application of the diagnosis to an individual appeared to represent a clinical opinion that the person had in fact been exposed to a traumatic event.

292. See State v. Alberico, 861 P.2d 192, 207 (N.M. 1993) (explaining that nearly all jurisdictions have concluded that PTSD evidence is appropriate to explain a victim’s behavior that is inconsistent with having been raped); Taylor, 552 N.E.2d at 138 (concluding that jurors can be assisted by evidence of RTS to dispel common misconceptions about rape).

293. Askowitz & Graham, supra note 285, at 2048-51.

294. See Burgess, supra note 291, at 110 (recounting a Montana Supreme Court case where evidence of the complainant’s symptoms of rape trauma syndrome was found to be probative and helpful to the jury to resolve); Alberico, 861 P.2d at 207–08 (holding that the prosecution’s introduction of expert testimony to show that a crime had been committed was proper).

295. See Alarid v. Ind. 571 A.2d at 751 (finding PTSD expert testimony is admissible by distinguishing it from RTS testimony, which most courts find inadmissible); Chapman v. State, 18 P.3d 1164, 1172 (Wyo. 2001) (stating that although most courts find testimony about PTSD to be sufficiently reliable to warrant admission, the purposes for which this testimony may be admitted remains a subject for debate). See generally Missy Thornton, State v. Chaunin: Determining the Admissibility of a Post-Traumatic Stress Syndrome Diagnosis as Substantive Evidence of Sexual Abuse, 78 Tul. L. Rev. 1743 (2004) (discussing split among both federal and state courts on whether expert witness testimony about PTSD to establish the trauma in fact occurred is admissible).

296. Alberico, 861 P.2d at 207–09.


299. See State v. Chaunin, 846 So. 2d 697, 707–08 (La. 2003) (stating that the method of diagnosing a person with PTSD is designed for therapeutic purposes and is not reliable as a fact-finding tool); People v. Taylor, 552 N.E.2d 131, 138–139 (N.Y. 1990) (finding the therapeutic nature of RTS makes it unreliable when introduced to prove a crime took place); State v. Black, 745 P.2d 12, 18 (Wash. 1987) (holding that RTS
The various judicial opinions in the litigation of a Maryland rape case, Allewalt v. State,\(^{300}\) exemplify the key arguments in this debate. In the 1983 trial, during which the defendant asserted a consent defense, the trial court permitted the state to offer rebuttal testimony of a forensic psychiatrist.\(^{301}\) The psychiatrist had examined the complainant and concluded that she had the symptoms of PTSD.\(^{302}\) The trial court admitted the testimony after conducting a voir dire examination of the expert, concluding that PTSD “has been around for a long time,” is “nothing new,” and was “recognized” within psychiatry.\(^{303}\) The trial court reasoned that the witness would “assist [the] jury in making a determination as to [the complainant’s] state of mind at the time of the event on the basis of post event findings.”\(^{304}\) However, on cross-examination, the psychiatrist conceded that in developing his opinion about whether the complainant had PTSD, he assumed that she had in fact been raped by the defendant: “I think it is more important that the individual reporting, that is the patient or person you are evaluating, believes that it took place. But . . . the whole diagnosis is predicated on the assumption that some traumatic incident occurred.”\(^{305}\) The psychiatrist also opined that none of the complainant’s other circumstances (i.e., a history of depression and “marital and domestic problems”) would account for her symptoms.\(^{306}\)

An intermediate appeals court reversed the conviction on the basis that the expert testimony was improperly admitted because its prejudicial effect outweighed the probative value, which was quite small in light of the fact that the assumption the rape had taken place rendered the expert’s conclusions unreliable in establishing that she had not consented to the sexual encounter.\(^{307}\) The appellate court was also concerned that the testimony appeared to be bolstering the credibility of the complainant: “By stating that a rape could cause the disorder, an expert implicitly verifies the victim’s claim that rape did cause it.”\(^{308}\)

expert testimony is not a scientifically reliable means of proving rape occurred because the diagnosing individual is not concerned with the accuracy of the victim’s description of the event); People v. Bledsoe, 681 P.2d 291, 301 (Cal. 1984) (noting that RTS testimony is not scientifically reliable because it is not based on a narrow set of criteria and its purpose is to help a victim of trauma, not to prove the trauma occurred). The opinion is “clinical” in the sense that it is based upon an examination of the person for purposes of making a medical assessment.

\(^{301}\) Allewalt I, 487 A.2d at 665–66.
\(^{302}\) Id. at 666.
\(^{303}\) State v. Allewalt (Allewalt II), 517 A.2d 741, 743 (Md. 1986).
\(^{304}\) Id.
\(^{305}\) Allewalt I, 487 A.2d at 666 (omission in original) (quoting cross-examination testimony).
\(^{306}\) Id.
\(^{307}\) Id. at 669–70. Other courts have also excluded similar evidence on the basis that jurors would be confused by the evidence or the defendant would be unfairly prejudiced, and based their rulings on rules similar to Federal Rule of Evidence 403. See, e.g., People v. Taylor, 552 N.E.2d 131, 138–39 (N.Y. 1990) (excluding RTS expert testimony because it might create an inference in the minds of jurors that rape occurred, which presents undue prejudice against the defendant). Federal Rule of Evidence 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403.
\(^{308}\) Allewalt I, 487 A.2d at 670.
The Court of Appeals of Maryland, in a sharply divided opinion, reversed and reinstated the conviction. The majority specifically noted the diagnostic criteria for PTSD and concluded that the psychiatrist was “acting well within the field of his special training and experience” when he opined, as part of the diagnostic process, that the alleged victim had experienced a sexual assault. In other words, arriving at an opinion about the occurrence of a trauma was simply part of what the PTSD criteria required. The majority concluded that the appellate court had imposed too high a standard on the admission of such testimony. Rather, it reasoned, this was simply another form of expert testimony as to causation of symptoms, which is generally admissible. The majority reviewed the competing line of cases on the issue of admitting PTSD (or RTS) testimony in the prosecution of rape cases and concluded that the testimony of the expert was sufficiently limited to warrant its admission at trial:

Just as a jury can understand that evidence of the complainant’s hysteria shortly following an alleged sexual assault tends to negate consent, so a jury, with the assistance of a competent expert, can understand that a diagnosis of PTSD tends to negate consent where the history, as reviewed by the expert, reflects no other trauma which in the expert’s opinion could produce that medically recognized disorder.

The concurring justice opined that there was some role for a forensic psychiatrist to offer testimony about PTSD generally (since it would not be within the general knowledge of the fact-finder), but thought that courts should draw the line at permitting a psychiatrist to opine that the witness had PTSD resulting from the alleged crime. The author of the dissenting opinion, however, reasoned that “[b]ecause post-traumatic stress disorder is not a fact-finding tool, but a therapeutic tool useful in counseling, and the relevant scientific literature does not even purport to claim that the disorder is a scientifically reliable means of providing that a rape occurred,” the testimony should not have been admitted. He also thought that there was no way to guard against the jury concluding that the expert had reached a conclusion about the alleged victim’s credibility and using the testimony to reach their conclusions about that issue.

Courts across the country debated the admissibility of such evidence for several years after the first reported cases, and apparently the consensus of the courts at present is to admit PTSD (or related syndrome) evidence in sexual assault cases, generally with a limiting instruction to jurors regarding the appropriate use of the evidence.
admissibility of PTSD or CSAAS evidence in child sexual abuse prosecutions, however, remains varied from state to state. Some courts that have rejected RTS or CSAAS have done so largely because, unlike PTSD itself, they are not found in the DSM, or because such terms have assumptions about the specific cause of the symptoms built into the names of the terms.

The use of PTSD evidence to prove the fact of the traumatic event is not limited to the criminal context. In civil cases, although a plaintiff may offer evidence of PTSD for the purportedly limited purpose of proving the extent of her damages, the nature of PTSD and its A Criterion suggests a finding of liability as well. Some plaintiffs suggest that their PTSD symptoms are probative of whether they had in fact been subjected to trauma. For example, if someone displays symptoms of PTSD, such evidence could be persuasive on the question of whether she did in fact experience sexual harassment. Courts have been less wary of its use in civil cases as compared with criminal prosecutions, but some have expressed concern about the potential inferential leap invited by such evidence and put strict limitations on the extent of an expert's testimony.

The A Criterion in the civil context raises the same problem of circularity as seen in the sexual abuse and rape cases. Clinicians cannot apply the PTSD diagnostic criteria without opining about the nature, extent, or even the existence of a reported or purported stressor event. Although a doctor setting a broken leg may refer to the fact of a motor vehicle collision in her report, whether or not a collision occurred has no bearing on whether the doctor concludes that the leg is broken. By contrast, the A Criterion requires an assessment of the stressor event on the part of the clinician to determine whether it met whatever the A Criterion required at that time. The existence of such a clinical determination cannot be deemed insignificant since the APA has amended the diagnostic criteria specifically (and more than once) to define who can be diagnosed with the disorder.

If a psychiatrist cannot in fact diagnose a person as having PTSD without making a determination as to whether a stressor event satisfying the A Criterion occurred, then

373, 373–74 (N.Y. App. Div. 2005) (ruling that RTS evidence was properly admitted in part because the court provided a limiting instruction).
319. See State v. Roles, 832 P.2d 311, 318 n.4 (Idaho Ct. App. 1992) (noting that the term RTS is much more inflammatory than the term PTSD); State v. Gettier, 438 N.W.2d 1, 5–6 (Iowa 1989) (finding no error in admitting evidence where an expert testified to PTSD instead of the more prejudicial term, RTS).
320. See, e.g., Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1358 (4th Cir. 1995) (upholding admission of expert psychological testimony opining that the plaintiff's symptoms "were consistent with those of someone who had been sexually assaulted"); overruled, Pa. State Police v. Suders, 542 U.S. 129 (1994).
321. See, e.g., Isely v. Capuchin Prov., 877 F. Supp. 1055, 1057 (E.D. Mich. 1995) (holding that an expert on PTSD may only testify to her theories and opinions of the syndrome and whether the plaintiff's behavior is consistent with someone who is suffering from PTSD); Garcia v. Los Banos Unified Sch. Dist., No. 1:04-CV-6059-SMS, 2007 WL 715526, at *5–5 (E.D. Cal. Mar. 8, 2007) (denying defendant's motion to exclude PTSD testimony from plaintiff's expert but cautioning plaintiff's counsel to ask only about the diagnosis, causation, and extent of harm, rather than the underlying events in that sexual harassment case).
there is considerable question as to whether psychiatrists can testify in the more theoretically limited role that some courts assign in terms of rehabilitating victims who have been impeached or in cases in which the occurrence of the stressor event is a central controversy. This problem is not unique to the A Criterion since several other PTSD criteria also tie back to the supposedly traumatic “event.” For example, if a person is “re-experiencing” an event, there is an explicit assumption that the person previously “experienced” the event that now arises in intrusive thoughts and nightmares. Similarly, if someone is avoiding something, such avoidance is a “symptom” only if it is associated with an identified traumatic event. These symptoms each link to the diagnostician’s initial assessment of the fact of “the event.”

Use in criminal and civil cases as proof of the occurrence of the traumatic event is based upon an assumption that a psychologist or psychiatrist, employing specialized skills, can attribute an individual’s symptoms to a specific event, isolated from the “myriad other sources encountered in life.” Thus, although the courts that found PTSD evidence to be potentially useful to fact finders claimed that they were not admitting expert testimony to bolster the credibility of the plaintiff or complainant, there can be little doubt that the evidence potentially has such effect. Given the central role of credibility in these cases and the challenge of reconciling competing stories, it is not difficult to imagine that a fact finder receiving the testimony of a mental health professional would, notwithstanding any limiting instruction, give it great weight as a measure of the truthfulness of the plaintiff-complainant’s allegations.

B. Tort Liability for Psychological Injury

As noted above, courts have been far less reluctant to admit PTSD in civil claims than in criminal cases. The diagnosis offers plaintiffs “a significant benefit” when

322. PTSD’s connection to memory raises the prospect of treating or perhaps even preventing PTSD using memory dampening techniques. If this is the case, this raises the possibility that plaintiffs are expected to mitigate their damages, shifting responsibility for PTSD back to the plaintiffs. See Adam J. Kolber, Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening, 59 Vand. L. Rev. 1561, 1592–95 (2006). For a broader discussion of the question of mitigation of psychological injuries, see generally Lars Noah, Comfortingly Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages, 42 U. Mich. J.L. Reform 431, 448–79 (2009).

323. Ralph Slovenko, Introduction to PTSD In Litigation, supra note 245, at xiv, xxiv.


325. See Christopher Slobogin, Psychological Syndromes and Criminal Responsibility, 6 Am. Rev. L. & Soc. Sci. 109, 118–19 (2010) (reviewing studies regarding the impact of RTS testimony on juror decision-making). Indeed, one court that concluded that PTSD should be admissible in sexual abuse prosecutions declined to draw distinctions among the various purported uses of the evidence. State v. Alberico, 861 P.2d 192, 210–12 (N.M. 1993). The court reasoned that there was no “logical difference” between using such evidence to explain a complainant’s behavior, to opine as to the complainant’s credibility, or to provide a specific opinion as to the “causality” of the complainant’s symptoms in relation to sexual abuse. Id.
proving causation and the extent of emotional injuries in tort cases, and its potential use in personal injury litigation is apparent. Articles appeared in legal publications assessing the potential impact on personal injury claims by the diagnosis, particularly after the 1994 revisions of the A Criterion. A psychiatrist observed that, by virtue of the A Criterion, "an external injury is by definition the explicit cause of this disorder," which then operates to support "legal arguments regarding single and proximate causation of harm." A forensic psychologist observed that PTSD is the "most common courtroom diagnosis" in claims of psychological injury. One defense attorney cautioned others that any PTSD claims they encounter must be "fleshed out as soon as possible and attacked immediately."

The APA's recognition of PTSD had a significant impact on the determination of liability for psychological injuries and, in the words of one group of commentators, "transformed and expanded the horizons of tort litigation, resulting in the recognition of a host of new claims tied to the diagnosis." It has had this effect in several ways that will be briefly reviewed here.

The DSM-IV appeared at a time when courts were grappling with the issue of whether and under what circumstances to permit recovery for emotional injuries, as described earlier in Part II. Although some courts permitted recovery for "traumatic neurosis," the notion of compensating for emotional injuries remained controversial. Many courts continued to apply the "impact rule" or the "physical manifestation" rule to limit damages for psychological injuries. With PTSD now listed in the definitive authority on mental disorders, however, several courts began to build their legal standard for negligent infliction of emotional distress around whether the emotional

327. See, e.g., Alphonso v. Charity Hosp. of La. at New Orleans, 413 So. 2d 982, 987 (La. Ct. App. 1982) (affirming $50,000 emotional distress award that was based upon PTSD diagnosis resulting from sexual assault in hospital).
328. See, e.g., Ziskin, supra note 158, at 73 (noting that all claims for "traumatic neurosis" would be cast using PTSD, "which appears to cover most of the cases formerly called traumatic neurosis").
329. See, e.g., Kutcher & Kirk, supra note 105, at 122 (explaining how changes in PTSD diagnoses were recognized by an audience that included non-psychotherapists); Paul R. Lees-Haley, DSM-IV Alert: Changes Important to Claims Evaluation, For the Def., June 1995, at 29, 30 (noting that problem of PTSD for defense attorneys may become worse under the DSM-IV revisions); Mark I. Levy, Stressing the Point: Post Traumatic Stress Disor...
injury was “medically diagnosable,” often using PTSD expressly or impliedly as the basis for evaluating whether specific claims met that standard. \footnote{335}

Some courts concluded that psychiatry had sufficiently progressed to the point where there was less reason to be concerned regarding the validity of such claims. \footnote{336} For example, in 1983, the Supreme Court of Missouri in \textit{Bass v. Nooney Co.} \footnote{337} was influenced by the “prevailing” belief among courts that “the development of psychiatric tests and refinement of diagnostic techniques have enabled science to establish with reasonable medical certainty the existence and severity of psychic harm” and “mental trauma.” \footnote{338} Accordingly, the court’s new legal standard included the requirement that “the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant.” \footnote{339} The dissent was less certain that the new standard was workable: “What does ‘medically significant’ mean in a courtroom?” \footnote{340}

Similarly, the Supreme Court of Tennessee dispensed with that state’s “physical manifestation” rule in \textit{Camper v. Minor}, \footnote{341} a personal injury case in which PTSD was the primary basis of the claim for damages, and instead imposed the requirement that claims of negligent infliction of emotional distress “be supported by expert medical or scientific proof.” \footnote{342} A Louisiana appeals court reached a similar conclusion and allowed an award for emotional injury damages to stand because the plaintiff suffered from “more than fright[,] . . . there was sufficient proof of emotional injury, \textit{post-traumatic stress disorder}, to support the Trial Judge’s award of damages.” \footnote{343}

\footnote{335. See Jarrett v. Jones, 258 S.W.3d 442, 449 (Mo. 2008) (holding that plaintiff’s PTSD was sufficient to establish that his emotional injury was “medically diagnosable and of sufficient severity to be medically significant.”); Hamilton v. Neeter, 659 N.W.2d 321, 329–30 (Neb. 2003) (holding that although plaintiff did suffer diagnosable and medically significant emotional distress, it was not of sufficient severity to be actionable); Johnson v. Ruark Ob / Gyn, 395 S.E.2d 85, 97 (N.C. 1990) (finding that severe emotional distress must be generally recognized and diagnosed by medical professionals); Hegel v. McMahon, 960 P.2d 424, 431 (Wash. 1998) (holding that “nightmares, sleep disorders, intrusive memories, fear, and anger” would be sufficient to satisfy the “objective symptomatology” requirement for negligent infliction of emotional distress, but only if they “constitute a diagnosable emotional disorder” such as PTSD).


\footnote{337. 646 S.W.2d 765 (Mo. 1983).

\footnote{338. \textit{Bass}, 646 S.W.2d at 769; see also Paugh v. Harke, 451 N.E.2d 759, 765 (Ohio 1983) (criticizing the persistence of the physical manifestation rule because it “completely ignores the advances made in modern medical and psychiatric science”).


\footnote{340. \textit{Bass}, 646 S.W.2d at 781 (Donnelly, J., dissenting).

\footnote{341. 915 S.W.2d 437, 446 (Tenn. 1996).

\footnote{342. \textit{Camper}, 915 S.W.2d at 439, 446.

\footnote{343. Id at 1023 (emphasis added). One notable implication of the increased use of PTSD in making emotional distress, such as to “medically diagnosable” standards, was the prospect of extensive discovery of a plaintiff’s mental health history or a requirement to submit to an independent psychiatric examination on the theory that such plaintiff has waived the psychotherapist-patient privilege. See generally Deirdre M. Smith, \textit{An}}
Some of the changes to PTSD’s A Criterion actually paralleled or even influenced the evolution in the legal standards for recovering for emotional distress. For example, many courts expanded the rules for liability to “bystanders” to include recovery for merely observing or encountering a trauma occurring to a family member.\textsuperscript{344} Similarly, the revisions to the A Criterion in \textit{DSM-IV} included extending “eligibility” for the diagnosis to one who “witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.”\textsuperscript{345} Indeed, at least one court cited specifically to that amended diagnostic language in deciding where to draw the line in allowing recovery for negligent infliction of emotional distress claims.\textsuperscript{346} Another court held, for purposes of summary judgment, that an expert witness’s opinion that the plaintiff had PTSD “as a direct and proximate result of being personally involved in a collision that resulted in the death of a child” was sufficient to generate a factual issue as to causation.\textsuperscript{347}

Not all courts embraced PTSD as a measure of the advancement of psychiatry’s role in law, and some explicitly rejected legal standards for recovery based upon the presence of a psychiatric diagnosis such as PTSD.\textsuperscript{348} The Supreme Court of Alaska, for example, reasoned that including a requirement of standard such as that in \textit{Bass}—that the distress be “medically diagnosable or objectifiable”—would usurp the jury’s function in determining the severity of the emotional distress as a question of fact.\textsuperscript{349}

The recognition of PTSD also did not silence the concerns about malingering in claims for psychological injuries; indeed, malingering has been a central issue with PTSD, perhaps more than any other diagnosis, due to the strong association with litigation.\textsuperscript{350} Although studies have documented the incidence of malingering, no

\textsuperscript{344} E.g., Clohessy v. Bachelor, 675 A.2d 852, 865 (Conn. 1996); Cameron v. Papin, 610 A.2d 279, 284 (Me. 1992); Gates v. Richardson, 719 P.2d 193, 199 (Wyo. 1986).

\textsuperscript{345} \textit{DSM-IV}, supra note 264, at 427; \textit{see also} Baldwin et al., supra note 13, at 42 (noting that \textit{DSM-IV} expanded the qualifications for PTSD to include one who “witness[ed]” or “learned about” a threat to a loved one’s life).

\textsuperscript{346} Marzolf v. Stone, 960 P.2d 424, 429 & n.2 (Wash. 1998) (citing \textit{DSM-IV}, supra note 264, at 429, and permitting recovery for family member who observed an injured family member at the scene of an accident). In an article titled \textit{Compensation Neurosis Rides Again} defense attorney James T. Brown wrote: “PTSD[] is demonstrating an ability to influence the current tort system, both economically and doctrinally. The diagnosis is being used to erode traditional legal restrictions and barriers to recovery.” Brown, supra note 332, at 467.

\textsuperscript{347} Jarrett v. Jones, 258 S.W.3d 442, 449 (Mo. 2008).


\textsuperscript{349} Chizmar, 896 P.2d at 205. However, among the reasons that the jury would have had sufficient basis to award the plaintiff damages was that she “presented medical testimony that she suffered from post-traumatic stress disorder.” Id.

\textsuperscript{350} Phillip J. Resnick, \textit{Guidelines for Evaluation of Malingering in PTSD}, in \textit{PTSD in Litigation}, supra note 245, at 187, 188. Defense-oriented commentators have attempted to resurrect notions of "compensation neurosis" to suggest that the secondary gain from alleging a potential traumatic stressor are the
empirical research has established a specific link between PTSD-related malingering and the prospect of compensation.\textsuperscript{351} However, the diagnostic criteria are readily available, and some court opinions have noted incidents of coaching by attorneys.\textsuperscript{352} The DSM-IV\textsuperscript{'}s addition of a subjective element in the A Criterion made the issue all the more acute.\textsuperscript{353} Indeed, the DSM-IV\textsuperscript{'}s inclusion of a comment directed specifically at PTSD: "Malingering should be ruled out in those situations in which financial remuneration, benefit eligibility, and forensic determinations play a role."\textsuperscript{354} This caveat is not directed at other diagnoses and did not appear in other editions.\textsuperscript{355} This reflects psychiatry's own acknowledgment of the unique link between that diagnosis and determinations of compensation.

C. Evidentiary Limitations on PTSD Evidence

The key mechanism in law to determine what a fact finder may consider in making determinations of liability (or resolving other legal controversies) is the body of relevant evidence law. Thus, questions of whether and where a fact finder may consider PTSD in assigning criminal or civil liability necessarily implicates the rules of evidence, particularly those pertaining to relevance and expert testimony. However, perhaps because courts have regarded PTSD as being a medical (and therefore "scientific") diagnosis uniquely suited for aiding in determinations of liability, courts have generally leaned in favor of putting such evidence in the hands of fact finders.

Evidence of PTSD is generally offered through expert witnesses, whether they are treating clinicians who describe their diagnostic impressions of their patients or forensic examiners retained by one of the parties to evaluate an individual and render an opinion on a specific issue tied to the civil or criminal litigation. Accordingly, the admissibility of PTSD evidence directly implicates the rules regarding the admissibility of expert opinion evidence. A comprehensive examination of the various rules governing the admissibility of evidence of PTSD and other mental disorders is beyond the scope of this Article,\textsuperscript{356} but a few of the particular admissibility issues that PTSD evidence implicates will be addressed.

\textsuperscript{351} See Resnick, supra note 350, at 187 (asserting that financial gain is primary motivation to malinger); Simon, supra note 245, at 81-82 (noting that secondary gain may be one of several factors in maintaining PTSD symptoms); Richard A. Bryant & Allison G. Harvey, The Influence of Litigation on Maintenance of Posttraumatic Stress Disorder, 191 J. NERVOUS & MENTAL DISEASE 191 (2003) (noting the "widely held view" that PTSD is "often mediated by compensation factors").

\textsuperscript{352} Some national service organizations reportedly distributed the PTSD criteria to Vietnam veterans, which could have made malingering easier. Resnick, supra note 351, at 195. See also Nelson v. Research Corp. of Univ. of Haw., 805 F. Supp. 837, 844-45 (D. Haw. 1992) (finding lack of candor on part of plaintiff alleging PTSD for, among other things, reviewing diagnostic criteria for disorder before reporting the full range of symptoms).

\textsuperscript{353} See Resnick, supra note 351, at 187 (noting that PTSD diagnoses are made "almost entirely" on subjective symptoms, and that the accessibility of DSM-IV\textsuperscript{'}s criteria makes malingering easier).

\textsuperscript{354} DSM-IV, supra note 264, at 427 (emphasis omitted).

\textsuperscript{355} Gerald M. Rosen & Steven Taylor, Pseudo-PTSD, 21 J. ANXIETY DISORDERS 201, 201-02 (2007).

\textsuperscript{356} For an overview of the applicable rules and case law, see generally Daniel W. Shuman, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE (3d ed. 2005); David Faust et al., The Admissibility of
The DSM-III was published only five years after Congress enacted the Federal Rules of Evidence, which evidenced a shift towards a bias of admissibility of a wide range of relevant evidence, including opinion testimony. In 1993, the year before the DSM-IV was released with its broader A Criterion, the United States Supreme Court issued its opinion in Daubert v. Merrill Dow Pharmaceuticals, Inc., which, along with the follow-up cases in the following few years, significantly revised the approach federal and many state courts took to the admissibility of most kinds of scientific and other expert testimony. The Court ruled that the federal common law Frye test for determining the admissibility of expert testimony—whether the basis for the opinion enjoyed “general acceptance” in the relevant scientific community—did not survive the enactment of the Federal Rules of Evidence with their “liberal thrust” and their “general approach of relaxing the traditional barriers to opinion testimony.” Rather, the Court held, courts should serve as “gatekeepers” of the admissibility of such evidence and consider a range of factors (rather than prerequisites) in assessing the reliability and relevance of the proffered expert testimony.

Most psychiatric evidence generally fared well under Frye as being “generally accepted.” The courts that reached such conclusions with respect to PTSD often based them primarily on the fact that PTSD had been included in the DSM. In theory, “abandonment of the Frye ‘general acceptance’ test” by the federal courts and the states that followed Daubert’s lead should have precluded granting any kind of “immunity from judicial scrutiny” to the DSM generally or PTSD specifically. However, few courts have used Daubert or other evidence rules to limit the admissibility of PTSD testimony, or indeed most other forms of clinical psychiatric evidence, and it appears that the controversies in the psychiatric and related medical...
or academic literature over the validity and reliability of this diagnosis have not had any significant impact on its use in courts. Courts also seem to be unconcerned with the fact that the PTSD criteria, including the A Criterion, were revised three times in fourteen years.

Courts have been somewhat more willing to play the role of “gatekeeper” for the use of PTSD and related diagnoses by prosecutors in sexual abuse and rape cases since such use directly implicates questions of the reliability of the testimony. Nonetheless, many courts provide fairly cursory analyses before admitting PTSD-based evidence. In 2001, the Supreme Court of Wyoming, applying Daubert, appeared to conclude that the broader question of admissibility of PTSD testimony in sex abuse cases was by then resolved. In an appeal of a sexual abuse conviction, the defendant argued that the trial court erred in allowing the state to offer a psychiatrist’s testimony that the complainant had PTSD on the basis that “the theory of PTSD related to child sexual abuse is not sufficiently developed to permit an expert to formulate a reasonable opinion on the subject.” The court rejected those arguments, noting first that PTSD’s inclusion in the DSM was in itself evidence that it had “achieved acceptance in the fields of psychiatry and psychology.” Further, the court reasoned, “the PTSD diagnosis appears to be grounded in basic behavioral psychology.” More significantly, by that time, the diagnosis had been “widely, although not universally, accepted by other jurisdictions as a reliable form of expert testimony in this context,” although the specific purpose for which it could be offered was still subject to some controversy.

Another example of a court applying little scrutiny to the reliability of PTSD evidence as proof of sexual abuse is a 1993 opinion of the Supreme Court of New Mexico, State v. Alberico. The court concluded: “We hold that PTSD testimony is grounded in valid scientific principle.” The inclusion of PTSD in DSM-III was a large part of that determination because the court reasoned that “[t]he existence of DSM III-R and its general acceptance in psychology indicate that PTSD has been exposed to objective scientific scrutiny and empirical verification.” The court also accepted the State’s argument that trained psychologists could “isolate the cause of the symptoms because different stressors manifest themselves in different symptoms.” The court thought that the “current state of the technique” of the diagnosis of PTSD had advanced sufficiently since the time of earlier decisions to permit experts to testify

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“mammoth study,” which demonstrated that “courts ignore [Frye and Daubert] when psychiatric testimony is at issue”.

367. See Chapman v. State, 18 P.3d 1164, 1173 (Wyo. 2001) (applying Daubert and stating that “[t]he pivotal question in determining the admissibility of PTSD testimony in sexual assault cases is the testimony’s relevance to the issues in the case”).

368. Id. at 1169.

369. Id. at 1171.

370. Id. at 1172.

371. Id.


373. Alberico, 861 P.2d at 208.

374. Id.

375. Id. at 209.
that the complainant's PTSD symptoms were consistent with having been sexually abused. 376

By contrast, some courts have declined to admit PTSD evidence specifically due to concerns about its reliability for purposes of proving that a trauma had occurred and have held that the fact PTSD is included in the DSM does not end the analysis required under Daubert's "gatekeeping" standard. 377 The Supreme Court of Washington held that it was improper to admit expert testimony on rape trauma syndrome, regardless of whether it was described as PTSD, on the basis that it was not a scientifically reliable method of determining whether a rape had occurred and it amounted to an expert opinion on the guilt of the defendant and the credibility of the plaintiff. 378 Similarly, the Louisiana Supreme Court concluded: "[I]t is widely accepted that PTSD has not been proven to be a reliable indicator that sexual abuse is the trauma underlying the disorder or that sexual abuse has even occurred." 379

The concept of the "traumatic memory" underlying PTSD also led to the theory of the "repressed memory" of a traumatic event that could be subsequently "recovered" through psychotherapy. 380 This theory became a central issue in several lawsuits in which adults claimed to have recovered memories of childhood abuse and then sought compensation. 381 A federal district court considered the reliability of evidence of PTSD and repressed memory in Isely v. Capuchin Province. 382 Relying largely on the reasoning in Alberico and the extensive work of the plaintiff's expert witness—who

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376. See id. at 209 (finding testimony, which indicated that psychologists have ability to isolate the cause of different symptoms, more persuasive than "judicial determinations of validity based on evidence that [was] many years old"); id. at 213 (holding that it was not an abuse of discretion for the trial court to admit expert testimony on PTSD because the expert testimony was convincing based on the validity of the science and contradictory case law was based on out-dated scientific evidence).

377. See, e.g., State v. Chauvin, 846 So. 2d 697, 705, 709 (La. 2003) (holding expert testimony inadmissible due to a lack of showing reliability and accuracy of PTSD evidence, and noting that despite PTSD being catalogued in the DSM, evidence that trial court performed its "gatekeeping" function was still necessary).


379. Chauvin, 846 So. 2d at 707-08 (concluding that the diagnostic criteria for PTSD was intended to be used for dealing with the aftermath of severe traumatic events, not for providing clinical and forensic tools). In civil cases as well, courts restricted the admissibility of PTSD evidence to prove that a plaintiff had experienced a traumatic event. In Spencer v. General Electric Co., 498 F. Supp. 1072 (E.D. Va. 1988), a federal district court (applying Frye in a pre-Daubert case) excluded the plaintiff's proffered psychological expert who would have testified that the alleged victim in the underlying sexual harassment case suffered from PTSD and therefore some kind of trauma must have occurred for such symptoms to be present, and that the only stressors in her life that could have caused such symptoms were the alleged rape and harassment. Id. at 1074. The court reasoned that "[e]vidence of PTSD occasioned by rape . . . is not a scientifically reliable means of proving that a rape occurred." Id. at 1075-76.


381. Shepherd, supra note 10, at 390.

had, among other things, served on the committees that revised Criterion A in *DSM-III-R* and *DSM-IV*—the court concluded that the expert “has met the foundational requirements to testify regarding PTSD and repressed memory.”383 The court further ruled that it would permit the expert to “not only testify as to her theories and opinions concerning PTSD and repressed memory, but also . . . to testify as to whether [the plaintiff’s] behavior is consistent with someone who is suffering repressed memory or post-traumatic stress disorder.”384 Although the court ruled that she could not go further and testify expressly that she believed the allegations, the court drew a very fine distinction there.385

In civil cases in particular, courts have grappled with the respective roles of the court, the fact finder, and the expert witness in applying the A Criterion to the issues presented at trial, particularly since the determination of the A Criterion so closely resembles the fact finding of causation typical in many trials.386 These questions are particularly apparent in cases where the court or a party raises questions about whether the forensic examiners or clinicians strictly adhered to the *DSM* criteria, including the A Criterion, when assigning PTSD diagnoses.387 Generally, courts do not exclude testimony on such basis, concluding that the issue goes to the weight rather than the admissibility of the testimony.388

For example, in *Bachir v. Transoceanic Cable Ship Co.*, the defendant filed a post-verdict motion to set aside an award to a former cook employed on a ship for damages resulting from an accident in which he tripped and fell over some pipes.389 A neuropsychiatrist had testified at trial that the plaintiff had PTSD as a result of the accident, which satisfied the “traumatic event” (i.e., A Criterion) requirement of the *DSM-IV*’s criteria for PTSD.390 Although the defense offered contradictory expert testimony on the issue of whether such incident could trigger PTSD, the trial court

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384. Id. at 1067.
385. Id.
386. Compare Marzolf v. Stone, 959 P.2d 424, 429 (Wash. 1998) (determining that the court has the authority to determine the sufficiency of emotional trauma to impose liability on a defendant), and Nielsen v. Research Corp. of Univ. of Hawaii, 805 F. Supp. 837, 844 (D. Haw. 1992) (determining that the court has the ultimate authority to determine if an individual meets the criteria for PTSD), with Bachir v. Transoceanic Cable Ship Co., No. 98 Civ. 4625(JFK), 2002 WL 413918, at *8 (S.D.N.Y. Mar. 15, 2002) (determining that it is the jury’s task to weigh and assess the credibility of expert witnesses regarding psychiatric testimony).
387. Apparently, it is not uncommon for treating or evaluating clinicians to vary from following the *DSM* criteria for PTSD and other disorders. See Robert I. Simon, Preface to *Posttraumatic Stress Disorder in Litigation: Guidelines for Forensic Assessment*, at xv (Robert I. Simon ed., 2d ed. 2003) (“In litigation, it is quite common to find the diagnosis of PTSD made without any attempt to follow the diagnostic criteria for this disorder.”). Cf. Owen Whooley, *Diagnostic Ambivalence: Psychiatric Workarounds and the Diagnostic and Statistical Manual of Mental Disorders*, 52 SOC. HEALTH & ILLNESS 452, 458 (2010) (finding that “[t]o carve a space of autonomous practice psychiatrists develop a series of workarounds to insulate their practice from [a] literal, reductionist application of the DSM”).
388. See Lingo v. Burle, No. 06·CV·1392 CAS, 2008 WL 1914148, at *3 (E.D. Mo. Apr. 25, 2008) (denying a defendant’s motion to exclude expert testimony based on the fact that courts “rarely exclude an expert from testifying under *Daubert* for failure to adhere to the DSM”).
391. Id. at *8.
dismissed the post-trial challenge to the admissibility of the evidence as going only to "weight and credibility" and therefore an issue for the jury to decide.\textsuperscript{392}

Some courts, however, have applied more scrutiny to plaintiffs' experts' opinions where they appear to stray from the DSM criteria, and at least one even substituted its own assessment. In the bench trial opinion in \textit{Nelsen v. Research Corp. of the University of Hawaii},\textsuperscript{393} another injury-at-sea case, the district court made a specific factual finding that, despite the plaintiff's treating psychiatrist's testimony to the contrary, the underlying incident at issue in that case—an on-board flood on a research vessel due to a faulty bilge pump—did not meet the A Criterion as it appeared in the DSM-III-R.\textsuperscript{394} Accordingly, for this reason, it was not "reasonably foreseeable" that the plaintiff would develop PTSD and he was not entitled to compensation for his psychological injury.\textsuperscript{395}

\textit{Alvarado v. Shipley Donut Flour & Supply Co., Inc.}\textsuperscript{396} is one of the few federal court opinions in civil cases demonstrating close scrutiny of PTSD testimony under a \textit{Daubert} analysis, but the result may have been due to the apparent overreaching by the plaintiffs and their expert.\textsuperscript{397} The federal district court excluded plaintiffs' expert testimony in an employment discrimination claim brought by twelve employees.\textsuperscript{398} The psychologist retained by the plaintiffs examined all twelve and diagnosed each of them with PTSD.\textsuperscript{399} The district court conducted a close review of the psychologist's techniques under \textit{Daubert} and concluded that they fell far short of being sufficiently reliable for admission.\textsuperscript{400} Among the deficiencies noted were a failure to use any of the standardized diagnostic instruments available for PTSD evaluations and the \textit{absence} of Criterion A1, the traumatic event.\textsuperscript{401} The judge further noted that the expert's conclusion that all fifteen of the original plaintiffs had PTSD was highly suspect, given studies suggesting that the post-trauma incidence is closer to ten to fifteen percent.\textsuperscript{402}

\begin{itemize}
\item \textsuperscript{392} \textit{Id.} at *8--9 (holding that the question of whether the incident at issue in the litigation was severe enough to satisfy the PTSD A Criterion was a matter for the jury, and that the plaintiff's expert testimony was properly admitted despite indications that he did not follow the DSM criteria when diagnosing plaintiff with PTSD); see also \textit{S.M. v. J.K.}, 262 F.3d 914, 921--22 (9th Cir. 2001) (concluding that the fact that the plaintiff's psychiatrist did not follow the PTSD criteria in effect at the time of the examination only indicated the "range where experts might reasonably differ, and where the jury must decide among the conflicting views" (quoting \textit{Kumho Tire Co. v. Carmichael}, 526 U.S. 137, 153 (1999))).
\item \textsuperscript{393} \textit{Nelsen}, 805 F. Supp. at 843--44; see also \textit{Perkins v. Gen. Motors Corp.}, 709 F. Supp. 1487, 1495--96 (W.D. Mo. 1989) (rejecting plaintiff's psychological expert's testimony that plaintiff had PTSD as a result of the alleged sexual harassment because "the stressor essential for the diagnosis does not exist").
\item \textsuperscript{394} \textit{Nelsen}, 805 F. Supp. at 844--46. Although the court concluded that the plaintiff was entitled to some compensation for his depression following his discharge from employment by the defendant, he was not otherwise entitled to compensation for a psychological injury. \textit{Id.} at 845--46. The court also appeared to discount the experts' assessment of PTSD since one of them had furnished the plaintiff with the DSM-III-R criteria before he was evaluated. \textit{Id.} at 844--45.
\item \textit{Alvarado}, 2007 WL 4480134, at *3--7.
\item \textit{Id.} at *7.
\item \textit{Id.} at *1.
\item \textit{Id.} at *1.
\item \textit{Id.} at *3--7.
\item \textit{Id.} at *4--6.
\item \textit{Id.} at *6.
\end{itemize}
In short, with few exceptions, courts generally do not use rules of evidence as a basis to restrict PTSD-based expert testimony. Rather, reasoning that due to its inclusion in DSM PTSD is a "medically recognized disorder," courts regard it as relevant, useful, and appropriate for fact finders to employ, even when making essential determinations of liability, and rely upon the adversarial process to flesh out the limitations of such evidence.

There are several other possible reasons for courts' inclination (implicitly or explicitly) to use PTSD in liability determinations. Courts and attorneys are drawn to the DSM perhaps because the diagnostic criteria bear some resemblance to legal criteria, with "prongs" and categorical criteria. Courts may place significant weight on the identification of psychiatric disease by doctors because they are doctors, ascribing to them a special power to detect disease and malingering. Courts may simply use PTSD as a stand-in for a broader legal rule regarding recovery for psychological injuries. Regardless of the specific reasoning, however, there is little indication that courts consider or acknowledge PTSD's development and long-standing association with assigning legal responsibility when deciding to admit such evidence.

V. PTSD'S PERSISTENT CONTROVERSIES

As demonstrated in Part IV, many courts assume that PTSD represents a well-settled scientific fact and, therefore, a reliable tool for fact finders to use when making liability determinations. However, during the three decades since the DSM-III's publication, the controversy over the diagnosis has not diminished and has perhaps intensified as a result of the extensive study of PTSD that took place only after the diagnosis was officially established. Robert Spitzer, DSM-III's lead editor, noted...
recently that, since PTSD's introduction "no other . . . diagnosis, with the exception of Dissociative Identity Disorder (a related disorder), has generated so much controversy in the field as to the boundaries of the disorder, diagnostic criteria, central assumptions, clinical utility, and prevalence in various populations." The large-scale epidemiological studies of PTSD have revealed strikingly diverse conclusions, putting some trauma researchers on the defensive regarding the validity of the diagnosis itself. The original questions raised about PTSD have not been answered in the eyes of many in psychiatry, including, perhaps most centrally, whether it is a normal reaction to an extraordinary event.

PTSD has been subjected to particular scrutiny within behavioral science in part because of the use of the diagnosis, or at least the term, in the courts and the broader culture. Many psychiatrists and psychologists have been struck by the widespread adoption of PTSD as "a household word and courtroom plea." Forensic psychiatrist Roger Pitman observed: "Perhaps more than any other psychological or medical disorder, [PTSD] has influenced, and been influenced by, the law. . . . [I]t has become the most important diagnosis in the forensic psychology of personal injury." Former APA President Alan Stone has been highly critical of PTSD's widespread adoption, particularly in personal injury law.

Asmundson, supra note 380, at 65-66 (finding criterion for traumatic stressor to be too liberal in some instances, such as viewing of film The Exorcist being classified as a traumatic stressor for individual who developed PTSD-like symptoms afterwards). Cf. Chris R. Beavin, Posttraumatic Stress Disorder: Malady or Myth? 29-28 (2003) (examining historical divergence in diagnosis of diseases similar to PTSD).


408. Young, supra note 7, at 130-33; see also Levy, supra note 13, at 6-7 ("[T]he very terms in which PTSD is described tend to produce controversy.")

409. Yehuda & McFarlane, supra note 239, at 1705-07.

410. See Appignanesi, supra note 273, at 427-28 (explaining that when the criteria delineating what qualified as PTSD were broadened, the diagnosis rate rose by half); Sherer, supra note 10, at 355, 385-87 (stating that the mental health field's adoption of PTSD as "scientific truth" and the ensuing media attention led to an "infinite" amount of literature on the subject); Siegler, supra note 172, at 290 (noting that after entry into popular culture, PTSD was "trivialized. . . . as a way of psychologizing life experiences"); Baldwin et al., supra note 13, at 45-48 (questioning legitimacy of popular concern about American citizens developing psychological injuries from learning about the September 11, 2001 terrorist attacks with an absence of such concern in following the Japanese attack on Pearl Harbor); Rachel Yehuda & Alexander C. McFarlane, PTSD is a Valid Diagnosis Who Benefits from Challenging Its Existence?, 26 PSYCHIATRIC TIMES, no. 7, July 9, 2009, at 31, available at http://www.psychiatrictimes.com/display/article/10168/1426957 (suggesting that some psychiatrists are bothered by PTSD due to their "resentment that some persons fake [PTSD] symptoms for secondary gain" or that some patients cease treatment as soon as they are awarded compensation).

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412. Paul R. McHugh & Glenn Treisman, PTSD A Problematic Diagnostic Category, 21 J. ANXIETY DISORDERS 211, 212 (2007). One psychiatrist commented that the concepts "traumatic" and "stress" for PTSD have become so non-specific as to be almost meaningless, and suggested that a more accurate term is "Post Somethings Really Horribler Disorder." Chris Cantor, Post-Traumatic Stress Disorder's Future, 192 REVI. J. PSYCHIATRY 594, 594 (2008).

413. Roger K. Pitman et al., Legal Issues in Posttraumatic Stress Disorder, in PSYCHOLOGICAL INJURIES AT TRIAL, supra note 229, at 861, 861-65; see also Landy F. Sparr & James K. Boelkin, Posttraumatic Stress Disorder in Tort Actions Forensic Medicine, 18 BULL. AM. ACAD. PSYCHIATRY & L. 283, 283 (1990) ("[PTSD] as the basis for a tort claim is a union of forensic problem children.")
No diagnosis in the history of American psychiatry has had a more dramatic and pervasive impact on law and social justice.

By giving diagnostic credence and specificity to the concept of psychic harm, PTSD has become the lightning rod for a wide variety of claims of stress-related psychopathology in the civil arena.

The recognition of this disorder by the medical community changed the nature of personal injury litigation. Several psychiatrists and psychologists, even those with forensic training and experience, raised questions early on regarding the ways that PTSD found its way into the courtroom. In 1983, Lawrence Raifman, with training in both law and psychology, questioned the use of PTSD in legal settings and argued that PTSD’s underlying conceptual problems made it a particularly poor fit for answering legal questions, whether they arise in criminal or in civil matters. He was particularly concerned that the misuse he observed in just the first few years of the diagnosis’s official existence would eventually lead to “skepticism and possible stigmatization of PTSD complainants,” which would “threaten the credibility and validity of the diagnostic entity.”

There is no dispute within psychiatry that many people who experience serious and distressing events may have resulting long-term psychological symptoms, some quite severe. However, the specific conceptualization of PTSD as a stand-alone diagnosis with a defined set of symptoms has brought widespread attention and scrutiny within psychiatry. Two key questions linger that have direct implications for the legal uses described in the prior Section: the validity of the A Criterion and the extent to which PTSD is a construct rather than a “scientific discovery.”

A. Revisiting the A Criterion

The most significant area of dispute within psychiatry regarding PTSD is, as has been the case since the publication of DSM-III, the precise role of the A Criterion, or underlying stressor event, in the development of a person’s PTSD symptoms.

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416. Id. at 126.
417. See Rosen & Lilienfeld, supra note 243, at 828 (stating that even though PTSD may not be entirely valid as a diagnosis, the “serious and often disabling” symptoms associated with it are not imaginary).
418. SHEPHERD, supra note 10, at 399–91 (PTSD's “theoretical underpinning... [is] unravelling.”).
Controversies regarding the A Criterion are often directly related to the increasing use of the diagnosis in civil litigation as a theory of recovery and the role of the diagnosis in the determination of legal causation. In a recent editorial co-authored by Robert Spitzer, three psychiatrists observed that the diagnosis's narrow focus on a single specific event may lead clinicians to "ignore crucial pathogenic features," remarking that, "[u]nfortunately, what may be best for a lawsuit is not necessarily best for the patient."

The determination of causation as required by the A Criterion raises questions of bias and skewed subjective assessment on the part of both the clinician and the patient, decreasing the validity and reliability of PTSD diagnoses. Several studies have suggested a significant potential role for bias on the part of clinicians when diagnosing PTSD. Research has indicated that PTSD is a diagnosis that may be particularly susceptible to "confirmatory" bias, in that a clinician who is aware of a person's experience (or allegation) of a potentially qualifying stressor may be more likely to assume that the person does have lasting symptoms from such an event (particularly if the distress from the trauma has led to the initiation of litigation). In one study of forty-seven sexual harassment cases in which a plaintiff was subjected to forensic psychiatric evaluations by examiners retained by either the plaintiff or defense attorneys, seventeen plaintiffs received PTSD diagnoses from plaintiffs' examiners but only three plaintiffs received PTSD or chronic PTSD diagnoses from defense examiners. Some courts have suggested in specific cases that the forensic examiners PTSD (separating A Criterion into narrow and broad definitions to analyze how diagnosis changes with definitional change). The other PTSD criteria are the subject of dispute as well, but I will focus here only on the A Criterion since that is the one that most clearly implicates legal questions. See Preface to POSTTRAUMATIC STRESS DISORDER: ISSUES AND CONTROVERSIES, at x-xii (Gerald M. Rosen ed., 2004) (hereinafter PTSD: ISSUES AND CONTROVERSIES) (listing current disputes involving PTSD's criteria).

420. See Landy F. Sparr & Roger K. Pitman, PTSD and the Law, in HANDBOOK OF PTSD: SCIENCE AND PRACTICE 449, 454 (Matthew J. Friedman et al., eds., 2007) (attributing the "geometric increase" in PTSD-based civil claims to the expansion of the DSM-IV's criteria for PTSD); Pitman et al., supra note 413, at 861 ("Non-psychiatric incentives (e.g., the prospect of financial gain or avoidance of criminal punishment), which are present in all civil and criminal legal systems, have cast a shadow over the validity of the PTSD diagnosis and delayed its acceptance into diagnostic systems in psychiatry."


423. E.g., Bowman, supra note 225, at 826-39; see also Olav Nielsen, et al., The Reliability of Evidence About Psychiatric Diagnosis After Serious Crime Part 1. Agreement Between Experts, 38 J. AM. ACAD. PSYCHIATRY & L. 516, 523 (2010) (finding lower reliability for PTSD in criminal forensic settings than for any other tested diagnosis, and attributing the findings, in part, to the fact that "it is difficult, with the current diagnostic criteria, to make the diagnosis in a reliable way in legal settings")


may have (perhaps even intentionally) attempted to support the plaintiffs’ claims when diagnosing plaintiffs with PTSD.\footnote{See, e.g., Alvarado v. Shipley Donut Flour & Supply Co., Inc., Civil Action No. H-06-2113, 2007 WL 4480134, at *6 (S.D. Tex. Dec. 18, 2007) (excluding evidence of forensic psychologist who diagnosed all twelve plaintiffs with PTSD); Nelson v. Res. Corp. of Univ. of Haw., 805 F. Supp. 837, 844-45 (D. Haw. 1992) (discounting plaintiff’s experts’ PTSD diagnosis because one of them had provided him with the DSM criteria before evaluations by the others); Perkins v. Gen. Motors Corp., 709 F. Supp. 1487, 1495 (W.D. Mo. 1989) (excluding PTSD evidence in a sexual harassment case on the basis that it appeared to be the “current diagnosis of choice with [the plaintiff’s] psychologists and they fit their patient to that diagnosis”); see also Pitman et al., supra note 413, at 875 (stating that bias can arise when diagnosing PTSD because of “sympathy” or “antipathy” the diagnostician may hold toward a patient’s status as a victim).}

There are also concerns about the heavy reliance during the diagnostic process on subjective reporting by the patient of both the stressor event and the resulting reactions, as well as the subjective impressions of the diagnostician.\footnote{Roger K. Pitman & Scott P. Orr, Forensic Laboratory Testing for PTSD, in PTSD IN LITIGATION, supra note 245, at 207.} One study documented low inter-rater reliability in determining whether specific events met the A Criterion and noted that “interpreting Criterion-A is a highly subjective process influenced not only by the personal experience of the victim but also the experiences and mindset of those who rate them.”\footnote{Van Hooff et al., supra note 419, at 78.} The researchers raised the question that courts struggled with in the personal injury cases in which the evaluator determined that the event at issue met the requirements of being a “stressor.”\footnote{See supra notes 367–79 and accompanying text for a discussion regarding the judicial scrutiny of stressors and their use in diagnosing PTSD.} They questioned how a clinician conducting a diagnostic evaluation could “define a stressor as ‘traumatic’ without relying on [her] own subjective interpretation of the definition of Criterion-A.”\footnote{Van Hooff et al., supra note 419, at 77.} The widespread use has resulted in “conceptual bracket creep,” meaning that clinicians are continuously broadening the categories of events that qualify for the criterion, thereby diminishing the significance of the criterion in the process.\footnote{McNally, supra note 380, at 231; Van Hooff et al., supra note 419, at 77.}

Even aside from these concerns about bias and subjective assessment, a number of studies have raised questions about the core assumption of PTSD (and its particular use in the legal context): that the symptoms of PTSD (that is, anxiety, poor sleep, irritability, flashbacks, and so forth) were in fact caused by a traumatic event. In a 2007 study, a group of researchers concluded that symptoms of PTSD were of equal prevalence among subjects divided into groups of those who identified as being “traumatized, non-traumatized, [or] equivocal.”\footnote{J. Alexander Bodkin et al., Is PTSD Caused by Traumatic Stress?, 21 J. ANXIETY DISORDERS 176, 176 (2007).} The researchers noted that “the diagnosis of posttraumatic stress disorder may harbor an uncertain theory of etiology within its name,” which suggests caution due to the “practical importance, as psychotherapy may be structured, research studies designed, and legal compensation awarded on the basis of an unexamined assumption that symptoms of PTSD are caused by specific traumatic events.”\footnote{Id at 181.} This study also refers to research noting the presence
of PTSD symptoms after "sub-threshold traumatic events," including divorce, money problems, and the death of livestock.\textsuperscript{434} These findings suggest that the mere presence of PTSD symptoms may serve as an imprecise or perhaps even improper proxy for legal standards that are based upon the severity of an underlying event.

Some psychological researchers theorize that is not entirely accurate to state that the A Criterion event caused the PTSD symptoms to develop because the primary determining factor in whether someone develops such symptoms is the way in which the person recalls the event. One group has suggested that a person's "memory of a stressful event, rather than the event itself, is the key to PTSD."\textsuperscript{435} Thus, it is the way a person organizes and accesses the memory of an event that is most determinative of whether PTSD symptoms will develop.\textsuperscript{436} It is widely understood by psychologists that certain individuals are predisposed to develop PTSD in response to particular events\textsuperscript{437} and that individuals have widely varying responses to threatening events.\textsuperscript{438} This suggests that any individual who develops PTSD had a preexisting, yet latent, condition, and that PTSD reflects merely a triggering of such condition.\textsuperscript{439} Thus, the causal relationship between the stressor event and PTSD symptoms is not one of "mechanistic linear causality but of dynamic interaction," and therefore is far more complex than was originally assumed.\textsuperscript{440}

The implications of these findings could be significant for the legal context, and at least one court has raised such questions. After a bench trial, the court in \textit{Burns v. Republic Savings Bank}\textsuperscript{441} concluded that one cannot readily determine where causation from the event ends and where perception and memory of the event begins.\textsuperscript{442} The court rejected the plaintiff's forensic expert who had opined that the plaintiff had

\textsuperscript{434} Id; see also Harold Merskey & August Piper, \textit{Posttraumatic Stress Disorder Is Overloaded}, 52 CAN. J. PSYCHIATRY 499, 499–500 (2007) (arguing that PTSD is diagnosed in a great number of cases where there has been no actual traumatic experience).
\textsuperscript{435} Berntsen et al., supra note 240, at 1104. Indeed, such a view is more consistent with Freud's initial conceptualization of traumatic neurosis. \textit{Leys}, supra note 13, at 20.
\textsuperscript{436} David C. Rubin et al., \textit{Memory In Posttraumatic Stress Disorder: Properties of Voluntary and Involuntary, Traumatic and Nontraumatic Autobiographical Memories in People with and Without Posttraumatic Stress Disorder}, 137 J. EXPERIMENTAL PSYCHOL.: GEN. 591, 594 (2008) ("[P]roperties of the memory of the event rather the A1 and A2 criteria of the event itself will predict PTSD symptoms. Thus, individual differences factors influencing the availability of the memory (such as personality and temperament) will have a well-specified role to play." (citation omitted)); see also Bowman, supra note 225, at 824–25 (noting that pre-event "traits" appear to contribute more significantly to the development of PTSD than the severity of the traumatic event itself); \textit{Young}, supra note 7, at 136, 141 (noting that some non-combat war veterans, after hearing of others' traumatic experiences, will "remember" false events).
\textsuperscript{437} Bowman, supra note 225, at 825–26; \textit{Horowitz}, supra note 225, at 9.
\textsuperscript{438} Bowman, supra note 225, at 821–23.
\textsuperscript{439} See Bowman, supra note 225, at 813 ("The clinical model for PTSD is biased by simple dose-response thinking, as if humans and flatworms had their well-being and behavior equally totally determined by external events."); John A. Call, \textit{Liability for Psychological Injury Yesterday and Today}, in \textit{PSYCHOLOGICAL INJURIES AT TRIAL}, supra note 229, at 40, 52–53 (citing studies associating PTSD with "childhood behavior problems, dysfunctional families, physical abuse, current unemployment, genetic predisposition, and experience with previous trauma").
\textsuperscript{440} Berntsen et al., supra note 240, at 1105.
\textsuperscript{441} 25 F. Supp. 2d 809 (N.D. Ohio 1998).
\textsuperscript{442} \textit{Burns}, 25 F. Supp. 2d at 822 n.7.
depression resulting from PTSD, and concluded instead that she had a “depressive episode . . . caused, at least in part, by [the plaintiff’s incorrect] perception that she had been treated unfairly and discriminated against.”

PTSD was originally conceptualized as a “natural process of adaptation to extraordinarily adverse situations” that arose in “normal people.” The dispute over the validity of this assumption has social and political dimensions as well as legal ones. The veterans’ campaign for PTSD’s recognition emphasized that the disorder was one caused entirely by their combat experiences. However, subsequent research pointed to several “risk factors,” and such findings “are inconsistent with the notion that traumatic events are the primary cause of symptoms and challenge the idea of PTSD as a typical stress response.” Some psychologists, particularly within the field of traumatology, resist such arguments, as they seem to redirect “blame” to the “victim” and challenge the “every person has a breaking point” notion that led to the development of PTSD for veterans as a service-connected event.

Commentators have also suggested that events are “traumatic” in part due to a person’s experience with society’s response to the event, and that certain events will have less effect as traumatic stressors “as society begins to supply victims with social

443. Id. at 821–22 (emphasis added). Although the “eggshell plaintiff” rule would nonetheless allow recovery of any damages that could be found to flow from the tortfeasor’s actions (assuming such calculation can be made), it would not implicate essential questions of liability.

444. Yehuda & McFarlane, supra note 239, at 1706; see also McNally, supra note 380, at 87 (characterizing original view of PTSD as a “normal response to an abnormal stressor”).

445. Yehuda & McFarlane, supra note 239, at 1706.

446. See supra Part IIIA for a discussion of how veterans of the Vietnam War were largely responsible for the official recognition of PTSD.

447. Yehuda & McFarlane, supra note 239, at 1707–08; see also McNally, supra note 380, at 237–39 (noting that the risk of developing PTSD symptoms is influenced by genetic and other vulnerability factors); Simon, supra note 245, at 59 (citing studies that have identified risk factors for exposure to traumatic events); Taylor & Asmundson, supra note 380, at 60 (emphasizing the important role played by risk factors in the development of PTSD).

448. See McNally, supra note 380, at 89 (noting that some “people” are offended by risk factor research because “it entails blaming victims for their plight”). Some researchers have alleged that the link between PTSD and its political and legal uses has inhibited scientific debate on the validity of the diagnosis. Editorial, Challenges to the PTSD Construct and its Database The Importance of Scientific Debate, 21 J. ANXIETY DISORDERS 161, 161–62 (2007); see also Maier, supra note 230, at 105 (“[I]t is still difficult and sometimes even impossible to mention other influencing factors, especially in psychotherapies or in litigation contexts. This is not helpful for the further development of therapeutic and preventive interventions in PTSD.”); Van Hooff et al., supra note 419, at 85 (“[D]iscussions about PTSD are often polarized because of the role this diagnosis plays in determining causation, and hence negligence, in many litigation settings.”).

449. One reviewer theorizes several reasons why the clinical model and DSM criteria continue to be based upon a dose-response, event-causative model, including the fact that the model was based upon those who sought treatment; that individuals “make errors in reasoning about the causes and meanings of emotional arousal”; and clinicians “may fear being accused of ‘blaming the victim’ in looking at factors beyond the event . . . This fear represents a shift away from a scientific approach to PTSD to a moralistic model.” Marilyn Laura Bowman, Individual Differences in Posttraumatic Distress Problems with the DSM-IV Model, 44 CAN. J. PSYCH. 21, 27 (1999). She also suggests that “the DSM model for PTSD developed partly in response to advocacy groups attempting to normalize the condition of people with certain experiences.” Id. at 29.
support services." For example, some attribute the widespread PTSD and other readjustment problems in Vietnam veterans to the hostile and unsupportive society they encountered upon their return. In fact, some studies have found that those with milder physical injuries are at a greater risk of developing PTSD because of the limited psychological support they received after a traumatic event.

In addition to these studies evaluating the validity of the A Criterion generally, several studies have specifically concluded that the diagnosis cannot be reliably used to determine whether the person has been subjected to trauma, particularly in cases of child abuse. A group of legal and psychological commentators concluded, based upon their review of the current literature, that psychologists and psychiatrists have no skills grounded in “specialized knowledge” to identify whether a child has been a victim of sexual abuse, and there is no scientific basis for child abuse syndrome evidence.

Given the controversies over the A Criterion—that it is unique, often disregarded, and seems to encourage use (and misuse) in legal settings—some psychiatrists have raised the question of whether, after thirty years, psychiatry should simply jettison the A Criterion or even the entire diagnostic category of PTSD. However, the APA is unlikely to take steps that could be interpreted as a denial of the “close relationship of trauma and disorder.”

450. Raifman, supra note 415, at 129. It has even been suggested that “[a]lthough the other medical diagnoses oriented to legal consequences, PTSD will—in the future—no longer be a medical syndrome.” Id.

451. Simon, supra note 245, at 60.

452. Askowitz & Graham, supra note 285, at 2047–48. Some have specifically criticized its use on the basis that child sexual abuse did not meet the A Criterion because it often occurs over time. E.g., David Finkelhor, Early and Long-Term Effects of Child Sexual Abuse: An Update, 21 PROF. PSYCHOL. RES. & PRAC. 325, 328–29 (1990); see also William J. Koch et al., Empirical Limits for the Forensic Assessment of PTSD in Child Maltreatment Litigants, 29 L. & HUMAN BEHAV. 121, 136–40 (2005) (discussing how documentation of the trauma experienced from sexual abuse, which rarely occurs, is critical to a careful forensic assessment of the Criterion A status); Steve Herman, Improving Decision Making in Forensic Child Sexual Abuse Evaluations, 29 L. & HUMAN BEHAV. 107 (2005) (“The current finding of low overall accuracy in clinician judgments about unconfirmed allegations of child sexual abuse is consistent with the almost universal consensus among top scientific experts that these evaluations currently have no firm scientific basis.”). See generally CLANCY, supra note 287.

453. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 516 (3rd ed. 2007); see also Daniel W. Shuman, The Diagnostic and Statistical Manual of Mental Disorders in the Courts, 17 BULL. AM. ACAD. PSYCH. L. 25, 28 (1989) (noting that child abuse accommodation syndrome, although often the subject of expert psychological testimony, is not consistent with the diagnostic criteria for PTSD and not supported by scientific literature).

454. E.g., Gerald M. Rosen et al., Afterword: PTSD’s Future in the DSM Implications for Clinical Practice, in CLINICIAN’S GUIDE TO PTSD, supra note 415, at 263, 264–65; Olav Nielsen & Matthew Large, Post-Traumatic Stress Disorder’s Future, 192 BRIT. J. PSYCH. 394, 394 (2008); see also Maier, supra note 230, at 105 (arguing that since the criterion has little use in the clinical setting, it should be eliminated from the diagnosis); Rosen & Taylor, supra note 355, at 206 (discussing how PTSD would be diagnosed if the field of traumatology were to do away with the A Criterion); Yehuda & McFarlane, supra note 416 (noting that “the existence of PTSD is being called into question”).

455. Maier, supra note 230, at 106; Yehuda & McFarlane, supra note 411 (arguing that, although original assumptions PTSD was based on have been proven incorrect, the diagnosis should be retained since it has been “on-target in so many ways for so many trauma survivors”). Such a step would likely render the diagnosis superfluous: How can something be post-traumatic if the precursor was irrelevant?
Indeed, in 2010, the APA working group released its proposal for yet another revision to PTSD in the *DSM-V*, which would retain the A Criterion but would modify it once more:

A. The person was exposed to one or more of the following event(s): death or threatened death, actual or threatened serious injury, or actual or threatened sexual violation, in one or more of the following ways:
   1. Experiencing the event(s) him/herself
   2. Witnessing, in person, the event(s) as they occurred to others
   3. Learning that the event(s) occurred to a close relative or close friend; in such cases, the actual or threatened death must have been violent or accidental
   4. Experiencing repeated or extreme exposure to aversive details of the event(s) (e.g., first responders collecting body parts; police officers repeatedly exposed to details of child abuse); this does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related.\(^{456}\)

Additionally, Criterion A2, which was added in 1994 to describe the subjective reaction of the patient to the traumatic event, would be eliminated from the criteria.\(^{457}\)

This proposal aims to "tighten[] up the A criterion to make a better distinction between ‘traumatic’ and events that are distressing but which do not exceed the ‘traumatic’ threshold" by restricting the types of events that can serve as a basis for a PTSD diagnosis to three: actual or threatened death, serious injury, or sexual violation.\(^{458}\) The “threat to physical integrity” category would be removed, eliminating the application of the A Criterion to many events currently considered to be potential stressors, including sexual harassment.\(^{459}\) The ambiguous term “confronted with” included in the *DSM-IV* revision would be replaced by a list of specific ways that the person was “exposed” to such events.\(^{460}\) Finally, with the elimination of Criterion A2—now deemed to be of “no utility”—the subjective reaction of the individual would be irrelevant to the diagnostic process.\(^{461}\) None of these changes, however, addresses the

\(^{456}\) AM. PSYCHIATRIC ASS’N, *G 05 Posttraumatic Stress Disorder, DSM-5 DEVELOPMENT*, http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=165 (last visited Nov. 14, 2011) (citation omitted). One reason for this new language is in response to the findings of Van Hooff et al., *supra* note 419, at 82, about the low inter-rater reliability in terms of meeting the A Criterion when the event was witnessed by the patient, rather than directly experienced.

\(^{457}\) See *supra* notes 264–73 and accompanying text for a discussion of the 1994 *DSM-IV* revisions to the diagnostic criteria for PTSD.

\(^{458}\) AM. PSYCHIATRIC ASS’N, *supra* note 456 (follow “Rationale” tab). The use of the term “event(s)” in the proposed A Criterion revision suggests that, for the first time, diagnosticians could assign the cause of a person’s PTSD to more than one distinct event.

\(^{459}\) In an influential article, psychologists Claudia Avina and William O’Donohue suggest that “threat to physical integrity” in the *DSM-IV’s* Criterion A1 potentially extends to sexual harassment in three ways: “(1) by threatening the victim’s financial well-being, (2) by threatening the victim’s physical boundaries, and (3) by threatening the victim’s control over situations that she should legitimately be able to have some control.” Claudia Avina & William O’Donohue, *Sexual Harassment and PTSD Is Sexual Harassment Diagnosable Trauma?*, 15 J. TRAUMATIC STRESS 69, 73 (2002).

\(^{460}\) Compare *DSM-IV*, *supra* note 264, at 427, with AM. PSYCHIATRIC ASS’N, *supra* note 461.

\(^{461}\) AM. PSYCHIATRIC ASS’N, *supra* note 456 (follow “Rationale” tab).
fundamental criticisms of the A Criterion and the role of causation in diagnosing PTSD.\footnote{Rosen et al., supra note 454, at 268 ("[T]he new working proposal for Criterion A does not resolve any of the core issues that constitute the 'Criterion A problem . . . .'")}

The research findings with respect to the uncertain reliability of the diagnosis of PTSD and the uncertain validity of the disorder itself underscore the dangers of admitting PTSD evidence in legal proceedings, particularly for the purpose of proving that a traumatic event occurred. Not only is the A Criterion itself the subject of a great deal of scientific debate as to its utility and validity, there is little to no research to support many of the PTSD-related theories that have found their way into trials, such as the existence of "typical" or "hallmark" symptoms that are reliable indicators that a person has been subjected to a particular kind of trauma, such as child sexual abuse or rape, or has repressed memories of a trauma. To be sure, PTSD does have many defenders within psychiatry and psychology who offer responses to many of the key challenges to PTSD's validity.\footnote{Id at 1–3.} However, even they are likely to concede that there is nothing resembling a scientific consensus within psychiatry about the core assumptions of PTSD as a stand-alone diagnostic category.\footnote{Id.}

Perhaps of most significance to the applicability of PTSD in legal contexts, these debates regarding PTSD and particularly the A Criterion exemplify the broader debate within psychiatry regarding the uncertain role of the concept of "causation" in that field. "Causation" has an unquestionably central operation in law, which uses the terms "legal cause" and "proximate cause" to construct normative rules to assign legal responsibilities between and among parties to a controversy. Such assignment is one of the core functions of law, particularly of litigation. However, causation has a far more uncertain—and some would argue nonexistent—role in contemporary psychiatry, which classifies and treats mental disorders based largely upon symptomatology without regard to etiology. Indeed, the role of "causes" of mental illness was the essential dispute between those within psychiatry who based their understanding of mental disorder upon psychoanalytic and other psychodynamic theories, and those who assumed that there were biological bases (even if they had not yet been precisely isolated) for most psychopathology.\footnote{Deirdre M. Smith, The Disordered and Discredited Plaintiff Psychiatric Evidence in Civil Litigation, 31 CASE W. RES. L. REV. 749, 755–71 (2010).} PTSD's A Criterion, with its roots in the former, is an outlier (and some would say a relic) within contemporary psychiatry's DSM.

**B. PTSD as a Construct**

Courts' use of a PTSD diagnosis as discussed in Part IV implicates the scientific basis of that diagnosis. However, science has an uncertain role in PTSD. The scores of empirical findings that emerged after the diagnosis had been in place for many years led the American Journal of Psychiatry, the official publication of the American Psychiatric Association, to title a 1997 editorial "What is PTSD?" in light of research
that challenged some of the basic assumptions upon which the diagnosis had been based, and to conclude that the question "has no one answer." \footnote{466}

This observation reflects the broader dispute within psychiatry regarding whether PTSD was a "discovery" or a "product" of psychiatric discourse. \footnote{467} One of the core assumptions of PTSD is that the symptoms included in the DSM diagnosis represent "the way" that trauma (or at least certain types of trauma) can lead to psychopathology. \footnote{468} Thus, the argument goes, PTSD is a disorder that was finally "recognized" by the APA in 1980, but it had in fact been in existence for decades, centuries, or longer. \footnote{469} However, many who have noted PTSD's conspicuously "political" origins question how organizing and lobbying could have resulted in the "discovery" of a new disease in an ostensibly science-driven document such as the DSM-III. \footnote{470} They challenge the notion that PTSD can be understood to exist apart from the APA determination through a show of hands in the late 1970s and that the cluster of symptoms constitutes a singular disorder. The implications of this debate go to the essential validity of using a unique diagnostic label to classify all psychological symptoms that are determined to be in reaction to identifiable events. \footnote{471}

A group of psychologists offering a critical historical analysis of PTSD explained why the origins of the diagnosis have become the focus of such a contentious debate:

[If one can demonstrate that a disorder shows up repeatedly across time and across cultures, one has evidence that the disorder is a state of nature rather than a social and cultural artifact due to social mores and conventions. Conversely, when disorders come and go we typically suspect that their instability is indicative of a social rather than natural basis.]

Along these lines, many in the field of traumatology or who otherwise work regularly with PTSD attempt to point to the timelessness of the condition, stating that it

\footnote{466. \textit{Editorial, What is PTSD?}, 154 Am. J. PsyCh. 143, 144 (1997).}

\footnote{467. \textit{Young, supra note 7, at 121; Patrick J. Bracken, Post-Modernity and Post-traumatic Stress Disorder, 55 SOC. SCI. \\& MED. 733, 735-36 (2001).}}

\footnote{468. \textit{See Watters, supra note 119, at 4 (listing some of the cultural assumptions that lie behind Western ideas of mental health); Gerald M. Rosen et al., \textit{Searching for PTSD's Biological Signature, in Clinician's Guide to PTSD, supra note 419, at 97, 97 (noting that the goal of medical nosology, including psychiatric classification, is to "reflect[] the true state of affairs in nature"); Bracken, supra note 467, at 733 ("Most of those who research and write about PTSD appear confident that the syndrome captures something fundamental about the way in which human beings deal with trauma.").}}

\footnote{469. \textit{Levy, supra note 13, at 3; Jones et al., supra note 250, at 158 (noting that some scholars claim to identify PTSD symptoms in the \textit{Iliad} and seventeenth century writings); Donna Trembinski, \textit{Comparing Premodern Melancholy/Mania and Modern Trauma: An Argument in Favor of Historical Experiences of Trauma}, 14 \textit{Hist. of Psychol.} 80, 80 (2011).}}


\footnote{471. \textit{In 2000, a resolution proposed in the Royal College of Psychiatry in the United Kingdom that would have stated that the body "believes that PTSD is largely a fictional condition" was defeated only narrowly. Bowman, supra note 225, at 821; see also Celia Hall, \textit{Stop Cashing In on Stress, Says Psychiatrist}, \textit{The Daily Telegraph} (July 4, 2000), http://www.telegraph.co.uk/news/newtopics/politics/health/1346618/Stop-cashing-in-on-stress-says-psychiatrist.html (criticizing the "compensation culture" created by psychoanalysis and lawyers through the application of PTSD to everyday experience).}}

\footnote{472. Baldwin et al., \textit{supra note 13, at 37.}}
is essentially the same disorder once diagnosed as shell shock. However, a number of scholars, both within and outside of the field, conclude otherwise. For example, one study of World War I military pension records found that there were virtually no complaints of what would now be referred to as “flashbacks,” the classic dissociation symptom of the PTSD experienced by Vietnam veterans; in fact, a significant number of soldiers receiving compensation for war neurosis or shell shock would not have met the current PTSD criteria if it were in place at the time. Moreover, cross-cultural studies of PTSD have revealed “remarkable deviations from the PTSD symptom list.” Medical anthropologist Allan Young concluded from his study of the development of PTSD that the diagnosis “is not timeless, nor does it possess an intrinsic unity.” Rather, he observed, “it is glued together by the practices, technologies, and narratives with which it is diagnosed, studied, treated, and represented and by the various interests, institutions, and moral arguments that mobilized these efforts and resources.”

As an alternative to proving the “timelessness” of PTSD, several researchers have attempted to locate a precise biological cause or indicator of PTSD to establish the elusive independent validity of the diagnostic category. Since 1980, numerous papers have attempted to align the diagnosis with the “new” biological psychiatry. Many researchers hope to identify specific psychobiologic responses or “biomarkers” to PTSD to improve the reliability of diagnoses. Finding these biological markers, the hallmarks of a “naturally occurring and inevitable phenomenon,” has become a key object of traumatologists. The expectation is that finding physiological indicators of the disorder will put an end to the controversies within psychiatry and allow the diagnosis (and presumably the entire field of traumatology) to receive broader

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474. Jones et al., supra note 250, at 160-61. One theory to account for the incidence of “flashbacks” in the later twentieth century is that the symptom is derived from the cinematic technique. Id. at 162. See also Baldwin et al., supra note 13, at 40 (noting the “discontinuity” of the conceptualization of PTSD over time).

475. Watters, supra note 199, at 162; see also Derek Summerfield, Cross-Cultural Perspectives on the Medicalization of Human Suffering, in PTSD: Issues and Controversies, supra note 419, at 233, 233-44 (noting that Western medicalization of distress has resulted in a wide range of symptoms being attributed to PTSD).

476. Young, supra note 7, at 5.

477. Id.

478. Young, supra note 7, at 105-06; Rosen et al., supra note 408, at 98; see also Baldwin et al., supra note 13, at 38 (“[P]hysiological differences between persons with a diagnosis of PTSD compared with those without the diagnosis have been used rhetorically to champion the ‘reality’ of PTSD and to discredit critics”); Leht, supra note 13, at 254 (noting that the “plausibility” of trauma theories would be “enormously enhanced” if they were “supported by neurological evidence”).

479. Sheehan, supra note 10, at 388-90; see also Taylor & Asmundson, supra note 380, at 63-64 (reviewing various studies examining potential neurobiological and behavioral-genetic causes of PTSD). Much research has focused on the potential role of hormones such as cortisol or norepinephrine. Appignani, supra note 273, at 436-37.

480. Baldwin et al., supra note 13, at 48-49; see also Yehuda & McFarlane, supra note 411 (noting the progress made in identifying biomarkers for PTSD and that “[s]oon it will be more difficult . . . to dismiss the ‘validity’ of the PTSD diagnosis”).
acceptance, including within the legal realm specifically. Most recently, a study claims to have identified a neurological abnormality in veterans with PTSD through magnetoencephalography (MEG) scans. However, no consensus has emerged on any biomarkers for PTSD, and thus far not one has been identified for diagnostic purposes.

The debate regarding PTSD's origins, however, fails to note that PTSD is not unique in its "constructed" evolution; rather, such evolution is perhaps simply more conspicuous than in other diagnoses. PTSD provides an example of medical historian Edward Shorter's theory of the "symptom pool," the mechanism through which the mind experiences and explains a reaction within the person's cultural context at a particular time and place. A patient's unconscious "striving for recognition and legitimization of internal distress" may lead the unconscious to manifest such distress through means that will lead to such result. The patient is not alone in this process. Through "illness negotiation" with a physician, the two "shape each other's perceptions of the behavior" with the backdrop of what has been recognized as a "legitimate disease category," thereby leading to "scientific validation" of the patient's experience.

This dynamic is particularly powerful with psychiatric diagnoses. "Hysteria," a psychosomatic illness in which individuals experience paralysis or the sudden loss of the ability to speak, hear, or see, was the "archetypal disorder of the Victorian era"; however, such symptoms are rarely encountered today. Similarly, the symptoms of World War I veterans' "shell shock" are quite different from those reflected in the current diagnostic criteria of PTSD (which themselves have undergone substantial

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481. Baldwin et al., supra note 13, at 49.
483. See Katie Drummond, Neuroscientists Say Brain Scans Can Spot PTSD, WIRE.COM (Jan. 22, 2010, 8:00 A.M.), http://www.wired.com/dangerroom/2010/01/brain-biomarker-could-be-the-key-to-ptsd-diagnosis (study indicating that new brain imaging technology permitted researchers to spot specific brain biomarkers, allowing them to diagnose PTSD with ninety percent accuracy).
484. Baldwin et al., supra note 13, at 49–52 (critiquing various psychophysiological studies).
485. See Pitman & Orr, supra note 427, at 207 (noting that diagnosis of PTSD continues to rely on "the veracity of the complainant").
486. SHORTER, supra note 43, at 2–4; WAETERS, supra note 199, at 32.
487. WAETERS, supra note 199, at 32 (noting that "[t]his sort of cultural molding . . . happens imperceptibly and follows a large number of cultural cues that patients simply are not aware of").
488. Id. at 33.
489. Id. at 60 (noting that there is "[a] pervasive mistaken assumption in the mental health profession: that mental illnesses exist apart from and unaffected by professional and public beliefs and the cultural currents of the time").
490. Id. at 72; see also WEILKE, supra note 18, at 158 (noting that "neurasthenia" was regarded as "America's primary mental disorder" at the turn of the twentieth century and had become "a household word").
revision since *DSM-III*). What PTSD and its forerunners have in common then is not their symptomatology, their theoretical underpinning, or their treatment, but rather their *utility* outside of the clinical setting. This commonality suggests a particularly strong role for the symptom pool, but PTSD is by no means the only diagnosis that developed in this fashion.

Indeed, it would be accurate to say that *all* of the *DSM* is infused with the policy choices made by those in positions of authority to decide the parameters of what is a mental “disorder.” The diagnostic categories in the *DSM* do not, for the most part, “reflect a coherent progression of empirical research,” but rather, are, “at best, a categorization of the pain, suffering, or distress.” The development of medical diagnoses generally reflects “negotiation,” rather than discovery, and the resulting classifications “serve to rationalize, mediate, and legitimate relationships between individuals and institutions in a bureaucratic society.” And the legal system is one of the players in such negotiations, particularly with respect to psychiatric diagnoses, given the extensive association of psychiatry with the legal system throughout the twentieth century. The demands the legal system brings to these negotiations often include consistency, certainty, and reliability and, more generally, the ability to aid in the resolution of legal questions and problems. *DSM-III*, at least on its face, appeared to satisfy all of these demands, and thus it should not be surprising that PTSD—which purported to provide consistent, certain, and reliable answers on the causation of injury—found a central place in litigation so quickly. Therefore, that PTSD is a “construct” is simply a given. It is remarkable, rather, because of the manifestly socio-political and legal origins of this particular psychiatric construct and, accordingly, the implications of such origins for its use in determining liability in legal settings.

The construct-versus-discovery argument itself has implications for the role of PTSD in law. As discussed above, many courts and legislatures have framed legal standards or requirements directly or indirectly around PTSD on the assumption that it

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491. Bracken, *supra* note 467, at 735. One analysis of the shifting criteria of PTSD noted eleven distinct changes to the diagnosis in the *DSM-III-R* and fifteen changes to the *DSM-IV* criteria, all in the space of fourteen years. These changes were so significant that a great number of patients who met the criteria under one would not meet the criteria under another, and that, under the current version, two patients without any overlapping symptoms could have the same PTSD diagnosis. **KUTCHIN & KIRK, supra** note 105, at 124.


493. Greenberg et al., *supra* note 6, at 5, 12.


496. *Id* at 215-16, 219.

497. See *Id* at 217 (noting that *DSM-III* was the most technologically sophisticated edition of the *DSM*).
represents an advancement in scientific understanding of the psychological impact of traumatic events. A few courts, by contrast, have dismissed the diagnosis as a mere “human construct,” using the term to signify that “PTSD” is nothing more than a label. However, in making either assumption, these courts fail to recognize the complexity not only of psychopathology itself, but of our very understanding and explication of mental disorders and, indeed, all medical diagnoses.

VI. CONCLUSION – THE LESSONS OF PTSD’S LEGAL HISTORY

At the time of PTSD’s recognition by the APA, few within the psychiatric establishment raised concerns about recognizing, treating, and compensating the psychological injuries of the people who fought a violent and controversial war. However, since that time, PTSD’s association with law, and particularly with compensation, has led to a backlash against the diagnosis. Many psychiatric and legal commentators regard it as a medical term co-opted by the legal profession and its clients to be a mechanism either to acquire undeserved compensation or to evade personal responsibility. As a result, the very real psychological impact of horrific events is often minimized and claims of psychological injuries continue to be regarded with suspicion.

Some commentators from within psychiatry who have expressed particular skepticism about the role of PTSD in legal settings urge a decoupling of legal and medical notions of causation embodied in PTSD. The assignment of responsibility to a source is the purview of law, not psychiatry. Regardless of the particular school or theory, psychiatry has always seen the workings of the psyche as being far more complex than the liability questions raised in most civil and criminal cases resolved by non-expert fact finders. Those within psychiatry who criticize the legal system for taking PTSD and running with it, however, fail to acknowledge that PTSD and the legal conceptualizations of emotional injuries share a common past and have evolved


500. See, e.g., Brown, supra note 332, at 468 (stating that “symptoms of PTSD can be easily coached and simulated,” and that some “individuals and their counsel take advantage of these ploys”); Derek Summerfield, The Invention of Post-Traumatic Stress Disorder and the Social Usefulness of a Psychiatric Category, 322 Brit. Med. J. 95, 96 (2001) (“Once it becomes advantageous to frame distress as a psychiatric condition people will choose to present themselves as medicalised victims rather than as feisty survivors . . . . There is a veritable trauma industry comprising experts, lawyers, claimants, and other interested parties . . . .”). For an example of such backlash in the popular culture, see generally ALAN M. DERSHOWITZ, THE ABUSE EXCUSE, AND OTHER COP-OUS, SOR STORIES, AND EVASIONS OF RESPONSIBILITY (1994).

501. See, e.g., Maier, supra note 230, at 105 (“The legal system . . . , which is based on strictly causal thinking, gratefully picked up the diagnosis and has built in the meantime a whole industry of victimology on PTSD.” (emphasis omitted)).
Where physicians have built a theory of causation into the “signs and symptoms” themselves, it is not so simple to suggest that “the physician delineates signs and symptoms; the legal system decides on compensation.” Jerome Wakefield and Allan Horwitz, two noted scholars of the development and implications of psychiatric diagnoses, recently observed of PTSD: “No other psychiatric diagnosis involves issues where drawing boundaries is not just a matter of diagnostic convenience but also of justice and injustice.” The line between law and medicine is not merely blurred in PTSD; it is absent.

PTSD’s inextricable relationship to notions of causation and responsibility does not, however, mean that the legal system should utilize it freely. In fact, PTSD’s distinctly legal history suggests that the law should in fact apply far greater scrutiny to the role of PTSD in litigation than it does for other psychiatric diagnoses. The studies that have called into question the original theoretical assumptions of PTSD and the problems inherent in the A Criterion demonstrate that courts should be reluctant to allow a PTSD diagnosis to be assigned legal significance in itself. Permitting PTSD to play a central role in legal settings risks conflating the unsettled psychiatric conceptualization of “causation” with the questions of legal or proximate cause reserved for fact finders.

Although unquestionably infused with policy choices, psychiatric diagnoses were developed to serve that profession’s clinical and research needs. Law, by contrast, serves distinctly normative goals through the development of legal rules or standards, which determine the framework to allocate responsibility based upon policy determinations reached by “lawmakers” (generally legislators and judges) applying their notions of “justice.” When courts employ legal standards that incorporate conceptualizations of “diagnosable” conditions, they are thereby assuming something legally significant about the thresholds the psychiatric profession chooses to set. However, courts do not acknowledge or understand the construction of psychiatric

502. In this regard, PTSD can be seen as a “co-production” of psychiatry and law, to borrow a concept from noted science and technology studies scholar Sheila Jasanoff. Sheila Jasanoff, The Idiom of Co-Production, in STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND SOCIAL ORDER 1, 2 (Sheila Jasanoff ed., 2004) (“Briefly stated, co-production is shorthand for the proposition that the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it.”). I am appreciative of Allan Young for bringing this term to my attention in our correspondence.

503. Kinzie & Goetz, supra note 28, at 166.

504. Jerome C. Wakefield & Allan V. Horwitz, Normal Reactions to Adversity or Symptoms of Disorder?, in CLINICIAN’S GUIDE TO PTSD, supra note 419, at 33, 42.

505. See Shuman, supra note 282, at 7 (“Both Daubert and the DSM make clear that it is not appropriate to assume that a psychiatric diagnosis is relevant to, let alone dispositive of, an issue in a case.”).

506. To be sure, PTSD is not unique in this respect since law has certainly relied upon the presence of a “diagnosable” mental disorder in other contexts, particularly with respect to preventative detention laws. For example, people are subject to involuntary commitment, only where an examiner has found the presence of a mental illness. Similarly, sexually violent predator laws universally require a finding of a mental disorder as well as a history of sexual violence in order to detain a person. Several conceptualizations of the insanity defense require the presence of a mental disease or defect in addition to specific cognitive or volitional impairments. MELTON ET AL., supra note 453, at 210-12.

507. Shuman, supra note 282, at 10 (“[T]he role of PTSD in litigation turns, in part, on diagnostic nomenclature that psychiatry largely controls...”).
disease and the limitations of using psychiatric labels outside of clinical and research settings. 508 Linking PTSD—with its built-in clinical determination of causation—to legal standards effectively delegates to the psychiatric profession determinations of legal responsibility. 509

Accordingly, although PTSD is now commonplace in the legal system, this Article suggests that courts and other legal policymakers consider PTSD’s legal history as part of a reexamination of the roles that law has assigned to the diagnosis. PTSD evidence arises in a wide range of legal contexts, including workers’ compensation claims, criminal defenses and sentencing, and explaining the extent of a personal injury plaintiff’s emotional distress damages, and there are varying degrees of danger of misuse in each of these settings. However, the uses described in Part II—where a fact finder is permitted to use PTSD’s construction of causation to make a finding of civil or criminal liability—likely pose a greater danger of courts unknowingly permitting a policy-driven diagnosis to influence a legal outcome.

Courts should also be cognizant of the fact that laypersons lack the tools to understand the limitations of this diagnosis and may misapprehend the significance of the diagnostic label. PTSD evidence, like any other expert opinion testimony, should not be exempt from the application of the rules of evidence, particularly Daubert scrutiny. It represents precisely the kind of expert opinion that is often presented as the ipse dixit conclusion of a treatment provider or forensic examiner that Daubert and its progeny warn are of little use to lay fact finders who cannot evaluate the reliability of the testimony for themselves. 510 It is unlikely that the typical cross-examination of a forensic examiner can bring out the full extent of the construction of trauma and psychological injury embodied in the diagnosis, the role of the diagnostician’s own value judgments about causation in applying the diagnosis, and the overall complexity of the psychological mechanisms involved in mental disorders, including PTSD.

Using PTSD as the stand-in for severe emotional distress or proof of a traumatic event asks fact finders to distill an elaborate and poorly understood psychological process into simple determinations of liability. A PTSD diagnosis provides fact finders “a semantic handle for the complexity inherent in diagnostic issues,” 511 particularly since jurors (like all of us) are drawn to “simple causal explanations.” 512 Nonetheless, the widespread use of the term, particularly in the wider culture, has rendered it loaded,
diluted, and confused, and it risks being a misleading and unreliable tool in the hands of lay fact finders for purposes of assigning legal responsibility or assessing harm.\footnote{Noah, supra note 405, at 243 (noting that when legal institutions “rely heavily on clinical judgments” it can in turn “distort the diagnostic process”).} Indeed, encouraging challenges to PTSD to be played out in front of the fact finder may even undermine a plaintiff’s claim for emotional distress damages or a complainant’s allegation of sexual assault where the fact finder then links the problems of the diagnosis with the legitimacy of such claims and allegations; such a result would hardly be just.

It is important to emphasize here that scrutinizing the use of a PTSD diagnosis as evidence of liability does not require us to discount or diminish the recognition of and compensation for the events that can give rise to such liability, ranging from the horrors of combat, to the exploitation of children, to discrimination in workplaces, to the negligent operation of automobiles. Rather, this argument urges that determinations of liability for such actions must remain within the legal system without overreliance on psychiatry, and that legal barriers to recovery should be removed through legal mechanisms such as legislation, judicial opinions, and rules, rather than through the adoption of psychiatric standards of causation. PTSD may serve several important roles within psychiatry, including those which do not require any particular level of scientific reliability, such as to validate a person’s reactions to an event or to encourage a person to pursue treatment. But psychiatric diagnoses are not fact-finding tools and have no place in litigation for such purpose.

One could certainly say that PTSD has provided important roles in legal contexts by, for example, enabling Vietnam veterans to receive critical benefits and health care for psychological injuries after exposure to a horrific and arguably unjust war. But such arguments are based upon a misplaced assumption that psychiatry was the proper route to fix the problem of compensation standards for veterans. The fault was with the VA and Congress for failing to provide compensation in the absence of a targeted diagnosis and for relying upon psychiatry to dictate compensation determinations in the first place. Courts repeat such mistakes by looking to psychiatry to fix problems with legal standards when they create legal rules such as “medically diagnosable” requirements to recover emotional distress damages.\footnote{See ROBIN FELDMAN, THE ROLE OF SCIENCE IN THE LAW, at xi (2009) (“We continually look to science to rescue us from the discomfort of difficult legal decisions . . . .”).} Although psychiatry may have created a diagnosis that is intertwined with legal concepts, the law should not implement legal standards that are intertwined with psychiatric concepts without first considering the full implications of doing so.\footnote{Maintaining a clearer demarcation between the legal and medical judgments not only protects the legal system from unintentionally delegating policy-making to medicine, it also protects medicine from the influence of the law. See Noah, supra note 410, at 244 (arguing that “legal institutions should better insulate the diagnostic enterprise by delinking their decisions from clinical judgments”).}

PTSD has served as a critical mechanism in law for other important purposes, such as the recognition that misconceptions about sexual assault victims can skew the results in prosecutions. It has also played a role in the erosion of the rigid mind-body dichotomy in personal injury law to permit expanded recovery for psychological injuries in tort actions. The problems in the legal systems that PTSD has been used to
remedy should not go unaddressed. Rather, courts should use legal tools to dispel such misperceptions about sexual assault so that they do not interfere with fact-finding in such cases.\textsuperscript{516} For example, “rape shield” laws such as Federal Rule of Evidence 412 limit a defendant’s ability to exploit common (yet wrong) assumptions about the role of a woman’s sexual “predisposition” in sexual assault cases.\textsuperscript{517} Also, courts should allow compensation of psychological injuries through testimony of plaintiffs and their mental health providers who can describe symptoms and treatment for such injuries without being obliged to convey the impression that the cluster of symptoms signals something transformative in the person. Indeed, the American Law Institute’s forthcoming \textit{Restatement (Third) of Torts} permits recovery for emotional injury without any requirement for a medical diagnosis.\textsuperscript{518}

Although PTSD, given its well-documented legal and political origins, may offer perhaps the most stark example of how psychiatric diagnoses can reflect legally-significant assumptions, we must also recognize that all psychiatric diagnoses reflect assumptions and conclusions about human behavior and emotion that reflect the time when they were developed. Indeed, unlike many legal rules, such framing can shift quite rapidly, with diagnoses being added, removed, or revised, within just a few years of the prior conceptualizations.\textsuperscript{519} If the law decides to address problems of justice by looking to psychiatry or other branches of medicine and science for solutions, it must only do so with a full appreciation and understanding of the origins and limitations of the concepts it seeks to adopt. Absent such acknowledgement, together with a determination that such concepts are in fact appropriate to import into law, the legal system simply delegates juridical authority to those fields.

\textsuperscript{516} MELTON ET AL., supra note 453, at 226.
\textsuperscript{517} FED. R. EVID. 412.
\textsuperscript{518} The \textit{Restatement (Third) of Torts} includes Section 46, which provides as follows:
An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct: (a) places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; or (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.
\textit{Restatement (Third) of Torts: Liability for Physical & Emotional Harm} § 46 (Tentative Draft No. 5, 2007); see also CHAMALLA & WRIGHT, supra note 125, at 95 (noting “[t]he Restatement’s emphasis [is] on the relational context in which the tort is committed,” not “on the categorization of the injury marks”).