SON OF SAM, SERVICE-CONNECTED ENTITLEMENTS, AND DISABLED VETERAN PRISONERS

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INTRODUCTION

> In a great war for the right the one great debt owed by the nation is that to the men who go to the front and pay with their bodies for the faith that is in them.[1]

> Modern war is about many things, but its most defining feature is the rupturing, wounding, and destroying of human bodies.[2]

U.S. Army veteran Billy Smith[3] served back-to-back combat tours in Iraq and Afghanistan. While on patrol near the end of his second deployment, Billy was the victim of an improvised explosive device ("IED") blast, which killed his battle buddy and left parts of his legs and genitals shredded and burned. Billy is no longer capable of procreating.[4] Moreover, the brain injury Billy suffered from the explosion makes sleeping difficult. When Billy does sleep, he experiences horrifying nightmares about the IED blast and the loss of his battle buddy. A United States Department of Veterans Affairs ("VA") physician prescribes Billy heavy doses of an oral opioid to ease his chronic pain and help him rest.

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[1] THEODORE ROOSEVELT, THE GREAT ADVENTURE: PRESENT-DAY STUDIES IN AMERICAN NATIONALISM 9 (1919).

[2] JOHN M. KINDER, PAYING WITH THEIR BODIES: AMERICAN WAR AND THE PROBLEM OF THE DISABLED VETERAN 8 (2015).

[3] Billy Smith is a fictitious name, and the fact pattern presented here, while also fictitious, is based on a combination of several fact patterns involving actual veteran clients whom we have represented in the West Virginia Veterans Advocacy Clinic.

[4] *See, e.g.*, Nikki Wentling, *IVF Coverage for Wounded Vets Preserved in House VA Funding Bill*, STARS & STRIPES (June 16, 2017), https://www.stripes.com/ivf-coverage-for-wounded-vets-preserved-in-house-va-funding-bill-1.473986#.WUVY_xPytTZ ("Because of the use of improvised explosive devices against U.S. forces in Iraq and Afghanistan, thousands of servicemembers have suffered traumatic wounds to their genitals and spines, leaving them unable to procreate.").

As the result of his significant and permanent injuries, the VA rates Billy as 50 percent disabled and, thus, entitled to $838.64 in monthly disability compensation.[5] The VA also finds that Billy is entitled to an additional $103.54 in "special monthly compensation" to compensate him for the loss of use of his testicle. Billy is able to supplement his monthly disability compensation by working in his brother-in-law's small barbershop. About a year after returning home from his deployment and subsequent military hospitalization, Billy is able to qualify for a small mortgage and purchase a modest home outside town.

Just as Billy begins to readjust to civilian life and gain financial stability, his VA treatment team shifts gears. Facing mounting criticism regarding the VA's liberal narcotic prescribing practices,[6] Billy's treating physician cancels his prescription painkiller and refers him to an alternative therapy of acupuncture and yoga. Billy, however, has become dependent on his pain medication.[7] He begins to travel across state lines to purchase prescription painkillers from a veteran platoon-mate for himself and other local combat veterans whose prescriptions also were cancelled by the VA.

Shortly thereafter, Billy is arrested and charged with possession with intent to distribute narcotics, a federal felony. He is convicted and sentenced to a five-year term in prison. Pursuant to 38 U.S.C. § 5313, on the sixty-first day of Billy's incarceration, the VA reduces his monthly disability payment to $133.57 a month until his release from prison. Billy defaults on his home loan, and his house is repossessed. The state board of cosmetology also revokes Billy's barber license due to his conviction. Disabled, addicted, unemployed, and financially destitute, Billy slips into chronic depression and begins to self-medicate with alcohol and drugs immediately upon his release from federal custody.

In recognition of their selfless sacrifice to the nation, American veterans, like Billy, have long enjoyed enhanced political identity and citizenship status bestowing numerous post-service entitlements. As explained by historian Jennifer Mittelstadt, the federal government "crafted [significant military benefits] for veterans as rewards for faithful service and compensation

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[5] Notably, Billy's annual disability compensation of $10,063.68 is well below the federal poverty level ("FPL") for a single adult in the United States. OFF. OF THE ASSISTANT SECRETARY FOR PLAN. & EVALUATION, DEP'T OF HEALTH & HUMAN SERVS., U.S. FEDERAL POVERTY GUIDELINES USED TO DETERMINE FINANCIAL ELIGIBILITY FOR CERTAIN FEDERAL PROGRAMS, https://aspe.hhs.gov/poverty-guidelines (indicating that the FPL for a single adult in the United States is $12,140 under the 2018 FPL guidelines).

[6] *See, e.g.*, NAT'L INST. ON DRUG ABUSE, SUBSTANCE ABUSE IN THE MILITARY (Mar. 2013), https://www.drugabuse.gov/publications/drugfacts/substance-abuse-in-military ("Pain reliever prescriptions written by military physicians quadrupled between 2001 and 2009—to almost 3.8 million.").

[7] *See* Andrew Golub & Alexander S. Bennett, *Introduction to the Special Issue: Drugs, Wars, Military Personnel, and Veterans*, 48 SUBSTANCE USE & MISUSE 795, 796 (2013) ("Recent research suggests that the use and misuse of alcohol and prescription opioids (or POs such as OxyContin, Vicodin, and Percocet) are the signature substances associated with OEF/OIF/OND military personnel and veterans."); Andrew Golub & Alexander S. Bennett, *Prescription Opioid Initiation, Correlates, and Consequences Among a Sample of OEF/OIF Military Personnel*, 48 SUBSTANCE USE & MISUSE 811, 811 (2013).

for loss. Their political success depended on differentiating the veteran from the civilian and elevating him as worthy of entitlement."[8] In other words, our collective understanding that the country owes a special debt (and, arguably, its very existence)[9] to veterans propelled federal officials to vest veterans with preferential citizenship and create an expansive and unique entitlement regime.[10] This regime provides veterans myriad post-service medical, educational, employment, housing-related, and other social and economic benefits.

While many Americans are familiar with veterans' benefits, most are unaware that the United States strips certain justice-involved veterans of the overwhelming majority of their service-connected benefits, including disability compensation.[11] Even fewer Americans realize that the federal government strips these benefits despite the mounting evidence that post-service veteran misconduct is linked to service-related trauma and its mental and behavioral health consequences.[12] Research makes clear that, "[o]ften, learned military skills and tactics such as hyper-vigilance and rapid response to threatening encounters that enhance survival in combat may translate to aggressiveness, impulsivity, arrest, and potential for incarceration in the civilian community."[13] Indeed, "[t]here is a wealth of literature describing the emotional fallout of the wars in Iraq and Afghanistan, and highlighting the need for more comprehensive care and support for veterans and their families."[14]

Legal scholarship has accorded no attention to section 5313 (the "stripping statute"), the federal statute that strips service-connected disability entitlements from disabled, justice-involved veterans who, like Billy, were severely and irreparably injured in the line of duty. This Article argues that Congress enacted the stripping statute largely in response to public pressure resulting from sensationalized media stories alleging that infamous prisoners, including New York mass murderer "Son of Sam," were abusing the Social Security Disability Insurance ("SSDI") program. It also posits that the

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8 JENNIFER MITTELSTADT, THE RISE OF THE MILITARY WELFARE STATE 4 (2015).

9 *See* Earl Warren, *The Bill of Rights and the Military*, 60 A.F. L. REV. 5, 6 (2007) (acknowledging that "the military serves the vital function of preserving the existence of the nation").

10 *See* Suzanne Mettler, *Foreword* to VETERANS' POLICIES, VETERANS' POLITICS: NEW PERSPECTIVES ON VETERANS IN THE MODERN UNITED STATES xii (Stephen R. Ortiz ed., 2014) (pointing out that "disabled veterans were the first Americans to become beneficiaries of rights based on [disability] even while other disabled people remained without such status").

11 *See* ROPER CTR., A HERO'S WELCOME: THE AMERICAN PUBLIC AND ATTITUDES TOWARD VETERANS, https://ropercenter.cornell.edu/a-heros-welcome-the-american-public-and-attitudes-toward-veterans/ (last visited June 17, 2017).

12 *See* Matthew Wolfe, *From PTSD to Prison: Why Veterans Become Criminals*, THE DAILY BEAST (July 28, 2013, 4:45 AM), http://www.thedailybeast.com/from-ptsd-to-prison-why-veterans-become-criminals (observing that "[w]hen soldiers come back from war, part of the war comes back with them," and "[a] certain number of veterans suffering from mental-health issues will, invariably, end up in jail or prison").

13 INST. FOR VETERAN POL'Y, SWORDS TO PLOWSHARES, VETERANS AND CRIMINAL JUSTICE: A REVIEW OF THE LITERATURE 1 (2012), https://www.swords-to-plowshares.org/wp-content/uploads/Veterans-and-Criminal-Justic-Literature-Review-2012.pdf.

14 *Id.* at 1.

stripping statute has escaped significant scrutiny because it disaffects a politically disenfranchised population with whom the American public prefers to dissociate: disabled veteran felons. It further contends that section 5313 is unjust, unwarranted, and unproductive and, consequently, should be repealed.

The stripping statute is unjust because it was enacted by Congress to realize federal cost savings at the expense of a politically and socially vulnerable population: disabled, justice-involved veterans. These veterans suffer at least two forms of status discrimination: they are both criminals and service-disabled. Veteran prisoners' dual discriminatory status and attendant political disenfranchisement made them easy targets for federal legislators in search of cost savings opportunities at a time of federal budget contraction and public uproar over Son of Sam and other notorious prisoners.

The stripping statute is unwarranted because it is grounded in faulty logic and a fundamental misunderstanding of the nature and purpose of the VA service-connected disability compensation program. Specifically, section 5313 is built on the invalid premise that VA service-connected disability compensation is a needs-based program that operates to replace a veteran's lost earnings due to work disability rather than an earned entitlement awarded without regard to work capacity. It is also the product of Congress's conflation of SSDI and the VA service-connected disability compensation programs.

The stripping statute is unproductive because it suffers at least two additional—and related—flaws. It entirely fails to consider the demonstrated nexus between military service trauma and post-service mental health issues, substance abuse disorders, and related criminal behavior. Worse yet, it actively impedes the rehabilitation and readjustment of justice-involved veterans.

This Article proceeds in four parts. Part I describes the evolution of the American veteran service-connected disability compensation benefits regime and explains the current VA service-connected disability compensation program. Part II introduces the stripping statute and its exceptions. Part III discusses the salacious public controversy that provoked Congress to enact laws stripping SSDI and VA disability compensation benefits from prisoners through an examination of the pertinent legislative history and the dramatic media accounts about notorious prisoner abuse of SSDI benefits. Part IV contends that the stripping statute is unjust, unwarranted, and unproductive for at least five reasons and, as a result, should be repealed.

I. AMERICAN VETERAN SERVICE-CONNECTED DISABILITY BENEFITS

> Disability and disfigurement are not incidental to war's purposes nor marginal to its effects, but rather, alongside the murder of those killed, the point to begin with. Only in making victims

> can war achieve its political ends. If we are to understand war, we must come to intellectual, moral, and emotional terms with the disabled veteran.[15]

A. *The Historical Evolution of Veteran Disability Compensation Benefits*

Nations have provided post-service benefits to combat veterans and their survivors dating back to antiquity:

> Warriors have been rewarded for their service—or their widows and children have been provided support—since the beginnings of organized society. Rewards have been granted in the form of plunder, money, goods, land, assured employment, health care, and special status. From the veterans of Egypt in the third millennium B.C., through the mercenaries of medieval Europe, to veterans in the allied forces who fought in the Persian Gulf region in 1991, governments have compensated military personnel—or their survivors—for loss of life, wounds, injuries, or length of service in defense of the state.[16]

Concomitant with the demise of feudalism and the rise of nation-states and their standing military forces, the English Parliament enacted Europe's first state-sponsored disabled veterans compensation benefits system, An Act for the Relief of Souldiours, in 1593.[17] Not coincidentally, North American laws mandating government payment of compensation to disabled veterans trace their roots to the British system and the establishment of the English colonies.[18] In fact, the very first such law was "enacted in 1636 by Plymouth [and]

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15 David A. Gerber, *Introduction* to DISABLED VETERANS IN HISTORY 4 (David A. Gerber ed., 2000).

16 IHOR GAWDIAK ET AL., LIBRARY OF CONG., VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM vii (1992); *see also* James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 137 (2011) ("Veterans' benefits are as old as civilization itself. The empires of Egypt, Babylon, Greece, and Rome all had some organized form of benefits for veterans." (footnotes omitted)).

17 Geoffrey L. Hudson, *Disabled Veterans and the State in Early Modern England*, *in* Gerber, *supra* note 15, at 117; WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 9 (David Kinley ed., 1918); *see also* KINDER, *supra* note 2, at 18–19 (expounding that "the disabled veteran is a relatively modern figure on the historical stage" because his "cohere[nce] as an institutionally recognized social category" coincided with "the transition from 'tenant-based armies to nationally raised forces'").

18 U.S. DEP'T OF VETERANS AFF., VA HISTORY IN BRIEF 3, https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf [hereinafter VA HISTORY IN BRIEF]; VETERANS ADMIN., MEDICAL CARE OF VETERANS 2 (Robinson E. Adkins ed., 1967) (positing that the 1593 English disabled veterans compensation scheme was "the cornerstone of the entire structure of the American compensation and pension system, and Federal care for disabled veterans, that came into being centuries later"); PRESIDENT'S COMM'N ON VETERANS' PENSIONS, COMPENSATION FOR SERVICE-CONNECTED DISABILITIES 1 (1956) [hereinafter COMPENSATION FOR SERVICE-CONNECTED DISABILITIES] (noting that American "early patterns for care of individuals injured in defense of the colonies follow the British heritage, the same as with our civil development").

provided money to those disabled in the colony's defense against [the Pequot] Indians."[19]

The evolution of the American system of veteran disability compensation is closely tied to the evolution of American warfare and, as such, finds its ascendency in the very first war the country fought as a nation. As the nascent Continental Congress began consolidating the individual colonies' militia forces to wage the Revolutionary War, it began to adopt resolutions concerning the criteria and payment of veteran disability benefits to recruit and retain troops.[20] Indeed, "[t]he need of an invalid-pension [for wounded warriors] became apparent soon after the outbreak of hostilities" against the vastly superior armed forces of Great Britain.[21] In retrospect, the importance of the Revolutionary War to the development of the American veteran benefits system simply cannot be overstated. "The first compensation for service-connected disability or death, the first pension for other than service-connected causes, and the first grants of free public land to veterans, were established during or as a result of" that conflict.[22]

In 1776, the Continental Congress "agreed" to and ordered "published" a committee report promising "half-pay for life, or during disability, to every officer, soldier, or sailor losing a limb in battle, or being so disabled in the military or naval service as to be rendered incapable of earning a livelihood."[23] Promises of disability payment to wounded soldiers were designed to encourage enlistment in and prevent desertion from the Continental

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19 VA HISTORY IN BRIEF, *supra* note 18, at 3; *see also* COMM. ON VETERANS' COMP. FOR POSTTRAUMATIC STRESS DISORDER, INST. OF MED. & NAT'L RES. COUNCIL, PTSD COMPENSATION AND MILITARY SERVICE 29 (2007), http://www.nap.edu/catalog/11870.html (explaining that "[t]he Pilgrims at Plymouth are credited with passing the first [veteran disability compensation] law in America" because "[i]n 1636 [they] 'enacted in their Court that any man who should be sent forth as a soldier and return maimed should be maintained competently by the colony during his life'" (citation omitted)); LIBRARY OF CONGRESS REPORT FOR H. COMM. ON VETERANS' AFFAIRS, 84TH CONG., 1ST SESS., THE PROVISION OF FEDERAL BENEFITS FOR VETERANS 258–65 1 (Comm. Print No. 171, 1955) ("Men who have served under arms in America as far back as 1636 have been designated under certain prescribed and varying conditions to be eligible for public assistance.").

20 VA OFF. OF POL'Y, PLAN., & PREPAREDNESS, VA DISABILITY COMPENSATION PROGRAM: LEGISLATIVE HISTORY 11 (2004) [hereinafter LEGISLATIVE HISTORY]; *see also* GAWDIAK ET AL., *supra* note 16, at 35 ("The inconsistent patterns of veteran's [*sic*] benefits in the colonial period began to change almost as soon as the Revolutionary War with Britain broke out in 1775."). *See generally* GLASSON, *supra* note 17, at 19–97 (exploring in detail the development of centralized federal administration of veterans' benefits during the Revolutionary period from 1776–89).

21 GLASSON, *supra* note 17, at 19.

22 PRESIDENT'S COMM. ON VETERANS' PENSIONS REP. FOR H. COMM. ON VETERANS' AFF., 84TH CONG., 2D SESS., THE HISTORICAL DEVELOPMENT OF VETERANS' BENEFITS IN THE UNITED STATES 1 (Comm. Print No. 244, 1956) [hereinafter HISTORICAL DEVELOPMENT OF VETERANS' BENEFITS IN THE UNITED STATES].

23 VETERANS ADMIN., *supra* note 18, at 28–29; *see also* HAL D. BAIRD, RETOOLING DOD AND VA DISABILITY COMPENSATION SYSTEMS 1 (2009) ("In 1776, the Continental Congress passed a resolution giving veterans who lost a limb or incurred other serious disability half pay for life.").

Army.[24] In that sense, they were successful. As Weber and Schmeckebier conclude, "[t]hey probably prevented the dissolution of the Army and the loss of the Revolutionary War."[25] The new republic's veteran disability compensation scheme, however, delegated to the individual states responsibility for the administration and financing of its benefits.[26] Perhaps unsurprisingly, the 1776 resolution, which lacked both funding and the force of law, was "pitifully ineffective."[27]

Not until after the adoption of the Constitution and the convening of the First Session of the Second United States Congress did the American legislature enact a law, the Invalid Pension Act of 1792, creating a centralized national veteran disability benefits system.[28] As one VA historian explains, "Congress had now become, for the first time, the guardian of the disabled veteran, his widow, and his orphan—a right which it has jealously guarded ever since."[29] The 1792 veteran disability benefits compensation scheme, however, proved to be constitutionally controversial and, consequently, short-lived.[30]

The 1792 act vested responsibility in hearing and deciding veteran benefit claims in the federal circuit courts.[31] It also delegated appellate-like review of those determinations to the Secretary of War and Congress.[32] "In essence, the act constituted a bureau in the circuit court system for the examination, rating, and allowance of claims for service-connected disabilities, with decisions subject to review and revision" by the other two branches of government.[33] As a result, the 1792 act was invalidated by the Eastern Circuit

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24 GUSTAVUS A. WEBER & LAURENCE F. SCHMECKEBIER, THE VETERANS' ADMINISTRATION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 5 (1934).

25 *Id.*

26 GAWDIAK ET AL., *supra* note 16, at 37; WEBER & SCHMECKEBIER, *supra* note 24, at 5.

27 VETERANS ADMIN., *supra* note 18, at 29; *see also* INST. OF MED. OF THE NAT'L ACADS., COMM. ON MED. EVALUATION OF VETERANS FOR DISABILITY COMPENSATION, A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 93 (Michael McGeary et al. eds., 2007), https://www.nap.edu/download/11885# [hereinafter IOM REPORT] (noting that "the Continental Congress lacked the authority or the money to make the pension payment" and "[a]t most, only 3,000 Revolutionary War veterans drew any pension because the obligation was met differently by the individual states").

28 Act of Mar. 23, 1792, ch. 11, 1 Stat. 243, 244; *see also* VETERANS ADMIN., *supra* note 18, at 30 ("Because the administration of [veterans'] benefits by the States had been so unsatisfactory, the Federal Government took over the payment of pensions [in 1792].").

29 VETERANS ADMIN., *supra* note 18, at 30.

30 GLASSON, *supra* note 17, at 55 (positing that the 1792 act "was not long in force, but it is important as the first of a long series of Revolutionary pension laws passed under our present federal government and also as the occasion of an interesting controversy regarding the constitutional functions of the federal judiciary").

31 *See* Maeva Marcus & Robert Teir, Hayburn's Case*: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 529 (1988).

32 Act of Mar. 23, 1792, ch. 11, 1 Stat. 243, 244.

33 PRESIDENT'S COMM. ON VETERANS' PENSIONS FOR H. COMM. ON VETERANS' AFF., 84TH CONG., 2D SESS., THE VETERANS' ADMINISTRATION DISABILITY RATING SCHEDULE: HISTORICAL

as an unconstitutional infringement on the judicial power and was quickly replaced by the Invalid Pension Act of 1793.[34]

The 1793 act vested in the federal district courts the authority to take evidence from veterans in support of their disability claims and transmit that evidence to the Secretary of War, who, in turn, sent a claims report to Congress for final adjudication.[35] It thereby improved on the 1792 act by imposing no adjudication function on the federal courts.[36] In 1803, Congress transferred the power to decide veteran disability compensation claims to the executive branch of government, where it has remained ever since.[37]

In 1833, Congress established the Bureau of Pensions, which was the first U.S. government office authorized specifically to handle veteran disability benefits.[38] Between 1833 and 1917, numerous events occurred crucial to the development of the current, complex American veteran disability compensation system. The Civil War era witnessed the rise of significant veteran advocacy groups, including the Grand Army of the Republic, which successfully organized and lobbied for enhanced and expansive disability and other veterans benefits.[39] Indeed, "[a]dvocacy by and on behalf of disabled veterans of the Union Army following the Civil War is, in large part, the genesis of

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DEVELOPMENT AND MEDICAL APPRAISAL 6 (Comm. Print No. 275, 1956) [hereinafter VETERANS' ADMINISTRATION DISABILITY RATING SCHEDULE].

34 Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792) (highlighting that, on April 5, 1791, the Eastern Circuit judges unanimously ruled that the 1792 act violated separation of powers); GAWDIAK ET AL., *supra* note 16, at 44 ("The revised Invalid Pension Act of 1793, which repealed sections of the 1792 pension act, was clearly intended by Congress to address the procedural concerns raised by circuit court justices under the 1792 pension act."); GLASSON, *supra* note 17, at 60 ("Congress yielded to the objections of the judiciary in the act of February 8, 1793, which repealed the objectionable sections of the act of 1792 and established new regulations.").

35 Act of Feb. 28, 1793, ch. 17, § 2, 1 Stat. 324, 325 (1793); GAWDIAK ET AL., *supra* note 16, at 44.

36 GLASSON, *supra* note 17, at 60–61 (revealing that, unlike the 1792 act, "the act of 1793 imposed no duty of making decisions upon the judges").

37 *Id.* at 62 ("The most important change in procedure [in the 1803 law] was the endowing of the Secretary of War with the power of final decision in the allowance of claims"); *see also* COMPENSATION FOR SERVICE-CONNECTED DISABILITIES, *supra* note 18, at 1.

38 VA HISTORY IN BRIEF, *supra* note 18, at 4 ("When Congress authorized the establishment of the Bureau of Pensions in 1833, it was the first administrative unit dedicated solely to the assistance of veterans. The new Bureau of Pensions was administered from 1833 to 1840 as part of the Department of War, and from 1840 to 1849 as the Office of Pensions under the Navy Secretary. The office then was assigned to the new Department of the Interior, and renamed the Bureau of Pensions.").

39 IOM REPORT, *supra* note 27, at 96; Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303, 310 ("The Civil War, which left many veterans severely wounded, marked a significant expansion of benefits, as the size of the veteran population and the problems they faced forced Congress to become more involved and to initiate new programs."). It should be noted that only Union Army soldiers were entitled to federal Civil War era veteran benefits until 1958, when Congress pardoned Confederate Army veterans and extended benefits to the sole remaining Confederate veteran survivor. IOM REPORT, *supra* note 27, at 95 n.4; *see also* VA HISTORY IN BRIEF, *supra* note 18, at 4.

the contemporary struggle of people with disabilities for social and economic recognition."[40]

During the war, Congress enacted the General Pension Act of 1862, which granted payments to veterans for service-connected disabilities and diseases, provided additional benefits for veterans' dependents, and extended disability compensation to veterans with nonwartime service.[41] "After the Civil War, the federal government created a pension program for disabled Union veterans that became, to that time, the world's largest and most generously funded social insurance scheme."[42] In 1890, Congress enacted the Dependent Pension Act, which extended disability compensation to veterans incapable of manual labor.[43] "As the result of this act alone, the number of veterans receiving benefits doubled, from approximately 500,000 to approximately 1,000,000 recipients."[44] Congress also created several independent agencies to manage the burgeoning veterans benefit system in the aftermath of the Civil War, including the National Home for Disabled Volunteer Soldiers, which provided medical care and rehabilitation to disabled veterans.[45]

Not until shortly after the United States entered World War I and reinstated the Selective Service draft, however, did Congress first adopt a schedule for rating veteran service-connected disability on a percentage basis with a methodology similar to the current system.[46] On October 6, 1917, Congress enacted amendments to the War Risk Insurance Act of 1914,[47] which described the new rating system as follows:

> A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the [B]ureau [of War Risk Insurance]. Ratings may be as high as one hundred per centum. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of permanent injury.[48]

The 1917 act also authorized an advisory board to the Secretary of the Treasury to compile and submit to Congress the above-described disability

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40 Ann Hubbard, *A Military-Civilian Coalition for Disability Rights*, 75 MISS. L.J. 975, 979 (2006).

41 IOM REPORT, *supra* note 27, at 95–96.

42 Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 3–4 (2000); *see also id.* at 4 ("In an era when the national government played a minimal role in the affairs of most Americans, Civil War pensions consumed as much as 42% of the federal budget in many years.").

43 IOM REPORT, *supra* note 27, at 97; VA HISTORY IN BRIEF, *supra* note 18, at 5.

44 Levy, *supra* note 39, at 310–11.

45 VA HISTORY IN BRIEF, *supra* note 18, at 5. The home was named the National Asylum for Disabled Volunteer Soldiers when it was created in 1865 but was renamed the National Home for Disabled Volunteer Soldiers in 1873. *Id.*

46 *See* Act of Oct. 6, 1917, Pub. L. No. 65-90, art. 3, 40 Stat. 398, 405–06 (1917).

47 Pub. L. No. 63-193, 38 Stat. 711 (1914).

48 Act of Oct. 6, 1917, Pub. L. No. 65-90, § 302(2), 40 Stat. 398, 406.

rating schedule based on "average impairments of earning capacity," which it did in 1919.[49] Since 1919, this basic method of rating veteran disability as a percentage expression of severity of disability based on average (and not individual) impairment of earning capacity continues in force, with the last major revisions to the rating schedule made in 1945.[50] As such, the 1945 rating schedule serves as the foundation for the current schedule.[51]

To further dissociate from the increasingly unpopular pre–World War I veteran disability benefits system, the 1917 War Risk Insurance Act amendments changed the term of art used to describe service-connected disability payment from "pension" to "compensation."[52] In addition, the considerable inflow of World War I veterans catalyzed institutional reform.[53]

> Congress provided for the consolidation of various existing agencies into the Veterans Bureau in 1921, and further consolidation came with the creation of the Veterans Administration in 1930 as a single agency with administrative responsibility for the veterans benefit system. The VA was elevated to cabinet level and renamed the Department of Veterans Affairs in 1988.[54]

Today, the VA administers two distinct veteran disability benefit programs through the Veterans Benefits Administration: the service-connected disability compensation program and the nonservice-connected disability

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49 VETERANS' ADMINISTRATION DISABILITY RATING SCHEDULE, *supra* note 33, at 33–35; *see also id.* at 34 (detailing that the Board, among other considerations, looked to the schedules of allowances contained in state workmen's compensation laws and consulted with "surgeons in New York" in preparing the 1919 rating schedule); IOM REPORT, *supra* note 27, at 75–76 ("When disability benefits for veterans were established by an amendment to the War Risk Insurance Program in 1917, the concept of a rating schedule to compensate for diminished earning capacity was borrowed from state workers' compensation programs.").

50 U.S. GOV'T ACCOUNTABILITY OFF., SSA AND VA DISABILITY PROGRAMS: RE-EXAMINATION OF DISABILITY CRITERIA NEEDED TO HELP ENSURE PROGRAM INTEGRITY 12 (2002), http://www.gao.gov/new.items/d02597.pdf [hereinafter GAO PROGRAM INTEGRITY REPORT] ("*The Schedule for Rating Disabilities* was first developed in 1919 and had its last major revision in 1945."); COMPENSATION FOR SERVICE-CONNECTED DISABILITIES, *supra* note 18, at 2.

51 IOM REPORT, *supra* note 27, at 101.

52 COMPENSATION FOR SERVICE-CONNECTED DISABILITIES, *supra* note 18, at 2 ("Prior to the First World War, payments for disability were called 'pensions,' while the awards for non-service connected disabilities were classified as 'service pensions'. . . [E]fforts succeeded in the World War I legislation to designate the payments for war-incurred injuries as 'compensation,' thus removing any possible stigma attached to the term 'pensions.'"); HISTORICAL DEVELOPMENT OF VETERANS' BENEFITS IN THE UNITED STATES, *supra* note 22, at 28 ("In an attempt to get away from the pension idea, which was out of favor at the time, the name of the basic payment made to veterans with service-connected disability was changed from pension to compensation. This was the first time the term had been used in connection with veterans' benefits; prior to this all payments had been called pensions regardless of whether they were for service-connected disability or otherwise.").

53 Levy, *supra* note 39, at 314.

54 *Id.* (footnotes omitted).

pension program.[55] An overview of the current veteran service-connected disability compensation program is provided below.

B. *The Current Service-Connected Disability Compensation Program*

"Every [American] military service member who is discharged with some type of disabling disease or injury related to that service member's period of service has a congressionally granted entitlement to disability compensation. . . ."[56] Under the current system, the VA provides a monthly tax-exempt cash payment to veterans who are disabled so long as they were discharged or released under conditions other than dishonorable,[57] their disability was incurred or aggravated while in service,[58] and their disability is not the result of their own willful misconduct or alcohol or drug abuse.[59]

1. The VA Schedule for Rating Disabilities ("VASRD")

As noted above, the VA determines an individual veteran's monthly disability compensation based on its average earnings impairment disability rating schedule, the VASRD.[60] Under the VASRD, a veteran's composite disability rating varies according to the severity of his or her disability expressed in ten percentage point increments from 0 percent to 100 percent.[61] "The

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55 As explained in a leading treatise on veteran benefits, "[t]he term 'VA pension' has a special meaning. VA pension benefits are *not* retirement benefits based on amount of earnings or years worked. VA pension is a needs-based program for veterans with war-time experience who are either totally disabled or over age 65." VETERANS BENEFITS MANUAL § 3.1.1 at 55 n.1 (Barton F. Stichman et al. eds., 2014).

56 Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 WIDENER L.J. 57, 74 (2009) (citing 38 U.S.C. §§ 1110, 1131).

57 38 U.S.C. § 101(2) (2012) ("The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."); 38 C.F.R. § 3.1(d) (2017) ("*Veteran* means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable."); *see also id.* § 3.12 (enumerating character-of-discharge eligibility criteria for VA disability compensation, pension, and dependency and indemnity ("DIC") benefits).

58 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.4(b)(1).

59 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.301.

60 38 U.S.C. § 1155 ("The ratings shall be based, as far as practical, upon the average impairments of earning capacity resulting from such injuries in civil occupations."); 38 C.F.R. § 4.1 ("The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations").

61 38 U.S.C. § 1155 ("The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, and total, 100 percent."); *see also* ECON. SYS. INC., A STUDY OF COMPENSATION PAYMENTS FOR SERVICE-CONNECTED DISABILITIES, VOL. I, EXECUTIVE REPORT 7 (2008), https://www.va.gov/op3/docs/ProgramEvaluations/

underlying assumption of this system of rating is that degree of disability is the equivalent or reasonably similar to percentage of impairment."[62]

Perhaps unsurprisingly, commentators routinely question whether the VASRD methodology achieves its express statutory purpose[63]—that is, to compensate disabled veterans for "average impairments of earning capacity resulting from such injuries in civil occupations."[64] A consistent point of contention is the rating schedule's nonlinearity in terms of its enumerated monthly cash payment amounts.[65] In other words, although the VASRD ratings increase in 10 percent increments, the cash compensation associated with those incremental increases do not.[66] In fact, monthly cash compensation is exponentially greater for veterans with higher disability ratings.[67]

For example, as of December 1, 2017, VA monthly compensation for single veterans without dependents ranged from $136.24 for those rated 10 percent disabled to $2,973.86 for those rated 100 percent or totally disabled.[68] The current schedule, therefore, reflects a determination that a 100 percent disability rating is 21.8 times worse than a 10 percent rating (and, not, as one might assume, simply 10 times worse). "This suggests Congress' intent is not just economic compensation; rather, the scale suggests compensation for loss in quality of life."[69]

CompPaymentStudy/DS_VOLUME_I_Executive_Report.pdf [hereinafter A STUDY OF COMPENSATION PAYMENTS FOR SERVICE-CONNECTED DISABILITIES]; RICHARD BUDDIN & KANIKA KAPUR, RAND NAT'L DEF. INST., AN ANALYSIS OF MILITARY DISABILITY COMPENSATION 7–8 (2005), http://www.rand.org/content/dam/rand/pubs/ monographs/2005/RAND_MG369.pdf.

62 IOM REPORT, *supra* note 27, at 102.

63 *E.g.*, A STUDY OF COMPENSATION PAYMENTS FOR SERVICE-CONNECTED DISABILITIES, *supra* note 61, at 39; IOM REPORT, *supra* note 27, at x; BUDDIN & KAPUR, *supra* note 61, at xiii–xiv.

64 38 U.S.C. § 1155; *accord* 38 C.F.R. § 4.1; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO/HEHS-97-9, VA DISABILITY COMPENSATION: DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES 10 (1997), http://www.gao.gov/assets/230/223533.pdf [hereinafter DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES] ("VA has not defined in regulations what is meant by average impairment in earning capacity other than to generally describe it as an economic or industrial handicap.").

65 *See, e.g.*, LEGISLATIVE HISTORY, *supra* note 20, at 5–6.

66 *Id.* at 7.

67 LEGISLATIVE HISTORY, *supra* note 20, at 7 ("Overall, compensation is not proportional to disability ratings. Given additional compensation for specific losses and conditions, the benefit schedules begin in a linear fashion and then curve exponentially.").

68 U.S. DEP'T OF VETERANS AFF., VETERANS COMPENSATION BENEFITS RATE TABLES - EFFECTIVE 12/1/17 (2017) http://www.benefits.va.gov/compensation/resources_comp01.asp [hereinafter VETERANS COMPENSATION BENEFITS RATE TABLES - EFFECTIVE 12/1/17]. Veterans with dependents who are rated at least 30 percent disabled are entitled to higher monthly compensation payments. LEGISLATIVE HISTORY, *supra* note 20, at 7.

69 LEGISLATIVE HISTORY, *supra* note 20, at 8; *see also id*. at 2 ("The legislation does not explicitly state that intent of the disability program is to compensate for reduction in quality of life due to service-connected disability. However, this intent is implicit because Congress has set forth certain presumptions of eligibility for disability compensation and higher benefit levels for certain disabling conditions such as loss of a limb that reflect humanitarian concern about quality of life.").

The VASRD methodology also fails to take into account the individual veteran's actual need, income, resources, or capacity to work.[70] The schedule, therefore, struggles to comport with the regulatory command that its "degrees of disability . . . [be] adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability."[71] As the Government Accountability Office ("GAO") has argued, "[b]asing disability ratings at least in part on actual earnings loss rather than solely on judgments of loss in functional capacity would help to ensure that veterans are compensated to an extent commensurate with their economic losses."[72] The service-connected disability program's refusal to consider a veteran's actual employability or pre-disability earnings also distinguishes it from virtually all other federal and state disability benefit programs, including worker's compensation[73] and SSDI.[74] This is because these programs limit benefits to individuals who have proved that they are substantially work-disabled and calculate benefits based on a beneficiary's actual earnings record.[75]

The VASRD also has been challenged for its failure to define what is meant by "average impairment of earning capacity":[76]

> There is a distinction between "lost earnings," which, for example, is a common element for damages in tort cases, and the average impairment of earning capacity, which for VA disability compensation benefits is an objective determination without regard to prior employment or military occupational specialty. The legislation does not currently provide guidance on tailoring compensation benefits to specific occupations that the veteran had been engaged in as a civilian prior to military service. In contrast to other disability compensation programs, the Disability Compensation Program . . . also does not require the disabled veteran to actively strive to be employed. In addition, Disability Compensation benefits are not offset against post-military civilian employment earnings.[77]

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70 *See* VETERANS BENEFITS MANUAL, *supra* note 55, at 57 (stating that "entitlement to service connection [compensation benefits] is never barred by employment" and "is not affected by earned or unearned income" or the value of a veteran's estate).

71 38 C.F.R. § 4.1; *see also* RICHARD BUDDIN & BING HAN, IS MILITARY DISABILITY COMPENSATION ADEQUATE TO OFFSET CIVILIAN EARNINGS LOSSES? xii–xiii (2012), http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1098.pdf [hereinafter IS MILITARY DISABILITY COMPENSATION ADEQUATE TO OFFSET CIVILIAN EARNINGS LOSSES?] (noting that the VASRD "is only nominally related to actual earnings losses").

72 DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES, *supra* note 64, at 3.

73 U.S. GOV'T ACCOUNTABILITY OFF., VA DISABILITY COMPENSATION: COMPARISON OF VA BENEFITS WITH THOSE OF WORKERS' COMPENSATION PROGRAMS 3 (1997), http://www.gao.gov/assets/230/223670.pdf.

74 GAO PROGRAM INTEGRITY REPORT, *supra* note 50, at 11.

75 *Id*. at 6 ("Established in 1956, [SS]DI is an insurance program that provides benefits to workers who are unable to work because of severe long-term disability.").

76 LEGISLATIVE HISTORY, *supra* note 20, at 2 ("The legislation does not specifically define how 'average' is to be determined (i.e., there is no single permanent reference point specified in the law such as median earnings by a particular group).").

77 *Id.*

Moreover, and as mentioned above, the VA currently "uses the [outdated] 1945 Rating Schedule and its medical criteria with some revisions to evaluate veterans for disability compensation."[78] As a result, "[t]he disability ratings in VA's current schedule are still primarily based on physicians' and lawyers' judgments made in 1945 about the effect service-connected conditions had on the *average* individual's ability to perform [civilian] jobs requiring *manual or physical labor*."[79] In addition, the rating schedule's medical criteria often are obsolete or have inadequately integrated current and accepted diagnostic procedures.[80] The current VASRD, therefore, fails to reflect the realities of the modern U.S. economy, which demands a predominantly knowledge- and service-based labor market.[81] It also has failed to keep up with the myriad advances in medicine over the ensuing seven-plus decades since the conclusion of the Second World War.[82]

2. Extra-Schedular Service-Connected Disability Compensation

It is important to point out that the VA can provide service-connected disability compensation that exceeds a veteran's VASRD rating. Indeed, veterans are entitled to "extra-schedular" service-connected disability compensation under two circumstances.

First, a veteran who is not rated 100 percent disabled but is unable to secure substantial gainful employment may be entitled to a total disability rating based on individual unemployability ("IU") compensation.[83] Specifically, unemployable veterans rated at 60 percent to 90 percent disabled qualify for the same benefit payment amount as veterans rated 100 percent or

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78 IOM REPORT, *supra* note 27, at 102; *see also* DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES, *supra* note 64, at 4 ("The last major revision to the schedule was made in 1945.").

79 DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES, *supra* note 64, at 2 (emphases added).

80 IOM REPORT, *supra* note 27, at 114.

81 *See* DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES, *supra* note 64, at 2 ("Although the ratings in the schedule have not changed substantially since 1945, dramatic changes have occurred in the labor market and in society since then."); GAO PROGRAM INTEGRITY REPORT, *supra* note 50, at 12 ("*The Schedule for Rating Disabilities* was first developed in 1919 and had its last major revision in 1945."); *id*. at 3 ("VA . . . has not updated its estimates of the effect that impairments have on earning capacity to reflect today's labor market. Its last update was made in 1945.").

82 *See* IOM REPORT, *supra* note 27, at 5 (recommending that the rating schedule "be revised to remove ambiguous criteria and obsolete conditions and language, reflect current medical practice, and include medical advances in diagnosis and classification of new conditions"); U.S. GOV'T ACCOUNTABILITY OFF., NEED TO UPDATE MEDICAL CRITERIA USED IN VA'S DISABILITY RATING SCHEDULE (1988), http://www.gao.gov/assets/150/147236.pdf; GAO PROGRAM INTEGRITY REPORT, *supra* note 50, at 12.

83 38 C.F.R. § 4.17 (2017).

totally disabled.[84] The IU framework indicates that Congress has decided as a matter of public policy that a veteran's inability to work overrides his or her disability impairment rating so long as that veteran is at least 60 percent disabled.

Second, veterans with certain enumerated disabilities or combinations of severe disabilities may be entitled to special monthly compensation ("SMC").[85] SMC is a benefit that is paid in addition to or instead of the rates payable under the VASRD.[86] Notably, *it is* "*not specifically intended, as is the regular rating schedule, to replace lost earnings*."[87] SMC eligibility criteria include the anatomic loss or loss of use of organs (such as loss or lost use of a hand, foot, or limb) or impairment of the senses (such as loss of hearing or vision);[88] disabilities that render the veteran housebound[89] or in need of aid and attendance;[90] and multiple, independent disabilities each rated at 60 percent or higher.[91] As has been noted, the fact that "SMC benefits are paid in addition to or at higher rates than benefits for work disability . . . suggests or implies that the amount payable over and above the amount payable for the schedular rating is intended to compensate for quality of life ("QOL") loss in addition to work disability."[92]

As detailed in the Introduction to this Article, Billy Smith lost the use of a creative organ—specifically, his testicle—while on combat patrol. Accordingly, the VA determined that Billy was entitled to SMC in the amount of $103.54 per month. Unfortunately, the stripping statute, section 5313, eliminates the payment of SMC benefits to disabled, justice-involved veterans, like Billy, throughout their incarceration although such veterans, like Billy, necessarily continue to suffer the loss of organs or other body parts while imprisoned. Part II examines section 5313's mandates and exceptions.

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84 U.S DEP'T OF VETERANS AFF., DISABILITY COMPENSATION: INDIVIDUAL UNEMPLOYABILITY (2017), https://benefits.va.gov/BENEFITS/factsheets/serviceconnected/IU.pdf.

85 *Types of Compensation*, U.S DEP'T OF VETERANS AFF., (Jan. 19, 2018), https://www.benefits.va.gov/COMPENSATION/types-compensation.asp.

86 *Id.*

87 A STUDY OF COMPENSATION PAYMENTS FOR SERVICE-CONNECTED DISABILITIES, *supra* note 61, at 7 (emphasis added).

88 38 U.S.C. § 1114(k) (2012); 38 C.F.R. § 3.350.

89 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i).

90 38 U.S.C. § 1114(l); 38 C.F.R. § 3.352.

91 38 U.S.C. § 1114(s); 38 C.F.R. § 3.350(i)(1).

92 A STUDY OF COMPENSATION PAYMENTS FOR SERVICE-CONNECTED DISABILITIES, *supra* note 61, at 7.

II. THE SERVICE-CONNECTED DISABILITY COMPENSATION STRIPPING STATUTE

A. *Introduction*

Veterans are entitled to apply for service-connected disability compensation while incarcerated.[93] Indeed, the VA has a statutory duty to assist justice-involved veterans with those disability claims.[94] As the United States Court of Appeals for Veterans Claims has explained, this is because incarcerated veterans "are entitled to the same care and consideration given to [non-inmate] veterans."[95] Needless to say, imprisoned disabled veterans earned their disability compensation entitlement by satisfying precisely the same eligibility criteria as did their nonincarcerated counterparts—that is, by honorably serving in our nation's armed forces and, while so doing, incurring or aggravating a disability. Accordingly, a veteran's post-discharge, non-service-related, civilian misconduct and conviction should have no bearing on that veteran's well-earned service-connected entitlement to disability compensation. Consistent with this basic principle, the VA fully compensated veteran prisoners for their service-connected disabilities until 1980.[96]

Congress reversed the centuries-long federal policy to provide full benefits to *all* service-disabled American veterans by enacting the Veterans' Disability Compensation and Housing Benefits Amendments of 1980. Section 504 of the act, which is codified at section 5313, severely reduces the monthly disability compensation payment amount the VA owes to certain veterans while incarcerated.[97] Specifically, section 5313 demands the near-elimination of disability compensation payment to any veteran "incarcerated in a Federal, State, local, or other penal institution or correctional facility for a period in excess of sixty days for conviction of a felony."[98] The extent to which disabled veteran felons are subject to a reduction of their disability entitlement payment depends on their rating.[99] The VA reduces the monthly

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93 *See* 38 U.S.C. §§ 5313, 5313A; *see also, e.g.*, Bolton v. Brown, 8 Vet. App. 185, 187 (1995).

94 38 U.S.C. §§ 5103A, 5107(a) (2012 & Supp. 2017); *see also Bolton*, 8 Vet. App. 185, 190 (1995) (explaining that once a veteran inmate submits a service-connected disability claim, "VA has an affirmative duty to 'assist such a claimant in developing the facts pertinent to the claim'") (quoting 38 U.S.C. § 5107(a) (1994)).

95 Wood v. Derwinski, 1 Vet. App. 190, 193 (1991).

96 As noted in the previous Section, veterans with dishonorable discharges are statutorily barred from receipt of service-connected disability compensation. *See* 38 U.S.C. § 101(2) (2012) ("The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."); *accord* 38 C.F.R. § 3.1(d) (2017); *see also* 38 C.F.R. § 3.12 (enumerating character-of-discharge eligibility criteria for VA disability compensation, pension, and DIC benefits).

97 Veterans' Disability Compensation and Housing Benefits Amendments of 1980 § 504, 38 U.S.C. § 5313.

98 *Id.* § 5313(a)(1); *accord* 38 C.F.R. § 3.665.

99 38 U.S.C. § 5313(a)(1)(A)–(B); 38 C.F.R. § 3.665(d)(1)–(2).

payment amount to the 10 percent rate[100] (or $136.24 a month under the 2017 schedule[101]) for veterans rated at 20 percent or above and to half the 10 percent rate for veterans rated at 10 percent[102] (or $68.12 a month under the 2017 schedule[103]).

B. *Exceptions and Disparate Impact*

The service-connected disability compensation-stripping scheme is riddled with exceptions and exemptions, which disparately impact various categories of disabled veterans. First, "[a]ll or any part of the compensation not paid to a veteran" under section 5313 may be apportioned to the veteran's dependents.[104] Second, no reduction in disability payment applies to a veteran either participating in a work-release program or residing in a halfway house.[105] Third, no reduction in payment applies to a veteran incarcerated in a foreign prison.[106] Fourth, no compensation stripping applies to a veteran confined in a mental institution, even when that veteran is so confined because he has been found not guilty of a felony charge by reason of insanity.[107] Finally, and as section 5313 makes clear on its face, no reduction in compensation applies to a veteran incarcerated as the result of a misdemeanor conviction (or multiple misdemeanor convictions) no matter the length of the term (or terms) of incarceration or nature of the crime (or crimes) committed.[108]

Unfortunately, the stripping statute results in uneven and facially unfair outcomes for disabled, justice-involved veterans. This means that a single veteran felon without dependents rated 50 percent disabled, entitled to SMC for loss of use of a creative organ, and sentenced to a five-year term, like Billy Smith, receives $9,612.74 in total disability payments while incarcerated, a $48,048.06 reduction of benefits over the same five-year period.[109] A

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100 38 U.S.C. § 5313(a)(1)(A); 38 C.F.R. § 3.665(d)(1).

101 VETERANS COMPENSATION BENEFITS RATE TABLES - EFFECTIVE 12/1/17, *supra* note 68.

102 *See* 38 U.S.C. § 5313(a)(1)(B); 38 C.F.R. § 3.665(d)(2).

103 VETERANS COMPENSATION BENEFITS RATE TABLES - EFFECTIVE 12/1/17, *supra* note 68.

104 38 U.S.C. § 5313(b)(1); 38 C.F.R. § 3.665(e). Veterans without dependents, of course, are not entitled to apportionment. *See id.*

105 *Id.* § 3.665(a)–(b).

106 *Id.*§ 3.665(c)(3); Veterans Aff. Op. Gen. Couns. Prec. 10-01, VAOPGCPREC 10-01, (May 24, 2001) (explaining that incarceration does not include parole, work release, residency in a halfway house, participation in a community control program, confinement to a state hospital, or incarceration in a foreign prison).

107 Veterans Aff. Op. Gen. Couns. Prec. 3-90, VAOPGCPREC 3-90 (Mar. 20, 1990) (holding that there is no reduction in disability compensation benefits under section 5313 for "veterans who, under California law, have been found 'not guilty by reason of insanity' and confined to a state hospital for care and treatment").

108 *See* 38 U.S.C. § 5313 (stating that the stripping statute applies only to felons).

109 *See id.* § 5313(a)(1)(A) (stating that the reduction in benefits begins on day sixty-one following initial incarceration, and thereafter, the benefit paid is reduced to the 10 percent disability rate). Here,

similarly situated veteran, convicted of multiple misdemeanors and sentenced to five consecutive one-year terms in prison or criminally committed to a psychiatric facility for the same period of time, however, receives $57,660.80 in compensation, or the full amount for which he is rated and SMC eligible.[110]

The stripping statute's disparate treatment of disabled, justice-involved veterans based on the federal or state characterization of their at-issue criminal conduct (misdemeanor or felony), the nature of their confinement (prison or psychiatric facility or halfway house), and their ability to participate in a work-release program raises an important equal protection question. Specifically, is there any rational basis for distinguishing disabled veteran felons, who are subject to benefit stripping, from other classes of disabled, justice-involved veterans who are not?[111]

Regarding section 5313's express distinction between disabled veteran felons and disabled veteran misdemeanants, the answer seems to be no. As Professor Anna Roberts has explained:

> Far from having a fixed referent, the label of "felon" has been applied increasingly broadly, as the number of felonies has expanded, and the number of people with felony convictions has grown to more than twenty million. At common law, felonies were a narrow group of offenses, all punishable by death, and all deemed to be "inherently morally wrong." Now, however, there are "numerous felonies, but not all are serious, or *mala in se*, or life-endangering."[112]

The proliferation of crimes classified as felonies is so ubiquitous in the United States that attorney Harvey Silverglate wrote a book in 2009 estimating that the average American unintentionally commits *three felonies a*

$9,612.74 represents approximately two months of full benefits for a 50 percent disabled veteran ($855.41 per month) plus fifty-eight months of reduced benefits ($136.34 per month). For the applicable rates, see VETERANS COMPENSATION BENEFITS RATE TABLES - EFFECTIVE 12/1/17, *supra* note 68.

110 The full compensation amount over five years, $57,660.80, is calculated by multiplying the sum of $855.41, the regular monthly compensation amount for 50 percent disabled veterans, and $105.61, the SMC (k) rate that accounts for the loss of a creative organ, by sixty months. For the regular benefit rates, see *id.* For the special rates for loss of a creative organ, see U.S. DEP'T OF VETERANS AFF., SPECIAL MONTHLY COMPENSATION (SMC) RATE TABLE - EFFECTIVE 12/1/17, http://www.benefits.va.gov/COMPENSATION/resources_comp02.asp, and see 38 U.S.C. § 1114(k).

111 In *City of Cleburne v. Cleburne Living Center, Inc.*, the U.S. Supreme Court held that disability is not a quasi-suspect classification. 473 U.S. 432, 442 (1985). As a result, equal protection clause challenges brought by individuals with disabilities, including veterans, receive the minimum level of judicial scrutiny, which is rational basis review. *Id.* at 441–42. *See also* Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 115 (1987).

112 Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 622–23 (2013) (footnotes omitted). Roberts also posits that "the distinction between felony and misdemeanor now seems . . . 'increasingly technical,' and may be detached from measures of relative threat, or of factual guilt. It can be one's prior record, for example, rather than any difference in the instant offense, that makes that offense a felony rather than a misdemeanor." *Id.* at 623 (footnotes omitted).

day.[113] Indeed, the Supreme Court acknowledged more than three decades ago that distinctions between a "felon" and a "misdemeanant" are often arbitrary. In *Tennessee v. Gardner*,[114] the Court wrote as follows:

> [W]hile in earlier times "the gulf between the felonies and the minor offences was broad and deep," today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. These changes have . . . made the assumption that a "felon" is more dangerous than a misdemeanant untenable. Indeed, *numerous misdemeanors involve conduct more dangerous than many felonies*.[115]

Moreover, whether a disabled, justice-involved veteran is stripped of service-connected disability benefits is often jurisdiction dependent. This is because the stripping statute defers to state law to classify state-level veteran criminal conduct.[116] States can and do classify the same conduct differently under their respective criminal codes. As a result, disabled, justice-involved veterans are at the mercy of *state* criminal conduct classification schemes regarding retention of their *federal*, service-connected benefits.

The stripping statute's blanket distinction between disabled veteran felons and disabled veteran misdemeanants seems to lack any rational basis. As explained in more detail in Part III, the government contends that disabled veteran felons do not "need" VA disability compensation while incarcerated because the government is paying for their room and board. It does not, however, clarify why that needs-based argument applies to incarcerated veteran felons but not their imprisoned misdemeanant counterparts.

The stripping statute's disparate treatment of disabled veteran felons participating in a work-release program and those who cannot do so due to disability also appears arbitrary. In fact, it seems particularly irrational and capricious to continue to withhold disability compensation benefits from disabled veterans eligible for work-release due to their good behavior but incapable of working because of the severity of their service-connected injuries. The only court that has entertained a disparate impact challenge to the stripping statute's work-release exception on similar facts, however, disagreed.[117]

Vietnam veteran David E. Brown was rated 100 percent disabled for posttraumatic stress disorder ("PTSD") prior to his felony conviction.[118] On the sixty-first day of his incarceration, the VA stripped Brown's disability

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113 L. Gordon Crovitz, *Information Age: You Commit Three Felonies a Day*, WALL ST. J. A21 (Sept. 28, 2009); *see also* Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 268 (2003) (noting that "[it] is hard to believe that many of us have not committed countless state and federal offenses").

114 471 U.S. 1 (1985).

115 *Id.* at 14 (1985) (emphasis added) (citations omitted).

116 A "felony" under section 5313 is defined as "an offense punishable by death or imprisonment for a term exceeding one year, *unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction*." 38 C.F.R. § 3.665(b) (2017) (emphasis added).

117 *See* Brown v. Dep't of Veterans Aff., 451 F. Supp. 2d 273, 282 (D. Mass. 2006).

118 *Id.* at 275.

compensation to the 10 percent rate pursuant to section 5313(a)(1).[119] It was undisputed that Brown was eligible for a Massachusetts work-release program but could not participate as a result of his service-connected disability and, therefore, could not qualify for reinstatement of his service-connected disability benefits.[120]

Consequently, Brown brought a suit arguing, among other things, that the stripping statute "violates the Fifth Amendment on its face because it irrationally discriminates against incarcerated veterans who qualify for work release, but whose disability prevents them from participating."[121] The court, however, concluded that the stripping statute's work-release exemption was rationally related to a legitimate government purpose—that is, to incentivize veteran prisoner good behavior and rehabilitation—so the court rejected Brown's claim.[122] In so doing, the court noted that "[t]he notion that some veterans will be excluded from this incentive solely because of the severity of their disability, while unfortunate, is far from sufficient to overcome the presumption of constitutionality the statute carries."[123] What is more unfortunate, of course, is the court's failure to recognize the obvious: that is, that the work-release exemption is irrational insofar as it disincentivizes good behavior on the part of veteran felons whose service-related injuries are so severe that they are simply unable to work and, therefore, to realize the benefits of the program.

Two other points warrant mention here. To begin, the stripping scheme operates to disproportionately "punish" justice-involved veterans suffering disabilities that preclude them from participating in work-release programs by reducing their monthly disability compensation solely because of the severity of their disabilities. As explained in the previous Part, the VA rating schedule is nonlinear in terms of the amount of monthly cash payments it allots as a veteran's disability rating increases. Under the current schedule, for example, the monthly disability compensation for a 100 percent disabled veteran incarcerated on a felony conviction is reduced by 95 percent, from $2,973.86 to $136.24.[124] On the other hand, the monthly disability compensation for a much less severely disabled veteran, rated at 20 percent, is reduced by only 49 percent, from $269.30 to $136.24.[125]

Next, the stripping statute prefers veterans with families over those who are single without dependents.[126] This is because veterans with dependent family members, including spouses, are entitled to allot their full monthly

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119 *Id.* at 275–76.

120 *Id.* at 276.

121 *Id.* at 281.

122 *Id.* at 281–82.

123 *Brown*, 451 F. Supp. 2d at 282.

124 38 U.S.C. § 5313(a)(1)(A) (2012); 38 C.F.R. § 3.665(d)(1) (2017); VETERANS COMPENSATION BENEFITS RATE TABLES - EFFECTIVE 12/1/17, *supra* note 68.

125 *Id.*

126 *See* 38 U.S.C. § 5313(b)(2)(A)–(B).

compensation to those dependents while incarcerated.[127] Veterans without dependents, by contrast, are entitled neither to allot their compensation to a designated nondependent nor to have their compensation held in trust by the VA while incarcerated.[128] This anomaly results in a system that renders disabled, justice-involved veterans, without significant external supports, the most destitute upon their release from prison or jail.

III. THE 1980 DISABILITY BENEFIT-STRIPPING STATUTES: "SON OF SAM" CONTROVERSY AND LEGISLATIVE HISTORY

The significant disconnect between the VA eligibility criteria that entitle all service-connected disabled veterans to disability compensation and the stripping statute, which deprives disabled, justice-involved veteran felons of the overwhelming majority of those benefits, begs at least two questions. First, why did Congress enact a law in 1980 that, for the first time in American history, stripped disabled, justice-involved veterans of a benefit they had earned as a result of their satisfactory in-service conduct and service-related injuries on the basis of subsequent, nonservice-related misconduct? Second, why has the nearly forty-year-old stripping statute received so little attention from veterans' advocacy groups, politicians, and academics?

It is because Congress enacted the stripping statute largely in response to public pressure resulting from sensationalized national media coverage of alleged SSDI program abuse by certain infamous prisoners.[129] In addition, Congress passed the legislation to realize cost savings at the expense of a socially and politically disenfranchised population—disabled veteran felons—during a time of federal budget contraction.[130] To explain these conclusions, it is important to first explore the sequence of events that led to the enactment of the 1980 stripping statute.

A. *Son of Sam and the SSDI Prisoner Abuse Controversy*

Pertinent legislative history and other contemporaneous reports strongly indicate that Congress's concern over the payment of service-connected disability compensation to veteran prisoners was fueled by public outrage over an entirely different federal disability benefit program: SSDI. Specifically, public interest in prisoner disability benefits stemmed from dramatic news stories published in the year leading up to the enactment of the stripping

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127 *See id.* § 5313(b)(1).

128 *See id.* § 5313(b)(1)–(3).

129 *See infra* Parts III.A–D.

130 H.R. REP. NO. 96-1155, intro., at 15–16 (1980) (describing the stripping statute as a "cost-savings" provision and explaining that it "would result in reduced Federal expenditures of $3 million in fiscal year 1981 and each year thereafter through fiscal year 1985"); *see also infra* Part III.D.

statute.[131] Those media accounts reported that "[m]ass murderers, child molesters, and other [notorious] prison inmates," including New York City "Son of Sam" killer David Berkowitz, "collect millions of dollars in benefits from the financially troubled [SSDI program] each year."[132]

Federal agencies seem to agree that Son of Sam and other infamous prisoner SSDI beneficiaries raised congressional ire in the months leading to the stripping of VA disability compensation from veteran prisoners. As explained in a 1982 GAO report entitled *Prisoners Receiving Social Security and Other Federal Retirement, Disability, and Education Benefits*,

> [The receipt of Social Security Administration ("SSA") and VA benefits by incarcerated prisoners] drew public attention during 1979 and 1980, when prison guards and officials complained about prisoners' use of these benefits and the news media publicized examples of certain prisoner benefits. In the Social Security disability examples, usually the disability began during or after the time of the crime, and the severity of impairment appeared questionable.[133]

The report goes on to cite salacious examples of SSDI benefit abuse by prisoners, including one instance in which an inmate received such benefits "for a disabling condition of headaches and dizzy spells allegedly resulting from a struggle with the police upon arrest," and, worse yet, the inmate then used those funds to organize a mail order fraud scheme while incarcerated.[134]

Remarkably, the report relies exclusively on a single prisoner's receipt of VA educational benefits to reach its conclusion that veteran prisoners were somehow abusing their VA disability compensation benefits.[135] As it turns out, the report fails to provide even a single example involving a prisoner's receipt—let alone abuse—of VA service-connected disability compensation. In fact, its only commentary whatsoever regarding VA benefits involves a veteran prisoner, who, according to a prison guard, "preferred to remain in prison rather than accept probation because he was receiving . . . G.I. Bill payments and had no subsistence expenses."[136]

Stripping veteran prisoners of their disability compensation as the result of one prison guard's complaint about a single veteran inmate's "abuse" of

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131 Richard Haitch, *Follow-Up on the News; Convict Benefits*, N.Y. TIMES (July 26, 1981), http://www.nytimes.com/1981/07/26/nyregion/follow-up-on-the-news-convict-benefits.html ("After newspaper articles had disclosed that many imprisoned criminals were receiving monthly Social Security benefits – including David Berkowitz, the so-called Son of Sam killer in New York – President Jimmy Carter last October signed into law legislation restricting the benefits.").

132 Associated Press, *Prisons Get Millions from Social Security*, CHICAGO TRIB., at 2 (June 22, 1980), http://archives.chicagotribune.com/1980/06/22/page/2/article/prisoners-get-millions-from-social-security/index.html.

133 U.S. GOV'T ACCOUNTABILITY OFF., GAO/HRD-82-43, PRISONERS RECEIVING SOCIAL SECURITY AND OTHER FEDERAL RETIREMENT, DISABILITY, AND EDUCATION BENEFITS 2 (1982), http://www.gao.gov/assets/140/138203.pdf [hereinafter PRISONERS RECEIVING SOCIAL SECURITY AND OTHER FEDERAL RETIREMENT, DISABILITY, AND EDUCATION BENEFITS].

134 *Id.*

135 *See id.*

136 *Id.*

VA educational benefits is nonsensical. It is also ironic. While disabled veteran felons are stripped of their disability compensation while incarcerated, they remain entitled to significant educational benefits while imprisoned, including the lesser of "the cost of established charges for tuition and fees required of similarly circumstanced nonveterans enrolled in the same program and the cost of necessary supplies, books, and equipment" or the allowance of an unincarcerated veteran with no dependents.[137] That said, to understand the events that provoked Congress to strip disabled, justice-involved veterans of their service-connected disability benefits, it is important to first understand the basic fundamentals of the SSDI system and the 1979–80 public furor that provoked Congress to enact two government disability benefit program-stripping statutes.

B. *The SSDI Program*

Congress created SSDI by enacting the Social Security Amendments of 1956.[138] As a historical reference, the SSDI program was created approximately 320 years after the Plymouth Pilgrims extended disability benefits to disabled veterans who waged the colony's wars against Native Americans.[139] SSDI pays monthly federal cash benefits to individuals with a disability and defines "disability" as the "inability to engage in *any substantial gainful activity* by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[140] SSDI's definition of "disability" further requires that an eligible beneficiary be "unable to do his previous work" or to "engage in any other kind of substantial gainful work which exists in the national economy."[141] The SSA is required to consider the applicant's age, education, and work experience in making his or her individualized "disability" determination.[142]

SSDI is available only to workers who have not yet attained retirement age[143] but who nonetheless have worked long enough (e.g., forty calendar quarters or ten years) to be "fully insured"—that is, to have sufficiently contributed to the system via payment of Social Security wage taxes.[144] SSDI has been described as "a monthly cash benefit that effectively serves as early

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137 38 U.S.C. § 3231(d)(1) (2012).

138 Social Security Amendments of 1956, Pub. L. No. 84-880, §§ 101–121, 70 Stat. 807, 807–37 (codified as amended at 42 U.S.C. §§ 401(b), 420–25).

139 *See* Pamala Mondragon, *Disability in History—Benefits for Disabled Vets*, INDEPENDENCE, INC. (Apr. 14, 2014), http://independencecil.org/News/Disability-in-History--Benefits-for-Disabled-Vets.

140 42 U.S.C. § 423(d)(1)(A) (emphasis added).

141 *Id.* § 423(d)(2)(A).

142 *Id.*

143 *Id.* § 423(a)(1)(B).

144 *See* 20 C.F.R. § 404.130(b)–(e) (2017) (outlining the requirements to qualify as "fully insured").

retirement pay."[145] Similar to the SSA retirement benefit and like VA disability compensation, SSDI is paid regardless of need or wealth.[146] An SSDI beneficiary's monthly cash payment amount, however, does vary depending on his or her individual earnings history.[147] Importantly, and as discussed in more detail in Part IV, disabled veterans are entitled to both SSDI and VA service-connected disability compensation benefits without any financial offset so long as they satisfy each program's eligibility criteria.

C. *1980 SSDI Prisoner Beneficiary Amendments: Legislative History*

> In the late 1970s, David Berkowitz, also known as Son of Sam, applied for and received Social Security benefits while serving a life sentence for a series of murders in New York City. When the news got out, Congress rushed to pass a law to cut him off.[148]

In October 1980, Congress enacted amendments to the Social Security Act limiting prisoner entitlement to SSDI benefits.[149] Consistent with the 1982 GAO report findings, the pertinent legislative history makes clear that Congress stripped prisoner beneficiaries of their SSDI benefits in response to the widespread reporting of—and attendant public outrage over—prisoner abuse of those benefits. Even a casual perusal of the relevant hearing testimony demonstrates that Congress, which was anxious to shore up financing of the Social Security trust fund,[150] correctly calculated that stripping SSDI benefits from prisoners would be both publicly popular and financially advantageous. Representative J. J. Pickle (D-TX), who chaired the House Subcommittee on Social Security, opened the June 20, 1980, subcommittee hearing concerning prisoner SSDI beneficiaries as follows:

> At a time when there is public concern over the soundness of the social security program, press reports that perpetrators of heinous crimes can receive social security benefits while in prison have outraged many reasonable people both in and out of Congress.

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145 Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 11 (2004).

146 *See* 20 C.F.R. § 404.130(b)–(e).

147 *Id.*

148 *See* 140 CONG. REC. 1683 (1994) (statement of Rep. Torkildsen).

149 Pub. L. No. 96-473, 94 Stat. 2263, 2265 (1980) (codified as amended in scattered sections of 42 U.S.C.).

150 Off. of Leg. & Reg. Pol'y, Off. of Pol'y, *Social Security Disability Amendments of 1980: Legislative History and Summary of Provisions*, 44 SOC. SEC. BULLETIN 1, 15 (1981) [hereinafter SOC. SEC. BULLETIN] ("In its 1973 report, the Board of Trustees of the Social Security Trust Funds noted the significant increase in the cost of the DI program resulting from higher disability incidence; the Trustees stated that if the trend of higher disability rates continued, the resultant cost increase of the disability program would be of sufficient magnitude to require additional financing.").

> This committee intends to put a stop to any abuses of the social security program and . . . see that the receipt of social security benefits by prisoners is limited in such a way as to pursue the best interest of the social security program . . . .[151]

The overwhelming majority of the members of Congress who attended the June 20, 1980, subcommittee hearing echoed these sentiments. Representative Clarence J. Brown (R-OH) made the point succinctly, asserting that the "social security system is on the brink of financial disaster" and that the proposed prisoner SSDI benefit-stripping legislation "rids the American taxpayer of an expensive and unnecessary tax burden."[152]

The legislative history also demonstrates that Congress was galvanized to eliminate prisoner SSDI benefits as the result of national media stories exposing the infamous Son of Sam killer, David Berkowitz, as an SSDI beneficiary.[153] The specter of Berkowitz, a mass murderer who was invoked on more than thirty separate occasions during the June 20, 1980, subcommittee hearing alone, loomed large over the congressional proceedings leading up

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151 *Receipt of Social Security Benefits by Persons Incarcerated*: *Hearing Before the Subcomm. on Social Security of House Comm. on Ways & Means*, 96th Cong. 2 (1980) (statement of Rep. Pickle) [hereinafter *SSDI Prisoner Beneficiary Hearings*].

152 *Id.* at 81 (statement of Rep. Brown); *see also id.* at 83 (statement of Rep. Daniel) (discussing the "impending bankruptcy of Social Security" and concluding that "[j]ust as convicted felons are generally deprived of their right to vote, so should they lose the right to receive Disability Insurance"); *id*. (statement of Rep. Derwinski) ("At a time when the financial integrity of the Social Security system is in question, we cannot allow any loopholes in the law to be exploited. The idea that persons convicted of crimes can use their crimes as a basis for claiming eligibility for disability benefits is outrageous"); *id.* at 84 (statement of Rep. Evans) ("We have spent much time since I have been in Congress discussing ways to ensure the viability of the Social Security system. We have sought methods to end the drain on SS funds . . . . It is certainly a well placed step to wipe out this unconscionable drain on an already flaggeling system."); *id.* at 85 (statement of Rep. Marks) ("In view of the fact that this House only this year was discussing the financial problems of the disability trust fund, and indeed passed legislation making major changes in benefit levels, I think it is imperative that this Congress act promptly to correct this type of abuse of the Social Security system."); *id.* (statement of Rep. Horton) (stating that he "read in the Wall Street Journal . . . that a severe recession could again put Social Security in the throes of bankruptcy" and that "[e]liminating disability payments to inmates is a step in the right direction" to "trim the fat from a bloated Social Security bureaucracy").

153 On May 8, 1978, 24-year-old postal worker and "Son of Sam" killer David Berkowitz "admitted the killing of five young women and a young man, and the attempted murders of seven other young people during his year of slaughter in New York City." Theo Wilson, *David Berkowitz Pleads Guilty to 'Son of Sam' Murders*, N.Y. DAILY NEWS (May 9, 1978), http://www.nydailynews.com/news/crime/son-sam-pleads-guilty-1978-article-1.2212235. Berkowitz has continuously maintained that, in committing the killings, "he took orders from a demonic black Labrador retriever [named Harvey] owned by [his] neighbor [Sam]." Serge F. Kovaleski, *Backers Give 'Son of Sam' Image Makeover*, N.Y. TIMES (July 12, 2010), http://www.nytimes.com/2010/07/13/nyregion/13berkowitz.html. It has been widely acknowledged that "the media frenzy surrounding the [Son of Sam] murders was unprecedented, particularly in the tabloids." Cady Drell, *How Son of Sam Changed America*, ROLLING STONE (July 29, 2016), http://www.rollingstone.com/culture/features/how-son-of-sam-changed-america-w431502 (reporting that, throughout New York and the nation, "[t]he frenzied coverage fanned the growing sense of fear; the growing sense of fear fanned the frenzied coverage" (quoting JONATHAN MAHLER, LADIES AND GENTLEMEN, THE BRONX IS BURNING (2005))).

to the enactment of the 1980 SSDI amendments.[154] Representative Conable (R-NY), for instance, candidly expressed his motivation for repeal of inmate SSDI benefits, as follows:

> [Prisoner receipt of SSDI] is a matter of particular interest to me because of disclosures relating to David Berkowitz, the so-called Son of Sam killer, who is in Attica Prison in my district. That has had a good deal of attention up home, and has become *the focal point of unhappiness*.[155]

Congressman William G. Whitehurst (R-VA), who was the lead sponsor of the House bill repealing prisoner SSDI benefits, also testified:

> [L]ike you, Mr. Chairman, I, too, agree that it is ridiculous for someone like David R. Berkowitz, New York City's "Son of Sam" mass murderer, to be allowed to collect several hundred dollars each month in social security benefits because of some asinine qualification procedure. For what possible reason can there be in paying an animal like this from our country's already strained social security fund? What must the families of this creature's victims think? Have our laws become so inflexible that our social security administrators must bend over backwards to make sure that another parasite is added to suck the life out of the social security host? I hope to God they are not. And I cannot help but wonder how many other mass murderers are on the rolls of social security who are shielded from public scrutiny by privacy laws.[156]

Congressman Mario Biaggi (D-NY) further added:

> Insofar as New York City is concerned, the city where David Berkowitz conducted his reign of terror . . . I think what he has accomplished points out very clearly the outrageous situation that exists, a situation that has made people of our country furious in the light of the difficulties that social security is having. David Berkowitz was in our city, and practically brought the city to its knees by virtue of his maniacal conduct. He was sentenced to 315 years in prison. All things being equal, absent a change of fact and circumstance, the social security fund will be paying for him . . . for the rest of his life.[157]

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154 *SSDI Prisoner Beneficiary Hearings*, *supra* note 151, at 3 (one reference), 8 (four references), 10 (one reference), 11 (one reference), 12 (three references), 14 (one reference), 15 (two references), 16 (one reference), 17 (five references), 18 (two references), 19 (one reference), 20 (one reference), 25 (two references), 48 (one reference), 61 (one reference), 81 (one reference), 83 (one reference), 85 (one reference), 86 (two references), 93 (one reference); *see also* Arizona Republic, *Killers Who Are Found to Be Insane Still Receive Social Security Benefits*, BALTIMORE SUN (Sep. 10, 1993), http://articles.baltimoresun.com/1993-09-10/news/1993253198_1_social-security-benefits-security-disability-mcdonnell ("Social Security benefits for felons were barred by Congress after it was learned that New York's 'Son of Sam' killer, David Berkowitz, was receiving more than $300 a month in disability aid."); Haitch, *supra* note 130 ("After newspaper articles had disclosed that many imprisoned criminals were receiving monthly Social Security benefits – including David Berkowitz, the so-called Son of Sam killer in New York – President Jimmy Carter last October signed into law legislation restricting the benefits.").

155 *SSDI Prisoner Beneficiary Hearings*, *supra* note 151, at 3 (emphasis added).

156 *Id*. at 8.

157 *Id*. at 15.

While it is well documented that the 1980 repeal of prisoner SSDI benefits was motivated by sensationalized media reports concerning Son of Sam and other infamous prisoners, Congress's express rationale for the legislation—to prohibit inmates from "double-dipping" from the public fisc—was grounded in "social adequacy" theory. As explained by Representative William Whitehurst during his June 20, 1980, testimony, "the Social Security system can be viewed as resting on two supporting pillars—individual equity, based on the relationship between contributions and earning; and social adequacy, based on a need factor."[158] "Under the social-adequacy concept, it can be argued . . . that prisoners do not need benefits because their basic needs, including food, clothing, medicine, and shelter, are already being borne at considerable expense by the State."[159]

Relying on a social adequacy justification to strip prisoners of SSDI benefits, however, is logically problematic because SSDI is not—and never has been—a needs-based program. Instead, it is an entitlement program based on an individual's Social Security tax contributions made during years of productivity in the American workforce.[160] The SSA's Associate Commissioner for Policy, Lawrence H. Thompson, went out of his way to emphasize this point during his June 20, 1980, appearance before the subcommittee:

> One prominent argument for restricting social security benefits to prisoners is that the prisoners do not need the benefits. However, such a restriction would represent a major departure in program philosophy. . . . [W]e believe that any proposal that might be seen as moving in the direction of establishing a needs test in the social security program should be subject to the most careful consideration . . . .
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> . . . .
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> The legislation does not establish a needs test, but the rationale is close to it.[161]

Several other opponents of the effort to repeal prisoner SSDI benefits raised the same issue. The National Retired Teachers Association and the American Association of Retired Persons, for example, submitted letter testimony, which stated:

> It is argued that prisoners whose basic needs (i.e., food, shelter, clothing) are taken care of by the state, ought not be permitted to receive additional "windfall" funds from the federal government . . . . Such a theory, however, is inconsistent with the philosophy behind social

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158 *Id.* at 13.

159 *Id.* at 10.

160 *Id*. at 36 (statement of Lawrence H. Thompson, Associate Commissioner for Policy, Social Security Administration) ("With rare exception, a person's eligibility for social security is based upon work in employment covered by social security, and without regard to individual need or circumstances.").

161 *Id*. at 37.

> security. Social security is not, and has never been, a system based on need. It is an earned right based on individual contributions.[162]

The American Civil Liberties Union National Prison Project also warned the subcommittee that the proposed legislation represented "a major shift in the Social Security program from that of an earned benefit to that of a needs-based program."[163] The Lawyers Committee for Civil Rights Under Law advanced the same argument in opposition to the draft bill.[164]

The dissenters' contentions concerning the nature of the SSDI program were hardly controversial. In 1976, the United States Supreme Court made clear in *Mathews v. Eldridge*[165] that SSDI is an entitlement and not a needs-based program.[166] Indeed, in passing the Social Security Act, Congress went to great lengths to emphasize that Social Security benefits were "earned right[s] based upon the contributions and earnings of the individual" and "not a handout."[167]

Opponents of the effort to repeal prisoner SSDI benefits advanced several other coherent objections. First, they argued that the alleged SSDI program abuses were outliers that "ha[d] been grossly exaggerated" by the media.[168] Second, they countered the prisoner "undeserved windfall" narrative by contending that "it is based on the utterly false assumption that [prisoners'] medical and housing needs are . . . being adequately met" by carceral

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162 *See id*. at 96 (statement of the National Retired Teachers Association and American Association of Retired Persons); PRISONERS RECEIVING SOCIAL SECURITY AND OTHER FEDERAL RETIREMENT, DISABILITY, AND EDUCATION BENEFITS, *supra* note 132, at 5 ("[A] primary issue raised during the deliberations preceding the 1980 change in law was whether taking away a prisoner's benefits on the basis of incarceration and/or convictions violates an 'earned right' principle of Social Security.").

163 *SSDI Prisoner Beneficiary Hearings*, *supra* note 150, at 49 (statement of the National Prison Project of the American Civil Liberties Union Foundation, Inc.); *see also id.* at 45 ("What has been overlooked in most of the testimony this morning is . . . that a disabled prisoner must meet the same standards of disability as anyone else. He has paid into the system and he has worked and paid for those benefits by contributing to an insurance trust fund.").

164 *Id.* at 93 (statement of the Lawyers' Committee for Civil Rights Under Law).

165 424 U.S. 319 (1976).

166 *Id*. at 340–41 ("Eligibility for [social security] disability benefits . . . is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the 'many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force.'" (quoting Richardson v. Belcher, 404 U.S. 78, 85–87 (1971) (Douglas, J., dissenting))).

167 *E.g.*, 102 CONG. REC. 15110 (July 27, 1956) (statement of Sen. George).

168 *SSDI Prisoner Beneficiary Hearings*, *supra* note 150, at 49 (statement of the National Prison Project of the American Civil Liberties Union Foundation, Inc.); *see also id.* at 93 (statement of the Lawyers' Committee for Civil Rights Under Law); *id.* at 96 (statement of the National Retired Teachers Association and American Association of Retired Persons). In counseling caution on the part of the subcommittee in proceeding with its proposed repeal of prisoner SSDI benefits, Social Security Commissioner Thompson testified that "it is apparent that much of the current concern stems from information conveyed by the media which is, at best, dubious." *Id.* at 38.

institutions.[169] Third, opponents pointed out that the legislation would result in disparate impact across jurisdictions because it unfairly hinged on the states' wildly varying definitions of what constituted felonious conduct in the first instance.[170] Finally, they contended that repeal of inmate SSDI benefits would impede prisoner rehabilitation and reentry.[171] In fact, the American Correctional Association forcefully opposed the legislation on rehabilitation advocacy grounds, testifying, "[w]e feel very strongly that denying incarcerated offenders social security benefits would have a further deteriorating effect on our efforts to effectively utilize available resources to prepare the successful reentry of offenders back into the mainstream of society."[172]

This chorus of evidence-based resistance notwithstanding, Congress enacted legislation repealing SSDI benefits from inmates convicted of a felony offense on October 19, 1980.[173] The new law, however, did contain a singular exception. Specifically, it permitted an incarcerated felon, who was "actively and satisfactorily participating in a [prison] rehabilitation program which . . . [was] expected to result in [the] individual being able to engage in substantial gainful activity upon release and within a reasonable time," to continue to receive SSDI benefits.[174] Nearly two decades later, Congress expanded the repeal of SSDI benefits to all persons confined in a penal institution for *any* crime.[175] The SSDI prisoner vocational rehabilitation exception nonetheless survived Congress's 1999 program amendments and continues in force to date.[176] As explained in more detail below, Congress has never provided a

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169 *Id*. at 51 (statement of the National Prison Project of the American Civil Liberties Union Foundation, Inc.).

170 *Id*. at 40 (statement of Lawrence H. Thompson, Associate Commissioner for Policy, Social Security Administration) ("You also have to think about the fact that you are creating a situation where statutes will vary from State to State as to what a felony is and how people are treated, and judges will be applying those in such a way as to control entitlements to Federal benefits. You have to ask yourself whether that makes you uncomfortable."); *see also id.* at 92–93 (statement of the Lawyers' Committee for Civil Rights Under Law) ("The various bills now under consideration would deny certain categories of benefits to all incarcerated and/or convicted beneficiaries regardless of the reason for their imprisonment and the severity of their crime."); *id.* at 96 (statement of the National Retired Teachers Association and American Association of Retired Persons) (taking issue with the fact that the denial of benefits "is not based on the status of criminality but rather on the status of incarceration").

171 *Id.* at 51 (statement of the National Prison Project of the American Civil Liberties Union Foundation, Inc.); *see also id.* at 92 (statement of the American Correctional Association).

172 *Id*.

173 Pub. L. No. 96-473, § 5(c), 94 Stat. 2263, 2265 (1980) (codified as amended at 42 U.S.C. § 423 (2012 & Supp. 2017)).

174 *Id.*

175 In 1999, Congress enacted *The Ticket to Work and Work Incentives Improvement Act*, which expanded the repeal of SSDI benefits to any inmate convicted of *any offense* punishable by incarceration for more than thirty days effective April 1, 2000. Pub. L. No. 106-170, § 402, 113 Stat. 1860, 1908 (1999) (codified as amended at 42 U.S.C. § 402).

176 20 C.F.R. § 404.468(d) (2017).

vocational rehabilitation exception for service-connected disabled veteran felons.[177]

D. *1980 Service-Connected Disability-Stripping Statute: Legislative History*

Disabled veteran prisoners were targeted by Congress for disability benefit reductions at least in part—if not entirely—because of the public uproar over Son of Sam's and other notorious prisoners' alleged abuses of the SSDI program. Concomitant with its repeal of SSDI inmate benefits in October 1980, Congress enacted legislation that reduced and nearly eliminated justice-involved veteran service-connected disability compensation.[178] The congressional record is sparse in comparison to that of the SSDI prisoner beneficiary stripping act, but the VA stripping statute's legislative history does reveal congressional preoccupation with Son of Sam.[179] The record also demonstrates that the House and the Senate vehemently disagreed as to whether it was appropriate for Congress to even consider reducing or stripping *veteran* prisoners of their service-connected disability compensation.[180]

The House was in favor of significantly curtailing incarcerated veteran service-connected compensation, and on July 21, 1980, it passed a bill that reduced disability payment to no more than $60 a month to all veterans incarcerated for either a felony or misdemeanor.[181] The Senate, on the other hand, refused to support the measure, and as a result, its August 6, 1980, counterpart bill contained no such provision.[182] Ultimately, the House and Senate Committees on Veterans Affairs reached a compromise agreement,[183] under which the VA was mandated to reduce the disability compensation paid to veteran felons rated at least 20 percent disabled to the 10 percent rate beginning the sixty-first day of incarceration.[184] Veteran felons who were rated as less than 20 percent disabled were limited to disability compensation in the amount of half the 10 percent rate.[185]

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177 *See infra* Part III.D.

178 Pub. L. No. 96-385, § 504(a), 94 Stat. 1528, 1534 (Oct. 7, 1980) (codified as amended 38 U.S.C. § 5313).

179 *Review of Compensation and DIC Programs: Hearings Before the Subcomm. on Comp., Pension, Ins., & Mem'l Aff., H. Comm. on Veterans' Aff.*, 96th Cong. 3 (1980) [hereinafter *Review of Comp. and DIC Programs Hearing*]; *Veterans' Disability Compensation and Survivors' Benefits Amendments of 1980: Hearing Before the S. Comm. on Veterans' Aff.*, 96th Cong. (1980).

180 *See Review of Comp. and DIC Programs Hearing*, *supra* note 179, at 3; *Veterans' Disability Compensation and Survivors' Benefits Amendments of 1980: Hearing Before the S. Comm. on Veterans' Aff.*, 96th Cong. (1980).

181 H.R. 7511, 96th Cong. § 306 (1980); 126 CONG. REC. 18873 (1980).

182 S. 2649, 96th Cong. (1980); *see also* 126 CONG. REC. 21447–48 (1980).

183 *See* 126 CONG. REC. 26119 (1980).

184 Pub. L. No. 96-385, § 504(a), 94 Stat. 1528, 1534 (1980) (codified as amended at 38 U.S.C. § 5313 (2012)).

185 *Id.*

Unsurprisingly, the House's articulated motivation for stripping disabled veteran inmates of their service-connected benefits was identical to its rationale for stripping disabled inmates of their SSDI benefits—that is, to realize cost savings in a time of federal budget contraction by denying disabled prisoners compensation that they no longer "needed."[186] In introducing the final version of the bill on the House floor, Congressman Montgomery (D-MS) summed up the House's sentiments as follows:

> Mr. Speaker, the purpose of compensation is to replace lost earning capability of a disabled veteran where the impairment is caused by a service-connected condition. I do not consider it unreasonable to recognize that individuals who are confined by our judicial system for commission of a serious offense against society are no longer available to the labor market. An economic detriment caused by a disability is not felt by such individuals during long periods of confinement.
>
> . . . .
>
> I do not see the wisdom of providing hundreds and thousands of dollars of tax free benefits to individuals when at the same time the taxpayers of this country are spending additional thousands of dollars to maintain these same individuals in penal institutions. [187]

The Senate, however, displayed considerable skepticism about this narrative. In explaining his committee's reluctance to strip disabled veteran prisoners of their hard-earned, service-connected disability benefits, Senator Cranston (D-CA) stated:

> Mr. President, in my view and in the view of the other committee members, the House-passed provision not only *raised questions of fundamental fairness* but also *threatened basic principles underlying the service-connected compensation programs*. However, with the utmost reluctance and recognizing the depth of the feelings in the other body with regard to the issues involved . . . we have reached an accord on the provisions in the compromise agreement.[188]

Senator Strom Thurmond, the senior Republican on the Senate Veterans' Affairs committee, added:

> [T]he original legislation by the House contained a provision that would deny compensation benefits to a veteran once that veteran became incarcerated, and upon release these benefits would be reinstated. The Senate bill did not address this issue. However, during consideration of this matter by the members of both Veterans' Committees, to reach a suitable resolution, the very theory and purpose of service-connected compensation was discussed. The compromise agreement . . . is not what I wanted nor was it the position of the Senate; yet, the House felt strongly on this matter and I believe this compromise is the best that could have been achieved under the circumstances.
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> . . . VA compensation is paid to a veteran for his service-connected disability. The rate of payment reflects the average impairment of earning capacity as the result of this disability. It is my opinion that the economic or social status of the veteran should not determine his receipt

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186 H.R. REP. NO. 96-1155, at 16 (1980) (describing the stripping statute applicable to veteran inmates as a "cost-savings" provision and explaining that it "would result in reduced Federal expenditures of $3 million in fiscal year 1981 and each year thereafter through fiscal year 1985").

187 126 CONG. REC. 26118 (1980).

188 126 CONG. REC. 27012 (1980) (emphases added).

> of compensation. If a veteran's status in life was considered to be a factor in the receipt of compensation, then the argument could be made that a veteran who has a certain income level should have his compensation reduced. Thus, receipt of compensation would be needs-based and not totally related to a disability incurred while in service.[189]

The legislative history also reveals that the VA advanced the same logic as the Senate in its response to the House's push to strip disabled veteran prisoners of their service-connected benefits. Months prior to the House's introduction of its veteran disability compensation-stripping draft bill, a subcommittee of the House Veterans Affairs Committee held hearings on unrelated, proposed legislation to increase veteran disability compensation and dependency and indemnity compensation ("DIC") payments.[190] During those April 1980 hearings, the following exchange occurred between Representative Sonny Montgomery, the Subcommittee Chair, and J.C. Peckarsky, Director of VA's Department of Veterans Benefits:

> Chairman Montgomery. . . . What would you think of a change in the law that would cut off or reduce compensation . . . payments to a veteran . . . who is in prison?
>
> Mr. Peckarsky. The law has never provided for reductions of disability compensation during a veteran's confinement in prison, presumably on the ground that compensation is not a direct needs benefit, but is rather an average impairment of earning capacity benefit.[191]

Chairman Montgomery continued to press the Director, demanding his rationale for opposing a VA disability benefit-stripping bill.[192] The Director candidly responded, "[C]ompensation has never been subject to reduction because the veteran's needs are satisfied some other way. We do not penalize the totally disabled veteran because he has a good job; we do not hold it against him the fact that he's totally employed in a substantial occupation."[193] In the wake of the outrage over the Son of Sam SSDI benefits scandal, however, Chairman Montgomery could not be persuaded. He responded: "Well,

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189 126 CONG. REC. 27017 (1980).

190 *Review of Comp. and DIC Programs Hearing*, *supra* note 179.

191 *Id.* at 26.

192 *Id.*

193 *Id.* John F. Heilman, the then–National Legislative Director of the Disabled American Veterans ("DAV"), also weighed in on the subject of depriving veteran prisoners of their service-connected benefits during the hearing. *Id*. at 47. He began his testimony by pointing to a 1979 prison study which found that veteran inmates "do not have a history of criminal behavior [and are] often . . . one-time offenders," "are subject to fewer incident reports," "don't engage in assaults or violent behavior," "don't engage in work stoppages," and are more akin to "model prisoner[s] than the rest of the prison population." *Id*. at 47–48. He then testified:

> [The veteran prisoner] does have honorable service. If he incurred service-connected disability during that service, he is drawing compensation from the VA. . . . So at the end of his 3- or 4-year sentence, which is the average sentence, for this veteran inmate, . . . should we object to him having a stake about $2,000 or $3,000 or $4,000 to set him on the correct path when he gets out, so that, perhaps, he won't return to prison, will not be forced to associate with criminals on the outside, or engage in criminal activity?

Review of Comp. and DIC Programs Hearing, *supra* note 179, at 48.

there has been some publicity on it, and I think we are going to have to straighten it out. We can't let a man in prison who has done horrible, horrible things, draw $800 a month."[194]

IV. THE STRIPPING STATUTE SHOULD BE REPEALED BECAUSE IT IS UNJUST, UNWARRANTED, AND UNPRODUCTIVE

A. *The Stripping Statute Was Enacted to Realize Cost Savings at the Expense of a Vulnerable Population*

As detailed above, Congress enacted the stripping statute largely in response to public outrage over sensationalized news stories alleging abuse of SSDI benefits by Son of Sam and other infamous prisoners.[195] This part contends that Congress was further motivated to enact the stripping statute to realize federal cost savings at the expense of a politically disenfranchised population—disabled, justice-involved veterans—during a time of federal budget contraction. It also explains that the stripping statute goes beyond cost savings and actually affords a windfall to the federal government.

It is well documented that the United States has experienced a decades-long "ideological shift to a more punitive attitude in policy and practice toward crime and criminal offenders."[196] In an article characterizing the "toothlessness" of the Prison Rape Elimination Act as a function of American "[h]atred or indifference to people in prison," journalist Elizabeth Stoker Bruening wrote that "[i]t is difficult to conjure up similar legislation applied to any other population that would be met with such a resounding shrug."[197] The same certainly could be said with regard to the stripping statute.

Americans, however, are not only dispassionate about prisoners; they also tend to "associate war-related disability with a host of social ills: pathological dependency, compromised masculinity, and the crippling legacies of foreign intervention."[198] While ruminating on the "problem of the disabled veteran,"[199] historian John M. Kinder muses as follows:

> [A]midst the flag-waving and fanfare, the fate of disabled veterans remains both a source of national anxiety and fodder for political debate. In an era when "supporting the troops" has become something of a civic religion, many Americans struggle to make sense of the social, political, and personal legacies of war injury. What are the nation's obligations to those who

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194 *Id.* at 26.

195 *See supra* Part III.

196 *See, e.g.*, Mary Ann Farkas, *Correctional Officer Attitudes Toward Inmates and Working with Inmates in a "Get Tough" Era*, 27 J. CRIM. JUST. 495, 495 (1999).

197 Elizabeth Stoker Bruenig, *Why Americans Don't Care About Prison Rape*, THE NATION (Mar. 2, 2015), https://www.thenation.com/article/why-americans-dont-care-about-prison-rape/.

198 KINDER, *supra* note 2, at 3–4.

199 *Id.* at 3 (characterizing the "problem of the disabled veteran" as "a perceived national crisis about the social, political, and foreign-policy implications of disabled veterans in modern American society").

> fight in its name? Who is ultimately responsible for veterans' disabilities—the enemy combatants they faced abroad or the public officials whose policies put them in harm's way?[200]

Kinder goes on to note that "Americans' anxieties about war-produced disability . . . have rendered disabled veterans dangerous or problematic in the popular imagination."[201] Disabled, justice-involved veterans, therefore, suffer at least two forms of status-based discrimination in this country: they are prisoners, and they are service-disabled. The theory here is that justice-involved veterans' dual discriminatory status and attendant political disenfranchisement made them easy targets for federal legislators in search of cost savings opportunities at a time of federal budget contraction and public furor concerning prisoner SSDI beneficiaries.

The pertinent legislative history examined in Part III supports the theory that Congress enacted the law that eliminates prisoner receipt of SSDI benefits and the statute that strips veterans of VA service-connected disability benefits at least in part to realize cost savings in the face of federal budget constraints. Congress displayed considerable concern about the financial viability of federal disability benefits programs throughout the 1980 hearings relevant to both bills.[202] Senator Malcolm Wallace perhaps summed it up best when he explained that, "[f]aced with the decision of raising social security taxes, reducing benefits, or eliminating benefits to prisoners, to shore up the financial condition of the trust funds, *the choice seems clear*."[203]

Not only was the service-connected disability statute enacted at least in part to realize federal cost savings; it also operates in practice to ensure the federal government a financial windfall. Section 5313 strips disabled veteran felons of their entitlement to service-connected disability compensation regardless of whether the federal government is actually obligated to pay any costs associated with those veterans' incarceration.[204] It is undisputed that the overwhelming majority of veteran inmates are incarcerated in state and local penal institutions and not federal prisons.[205] The federal government, however, does not provide any in-kind stipend or payment to state or local penal institutions to defray the cost of housing service-connected disabled

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200 *Id.*; *see also id*. at 8 ("[D]isabled vets are constructed as problems within American culture—problems to be solved, problems to be exposed, and problems to be ignored.").

201 *Id.* at 8.

202 *See*, *e.g.*, *SSDI Prisoner Beneficiary Hearings*, *supra* note 151, at 81, 83–85 (statement of Rep. Brown); DAVID KOITZ, CONG. RES. SERV., SOCIAL SECURITY BENEFITS FOR PRISONERS IB81163, at 2–3 (1983), https://digital.library.unt.edu/ark:/67531/metacrs8825/m1/1/high_res_d/IB81163_1983Nov01.pdf ("The thrust of the [national news] articles [about prisoner SSDI abuse in 1979–80] was that there was a moral question involved in the payment of benefits to prisoners, that prisoners were causing a sizable drain on the social security system at a time when it was having financial problems, and that since these individuals were in prisons, at public expense, they did not need such benefits.").

203 *SSDI Prisoner Beneficiary Hearings*, *supra* note 150, at 5 (emphasis added).

204 *See* 38 U.S.C. § 5313(a)(1) (2012).

205 JENNIFER BRONSON ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., VETERANS IN PRISON AND JAIL, 2011–12 (2015), https://www.bjs.gov/content/pub/pdf/vpj1112.pdf.

prisoners.[206] As a result, the federal government realizes cost savings at the expense of state and local governments by stripping disability benefits from veterans incarcerated in state and local facilities.

B. *The Stripping Statute Is Illogical and Misunderstands the Nature and Purpose of VA Disability Compensation*

This part maintains that the stripping statute is unwarranted for at least three reasons. First, section 5313 is grounded in faulty logic and fundamentally misunderstands the nature and purpose of the VA service-connected disability program. Second, the stripping statute's alleged concern regarding double-dipping from the public fisc appears to apply only to justice-involved felons. Finally, section 5313's myriad exceptions operate to undermine its purported rationale.

1. The Stripping Statute Is Grounded in Faulty Logic

This Article argues that section 5313 operates to unfairly punish the problematic and politically disfavored class of disabled, justice-involved veterans. The VA, of course, rejects that contention. Instead, it posits that the stripping statute's purpose is to prohibit veterans from unfairly "double-dipping" from the federal fisc.[207] As explained in one report,

> The theory here . . . is not to further penalize the disabled veteran but rather to prevent effective dual compensation for living expenses. Since imprisonment provides room and board, and since disability compensation is intended to assist with living expenses, Congress deemed it inappropriate to additionally provide compensation that would otherwise be used for such. Without this provision, it could be argued, the imprisoned disabled veteran could actually amass a considerable savings not available to the non-imprisoned disabled veteran whose compensation actually *is* used to purchase room and board.[208]

In other words, the VA contends that the stripping statute is grounded in the propositional logic of *modus ponendo ponens*, which goes something like this in form:

* The purpose of veteran disability compensation is to provide living expenses for disabled veterans.

* Disabled veteran prisoners' living expenses are paid for by taxpayers.

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206 *E.g.*, *SSDI Prisoner Beneficiary Hearings*, *supra* note 150, at 17 (discussing how no New Jersey laws helped defray a state's costs of incarcerating a disabled veteran).

207 LEGISLATIVE HISTORY, *supra* note 20, at 67.

208 *Id.*

* Therefore, disabled veteran prisoners are not entitled to disability compensation payment while imprisoned.

Presenting the stripping statute's alleged purpose in the form of the logical syllogism, *modus ponens*, exposes its speciousness. This is because a *modus ponens* syllogism cannot be sound unless all of its conditions precedent are true.[209]

As explained above, the VA's disability compensation program does not—and is not even intended to—compensate a veteran based on his or her individual need for room or board or any other expenses.[210] As emphasized repeatedly in this Article, under the current veteran disability compensation laws and regulations, a homeless veteran struggling with PTSD rated at 50 percent disabled is entitled to the exact same monthly disability compensation as a billionaire veteran Congressman rated 50 percent disabled whose federal salary and benefits are paid for by American taxpayers. Simply stated, because service-connected disability benefits are neither needs-based nor means-tested, the stripping statute, which relies exclusively on a needs-based justification, is illogical on its face.

2. The Stripping Statute's Concerns About Double-Dipping Extend Only to Veteran Felons

As mentioned earlier in this Article, disabled veterans are entitled to service-connected disability compensation and SSDI benefit payments concomitantly and without any setoff[211] so long as they meet each program's eligibility requirements and, of course, are not incarcerated.[212] The fact that

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209 Eric Heinze, *The Logic of Standards of Review in Constitutional Cases: A Deontic Analysis*, 28 VT. L. REV. 121, 127 (2003).

210 *See supra* Part I.B.1; VETERANS BENEFITS MANUAL, *supra* note 55, at 57 (stating that "[e]ntitlement to service connection is never barred by employment" and "is not affected by earned or unearned income" or the value of a veteran's estate).

211 John Kregel & Lucy Miller, *Disability Benefits for Veterans: Interactions Among Department of Defense, Department of Veterans Affairs, and Social Security Administration Programs*, MATHEMATICA CTR. FOR STUDYING DISABILITY POL'Y, DRC BRIEF NO. 2016-07, at 1 (2016), https://www.mathematica-mpr.com/our-publications-and-findings/publications/disability-benefits-for-veterans-interactions-among-department-of-defense.

212 *See* GOV'T ACCOUNTABILITY OFF., DISABILITY COMPENSATION: REVIEW OF CONCURRENT RECEIPT OF DEPARTMENT OF DEFENSE RETIREMENT, DEPARTMENT OF VETERANS AFFAIRS DISABILITY COMPENSATION, AND SOCIAL SECURITY DISABILITY INSURANCE 2–3 (2014), http://www.gao.gov/assets/670/666267.pdf [hereinafter REVIEW OF CONCURRENT RECEIPT PROGRAMS]; L. Scott Muller et al., *Veterans Who Apply for Social Security Disabled-Worker Benefits After Receiving a Department of Veterans Affairs Rating of "Total Disability" for Service-Connected Impairments: Characteristics and Outcomes*, 74 SOC. SEC. BULL., no. 3, 2014, at 1, 1; *see also, e.g.*, McCartey v. Massanari, 298 F.3d 1072, 1076 (9th Cir. 2002) (holding that VA disability determinations are entitled to "great weight" by SSA in making a veteran's SSDI disability determination); Murincsak v. Derwinski, 2 Vet. App. 363, 372 (1992) (explaining that "[t]he Secretary's duty to assist includes

Congress expressly permits disabled veterans to collect monthly disability benefits from both the VA service-connected compensation program and SSDI for the exact same disability[213] undermines the purported purposes of both the service-connected disability compensation program and the stripping statute. First, it simply cannot be maintained that the exclusive or even primary purpose of the service-connected disability compensation program is to replace a veteran's lost earnings if that veteran is also entitled to SSDI for a service-connected disability. Second, dual eligibility for SSDI and service-connected compensation calls into question Congress's purported purpose in enacting the stripping statute, which was its alleged concern about double-dipping from the public fisc. It is difficult to think of a better example of double-dipping than the scenario in which a veteran collects full monthly compensation from the service-connected program to replace average impairment in earnings as the result of disability and, in addition, full monthly SSDI benefits as the result of the exact same work disability.[214] As explained by one commentator:

> Ideally, veterans would be covered by the VA disability system for service-connected impairments and by SSDI for non-service-related disability. In practice, SSDI considers all impairments when assessing benefit eligibility, whether service-connected or not, which is why some veterans may receive benefits for the same impairment from both systems.[215]

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obtaining this evidence from the SSA and giving it appropriate consideration and weight in its determination to award or deny appellant a total disability rating based on unemployability. At a minimum, the decision of the administrative law judge at the SSA 'is evidence which cannot be ignored and to the extent its conclusions are not accepted, reasons or bases should be given therefor.'" (quoting Collier v. Derwinski, 1 Vet. App. 413, 417 (1991))).

213 ERIC CHRISTENSEN ET AL., CRM D—16570.A4/1REV , FINAL REPORT FOR THE VETERANS' DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS 174 (2007), https://www.researchgate.net/profile/Eric_Christensen/publication/259482226_Final_Report_for_the_Veterans'_Disability_Benefits_Commission_Compensation_Survey_Results_and_Selected_Topics/links/02e7e52c1de33546f7000000.pdf (explaining that about 10 percent of service-connected veterans who are not rated IU receive SSDI and about 61 percent of service-connected veterans who are rated IU receive SSDI benefits).

214 *See, e.g.*, Romina Boccia, *Triple-Dipping: Thousands of Veterans Receive More Than $100,000 in Benefits Every Year*, THE HERITAGE FOUND. ISSUE BRIEF NO. 4295 (2014), http://www.heritage.org/social-security/report/triple-dipping-thousands-veterans-receive-more-100000-benefits-every-year#_ftn1 ("It is not illegal for veterans with a disability rating of at least 50 percent, or those receiving combat-related disability compensation, to collect retirement pay from the Department of Defense, disability compensation from the Department of Veterans Affairs (VA), and Social Security Disability Insurance (SSDI) all at the same time. Receiving concurrent benefits from three different federal programs is leading to excessive amounts for some recipients, warranting congressional action to streamline duplicative benefits.").

215 *Id.*

Disabled Americans are similarly entitled to concomitantly collect unemployment and SSDI.[216] Indeed, the practice of double- or even triple-dipping from the public fisc is legally condoned across numerous federal and state benefit programs in the United States.[217] It therefore appears that Congress's concern about double-dipping is limited to justice-involved citizens.

The points here are simple ones. First, need is not a factor in ascertaining whether a veteran who is disabled in the line of duty is entitled to service-connected disability compensation.[218] Therefore, Congress's needs-centric rationale advanced to justify the stripping statute is disingenuous. Second, there is no prohibition whatsoever on double- or even triple-dipping from the public fisc for noninmate veterans or, for that matter, former public employee inmates, such as Jerry Sandusky,[219] or former members of Congress, such as Dennis Hastert,[220] who are convicted of crimes allegedly unrelated to their public service.[221] Accordingly, the stripping statute rests on prima facie faulty premises.

3. The Stripping Statute's Exceptions Undermine Its Purported Rationale

As explained above, the stripping statute's purported rationale is that veteran prisoners ought to be stripped of their VA disability compensation because taxpayers are footing the costs associated with their incarceration,

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216 Lydia Wheeler, *GOP Senator Targets 'Double Dipping' in Federal Benefits*, THE HILL (Aug. 12, 2015, 11:19 AM), http://thehill.com/regulation/250931-bill-aims-to-end-double-dipping-in-federal-benefits (reporting that "at least 117,000 people received both disability and unemployment insurance in 2010").

217 *See, e.g.*, Gary Burtless & Jerry A. Hausman, "*Double Dipping": The Combined Effects of Social Security and Civil Service Pensions on Employee Retirement* 2 (Nat'l Bureau of Econ. Res., Working Paper No. 800, 1981) (discussing duplicative pensions).

218 *See supra* Part I.B.1; VETERANS BENEFITS MANUAL, *supra* note 55, at 57.

219 John W. Schoen, *Public Pension Cuts? Not for Convicted Lawmakers*, CNBC (Dec. 2, 2015, 3:09 PM), http://www.cnbc.com/2015/12/02/public-pension-cuts-not-for-convicted-lawmakers.html (explaining that "former Penn State assistant football coach Jerry Sandusky, sentenced to prison" for thirty to sixty years for sexually abusing ten children "should continue to get his $4,900-a-month state pension because he wasn't a Penn State employee when he committed the crimes that prompted state officials to revoke his pension").

220 *Id*. (explaining that former Speaker of the U.S. House of Representatives, Dennis Hastert, collects his $70,000-a-year federal pension while serving a term in federal prison for "evading banking law in hush-money scheme" designed to keep secret Hastert's years of sexual abuse of young boys); *see also id*. ("A dozen federal lawmakers convicted of crimes are collecting more than $700,000 a year in federally funded pensions . . . .").

221 Jack Maskell, *Loss of Federal Pensions for Members of Congress Convicted of Certain Offenses*, CONG. RES. SERV. 7-5700 1 (2013), https://fas.org/sgp/crs/misc/96-530.pdf (explaining that justice-involved members of Congress are permitted to keep their federal retirement annuities so long as they are not convicted of certain enumerated federal crimes that are directly connected to their federal service, such as "federal crimes relating to disloyalty or involving national security or national defense-related offenses against the United States" or "corruption in public office").

and, as such, they no longer have a "need" for disability benefits.[222] Section 5313, however, fails to reduce justice-involved veteran disability compensation in numerous instances in which taxpayers are obligated to cover the cost of veterans' living and other expenses. Examples include veterans incarcerated for misdemeanor offenses,[223] veterans serving criminal sentences on supervised release,[224] veterans residing at a halfway house,[225] and veterans subject to criminal commitment in taxpayer-funded psychiatric institutions.[226] The stripping statute, therefore, not only is based on faulty premises, but also frequently fails to satisfy its express purpose.

C. *The Stripping Statute Is the Product of Congressional Conflation of VA Disability Compensation and SSDI*

As explained earlier in this Article, Congress stripped prisoners of their disability benefits in response to spectacular media stories alleging that notorious prisoners, including Son of Sam, were abusing the SSDI program.[227] By all accounts, it appears that disabled veteran prisoners simply got caught in the wake of the 1980 push to eliminate inmate receipt of SSDI program benefits. Congress's treatment of the SSDI program and the veteran service-connected disability compensation scheme as bedfellows, however, was erroneous for at least two reasons.

First, the VA service-connected disability and SSDI programs have dramatically different service and disability causation criteria.[228] While service-connected veterans are required to have actively served the nation in the armed forces and incurred or aggravated a disability in the line of duty,[229] SSDI recipients need not have served the nation—let alone the military—in any capacity.[230] Moreover, the cause or type of a SSDI-qualifying disability need not be connected to anything; indeed, the cause and type of a disability under the SSDI criteria are irrelevant unless they are due to alcohol or drug abuse.[231] This is why it was possible for prisoners to be eligible for SSDI

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222 *SSDI Prisoner Beneficiary Hearings*, *supra* note 150, at 96 (statement of Peter W. Hughes, Legislative Counsel, National Teachers Association & American Association of Retired Persons).

223 *See* 38 U.S.C. § 5313(a)(1) (2012).

224 *Id.* § 5313(a)(2).

225 *Id.*

226 Veterans Aff. Gen. Coun. Prec. 10-2001, *supra* note 106, at 3 (explaining that incarceration does not include parole, work release, residency in a halfway house, participation in a community control program, confinement to a state hospital, or incarceration in a foreign prison).

227 *See supra* Part III.

228 *Compare* 38 U.S.C. § 101(2) (defining a veteran for service-connected disability compensation), *with* 42 U.S.C. § 423(a) (2012) (laying out the qualifications for disability insurance benefits).

229 38 U.S.C. § 101(2); 38 C.F.R. § 3.1(d) (2017).

230 42 U.S.C. § 423 (2012 & Supp. 2017).

231 *Id*. § 423(d)(2)(C).

benefits as the result of a disability incurred in the course of criminal conduct or while incarcerated until 1980.

Veterans, on the other hand, could not and cannot satisfy the service-connected eligibility criteria unless their disabilities *were incurred in service* during the period of time when the veteran's in-service conduct was satisfactory (e.g., classified as honorable, under honorable conditions, or general).[232] This important distinction between the two programs is why the above-described legislative hearings and other contemporaneous government reports pertaining to the successful 1980 movement to strip prisoners of their disability benefits are bereft of even a single example of a disabled veteran prisoner abusing service-connected benefits. Simply stated, abuse of service-connected disability benefits by veteran prisoners comparable to that about which the media reported involving the SSDI program (e.g., prisoner receipt of compensation for disabilities incurred in the course of criminal conduct or while incarcerated) was—and remains—a factual impossibility.

Second, the two programs diverge with regard to their eligibility criteria related to work capacity. As explained above, to qualify for SSDI benefits, an applicant must prove a debilitating work disability.[233] Specifically, SSDI mandates that applicants establish that their disability renders them incapable of engaging in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than 12 months."[234] SSDI beneficiaries must be "unable to do [their] previous work" and incapable of "engag[ing] in any other kind of substantial gainful work which exists in the national economy."[235]

The service-connected disability benefits program, by contrast, does not require a veteran to establish or prove any work disability.[236] As a result, the capacity to engage in substantial gainful activity is no bar whatsoever to eligibility for VA service-connected disability benefits.[237] This is because VA ratings are based on the average impairment of earning capacity that the schedule assigns to a particular disability and not on an individual assessment of a veteran's actual earnings loss or inability to work in the economy.[238] In

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232 38 U.S.C. §§ 1110, 1131.

233 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505(a).

234 *Id.* ("The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy.").

235 42 U.S.C. § 423(d)(2)(A).

236 CONG. BUDGET OFF., VETERANS' DISABILITY COMPENSATION: TRENDS AND POLICY OPTIONS 4–5 (2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45615-VADisability_2.pdf ("Veterans need not demonstrate any loss of earnings to qualify for benefits; documented disabilities . . . need not impair either employment or employability.").

237 *Id.* (explaining that this "feature of VA's disability compensation makes the program markedly different from private disability insurance and other government disability programs").

238 *See* 38 U.S.C. § 1155; 38 C.F.R. § 4.1.

fact and as explained previously, eligibility for service-connected compensation is so divorced from the concept of work disability that the program provides additional, extra-schedular compensation benefits (individual employability or IU) above and beyond the VASRD rating payment amount to disabled veterans who demonstrate that they are actually unable to work.[239]

The service-connected disability scheme also provides disabled veterans additional, extra-schedular SMC[240] above and beyond their average impairments or disability rating for disabilities that affect their quality of life,[241] such as "loss of physical integrity" and sense impairment.[242] The scheme further allows for the payment of extra-schedular compensation to disabled veterans for "pain and suffering"[243] and "social maladjustment."[244] As a result,

> [a]nother view of the purpose of disability compensation is that it is in part an indemnification against enduring losses, such as blindness, amputation, or PTSD, and other permanent effects, such as pain, and it includes losses that do not seem likely to affect a veteran's earning capacity or ability to work.[245]

Moreover, the VA's decision to use a veteran's "degree of anatomic and functional loss of body structures and processes (i.e., impairment) as the basis for the amount of compensation, rather than evaluating the veteran's ability to function in daily life and earn a living (i.e., disability), makes the compensation in part an indemnification or recognition of permanent damage or loss."[246]

As it must, the VA openly concedes that (1) the VASRD does not actually adhere to its express statutory purpose of compensating veterans for

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239 *See id.*; IOM REPORT, *supra* note 27, at 84 ("In 1933, VA officially recognized that some individuals are not able to earn as much as others with the same degree of impairment, by establishing the individual employability (IU) benefit . . . .").

240 38 U.S.C. § 1114(a)–(j).

241 A STUDY OF COMPENSATION PAYMENTS FOR SERVICE-CONNECTED DISABILITIES, *supra* note 61, at 50 ("VA currently makes . . . QOL [quality of life] payments through SMCs for certain physical disabilities.").

242 DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES, *supra* note 64, at 7 ("Although the primary purpose of VA's disability compensation is compensation for impairment in earning capacity, the program also provides for additional monthly compensation over and above the amount based on the schedule, for loss of 'physical integrity.'"); IOM REPORT, *supra* note 27, at 3 ("In practice, Congress and VA have implicitly recognized consequences in addition to work disability of impairments suffered by veterans in the Rating Schedule and other ways.").

243 IOM REPORT, *supra* 27, at 87; *7*1IS MILITARY DISABILITY COMPENSATION ADEQUATE TO OFFSET CIVILIAN EARNINGS LOSSES?, *supra* note 27, at 10; *see also* 38 C.F.R. § 4.40 (2017).

244 IOM REPORT, *supra* note 27, at 87.

245 *Id*.

246 *Id*.; *see also* DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES, *supra* note 64, at 9 ("While the law contains no definition of 'impairments in earning capacity,' ratings assigned to conditions in the schedule are based more on judgments of the loss in functional capacity, than in earning capacity, resulting from these conditions.").

average impairment of disability,[247] and (2) the overwhelming majority of service-connected disabled veterans are gainfully employed in the national economy.[248] In 2002, the GAO drafted a report in which it recommended, among other things, that the VA update the VASRD and the labor market data it uses in its disability determination to actually reflect the average impairment in earning capacity of disabled veterans.[249] The VA rejected those recommendations, responding that the "VA does not plan to initiate an economic validation study or a revision of the rating schedule based on economic factors."[250]

The VA went on to admit that "the basic purpose of disability compensation . . . was not to strictly adhere to the basic standard of assigning percentages based on average impairment of earning capacity," but that, instead, "VA's standard has been primarily a physical disability standard that also takes into consideration pain, suffering, shortening of life, disfigurement, and social inconvenience."[251] The VA further chastised the GAO for failing to "understand[] that the great majority of disabled veterans are working, including a number who are evaluated at 100 percent" disabled.[252] According to the VA,

> [t]he term "disability" for VA purposes encompasses all gradations of impairment from slight to total. Many who are fully employed suffer the effects of their disability in various ways, some subtle, some obvious. There may, for example, be pain, anxiety, fatigue, weakness or nausea that does not prevent employment but that would certainly make it more difficult to

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247 GAO PROGRAM INTEGRITY REPORT, *supra* note 50, at 41.

248 *Id*. at 43 ("*The great majority of disabled veterans are working, including a number who are evaluated at 100 percent*. . . . [F]ully employed veterans may deserve compensation based on a medical impairment even if the effects on employment are not obvious and are hard to measure." (emphasis added)).

249 *Id*. at 11–13, 33–34, 41. In its report, the GAO explained that "[t]wo major studies have been conducted since the implementation of the 1945 version of the schedule to determine whether the schedule constitutes an adequate basis for compensating veterans with service-connected conditions," and "[b]oth concluded . . . that at least some disability ratings in the schedule did not accurately reflect the average impairment in earning capacity among disabled veterans and needed to be adjusted." *Id*. at 12.

250 *Id*. at 41.

251 *Id*.; *see also Review of Veterans Disability Compensation: Benefits of the 21st Century*: *Hearing Before the S. Comm. on Veterans' Aff.*, 111th CONG. 48–49 (2009) (statement of Susan Prokop, Associate Advocacy Director, Paralyzed Veterans of America) ("VA compensation is meant to offset more than economic loss . . . [i]t also takes into consideration a lifetime of living with a disability and the every day challenges associated with that disability [and] it reflects the fact that even if the veteran works, the disability does not stay at the office when he or she goes home at the end of the day.").

252 GAO PROGRAM INTEGRITY REPORT, *supra* note 50, at 43; *see also* CONG. BUDGET OFF., *supra* note 236, at 4 ("Most disabled veterans of working age (18 to 65) are in the labor force . . . . [T]he participation rate for working-age male civilians with disabilities was much lower than that for disabled veterans . . . in part because other disability programs have stricter rules for determining what constitutes a compensable disability and place great limits on employment for recipients."). The CBO report also noted that "[d]isabled veterans were much more likely to be employed in the public sector (31 percent) than were other veterans (19 percent)." *Id.*

> work. Therefore, fully employed veterans may deserve compensation based on medical impairment even if the effects on employment are not obvious and are hard to measure.[253]

The VA's candor here is refreshing insofar as it acknowledges that its disability program is more concerned with compensating veterans for their service-connected physical disabilities, mental health issues, pain, and suffering than with "validat[ing] the ratings solely from an economic perspective"[254] to ensure the ratings actually reflect average impairment of earning capacity. It raises the question, however, why the VA's logic does not extend to justice-involved disabled veterans. Certainly, disabled veteran prisoners who experienced pain, anxiety, fatigue, weakness or nausea as a result of their service-connected injuries preincarceration continue to experience those same infirmities or disability-related consequences while incarcerated. And veterans like Billy, who are service-connected for the loss of a creative organ preincarceration, necessarily continue to experience the loss of that creative organ while in prison or jail.

The bottom line is that the pertinent similarities between SSDI and VA service-connected disability compensation begin and end with the fact that both programs' benefits are earned entitlements not subject to means-testing.[255] Unlike SSDI, veterans are entitled to service-connected compensation only if they incurred or aggravated their disability both in the line of duty and during a period of satisfactory military service.[256] Unlike SSDI, the veteran service-connected disability compensation scheme does not compensate disabled veterans as a result of either their inability to maintain substantial gainful employment or actual economic losses. Moreover, and as the VA concedes, the service-connected disability scheme goes well beyond its statutory purpose of compensating veterans for average impairment in earnings by providing veterans with disability compensation for a litany of conditions that affect their quality of life but do not affect their employability.[257]

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253 GAO PROGRAM INTEGRITY REPORT, *supra* note 50, at 43.

254 *Id.* at 41.

255 The Federal Circuit has in fact held that veteran "entitlement to benefits [for service-connected disabilities] is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution." Cushman v. Shinseki, 576 F.3d 1290, 1298 (Fed. Cir. 2009). The court reached that result by reasoning that veteran service-connected disability benefits are "nondiscretionary [and] statutorily mandated" and, in so doing, explained that a "veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations." *Id.*

256 38 U.S.C. § 1110 (2012).

257 LEGISLATIVE HISTORY, *supra* note 20, at 2 ("The legislation does not explicitly state that intent of the disability program is to compensate for reduction in quality of life due to service-connected disability. However, this intent is implicit because Congress has set forth certain presumptions of eligibility for disability compensation and higher benefit levels for certain disabling conditions such as loss of a limb that reflect humanitarian concern about quality of life. The quality of life factor may be a more critical issue than employability for amputees given advances in medical technology and emphasis on occupations not requiring physical labor."). For example, the fifth most prevalent service-connected disability for

D. *The Stripping Statute Fails to Account for the Nexus Between Military Service Trauma and Post-Service Criminal Behavior*

> [N]ot all the causalities [of war] . . . come home in body bags.[258]

The stripping statute fails to acknowledge any nexus between military service trauma and post-service veteran misconduct. "There is a growing prevalence of veterans entering our jails, state and federal prisons with criminal behavior stemming from service-related mental health issues."[259] "[E]vidence indicates that a substantial proportion of military personnel are involved in high-risk and antisocial behaviors that place them at jeopardy for criminal justice system involvement."[260]

A recent literature review assessing the mental health consequences of the wars in Iraq and Afghanistan similarly noted the "clear evidence of higher rates of homeless, alcohol abuse, domestic violence, relationship breakdown and criminality" among veterans "with untreated mental health conditions."[261] *The Economist* reported that veterans are more likely to be unemployed than nonveterans, account for 20 percent of U.S. suicides, and compose nearly 20 percent of the American homeless population.[262] The VA "confirm[s] that veterans face a variety of difficulties related to readjusting to civilian life, including financial and employment, relationships, legal difficulties, homelessness, and substance abuse"[263] and that its failure to provide readjusting veterans with timely benefits and services contributes to and exacerbates these issues.[264]

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which veterans received compensation in fiscal year 2016 was "scars." U.S. DEP'T OF VETERANS AFF., VETERANS BENEFITS ADMIN., ANNUAL BENEFITS REPORT FISCAL YEAR 2016, at 71 (2017).

258 Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Is Taking the Stand*, N.Y. TIMES (Jan. 27, 2008), http://www.nytimes.com/2008/01/27/us/27vets.html (quoting United States District Court Judge Charles B. Kornmann).

259 INST. FOR VETERAN POL'Y, *supra* note 13, at 1.

260 David L. Snowden et al., *Military Service and Crime: New Evidence*, 52 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 605, 605 (2017).

261 Steven Walker, *Assessing the Mental Health Consequences of Military Combat in Iraq and Afghanistan: A Literature Review*, 17 J. PSYCHIATRIC & MENTAL HEALTH NURSING 790, 794 (2010).

262 *Leave No Veteran Behind*, THE ECONOMIST (June 2, 2011), http://www.economist.com/node/18775315 ("Unemployment among veterans who have served since 2001 is higher than for non-veterans. Veterans make up 20% of all suicides. Nearly a fifth of the homeless population in the United States are veterans. Substance abuse is pervasive. Many more have mental-health problems, which often lead to criminal behaviour.").

263 U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-676, VETERANS AFFAIRS: BETTER UNDERSTANDING NEEDED TO ENHANCE SERVICES TO VETERANS READJUSTING TO CIVILIAN LIFE 6 (2014), http://www.gao.gov/assets/670/665725.pdf.

264 *Id.* at 21–24.

Prior to service, most veterans were never involved in the criminal justice system.[265] Unfortunately, many veterans, "especially those who have been viscerally exposed to the devastation and degradation of warfare, the blood and gore and death, the incessant, wrenching fear wrought by the agencies of combat, return to our shores plagued by demons from their wartime experiences."[266] The RAND Corporation found that 19.5 percent of servicemembers returning from Iraq and Afghanistan suffered traumatic brain injuries as a result of violent physical jolts to the head, mainly from explosives, and another 18.5 percent now have posttraumatic stress syndrome or depression.[267] Alarmingly, "[t]reatment models tell us that about half (53 percent) of Global War on Terror (GWOT) veterans who need treatment for major depression or post traumatic stress seek it, [and only] half of those [veterans] who seek treatment for mental conditions receive 'minimally adequate care.'"[268]

Our understanding of the nexus between in-service combat trauma and veteran post-service misconduct is admittedly "in its infancy."[269] It is nonetheless "difficult to ignore the possibility that PTSD [and traumatic brain injury ("TBI")], specifically PTSD [and TBI] caused by combat, may have some causal relationship to criminal conduct."[270] The stripping statute, however, ignores even the possibility that a veteran's criminal behavior is a result

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265 BERNARD EDELMAN, U.S. DEP'T OF JUST., NAT'L INST. OF CORRECTIONS, VETERANS TREATMENT COURTS: A SECOND CHANCE FOR VETS WHO HAVE LOST THEIR WAY v (2016), http://nicic.gov/ library/030018; *see also* Steven Berenson, *The Movement Towards Veterans Courts*, 44 CLEARINGHOUSE REV. 37, 38 (2010) (asserting that the "invisible wounds" associated with the wars in Iraq and Afghanistan, PTSD, major depression, and traumatic brain injury "correlate with increased involvement in the criminal justice system"); Sontag & Alvarez, *supra* note 258 (positing that "war can be seen as a backdrop for [veteran] crimes, most of which are committed by individuals without criminal records").

266 EDELMAN, *supra* note 265, at v ("Because of what they have seen and done during their deployment in a combat zone, too many [veterans] self-medicate with alcohol and/or drugs in an attempt to assuage their demons — and deal with a society they feel neither accepts nor understands them. And some wind up butting heads with the criminal justice system."); *see also* David J. Morris, *War Is Hell, and the Hell Rubs Off: PTSD Contributes to Violence. Pretending It Doesn't Is No Way to Support the Troops*, SLATE (Apr. 17, 2014, 4:04 PM), http://www.slate.com/articles/ health_and_science/medical_examiner/2014/04/ptsd_and_violence_by_veterans_increased_murder_rates_related_to_war_experience.html ("Serving in a war zone exposes people to very serious moral challenges, and the experience can serve as a catalyst, making some people less stable and more violent than they would have been otherwise. War is hell, and the hell rubs off.").

267 RAND CTR. FOR MIL. HEALTH POL'Y RES., INVISIBLE WOUNDS: MENTAL HEALTH AND COGNITIVE CARE NEEDS OF AMERICA'S RETURNING VETERANS 2 (2008), http://www.rand.org/pubs/ research_briefs/RB9336.html.

268 INST. FOR VETERAN POL'Y, *supra* note 13, at 1.

269 Snowden et al., *supra* note 260, at 605–06 ("[W]hile prior research has shed light on the links between military service and crime, our understanding of the involvement of military personnel in criminal behaviors and the criminal justice system continues to be in its infancy.").

270 Kristine A. Huskey, *Reconceptualizing "The Crime" in Veterans Treatment Courts*, 27 FED. SENT'G REP. 178, 181 (2015).

of or, at least, related to combat trauma.[271] It also fails to take seriously the VA's well-documented failure to provide veterans experiencing service-related reintegration challenges with the post-deployment treatment services that they need and deserve.[272] The American public, Congress, and the VA should feel obligated to reconsider whether it is fair to continue to strip our disabled veterans of their hard-earned, service-connected compensation for post-service misconduct that research indicates may have been provoked or exacerbated by service-related trauma or injury.

E. *The Stripping Statute Impedes Justice-Involved Veteran Rehabilitation and Reentry*

> I see these stickers that people have on their vehicles saying, 'Support the troops,' [but] I don't see much support for the troops as years go on when these people come back injured and maimed.[273]

It is undisputed that the United States is the highest-incarcerating country in the world.[274] Often overlooked, however, are two simple truths: (1) American veterans are overrepresented in the U.S. prison population, accounting for at least nine of every hundred individuals currently incarcerated in U.S. jails and prisons,[275] and (2) the overwhelming majority (over 95 percent) of these justice-involved veterans will be released and will return to our

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271 Consider that "[a]pproximately thirty percent of veterans returning home from combat suffer from 'invisible wounds,' injuries that are not visible to the eye and, as a result, often go unrecognized and unacknowledged. These injuries are post-traumatic stress disorder, traumatic brain injury, military sexual trauma, and major depression." Robert T. Russell, *Veterans Treatment Courts*, 31 TOURO L. REV. 385, 386 (2015).

272 *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 263, 21–24; Nina A. Sayer et al., *Reintegration Challenges in U.S. Service Members and Veterans Following Combat Deployment*, 8 SOC. ISSUES & POL'Y REV. 33 (2014).

273 Sontag & Alavarez, *supra* note 258 (quoting United States District Court Judge Charles B. Kornmann).

274 Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.15f2eda71b4b; Am. Psychol. Ass'n, *Incarceration Nation: The United States Leads the World in Incarceration*, 45 MONITOR ON PSYCH. 56, 56 (2014), http://www.apa.org/monitor/2014/10/incarceration.aspx ("While the United States has only 5 percent of the world's population, it has nearly 25 percent of its prisoners — about 2.2 million people.").

275 *Compare* BRONSON, *supra* note 205 (estimating that veterans compose approximately 9 percent of the U.S. jail and prison population), *with* NAT'L CTR. FOR VETERANS ANALYSIS & STAT., PROFILE OF VETERANS: 2016, DATA FROM THE AMERICAN COMMUNITY SURVEY 2 (2018), https://www.va.gov/vet-data/veteran_population.asp (estimating that veterans compose 7.8 percent of the U.S. population). *See also* Huskey, *supra* note 270, at 180 ("[Since the post-Vietnam era, there has been a disproportionate number of veterans in jails and prisons as compared to the general population.").

communities.[276] It is well documented that all returning citizens face considerable obstacles to successful community reintegration, and, unfortunately, many return to prison.[277] We also know that veterans returning from combat deployments face significant readjustment challenges[278] and that justice-involved veterans often reoffend, commit progressively more serious offenses, and serve longer sentences.[279]

As a general rule, Americans seem unaware that federal law strips incarcerated veterans of the vast majority of the benefits they earned through their satisfactory service.[280] That is to say, notwithstanding American flag-waving and "support our troops" rhetoric, veterans who return home from war disabled and commit crimes are no longer eligible for service-connected disability compensation and other service-related entitlements. These benefit-stripping laws undermine the well-accepted and longstanding notion that veterans have earned enhanced citizenship status and access to benefits for injuries incurred in the line of duty as a result of their sacrifice on behalf of the nation. They also eradicate veterans' positively valued social identity, which serves as a protective factor, and leaves in its stead a negatively valued criminal social identity, which is a risk factor.[281] Worse yet, they often function to ensure that disabled veterans are destitute upon their release from a carceral institution. As a result, the statutes that strip justice-involved veterans of their well-earned entitlement to service-connected benefits impede veteran rehabilitation, reentry, and readjustment.[282]

The stripping statute is also out of step with the modern therapeutic justice movement to treat and rehabilitate—rather than punish and incarcerate—justice-involved veterans.[283] Indeed, "recognition of the negative impact of

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276 TIMOTHY HUGHES & DORIS JAMES WILSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., *Reentry Trends in the United States* (2004), https://www.bjs.gov/content/pub/pdf/reentry.pdf.

277 *See, e.g.*, Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 778 (2012) (quoting President George W. Bush). *See generally* David F. Weiman, *Barriers to Prisoners' Reentry into the Labor Market and the Social Costs of Recidivism*, 74 SOC. RES. 575 (2007).

278 Nina A. Sayer, et al., *Reintegration Problems and Treatment Interests Among Iraq and Afghanistan Combat Veterans Receiving VA Medical Care*, 61 PSYCHIATRIC SERVS. 589, 593 (2010); Michael E. Doyle & Kris A. Peterson, *Re-Entry and Reintegration: Returning Home After Combat*, 76 PSYCH. Q. 361, 362, 364–67 (2005).

279 MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., VETERANS IN STATE AND FEDERAL PRISON, 2004 5 (2007).

280 38 U.S.C. § 5313 (2012).

281 *See* Theodore R. Sarbin, *The Dangerous Individual: An Outcome of Social Identity Transformations*, 7 BRITISH J. CRIMINOLOGY 285, 294 (1967).

282 *See generally* Misty Kifer et al., *The Goals of Corrections: Perspectives from the Line*, 28 CRIM. JUST. REV. 47, at 47 (characterizing the goals of imprisonment as "deterrence, incapacitation, retribution, and rehabilitation").

283 *See generally* Julie Marie Baldwin, *Whom Do They Serve? A National Examination of Veterans Treatment Court Participants and Their Challenges*, 28 CRIM. JUST. POL'Y REV. 515, 516 (2017); Mark A. McCormick-Goodhart, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma,*

military service, particularly exposure to combat and/or war zones, and the enormous challenges faced in assimilating back into civilian life" led to "[t]he establishment and proliferation of veterans treatment courts (VTCs)" throughout the United States over the last decade.[284] VTCs are problem-solving courts modeled after drug, mental health, domestic violence, or other specialized criminal courts, which "'divert' offenders from the conventional criminal justice system to a specialized court where treatment [for the underlying causes of the veteran's criminal conduct], rather than incarceration, tends to be the primary force driving resolution of the case."[285]

As of December 31, 2015, there were approximately 350 VTCs located across forty-one states.[286] Bolstering the argument for repeal of the stripping statute, preliminary evidence indicates that VTCs have been effective at rehabilitating justice-involved veterans, reducing recidivism rates, and realizing significant taxpayer cost savings.[287] As Judge Russell has explained, VTCs provide additional, difficult-to-qualify benefits for veterans and their communities:

> The successes of these veterans may not be adequately expressed simply by the inexistence of recidivism and relapse. Rather, their success may be better understood by the positive changes in their individual lives. . . . Participants emerge from the process standing tall, smiles on their faces, with a renewed sense of hope, pride, accomplishment, motivation, and confidence in their ability to continue to face challenges and better their lives.[288]

Moreover, and unlike the SSDI prisoner beneficiary stripping statute, the service-connected disability compensation-stripping statute fails to incentivize disabled, justice-involved veterans to participate in rehabilitation programs while incarcerated. As briefly pointed out earlier in this Article, disabled SSDI prisoner beneficiaries are entitled to continued payment of their disability benefits so long as they actively participate in an approved carceral vocational rehabilitation program.[289] Veteran prisoners, on the other hand, are entitled to no such rehabilitation programming exception. Even if Congress is unwilling to repeal the stripping statute, it should at least amend the current law to extend a rehabilitation exception to disabled veteran prisoners. As Marine Corps defense counsel Lt. Col. Colby Vokey contends,

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Veterans Courts, and the Rehabilitative Approach to Criminal Behavior, 117 PENN. ST. L. REV. 895, 896–98 (2013).

284 Huskey, *supra* note 270, at 178–79 ("The first official VTC was established in Buffalo, New York, in 2008, by municipal Judge Robert Russell, though some accounts note that the first informal veterans court program originated in Anchorage, Alaska, four years earlier.").

285 *Id.* at 178.

286 JUSTICE FOR VETS, Veterans Treatment Court Locations, https://justiceforvets.org/veterans-treatment-court-locations/ (last visited Apr. 7, 2018).

287 McCormick-Goodhart, *supra* note 283, at 917–20 ("One authoritative study found that treatment saved taxpayers more than 79 million dollars over ten years.").

288 Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 370 (2009).

289 *See supra* Part III.C.

justice-involved veterans "should always receive some kind of consideration for the fact that their mind has been broken by war."[290]

CONCLUSION

In his 2004 State of the Union Address, President George W. Bush explained that "America is the land of second chance, and when the gates of prison open, the path ahead should lead to a better life."[291] Veterans have borne the risk and sacrifice of armed service since before the founding of our nation so that the rest of us can enjoy a life of freedom. In exchange, we as a people should commit to ensuring that all veterans are provided the services and resources they need to successfully readjust to civil life and reintegrate into their communities upon completion of their military service. Moreover, and given that the VA concedes that it often has failed to do just that,[292] we are duty-bound to take immediate action to ensure that disabled, justice-involved veterans have a real second chance upon their release from prison. The first such step is for Congress to repeal the unjust, unwarranted, and unproductive stripping statute. "Abandoning [veterans] who are unable to cope with the traumas of war is unbecoming . . . of a grateful nation"[293] and, quite frankly, un-American.

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290 Sontag & Alvarez, *supra* note 258.

291 President George W. Bush, State of the Union Address (Jan. 20, 2004), https://georgewbush-whitehouse.archives.gov/stateoftheunion/2004/.

292 *See* DEP'T OF VETERANS AFF., VETERANS REENTRY: POLICIES AND PRACTICES, REENTRY SYMPOSIUM (2015).

293 Beth A. Colgan, *The Presidential Politics of Prisoner Reentry Reform*, 20 FED. SENT'G REP. 110, 116 (2007).