

DISABILITY COMPENSATION FOR THE PSYCHOLOGICAL IMPACT OF RACE DISCRIMINATION: LESSONS FROM THE BOARD OF VETERANS' APPEALS

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INTRODUCTION	310
II. VA DISABILITY COMPENSATION FRAMEWORK.....	317
III. RESEARCH METHODOLOGY	323
A. <i>The Written VA Appellate Decision as the Unit of Analysis</i>	323
B. <i>Supervised Machine Learning to Classify Discrimination Cases</i>	326
C. <i>Study Limitations</i>	327
IV. STUDY RESULTS	329
A. <i>General Trends in Outcomes Across Discrimination Cases</i>	329
B. <i>Discrimination Case Attributes</i>	332
1. <i>Mental Health Conditions Claimed</i>	333
2. <i>Discriminatory Acts Attributed to Mental Health Conditions</i>	333

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3. <i>BVA's Approach to Stressor Corroboration</i>	334
4. <i>Psychiatric Assessment of PTSD Criterion A</i>	337
5. <i>Other Notable Observations</i>	339
i. <i>Vague and Sanitized Descriptions</i>	339
ii. <i>Race Discrimination in a Combat Zone</i>	340
iii. <i>Discrimination Incorporating Racist Symbols</i>	341
C. <i>Relationships Between Case Variables</i>	342
D. <i>Multilevel Logistic Regression Analysis</i>	343
CONCLUDING RECOMMENDATIONS	348
APPENDIX	355
<i>Results of Hypothesis Tests</i>	355

INTRODUCTION

The issue of police brutality against Black people, particularly officers' use of deadly force, has brought systemic racial discrimination to the forefront through public, often painful, dialogue regarding the need for reform.¹ These ongoing and controversial discussions have touched upon the issue of reparations as one way of addressing the long-term, intergenerational effects of prejudice to include the psychic toll of being treated in a stigmatizing way.²

1. The killings of George Floyd, Breonna Taylor, Rayshard Brooks, and Ahmaud Arbery have collectively contributed to a national awakening on the potential for systematic racial bias within the justice system. See, e.g., Elliot C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> (identifying these and numerous other "police killings in recent years"); Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/> (observing that "the notion of 'systemic racism,'" is no longer "confined to academic and activist circles," and has been accepted by the most diverse group of Americans in history as opposed to past generations). Disparities have been found in both the civil and criminal courts. For the criminal context, see, e.g., Mitchell F. Crusto, *Right to Life: Interest-Convergence Policing*, 71 RUTGERS U. L. REV. 63, 65 (2018) ("[P]olice officers are seldom prosecuted for, and rarely found guilty of, homicide resulting from the unjustified use of lethal force."). For the civil context, see, e.g., Arthur H. Garrison, *Criminal Culpability, Civil Liability, and Police Created Danger*, 28 GEO. MASON U. C.R.L.J. 241, 244 (2018) ("[R]egarding police civil liability . . . the jurisprudence provides a very limited range of protection from police maleficence in use of force.").

2. See, e.g., Michael Conklin, *An Uphill Battle for Reparationists: A Quantitative Analysis of the Effectiveness of Slavery Reparations Rhetoric*, 10 COLUM. J. RACE & L. 33, 36 (2020) (noting a "recent surge in the popularity of reparations—demonstrated by sixteen of the twenty Democratic 2020 presidential frontrunners expressing support for slavery reparations"). In a bold move,

One of numerous considerations in the larger discussion is the task of measuring the psychological damage that has resulted from racial discrimination in various forms.³ After centuries, our nation has yet to develop a uniform or practical way to assess the injuries caused by discrimination.⁴

In both the courts and public discourse, the sticking point appears to be the severity of the discriminatory treatment.⁵ Standards for assessing racial harassment across judicial forums have tended to require prolonged, extreme, and outrageous treatment to the point where verbal abuse and slurs are considered to be a predictable consequence of life.⁶ Psychiatry has reinforced

the city of Evanston, Illinois, was the first American jurisdiction to implement a reparation system linking housing benefits to past racial discrimination. Memorandum from Kimberly Richardson, Interim Asst. City Mgr., Adoption of Resolution 37-R-27, Authorizing the Implementation of the Evanston Local Reparations Restorative Housing Program and Program Budget 2 (Mar. 22, 2021); *see also* Taryn Luna, *California Reparations Effort Moves Ahead: Here's What's Next*, L.A. TIMES (Mar. 30, 2022, 8:20 AM), <https://www.latimes.com/california/story/2022-03-30/california-reparations-effort-moves-ahead> (describing the California Reparations Task Force's recent vote to provide reparations for residents who are descendants of "a chattel enslaved person or the descendant[s] of a free [B]lack person living in the United States prior to the end of the 19th Century.").

3. *See generally* ROBERT T. CARTER & ALEX L. PIETERSE, *MEASURING THE EFFECTS OF RACISM: GUIDELINES FOR THE ASSESSMENT AND TREATMENT OF RACE-BASED TRAUMATIC STRESS* 89 (2020) (identifying the challenges of measuring the impact of racial discrimination, including the rigid standards for assessing Posttraumatic Stress Disorder (PTSD)); Rachel Treisman, *In Likely First, Chicago Suburb of Evanston Approves Reparations For Black Residents*, NPR (Mar. 23, 2021, 2:36 PM), <https://www.npr.org/2021/03/23/980277688/in-likely-first-chicago-suburb-of-evanston-approves-reparations-for-black-reside> (noting the long-term effects of discriminatory practices on wealth, education, and property ownership among Evanston citizens).

4. ROBERT T. CARTER & THOMAS D. SCHEUERMANN, *CONFRONTING RACISM: INTEGRATING MENTAL HEALTH RESEARCH INTO LEGAL STRATEGIES AND REFORMS* (2020) [hereinafter CARTER & SCHEUERMANN, *CONFRONTING RACISM*] (addressing various obstacles in adjudication of race-related injuries).

5. *Id.* at 113–14 (“We reason that since racism is rarely an experience that involves direct threats to one’s life, it should follow that racism-related stress or race-based trauma would not be associated with PTSD.”). These psychiatric views are embodied in longstanding legal theories; for example, the *Restatement (Second) of Torts*’ guidance that compensable emotional distress must be “so severe that no reasonable [person] could be expected to endure it.” *RESTATEMENT (SECOND) OF TORTS* § 46 cmt. j. (AM. L. INST. 1965).

6. *See, e.g.*, *RESTATEMENT (SECOND) OF TORTS* § 46 cmt. j. (1965) (“Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people.”); David C. Yamada, *Workplace Bullying and Employment Law: A Ten-Year Progress Report and Assessment*, 32 *COMP. LABOR L. &*

this view in defining traumatic events in a manner that has traditionally included a form of life-threat in the diagnosis of “trauma.”⁷ Notably, the most recent version of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* has reconceptualized Posttraumatic Stress Disorder (PTSD) as a “Trauma and Stressor-Related Disorder,” and limited the qualifying traumatic events to “actual or threatened death, serious injury, or sexual violence.”⁸

Administrative tribunals face the same challenges as traditional courts of general jurisdiction in adjudicating racial discrimination claims.⁹ However, the nature of “mass adjudication” adds complexity to the issue.¹⁰ More specifically, because administrative tribunals are under pressure to generate

POL’Y.J. 251, 257–59 (2010) (considering potential avenues of relief for intentional infliction of emotional distress; intentional interference with the employment relationship; discrimination laws at the federal and state levels; and occupational safety and health law before rejecting each as a viable method to remedy workplace harassment); Robert T. Carter & Thomas D. Scheuerman, *Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 24–86 (2007) [hereinafter Carter & Scheuerman, *Addressing Workplace Racism*] (describing the evolution and ineffectiveness of different jurisprudential frameworks for remedying workplace discrimination, including Title VII, workplace bullying, intentional and negligent infliction of emotional distress, Section 1981 and Section 1983, and state workers’ compensation).

7. Carol S. North, Barry A. Hong & Dana L. Downs, *PTSD: A Systematic Approach to Diagnosis and Treatment*, 17 CURRENT PSYCHIATRY 35, 36 (2018) (describing the requirement that a “requisite trauma” consists of a “threat to life or limb”).

8. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013); Anuska Pai, Alina M. Suris & Carol S. North, *Posttraumatic Stress Disorder in the DSM-5: Controversy, Change, and Conceptual Considerations*, 7 BEHAV. SCI. 1, 1–3 (2017) (discussing the change in category for PTSD and the new requirement for Criterion A).

9. Compare Jana R. DiCosmo, Robert L. Hayman, Jr. & Jordan G. Mickman, *Interest Convergence and the Disability Paradox: An Account of the Racial Disparities in Disability Determinations Under the SSA and IDEA*, 4 WIDENER J. L., ECON. & RACE 78, 84–87 (2013) (identifying disproportionately negative case outcomes among racially diverse claimants in Social Security disability awards through decades of research studies), with Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 345 (2012) (addressing disproportionately negative case outcomes among racially diverse plaintiffs in federal judges’ decisions at the summary judgment stage).

10. Mass adjudication generally describes “informal alternatives” to formal adjudication that enable “a vast number of individual claims involving relatively small amounts.” Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 497–98 (2003). Hallmarks include heavy screening and limited scope of review by administrative judges. *Id.* at 498. Drawbacks typically include “unpredictable surges and large backlogs of claims” that increase the risk of inconsistency and arbitrariness. Adam S. Zimmerman, *Surges and Delays in Mass Adjudication*, 53 GA. L. REV. 1335, 1338 (2019).

written decisions at a rate far greater than traditional courts, there is greater likelihood of abbreviated summaries that do not fully explain the evidence considered and the courts' rationale for decisions.¹¹ In the context of Equal Employment Opportunity Commission administrative decisions regarding racial discrimination claims, for example, researchers have observed that these most frequently filed discrimination claims "have the lowest rate of success, with just fifteen percent [15%] receiving some form of relief."¹² Most cases were closed "without concluding whether discrimination occurred."¹³ Scholars have further traced the problems inherent in the adjudication of Title VII discrimination claims to workers' compensation cases, with an overarching conclusion that these forums—in addition to traditional courts that decide tort claims—are inadequate for addressing discriminatory injury due to the absence of clear standards and embedded skepticism of such claims.¹⁴

This Article examines racial discrimination in a new context—the adjudication of claims filed by military veterans who attribute mental health conditions to discriminatory events during their prior military service. Although the military represents a very small microcosm of the American population, estimated to be 7% overall,¹⁵ with less than 1% actively serving at any given time,¹⁶ the institution has been rife with discrimination since its

11. See, e.g., David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 5 (2020) (examining a number of factors that contribute to a "crisis of decisional quality" in administrative courts, including those relating to immigration, Social Security benefits, and veterans' benefits).

12. See Maryam Jameel & Joe Yerardi, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases/> (analyzing eight years of racial discrimination complaint outcomes through 2017); see also Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 468, 473 (2020) (describing serious limitations on pursuing redress for "low-grade harassment" under Title VII, which represents "intentional acts that are similar to cognizable misconduct but insufficiently severe or pervasive to give rise to liability").

13. Jameel & Yerardi, *supra* note 12.

14. See CARTER & SCHEUERMANN, CONFRONTING RACISM, *supra* note 4 (discussing legal and mental health strategies to confront racism); Carter & Scheuerman, *Addressing Workplace Racism*, *supra* note 6, at 21–36 (addressing the limited redressability for racial discrimination in the workplace); Yamada, *supra* note 6, at 257–59 (discussing claims related to workplace bullying).

15. News Release, Bureau of Labor Statistics, Dep't of Labor, Employment Situation of Veterans — 2020 (Mar. 18, 2021), <https://www.bls.gov/news.release/pdf/vet.pdf>, at 2.

16. Katherine Schaeffer, *The Changing Face of America's Veteran Population*, PEW RSCH. CTR. (Apr. 5, 2021), <https://www.pewresearch.org/fact-tank/2021/04/05/the-changing-face-of-americas-veteran-population/>.

inception.¹⁷ The Armed Forces segregated servicemembers by race until the 1950s¹⁸ and then experienced a racial war “within a war” during the Vietnam era.¹⁹ Today, even after instituting numerous measures and programs to eliminate racism in the ranks, secretaries of defense and military leaders have admitted to the persistence of systemic racial discrimination.²⁰

17. See, e.g., Alexis Clark, *Black Americans Who Served in WWII Faced Segregation Abroad and at Home*, HISTORY (last visited May 10, 2022), <https://www.history.com/news/black-soldiers-world-war-ii-discrimination> (tracing discriminatory military racial segregation practices to the Revolutionary War).

18. *Id.*

19. See James Maycock, *War Within War*, THE GUARDIAN (Sept. 14, 2001, 9:25 PM), <https://www.theguardian.com/theguardian/2001/sep/15/weekend7.weekend3> (explaining the analogy for Black servicemembers). Veterans in this study analogized this same concept in describing stressor events during military service. See, e.g., Name Redacted, Citation No. 16-25292 (Bd. Vet. App. June 23, 2016) (“[T]he veteran reported that he felt like he was ‘fighting two wars’ as he was in a racial war with other people.”); Name Redacted, Citation No. 05-17699 (Bd. Vet. App. June 29, 2005) (“It was stated that a great many of the veteran’s stressful events occurred [from] fighting the ‘War within the War,’ times were different, military services were segregated, [B]lack soldiers were discriminated against despite their obvious abilities, and they were bombarded with racism and racial slurs.”).

20. For instance, former Defense Secretary Mark T. Esper commented: “[W]e are not immune from the forces of bias and prejudice We can and must do better.” SEC’Y OF DEF., DEP’T OF DEF., NO. OSD005966-20/CMD007245-20, MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEP’T OF DEF. ET AL. (June 19, 2020). General Mark Milley, Army Chief of Staff, observed the degrading effects on Black soldiers who lived or performed duties on bases named after Confederate generals. See Robert Burns, *Milley: Confederate Names on Army Bases Divide the Military*, WASH. POST. (July 9, 2020), https://www.washingtonpost.com/world/national-security/milley-confederate-names-on-army-bases-divide-the-military/2020/07/09/19a3ad8a-c225-11ea-8908-68a2b9eae9e0_story.html (“For those young soldiers that go onto a base . . . named after a Confederate general—they can be reminded that that general fought for the institution of slavery that may have enslaved one of their ancestors.”); see also Kat Stafford, James Laporta, Aaron Morrison & Helen Wiewfering, *Deep-Rooted Racism, Discrimination Permeate US Military*, U.S. NEWS (May 27, 2021, 8:03 PM), <https://www.usnews.com/news/politics/articles/2021-05-27/deep-rooted-racism-discrimination-permeate-us-military> (highlighting the ongoing issues of discrimination in the military). In fact, it was not until August 2020 that the Army finally ended the practice of requiring officers to submit photographs of themselves as a requirement for promotion consideration. See Matthew Cox, *Inside the Army’s Decision to Eliminate Photos from Officer Promotion Boards*, MILITARY.COM (June 25, 2020), <https://www.military.com/daily-news/2020/06/25/inside-armys-decision-eliminate-photos-officer-promotion-boards.html>. Prior to this, it was possible for senior officers to consider, even at an unconscious level, the race of the officer when making crucial determinations. *Id.* The policy recognized the connection between reliance on the

In the military context, discriminatory stress compounds other existing sources of stress that already create unique risks for developing mental health disorders, such as PTSD from combat and the stress of being separated from family members for frequent and extended periods of time.²¹

Given the Department of Veterans Affairs' (VAs') broad mandate to compensate for a mental health condition that was caused or aggravated by military service,²² and for specific regulations covering compensation for the personal assault or harassment of another servicemember or persons other than enemy forces,²³ the VA appears to be an administrative forum ideally suited to evaluate the nature of and adjudication over racial discrimination claims.²⁴ In fact, the requirement for consideration of a veteran's mental health status prior to, during, and after military service, would appear to provide significantly more evidence for assessing the etiology of discriminatory harm than any other adjudicatory forum.²⁵ Despite the recent

photographs and significant racial disparities in minority officer promotion rates. Aila Slisco, *Army to Eliminate Officer Promotion Photos to Curb Racial Bias in Selection*, NEWSWEEK (June 26, 2020, 12:20 AM), <https://www.newsweek.com/army-eliminate-officer-promotion-photos-curb-racial-bias-selection-1513560>.

21. See, e.g., Adolph J. Delgado, Danielle Gordon & Phillip Schnarrs, *The Effect of Discrimination and Stress on Sexual and Behavioral Health Among Sexual Minority Servicemen*, 20 J. GAY & LESBIAN MENTAL HEALTH 258, 259 (2016) (observing “[i]n the military, service[]members experience more traumatic and stressful situations than civilians,” including not only combat but “daily stressors and challenges, such as financial hardships and stringent military rules”). See generally Lynn K. Hall, *The Importance of Understanding Military Culture*, 50 SOC. WORK 4, 4–5, 16–17 (2011) (exploring salient aspects of military culture that can impact military members in more significant ways than traditional civilian occupations).

22. See 38 C.F.R. § 3.303(a) (2020) (identifying the standard for service-connection of a disability “that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces”). The standard for service-connection has further been outlined as a disorder “resulting from personal injury suffered or disease contracted in the line of duty . . . in the active military, naval, or air service . . .” 38 U.S.C. §§ 101(16).

23. See 38 C.F.R. § 3.304(f)(5) (2020) (identifying the PTSD stressor corroboration standard for personal assault).

24. See Seamone, *supra* note *, at 19 (discussing how the Department of Veterans Affairs (VA) “claims for acquired psychiatric illness attributed to discrimination during service may be deemed service-connected for mental health conditions including depression, schizophrenia, PTSD, and other disorders within the existing VA disability framework”).

25. See Thor Johansen, *Core Competencies in VA Compensation and Pension Exams for PTSD and Other Mental Disorders*, 10 PSYCH. INJURY & L. 234, 239 (2017) (describing the comprehensive nature of medical evidence over time that must be considered by VA compensation and pension examiners).

recognition of the VA agency courts (the Board of Veterans' Appeals (BVA)) as ideal for drawing lessons of broader applicability to mass adjudication and administrative law contexts,²⁶ no independent researchers have examined race discrimination in the VA context.²⁷ Nor has the VA conducted any publicly accessible research or publicly tracked these types of cases.²⁸

This Article is the first to explore the question of how the VA's administrative court adjudicates racial discrimination cases with the goal of identifying any lessons that transcend the VA context and inform other administrative courts.²⁹ Part II provides additional background on the VA's compensation standards for service-connection of mental health disorders and the function and operation of the BVA. Part III then outlines the artificial intelligence methodology I adopted using Natural Language Processing and supervised Machine Learning (ML) to identify and classify discrimination cases within a repository of over one million administrative appellate decisions.

Part IV presents the descriptive and quantitative results of the study, including the associations between various case characteristics and the judicial outcomes. Finally, Part V distinguishes findings that will improve adjudication of VA discrimination cases from three overarching findings that are connected to the broader adjudication of discrimination claims in other administrative forums. An overarching recommendation urges courts to conduct a "demographic inquiry" in all cases where discrimination is alleged to ensure greater transparency of racial factors considered by the court and

26. See, e.g., Daniel E. Ho, Cassandra Handan-Nader, David Ames & David Marcus, *Quality Review of Mass Adjudication: A Randomized Natural Experiment at the Board of Veterans Appeals, 2003–16*, 35 J. L., ECON. & ORG. 239, 243 (2019) (describing "parallels" between the Board of Veterans' Appeals (BVA) and other tribunals within the administrative state, including immigration courts and Social Security benefits courts); David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REG. 800, 813, 849 (2020) (describing similar structural similarities in several administrative courts, including the BVA).

27. Seamone, *supra* note *, at 19 ("[T]o date, there have been no studies of the characteristics of the claims, claimants, or [VA] adjudicatory treatment of discrimination-based claims.").

28. See *id.* at 5 (observing the VA's failure to collect any "data relating to the presentation and evaluation of discrimination claims").

29. Readers should note that some of the discriminatory acts described in this Article may be particularly disturbing to review. Although this Article addresses disturbing issues such as racist verbal slurs and taunts, physical and sexual violence, and other instances of abuse and victimization in a manner that complies with the *Administrative Law Review's* (ALR's) *Guiding Language Principles*, the circumstances and contexts of these reprehensible acts may still be distressful to readers. The ALR Editorial Board and I have carefully reviewed these accounts and implemented extra precautions where possible to reduce the distressing impact. References are provided to the original text of all BVA decisions to review at the reader's discretion.

trends in adjudication by individual judges and judges overall.³⁰

II. VA DISABILITY COMPENSATION FRAMEWORK

Veterans who have met basic eligibility criteria, such as minimum time-in-service and honorable conditions discharge, may be compensated for a health condition “incurred coincident with”³¹ and “in [the] line of”³² active-duty military service. The VA has developed rules and regulations, in accordance with the duties delegated by Congress,³³ for establishing service-connection of a health condition: “(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury”³⁴ When a veteran applies for service-connection of a mental health condition, however, additional evidentiary standards arise for claims of PTSD.

Recognizing that PTSD is the only mental health disorder that requires a causal event for diagnosis under the *DSM*, the VA has adopted a standard that requires proof of a stressor event during active-duty service.³⁵ The stressor may not be established by the veteran’s testimony without sufficient independent corroboration,³⁶ and “credible supporting evidence that the claimed stressor occurred.”³⁷ The question of evidence of a sufficient stressor event is reserved for VA adjudicators, while the diagnosis of PTSD is a matter reserved for mental health examiners.³⁸ In

30. *Infra* Part 0.

31. 38 C.F.R. § 3.303(a) (2020).

32. 38 U.S.C. § 1110 (2020); 38 U.S.C. § 101(16) (2020).

33. 38 U.S.C. § 501(a) (2020).

34. Sarah K. Mayes, *Unraveling the PTSD Paradox: A Proposal to Simplify the Adjudication of Claims for Service Connection for Posttraumatic Stress Disorder*, 6 VETERANS L. REV. 125, 130 (2014).

35. *See id.* at 128, 130 (explaining that PTSD has a “heightened evidentiary burden” that is not applicable to other mental health disorders).

36. Name Redacted, Citation No. 05-22837 (Bd. Vet. App. Aug. 19, 2005) (confirming, “when the claimed stressor is not related to combat, the veteran’s lay testimony, by itself, will not be enough to establish the occurrence of the alleged stressor.”). This rule coincides with the Court of Appeals for Veterans Claims’ ruling that “a medical opinion premised upon an unsubstantiated account is of no probative value and does not serve to verify the occurrences described.” *McLendon v. Nicholson*, 20 Vet. App. 79, 84 (2006) (citing *Swann v. Brown*, 5 Vet. App. 229, 233 (1993)).

37. 38 C.F.R. § 3.304(f) (2020).

38. *See* Name Redacted, Citation No. 06-12927 (Bd. Vet. App. May 4, 2006) (“The question of whether the veteran was exposed to a [PTSD] stressor in service is a factual one, and VA adjudicators are not bound to accept uncorroborated accounts of stressors or medical opinions based on such accounts.”).

many instances, veterans with PTSD diagnoses on record still fail to meet the threshold for independent corroboration of the in-service military stressor event.³⁹ While the courts recognize that the stressor requirement is a significant obstacle for applicants who claim non-combat PTSD, they have upheld the more stringent standards.⁴⁰

The VA modified its evidentiary standards in recognition that it is more difficult for veterans to obtain evidence of traumatic events.⁴¹ The modification permits the consideration of alternative forms of evidence.⁴² In 2010, for example, to alleviate evidence-collection burdens for combat veterans, the VA established a policy to concede the stressor event if a veteran could demonstrate that they served in a qualifying combat zone and they could state that they experienced “fear of hostile military or terrorist activity” while performing combat service.⁴³ This combat stressor allowance has contributed to higher levels of PTSD service-connection decisions.⁴⁴

In contrast to veterans who have claimed combat stressors, veterans who

39. See Mayes, *supra* note 34, at 125–27 (arguing that debates over how to characterize PTSD and public misconceptions regarding veterans with PTSD has inhibited independent corroboration for many veterans).

40. See, e.g., *Serv. Women’s Action Network v. Sec’y of Veterans Affs.*, 815 F.3d 1369, 1378 (Fed. Cir. 2016) (upholding a requirement for “veterans seeking benefits for MST-based PTSD to provide corroborating evidence establishing the occurrence of the MST” as “consistent with the ‘places, types and circumstances’ of service”); *Nat’l Org. of Veterans Advocs. v. Sec’y of Veterans Affs.*, 330 F.3d 1345, 1352 (Fed. Cir. 2003) (denying challenge to stricter evidentiary standards for veterans seeking PTSD benefits from in-service personal assault than those seeking PTSD benefits for PTSD related to combat); *Moran v. Principi*, 16 Vet. App. 243, 243 (2002) (describing prior cases holding that noncombat veterans seeking service connection for PTSD faced a greater evidentiary burden than for other disabilities).

41. Kara Contreary, Jennifer Tennant & Yonatan Ben-Shalom, *Impacts of the 2010 VA PTSD Rule Change on Veteran Disability Compensation and Reported Cognitive Disability*, 28 DISABILITY POL’Y STUD. 141, 142 (2017).

42. *Id.*

43. See 38 C.F.R. § 3.304(f)(3) (2011) (defining “fear of hostile military or terrorist activity” as a “veteran [who] experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others”).

44. Presently, PTSD is the leading mental health condition claimed by veterans and awarded by the VA. U.S. DEP’T OF VETERANS AFF., VETERANS BENEFITS ADMIN., ANNUAL BENEFITS REPORT, FISCAL YEAR 2019, at 99, 100, 104 (2020) (reporting the “Most Prevalent Disabilities of All Compensation Recipients”). Researchers have attributed the explosive rates of PTSD application and service-connection to the 2010 combat stressor allowance. See, e.g., Contreary, Tennant & Ben-Shalom, *supra* note 41, at 142 (hypothesizing that the easing of eligibility rules also contributed to reduced stigmatization among veterans about reporting their difficulties).

have claimed non-combat trauma have consistently faced a significant risk of denial of their claims under more stringent standards.⁴⁵ Their plight is most evident in the case of survivors of Military Sexual Trauma (MST).⁴⁶ Because these veterans have faced retaliation for seeking medical care or making complaints related to their assaults, the VA courts and the Court of Appeals for the Federal Circuit have mandated consideration of evidence existing beyond the veterans' military medical or personnel records.⁴⁷ Since 2002, special rules have allowed for the consideration of "markers" to help establish the in-service stressor event in the case of "personal assault."⁴⁸ Personal assault occurs when the veteran attributes their PTSD to a perpetrator that committed an act of "human design that threatens or inflicts harm,"⁴⁹ including "rape, physical assault, domestic battering, robbery, mugging, stalking, and harassment."⁵⁰

Consistent with increased advocacy for MST survivors with PTSD, many of the markers relate to sexual assault, such as use of pregnancy tests, visits to rape crisis centers, and treatment for sexually transmitted diseases.⁵¹ Other more generic markers available to all veterans who claim trauma consist of entries in personal journals, records from private mental health providers, and evidence of a decrease in one's performance around the time of the alleged maltreatment.⁵² For instance, in a racial trauma case where a Navy sailor reported that he "was threatened in boot camp by white servicemen who taunted him with KKK innuendos," the BVA "recognize[d] that the present case falls within the

45. See Mayes, *supra* note 34, at 143–44, 157 (describing several cases where veterans faced additional burdens ranging from VA denials of independent diagnoses to VA refusals to accept veteran recollections and other judicially imposed requirements).

46. See generally Evan R. Seamone & David M. Traskey, *Maximizing VA Benefits for Survivors of Military Sexual Trauma: A Practical Guide for Survivors and Their Advocates*, 26 COLUM. J. GENDER & L. 343, 345–46 (2014) (identifying various challenges for veterans claiming military sexual trauma (MST) under the personal assault standard).

47. See, e.g., *Molitor v. Shulkin*, 28 Vet. App. 397, 402–03 (2017) (describing the basis for regulatory revisions).

48. See Seamone, *supra* note *, at 20–24 (identifying the historical development of trauma markers as well as specific examples).

49. *Patton v. West*, 12 Vet. App. 272, 278 (1999).

50. Name Redacted, Citation No. 08-41370 (Bd. Vet. App. Dec. 9, 2008) (citing M21-1MR, pt. IV subpt. ii, ch.1, § D (Dec. 13, 2005)). The courts have rejected the theory that a perpetrator of MST qualifies under the combat stressor corroboration standard of "hostile military or terrorist activity." *Acevedo v. Shinseki*, 25 Vet. App. 286, 291 (2012) (finding that the definition precludes "nefarious, or even criminal, acts of one service[]member directed at another service[]member").

51. Seamone, *supra* note *, at 23.

52. *Id.*

category of situations, to include allegations of racism and racial harassment, in which it is not unusual for there to be an absence of service records documenting the events of which the veteran complains.”⁵³ Despite the BVA’s recognition of racial harassment as a form of personal assault, the VA has not identified any trauma markers related to discrimination claims.⁵⁴

The lack of specific markers and frameworks for race discrimination is all the more concerning given research that connects military discrimination to more severe health outcomes in veterans.⁵⁵ Aside from the occupational stressors military members face, racially diverse veterans are subjected to disproportionately higher levels of discipline and punishment than White counterparts.⁵⁶ Racial disparities in rank and power within the military hierarchy have enabled military commanders to cloak discriminatory behaviors in the veil of administrative rules and regulations that appear to be facially permissible while permitting the exercise of discrimination through

53. Name Redacted, Citation No. 08-10422 (Bd. Vet. App. Mar. 28, 2008).

54. Seamone, *supra* note *, at 23.

55. See generally Daniel H. Kabat, Steven D. Stellman & Jeanne Mager Stellman, *Perceived Racial, Ethnic, and Gender Discrimination Among Male and Female Vietnam Era Veterans and PTSD Symptoms Later in Life*, in LONG-TERM OUTCOMES OF MILITARY SERVICE: THE HEALTH AND WELL-BEING OF AGING VETERANS 57 (Avron Spiro III, Richard A. Settersten & Carolyn M. Aldwin eds., 2018) (describing higher rates of PTSD among Black and Hispanic veterans than White veterans); Chalsa M. Loo, Salvador S. Ueda & Robert K. Morton, *Group Treatment for Race-Related Stresses Among Minority Vietnam Veterans*, 44 *TRANSCULTURAL PSYCHIATRY* 115 (2007) [hereinafter *Group Treatment*] (offering an intervention model for minority veterans with race-related PTSD); Chalsa M. Loo, Raymond M. Scurfield, Daniel W. King, John A. Fairbank, Libby O. Ruch & Lily J. Adams, *Measuring Exposure to Racism: Development and Validation of a Race-Related Stressor Scale (RRSS) for Asian American Vietnam Veterans*, 13 *PSYCH. ASSESSMENT* 503, 504 (2001) [hereinafter *Measuring Exposure*] (explaining the development of new techniques to assess the exposure of veterans to race-related stressors in the military and war zones); Chalsa M. Loo, Karam Singh, Ray Scurfield & Bill Kiluano, *Race-Related Stress Among Asian American Veterans: A Model to Enhance Diagnosis and Treatment*, 4 *CULTURAL DIVERSITY & MENTAL HEALTH* 75, 78 (1998) [hereinafter *Race-Related Stress*] (focusing on the existence of race-related stress and trauma among Asian-American veterans); Chalsa M. Loo, *Race-Related Posttraumatic Stress Disorder*, in U.S. DEP’T OF VETERANS AFF., *READJUSTMENT COUNSELING SERV., A REPORT ON ASIAN PACIFIC ISLANDER VETERANS BY THE VET CENTER ASIAN PACIFIC ISLANDER WORKING GROUP* 44 (Spring 1998) [hereinafter *Race Related PTSD*] (describing greater intensity of race-related stressors among Asian or Pacific Islander veterans).

56. See generally MARGARET KUZMA, DANA MONTALTO, BETSY GWIN & DANIEL NAGIN, *MILITARY DISCHARGE UPGRADE LEGAL PRACTICE MANUAL* Ch. 11 (2021) (addressing the trend of racial disparities in military discipline and discharge).

the commander's significant discretion.⁵⁷ Various studies demonstrate that veterans involuntarily discharged for misconduct and those discharged with the stigmatizing less-than-honorable discharge characterizations are significantly more likely than honorably discharged veterans to experience suicide, suicidal ideation, and a range of mental health disorders.⁵⁸

Aside from administrative discrimination in the exercise of military discipline, combat service amplifies the psychological impact of discrimination.⁵⁹ Specifically, discrimination can increase a military member's fear of death from the enemy based on the prospect that prejudiced peers will not assist and may even intentionally place the stigmatized member in harm's way.⁶⁰ For instance, reports abound of white commanders ordering only Black troops to the front lines or to perform particularly dangerous missions, such as searching for mines.⁶¹ Research has also revealed special challenges facing

57. See Mary F. Katzenstein & Judith Reppy, *Introduction: Rethinking Military Culture*, in *BEYOND ZERO TOLERANCE: DISCRIMINATION IN MILITARY CULTURE* 1, 2 (Mary F. Katzenstein & Judith Reppy eds., 1999) (discussing one of many aspects of military culture that "actively reinforce" discriminatory attitudes rather than quell them).

58. See Mark A. Reger, Derek J. Smolenski, Nancy A. Skopp, Melinda Metzger, Han K. Kang, Tim A. Bullman, et al., *Risk of Suicide Among U.S. Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the U.S. Military*, 72 *JAMA PSYCHIATRY* 561, 561 (2015) (addressing suicide risk related to Other-Than-Honorable discharge); Emily Brignone, Jamison D. Faro, Rebecca K. Blais, Marjorie E. Carter, Matthew H. Samore & Adi V. Gundlapalli, *Non-Routine Discharge from Military Service: Mental Illness, Substance Use Disorders, and Suicidality*, 52 *AM. J. PREVENTIVE MED.* 557, 559, 562 (2017) (revealing higher incidences of PTSD among veterans discharged for misconduct); Eric B. Elbogen, H. Ryan Wagner, Mira Brancu, Nathan A. Kimbrel, Jennifer C. Naylor, Cindy M. Swinkels, et al., *Psychological Risk Factors and Other Than Honorable Military Discharges: Providing Healthcare to Previously Ineligible Veterans*, 183 *MIL. MED.* e532, e532 (2018) (linking less-than-honorable discharges with depression, substance abuse, and other mental health conditions); Claire A. Hoffmire, Lindsey L. Monteith, Ryan Holliday, Crystal L. Park, Lisa A. Brenner & Rani A. Hoff, *Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans*, 56 *AM. J. PREVENTIVE MED.* 727, 733 (2019) (describing a range of adverse mental health outcomes associated with negative military discharge characterization).

59. See Kabat, Stellman & Mager Stellman, *supra* note 55, at 58 (explaining various studies confirming this).

60. See *id.* ("[T]he experience of discrimination in a wartime environment may contribute additional stress beyond the stresses of combat and life-threatening situations."); Loo, Scurfield, King, Fairbank, Ruch & Adams, *Measuring Exposure*, *supra* note 55, at 504 (positing that "the stressful effects of exposure to combat and racism could be additive and that cumulative racism can be experienced as traumatic").

61. See, e.g., BENJAMIN FLEURY-STEINER, *DISPOSABLE HEROES: THE BETRAYAL OF*

Asian-American/Pacific Islander Vietnam veterans who were often compared to the enemy based solely on similarities in physical appearance.⁶² Some of these veterans intentionally abused or mistreated Vietnamese nationals in an effort to prove their loyalty or erase the doubts of White peers.⁶³ Many of those receiving treatment for diagnosed PTSD attributed the condition to the effects of regularly being compared to the Viet Cong.⁶⁴

Psychologists within the VA have recently conducted research that confirms the compounding effect of discrimination on the development of PTSD among veterans.⁶⁵ Working with the population of self-identified Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) veterans, Livingston and colleagues confirmed that aspects of the military environment may transform discriminatory treatment into trauma despite the fact that the same discriminatory events would not normally meet the diagnostic threshold for Criterion A trauma in a different environment.⁶⁶ On this view, many particularly severe acts of military discrimination may occupy an “ambiguous space between non-Criterion A stressors and Criterion A trauma.”⁶⁷

The researchers offer an illustrative example of an LGBTQ servicemember who had learned of “hate crimes against other LGBT[Q] individuals who share minority identities.”⁶⁸ Although knowledge of harm to others with whom one does not have a connection would not normally constitute a Criterion A stressor, this knowledge may “be experienced as traumatic due to the implied possibility that the [bystander] could have been, or become, a

AFRICAN-AMERICAN VETERANS 69 (2012) (“The most blatant racist thing to me was all [B]lack guys being ordered to actually go look for mines. I mean if we find one we’re dead.”).

62. See Loo, *Race Related PTSD*, *supra* note 55, at 40 (hypothesizing that the nature of the Vietnam War added stress to Asian-American/Pacific Islander servicemembers).

63. See, e.g., *id.* at 44 (describing numerous ways Asian American “veterans were forced to acquire a racially prejudicial behavioral repertoire”).

64. See, e.g., Loo, Ueda & Morton, *Group Treatment*, *supra* note 55, at 123 (discussing salient examples from lived experiences of Vietnam veterans).

65. See Nicholas A. Livingston, Mollie A. Ruben, Danielle S. Berke, Alexis R. Matza & Jillian C. Shipherd, *Experiences of Trauma, Discrimination, Microaggressions, and Minority Stress Among Trauma-Exposed LGBT Veterans: Unexpected Findings and Unresolved Service Gaps*, 11 PSYCH. TRAUMA: THEORY, RES., PRACT., & POL’Y 695, 695 (2019) (“LGBT veterans disclosed a range of clinically relevant stressors, including Criterion A traumatic events, minority stress, and microaggression experiences, including interpersonal and institutional discrimination perpetrated by fellow servicemembers/veterans, citizens, therapy group members, and health care providers.”).

66. *Id.* at 698 & fig.1.

67. *Id.*

68. *Id.* at 697.

target of similar violence.”⁶⁹ The same overlap in traumatic consequences would theoretically apply to a racial minority servicemember who has learned about prejudiced or discriminatory acts against fellow servicemembers of the same racial group. I developed the research methodology discussed below to identify VA cases involving claims of discriminatory trauma with the goal of examining factors associated with the success or failure of these claims.

III. RESEARCH METHODOLOGY

A. *The Written VA Appellate Decision as the Unit of Analysis*

Despite research demonstrating widely disproportionate negative outcomes for Black as opposed to White veterans seeking PTSD benefits,⁷⁰ and other reports suggesting similar disparities in VA benefit awards for other conditions,⁷¹ there is a huge gap in publicly available data. Non-VA-affiliated researchers have faced tremendous hurdles in obtaining data related to outcome by race of the veteran applicant.⁷² Beyond this, within the VA’s research on claim types,

69. See *id.*; see also Virginia W. Huynh, Que-Lam Huynh & Mary-Patricia Stein, *Not Just Sticks and Stones: Indirect Ethnic Discrimination Leads to Greater Psychological Reactivity*, 23 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 423, 426 (2017).

70. See, e.g., Brian P. Marx, Michelle J. Bovin, Matthew W. Gallagher, Raymond C. Rosen, Eden Engel-Rebitzer, Kelly S. Parker-Guilbert, et al., *The Influence of Veteran Race and Psychometric Testing on Veterans Affairs Posttraumatic Stress Disorder (PTSD) Disability Exam Outcomes*, 29 PSYCH. ASSESSMENT 710 (2017) (observing significant disparities for PTSD service-connection decisions for Black veterans); Maureen Murdoch, James Hodges, Diane Cowper, Larry Fortier & Michelle van Ryn, *Racial Disparities in VA Service Connection for Posttraumatic Stress Disorder Disability*, 41 MED. CARE 536, 542 (2003) (“Black race was strongly, robustly, and negatively associated with veterans’ odds of becoming service connected for PTSD.”).

71. Adam Morey, *Black Veterans Group Sues the VA for Racial Disparity Data*, MIL. TIMES (July 8, 2021), <https://www.militarytimes.com/veterans/2021/07/08/black-veterans-group-sues-va-for-racial-disparity-data/> (identifying 2018 data “showing that Black veterans receive disability compensation at a ‘significantly lower rate’ than the overall rate of compensation”).

72. See Editorial, *Veterans Law Clinic Suing VA for Racial Disparity Data and Records*, YLS TODAY (July 8, 2021), <https://law.yale.edu/yls-today/news/veterans-clinic-suing-va-racial-disparity-data-and-records> (reporting VA’s “delayed and incomplete responses” for data in response to Freedom of Information Act requests by the Black Veterans Project and the National Veterans Council for Legal Redress, as well as how the BVA “completely ignored” such requests). The lack of data concerning VA benefit eligibility is all the more concerning given a contrasting effort to identify racial disparities among veterans in the provision of healthcare, where the Veterans Health Administration (vice Veterans Benefits Administration) has recognized in its Health Equity Action Plan a “mission to understand the differences across many groups of Veterans and to work to

there appears to be no collection or evaluation of data regarding the outcomes of mental health claims related to racial discrimination.⁷³

After initial assessment of available VA databases, I selected the BVA's digital repository of appellate opinions, the Decision Search Database,⁷⁴ as the sample population for this study. Although the BVA redacts the names of veterans and other personally identifying information,⁷⁵ written opinions from Veterans Law Judges (VLJs) offer the first opportunity to identify the nature of a claim for benefits, the outcome of the appeal, and the evidence supporting the decision in a publicly available repository.⁷⁶

The BVA is considered to be the final agency authority in adjudicating the denial of a VA claim by lay adjudicators from a local Regional Office (RO).⁷⁷ While the adjudicators rely on policy guidelines and handbooks, members of the BVA apply legal precedents under a *de novo* standard of review that allows them to reassess the facts in the record.⁷⁸ In 2020, 100 VLJs worked at the BVA.⁷⁹ Their decisions are only binding on particular claimants and do not have precedential weight on other BVA judges.⁸⁰ When the BVA rules on a case, the decision is final and may be appealed to the Court of Appeals for Veterans Claims (CAVC).⁸¹

eliminate non-clinical differences related to [] race or ethnic group[.]” ERNEST M. MOY, VHA HEALTH EQUITY ACTION PLAN (10EB) 3 (Sept. 27, 2019), https://www.va.gov/HEALTH/EQUITY/docs/Health_Equity_Action_Plan_Final_022020.pdf.

73. Seamone, *supra* note *, at 5, 19.

74. *The Board of Veterans' Appeals Decision Search Results*, U.S. DEP'T OF VETERANS AFF., <https://www.index.va.gov/search/va/bva.jsp> (last visited May 10, 2022).

75. Seamone, *supra* note *, at 62–63.

76. *Id.* at 64 (describing the value of the BVA's template for reporting written decisions).

77. See, e.g., Stacey Rae Simcox, *Depriving Our Veterans of their Constitutional Rights: An Analysis of the Department of Veterans Affairs Practice of Stripping Veterans of Their Second Amendment Rights and Our Nation's Response*, 2019 UTAH L. REV. 1, 4–5 (2019) (describing the steps of adjudication, which begin with the filing of “a claim for benefits with the regional office of their local VA”).

78. *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 419 F.3d 1317, 1319 (Fed. Cir. 2005) (“[T]he Board conducts *de novo* review of regional office proceedings based on the record.”).

79. U.S. DEP'T OF VETERANS AFF., BD. VETERANS' APP., ANNUAL REPORT FISCAL YEAR (FY) 2020, at 6 (2021) (identifying an additional support staff of 850 attorneys).

80. 38 C.F.R. § 20.1303 (2020) (“[P]reviously issued Board decisions will be considered binding only with regard to the specific case decided.”); *Lynch v. Gober*, 11 Vet. App. 22, 27 (1997) (“It is well established that BVA decisions are of no precedential value before the BVA or this Court.”).

81. 38 U.S.C. § 7104(a) (“Final decisions on [agency] appeals shall be made by the Board.”). The BVA remands a large number of appeals back to regional offices (ROs). In 2020, for example, the BVA remanded 40.9% of its legacy compensation appellate cases,

My methodology aimed to identify race and sexual-orientation/gender identity discrimination cases in the corpus of over one million BVA electronic appeals decisions.⁸² The task required not only the identification of the case facts, but also those cases that reached a conclusion on the issue (approved or denied, versus some intermediate outcome like remand). While I have exhaustively detailed the study methodology elsewhere,⁸³ the first step was to isolate the BVA cases addressing service-connection of a mental health disorder from other types of appeals. I accomplished this task by querying the BVA's electronic quality assurance program known as the Veterans' Appeals Control and Locator System (VACOLS).⁸⁴ After developing a list of docket numbers that corresponded with mental health service-connection appeals, I then employed freely available web-scraping software to extract the text of each electronic decision into a text file capable of review by the Python suite of text analysis tools.⁸⁵

After cleaning the data and removing text files that contained duplicates, indecipherable text, or other corrupt features, I identified a total of 123,011 mental health service-connection decisions.⁸⁶ To narrow the sample, I next employed Regular Expression (REGEX) search terms that broadly related to discriminatory language.⁸⁷ I applied separate search terms for

while it affirmed 34.2% and denied 19.7%. U.S. DEP'T OF VETERANS AFFAIRS, BOARD OF VETERANS' APPEALS ANNUAL REPORT FISCAL YEAR (FY) 2020, at 37 (2020). Many of these remands are based upon insufficient or incomplete medical examinations by the VA. James D. Ridgway, *Why So Many Remands?: A Comprehensive Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 122–24 (2009).

82. At the time of data collection on February 12, 2019, the BVA Decision Search Database consisted of 1,059,258 individual BVA decisions. Seamone, *supra* note *, at 63. The database is freely accessible to the public and contains decisions since the early 1990s. U.S. Dep't of Veterans Aff., The Board of Veterans' Appeals Decision Search Results, <https://search.usa.gov/search?affiliate=bvadecisions> (last visited May 10, 2022).

83. Seamone, *supra* note *, at 62–85.

84. See BD. OF VETERANS' APP., THE PURPLEBOOK 13 (Sept. 2018), <https://asknod.files.wordpress.com/2019/07/bva-purple-book.pdf> (describing throughout the manual how the Veterans' Appeals Control and Locator System (VACOLS) is “used by the Board for various functions, including monitoring the physical location of case files and the status of cases”); see also Ames, Handan-Nader, Ho & Marcus, *supra* note 11, at 49 (describing how the VACOLS database contains “rich information about every veteran’s case” appealed to the BVA).

85. Seamone, *supra* note *, at 63 (describing the deployment of the Scrapyhub and Crawlera programs).

86. *Id.*

87. *Id.* at 67 (describing the use of general terms including “racial,” “discrimination,” “gay,” “sexual orientation,” and “harassment”).

discrimination cases in general, race-discrimination, and sexual-orientation discrimination for a total of 2,136 candidate cases.⁸⁸ To identify potential matches within this pool, I then used the word-vectorization software Word2Vec, which identified additional combinations of words by comparing them across vector space.⁸⁹ Applying this process to the 123,011 cases identified a total of 4,229 candidates for ML analysis.⁹⁰

B. Supervised Machine Learning to Classify Discrimination Cases

My next step in identifying the discrimination-related mental health service-connection cases was the development of supervised machine-learning algorithms that would classify discrimination cases based on comparison with pre-identified matches.⁹¹ I used Python to run the same combinations of algorithms employed by occupational health experts and researchers to automatically classify accident narratives in medical reports at a high degree of precision and accuracy.⁹² Similar to the accident surveillance filed, I used a multi-agreement model where the results of two independent algorithms were compared for classifying a single document.⁹³ In my study, for both race and sexual-orientation, the two best performing ML classification models were Term Frequency-Inverse Document Frequency (TF-IDF) and Support Vector Machine (SVM).⁹⁴ After

88. *Id.* at 67 tbl.4.

89. See generally Tomas Mikolov, Kai Chen, Greg Corrado & Jeffrey Dean, *Efficient Estimation of Word Representations in Vector Space*, 3 COMP. SCI.: COMPUTATION & LANGUAGE 1 (2013) (introducing the Word2Vec program).

90. Seamone, *supra* note *, at 68.

91. See Frank Fagan, *Big Data Legal Scholarship: Toward a Research Program and Practitioner's Guide*, 20 VA. J. L. & TECH. 1, 59–60 (2016) (identifying supervised machine learning (ML) as a process in which humans manually classify texts to use as a training data set for predicting class labels within a testing data set of unclassified texts).

92. See Kristen Vallmuur, Helen R. Marucci-Wellman, Jennifer A. Taylor, Mark Lehto, Helen L. Corns & Gordon S. Smith, *Harnessing Information from Injury Narratives in the "Big Data" Era: Understanding and Applying Machine Learning for Injury Surveillance*, 22 INJ. PREVENTION i34, i35 (2016) (adopting a multi-algorithm agreement standard).

93. *Id.* at 4.

94. Seamone, *supra* note *, at 75–76. This combination outperformed combinations with Bag-of-Words, Support Vector Machine, Logistic Regression, and Naïve Bayes models within Python. *Id.* at 75 tbl.5. I used confusion matrices to evaluate the precision and accuracy of the algorithm combinations. See, e.g., Xu Zhang, Eric Green, Mei Chen & Reginald R. Souleyrette, *Identifying Secondary Crashes Using Text Mining Techniques*, 12 J. TRANSP. SAFETY & SEC. 1338, 1347 (2019) (describing the purpose and use of the confusion matrix and its accompanying scores for precision and accuracy of a model).

identifying the documents with the highest rate of agreement between these two algorithms, research assistants familiar with legal analysis conventions reviewed each document to validate the match.⁹⁵

Prior to human review and the application of exclusionary criteria, ML identified 1,828 race cases and 322 sexual-orientation and gender identity discrimination cases.⁹⁶ Further human validation, which excluded cases that did not specify the type of discrimination intermediate outcomes, resulted in a total of 535 confirmed race discrimination and 118 sexual-orientation discrimination cases.⁹⁷ Statistical power analysis indicated that the population size was sufficient for correlational and multilevel logistic regression analysis of overall discrimination cases and race discrimination cases.⁹⁸ For the empirical analysis, the independent variables were the discrimination case characteristics and the dichotomous dependent variable was either grant or denial of the appeal.⁹⁹

C. Study Limitations

The research methodology described above introduces the possibility of three major limitations that could skew the results. First, due to the appellate character of BVA cases, the decisions do not reflect initial approvals and denials of discrimination claims, resulting in representation of only a minority of veterans who have the time and resources to wait for appellate review.¹⁰⁰ Because research suggests that an extremely small fraction of veterans' appeal denials of their claims make it past an initial notice-of-

95. Seamone, *supra* note *, at 77–79 (discussing human review and exclusionary criteria).

96. *Id.* at 66.

97. *Id.* at 65 fig.3.

98. Power analysis is “the process of determining the number of cases or observations that a study would need to achieve a desired level of [power] with a certain [effect size] and a certain [significance level].” *Power analysis*, APA DICTIONARY OF STATISTICS AND RESEARCH METHODS (1st ed. 2014) (explaining that this information allows researchers to proactively design a study’s participants). Applied to these data, the gPower analysis indicated that a 60/40 outcome ratio for binary outcomes would require a sample size of at least 351. Seamone, *supra* note *, at 80. See generally Franz Faul, Edgar Erdfelder, Axel Buchner & Albert-Georg Lang, *Statistical Power Analysis Using G*Power 3.1: Tests for Correlation and Regression Analyses*, 41 BEHAV. RES. METHODS 1149 (2009) (providing methods of power analysis).

99. *Logical Regression Analysis*, THE SAGE DICTIONARY OF STATISTICS AND METHODOLOGY: A NONTECHNICAL GUIDE FOR THE SOCIAL SCIENCES (5th ed. 2016) (identifying suitable conditions for using logistic regression analysis).

100. Seamone, *supra* note *, at 177.

disagreement stage,¹⁰¹ the results of this study cannot be generalized to the population of all benefit-seeking veterans with discrimination claims.

The second limitation of this study is the inability of ML algorithms to accurately classify legal texts.¹⁰² There is a substantial difference between the text of a medical report and a judicial decision that employs legal reasoning and legal analysis. Despite the sophistication of Artificial Intelligence, humans still inevitably outperform machines in the evaluation of legal texts.¹⁰³ Legal scholars who have evaluated various legal documents using ML have conceded this limitation.¹⁰⁴ However, they argue that ML is particularly well-suited to identify “hidden patterns” within massive repositories of legal decisions due to the limitations of human review.¹⁰⁵ Contemporary legal scholars suggest that ML results should be used as helpful, rough guides to supplement traditional legal analysis and help in evaluating potential issues in similar cases rather than for predictive value in estimating a particular result.¹⁰⁶

The third limitation of this study applies equally to any study of judicial opinions. Specifically, written judicial decisions rarely include complete discussion

101. See, e.g., *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1073 (N.D. Cal. 2008), *aff'd in part, rev'd in part, and remanded* by *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), *cert. denied*, 568 U.S. 1086 (2013) (“[O]nly 4% of the total number of claims filed each year actually proceed past the [Notice of Disagreement] to a decision by the BVA.”).

102. See generally Frank A. Pasquale & Glyn Cashwell, *Prediction, Persuasion, and the Jurisprudence of Behaviorism*, 68 U. TORONTO L.J. 63, 73–75 (2018) (addressing several reasons for errors and spurious relationships in ML outputs, particularly regarding legal texts).

103. *Id.* at 74–75.

104. See, e.g., Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. L. REV. 1305, 1309 (2019) (describing how we are very far from achieving “strong AI” systems in the law); Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 105 (2008) (explaining how, in the analysis of judicial opinions, “[a]ll empirical studies are imperfect” with significant risks of skewed, incomplete, and nonrepresentative results).

105. See Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 107 (2014); see also Jennifer P. Nock & Sreekar Gadde, *Raising the Bar for Nonobliviousness: An Empirical Study of Federal Circuit Law Following KSR*, 20 FED. CIR. B.J. 369, 381 (2011) (identifying how empirical studies of judicial decisions “may reveal ‘patterns and associations . . . across the broader universe of sampled cases’ that might be missed when reviewing only exemplary cases”) (internal citation omitted).

106. See Surden, *Machine Learning and the Law*, *supra* note 105, at 104 (identifying how ML algorithms could offer unique insights on the employment discrimination evidence most associated with successful claims); see also Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 PENN. ST. L. REV. 41, 88 (2018) (observing that an underlying assumption favoring empirical analysis of judicial decisions and predictive analytics in the law is that “similar cases are likely to be decided similarly”).

of the factors considered along the way.¹⁰⁷ Judges may purposely exclude or omit certain facts or decision factors based upon the audience they envision when writing an opinion.¹⁰⁸ While the law requires BVA judges to provide sufficient reasons and bases supporting their decisions,¹⁰⁹ even this mandate does not require a detailed description of every factor considered by the judge.¹¹⁰ As this study reveals, judges may describe discriminatory events in a manner that is so vague as to prevent confirmation of the acts or nature of the discrimination, including the judge's considerations in resolving the issue.¹¹¹ Such omissions inevitably affect the representativeness of the sample and the results of the study.

IV. STUDY RESULTS

Time and resource constraints prevented me from conducting a comprehensive content analysis of the race discrimination cases with standardized analytical packages like NVivo.¹¹² However, the research team identified a number of important trends in discrimination case adjudication during the process of coding case variables for empirical analysis. This Part identifies several trends and concludes with the results of the statistical analyses.

A. General Trends in Outcomes Across Discrimination Cases

Figure 1, below, depicts granted and denied appeals of discrimination cases over time. The drop-off in 2019 reflects the end of my data collection rather than a decline in discrimination cases.

107. See generally Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1317 (1995) (discussing many reasons why judges limit the “full disclosure of relevant information” that they have considered in reaching a decision).

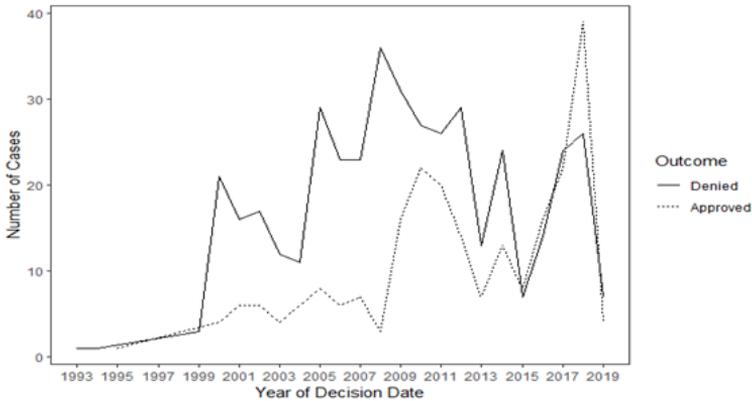
108. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 164–65 (2006) (exploring the concept of multiple audiences for judicial opinions).

109. 38 U.S.C. §§ 7104(1)–(3); 38 C.F.R. § 19.7 (2016).

110. *Dela Cruz v. Principi*, 15 Vet. App. 143, 149 (2001) (confirming that the Board is not required to address all evidence of record in its decision).

111. *Infra* Part IV.B.5.i.

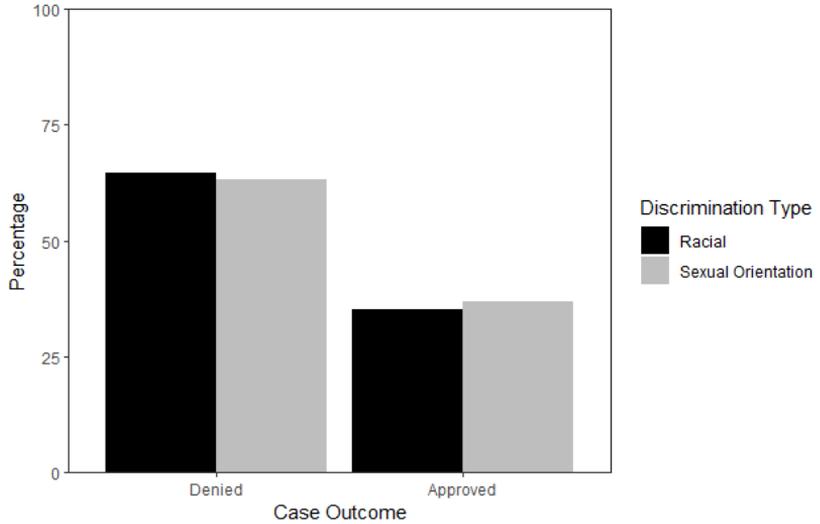
112. For examples of comprehensive methods to evaluate qualitative data, see, e.g., MATTHEW B. MILES, A. MICHAEL HUBERMAN & JOHNNY SALDAÑA, *QUALITATIVE DATA ANALYSIS: A METHODS SOURCEBOOK* (3d ed. 2014).

Figure 1: Approved vs. Denied Discrimination Cases by Year and Outcome

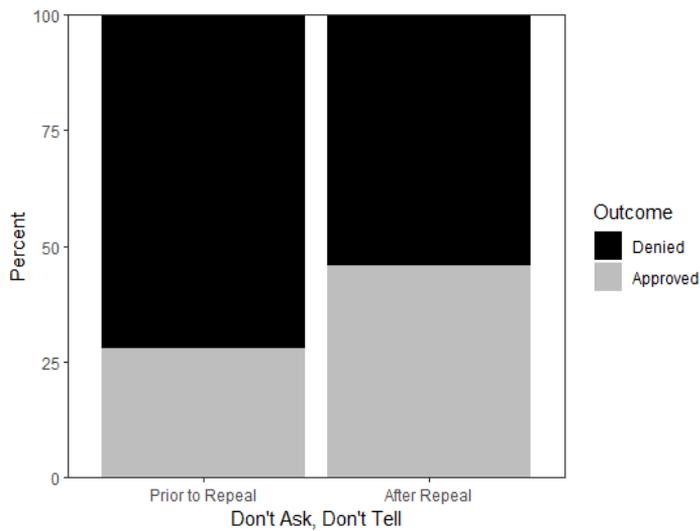
The figure reveals that the BVA denied a substantially greater number of cases than it approved through 2015. Later, 2016 marked a period of nearly identical approvals and denials of discrimination claims. Yet, between the two years from 2017 to 2019, the BVA approved a substantially greater number of discrimination appeals than it denied.¹¹³ The approval and denial rates for race discrimination as opposed to sexual-orientation discrimination were nearly identical and separated by only 1% difference as reflected in Figure 2.¹¹⁴

113. Seamone, *supra* note *, at 115–16.

114. *Id.* at 117.

Figure 2: Case Outcomes by Discrimination Type

Aside from these rates, further evidence of a similarity in the manner of treating discrimination cases exists in the Board's treatment of discrimination cases in the time following the repeal of the military Don't Ask, Don't Tell (DADT) policy in 2011, as reflected below in Figure 3.

Figure 3: Case Outcomes Prior to and Following Repeal of DADT

This statistically significant difference in outcomes, $X^2(1, 653) = 22.66$, $p < .001$,¹¹⁵ also applied to race discrimination case outcomes—not just sexual-orientation and gender identity discrimination outcomes—raising the possibility that knowledge of the repeal of a discriminatory policy made the Board more sensitive to the deleterious effects of all forms of discrimination occurring during military service.¹¹⁶

B. Discrimination Case Attributes

I address notable trends in discrimination case attributes in the following manner: (1) the most common mental health conditions claimed in relation to military discrimination; (2) the types of discriminatory treatment attributed to mental health conditions by claimants; (3) the Board’s manner of assessing the corroboration for claimed PTSD stressor events in discrimination cases; (4) the psychiatric consideration of the nexus between the mental health condition and military service in discrimination cases; and

115. Seamone, *supra* note *, at 98.

116. Logistic regression analysis did not find that repeal of Don’t Ask, Don’t Tell (DADT) fully accounted for the increase in successful outcomes. Seamone, *supra* note *, at 120 (observing that “the repeal of DADT may have nevertheless increased BVA judges’ sensitivity to other forms of discrimination and their deleterious effects.”).

(5) any other observations of note. Although this Article focuses on racial discrimination against veterans, LGBTQ discrimination cases will be referenced to illustrate applicable points and provide additional context.

1. *Mental Health Conditions Claimed*

Veterans who claimed discrimination during military service most frequently claimed related PTSD (60%) and depressive disorders (18%).¹¹⁷ Less frequently, veterans attributed military discrimination to claimed anxiety disorders (8%), acquired psychiatric conditions (6%), schizophrenia and psychotic disorders (5%), and bipolar and related disorders (3%).¹¹⁸ Nearly always, (93%), veterans claimed one or two separate mental health conditions, while a very small group (7%) alleged three or more mental health conditions related to discrimination.¹¹⁹

Despite being the most claimed disorder attributable to discrimination, PTSD was hardly the most frequently approved disorder.¹²⁰ Rather, the veterans who alleged discrimination were approved at the highest levels for anxiety disorders ($z = 3.68, p < .001$), schizophrenia and psychotic disorders ($z = 2.00, p < .05$), and depressive disorders ($z = 5.53, p < .001$).¹²¹ Veterans who claimed two or more mental health conditions were more successful on appeal than those who claimed one disorder only $X^2(2, 653) = 25.90, p < .001$.¹²² In some instances, while the Board denied PTSD claims for lack of stressor corroboration, the Board nevertheless approved the same veteran's claim for service-connection of major depression related to the discriminatory event(s).¹²³

2. *Discriminatory Acts Attributed to Mental Health Conditions*

Veterans in race discrimination cases attributed their mental health conditions to a wide range of discriminatory acts and circumstances. Consistent with the military's surveys of harassment in the early 2000s,¹²⁴

117. *Id.* at 97 fig.7.

118. *Id.*

119. *Id.* at 97.

120. *Id.* at 88 tbl.8.

121. *Id.* at 97.

122. *Id.*

123. *See, e.g.,* Name Redacted, Citation No. 09-42480 (Bd. Vet. App. Nov. 6, 2009).

124. *See generally* Armando X. Estrada, Tahira M. Probst, Jeremiah Brown & Maja Graso, *Evaluating the Psychometric and Measurement Characteristics of a Measure of Sexual Orientation Harassment*, 23 MIL. PSYCH. 220 (2011) (reviewing the classification scheme of the Inspector General's 2000 study of component-wide harassment incidents and mechanisms).

common discriminatory acts claimed as stressors included: racial slurs and epithets; physical assaults, threats, and intimidation; being assigned to humiliating duties; and other forms of abuse experienced by gender, religious, and sexual minorities and marginalized groups.¹²⁵ For example, many racially diverse veterans alleged that they were prevented from performing duties due to their race, such as flying planes or driving tanks.¹²⁶ Others reported that they were not recognized for significant achievements due to race or told that they would not be promoted due to their race.¹²⁷ Some claimed that racial discrimination accounted for false charges of military misconduct.¹²⁸ Furthermore, consistent with studies of discriminatory practices in the Navy, Black veterans reported being assigned to humiliating and dangerous duties below deck, such as work in the boiler room.¹²⁹ Veterans were further subjected to discrimination based on associations with members of different races, such as those in interracial marriages or romantic relationships.¹³⁰

3. *BVA's Approach to Stressor Corroboration*

As discussed previously, to prevail in a PTSD diagnosis, VA adjudicators must find sufficient independent corroboration of a claimed stressor event during military service.¹³¹ Review of denials of race discrimination cases revealed that the lack of corroboration for the discriminatory stressor event was a leading reason for denial of the appeal.¹³² The Board has provided examples of sufficient corroborating evidence in the form of names of witnesses, dates and locations of the events, statements of eyewitnesses, contemporaneous letters or journal

125. See, e.g., Seamone, *supra* note *, at 133–43; see also Evan R. Seamone, *Beyond "Restoration of Honor": Compensating Veterans for the Psychological Injuries of the Gay and Transgender Bans*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. (forthcoming 2022) (identifying specific methods of harassment in sexual-orientation and gender identity discrimination cases).

126. See, e.g., Name Redacted, Citation No. 11-15288 (Bd. Vet. App. Apr. 19, 2011) (“[D]uring his duty he was rejected by a superior officer from being allowed to fly in a plane because he was [B]lack, resulted in the veteran crying.”).

127. See Seamone, *supra* note *, at 135–37.

128. See, e.g., Name Redacted, Citation No. 16-43098 (Bd. Vet. App. Nov. 9, 2016) (reporting the veteran’s racial harassment stressor as “drugs . . . planted under his bunk on several occasions”).

129. Seamone, *supra* note *, at 136 & n.27.

130. *Id.* at 134 n.17, 137 nn.35–36.

131. *Supra* Part B.

132. Seamone, *supra* note *, at 195 (“[C]areful review of known traumatic discrimination appeals revealed that lack of corroboration for a discriminatory stressor in the case of PTSD claims was a primary reason for denial of these appeals.”).

entries, and photographs.¹³³ To the BVA, these forms of corroborating evidence impose a “low” evidentiary bar on the veteran,¹³⁴ and represent the reciprocal duty of the claimant to enable the VA to meet its duty to assist.¹³⁵

Merely referencing the racist or abusive environment experienced by all Black veterans would not appear to be sufficient corroborating evidence of a stressor event.¹³⁶ For instance, in a case involving an Asian-American/Pacific Islander Vietnam veteran, the Board did not find corroboration in references to a general air of discrimination against minority troops.¹³⁷ Noting the veteran’s “content[ion] that every Vietnam veteran knows about the prejudicial attitudes toward[s] Asians that were prevalent in the Armed Forces during that time,”¹³⁸ the Board refused to “take judicial notice” of “unidentified ‘standard historic sources’” and found no “independent verification of stressors not related to combat.”¹³⁹ Similarly, the Board has found that a verified stressor cannot simply be a “generally hostile environment” against a specific minority group.¹⁴⁰

The specific quantity and quality of evidence required for sufficient corroboration of a race discrimination stressor event involves a nuanced analysis. Despite the inadequacy of general descriptions of stressors, the CAVC has nevertheless clarified that veterans need not prove every detail of a traumatic event for adequate corroboration.¹⁴¹ For instance, the BVA found sufficient corroboration when a witness attested in writing to “a racially charged atmosphere” in existence at the place and time where the

133. See, e.g., Name Redacted, Citation No. 99-19055 (Bd. Vet. App. Jul. 13, 1999) (noting lay testimony, but not bare claims, is sufficient to corroborate combat related stressors); Name Redacted, Citation No. 17-44884 (Bd. Vet. App. Oct. 10, 2017) (noting that statements from fellow servicemembers, contemporaneous letters home, or pictures would corroborate claims); see also Name Redacted, Citation No. 04-07911 (Bd. Vet. App. Mar. 26, 2004) (noting the expectation for corroboration of a racism stressor from “contemporaneous letters from family members or statements from service comrades”).

134. Name Redacted, Citation No. 12-32005 (Bd. Vet. App. Sept. 17, 2012).

135. See *Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991) (recognizing that the VA’s duty to assist does not represent “a one-way street”).

136. Seamone, *supra* note *, at 156 (observing that “a verified stressor cannot simply be a ‘general hostile environment’ against a specific racial or ethnic minority group”) (internal citations omitted).

137. See Name Redacted, Citation No. 03-22677 (Bd. Vet. App. Sept. 4, 2003).

138. *Id.*

139. *Id.*

140. Name Redacted, Citation No. 05-22837 (Bd. Vet. App. Aug. 15, 2005).

141. *Pentecost v. Principi*, 16 Vet. App. 124, 128 (2002).

veteran alleged specific acts of racial discrimination.¹⁴²

In some instances, the BVA has relied upon less common discriminatory trauma markers. One such marker is whether enough evidence has been presented about the discriminatory injury to infer that an incident of the nature alleged commonly occurred under the same circumstances.¹⁴³ For example, in a case involving the claim that a Black veteran walked in on senior officers holding a KKK meeting and, after reporting his concerns, the senior officers sent him to combat in Vietnam as retaliation, the BVA explained:

The Board is prepared to accept that—even though there is insufficient [evidence] to demonstrate some of the Veteran’s more extraordinary claims—it is fairly credible that the Veteran would have incurred at least some incidents of racism during the 1960s; and that these incidents may have even devolved into acts of physical violence.¹⁴⁴

Historical publications and newspaper articles may serve as markers to corroborate racial discrimination when the publications are specific enough to encompass the veteran’s individual circumstances.¹⁴⁵ In a notable case, falling short of this standard, the veteran supplied a scholarly article that “described a history of institutional racism in the military and personal racism between military members.”¹⁴⁶ The veteran offered the article as corroboration for the veteran’s claimed stressor of “institutional and personal racism” while serving in the Marine Corps to include interracial fights involving death, improvised weapons, and bricks being thrown at him by white soldiers.¹⁴⁷ To the BVA, “[t]he article did not reference any particular events or the general atmosphere of military race relations in Okinawa, Japan, including during the time the veteran was stationed there.”¹⁴⁸ Numerous cases cited the CAVC case of *Cohen v. Brown*,¹⁴⁹ which held that “[a]necdotal incidents, although they may be true, are not researchable.”¹⁵⁰ In order to be researched, incidents must be reported and documented.

142. Name Redacted, Citation No. 08-26657 (Bd. Vet. App. Aug. 7, 2008).

143. Name Redacted, Citation No. 04-07911 (Bd. Vet. App. Mar. 26, 2004) (rejecting magazine articles as corroboration for the stressor of discrimination against an Asian-American soldier during the Korean War because “there is no way to relate that incident to the veteran,” including any statements of the veteran describing that he had personal knowledge of the events described in the articles).

144. Name Redacted, Citation No. 17-44884 (Bd. Vet. App. Oct. 10, 2017).

145. Seamone, *supra* note *, at 142 n.68 (describing the Board’s unwillingness to corroborate discriminatory stressors through “generalized, unspecific descriptions”) (citations omitted).

146. Name Redacted, Citation No. 17-06402 (Bd. Vet. App. Mar. 2, 2017).

147. *Id.*

148. *Id.*

149. 10 Vet. App. 128 (1997).

150. *Id.* at 134.

Contrary to the denial above, the Board found sufficient corroboration of race-based assault and slurs through reference to facts asserted in a book excerpt describing the extent of public operations of the KKK at Camp Pendleton Marine Base in the late 1970s.¹⁵¹ The veteran offered excerpts from *The African American Experience in Vietnam: Brothers in Arms*.¹⁵² The Board further recognized that at the time, “the Marine Corps admitted a Klan presence at Camp Pendleton,” to include warnings “of a dramatic increase in [KKK] activity among off-duty service personnel.”¹⁵³ The decision further cited facts about minority servicemembers who were killed or injured as a result of hate crimes committed by the KKK at Camp Pendleton in the 1970s.¹⁵⁴ Despite the Board’s recognition that “there [was] no specific evidence in the claims file that the veteran was the victim of racial discrimination during military service,”¹⁵⁵ the Board found sufficient corroboration based on the detailed history reported in the book: “The fact that the veteran was assigned to and stationed with a unit that was present while such an event occurred” provided sufficient evidence to corroborate racial discrimination.¹⁵⁶

Beyond corroboration through detailed historical and scholarly publications recounting military discrimination, veterans may present facts about their life after service which could corroborate the discrimination claim. In at least one case involving an Asian-American/Pacific Islander Vietnam veteran, the veteran described how, following his service and upon naturalization as a U.S. citizen, he selected a different last name specifically “to sound more ‘American.’”¹⁵⁷ The Board found that the veteran’s reasons for the post-service name change corroborated the traumatic impact of his claimed military stressors of threats by white Sailors to throw him overboard and their vocalized suspicions that he was a spy for the Viet Cong based on his name, accent, and physical appearance.¹⁵⁸

4. *Psychiatric Assessment of PTSD Criterion A*

All claimants for service-connection of a mental health disorder must establish that they incurred or aggravated their condition during military

151. Name Redacted, Citation No. 15-27650 (Bd. Vet. App. June 29, 2015).

152. *Id.* (citing JAMES E. WESTHEIDER, *THE AFRICAN AMERICAN EXPERIENCE IN VIETNAM: BROTHERS IN ARMS* (2008)).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Name Redacted, Citation No. 16-45339 (Bd. Vet. App. Dec. 2, 2016).

158. *Id.*

service.¹⁵⁹ While PTSD requires corroboration of a veteran's account of the stressor event, other mental health disorders do not require the same high degree of proof and the evidence need only show that the disorder was as likely as not linked to military service.¹⁶⁰ In the case of PTSD, while the adjudicator determines the adequacy of the corroboration for the stressor event, mental health examiners must further find that all of the PTSD diagnostic criteria from the *DSM* have been satisfied.¹⁶¹ The examined PTSD cases revealed frequent disagreement between adjudicators and medical examiners even though Sexual and Gender Identity Minority (SGIM) veterans had satisfied one or the other requirement.

In denied appeals, psychiatric examiners frequently deemed the veteran's harassing experience insufficient to meet Criterion A's requirement for a trauma. This was true even though the VA adjudicator believed the veteran met the standard of corroboration for a PTSD stressor event under the VA's PTSD standard. VA standards specifically list "harassment" as an example of personal assault for PTSD stressor corroboration.¹⁶² However, in the cases identified by this study, proof of verbal harassment alone usually failed to meet the *DSM's* PTSD criteria.¹⁶³ For instance, even though a veteran's account of discriminatory experiences amounted to a continuing chain of "micro insults and macro insults," the provider concluded that "insults are not necessarily the stuff of trauma."¹⁶⁴ "The examiner noted that he had no way of firmly establishing a nexus between the Veteran's [condition] and the military without resorting to speculation, if not divination."¹⁶⁵

When another veteran claimed the stressor of being harassed for associating with another minority soldier in the early 1950s, the BVA found

159. *Supra* Part III.A.

160. *Id.*

161. Name Redacted, Citation No. 06-12927 (Bd. Vet. App. May 4, 2006) ("[W]hether stressors that occurred were of sufficient gravity to cause or to support a diagnosis of PTSD is a question of fact for medical professionals.").

162. M21-1MR, *supra* note 50, at § D(5) (providing administrative guidance on the application of 38 C.F.R. § 3.304(f)(5)).

163. In a salient example, the BVA denied the veteran's verbal discrimination claim on the basis that "the allegation of racial discrimination on its face fails to satisfy the stressor definition criteria under the DSM-IV." Name Redacted, Citation No. 10-33511 (Bd. Vet. App. Sept. 7, 2010).

164. Name Redacted, Citation No. 18-119553 (Bd. Vet. App. Jul. 19, 2018).

165. *Id.* Although this veteran was denied service-connection for PTSD for lack of a sufficient stressor, service-connection was approved for the acquired psychiatric disorder of Depressive Disorder not otherwise specified, on the basis that the examiner still expressed that "[the] possibility exists of a connection, but supportive data are not in evidence." *Id.*

sufficient corroboration for the personal assault stressor “in light of the era in which the [v]eteran served and the [recorded] prejudice and animus that was present at the time.”¹⁶⁶ Yet, the Board adopted the medical conclusion that the event failed to meet Criterion A since the veteran had only experienced a “sense of being wronged.”¹⁶⁷ These cases reflect incongruence between the VA’s regulatory PTSD stressor standards and the *DSM*’s trauma standard for diagnosing PTSD when it comes to discriminatory events. These opinions also support the finding that physical assault at least marginally increases the odds of success in discrimination claims. This was the case where a perpetrator’s verbal slurs and epithets during a physical assault demonstrated a discriminatory motive.¹⁶⁸

5. Other Notable Observations

i. Vague and Sanitized Descriptions

In many cases where veterans alleged military racial discrimination as the basis of their mental health condition, even though judges generally mentioned these claims, the judges frequently omitted the veteran’s race.¹⁶⁹ More troubling, in many instances the decisions referenced some form of discriminatory treatment but failed to identify the type or the acts alleged to have resulted from the discriminatory animus.¹⁷⁰ For example, during manual review of the ML classified cases, failure to describe discrimination type forced me to exclude over two dozen decisions.¹⁷¹ The Board Members stated that the veteran claimed “discrimination,” “prejudice,” “harassment,” or combinations thereof but did not specify discrimination type, such as racial, religious, ethnic, or sexual-orientation.¹⁷² In some instances, judges used terminology that could have ostensibly amounted to discrimination but was too vague to support the conclusion. In one such example, a judge referenced a veteran’s claimed stressor of a “personality conflict” with a superior.¹⁷³

Other cases revealed deliberate withholding of information about discriminatory events alleged by a claimant, such as the judge who omitted

166. Name Redacted, Citation No. 11-19942 (Bd. Vet. App. May 23, 2011).

167. *Id.*

168. *Infra* Part IV.D (providing statistical results of associations between variables).

169. Seamone, *supra* note *, at 89 (“Regarding race . . . the veteran’s race was not always mentioned in an opinion, and was not discernable in the majority of cases[.]”).

170. *Id.* at 77.

171. *Id.*

172. *See id.* at 77, note 2.

173. Name Redacted, Citation No. 17-42581 (Bd. Vet. App. Sept. 26, 2017).

discussion of racial discriminatory acts for the stated purpose of sparing the “vulgar details.”¹⁷⁴ While judges may have good intentions for sanitizing the nature of claimed discrimination,¹⁷⁵ such practices make the decisions unreviewable for discriminatory trauma. Furthermore, they can make it impossible to identify trends in judicial treatment of racially diverse applicants who have claimed injuries related to racial discrimination.¹⁷⁶ At least one experienced practitioner who has worked for the VA on quality assurance issues confirms that VA judges have been encouraged not to identify issues related to the race of the appellant.¹⁷⁷ The following two subsections describe two forms of discriminatory events that appeared magnified by the military environment: discrimination involving combat and discrimination involving racist symbols or hate groups.¹⁷⁸

ii. Race Discrimination in a Combat Zone

Consistent with the research on combat veterans, this study revealed numerous cases where the veteran specifically indicated no trauma from combat itself, but rather from discrimination occurring in a combat zone.¹⁷⁹ This included the refusal of subordinates to follow orders on discriminatory grounds.¹⁸⁰ Many veterans feared harm from their peers more than the enemy, such as a friendly fire incident or fragging with grenades.¹⁸¹ Others

174. Name Redacted, Citation No. 18-07374 (Bd. Vet. App. Feb. 6, 2018).

175. Seamone, *supra* note *, at 174 (providing several alternative reasons for judges to censor race or other details related to discrimination).

176. The problem seems widespread beyond cases at the BVA. *See* Hall & Wright, *supra* note 104, at 96 (recognizing a similar limitation in judges’ reluctance to identify race in employment discrimination cases).

177. Seamone, *supra* note *, at 173–74.

178. Although not discussed in detail in this Article, other forms of discrimination explored in the dissertation include claimed traumatic stressors related to race riots, particularly in the period following the assassination of Dr. King, as well as racial discrimination involving elements of sexual trauma. *See id.* at 141 (surveying “[a] separate subcategory of race discrimination stressors involved race riots, which have also been referred to as mutinies on ships”); *id.* at 146–47 (surveying cases in which “service[]members reported being sexually assaulted as a form of . . . racial discrimination”).

179. Seamone, *supra* note *, at 147–48.

180. *See, e.g.*, Name Redacted, Citation No. 15-53544 (Bd. Vet. App. Dec. 23, 2015) (describing the stressor of having his orders “ignored” as the only Black soldier in his unit).

181. *See* Name Redacted, Citation No. 13-02375 (Bd. Vet. App. Jan. 22, 2013) (friendly fire due to racism); Name Redacted, Citation No. 98-22706 (Bd. Vet. App. July 27, 1998) (race riots involving soldiers rolling grenades into sleeping areas).

experienced commanders confiscating weapons from minority troops¹⁸² or ensuring that only non-minority troops were issued ammunition.¹⁸³ Based on these acts, one victimized veteran observed that he was “more traumatized by ongoing racial harassment than combat stressors.”¹⁸⁴ A Black veteran, for example, recounted discrimination when his commanders purposely assigned him to the front lines in Vietnam when he had only three months of service remaining in retaliation for his role in “breaking up a [KKK] meeting” on base.¹⁸⁵ From an evidentiary perspective, it is noteworthy that veterans succeeded in establishing the Criterion A stressor event requirement when they linked discrimination to “psychiatric symptoms to fear of hostile, military, or terrorist activity during . . . service” through the “belief that . . . [peers] would not come to [their] aid if attacked.”¹⁸⁶

iii. Discrimination Incorporating Racist Symbols

Black veterans identified historically significant symbols of race discrimination in describing their PTSD stressor events. This trauma frequently involved the display of white hoods, burning crosses, the acronym

182. See Name Redacted, Citation No. 09-27184 (Bd. Vet. App. Jul. 21, 2009) (weapons removed from unit); Name Redacted, Citation No. 08-25400 (Bd. Vet. App. Jul. 20, 2008) (ammunition confiscated).

183. See Name Redacted, Citation No. 16-22397 (Bd. Vet. App. June 3, 2016) (withholding ammunition from Black soldiers); see also Name Redacted, Citation No. 13-09260 (Bd. Vet. App. Mar. 19, 2013) (addressing a situation in which a first sergeant armed white troops during a racial conflict in the ranks).

184. Name Redacted, Citation No. 12-36218 (Bd. Vet. App. Oct. 18, 2012).

185. Name Redacted, Citation No. 15-48493 (Bd. Vet. App. Nov. 18, 2015).

186. See Name Redacted, Citation No. 17-55758 (Bd. Vet. App. Dec. 5, 2017); see also Name Redacted, Citation No. 16-25292 (Bd. Vet. App. June 23, 2016) (noting the veteran's claimed stressor as “fear that he would be killed or left behind in Vietnam” after reporting instances of racism); Name Redacted, Citation No. 10-04384 (Bd. Vet. App. Jan. 28, 2010) (asserting “a racist captain purposely assigned only African-American troops to go on the patrol”); Name Redacted, Citation No. 13-27359 (Bd. Vet. App. Aug. 26, 2013) (“[H]e was given a security duty assignment [based on being Black] that required him to be essentially alone in the desert for five days and nights with limited outside contact, which left [him] scared and fearful for his life.”). Veterans claimed discrimination-related stressors that left them feeling “isolated.” See Name Redacted, Citation No. 04-11021 (Bd. Vet. App. Apr. 27, 2004) (“He also contended that the soldiers in his unit were racist; therefore, he did not trust them and felt isolated.”); see also Name Redacted, Citation No. 12-23678 (Bd. Vet. App. Jul. 9, 2012) (“He reported that he felt alone and unsupported.”).

“KKK” written in graffiti, nooses, and display of the Confederate flag.¹⁸⁷ Given that it was common for the KKK to conduct meetings and recruit membership from the ranks at various installations, several traumatic stressors related to intimidation by Klan members.¹⁸⁸ In relation to the letters KKK, particularly traumatizing events included perpetrators etching the term with a cross in a Black servicemember’s helmet,¹⁸⁹ writing out the acronym in ketchup on a Black servicemember’s pillowcase,¹⁹⁰ and placing nooses in the veteran’s living space.¹⁹¹ Black veterans also described terrorizing experiences involving white troops discussing having committed hate crimes against Black families in Mississippi while standing within earshot waiting in line to enter the dining facility.¹⁹²

C. Relationships Between Case Variables

I performed empirical analysis of the 653 cases identified by ML algorithms using a series of nonparametric analyses (chi-square analyses, Fisher’s exact test, and Wilcoxon rank sum tests) to determine whether success of appeal differed across a number of variables.¹⁹³ Although I hypothesized that multiple traumatic events would increase the likelihood of a favorable outcome on appeal, the study revealed only a marginal difference

187. See, e.g., Name Redacted, Citation No. 01-00621 (Bd. Vet. App. Jan. 10, 2001) (“The veteran testified that he was subjected to numerous incidents of racial harassment by an unknown person or persons. Pictures of rebel flags, photos of him with a noose drawn around his neck, and ‘KKK’ signs were placed on his bed.”); Name Redacted, Citation No. 10-47651 (Bd. Vet. App. Dec. 22, 2010) (citing “frequent racial harassment [at Westover Air Force Base] including having a cross burned in front of the medical services dormitory”). Name Redacted, Citation No. 10-15193 (Bd. Vet. App. Apr. 26, 2010) (noting racial discrimination by “a sargeant [sic] who wore a confederate flag on his helmet”).

188. Seamone, *supra* note *, at 135 n.22.

189. Name Redacted, Citation No. 08-04458 (Bd. Vet. App. Feb. 7, 2008) (“He claims . . . racism, including . . . having ‘KKK’ and a cross etched into his head gear.”).

190. Name Redacted, Citation No. 18-106273 (Bd. Vet. App. May 30, 2018).

191. See, e.g., Name Redacted, Citation No. 01-06933 (Bd. Vet. App. March 8, 2001) (“A hangman’s noose was hung on his door, and a noose with a monkey in it was placed in the shower.”); Name Redacted, Citation No. 12-05346 (Bd. Vet. App. Feb. 13, 2012) (having “a ‘[KKK] rope,’ or noose, [placed] under his bed”).

192. Name Redacted, Citation No. 18-21310 (Bd. Vet. App. Apr. 11, 2018) (“[W]hile he was in service at Fort Lewis, Washington, he was standing in the chow line with several other African American soldiers when a soldier told another soldier that he and his family were members of the [KKK] and had killed and burned down the houses of African Americans in Mississippi. The [v]eteran reported that his mind went blank with fear.”).

193. Seamone, *supra* note *, at 86–89 tbl.8.

between number of trauma types claimed and outcome ($W = 44914, p = .08$). A more significant relationship was detected for the incidence of pre-service trauma, which was negatively associated with success on appeal, ($\chi^2(1, 563) = 8.30, p < .01$). This result was consistent with my prior research on cumulative traumatic events, which demonstrated the difficulty of attributing PTSD to MST when the veteran had been sexually assaulted prior to enlistment.¹⁹⁴ The examined discrimination cases reveal that prior traumatic events in civilian life created a similar cumulative trauma dilemma in which VA adjudicators experienced difficulty disaggregating the effects of military discrimination. However, on balance, in all discrimination cases, physical assault was positively associated with appeal success ($\chi^2(1, 563) = 4.17, p < .05$).

Recognizing that the VA changed its criteria for assessing PTSD and moved from using the *Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR)* to the *DSM-5* in all PTSD service connection adjudications on August 4, 2014,¹⁹⁵ this study considered the distribution of all discrimination case outcomes across the current and two previous versions of the *DSM*. There was a higher likelihood of success after the implementation of the *DSM-5*, relative to before ($\chi^2(1, 653) = 33.40, p < .001$). Yet this relationship was not specific to PTSD.

D. Multilevel Logistic Regression Analysis

Logistic regression analysis is appropriate for an exploration of the determinants of case outcomes.¹⁹⁶ Similar to other empirical legal

194. See, e.g., Seamone & Traskey, *supra* note 46.

195. Schedule for Rating Disabilities—Mental Disorders and Definition of Psychosis for Certain VA Purposes, 79 Fed. Reg. 45,093 (Aug. 4, 2014) (to be codified at 38 C.F.R. pts. 3, 4).

196. Binomial logistic regression permits the identification of significant relationships between a given characteristic on case outcome while controlling for other characteristics. ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 298–304 (2d ed. 2016) (acknowledging the appropriateness of this “special” logistic regression analysis in many legal contexts where the “the dependent variable takes on only two (or very few) values”).

researchers, this study treated the dichotomous approved/disapproved appeal choices as the dependent variable (i.e., Approved = 1, Denied = 0), and various case characteristics as the independent or predictor variables.¹⁹⁷ I used theory to include or exclude each independent variable in the regression model.¹⁹⁸ Each of the hypotheses I tested and the corresponding results appear below in the Appendix to this Article.

The detailed results for the combined discrimination (i.e., race and sexual-orientation) regression model appear in Table 1.¹⁹⁹

197. See Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 907–913 (2020) (evaluating applications of the fair use defense in copyright); Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1031–35 (2017) (examining the granting of Chapter 13 bankruptcy protection by appellate courts); Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275 (2017) (reviewing court decisions on the application of strict scrutiny); Pat K. Chew & Robert E. Kelley, *Myth of the Colorblind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009) (measuring the relationship between plaintiff's race and discrimination case outcome); John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKLEY BUS. J. at 1, 4–5 (2009) (assessing courts' decisions to pierce the corporate veil).

198. Prior to conducting logistic regression analysis, I first conducted an exploratory examination of the degree of variability in decisions across judges for a random sample of twenty-five judges with at least two decisions per judge. For an in-depth review of the process, see Seamone, *supra* note *, at 98–100. The null model indicated that differences across judges accounted for 17% of the total variance in case outcomes (Intraclass Correlation (ICC): .17), suggesting the appropriateness of multilevel modeling. I further developed a model that indicated a better fit with a control for year based on fixed effects for a list of variables and a random intercept for year. *Id.*

199. *Id.* at 101 tbl.13.

Table 1: LR Model Predicting the Likelihood of Successful Appeals-All Discrimination Cases

Fixed Effects	<i>b</i>	<i>SE</i>	<i>OR</i>	<i>p</i>	95% CI
Sexual Orientation Discrim.	0.17	0.32	1.18	0.600	[-0.46, 0.79]
<u>Veteran & Case</u>					
Pro se	-0.77	0.38	0.46	0.046*	[-1.52, -0.01]
Representation Unknown	0.41	0.48	1.50	0.397	[-0.53, 1.34]
Female or Transgender	0.37	0.38	1.45	0.332	[-0.38, 1.12]
Years of Service	-0.00	0.02	1.00	0.971	[-0.04, 0.04]
<u>Trauma-Related</u>					
Preservice Trauma	-0.99	0.41	0.37	0.016*	[-1.79, -0.18]
Military Sexual Trauma	0.29	0.40	1.34	0.473	[-0.50, 1.08]
Administrative Discrim.	0.03	0.37	1.03	0.940	[-0.69, 0.74]
Physical Assault	0.58	0.31	1.78	0.068†	[-0.04, 1.19]
Combat	0.86	0.50	2.36	0.087†	[-0.12, 1.84]
Number of Trauma Types	0.23	0.25	1.26	0.359	[-0.26, 0.72]
<u>Policy-Related</u>					
DADT (Post-Repeal)	0.10	0.39	1.10	0.809	[-0.67, 0.86]
Draft Era (Post-Draft)	-0.29	0.22	0.75	0.188	[-0.73, .143]
DSM Version (V)	1.09	0.57	2.98	0.055†	[-0.02, 2.20]
<u>Mental Health Related</u>					
MH Claims (2)	1.16	0.27	3.20	0.000***	[0.64, 1.69]
MH Claims (3/4)	0.69	0.38	2.01	0.063†	[-0.04, 1.43]
PTSD	-0.66	0.30	0.51	0.025*	[-1.24, -0.08]
PTSD * DSM	-0.39	0.48	0.67	0.419	[-1.33, 0.55]
<u>Random Effects</u>					
	<u>Variance</u>	<u>ICC</u>			
Judge	0.49	0.12			
Year	0.21	0.05			

Note. CI = confidence intervals; SE = standard error; MH = Mental Health

† $p < 0.10$, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Contrary to the idea that multiple types of trauma were associated with greater severity of injury, and therefore success on appeal, the number of trauma types claimed did not significantly correlate with success. Pre-service trauma was negatively associated with success on appeal. Relative to veterans who did not report pre-service trauma, the odds of success for a veteran who did were reduced by 63% (OR = .37, $p = .016$). The *DSM-5* with its new definition for PTSD was marginally associated with an increased likelihood of success on appeal (OR = 2.98, $p = .055$). Ultimately, the implementation of the *DSM-5* was not uniquely beneficial for PTSD claims. Veterans who reported physical assault in addition to discrimination had a higher likelihood of success (OR = 1.78) than those who did not; however, this finding was not statistically significant ($p = .068$).

Several unexpected relationships emerged from the data. The odds of success were reduced by 54% for veterans who represented themselves on appeal versus those who had representation (OR = .46, $p = .046$). A greater

number of mental health claims were more successful than a single claim. Relative to a single claim, two claims were associated with more than a threefold increase in the odds of success (OR = 3.20, $p < .001$) and three or four claims showed a statistically non-significant increase in the odds of success (OR = 2.01, $p = .06$). Finally, relative to claims for other diagnoses, PTSD claims were associated with a reduced likelihood of success (OR = .52, $p = .025$). There was no significant difference in the likelihood of success of a racial discrimination case and an SGIM discrimination one.

The next step was to conduct a logistic regression analysis on the subset of race discrimination cases. Here, I reduced the number of predictors, due to the relatively small number of observations. I dropped variables from the model where no significant relationships emerged. The final model did not include a random intercept for year. As depicted in Table 2 below,²⁰⁰ the only significant relationship to emerge from this analysis was the number of mental health claims (2 v. 1, OR = 7.56, $p = .01$). PTSD claims were marginally associated with a reduced likelihood of success relative to other types of claims (OR = .30, $p = .06$).

200. *Id.* at 104–05 tbl.16.

Table 2: LR Model Predicting the Likelihood of a Successful Race Discrimination Appeal²⁰¹

Fixed Effects	<i>b</i>	<i>SE</i>	<i>OR</i>	<i>p</i>	95% CI
<u>Veteran & Case</u>					
<i>Pro se</i>	-1.07	0.45	0.34	0.017*	[-1.95, -0.19]
Representation Unknown	0.85	0.52	2.34	0.103	[-0.17, 1.88]
Female or Transgender	0.48	0.56	1.62	0.384	[-0.60, 1.57]
Years of Service	-0.02	0.02	0.98	0.479	[-0.06, 0.03]
<u>Trauma-Related</u>					
Preservice Trauma	-1.61	0.53	0.20	0.003**	[-2.65, -0.56]
Military Sexual Trauma	0.39	0.56	1.48	0.484	[-0.71, 1.49]
Administrative Discrim.	-0.17	0.47	0.84	0.711	[-1.09, 0.75]
Physical Assault	0.29	0.39	1.33	0.463	[-0.48, 1.05]
Combat	0.77	0.60	2.17	0.198	[-0.41, 1.95]
Number of Trauma Types	0.52	0.34	1.69	0.126	[-0.15, 1.19]
<u>Policy-Related</u>					
DADT (Post-Repeal)	0.05	0.40	1.05	0.908	[-0.73, 0.82]
Civil Rights Act (Post-Act)	-0.13	0.27	0.88	0.618	[-0.66, 0.39]
<i>DSM</i> Version (V)	0.94	0.60	2.57	0.118	[-0.24, 2.13]
<u>Mental Health Related</u>					
MH Claims (2)	1.08	0.30	2.95	0.000***	[0.49, 1.68]
MH Claims (3/4)	0.81	0.42	2.25	0.052†	[-0.01, 1.63]
PTSD	-0.57	0.35	0.57	0.105	[-1.24, 0.12]
PTSD * <i>DSM</i>	-0.26	0.54	0.77	0.632	[-1.33, 0.80]
<u>Random Effects</u>					
	<u>Variance</u>	<u>ICC</u>			
Judge	0.59	0.15			
Year	0.14	0.04			

Note. CI = confidence intervals; SE = standard error; MH = Mental Health

† $p \leq 0.10$, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Unlike the model for discrimination in general, PTSD and *DSM* edition were no longer significant in the race model. The remaining relationships of significance were reflective of the combined discrimination model. For the race model, pro se representation was associated with significantly lower odds of success on appeal ($OR = .34, p = .017$). Odds of success significantly increased based on the number of mental health conditions claimed in relation to discrimination (2 v. 1, $OR = 2.95, p < .001$; 3/4 v. 1, $OR = 2.25, p = .052$). I collected too few cases to effectively test a number of hypotheses involving race, such as the impact of racial discrimination by a person of the same versus different race, the impact of discrimination occurring prior to versus after racial integration of the military, and the impact of racial discrimination claimed by White veterans.²⁰² Anecdotally, however, White veterans who claimed discrimination based on race were approved at a far

201. *Id.* at 103 tbl.15.

202. *Id.* at 107 tbl.17.

lower rate than Black veterans who claimed discrimination based on race.²⁰³

CONCLUDING RECOMMENDATIONS

This Article identified 535 BVA opinions that reached a final outcome on claims involving the psychological impact of race discrimination. The data offer some preliminary lessons for those who practice in the VA administrative forums, including but not limited to: the imperative for the VA to collect, analyze, and make available data regarding racial discrimination claims at all levels—from the ROs to the BVA;²⁰⁴ the tremendous value of creating a clearinghouse of verified records of military discrimination to assist veterans in corroborating their traumatic stressors;²⁰⁵ and the unmatched benefit of summarizing discrimination case facts and outcomes by issue, much like jury verdict reporters to help practitioners better identify potential issues that are similar to their current clients' cases.²⁰⁶

Beyond these VA-specific findings, the Article also highlights three lessons of general applicability across administrative fora. First, to the extent possible, advocates and judges should request that mental health evaluators incorporate objective, peer-reviewed measures for assessing the impact of racial discrimination in their assessments of alleged discriminatory injuries. While, in practice, examiners may use widely divergent standards to assess mental conditions, principles adopted by the American Psychological Association and other professional associations encourage the use of objective assessments in forensic examinations that represent the present state of knowledge within the profession.²⁰⁷

Specifically, because racial discriminatory trauma has been identified as a challenging area subject to many assumptions that lead to errors in

203. *Id.* at 119 (identifying an 8% success rate on racial discrimination claims by White veterans as opposed to a 41% success rate on racial discrimination claims by Black veterans).

204. *Id.* at 193.

205. *Id.* at 199–203.

206. *Id.* at 183 tbl.18. In the context of sexual-orientation discrimination, I developed an *Online Supplement* containing summaries of fifty-six cases with various methods to identify case characteristics similar to a jury verdict reporter for VA discrimination cases. See Seamone, *supra* note 125 (introducing the *Online Supplement*); Evan R. Seamone, *Supplement to Evan R. Seamone's "Beyond Restoration of Honor": Compensating Veterans for the Psychological Injuries of the Gay and Transgender Bans* 1, 3 app. A (2022) (on file with author), <https://www.linkedin.com/feed/update/urn:li:activity:6904112136545808384/>.

207. Gerald Young, *Towards Balanced VA and SSA Policies in Psychological Injury Disability Assessment*, 8 PSYCH. INJURY & L. 200, 201 (2015) (“[C]ompensation and pension (C&P) evaluations are forensic in nature[.]”).

diagnosis,²⁰⁸ there is even greater need in these cases to conduct a careful and detailed analysis.²⁰⁹ The notion that discrimination, by definition, cannot constitute a stressor event for a PTSD diagnosis under Criterion A is insufficient as a medical conclusion if the examiner does not justify this conclusion with a fact-based rationale tailored to the individual under examination.²¹⁰ Although in many areas the conclusion could be true, researchers recognize that some scenarios would meet the criteria.²¹¹ A number of cases explain why discrimination, including non-physical discrimination, may nevertheless meet the threshold in an individual case.²¹² Moreover, researchers have established that discrimination can result in anticipated death, physical injury, or sexual violence based upon the context of the racial discrimination and the past experiences of the traumatized individual.²¹³ Some of the peer-reviewed and validated measures to assess

208. “[A]uthentic” discrimination-based PTSD is frequently misdiagnosed (e.g., as substance use, Major Depression, or Schizophrenia) and often “clinically disregarded altogether.” Monnica T. Williams, Isha W. Metzger, Chris Leins & Celenia DeLapp, *Assessing Racial Trauma Within a DSM-5 Framework: The UConn Racial/Ethnic Stress and Trauma Survey*, 3 PRACT. INNOVATIONS 242, 247 (2018).

209. See James D. Ridgway, *Erratum to: Mind Reading and the Art of Drafting Medical Opinions in Veterans Benefits Claims*, 5 PSYCH. INJURY & L. 72, 78–80 (2012) (describing the necessity for examiners to identify factual premises with the reasoning leading to conclusions supported by the medical record).

210. See, e.g., Name Redacted, Citation No. 10-33511 (Bd. Vet. App. Sept. 7, 2010) (rejecting the VA examiner’s conclusory statement that sexual harassment does not qualify as a stressor for diagnosing PTSD when the examiner failed to explain how contrary medical opinions were refuted).

211. See, e.g., Nicholas J. Sibrava, Andri S. Bjornsson, A. Carlos I. Perez Benitez, Ethan Moitra, Risa B. Weisberg & Martin B. Keller, *Posttraumatic Stress Disorder in African American and Latinx Adults: Clinical Course and the Role of Racial and Ethnic Discrimination*, 74 AM. PSYCH. 101, 108 (2019) (finding that “perceived discrimination uniquely predicted PTSD diagnostic status” and “that discrimination experiences may be a possible risk factor for the development of PTSD”); Sarah R. Lowe, Petty Tineo, Jessica L. Bonumwezi & E. James Bailey, *The Trauma of Discrimination: Posttraumatic Stress in Muslim American College Students*, 25 TRAUMATOLOGY 115, 119 (2019) (“[D]iscrimination experiences can trigger symptoms comparable with the [Diagnostic and Statistical Manual of Mental Disorders] DSM-5 trauma both in severity and the factors that predict them.”); *id.* at 121 (“[I]n addition to increasing the severity of DSM trauma-related PTSD symptoms, discrimination can itself lead to PTSD symptoms.”).

212. See, e.g., Seamone, *supra* note 206 (identifying sexual-orientation discrimination cases where the BVA granted PTSD service-connection despite the absence of physical harm by perpetrators, such as the impact of verbal harassment and the impact of interrogation, military separation, and receipt of a military discharge based on sexual orientation).

213. See generally CARTER & PIETERSE, *supra* note 3 (describing the influence and impact

the impact of race discrimination include the Race-Based Traumatic Stress Symptom Scale,²¹⁴ the UConn Racial/Ethnic Stress & Trauma Survey,²¹⁵ the Race-Related Events Scale,²¹⁶ the Workplace Prejudice/Discrimination Inventory,²¹⁷ and the Perceived Ethnic Discrimination Questionnaire.²¹⁸ At least one measure, the Race-Related Stressor Scale for Asian-American Vietnam Veterans, assesses the impact of military discrimination.²¹⁹ Shockingly, however, not a single VA race discrimination case in this study referenced any of these vital measures.²²⁰ This result was not unique to race discrimination, as none of the 118 sexual-orientation and gender identity discrimination cases referenced or incorporated similar measures developed to assess the impact of discrimination against LGBTQ people.²²¹

The second lesson of broad applicability to administrative fora is the recognition that racial discrimination can result in other mental health

of prior experiences and the crucial role of the individual's personal identification as a member of the racial group that is targeted by the discriminatory perpetrator).

214. For the recommended Race-Based Traumatic Stress Symptom Scale Short Form (RBTSSS-SF), see *id.* at 233–46 app. A. For the Carter-Vinson Race-Based Traumatic Stress Interview Schedule, see *id.* at 247–59 app. B.

215. Williams et al., *supra* note 208 (assessing the value and validity of the scale).

216. Lynn C. Waelde, David Pennington, Ciara Mahan, Richard Mahan, Marianne Kabour & Renee Marquett, *Psychometric Properties of the Race-Related Events Scale*, 2 PSYCH. TRAUMA: THEORY, RES., PRACT., & POL'Y 4, 11 app. (2010) (reprinting the measure after discussing its validity and application).

217. Keith James, Chris Lovato & Russell Cropanzano, *Correlational and Known-Group Comparison Validation of a Workplace Prejudice/Discrimination Inventory*, 24 J. APPLIED SOC. PSYCH. 1573 (1994).

218. See Richard J. Contrada, Richard D. Ashmore, Melvin L. Gary, Elliot Coups, Jill D. Egeth, Andrea Sewell et al., *Measures of Ethnicity-Related Stress: Psychometric Properties, Ethnic Group Differences, and Associations with Well-Being*, 31 J. APPLIED SOC. PSYCH. 1775, 1783 (2001) (introducing the tool); Elizabeth Brondolo, Kim P. Kelly, Vonetta Coakley, Tamar Gordon, Shola Thompson & Erika Levy, *The Perceived Ethnic Discrimination Questionnaire: Development and Preliminary Validation of a Community Version*, 35 J. APPLIED SOC. PSYCH. 335, 338–39, 345–46 (2005) (further adapting the measure).

219. See Loo et al., *Measuring Exposure*, *supra* note 55, at 518 app. (including the validation of the measure and reprinting it for use). For the Race-Related Experiences Questionnaire (RREQ) for Asian American Veterans, see Loo et al., *Race-Related Stress*, *supra* note 55, at 85 (discussing the questionnaire and providing examples of key questions).

220. Seamone, *supra* note *, at 190 (“[N]o traumatic discrimination cases identified in this study (and none stored in the BVA decision database) referenced these tools[.]”).

221. See *id.* at 199 (identifying and reporting the results of text searches for several peer-reviewed and validated measures designed to assess the impact of discrimination against sexual minority persons).

disorders besides PTSD.²²² The more common disorders of major depression and generalized anxiety disorders, which were successfully attributed to racial discrimination in BVA decisions, are far less burdensome to establish under the *DSM-5* given that these disorders do not require a causal event of sufficient “traumatic” magnitude like PTSD’s Criterion A.²²³ While this finding does not lessen in any way the experience of discrimination as personally traumatic, it highlights the importance of seeking evaluation for other mental health injuries in addition to PTSD and asserting additional conditions supported by such assessment.²²⁴

The third lesson of general applicability to administrative tribunals relates to the language used by the court to describe the party and the events in cases involving race discrimination. As noted in the results section above, insufficient detail on the nature of the discrimination in the opinions forced me to exclude over two dozen cases from the statistical analysis. Although the cases referenced “discrimination,”²²⁵ “prejudice,”²²⁶ “harassment,”²²⁷ and even “harassment and discrimination,”²²⁸ they did not describe the kind of discrimination experienced. One judge’s use of the term “without getting into the vulgar details”²²⁹ in a discrimination case signaled that judges may have employed vagueness to prevent further identification of the underlying discriminatory acts. Although not excluded from the analysis, many of the cases I did include mentioned racial discrimination but nevertheless omitted the claimant’s race.

I have suggested several reasons why judges may have sanitized the content of discrimination cases. However, in all instances, the missing information prevents the type of transparency and oversight that enables analysis of judicial behavior and the detection of deliberate or subconscious

222. *Supra* Part IV.B.1.

223. *See supra* Parts I, II, IV.B.1.

224. *See* Seamone, *supra* note 194, at 191. Based on the extent to which pre-service trauma decreased the odds of success on discrimination claims, in cases where a claimant has experienced other life traumas, it is also imperative to distinguish the impact of the claimed harassment from other traumatic events. *Id.* at 181.

225. *See, e.g.*, Name Redacted, Citation No. 18-15571 (Bd. Vet. App. Mar. 15, 2018) (merely alluding to the claim that the veteran “suffered discrimination during military service” but omitting any details).

226. *See, e.g.*, Name Redacted, Citation No. 06-17386 (Bd. Vet. App. June 14, 2006) (indicating only “prejudice and discriminatory treatment” without further detail).

227. *See, e.g.*, Name Redacted, Citation No. 15-10195 (Bd. Vet. App. Mar. 11, 2015) (describing the claim of being “harassed by a platoon Sergeant,” with no further information on the type and extent of such harassment).

228. Name Redacted, Citation No. 17-14560 (Bd. Vet. App. May 3, 2017).

229. Name Redacted, Citation No. 18-07374 (Bd. Vet. App. Feb. 6, 2018).

bias in adjudication.²³⁰ Commissions and task forces that have investigated bias in judicial decisionmaking have identified best practices for identifying trends. One of the leading approaches is to measure case outcomes involving parties of different racial groups. In the 1990s, the then-General Accounting Office (GAO) employed a research methodology to identify the extent to which an applicant's race impacted disability awards for Social Security Disability and Supplemental Security Income adjudications.²³¹ This research identified substantial disparities in awards at Administrative Law Judge adjudication stages, particularly when the appellant had an in-person appearance.²³² The GAO's awards-by-race research led to the recurring priority to examine racial compensation trends with an eye toward mitigation efforts.²³³ More recently, bias task forces have mandated the collection, analysis, and publication of similar data on court outcomes specifically to address intra-judge, structural, and subconscious bias within the judicial system.²³⁴ The same authorities usually recommend using the courts' own internal resources for the analyses, such as offices responsible for conducting statistical analysis.²³⁵

Although any analysis is better than none, my research suggests that greater transparency is needed much more than aggregate statistical results for data that may not be available to the public in its raw form. Recent litigation against the VA highlights the difficulty of obtaining race data for benefits awards, pursuant to the Freedom of Information Act, to the extent that the collected data even exist. The Black Veterans Project and the

230. *See* Attorney Grievance Comm'n v. Markey, 230 A.3d 942, 956, (Md. 2020) (indefinitely suspending the law license of a Veterans Law Judge who repeatedly engaged in racist behavior rising to the level of interference with administration of justice and did not appreciate the severity of his conduct and beliefs).

231. U.S. GEN. ACCT. OFF., GAO/HRD-92-56, SOCIAL SECURITY: RACIAL DIFFERENCE IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION (Apr. 21, 1992).

232. *Id.* at 47 ("At the ALJ level, the largely unexplained racial difference in allowance rates calls into question the equity of treatment between [B]lack and [W]hite appellants under the DI and SSI programs.").

233. DiCosmo, Hayman & Michman, *supra* note 9, at 84–87 (observing consistent reference to the 1992 study for decades following its publication).

234. *See, e.g.*, N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM. JUST., NORTH CAROLINA TASK FORCE FOR RACIAL EQUITY IN CRIMINAL JUSTICE: REPORT 2020, at 134 (2020) https://ncdoj.gov/wp-content/uploads/2020/12/TRECReportFinal_12132020.pdf (recognizing the necessity of collecting racial data to address inequitable racial disparities in the criminal justice system).

235. Kathryn Genthon & Diane Robinson, *Collecting Race & Ethnicity Data: CPS Data Governance Special Topic*, CT. STATS. PROJECT, Feb. 8, 2021 (identifying the recommended statistical analysis role of the "court's data governance committee").

National Veterans Council for Legal Redress have alleged in lawsuits that the agency has ignored their requests, especially for statistics from the BVA level.²³⁶ To eliminate similar difficulties, I recommend the collection and publication of certain demographic information in all written decisions, including the race of the claimant/appellant.

Specifically, within the VA and any other forum that adjudicates claims relating to racial discrimination, I recommend a “demographic inquiry,” which requires all adjudicators to provide and publish the following information in their written decisions:

1. The self-identified race and gender of the claimant;
2. The self-identified race and gender of the adjudicator;²³⁷
3. The number of alleged discriminatory events and corresponding dates of the events in question;
4. The perceived race and gender of the perpetrator for each corresponding discriminatory event; and
5. The specific victimizing acts involved in each discriminatory event.

Identifying and publishing these demographic facts would enable a better understanding of the nature of discriminatory acts alleged in cases and provide important insight of the success rates and status of discrimination cases in different fora. More importantly, collection and publication of this information would monumentally expand the arsenal of tools to detect and mitigate bias in

236. *Supra* note 72 and accompanying text.

237. This recommendation may be considered controversial, given that many court systems recommend collection of data about judges be entirely voluntary on the part of the judge. *See, e.g.,* YUVRAJ JOSHI, DIVERSITY COUNTS: WHY STATES SHOULD MEASURE THE DIVERSITY OF THEIR JUDGES AND HOW THEY CAN DO IT 24 (Lambda Legal & Am. Const. Soc’y for L. & Pol’y 2017) (discussing voluntary data collection with confidentiality among assessors as a “best practice[]”). The use of standardized definitions of one’s race, such as the categories defined by the U.S. Census, may limit both the adjudicator and the claimant/appellee’s ability to self-identify their race in a personal way. *See, e.g.,* Sowmiya Ashok, *The Rise of the American “Others,”* THE ATLANTIC (Aug. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/08/the-rise-of-the-others/497690/> (describing the challenges of narrow race categories and Census respondents’ perceptions that the categories are inadequate). I still recommend the collection of this data, given the wide array of studies which demonstrate that a judge’s race plays a significant role in the outcome of cases, especially when the judge is White and the party is Black or a member of a racial minority group. *See supra* note 9 and accompanying text (describing racial disparities in case results in both administrative and traditional court contexts).

judicial decisionmaking.²³⁸ It goes without saying that “What gets measured gets managed.”²³⁹ Beyond providing greater support for the reasons and bases underlying judicial decisions, the demographic inquiry can assist in preventing the courts from unintentionally perpetuating the discrimination that formed the basis of the allegation.²⁴⁰

238. For example, if a jurisdiction confirms through outcome analysis by race that Black claimants/appellants assigned to White judges result in disparity in case outcomes, it may be possible to create a smaller pool of diverse judges for random assignment to Black claimants/appellants to increase equitable results. *See generally* Weinberg & Neilsen, *supra* note 9 (discussing the importance of a representative bench).

239. Larry Prusak, *What Can't Be Measured*, HARV. BUS. REV. (Oct. 7, 2010), <https://hbr.org/2010/10/what-cant-be-measured> (citing the maxim oft attributed to Peter Drucker).

240. Genthon & Robinson, *supra* note 235 (sharing the position of the Conference of Chief Justices and the Conference of State Court Administrators that “collect[ing], maintain[ing] and report[ing] court data regarding race and ethnicity . . . enables courts to identify and remedy racial disparities”).

APPENDIX²⁴¹*Results of Hypothesis Tests****Test Results for Hypotheses***

	Predicted Relationship	Results	Test Statistics
<u>All Cases</u>			
<i>H₁</i> : Number of different types of discriminatory events	+	Not supported	
<i>H₂</i> : Perceived lack of support in combat	+	Unable to identify enough relevant cases	
<i>H₃</i> : Discrimination on a military installation base/ship	+	Unable to identify enough relevant cases	
<i>H₄</i> : Pre-enlistment trauma history	-	Supported	$\chi^2(1, 563) = 8.30, p < .01$ $b = -.99, p < .05$
<i>H₅</i> : Adoption of <i>DSM-5</i> criteria	+	Partially supported , not specific to PTSD	$\chi^2(1, 563) = 33.40, p < .001$ $b = 1.09, p = .05$
<i>H₆</i> : Discrimination involving physical assaults	+	Significant chi-square, no longer significant in LR	$\chi^2(1, 563) = 6.88, p < .01$ $b = .58, p < .10$
<u>Race Discrimination Cases Only</u>			
<i>H₇</i> : White v. minority veterans	+	Unable to identify enough relevant cases	
<i>H₈</i> : Discrimination by same-race v. other-race others	+	Unable to identify enough relevant cases	
<i>H₉</i> : Racial integration of the military	+	Unable to identify enough relevant cases	
<u>Sexual Orientation Discrimination Cases Only</u>			
<i>H₁₀</i> : Heterosexual v. LGBT veterans	+	Not supported	
<i>H₁₁</i> : Interrogation about sexual orientation	+	Not supported	
<i>H₁₂</i> : Discharge on the basis of sexual orientation	+	Not supported	
<i>H₁₃</i> : Repeal of 'Don't Ask, Don't Tell'	+	Significant chi-square, no longer significant in LR	$\chi^2(1, 563) = 22.66, p < .001$ $b = .10, p = .81$
<i>H₁₄</i> : Military Sexual Trauma	+	Not supported	
<i>H₁₅</i> : Concealment of sexual orientation	+	Unable to identify enough relevant cases	
<u>Unexpected Findings</u>			
<i>Pro se</i> v. represented	Relationship -		$\chi^2(2, 563) = 18.99, p < .001$ $b = -.77, p < .05$
Number of Mental Health Conditions Claimed (2 v. 1)	+		$\chi^2(2, 563) = 25.90, p < .001$ $b = 1.16, p < .001$
Number of Mental Health Conditions Claimed (3/4 v. 1)	+		$\chi^2(2, 563) = 25.90, p < .001$ $b = .69, p = .06$
PTSD v. other diagnoses	-		$\chi^2(1, 563) = 7.35, p < .01$ $b = -.66, p < .05$

241. Seamone, *supra* note *, at 107.