

# Paving the Road Less Travelled: Structuring Veterans Disability Compensation to Facilitate Readjustment

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## INTRODUCTION

Joe Veteran is a thirty-year-old United States Army veteran with a college degree who left the Army after sustaining a traumatic brain injury (TBI) that caused a range of physical, cognitive, and emotional problems. The Department of Veterans Affairs (VA) compensated Joe generously because he could not work at the time he filed his disability claim. During the six years following the award of disability compensation benefits, Joe marries, has children, and with great effort rehabilitates to a degree that would allow him to work again. Joe considers using his veterans' education benefits to attend law school, but finds out that the value of his disability compensation, tax exemptions, free health care, and other myriad benefits actually eclipses the average salary of a recent law school graduate in his state, meaning Joe would likely have less money if he became a lawyer than if he remained unemployed. VA is indifferent to Joe's choice, so he must choose himself. If Joe does go to school, he will likely lose a sizeable portion of his benefits. Should Joe exchange the safety and comfort of his status as a disabled veteran for the uncertainty of the job market, even with a "go-to-law-school-free" card? Should he risk his ability to support himself and his family by attending school, or should he play it safe and stay comfortably retired at thirty?

Joe's conundrum is one that many veterans who suffer disability face, because the modern disability compensation system was crafted without much regard for education or rehabilitation benefits. The system is at odds with itself, unable to make up its mind whether its overall purpose is one of providing welfare or one of providing rehabilitation. Joe is confused because VA is confused: does it want rehabilitation, re-entry, and contribution from veterans who are identified as disabled, or is it content to continue providing directly for their needs? At the center of this confusion is the disability rating system itself.

The modern veteran Disability Rating System emerged in 1933.<sup>2</sup> It was largely forged through executive order and based on the theory that calculating and replacing expected lost earnings over a veteran's lifetime should be the only purpose for military disability pensions.<sup>3</sup> Supposedly this system would be subjective, insulated from political manipulation, and able to keep veterans happy enough to

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<sup>2</sup> COMM. ON MED. EVALUATION OF VETERANS FOR DISABILITY COMP., INST. OF MED., A 21<sup>ST</sup> CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 100-01 (Michael McGeary et al. eds. 2007).

<sup>3</sup> *Id.* at 101.

protect the morale of America's fighting forces. President Roosevelt hoped that this system would put at ease a depression-weary public that had come to see veterans' pensions as corrupt at best and unmerited at worst.<sup>4</sup> The new system would restore public confidence and eliminate abuse by limiting the award of pensions to veterans who could show two things: (1) the presence of a disability and (2) military service as the cause of the disability.<sup>5</sup>

Eighty-three years later, this "Schedule of Disabilities" for which VA will pay compensation has grown considerably. Presumptive causation has led to many veterans receiving disability compensation for conditions that are likely related to normal aging, while leaving other veterans undercompensated.<sup>6</sup> The current rating schedule, the keel of which was laid down using 1930's economic principles, has become increasingly ill-suited to its purpose of matching a disability with a measurable economic impact on the individual because of changes in both the nature of work and public attitudes toward disability, as well as the emergence of medical conditions unknown at the time the system was conceived.

These same changes have also created an intolerable dissonance between VA's Disability Compensation policy and the other goals of VA.<sup>7</sup> The VA Disability Rating System (Scheduler System) in its present form rewards medical deterioration. Because the rate of compensation increases exponentially according to the severity of a veteran's disability, veterans (and their advocates) have a strong economic incentive to present a disability in the worst light possible. Once an award is made, the same incentive encourages these individuals to make the disability appear always worse and never better. In spite of the robust array of vocational rehabilitation services and education benefits offered to veterans who have been identified as having a disability, for disabled veterans, the choice to make an attempt at re-entry to the workforce can be a frightening one, or one that is simply not worth the effort. While on the one hand VA provides free health care to become healthy, and free education services to find work, on the other it pays handsomely those who remain unemployed and gives pay raises for becoming sicker.

These growing dysfunctions create a danger to the veteran disability compensation system that has historically emerged when the system has appeared to the public as excessive and corrupt: erosion of public support, sharp correction in the form of austerity-like cuts to veterans' benefits, and subsequent unrest between veterans and the broader polity.<sup>8</sup> Additionally, the dissonant messages a veteran receives from VA's disability compensation arm and education and rehabilitation arm may also create a damaging state of confusion and fear of what life after the military can or should bring. Avoiding these problems requires a paradigm shift: the re-invention of veterans disability compensation as a tool to facilitate rehabilitation, improved health, and productive re-entry to civilian life.

In this Article, I explain why the VA Disability Rating System (Scheduler Rating System) used to compensate veterans who have suffered disability as a result of their military service no longer achieves the goals it was introduced to advance. I identify early symptoms of skepticism in the polity about a system that rewards illness and trace the wellspring of these nascent doubts to the structure of

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<sup>4</sup> See U.S. DEP'T OF VETERANS AFFAIRS, BOARD OF VETERANS APPEALS, <https://www.bva.va.gov> (last visited, June 15, 2023).

<sup>5</sup> Exec. Order No. 6089, Part I, I(a) (1933).

<sup>6</sup> Daniel M. Gade, *A Better Way to Help Veterans*, 16 NATIONAL AFFAIRS 53, 58 (2013). See Douglass Mossman, *At the VA, It Pays to be Sick*, THE PUBLIC INTEREST 35 (Winter 1994); David Dobbs, *The Post Traumatic Stress Trap*, SCI. AM., Apr. 2009, 64-69.

<sup>7</sup> Compare 42 U.S.C. § 12101-12213 (2015) with 38 U.S.C. § 1151-1153 (2015). See generally Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Policy*, 76 TEX. L. REV. 1003, 1005 (1998).

<sup>8</sup> See discussion *infra* Part IV.

the Scheduler Rating System. I also explain that the best way to meet the public purposes upon which the disability compensation system was premised is to re-invent veterans disability compensation as a tool to facilitate rehabilitation, instead of as a means to calculate and directly replace lost income over a lifetime. Ultimately, I propose a system in which monetary compensation is viewed as a means to an end, in which several alternative forms of compensation are combined and integrated into existing readjustment programs. Such a system would offer a “compensation tool bag,” using different approaches to achieve a greater chance of successful readjustment. Compensation, therefore, becomes a method of achieving empowerment and independence whenever that is practical, rather than thinly veiled welfare.<sup>9</sup>

I proceed as follows. In Part II, I summarize the historical problems that the Scheduler Rating System was introduced to combat: inappropriately compensated veterans and the collapse of public support for veterans’ pensions that occurred in the 1920s and 1930s. Veterans’ benefits have existed in some form in the United States from the Revolutionary War forward.<sup>10</sup> Early systems had few objective standards and weak, inconsistent administration, which left the system vulnerable to corruption and excess.<sup>11</sup> Because the pensions were not seen as meritoriously awarded, public support for the benefit collapsed.<sup>12</sup> A new system was needed.

The modern Scheduler Rating System emerged in 1933 and was largely forged through executive order.<sup>13</sup> It was based on the theory that calculating and replacing expected lost earnings over a veteran’s lifetime should be the only purpose for military disability pensions.<sup>14</sup> Supposedly this system would be objective and eliminate abuse by limiting the award of pensions to veterans who could show two things: that they suffered disabilities that were incurred in or aggravated by active service.<sup>15</sup>

In Part III, I explain why architects of the new system chose to compensate lost economic output and rejected other purposes, such as compensating pain and suffering and the “thanks of a grateful nation” represented by the old gratuity system. When the Scheduler Rating System was crafted, calculating an individual’s lost income was relatively easy. Replacing economic loss was seen as a way to “objectify” the system, such that only truly disabled individuals with a calculable economic loss would be compensated. I further explain how this system expanded, broadened, and then became entrenched under the influence of the massive World War II cohort of veterans and their lobbying organizations.

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<sup>9</sup> A highly laudable attempt is underway to clarify and update the Scheduler Rating System. *See generally* William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA’s Regulation Rewrite Project*, 61 ADMIN. L. REV. 407, 409-410 (2009) (describing the history and purpose of VA’s Rewrite Project); William A. Moorman & William F. Russo, *Serving Our Veterans Through Clearer Rules*, 56 ADMIN. L. REV. 207, 208-10 (2004) (describing the origins of VA’s Rewrite Project). This effort, however, cannot reconcile the incompatibility of the Scheduler Rating System’s purpose with the changes that have occurred in society since the Scheduler Rating System was crafted. *See infra* Part IV.

<sup>10</sup> James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 139 (2011) [hereinafter Ridgway, *The Splendid Isolation Revisited*] (providing overview of pension benefits authorized to incentivize service during the Revolutionary War).

<sup>11</sup> *Id.* at 146-47.

<sup>12</sup> *Id.* at 169-70 (citing WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* viii (1918)).

<sup>13</sup> *Id.* at 179 (citing William P. Dillingham, *Federal Aid to Veterans 1917-1941* 38, 74-75, 79 (1952)).

<sup>14</sup> *Id.* at 170 (citing DAVIS R.B. ROSS, *PREPARING FOR ULYSSES: POLITICS AND VETERANS DURING WORLD WAR II* 21, 26 (1969)).

<sup>15</sup> Exec. Order No. 6089, Part 1(a) (1933) (Veterans Regulation No. 1).

In Part IV, I present evidence that the chosen model is no longer practical for three reasons. The first reason is that the Scheduler Rating System disincentivizes medical, occupational, and personal improvement on the part of a veteran receiving compensation and rewards deterioration, finding new disabilities, and finding new symptoms of old disabilities. The Scheduler Rating System in its present form rewards medical deterioration. Because the rate of compensation increases exponentially according to the severity of a veteran's disability, veterans (and their advocates) have a strong economic incentive to present a disability in the worst light possible.<sup>16</sup> Once an award is made, the same incentive encourages these individuals to make the disability appear always worse and never better. The second reason is that calculating lost income in an information and service economy is problematic because of the changed nature of "work" and changed concepts of "disability." Finally, the third reason is that, as administered, the Scheduler Rating System undermines the efforts of the medical and readjustment divisions of VA and is dissonant with the broader body of disability policy.<sup>17</sup> In spite of the robust array of vocational rehabilitation services and education benefits offered to veterans who have been identified as having a disability, for disabled veterans the choice to make an attempt at re-entry to the workforce can be a frightening one, or one that is simply not worth the effort. VA provides free health care to become healthy, and free education services to find work, but pays handsomely those who remain unemployed, and gives pay raises for becoming sicker.

In Part V, I propose an alternative to the current system that has a primary purpose of readjustment and uses three compensation tools as a means to effect that purpose. These tools are lump-sum payments, income guarantees, and monthly payments. I will explain how the first two options can be used to conserve resources and facilitate readjustment, using the experiences of the United Kingdom, Canada, and Australia as guides. I will then describe how to use monthly payments efficiently to serve veterans for whom readjustment is not possible. In part VI, I briefly conclude.

## I. HISTORICAL DANGERS OF INEFFECTIVE VETERANS' DISABILITY PENSIONS

As legal scholar James Ridgway has noted, because the nature of veterans' benefits at any particular time is related to the political power of veterans in the electorate, veterans' programs must be understood through the lens of the political environment of the time.<sup>18</sup> This section explores the political and economic conditions that gave rise to the Scheduler Rating System and the concerns that the architects of the system created it to address.

### A. Before the Great War

Before World War I, no consistent schema for compensating military personnel who were injured during their military service existed, because such benefits were not viewed as compensation for injury, but as a "gratuity."<sup>19</sup> The gratuity classification served the highly utilitarian purpose of maintaining a loyal fighting force.<sup>20</sup> In contrast to the modern conception of veterans' benefits as an entitlement, the gratuity benefits appeared to have been awarded for the purpose of encouraging service and keeping the peace, rather than as compensation for lost income. During the Revolutionary War, the Continental

<sup>16</sup> Gade, *supra* note 6, at 62-64 (2013); Mossman, *supra* note 6, at 37; Dobbs, *supra* note 6, at 68.

<sup>17</sup> Compare 42 U.S.C. §§ 12101-213 (2012), with 38 U.S.C. §§ 1151-53 (2012); see also Diller, *supra* note 7, at 1005-06 (contrasting the Americans with Disabilities Act and Social Security Administration programs).

<sup>18</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 168.

<sup>19</sup> *Id.* at 162 (citing *Daily v. United States*, 17 Ct. Cl. 144, 148 (1881)).

<sup>20</sup> *Id.* at 139.

Congress promised soldiers a pension if they served to the war's conclusion.<sup>21</sup> This first pension system was copied from the British with one significant difference: in addition to providing pensions for any soldiers injured or disabled during war, the system promised to provide service pensions to compensate all personnel, from the rank of private to general, instead of just officers.<sup>22</sup> The underlying purpose may have been to encourage service at a time when the very existence of the government making the promise of payment was contingent upon soldiers remaining in rank and file long enough to win the war.<sup>23</sup>

In the years following the Revolutionary War, support for veterans' pensions waned quickly.<sup>24</sup> Some members of the Continental Congress worried that the government simply could not afford to pay the pensions, and others feared that pensions would lead to the establishment of a "hereditary, military aristocracy"—a special class of citizen reminiscent of the European powers the colonists sought to distinguish themselves from.<sup>25</sup> The pension issue lingered longer than the Continental Congress lasted. Under the Constitutional government, Congress did not fund a general service pension for Revolutionary War veterans until 1818, by which time most of the Revolutionary War veterans had died.<sup>26</sup>

The basic arrangement of the military pension as a gratuity persisted through the Civil War. Sometimes the form of the gratuity changed, at times taking the form of a land grant or warrant, but its basic nature endured: it was not compensation for loss but rather a gift "from a grateful nation."<sup>27</sup> Because this system did not require a specific loss, the criteria for receiving a pension were highly subjective, often decided by a local judge, and land grants or warrants could be sold to an investor for cash.<sup>28</sup> The Civil War produced a very large cohort of veterans, and, coupled with loose standards of administration, the costs of the program escalated quickly, such that by the last years of the 19<sup>th</sup> century, veterans' benefits accounted for between thirty and forty percent of the federal budget.<sup>29</sup> Not coincidentally, the Sixteenth Amendment passed in 1913, giving the federal government the power to collect income taxes.<sup>30</sup>

## B. After the Great War

The immediate effect of World War I on the veteran population was to expand it by another 4.7 million—approximately 4.6 percent of the nation's population.<sup>31</sup> These men and a small number of women had experienced the first modern war in which tanks replaced horses, machine guns replaced picket lines, and chemical weapons created unprecedented lifetime disabilities for which no pre-industrial analog existed.<sup>32</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; Sung Won Kang & Hugh Rockoff, *After Johnny Came Marching Home: The Political Economy of Veterans' Benefits in the Nineteenth Century* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 13223, 2007), <https://www.nber.org/papers/w13223>.

<sup>23</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 139-40 ("It is not clear whether this largess was motivated by egalitarian ideals of the emerging democracy or desperation by a rebel government that had little to offer but promises. Regardless, these promises offered crucial incentives to those patriots whose resolve may have been wavering during the bleakest months of the conflict . . .").

<sup>24</sup> *Id.* at 140.

<sup>25</sup> *Id.* at 140-41.

<sup>26</sup> *Id.* at 142.

<sup>27</sup> *Id.* at 150, 172.

<sup>28</sup> *Id.* at 149-50.

<sup>29</sup> *Id.* at 168-69; see U.S. DEP'T OF VETERANS AFF., OFFICE OF PUB. AFF., AMERICA'S WARS: FACT SHEET (2017) [hereinafter AMERICA'S WARS: FACT SHEET].

<sup>30</sup> U.S. CONST. amend. XVI; Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 169.

<sup>31</sup> U.S. CENSUS BUREAU, HISTORICAL NAT'L POP. ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (2000), <https://www2.census.gov/programs-surveys/popest/tables/1900-1980/national/totals/popclockest.txt> (listing population as over 103,000 in 1918); AMERICA'S WARS: FACT SHEET, *supra* note 29.

<sup>32</sup> Exposure to mustard gas and chemical warfare created long-lasting disability in veterans of World War I. See ROBERT HARRIS & JEREMY PAXMAN, *A HIGHER FORM OF KILLING: THE SECRET STORY OF CHEMICAL AND BIOLOGICAL WARFARE* 20-21 (1982) (noting that

Congress was acutely aware of the size of the cohort, and the World War I veterans' legislation, passed in 1917, referred to disability pay as "compensation" instead of "pension."<sup>33</sup> This change in language reflected a belief, born of the Civil War experience, that Congress could not necessarily limit generosity but could control compensation for loss.<sup>34</sup> The 1917 legislation restricted disability benefits in the following three ways: (1) by requiring medical documentation that a veteran's disability was related to service; (2) by requiring proof that the disability manifested within one year of discharge from the military; and (3) by requiring that the veteran file the claim within five years of discharge from the military.<sup>35</sup>

Conspicuously missing from the legislation was any sort of gratuitous payment for all veterans, but newly chartered Veterans Service Organizations (hereafter collectively "VSOs") such as the American Legion quickly mobilized and lobbied for one.<sup>36</sup> Over presidential veto, Congress passed legislation creating a universal payment in 1924.<sup>37</sup> The payment provided a "bonus," which consisted of a payment of one dollar per day of service, or one dollar and twenty-five cents per day, if service was overseas, to veterans whether or not they were injured.<sup>38</sup> If the bonus payment exceeded fifty dollars, the payment came in the form of a certificate that could not be redeemed until 1945; therefore, in practice, most veterans did not receive their bonus at a time that would facilitate re-entry to the labor market or be otherwise useful to them.<sup>39</sup> The 1924 legislation also codified the disability compensation system in the 1917 legislation, including the first schedule of disabilities, but only for World War I veterans, leaving a patchwork quilt of benefits systems serving veterans of different conflicts.<sup>40</sup>

Aristotle teaches that "poverty is the parent of revolution and crime."<sup>41</sup> Veterans were not spared the poverty and desperation of the Great Depression. In May 1932, destitute veterans rode cattle cars to Washington, D.C. by the tens of thousands and demanded Congress pay veterans' bonuses immediately instead of in 1945.<sup>42</sup> These "Bonus March" veterans remained mostly orderly, but Congress did not deliver the payment they demanded, causing tension to increase.<sup>43</sup> In July 1932, an altercation on Pennsylvania Avenue killed two veterans and injured one police officer.<sup>44</sup> The District of Columbia's Commissioners asked President Hoover to deploy the United States Army to disperse the protesters, and Hoover complied.<sup>45</sup> Army Chief of Staff General Douglas MacArthur, assisted by aides Dwight Eisenhower and George Patton (both majors at the time), deployed tear gas and set the veterans' "shanty town" on fire.<sup>46</sup>

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mustard gas was referred to by British World War I veterans as "frightfulness," and possessed a unique "demonology" among them); MICHAEL FREEMANTLE, *GAS! GAS! QUICK, BOYS!: HOW CHEMISTRY CHANGED THE FIRST WORLD WAR* (2012). World War I veterans were also the first cohort in whom posttraumatic stress disorder (then called "shell shock") was studied. See also FIONA REID, *BROKEN MEN: SHELL SHOCK, TREATMENT AND RECOVERY IN BRITAIN 1914-30* (2010) [hereinafter REID, *BROKEN MEN*].

<sup>33</sup> Act of Oct. 16, 1917, Pub. L. No. 65-90, 40 Stat. 398, 405 (amending an Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department).

<sup>34</sup> James D. Ridgway, *A Benefits System for the Information Age*, 7 *VETERANS L. REV.* 36, 38 (2015) [hereinafter Ridgway, *Information Age*]; Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 170.

<sup>35</sup> Pub. L. No. 65-90, §§ 303, 306, 309, 40 Stat. 398, 405-07 (1917).

<sup>36</sup> EDWARD HUMES, *OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM*, 14-15 (2006) [hereinafter HUMES, *OVER HERE*].

<sup>37</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 171; World War Veterans' Act, Pub. L. No. 68-242, 43 Stat. 607 (1924).

<sup>38</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 171.

<sup>39</sup> *Id.*

<sup>40</sup> World War Veterans' Act, Pub. L. 68-242, §§ 200, 202, 43 Stat. 607, 615, 618-21 (1924).

<sup>41</sup> ARISTOTLE, *POLITICS* 32 (Benjamin Jowett trans., Batoche Books 1999) (c. 350 B.C.E.).

<sup>42</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 177.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 177-78.

<sup>46</sup> *Id.* at 178. Compare HUMES, *OVER HERE*, *supra* note 36, at 16-17 (stating that Hoover refused to meet with the veterans, referred to them as "assassins," and ordered the dispersal of the protest), with ROBERT S. MCELVAINE, *THE GREAT DEPRESSION: AMERICA, 1929-1941*

The Bonus March did not win early payments for the veterans, but it bore substantially on several important changes in the next year. First, the image of desperate veterans being forced at gunpoint from flaming tents helped secure Franklin Delano Roosevelt's election by providing negative press to an already faltering President Hoover.<sup>47</sup> Second, the disaster appeared to influence Roosevelt's belief that veterans' benefits required strict oversight and that swift action was needed to prevent further disorder and cost escalation, both of which could interfere with New Deal programs and threaten the nation's fragile economic and domestic security conditions.<sup>48</sup>

## II. REPLACING CALCULATED LOST INCOME

The Scheduling Rating System, conceived as a universal disability compensation system to replace those that came before, was the remedy to the bloated patchwork quilt.<sup>49</sup> The Scheduling Rating System therefore reflects the economic, social, and political conditions present prior to 1933.<sup>50</sup> These conditions included a deeply depressed manufacturing and agricultural economy, domestic unrest caused by widespread poverty and unemployment, and sharp disagreement among the three branches of government about how to remedy the nation's problems. Veterans' benefits were one of many government services that President Roosevelt sought to reform as part of the public mandate he was elected to implement.<sup>51</sup> In his first 100 days in office, President Roosevelt negotiated the passage of the Economy Act of 1933,<sup>52</sup> which repealed most of the existing laws governing veteran disability compensation and pensions.<sup>53</sup> The Act granted President Roosevelt the power to create a new veterans' disability compensation system by executive order, provided he did so within two years.<sup>54</sup> It also prohibited judicial review of veterans' benefits decisions.<sup>55</sup> But veterans' benefits were only a piece of the Economy Act, the stated purpose of which was "to maintain the credit of the United States Government."<sup>56</sup>

The disaster of the Bonus March, coupled with a strong electoral mandate, gave President Roosevelt bargaining high ground on veterans' issues, which he used to obtain the power to create a benefits system in isolation from congressional and judicial input.<sup>57</sup> President Roosevelt did not like the concept of special benefits for veterans and would have preferred to provide services to disabled veterans through welfare programs that were aimed at the broader polity.<sup>58</sup> President Roosevelt sought to avoid heavy Congressional involvement in crafting the system and judicial review of benefits decisions.<sup>59</sup> Having removed these barriers to reform, President Roosevelt issued over forty executive orders, and,

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94 (1993) (stating that Hoover did not order the Army to disperse the bonus marchers; rather, MacArthur disobeyed orders and acted unilaterally in dispersing the crowd). Who ordered the dispersal of the crowd is of less importance than the impact the event had on veterans and on the forthcoming election. Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 178.

<sup>47</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 178.

<sup>48</sup> *See id.* at 179-80.

<sup>49</sup> *Id.* at 179 (noting that the Economy Act of 1933 "repealed most of the existing patchwork of veterans' benefits laws").

<sup>50</sup> Ridgway, *Information Age*, *supra* note 34, at 38 (noting that, because in 1933 the World War I system was the "prevailing system," it is the model for the current system, "most major features of [which] can be traced back to the laws created for the first World War").

<sup>51</sup> *See* Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 179.

<sup>52</sup> Act of Mar. 20, 1933, Pub. L. No. 73-2, 48 Stat. 8.

<sup>53</sup> *See* James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 1, 12 (2013) [hereinafter Ridgway, *Recovering an Institutional Memory*].

<sup>54</sup> Pub. L. No. 73-2, § 19, 48 Stat. 8, 12.

<sup>55</sup> Pub. L. No. 73-2, § 5, 48 Stat. 8, 9; Ridgway, *Recovering an Institutional Memory*, *supra* note 53, at 21.

<sup>56</sup> Pub. L. No. 73-2, 48 Stat. 8, 8.

<sup>57</sup> *See* Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 178-80.

<sup>58</sup> *Id.* at 182-84.

<sup>59</sup> *See* PAUL C. LIGHT, FORGING LEGISLATION 61 (1992) (describing negative reaction of Congress).

with pen strokes rather than bargains with Congress and the VSOs, cast off the gratuitous pension concept completely.<sup>60</sup>

The new system cut payments to many veterans and created the substantive definition of veterans' benefits that is still in use today.<sup>61</sup> The decision to craft the benefits system in this manner had lasting repercussions but was likely seen by the President as necessary under the dire circumstances of the time. Congress, under pressure from the VSOs, acted quickly to mitigate the blow dealt to suddenly uncompensated veterans by passing the Independent Offices Appropriations Act of 1935.<sup>62</sup> The Act passed over President Roosevelt's veto and restored many benefit payments that had been cut, but the Act did not substantively change the new definition of benefits or how to qualify for them.<sup>63</sup> However incidental the task of creating a new veterans' disability compensation system was to President Roosevelt's ultimate goal of redirecting the American economy, the orders he issued became the bedrock of VA.<sup>64</sup>

President Roosevelt's system appears to have sought to eliminate the problem of subjectivity by quantifying disability. The quantification was done by VA, which promulgated rules defining what specific medical conditions were compensable and at what level.<sup>65</sup> The system allowed VA to classify the severity of a disability by assigning the disability a rating of zero percent to 100 percent.<sup>66</sup> For each assignable percentile rating, an executive order specified a dollar amount to be paid.<sup>67</sup> In determining which value to assign to each medical condition, the Roosevelt Administration seems to have considered what the estimated impact on lifetime earnings would be for a particular individual.

In 1930, and presumably also at the beginning of President Roosevelt's presidency, "work" for most people meant "physical labor."<sup>68</sup> The system President Roosevelt created in 1933 therefore likely assumed employment was a physical undertaking. Each ten-percent rating assigned to a disability increased the payment of benefits according to a straight linear function.<sup>69</sup> Physical disabilities such as the loss of hearing, loss of an extremity, or paralysis were relatively easy to correlate with lost work because the manner in which the loss interfered with production was readily observable and quantifiable: the output of a person on an assembly line could be measured one-handed and two-handed, and the difference in output correlated with income potential. The approach focused on the symptoms and manifestations of a disability, relating them to the work that was typical of former military personnel in 1933. Thus, a condition where a range of symptoms was possible might have been evaluated at a different level, depending on what symptoms were present and how severe they were, because the goal was to determine and then replace lost income.<sup>70</sup>

<sup>60</sup> Exec. Order No. 6093 (1933) (Veterans Regulation No. 5); Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 179.

<sup>61</sup> Much of the text of title 38 is traceable directly to Roosevelt's executive orders. Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 181 & n.306.

<sup>62</sup> Independent Offices Appropriation Act, Pub. L. No. 73-141, 48 Stat. 509 (1934).

<sup>63</sup> *Id.*

<sup>64</sup> See Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 181.

<sup>65</sup> See Exec. Order No. 6089 (1933) (Veterans Regulation No. 1); Exec. Order No. 6098 (1933) (Veterans Regulation No. 10); Exec. Order No. 6099 (1933) (Veterans Regulation No. 11).

<sup>66</sup> Exec. Order No. 6089 § II (1933) (Veterans Regulation No. 1).

<sup>67</sup> *Id.*; see also Exec. Order No. 6156 (1933) (Veterans Regulation No. 1(a)).

<sup>68</sup> In 1930, the majority of the national labor force was employed in agriculture, forestry and fishing, mining, manufacturing, construction, transportation, public utilities, and trades. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART 1, 139 (Bicentennial ed. 1975),

[https://www2.census.gov/library/publications/1975/compendia/hist\\_stats\\_colonial-1970/hist\\_stats\\_colonial-1970p2-start.pdf](https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p2-start.pdf).

<sup>69</sup> Exec. Order No. 6156, Part I(II)(a-j) (1933) (paying lower pension rates in Part II for disabilities incurred during peacetime service than in Part I for disabilities incurred during wartime service).

<sup>70</sup> Exec. Order No. 6091 (1933) (Veterans Regulation No. 3) (instructing the Administrator of Veterans' Affairs to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination or injuries . . . based, as far as practicable, upon

Mental health was a nascent field when President Roosevelt created the Scheduler Rating System. In 1933, the medical profession lacked a uniform way to describe and diagnose mental illnesses and disorders.<sup>71</sup> The rating schedule reflected this lack, with mental illness requiring profound manifestations—usually so severe that they required institutional care—before they could be classified as a compensable disability.<sup>72</sup> The inclusion of a comprehensive schema for evaluating cognitive and behavioral disorders was not possible in 1933 because of the absence of solid medical criteria for evaluating such conditions, and also because prior to the discovery of modern psychotropic medications, mental health treatment consisted almost exclusively of institutional care.<sup>73</sup> This very undesirable treatment would likely have served to discourage veterans from complaining to a doctor of mental health conditions.

President Roosevelt’s system did not strip veterans of their unique political identity in the way that rolling services to veterans into generalized social programs might have, and as a consequence, veterans, through the VSOs, were able to influence future legislation and fundamentally alter the system’s character.<sup>74</sup> When World War II ended, the largest cohort of veterans in history returned home and, through the VSOs, began lobbying for a bonus not unlike the World War I bonus.<sup>75</sup> Disagreements between the different VSOs about the form the bonus should take and the reluctance of Congress to pay such a gratuity-reminiscent award in cash led to the bonus primarily taking the form of education benefits,<sup>76</sup> a plan that simultaneously dealt with the very real need to find employment for the millions of military personnel who were de-mobilized at the end of the war.<sup>77</sup> The resultant legislation was the Servicemen’s Readjustment Act of 1944, popularly called “The G.I. Bill.”<sup>78</sup>

The G.I. Bill was an accidental success, beginning its legislative history as a gratuity and ending as the most successful labor re-entry program in the nation’s history.<sup>79</sup> Over seven million World War II veterans entered educational and training programs using their G.I. Bill benefits.<sup>80</sup> There are fourteen Nobel Prize and twenty-four Pulitzer Prize winners,<sup>81</sup> two presidents,<sup>82</sup> three Supreme Court Justices,<sup>83</sup>

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the average impairments of earning capacity resulting from such injuries in civil occupations”).

<sup>71</sup> The first such method was the DSM-I. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952); Gerald N. Grob, *Origins of DSM-I: A Study in Appearance and Reality*, 148 AM. J. PSYCHIATRY 421, 424 (1991) [hereinafter Grob, *Origins of DSM-I*] (noting that prior to the DSM-I, there was no standard system of classification).

<sup>72</sup> See Exec. Order. No. 6094 (1933) (Veterans Regulation No. 6).

<sup>73</sup> See Robert Whitaker, *The Triumph of American Psychiatry: How It Created the Modern Therapeutic State*, 17 EUR. J. PSYCHOTHERAPY & COUNSELLING 326, 333 (2015) [hereinafter Whitaker, *Triumph of American Psychiatry*] (“the number of people in America’s mental hospitals jumped from 31,973 people in 1880 to 419,374 patients in 1940”).

<sup>74</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 173.

<sup>75</sup> *Id.* at 184-85.

<sup>76</sup> *Id.* at 185.

<sup>77</sup> See generally HUMES, OVER HERE, *supra* note 36.

<sup>78</sup> Pub. L. No. 78-346, 58 Stat. 284 (codified at 38 U.S.C. § 3701); Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 185; accord SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION 17-22 (2005) [hereinafter METTLER, SOLDIERS TO CITIZENS].

<sup>79</sup> See METTLER, SOLDIERS TO CITIZENS, *supra* note 78, at 23 (noting that the G.I. Bill was more successful than its architects imagined).

<sup>80</sup> PRESIDENT’S COMM’N ON VETERANS’ PENSIONS, VETERANS’ BENEFITS IN THE U.S.: A REPORT TO THE PRESIDENT 254 (1956) [hereinafter PRESIDENT’S COMM’N], [https://www.va.gov/vetdata/docs/Bradley\\_Report.pdf](https://www.va.gov/vetdata/docs/Bradley_Report.pdf) (reporting that, since August 1950, the number of veterans utilizing training and education programs under the G.I. Bill had risen from 7.1 to 7.8 million).

<sup>81</sup> HUMES, OVER HERE, *supra* note 36, at 6.

<sup>82</sup> Presidents Gerald Ford and George H.W. Bush were G.I. Bill beneficiaries. METTLER, SOLDIERS TO CITIZENS, *supra* note 78, at 163.

<sup>83</sup> Chief Justice William H. Rehnquist and Justices John Paul Stevens and Byron R. White were G.I. Bill beneficiaries. *Id.*

a dozen senators,<sup>84</sup> and countless teachers, scientists, doctors, engineers, artists,<sup>85</sup> lawyers, nurses, businesspersons, and civic leaders<sup>86</sup> who earned their undergraduate degrees using G.I. Bill funding.<sup>87</sup> The return on investment for the United States was profound. The G.I. Bill created the backbone of America's middle class in the latter half of the 20th century, and supplied the country with some of its most accomplished scientists, politicians, teachers, lawyers, doctors, and engineers.<sup>88</sup> No wonder veterans of this era were such a powerful political demographic; they were better educated and more economically successful than non-veterans, and a majority credited their military service and the G.I. Bill with making them that way.<sup>89</sup>

Yet the G.I. Bill, by creating a program of benefits oriented around rehabilitation and re-entry, also created conflict. The Disabled American Veterans (“DAV”) and several other major VSOs initially criticized the G.I. Bill on the grounds that it would distract from the mission of serving disabled veterans, setting up the first example of dissonance between the re-adjustment and education missions of VA and its purpose of compensating lost income potential.<sup>90</sup> While the American Legion lobbied for the G.I. Bill, DAV lobbied to instead increase disability compensation and make it easier to obtain.<sup>91</sup>

DAV reasoned that a rating of less than 100 percent assumed that the veteran had the ability to work.<sup>92</sup> DAV lobbied for and received a substantial increase for the 100 percent rating to reflect the expectation that the veteran in receipt of such a rating could not work at all.<sup>93</sup> Because of these later changes to the Scheduler Rating System, the largest jump in monetary compensation now exists between the 90 percent and 100 percent ratings.<sup>94</sup>

Additionally, DAV lobbied to empower VA to combine multiple disabilities (each independently rated less than 100 percent) according to a formula in order to reach the 100 percent rating.<sup>95</sup> The formula is not simply additive, attempting instead to determine whether the disabilities together render the veteran unable to work.<sup>96</sup> DAV also lobbied for a mechanism to allow a veteran to receive an extra-schedular rating of 100 percent if the veteran presents without the proper symptoms to achieve that

<sup>84</sup> HUMES, OVER HERE, *supra* note 36, at 6. John Glenn was a G.I. Bill beneficiary. METTLER, SOLDIERS TO CITIZENS, *supra* note 78, at 163. In addition to service as a Senator, he was the first human to orbit the earth and, at age seventy-seven, became the oldest human in space, volunteering to ride the space shuttle so NASA could study the effect of weightlessness on geriatric physiology, which aided medicine's understanding of the relationship between aging and bone-density loss. See Nola T. Tillman, *John Glenn: 1st American to Orbit Earth, Oldest Man in Space*, SPACE (December 8, 2015), <https://www.space.com/17263-john-glenn-astronaut-biography.html>.

Other Senators who were G.I. Bill beneficiaries include Dale Bumpers, Ernest Hollings, Daniel Inouye, Spark Matsunaga, George Mitchell, Bob Dole, Alan Simpson, and Daniel Patrick Moynihan. METTLER, SOLDIERS TO CITIZENS, *supra* note 78, at 163. Many members of the House of Representatives also used the G.I. Bill. *Id.* For comments from Senator Moynihan regarding his G.I. Bill use, see *Daniel Patrick Moynihan: In His Own Words*, THINK TANK WITH BEN WATTENBERG (2004), <http://www.pbs.org/thinktank/transcript1108.html>.

<sup>85</sup> Johnny Cash, Harry Belafonte, Ossie Davis, Clint Eastwood, Paul Newman, Jonathan Winters and Walter Matthau were all G.I. Bill beneficiaries. METTLER, SOLDIERS TO CITIZENS, *supra* note 78, at 163.

<sup>86</sup> Civil rights leaders Medgar Evers and Hosea Williams were G.I. Bill beneficiaries. Suzanne Mettler, *How the G.I. Bill Built the Middle Class and Enhanced Democracy*, SCHOLARS STRATEGY NETWORK (2012), [http://www.scholarsstrategynetwork.org/sites/default/files/ssn\\_key\\_findings\\_mettler\\_on\\_gi\\_bill.pdf](http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_mettler_on_gi_bill.pdf).

<sup>87</sup> HUMES, OVER HERE, *supra* note 36, at 6 (noting the hundreds of thousands of professionals of all occupations who were able to have successful careers due to the G.I. Bill).

<sup>88</sup> *Id.* at 5-6.

<sup>89</sup> PRESIDENT'S COMM'N, *supra* note 80, at 90-96.

<sup>90</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 184.

<sup>91</sup> *Id.* at 184-85.

<sup>92</sup> See discussion *infra* note 70.

<sup>93</sup> See *id.*

<sup>94</sup> 38 U.S.C. §§ 1114, 1134 (2012).

<sup>95</sup> Act of Sept. 2, 1958, Pub. L. No. 85-857, § 357, 72 Stat. 1125 (codified as amended at 38 U.S.C. § 1157 (2012)); accord 41 Fed. Reg. 11,291, 11,293 (Mar. 10, 1976) (codified at 38 C.F.R. § 4.25 (2018)).

<sup>96</sup> See 38 C.F.R. § 4.16(a) (2018) (listing schedular requirements for total disability rating based on individual unemployability).

rating for a disability or combination of disabilities, but is nevertheless unable to work.<sup>97</sup> For such a veteran, payment continues as long as he or she remains unfit for work.<sup>98</sup> While these policies have benefited seriously disabled veterans, the ease with which fast and easy access to money has been made available to veterans identified as disabled has eroded the ability of the education and rehabilitation arms of VA to achieve their goals by offering some veterans a stable income that does not require hard work.

Thus, the Scheduling Rating System was crafted mainly through President Roosevelt's executive orders at a time when the economy had a strong basis in agriculture and manufacturing, work was considered a mostly physical undertaking, and psychiatry had yet to achieve full recognition as a legitimate field of medicine. The system was designed to replace calculable lost income due to decreased capacity to work, paying veterans enough to keep the peace while eliminating the perceived excess, waste, and fraud of the previous systems. The system was designed by President Roosevelt, was not subject to Congressional input, and its decisions would be made free from judicial review for several decades.<sup>99</sup> Over time the system grew, ultimately exceeding the scope of the "excessive" systems it was put into place to combat.

### III. WHY THE REMEDY FAILS

The purpose of the 1933 system—replacing calculable lost income—is no longer an achievable purpose for most disabled veterans for three reasons. First, the Scheduling Rating System disincentivizes disabled veterans from re-entering the labor market. Second, calculating lost income is far more problematic in 2018 than it was in 1933 because of changes in the nature of "work" and "disability," and the advent of modern psychiatry. Finally, the Scheduling Rating System undermines VA's health care and readjustment missions, and runs contrary to federal policy empowering persons with disabilities to work.

#### A. Disincentivizing Re-Entry to the Labor Market

By replacing lost income directly, the Scheduling Rating System incentivizes unemployment and disincentivizes employment, thus decreasing the chances that a veteran who is identified as disabled will re-enter the work force. This effect is damaging in three ways. First, it is damaging to veterans because some veterans will not realize their full potential due to lack of incentive to improve. Second, it is damaging to society because the record numbers of veterans who are identified as disabled are not contributing as much as they could to the national economy or their communities. Finally, it is damaging to VA because it exposes VA to the possibility of a future collapse of public support.

##### 1. *The Scheduling Rating System is a barrier to veteran self-improvement.*

The disincentive to work inherent in the Scheduling Rating System causes some veterans to lead less fulfilling lives than they could. Classical human motivation theory ("Maslow's Hierarchy") arranges human needs in a hierarchy of "pre-potency," or predominance.<sup>100</sup> To satisfy a new need, a person must first satisfy the previous, more predominant levels of need.<sup>101</sup> The simplest expression of this hierarchy, upon which most contemporary rehabilitation psychology rests, creates five levels of

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<sup>97</sup> *Id.* § 4.16(b).

<sup>98</sup> *Id.* § 4.16(a).

<sup>99</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 135-36.

<sup>100</sup> A.H. Maslow, *A Theory of Human Motivation*, 50 *PSYCHOLOGICAL REV.* 370, 370 (1943).

<sup>101</sup> *Id.*

needs.<sup>102</sup> These are (1) physiological needs, (2) safety needs, (3) love needs, (4) esteem needs, and (5) self-actualization needs.<sup>103</sup> This theory requires, for example, that a person's need for food and water (physiological needs) be met before he or she will attempt to meet the needs for safety and security.<sup>104</sup>

Working provides people with the esteem needs of achievement and attainment of real capacity.<sup>105</sup> By replacing lost income contingent on a veteran not working, and by increasing compensation when a veteran identifies new disabilities, the Scheduler Rating System places a significant barrier in front of meeting esteem and self-actualization needs. Satisfaction of esteem needs results in feelings of self-confidence, worth, and being "necessary in the world."<sup>106</sup> Failure to satisfy these needs when the prior pre-potent needs are met leads to feelings of inferiority, helplessness, and weakness.<sup>107</sup> If esteem needs are not met, self-actualization needs also cannot be met. Thus, a veteran who is compensated to a level of subsistence, but who cannot return to the workforce, is likely to perceive himself or herself as inferior.<sup>108</sup> This condition will likely persist unless the veteran closes the gap between capacity and performance.

This gap is an obstacle on the road to readjustment for "Joe Veteran." Joe knows he can work, and because his physiological, safety, and love needs are met, he desires to meet his higher self-esteem and self-actualization needs, both of which could be met by working. Because Joe feeds himself and his family using his disability compensation, in order to meet these higher needs, he must potentially jeopardize his ability to meet his physiological, safety, and love needs. Joe is unlikely to elect to change his circumstances; he is simply doing what most human beings would do in his situation, in accordance with Maslow's Hierarchy. As a consequence, Joe is likely to suffer feelings of inadequacy that are likely to contribute to poorer health and quality of life.<sup>109</sup>

The Scheduler Rating System was crafted at a time that predates Maslow's classical motivation theory, meaning it was forged absent a formal psychological model for living a fulfilling life. By providing replacement income that will vanish if a veteran attempts to improve his or her circumstances by finding work, the Scheduler Rating System interrupts the psychological development that is necessary for veterans struggling to re-define themselves after military service.<sup>110</sup> The Scheduler Rating System should be abandoned because its underlying purpose is not consistent with accepted rehabilitation psychology.

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<sup>102</sup> *Id.* at 394. Maslow's Hierarchy has been applied heavily in the field of rehabilitation psychology. See, e.g., Shlomo Kravetz et al., *The Development of a Multifaceted Measure of Rehabilitation Effectiveness: Theoretical Rationale and Scale Construction*, 30 REHABILITATION PSYCHOLOGY 195 (1985) (discussing clinical measure of rehabilitation success based on Maslow's hierarchy); Louis E. Calabro, "First Things First": Maslow's Hierarchy as a Framework for REBT in Promoting Disability Adjustment During Rehabilitation, 15 J. RATIONAL-EMOTIVE & COGNITIVE-BEHAVIOR THERAPY 193 (reviewing counseling methods for clinicians treating individuals with disabilities, based on Maslow's Hierarchy); *TED Radio Hour: Maslow's Human Needs*, NAT'L PUB. RADIO (Apr. 17, 2015), <http://www.npr.org/programs/ted-radio-hour/399796647/maslows-human-needs> (providing a succinct presentation of Maslow's Hierarchy as a "Ted Talk").

<sup>103</sup> Maslow, *supra* note 100, at 372-82.

<sup>104</sup> *Id.* at 373-74. According to Maslow's Hierarchy, a person who is starving is more likely to engage in risky behavior such as crime, because a person with unmet physiological needs is unlikely to pursue safety needs until the physiological needs are met.

<sup>105</sup> *Id.* at 381-82.

<sup>106</sup> *Id.* at 382.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 382-83.

<sup>109</sup> See *id.* at 383.

<sup>110</sup> Dobbs, *supra* note 6, at 68.

2. *When veterans can work but do not, society suffers.*

Successful readjustment of veterans to the civilian work force has a positive effect on the lives of veterans and on the economy, and failed re-entry has a negative effect.<sup>111</sup> Historically, when veterans have adjusted well to civilian life, such as via G.I. Bill benefits, their post-military activity has had a lifting effect on the national economy.<sup>112</sup> Veterans who are discouraged from seeking re-entry to the workforce generate overt cost to VA, as well as a hidden cost to society: what they are not contributing.<sup>113</sup>

Joe Veteran has a wide range of education and re-adjustment benefits available. Joe can make use of VA's Vocational Rehabilitation program ("Chapter 31").<sup>114</sup> He also has available Post 9/11 G.I. Bill education benefits ("Chapter 33").<sup>115</sup> Either of these would pay for his law school. If Joe were ambitious enough, he could use his Chapter 33 benefits for law school, and still have his Chapter 31 benefits available to obtain even more advanced education. Alternately, Joe could transfer his Chapter 33 benefits to his spouse or a child while using his Chapter 31 benefits to attend law school, thereby creating opportunity for another family member.<sup>116</sup> By doing so, Joe would be following in the footsteps of the World War II generation of veterans, who discovered the power of education as a means of transitioning to civilian life and influencing society.

Over seven million veterans of World War II were trained or educated via the G.I. Bill between 1945 and 1956, with the majority using education benefits within five years of discharge.<sup>117</sup> By 1954, World War II veterans on average earned twenty-nine percent more income than non-veterans.<sup>118</sup> In large part, veterans who were re-adjusting after life in the military constructed America's middle class in the 20<sup>th</sup> century.<sup>119</sup> Buying homes in large numbers, these veterans caused a massive expansion in housing construction, making housing prices stable and more affordable for everyone.<sup>120</sup> Veteran households similarly accounted for the massive surge in production of household goods, making everything from toasters to neckties more affordable because of the scale of production necessary to meet the new demand.<sup>121</sup> Had the World War II cohort of veterans not had access to education or had it believed that it did not need to use the accessible education, America would likely have had a much weaker economy in the 20<sup>th</sup> century.<sup>122</sup> The triumph of the free market in the late 20<sup>th</sup> century was, in actuality, the triumph of the American veteran and a testament to well-executed veteran readjustment policies.

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<sup>111</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 185; PRESIDENT'S COMM'N, *supra* note 80, at 250.

<sup>112</sup> HUMES, *OVER HERE*, *supra* note 36, at 102; GLENN C. ALTSCHULER & STUART M. BLUMIN, *THE GI BILL: A NEW DEAL FOR VETERANS 192-94* (2009); PRESIDENT'S COMM'N, *supra* note 80, at 262 (finding WWII readjustment benefits substantially caused successful readjustment of WWII veterans).

<sup>113</sup> Besides contributing to the tax base and by his work output, Joe would be more likely to contribute his experience through civic engagement if he used his readjustment benefits. METTLER, *SOLDIERS TO CITIZENS*, *supra* note 78, at 119.

<sup>114</sup> 38 U.S.C. §§ 3100-22 (2012); Vocational Rehabilitation & Employment, U.S. DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/vocrehab/>.

<sup>115</sup> 38 U.S.C. §§ 3301-25 (2012); Education & Training, U.S. DEP'T OF VETERANS AFF., <http://www.benefits.va.gov/gibill/>.

<sup>116</sup> 38 U.S.C. § 3319 (2012).

<sup>117</sup> PRESIDENT'S COMM'N, *supra* note 80, at 254.

<sup>118</sup> *Id.* at 93.

<sup>119</sup> HUMES, *OVER HERE*, *supra* note 36, at 102.

<sup>120</sup> ALTSCHULER & BLUMIN, *supra* note 112, at 192-94.

<sup>121</sup> PRESIDENT'S COMM'N, *supra* note 80, at 250 (finding increases in factory payrolls linked to prosperity of readjusting veterans).

<sup>122</sup> See METTLER, *SOLDIERS TO CITIZENS*, *supra* note 78, at 182-92 (reviewing tabular data considering alternative explanations for success of WWII veterans); HUMES, *OVER HERE*, *supra* note 36, at 291 (noting the majority of veterans of WWII benefited from the G.I. Bill, which "transformed" society).

Importantly, the presence or absence of a disability in the World War II cohort of veterans had minimal impact on a veteran's likelihood of using his or her education benefits and, consequently, his or her likelihood of re-entering the workforce.<sup>123</sup> In contrast, modern veterans are both more likely to claim a disability<sup>124</sup> and less likely to work.<sup>125</sup> They also appear to be less likely to make use of their education benefits and less likely to complete their education plan once one is initiated.<sup>126</sup>

These differences are explainable in light of the other Post-World War II changes to the 1933 schema, including the increases in monetary compensation, the introduction of Individual Unemployability, and the change to a non-linear payment function. A World War II veteran with Joe's disability rating would have fared much worse economically than Joe Veteran does today.<sup>127</sup> For World War II Joe, the G.I. Bill represented the more compelling road to walk, being a clear path to a good job with no serious alternative for living well. For Joe Veteran today the road is foggy and rough. Today's Joe can't see whether that road leads to a good living or the loss of the living he has.

These conclusions are important because the Global War on Terror has produced another very large cohort of veterans, and while many are claiming education benefits, an unprecedented number of veterans are also claiming disability.<sup>128</sup> The experience of the World War II cohort suggests that a policy crafted to encourage use of education benefits regardless of disability could help re-shape the national economy by creating anew a large, well-educated, sustainable middle class, while the current Scheduler Rating System is likely to lead an increasingly large percentage of veterans away from education, employment, and contribution.

If Joe believed he could take care of himself and his family financially by going back to school to become an attorney (both during and after school), Joe likely would. In doing so, he would be contributing to an improvement in America's economy, regardless of how successful he might become, because he would likely make positive contributions at work and in his community while becoming a source of tax revenue instead of a tax cost.<sup>129</sup> The hidden cost of the Scheduler Rating System is that it encourages Joe not to use his readjustment benefits and thus not to go back to school. Joe is therefore an overt cost to VA because Joe will likely draw disability payments for the rest of his life. Society pays the hidden cost of Joe electing this lifestyle, because without Joe's successful readjustment, Joe will never be a United States Supreme Court Justice or, perhaps more realistically, buy a car with money he earned serving

<sup>123</sup> PRESIDENT'S COMM'N, *supra* note 80, at 163 (finding eighty-three percent of disabled veterans were working and ninety-three percent of non-disabled veterans were working).

<sup>124</sup> *Compare* PRESIDENT'S COMM'N, *supra* note 80, at 146, 148 (finding over two million veterans were receiving disability compensation) *with* Gade, *supra* note 6, at 54 (noting that forty-five percent of veterans from Iraq and Afghanistan were seeking disability compensation).

<sup>125</sup> *Economic News Release: Table A-5 Employment Status of the Civilian Population 18 Years and Over By Veteran Status, Period of Service, and Sex, Not Seasonally Adjusted*, U.S. BUREAU OF LABOR STATISTICS (2017), <https://www.bls.gov/news.release/empstat.t05.htm> (showing labor participation rate of Gulf War Era veterans as between seventy-nine and eighty-one percent).

<sup>126</sup> VETERANS BENEFITS ADMIN., 2015 ANNUAL REPORT 203 (reporting 456 education rehabilitations and 10,242 discontinued vocational rehabilitation plans); MUSTAFA KARAKUS ET AL., ANNUAL REPORT 2012 FOR FY 2011: VR&E LONGITUDINAL STUDY, U.S. DEP'T OF VETERANS AFF. (noting that veterans who entered service with high school degrees were "underrepresented among rehabilitated participants" and overrepresented among participants in vocational rehabilitation and education services who discontinued their plans).

<sup>127</sup> *Compare* Act of Aug. 4, 1939, Pub. L. 76-257, 53 Stat. 1180 (providing pension to members of the armed forces who become disabled by reason of their service therein, equivalent to 75 percent of the compensation paid to war veterans for service-connected disabilities), *and* CPI INFLATION CALCULATOR, U.S. BUREAU OF LABOR STATISTICS, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (noting that a 100 percent disability rating paid \$750 per year in 1945; adjusted for inflation this amount would be over \$10,000 in 2018), *with* 38 U.S.C. §§ 1114, 1134 (2012) (noting that the 100 percent disability rating currently pays \$32,076 per year).

<sup>128</sup> *See* VETERANS BENEFITS ADMIN., 2019 ANNUAL BENEFITS REPORT: EDUCATION, 8 (stating that as of 2015, 790,507 veterans and family members of veterans have received educational benefits since August 1, 2009, using the Post 9/11 G.I. Bill); *see also* Gade, *supra* note 6, at 54 (stating that, in 2013, 45 percent of veterans of the wars in Iraq and Afghanistan were seeking disability compensation).

<sup>129</sup> *See infra* Parts IV, V.

clients. The Scheduler Rating System damages the national economy and therefore everyone's prospects for a good living because it inhibits the ability of disabled veterans to maximize their productivity. Therefore, we should abandon the Scheduler Rating System because it is an economic anachronism.

3. *The public reacts negatively to veterans benefits when benefits are seen as non-meritorious.*

By creating the appearance of over-awarded and un-merited disability compensation, the Scheduler Rating System may spawn a visceral public reaction to VA in the future, jeopardizing VA's capacity to meet the actual needs of veterans. Analogous historical conditions provide insight into what the future might hold.<sup>130</sup> Between 1924 and 1932, for example, support for perceived unmeritorious veterans' disability compensation collapsed when the Great Depression impoverished millions.<sup>131</sup>

The disastrous Bonus March and the drastic measures taken by President Roosevelt in 1933 to reign in veterans' pensions underscore how significantly the public attitude toward veterans' pensions contributed to change.<sup>132</sup> The President obtained authority from Congress to utterly erase the old system and craft a new agency by fiat to handle new claims, and the courts would not be able to review the new agency's decisions.<sup>133</sup> That it was possible for President Roosevelt, even under the dire conditions of the 1930s, to obtain the political capital to make these moves illustrates the power of public attitude toward veterans' programs.<sup>134</sup> Eighty-seven years later, the operative theory of Roosevelt's Scheduler Rating System stands, mutated from cost-saving executive orders into the second largest bureaucracy in the federal government.<sup>135</sup>

Joe Veteran, a mostly-recovered TBI survivor with a 100 percent disability rating due to his unemployability, might drive a car with handicapped plates and receive curious glances from others when he hops out of his car, seeming to have no visible injury.<sup>136</sup> In stores, Joe might claim a discount for being a disabled veteran, leading to the same head-scratching from others waiting to check out.<sup>137</sup> Right now Joe does not cause any serious upset or outrage. Many people do not care that Joe can walk but uses a handicapped parking space or think to inquire whether Joe can afford to pay full price. If members of the public are aware of his service, then they believe that Joe has earned the privilege.<sup>138</sup> If they are unaware, they may be mildly irritated that Joe is "milking the system." However, if an

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<sup>130</sup> NICCOLO MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS 230 (Ninian Hill Thomson Trans., Kegan Paul, Trench & Co. 1883) (1517).

<sup>131</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 168-72; *accord* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 43-45 (1963) [hereinafter LEUCHTENBURG, ET AL., FDR & THE NEW DEAL] (describing the differences in Congress during the worst years of the Great Depression that allowed Roosevelt's drastic cuts to existing veterans' programs to pass through Congress).

<sup>132</sup> *See supra* Parts II(B), III.

<sup>133</sup> Act of Mar. 20, 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8, 9.

<sup>134</sup> *See* PAUL C. LIGHT, FORGING LEGISLATION 4-5 (1992); *accord* LEUCHTENBURG, ET AL., FDR & THE NEW DEAL, *supra* note 131, at 45.

<sup>135</sup> Dennis Vilorio, *Working for the Federal Government: Part 1*, U.S. BUREAU OF LABOR STATISTICS (2014),

<https://www.bls.gov/careeroutlook/2014/article/mobile/federal-work-part1.htm> (documenting that VA employed 297,528 employees in fiscal year 2013, second only to the Department of Defense).

<sup>136</sup> GA. CONST. art. VII, § II, pr. 5 (2017).

<sup>137</sup> Hundreds of merchants give discounts to anyone who can show a military ID card, including the cards issued to veterans who have rated disabilities. *See, e.g., Military Discount Center: Deals and Discounts*, MILITARY.COM, <http://www.military.com/discounts/> (last visited May 3, 2017).

<sup>138</sup> *See generally* Alan Zarembo, *Disability System for Veterans Strays Far from Its Official Purpose*, L.A. TIMES (Nov. 16, 2014), <http://www.latimes.com/nation/la-me-adv-disability-politics-20141116-story.html> (noting that saying "thank you for your service" has become a "national meme," and currently, society places veterans "on a pedestal").

economic contraction caused true distress akin to the Great Depression, history teaches us that Joe would not find much support for his lifestyle from the public or from the government.<sup>139</sup>

With such a large proportion of veterans claiming disability compensation and with VA's budget swelling further every year, perhaps the only force preventing a collapse of public support is the mere absence—for now—of a depression. Relying on the absence of bad economic times to sustain a policy is bad policy. The Scheduler Rating System should be abandoned now under controlled circumstances instead of in the future during a collapse of public support precipitated by an economic downturn.

## **B. Calculating Lost Income Is Problematic in a Service/Information Economy**

The Scheduler Rating System is unworkable in the 21<sup>st</sup> century because in most cases it is no longer possible to calculate the lifelong economic impact of a disability. If VA cannot accurately calculate the real economic impact of a disability, replacing real lost income is not possible. VA, along with most state governments, provides substantial re-training benefits for veterans who suffer physical disability so they can obtain gainful employment consistent with their disability.<sup>140</sup> A majority of workers today do not work in capacities that require physical labor.<sup>141</sup> Moreover, a robust body of law now prevents employers from discriminating against persons with disabilities and requires employers to make accommodations for disabled employees.<sup>142</sup>

Additionally, modern psychiatry evolved after the creation of the Scheduler Rating System and introduced a range of hard-to-define disabilities. Prevalent among veterans is posttraumatic stress disorder (“PTSD”), a disability that is usually neither static nor untreatable. The Scheduler Rating System, which presumes a static medical condition in most cases, is poorly adapted to define the impact of a mental health condition such as PTSD on a veteran's lifetime earning capacity.

### *1. Calculating lost income is impractical because of changes in societal attitudes towards “work” and “disability.”*

The modern definitions of “work” and “disability” are too different from the 1933 meaning of these words to make the Scheduler Rating System's purpose of calculating and replacing lost income over a lifetime possible. In 1933, “work” referred to physical labor,<sup>143</sup> and, consequently, “disability” almost exclusively pertained to readily observable, permanent physical defects.<sup>144</sup> Because “disability” applied almost exclusively to physical limitations, and “work” meant “physical tasks,” calculating the impact of a disability involved correlating the physical limitations to physical tasks.<sup>145</sup> Today, most “work” happens in the service or information economy,<sup>146</sup> and “disability” can mean either a physical

<sup>139</sup> See *supra* Parts II(A), IV(A)(1).

<sup>140</sup> See *infra* Part IV; see also REHABILITATION SERVS. ADMIN., *VR State Plans*, U.S. DEP'T OF EDUC., <https://rsa.ed.gov/about/states> (2015) (listing states with state vocational rehabilitation entities endorsed by the U.S. Department of Education).

<sup>141</sup> *Household Data: Annual Averages*, U.S. BUREAU OF LABOR STATISTICS (2014) [hereinafter *Household Data: Annual Averages*] (showing that 78.9 percent of a workforce totaling 146,305 was engaged in management, professional, service, and office occupations).

<sup>142</sup> See *infra* Part IV.

<sup>143</sup> See Ridgway, *Information Age*, *supra* note 34, at 39 (“The concept of disability in the early twentieth century was also different. The economy was overwhelmingly driven by physical labor.”).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (“As a result, the focus of the benefits process was on how a disability affected a veteran's ability to find and maintain various types of labor-intensive employment.”).

<sup>146</sup> See *Household Data: Annual Averages*, *supra* note 141; see also BUREAU OF LABOR STATISTICS, EMPLOYED PERSONS BY SEX, OCCUPATION, CLASS OF WORKER, FULL OR PART-TIME STATUS, AND RACE (2014) (noting that 78.9 percent of the U.S. workforce is engaged

defect or a cognitive, emotional, or behavioral disorder.<sup>147</sup> Further mystifying an attempt to calculate economic loss from disability is the Americans with Disabilities Act,<sup>148</sup> which requires employers to make reasonable accommodations for employees with disabilities.

These changes are important because, for the underlying purpose of the Scheduler Rating System to be valid, VA must be able to correlate a specific disability with its real economic impact. In 1933, it was easier to determine the economic loss of someone who was confined to a wheelchair and could not work on a farm or in a factory, because fewer jobs that did not require physical labor existed.<sup>149</sup> A veteran who became paralyzed in 1933 could therefore expect significant economic loss because most jobs consistent with the veteran's education and experience would not be physically possible.<sup>150</sup> Today, the same veteran with the same disability could retrain using Chapter 31 benefits, Chapter 33 benefits, or both.<sup>151</sup> On one hand, a paralyzed Joe who is confined to a wheelchair is in the same position as TBI Joe, who has no obvious physical impairment: he could still use VA readjustment benefits to attend law school, and employers are prohibited from discriminating against him on the basis of disability. It is even possible that because of the disability, paralyzed Joe will realize economic gain, because Chapter 31 would not be available without it.<sup>152</sup> On the other hand, if a veteran retains his or her physical soundness and cognitive abilities but experiences unpredictable bursts of anger, he or she may have trouble functioning on the job. Trying to manage employment until he develops strategies to enable him to cope might in fact make him worse. The results of continuing to pursue a disability compensation system based on real economic loss are frequent absurd outcomes, with veterans capable of work collecting compensation with or without working, and veterans incapable of work unable to obtain the compensation they need because the particular constellation of symptoms they experience does not neatly correlate to an economic loss expressed on the Rating Schedule.<sup>153</sup>

The Scheduler Rating System, with its neat boundaries and classifications, is an animal attempting to make a life in the wrong habitat. It is a product of the Industrial Age transplanted into the Information Age, where it simply cannot flourish. The Scheduler Rating System should be abandoned as too rigid to survive in a changed society and economy.

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in management, professional, service, and office occupations).

<sup>147</sup> See *Household Data: Annual Averages*, *supra* note 141.

<sup>148</sup> 42 U.S.C. §§ 12101-213 (2012) (prohibiting discrimination on the basis of disability and requiring reasonable accommodations for persons with disabilities in employment, education, and public services).

<sup>149</sup> Ridgway, *Information Age*, *supra* note 34, at 39 (“When the benefits system was established, half of Americans lived in rural areas and a third of the population was engaged in farming.”).

<sup>150</sup> *Id.* (noting that the ability of disabled veterans to support themselves and their families largely depended on “their ability to use tools, operate machinery, and otherwise engage in physical labor”).

<sup>151</sup> 38 U.S.C. §§ 3100-22, 3301-25 (2012).

<sup>152</sup> 38 U.S.C. § 3102(a)(1)(i) (2012) (instructing that veterans with a service-connected disability rated at 20 percent or more are eligible for Chapter 31 job training). Chapter 31 is the most generous of VA readjustment benefits, paying 100 percent of tuition, books and expenses, and a monthly cash stipend based on the cost of living in the zip code where the veteran is training in addition to the veteran's normal disability compensation. See 38 U.S.C. §§ 3104, 3108 (2012).

<sup>153</sup> Studies commissioned by the legislative and executive branches have independently expressed doubt as to the ability to calculate and replace lost income in the modern economy. See U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-97-9, VA DISABILITY COMPENSATION: DISABILITY RATINGS MAY NOT REFLECT VETERANS' ECONOMIC LOSSES (1997); PRESIDENT'S COMM'N. *supra* note 90.

## 2. *The Scheduling Rating System cannot accurately classify mental health conditions for disability purposes.*

The Scheduling Rating System is not capable of accurately classifying mental health conditions because most mental health conditions are not static disabilities that VA can translate into a measurable economic loss. The inadequacy of the Scheduling Rating System where cognitive, emotional, and behavioral disabilities are concerned can be explained by the virtual non-existence of psychiatry as a fully accepted field of medicine at the time that the Scheduling Rating System was created. As the field of psychiatry grew in the latter half of the 20<sup>th</sup> century, new mental health conditions were added to the Rating Schedule, but because the original theory of the Rating Schedule was crafted without consideration for the dynamic nature of psychiatric conditions, it remains poorly equipped to categorize and compensate them.

Psychiatry was primitive when President Roosevelt crafted the Scheduling Rating System. In 1933, no uniform method of psychiatric diagnosis existed.<sup>154</sup> Treatment for patients diagnosed with a mental illness consisted almost exclusively of institutional care.<sup>155</sup> Very few effective psychopharmaceutical drugs existed.<sup>156</sup> In addition, many restrictive laws existed throughout the United States that impacted the rights of people who were diagnosed as mentally ill.<sup>157</sup> Generally, commitment to institutional care was the only treatment and was accomplished with little or no due process recourse for the patient who lost his or her freedom, quite often indefinitely.<sup>158</sup> Psychiatry in the first half of the 20<sup>th</sup> century also embraced the concept of eugenics, or the separation of the “well born” from the “poorly born.”<sup>159</sup> This theory attempted to protect the quality of the gene pool by separating individuals who were thought to contribute “bad genes,” then referred to as “germ plasm.”<sup>160</sup> The policy was as much about isolating the mentally ill and protecting society from their corrupting presence as it was about treatment. In furtherance of this policy, the United States Supreme Court held in 1927 that forced sterilization of the mentally ill was not a violation of due process, and this procedure was carried out on tens of thousands of people by the end of World War II.<sup>161</sup>

The medical condition known as PTSD, which is now the most frequently claimed mental health disability among veterans, was barely known in 1933.<sup>162</sup> Then called “shellshock,” the condition had been studied in Britain at the close of World War I,<sup>163</sup> but in the United States, psychiatry remained divided about whether the condition was a normal response to war or a disorder to which some individuals were predisposed, for which a recruit screening process should be developed.<sup>164</sup> Because

<sup>154</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS (1952); Bernard A. Fischer, *A Review of American Psychiatry Through Its Diagnoses: The History and Development of the Diagnostic and Statistical Manual of Mental Disorder*, 200 J. NERVOUS & MENTAL DISEASE 1022, 1023 (2012) [hereinafter Fischer, *A Review of American Psychiatry*].

<sup>155</sup> Whitaker, *Triumph of American Psychiatry*, *supra* note 73, at 333.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See *Buck v. Bell*, 274 U.S. 200, 205-08 (1927) (holding that a Virginia statute authorizing forced sterilization of individuals within mental institutions did not violate the Fourteenth Amendment and allowed for sterilized individuals to be released from the institutions); Whitaker, *Triumph of American Psychiatry*, *supra* note 73, at 333.

<sup>162</sup> See REID, BROKEN MEN, *supra* note 32; see also VETERANS BENEFITS ADMIN., 2014 ANNUAL REPORT: COMPENSATION 31 (noting that in 2014, PTSD was the third most commonly claimed disability among veterans, behind tinnitus and hearing loss).

<sup>163</sup> See generally REID, BROKEN MEN, *supra* note 32.

<sup>164</sup> Whitaker, *Triumph of American Psychiatry*, *supra* note 73, at 334 (“Psychiatrists took care of the ‘seriously’ mentally ill, with the disorders considered to be mostly biological in kind.”); Fischer, *A Review of American Psychiatry*, *supra* note 173, at 1023.

PTSD was not recognized or compensated and because reporting the condition might lead to the equivalent of a life of institutional commitment and mandatory sterilization, the scope of the problem was probably not clear to the Roosevelt Administration when it drafted the Scheduler Rating System.

World War II changed the fate of veterans who developed mental illness.<sup>165</sup> The DSM-I, the first nationally accepted diagnostic manual, was a direct consequence of World War II.<sup>166</sup> During World War II, many physicians trained in other areas were pressed into military psychiatry after receiving only minimal training on the specialty.<sup>167</sup> These doctors treated patients on the front who were experiencing PTSD.<sup>168</sup> Unable to send these patients to institutions, doctors in the field treated soldiers by sending them home and removing them from their stressful environments, which often proved effective.<sup>169</sup> When these doctors demobilized and returned to the private practice of medicine, many remained in their new specialty but brought with them a very different set of ideas about mental health conditions and care, particularly where veterans were concerned.<sup>170</sup> These doctors pressed their former service branches (the Army and Navy) to develop better diagnostic manuals, and the fruits of the Army's and Navy's projects were eventually adopted by the American Psychiatric Association ("APA") as the DSM-I.<sup>171</sup> The DSM-I contained only a few dozen conditions, excluding PTSD.<sup>172</sup>

The APA subsequently published four more versions of the DSM, the most recent (DSM-5) in 2012.<sup>173</sup> Each edition expanded the scope of the manual and added new conditions.<sup>174</sup> DSM-5 contains hundreds of conditions,<sup>175</sup> including PTSD.<sup>176</sup> There is also a catch-all condition, "Unspecified Trauma and Stressor Related Disorder."<sup>177</sup> One criticism of the DSM-5 is that virtually anyone in the population can fit into one of DSM-5's conditions, or, if they cannot, can be diagnosed as ill and disabled under the catch-all.<sup>178</sup>

The DSM-5's broad diagnostic framework creates a serious problem for the Scheduler Rating System, because virtually all returning veterans can be diagnosed with a mental illness.<sup>179</sup> VA rating specialists, who are responsible for adjudicating disability claims, can use this catch-all diagnosis to rate

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<sup>165</sup> Eugenics was discredited largely because of the role it played in state policy in Nazi Germany. *Id.* at 334.

<sup>166</sup> Fischer, *A Review of American Psychiatry*, *supra* note 154, at 1023.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Grob, *Origins of the DSM-I*, *supra* note 71, at 427; Whitaker, *Triumph of American Psychiatry*, *supra* note 73, at 334.

<sup>170</sup> Fischer, *A Review of American Psychiatry*, *supra* note 154, at 1023 (noting that former military doctors were largely responsible for the movement to treat all but the most serious cases of mental illness on an outpatient basis).

<sup>171</sup> *Id.*

<sup>172</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS (1952).

<sup>173</sup> *See generally* Fischer, *A Review of American Psychiatry*, *supra* note 154, at 1022-30.

<sup>174</sup> *See generally id.*

<sup>175</sup> *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Fifth ed. 2013) [hereinafter DSM-5].

<sup>176</sup> *Id.* at 271. The DSM-5 contains a range of disorders related to trauma and stress. *Id.* at 265-90.

<sup>177</sup> *Id.* at 290.

<sup>178</sup> Many commentators have criticized the DSM-5. *See generally* Matthew Mientka, *Is Mental Illness Over-Diagnosed? Backlash Over the New DSM-V*, MEDICALDAILY.COM (May 12, 2013), <http://www.medicaldaily.com/mental-illness-over-diagnosed-backlash-over-new-dsm-v-245791>; GARY GREENBERG, THE BOOK OF WOE: THE DSM AND THE UNMAKING OF PSYCHIATRY (2013); ALLEN FRANCES, SAVING NORMAL: AN INSIDER'S REVOLT AGAINST OUT-OF-CONTROL PSYCHIATRIC DIAGNOSIS, DSM-5, BIG PHARMA, AND THE MEDICALIZATION OF ORDINARY LIFE (2013) (criticizing the expansion of diagnostic criteria throughout the manual, by the chair of the committee that authored the DSM-IV, the immediate predecessor to the DSM-5).

<sup>179</sup> In addition to the catch-all relating specifically to trauma disorders, there is a general purpose catch-all, "Unspecified Mental Disorder." DSM-5, *supra* note 175, at 708. Caffeine intoxication and withdrawal are also listed as substance disorders. *Id.* at 503, 508.

a condition that lacks one or more essential elements of the specified conditions on the Schedule.<sup>180</sup> The pendulum of mental health diagnosis where veterans are concerned has swung from diagnosing no one to diagnosing everyone—and then handing them a disability rating that might as well be a stop sign on Maslow’s Hierarchy.

VA currently adopts the opinion that PTSD is a normal response to war, and that it is treatable and often curable,<sup>181</sup> but the treatment and cure depend to a large extent on the amount of work patients are willing to do to reframe their experiences.<sup>182</sup> PTSD should therefore be seen as a temporary condition for most patients, or one that, with management, need not interfere permanently with life. The Scheduler Rating System does not consider conditions such as PTSD as likely to improve because it was not designed to evaluate the recoverability of a condition, and therefore treats all conditions as static.

If Joe Veteran is diagnosed with PTSD, the danger in assigning a permanent rating—particularly a rating of Individual Unemployability—is that Joe will begin to identify himself as a permanently damaged veteran, and if this happens, Joe might not recover from his PTSD to the extent that he could if he believed recovery was possible. The longer Joe remains in this condition, the wider the employment gap on his resume becomes, and the more impossible a return to work will look to Joe.

The Scheduler Rating System not only fails to adequately address a treatable, curable disability; it also does not encourage, by way of the argument above, the attempt to do so, while also contributing to the problem of over-awarded benefits. Psychiatry and veterans’ benefits evolved along independent trajectories, intersecting today in an incompatible manner. The Scheduler Rating System was crafted to contain veterans’ benefits and eliminate overcompensation, making the current outcome well outside of the intended purpose. Worse still, the Scheduler Rating System discourages medical improvement by disincentivizing the hard work needed to recover from conditions such as PTSD. The Scheduler Rating System should therefore be abandoned as inconsistent with the purpose of veterans’ benefits in light of modern psychiatry’s understanding of mental health disabilities.

### **C. The Scheduler Rating System Undermines the Other Efforts of VA and Public Policy Promoting Empowerment of Persons with Disabilities**

By disincentivizing full rehabilitation from injuries and illnesses incurred by veterans during military service, the Scheduler Rating System undermines the purpose of VA healthcare. By disincentivizing disabled veterans from returning to the workforce, the Scheduler Rating System undermines the purpose of VA’s re-adjustment programs. Consequently, in both of these ways, the Scheduler Rating System is intolerably dissonant with the purpose of the Americans with Disabilities Act, which purports to promote the independence and individual dignity of persons with disabilities.

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<sup>180</sup> See 38 C.F.R. § 4.130 (2018).

<sup>181</sup> NAT’L CENTER FOR PTSD, UNDERSTANDING PTSD TREATMENT, DEP’T OF VETERANS AFF. (2013), [http://www.ptsd.va.gov/public/understanding\\_TX/booklet.pdf](http://www.ptsd.va.gov/public/understanding_TX/booklet.pdf).

<sup>182</sup> See Dobbs, *supra* note 6, at 66-69. Some researchers have discovered that soldiers who successfully recover from PTSD disproportionately become over-achievers in a variety of fields, and emphasize the need to treat the condition as temporary and curable. See, e.g., RICHARD G. TEDESCHI AND LAWRENCE G. CALHOUN, TRAUMA & TRANSFORMATION: GROWING IN THE AFTERMATH OF SUFFERING (1995); JIM RENDON, UPSIDE: THE NEW SCIENCE OF POST-TRAUMATIC GROWTH (2015).

*1. The Scheduling Rating System undermines VA's mission to provide readjustment services to eligible veterans.*

Obtaining a disability rating according to the Scheduling Rating System provides a fast, easy way to achieve economic stability after military service, thus undermining the purpose of VA's readjustment benefits. The G.I. Bill, VA Vocational Rehabilitation, and other readjustment benefits are excellent programs, but they require the veteran to do hard work and to redefine himself or herself after military service. Retaining an old identity and being paid for doing so is simply a more compelling offer for some veterans, and the money a veteran can make by being disabled is sometimes quite competitive.

Very often VA disability compensation is awarded concurrently with other disability benefits, such as Social Security Disability Insurance ("SSDI").<sup>183</sup> Comprehensive analysis of the replacement of veteran income through all available benefits shows the rate of income replacement for some disabled veterans can be as much as 280 percent, meaning some veterans with disability ratings are receiving nearly three times as much income as their non-disabled peers who left the military and joined the workforce.<sup>184</sup> This analysis excludes the impact of private charities, which inject billions of dollars per year (along with a heartfelt "thank you for your service") into the lifestyles of disabled veterans.<sup>185</sup> The analysis also fails to include benefits awarded by state governments.<sup>186</sup>

If he calculates the math, Joe Veteran is unlikely to use VA readjustment benefits because he may well not make any more money working as an entry-level attorney than he makes collecting disability benefits. Additionally, to make the extra money, Joe does not need to do any difficult work, like learn law. This outcome is diametrically opposed to the purpose of VA readjustment benefits. The Scheduling Rating System should be abandoned as incompatible with VA's readjustment mission.

*2. The Scheduling Rating System undermines VA's mission to provide healthcare services to eligible veterans.*

The Scheduling Rating System undermines VA's mission to provide healthcare to veterans by generating a strong incentive to exaggerate current medical conditions or to not report improved medical conditions. The Scheduling Rating System's basic nature creates the incentive to exaggerate: the worse the condition, the more money a veteran can collect. The best way for Joe Veteran to demonstrate that his condition is worsening is by frequently visiting the doctor.<sup>187</sup> Because visiting the doctor is entirely

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<sup>183</sup> PAUL HEATON ET AL., COMPENSATING WOUNDED WARRIORS: AN ANALYSIS OF INJURY, LABOR MARKET EARNINGS, AND DISABILITY COMPENSATION AMONG VETERANS OF THE IRAQ AND AFGHANISTAN WARS xix, 47, RAND MONOGRAPH (2012).

<sup>184</sup> *Id.*

<sup>185</sup> The Wounded Warrior Project, one of the largest private charities providing resources to disabled veterans, raised \$225 million in 2014 and spent \$124 million providing services to disabled veterans. See Dave Phillips, *Wounded Warrior Project Spends Lavishly on Itself, Insiders Say*, N.Y. TIMES, Jan. 27, 2016, <https://www.nytimes.com/2016/01/28/us/wounded-warrior-project-spends-lavishly-on-itself-ex-employees-say.html>.

<sup>186</sup> Many states exempt veterans from property taxes, and most states provide disabled veterans with free license plates, driver's licenses, and access to state facilities. See, e.g., GA. CONST. art. VII, § II, pr. 5 (2017) (exempting disabled veterans from most property taxes by state constitution); TENN. CODE ANN. § 55-4-237 (2015) (providing that veterans may receive free license plates); TENN. CODE ANN. § 55-21-106 (2015) (providing that veterans may obtain free driver's licenses); TENN. CODE ANN. § 70-2-201 (2015) (providing free fishing licenses for veterans). A few states provide their own cash payment to disabled veterans. See, e.g., OH. REV. CODE § 5902.05 (2015) (paying a state benefit to certain disabled veterans). One state helps veterans buy land. See ALASKA STAT. § 38.05.940 (2015) (holding disabled veterans eligible for 25 percent price reduction when buying state land).

<sup>187</sup> Mossman, *supra* note 6, at 42. The doctor is likely to tell the veteran that the veteran's condition is in fact worsening, because erring on the side of liberal diagnosis shields the doctor from malpractice. See Ray Moynihan et al., *Preventing Overdiagnosis: How to Stop Harming the Healthy*, BMJ 1, 4 (2012) ("Avoidance of litigation and the psychology of regret is another obvious driver [of overdiagnosis]

free for Joe, Joe is likely to make frequent use of VA healthcare services and even seek hospitalization in order to improve a disability rating.<sup>188</sup>

Overuse of VA healthcare undermines VA's mission to provide for the needs of veterans because it increases the demands on the healthcare system by adding an unknown number of patients who knowingly or unknowingly seek medical care that they do not need to VA's already overcrowded hospital system.<sup>189</sup> In 2012, overcrowding and understaffing of VA facilities in Arizona and elsewhere became front-page news, as veterans died while waiting for appointments at VA medical centers.<sup>190</sup> Subsequent investigation revealed problems in administration, but employees at the clinics involved also cited increased demand for services, patient no-shows, cancelled appointments, and increases in appointments for conditions related to the aging of the Vietnam Era veterans as a contributor to the scheduling problem.<sup>191</sup> The scheduling crisis and subsequent investigations ultimately led to the passage of the Veterans Access, Choice, and Accountability Act of 2012 ("Choice Act").<sup>192</sup> The Choice Act created a means for veterans to seek healthcare from private medical providers.<sup>193</sup> While helping to prevent veterans from dying while waiting for care, solutions such as the Choice Act do not address the source of overcrowding: that use of the facilities is rewarded monetarily.<sup>194</sup> The Scheduler Rating System should be abandoned because it undermines the ability of the VA healthcare system to meet the needs of the truly sick and disabled.

*3. The Scheduler Rating System is dissonant with public policy promoting the empowerment and independence of people with disabilities.*

Because the Scheduler Rating System creates a class of citizens who are presumed to be incapable of self-sufficiency, it directly challenges the legitimacy of the Americans with Disabilities Act, which communicates a strong policy goal of empowering people who have disabilities. This conflict exists because the purpose of the Scheduler Rating System and the purpose of the Americans with Disabilities Act cannot be drawn into harmony, creating two federal acts that are intolerably at odds with each other.

The Scheduler Rating System seeks to identify and replace lost income on a permanent basis.<sup>195</sup> The underlying assumption is that because a veteran has sustained a condition creating some sort of physical or mental limitation, the veteran is permanently impaired in his or her ability to participate in the workforce. This assumption conflicts with the purpose of the Americans with Disabilities Act,

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as [medical] professionals can be punished for missing the early signs of disease yet don't generally face sanctions for overdiagnosing." The combined effect of an incentive to visit the doctor and an incentive for liberal diagnosis is a feedback loop in which the veteran's condition will forever become worse, and never better.

<sup>188</sup> 38 U.S.C. § 1705(a) (2012); see Mossman, *supra* note 6, at 42 ("Patients [in the VA healthcare system] are very aware of the connection between remaining sick and remaining eligible for compensation.").

<sup>189</sup> See generally Gade, *supra* note 6, at 53-62 (stating that many veterans, after being labeled "disabled," begin to believe that they cannot recover, and legitimately believe they are more helpless than they are; others may deliberately overuse the healthcare system for economic gain).

<sup>190</sup> See Andrew Blankstein, *VA Problems Go Far Beyond Phoenix, Say Government Reports*, NBCNEWS.COM (May 9, 2014), <http://www.nbcnews.com/storyline/va-hospital-scandal/va-problems-go-far-beyond-phoenix-say-government-reports-n101281>.

<sup>191</sup> Blankstein, *supra* note 190.

<sup>192</sup> Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146 [hereinafter Choice Act].

<sup>193</sup> *Id.*

<sup>194</sup> See *supra* Part IV(A)(1), (3).

<sup>195</sup> "Compensation" has been interpreted as lost economic opportunity since the language was introduced in 1917. Pub. L. 65-90, 40 Stat. 398, 405 (1917); see *United States v. Golden*, 34 F.2d 367, 370 (10th Cir. 1929) ("Compensation benefits are paid to veterans to compensate them for a loss of ability to follow a pre-war occupation.").

which establishes a strong public policy of elevating persons with disabilities to equality with the non-disabled in the labor force.<sup>196</sup> Denial of employment on the basis of disability or failure of an employer to provide reasonable accommodations to help a disabled employee manage on the job can carry serious legal consequences.<sup>197</sup>

Joe is confused about what to do with his life because he is receiving two irreconcilable messages. Public policy as expressed in the Americans with Disabilities Act encourages independence and contribution from individuals who have disabilities. The Scheduler Rating System, by defining veterans who have disabilities as permanently less capable of earning money and contributing to society, presents an incompatible message to Joe and his potential employers. The Scheduler Rating System should be abandoned in order to reconcile competing policies.

#### IV. AN ALTERNATIVE TO THE SCHEDULAR RATING SYSTEM: A SMOOTH ROAD TO READJUSTMENT

What, then, should replace the Scheduler Rating System? I propose a system that uses three types of compensation tools to facilitate rehabilitation instead of income replacement. The three tools are (1) lump-sum payments, (2) an income guarantee, and (3) monthly payments. Additionally, I propose an adjudicatory mechanism consistent with federal administrative procedure in veterans law that would select an appropriate method of compensation for each veteran. This disability compensation system, with rehabilitation as its primary purpose, must consist of more than one method by which to pay disabled veterans, because not all veterans can reasonably be expected to rehabilitate and become self-sufficient. In allied countries that have recently employed lump-sum payments, such payments have been found effective in assisting with minor disabilities but do not help the veteran who is experiencing a more serious and chronic condition, such as a persistent coma. Income guarantees are effective when a veteran cannot achieve independence immediately but might be able to do so in the future. Direct compensation is useful when rehabilitation is not possible.

##### A. Lump-Sum Payments: A Lesson from our Allies

The United States should follow the example of the United Kingdom, Canada, and Australia (hereinafter collectively “Allied”) by adopting a lump-sum payment system for minor disabilities, but should purpose the payment exclusively to rehabilitation. In contrast, the Allied systems are premised at least in part on awarding lump sums as compensation for pain and suffering.<sup>198</sup> Such an award would be inconsistent with the conceptual framework of American veterans’ benefits,<sup>199</sup> and its development would likely be frustrated by the contentious nature of analogous injury remedies within the American

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<sup>196</sup> 42 U.S.C. § 12101 (2012); *Sutton v. United Airlines*, 527 U.S. 471, 488 (1999) (holding that “[t]he use or nonuse of a corrective device does not determine whether an individual is disabled”); see also Diller, *supra* note 7; Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081-88 (2010) (positing that the Americans with Disabilities Act is irreconcilable with the current framework for awarding veteran disability compensation and Social Security disability compensation).

<sup>197</sup> See 29 C.F.R. § 1630 (2018) (tasking the Equal Employment Opportunity Commission with enforcement of non-discrimination provisions of Americans with Disabilities Act).

<sup>198</sup> See Armed Forces (Pensions and Compensation) Act 2004, 52 & 53 Eliz. 2 c. 32 (Eng.); Canadian Forces Members and Veterans Re-establishment and Compensation Act, R.S.C. 2005, c 21 (Can.) [hereinafter Canadian Forces Compensation Act]; *Military Rehabilitation and Compensation Act, 2004* (Cth) (Austl.).

<sup>199</sup> Ridgway, *Recovering an Institutional Memory*, *supra* note 53, at 1-15. Whether military service should be viewed as a duty owed in the context of a professional, all-volunteer force will not be here explored; this proposal will assume that right or wrong, the traditional view will persist in some form for the foreseeable future.

legal system.<sup>200</sup> The Allied systems can support the validity of lump-sum payments as a concept, but deploying a lump-sum payment in the United States requires a different purpose.

That purpose can be supplied by provision of transition assistance,<sup>201</sup> and would orient the system around the goal of restoring the veteran to a condition equal to or better than his pre-military condition, thus making Joe Veteran no worse off for his service. Lump-sum payments paid as transition, and adjustment assistance paid at the time of discharge, would provide an injection of cash at the time that the veteran transitions to independence. This time is usually the most acute phase of adjustment to disability.<sup>202</sup> Lump-sum payments are not effective for all veterans because some cannot become independent, necessitating an adjudicatory mechanism for defining the category of veterans to whom this compensatory tool should apply, along with the category of veterans to whom it should not apply. I propose that existing adjudicatory processes can make this distinction.

*1. Lump-sum payments are appropriate compensation for the presently employable disabled.*

Immediate lump-sum payments are appropriate compensation when the veteran in question has suffered some form of disability but is capable of re-entering the workforce without substantial vocational training or a lengthy period of physical rehabilitation. A common element to lump-sum payment regimes in Allied nations is “work for those who can, security for those who can’t.”<sup>203</sup> A lump sum presupposes that presently, or in the near future, a disabled veteran is or can readily become economically self-sufficient.

Available data suggest that in evaluating a lump-sum payment system, careful consideration must be given to how and when such a payment is made, in order to mitigate the perceived risk associated with providing a windfall payment.<sup>204</sup> Lump sums have been considered in the United States in the past, but past proposals could not overcome the problem of identifying when the lump sum should be applied and how to compute the amount of the lump sum.<sup>205</sup> The gravest risk is erroneously paying lump sums to veterans who will not be able to achieve true independence.<sup>206</sup>

<sup>200</sup> See Rachel T. Brant, *Learning from an Ally: Can American Veterans Benefit from Lump Sum Payments and a Claim Submission Deadline?*, 6 VETERANS L. REV. 80, 106-07 (2014) [hereinafter Brant, *Learning from an Ally*] (finding civil tort liability and U.S. workers’ compensation frameworks not suitable for application to the veterans disability compensation context).

<sup>201</sup> *Id.* at 103.

<sup>202</sup> *Id.* at 104-05; See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 12-846, VA DISABILITY COMPENSATION: ACTIONS NEEDED TO ADDRESS HURDLES FACING PROGRAM MODERNIZATION 19 (2012).

<sup>203</sup> See Armed Forces (Pensions and Compensation) Act 2004, 52 & 53 Eliz. 2 c. 32 (Eng.); Canadian Forces Compensation Act, *supra* note 198; *Military Rehabilitation and Compensation Act, 2004* (Cth) (Austl.); U.K. HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 04/05, ARMED FORCES (PENSIONS AND COMPENSATION) BILL 36-37 (JAN. 8, 2004).

<sup>204</sup> See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 01-172, VETERANS’ BENEFITS: VETERANS HAVE MIXED VIEWS ON A LUMP SUM DISABILITY PAYMENT OPTION (2000); ERIC CHRISTENSEN ET AL., FINAL REPORT FOR THE VETERANS’ DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS, CNA CORP. (2007). In Australia, legal and financial management advice are reimbursable expenses when a lump sum is paid to a disabled veteran. *Military Rehabilitation and Compensation Act, 2004*, s. 81 (Cth) (Austl.).

<sup>205</sup> The commission specifically identified disabilities of 20 percent or less as candidates for lump-sum payment but expressed uncertainty as to the fairness of equating employability to a specific rating on the schedule. PRESIDENT’S COMM’N, *supra* note 80, at 13-14, 168.

<sup>206</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 01-172, VETERANS’ BENEFITS: VETERANS HAVE MIXED VIEWS ON A LUMP SUM DISABILITY PAYMENT OPTION (2000); ERIC CHRISTENSEN ET AL., FINAL REPORT FOR THE VETERANS’ DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS, CNA CORP. (2007).

*a. Deciding when a veteran is employable.*

I propose that in a system purposed to transition and rehabilitation, the type of payment a veteran receives should be adjudicated on the basis of a finding of employability rather than on a finding of a particular level of disability on the rating schedule. The question, after all, is not whether Joe Veteran has some disability at some rated level, but rather, can Joe reasonably be expected to achieve independence right now? VA requires an adjudication to answer whether Joe can readjust by returning to work, or whether he cannot, and is worse off for his service. Such an adjudication would avoid setting an arbitrary threshold (such as a rating less than thirty percent) for employability, focusing instead on Joe's likelihood of successful readjustment based on Joe's particular facts and circumstances.

Such an adjudication would necessarily be a fact-sensitive inquiry requiring qualitative assessment of an individual's medical condition in light of the individual's training, education, aptitudes, interests, and the availability of work consistent with that assessment. The adjudication would require extensive development and testing, which, fortunately, has already been done. Under Chapter 31, VA must adjudicate claims for vocational rehabilitation training by answering the same factual inquiry, because eligibility for Chapter 31 requires the presence of an "employment handicap" or a "serious employment handicap" that interferes with the veteran's return to work.<sup>207</sup>

Under my proposed system, veterans would be adjudicated for Chapter 31 as a part of their disability compensation application. Those who have a disability that fails the employment handicap inquiry would be paid only a lump-sum readjustment benefit.<sup>208</sup> Converting these Chapter 31 procedures for use in rendering decisions about compensation would require new legislation to fully integrate VA's disability compensation and readjustment efforts, but the adjudication process itself already exists. The Chapter 31 inquiry is a mature adjudicatory procedure that answers whether a veteran can currently work, whether an inability to work is caused by the veteran's disability, and how much effort is necessary to restore the veteran to a state of employability.<sup>209</sup> The question of when to apply the immediate lump-sum payment could therefore be reduced to a question of eligibility for Chapter 31 training.

Using a mature adjudicatory process to decide when to pay a lump sum is important, because in Allied nations that have transitioned to lump-sum payments, some of the most serious courtroom challenges arose from veterans who were in fact unable to achieve employment, and for whom the lump-sum payment was consequently inadequate.<sup>210</sup> The use of an existing procedure to render these decisions can help insulate against such error. An American lump-sum system would also be insulated against this kind of error to some degree by the non-adversarial nature of VA proceedings.<sup>211</sup>

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<sup>207</sup> 38 U.S.C. §§ 3101, 3106 (2012); see 38 C.F.R. §§ 21.50-52 (2018) (citing factors to consider in evaluating employment handicaps and serious employment handicaps); accord U.S. DEP'T OF VETERANS AFF., MANUAL M28, VOCATIONAL REHABILITATION ADJUDICATION HANDBOOK, Pt. IV, Subpt. iii, Ch. 3 (2014) (adjudication manual providing step-by-step guidance to VA adjudicators to determine if employment handicap or serious employment handicap is adequately established by the facts of record).

<sup>208</sup> Veterans who do not qualify for Chapter 31 benefits could still obtain education benefits through Chapter 33. See 38 U.S.C. §§ 3301-3325 (2012).

<sup>209</sup> 38 U.S.C. §§ 3101, 3106 (2012); 38 C.F.R. §§ 21.50-52 (2018).

<sup>210</sup> See, e.g., *Scott v. Canada (Attorney General)*, 2013 BCSC 1651 (2013) (Can.).

<sup>211</sup> See *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (holding that the plain meaning of 38 U.S.C. § 1151 did not require fault, and VA's inconsistent regulations and internal practices did not require deference, in part because judicial review did not exist until 1988); *Comer v. Peake*, 552 F.3d 1362, 1368-71 (Fed. Cir. 2009) (holding that VA's duty to evaluate all potential claims raised by the record applies regardless of representation); *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (holding that "in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight").

*b. Deciding how large the lump sum should be.*

Computing the amount of a lump-sum payment under a regime purposed with rehabilitation would be easier than crafting a lump sum paid for some other purpose. Payment models based on pain and suffering or lost income require formulas that assign dollar values to conditions or in some other way quantify the pain or define the lost income. A readjustment payment can be computed according to more objective criteria, such as the average length of job search for a healthy member of the military who does not need retraining, average costs of relocation, family care, and other practical expenses.<sup>212</sup> The building blocks for defining this payment already exist in the military's Basic Allowance for Subsistence (BAS) and Basic Allowance for Housing (BAH) calculations, which are already in use by VA to calculate living expenses paid as a part of some education benefits.<sup>213</sup>

Lump-sum payments fail to affect rehabilitation when a veteran is not currently employable. If a veteran lacks the ability to obtain gainful employment consistent with his or her disabilities at the time of the adjudication, and is awarded a lump sum, a likely outcome is that the veteran will deplete the lump sum and then have no means of survival, nor the resources to obtain training to become employable. Using the Chapter 31 Employment Handicap adjudication to decide when to apply an immediate lump-sum payment would likely result in most veterans with disabilities currently rated at twenty percent or less receiving a lump-sum adjustment payment instead of monthly disability compensation.<sup>214</sup> Such a change would reduce the number of veterans receiving ongoing disability support by thirty-two percent, while providing insulation against erroneously awarding a lump sum to an unemployable veteran.<sup>215</sup>

If Joe Veteran cannot work right now, he should not be paid a lump sum right now. A system purposed with rehabilitation should instead inquire whether it is reasonably likely that, with education, training, and counseling, Joe can reenter the work force at some point in the future? This inquiry is related to the previous one and is similarly fact-sensitive.<sup>216</sup> Fortunately, a ready-made solution exists in Chapter 31.<sup>217</sup> The standards of employability for Chapter 31 purposes could be applied to split veterans who do not receive lump sums into two categories: those who can likely someday return to work, and those who have a condition that precludes future employment. Those who can return to work with training can be immediately granted vocational rehabilitation services (since the necessary inquiries would already be complete). This category of veterans should then be provided with the income guarantee and lump-sum incentive, discussed below, while those who cannot reasonably be expected to work should receive monthly payments.

<sup>212</sup> Brant, *Learning from an Ally*, *supra* note 200, at 105.

<sup>213</sup> See 37 U.S.C. §§ 402-03 (2012) (providing computation of basic housing allowance (BAH) and basic subsistence allowance (BAS) for military personnel); 38 U.S.C. § 3313(c)(1)(B) (2012) (applying military BAH to compute living allowances for veterans receiving education benefits from VA). Developing a lump-sum readjustment payment based on BAS and BAH would require substantial study and effort but much less than would be required to develop such a payment from scratch. A lump-sum payment based on pain and suffering, or some purpose other than readjustment, could not be as readily calculated with BAS, BAH, or any other existing tool. *See id.*

<sup>214</sup> PRESIDENT'S COMM'N, *supra* note 80, at 106.

<sup>215</sup> VETERANS BENEFITS ADMIN., 2014 ANNUAL REPORT: COMPENSATION 8.

<sup>216</sup> See *supra* Part V(A)(1)(a).

<sup>217</sup> 38 U.S.C. §§ 3101, 3106 (2012) 38 CFR §§ 21.50-52 (2018). (listing factors to consider in evaluating for employment handicap and serious employment handicap); accord U.S. DEP'T OF VETERANS AFF., MANUAL M28, VOCATIONAL REHABILITATION ADJUDICATION HANDBOOK, Pt. IV, Subpt. iii, Ch. 3 (2014) (providing step-by-step instructions for adjudicators to make determinations of employability consistent with 38 C.F.R. §§ 21.050-52).

## **B. The Income Guarantee Safety Net and Lump-Sum Incentive**

Veterans who have an employment handicap but can return to work with retraining face the problem of disincentivization. How do we provide for Joe Veteran's basic needs without taking away the incentive to achieve higher-order needs? Joe requires a safety net for himself and his family while he retrains, and he needs an incentive to do the hard work of repurposing himself for a second, perhaps very different, career. A rehabilitation-oriented disability compensation system for veterans requires a safety net for veterans who are not presently employable but can be with retraining, along with an incentive to try.

Here, an income guarantee together with a future lump-sum payment provide the answer. The concept of an income guarantee is a predetermined amount of money a veteran is guaranteed to receive regardless of employment. An illustrative example is the Canadian Military Income Guarantee, which provides a guaranteed minimum income of \$42,400 to disabled veterans.<sup>218</sup> If Canadian Joe Veteran works but only makes \$20,000 per year, the Canadian government makes up the difference of \$22,400.<sup>219</sup> This system allows Canadian Joe Veteran to attempt a return to work without fear that if he does so he will be worse off. It also conserves resources, because in the above example, Joe has created \$20,000 of value in his society by working, and the government has spent \$20,000 less meeting Joe's survival needs.

The problem inherent in a Canadian-style income guarantee is that such a benefit provides little incentive for veterans with marginal employment to work at all or to do the hard work of retraining so they can earn more.<sup>220</sup> Canadian Joe Veteran in the example above would be no better off working than not working, because if he works and makes \$20,000 or does not work at all, he still ends up with \$42,400.

I propose to overcome this problem by retaining Joe's lump-sum payment for the future, meaning Joe receives an income guarantee while he rehabilitates and a lump-sum payment when he is successful.<sup>221</sup> Under my proposed system, Joe Veteran, who has already been adjudicated and found eligible for vocational rehabilitation training, would receive an income guarantee akin to the Canadian system.<sup>222</sup> However, because the purpose of my proposed system is to render Joe Veteran no worse off for his service, I propose that the income guarantee equal Joe's highest rate of pay while he was in service. This sets the dollar amount in objective terms consistent with the purpose of the system and provides the safety net Joe needs to support himself and his family through his re-training. After all, if Joe could support himself while in service, that same amount of money should support him after service. At the same time, this system provides a fail-safe: should Joe find that he cannot complete the training, the income guarantee ensures that he does not end up worse off for his service.

Providing the lump-sum payment at the end of rehabilitation creates an incentive for Joe Veteran to complete his education or training successfully and subsequently to find the best job he can. If Joe does not find a job that pays as much as his military service did right away, Joe will remain incentivized to keep

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<sup>218</sup> Canadian Forces Compensation Act, *supra* note 198.

<sup>219</sup> *Id.*

<sup>220</sup> Ridgway, *Information Age*, *supra* note 34, at 48.

<sup>221</sup> A variant of this possibility would include a gradual reduction of the amount of the lump-sum payment over time, down to some minimum percentage of the original lump-sum payment amount. This variant might be useful to offset feelings of unfair treatment among veterans who received only the lump-sum payment and to encourage Joe Veteran to readjust sooner rather than later, but care would need to be taken to avoid incentivizing a rush to work that Joe was not actually prepared for. See *supra* Part III (discussing how disabled veterans initially opposed the G.I. Bill while non-disabled veterans supported it, but when the disabled veterans understood that they would still be fairly treated their resistance to the G.I. Bill decreased).

<sup>222</sup> Canadian Forces Compensation Act, *supra* note 198.

improving himself and seeking better opportunities, knowing that he will receive at least his income guarantee until he is successful, and that when he eventually rehabilitates to the point that he is in a position equal to or better than his highest rate of pay in the military, he can accept his lump-sum payment in exchange for disconnecting from agency dependence. This combination of lump-sum payment, vocational training, and income guarantee not only cares for Joe by tending to his survival needs but also eliminates the problem of stalling out on Maslow's Hierarchy. By eliminating the fear of failure (and the destitution it might represent) and providing a significant incentive to keep improving (the reward of a lump sum on readjustment), Joe is empowered to reach higher levels of self-esteem and self-actualization, and has the best chance to be a true benefit to his community after his military service ends.<sup>223</sup>

My proposal would require significant expansion of VA's Vocational Rehabilitation and Education program and close integration of that program with Compensation programs, but would likely result in more thorough readjustment of disabled veterans.<sup>224</sup> Because most veterans with a rated disability would likely fall into this category, this program would firmly set readjustment and re-entry into the civilian labor force as the primary purpose and central mission of VA, thereby drawing VA compensation into better harmony with the concept of disability expressed in the Americans with Disabilities Act. Such an alignment would also stand a better chance than the Scheduler Rating System at spawning a modern wave of high-achieving veterans such as those produced by the original G.I. Bill. Such would restore confidence in the concept of veterans' benefits, because the general population would likely see more veterans returning to school and work and fewer veterans with no visible injury parking in handicapped spots.

### C. Direct Compensation

Under my proposed system, the only category of veterans requiring direct compensation in the form of a permanent monthly payment would consist of those adjudicated as unable to work both now and in the future. For this category of veterans, a lump sum is ineffective because no matter how large the lump sum is, the veteran will likely deplete it at some point. The income-guarantee and lump-sum payment solution is also ineffective for this category of veteran because he or she is not capable of generating income in the future. This category of veteran would presently be adjudicated as permanently and totally disabled according to the Scheduler Rating System.

Distinguishing between this category of veteran and the other two categories is easy. A negative determination as to both of the previous benefits would yield direct compensation by default. If Joe is adjudicated as both currently unable to work and not able to work in the future with re-training, Joe would not be a candidate for rehabilitation. Joe therefore needs direct support at the current 100 percent rate, or the highest payment available.

I propose that this payment be reserved for cases where rehabilitation is not reasonably possible. I further propose that the veteran retain the option to move himself, voluntarily, into the income guarantee and lump-sum incentive category, which is necessary because veterans may sometimes be

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<sup>223</sup> METTLER, *SOLDIERS TO CITIZENS*, *supra* note 78, at 132 (documenting that studies of G.I. Bill beneficiaries in the postwar era found that education made them less authoritarian, less dogmatic, less ethnocentric, and less prejudiced; G.I. Bill fostered values conducive to liberal democracy).

<sup>224</sup> See PRESIDENT'S COMM'N, *supra* note 80, at 188 (noting that lack of integration of VA programs, including disability compensation and readjustment benefits, impairs effectiveness of each separate part; integration of benefits is necessary to effect readjustment, particularly for veterans with a rated disability).

adjudicated for direct compensation and subsequently improve due, for example, to advances in medical technology. Because the system is considering recovery from injury, the system must retain flexibility, so that the “miracle veteran” can reap the rewards of his or her good fortune and get the most benefit possible out of the remainder of his or her life. Retaining this option could be as easy as allowing veterans in the direct compensation category to request re-adjudication.

If the symptoms of Joe’s brain injury are likely permanent and are so substantial that they leave no reasonable chance of employment, Joe must receive monthly support. This road is simply the only alternative consistent with the basic purpose of incentivizing military service that has motivated the creation of veterans’ disability systems since the Revolutionary War.<sup>225</sup> Because this category of veterans accounts for less than eleven percent of veterans receiving disability compensation, my proposed system would likely reduce the number of veterans receiving permanent assistance by nearly ninety percent.<sup>226</sup>

## V. CONCLUSION

The Scheduler Rating System currently in use by VA to calculate and replace lost income was a sensible reaction to the social, economic, and political realities of 1933, but is unworkable now because modern social, economic and political realities are incompatibly different. Today, the Scheduler Rating System’s inability to predict and replace lost income creates frequent absurd outcomes, leaving many veterans either under- or over-compensated. These inappropriate outcomes burden the VA appellate system, injure veterans, and erode public confidence in veteran compensation. The system encourages repeat filing, incentivizes medical deterioration, and disincentivizes the use of readjustment benefits, creating a massive burden on the federal budget while depriving society of the contributions of veterans who often do not even understand what they could be contributing.

Congress and VA must acknowledge that the original purpose of the Scheduler Rating System is no longer workable. VA cannot calculate and replace lost income because changes in the nature of work and the concept of disability have rendered this calculation impossible and the attempt futile. The results of pursuing a futile policy are erosion of public support, damage to veterans, and damage to the national economy.

The solution is to abandon the income replacement model and embrace a model purpose-built for rehabilitation. Such a model can be built out of existing benefits and adjudicatory procedures, because robust, well-developed processes have existed within VA for decades to answer all of the relevant inquiries and supply all of the required services. A shift to a rehabilitation-centered model would be a massive shift in paradigm, yet would consist mostly of a re-application of existing procedures, calculations, and benefits. A successful disability compensation system built for readjustment would require three different types of compensation, including a lump-sum payment, an income guarantee, and direct support.

In summary, the Scheduler Rating System of disability compensation used by VA has outlived its usefulness and should be abandoned. VA should employ a compensation system expressly purposed to readjustment, because such a system would be more practical in the Information Age, and would benefit the veteran, VA, and society.

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<sup>225</sup> Ridgway, *The Splendid Isolation Revisited*, *supra* note 10, at 139.

<sup>226</sup> VETERANS BENEFITS ADMIN., 2014 ANNUAL REPORT: COMPENSATION 8.