LTC Stephen C. Miller, Esquire
Pennsylvania Veterans Museum Law Clinic
Media Armory
12 E. State Street
Media, PA 19063

Enclosed:

- Outline of Testimony by Stephen C. Miller
- Summaries of Veterans Court Legislation from:*
  - California
  - Colorado
  - Illinois
  - Oregon
  - Texas
  - Virginia
- Veterans Court Legislation from:
- Summaries of Veterans Court Legislation from:
  - California
  - Colorado
  - Illinois
  - Oregon
  - Texas
  - Virginia
- Buffalo NY Veterans Court Policy and Procedure Manual
- Veterans Courts: Early Outcomes and Key Indicators for Success
  - 2011. Holbrook and Anderson. Widener UniversitySchool of Law
- Veterans' Courts and Criminal Responsibility: A Problem Solving History & Approach to the Liminality of Combat Trauma
  - 2011 Holbrook Widener University School of Law.

*The opinions and recommendations contained in the summaries are those of the Widener University School of Law students who compiled the summaries, and are not necessarily shared by the presenter.

LTC Stephen C. Miller, Esquire

Testimony Outline

- Thank you
    - April meeting w/ Chairman Marsico/Rep. Barrar/Rep. Micarelli
    - Support of Sen. Erickson/Rep. Killion
- My background
    - PAVM Veterans Law Clinic
    - Delaware County Taskforce
    - 177FW, Air National Guard pilot/Pro bono
    - Air Line Pilots Association Pro bono
- Legislation –why required. Although "problem solving courts" are permissible under current law. Vets court has unique attributes and requirements warranting specific legislation.
    - General
        - Shows Legislative Support
        - Provides Mechanism for funding
        - Codifies policy and procedure
        - Standardizes best practices
    - Substantive
        - Education requirement for all participants
        - Veteran in the adjudicative loop
- General
    - Shoes Legislative Support
        - PA General Assembly is big vet supporter

        - Preferential hiring
        - Military Childcare Assistance
        - Veteran membership on Civil Service Commission
            - Need for "advocate ... who understands the challenges faced by veterans,"
            - "a fellow veteran ... would better serve the needs of our veteran community."
    - Legislation would further demonstrate PA GA's tradition of veterans support

- Mechanism for funding
    - At April meeting, discussed SERV Act
        - Died in committee
    - Cong. Meehan – introducing legislation
        - "Congressman Meehan plans to introduce legislation that will give communities across the country access to federal assistance to create Veterans' Treatment Courts in their area, and improve existing Veterans' Treatment Courts. The funding will come from federal dollars already appropriated. The bill will not require any new spending."
    - Other states have funding schemes built into legislation
    - Legislation would provide conduit for receipt and distribution of federal funding and could establish other funding schemes

- Codify Policy and Procedure

- Currently Justice McCaffery's program up and running, or about to be, in about half-dozen counties
- Right now, big support by Supreme Court of PA and public
  - SCOPA Chief through spouses
  - 2 wars
  - 10th anniversary of 9/11
- Codifying current policy and procedure would capture the currant brain trust/passion/motivation for posterity, and ensure the public service survives our current public servants

- Standardization
  - DelCo (my county) rich tradition of uniformed service on our bench/bar
  - Some of PA's 67 counties maybe not
  - Capture "best practices"
  - Legal entity, therefore, potential challenges
    - Perceptions of status based benefit/special treatment
    - misunderstanding of costs – in time of financial uncertainty
  - Standardization enables us to capture best practices and is our insurance against potential challenges to the system because it allows us to put our best minds into the development of the system and gives the individual courts the "quality of quantity" in defending the system

- Substantive
  - Education
    - Volunteer education

- Supreme Court of Pennsylvania Administrator of Problem Solving Courts has under development
- Due for release 19 September

- Judges/DAs/PDs/private practitioners
- Continuing Legal Education

- Client story regarding "doesn't look like a combat wounded veteran."

- Veteran in the adjudicative loop
- Consistent with veteran membership on Civil Service Committee
- Client story regarding pilots v. "adjudicators."

- Thank you. Offer of my continued service.

California Legislation: CA Penal Code § 1170.9

(a) If a person:
- is convicted of a criminal offense and
- could be sentenced to county jail or state prison

and alleges that he committed the offense as a result of:
- sexual trauma,
- traumatic brain injury,
- post-traumatic stress disorder,
- substance abuse, or
- mental health problems

stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to:
- whether the defendant was, or currently is, a member of the United States military and
- whether the defendant may be suffering from 1 of the 5 disorders previously listed.

The court may request, through existing resources, an assessment to aid in that determination.

(b) If the court concludes that a defendant convicted of a criminal offense:
- is a person described in subdivision (a), and
- if the defendant is otherwise eligible for probation and the court places the defendant on probation,

the court may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that which the defendant would have served in state prison or county jail, provided:
- the defendant agrees to participate in the program and
- the court determines that an appropriate treatment program exists.

(c) If a referral is made to the county mental health authority, the county shall be obligated to provide mental health treatment services only to the extent that resources are available for that purpose. The county mental health agency shall not be responsible for providing services outside its traditional scope of services.

(d) When determining the "needs of the defendant," the court shall consider the fact that the defendant is a person described in subdivision (a) in assessing whether the defendant should be placed on probation and ordered into a federal or community-based treatment service program with a demonstrated history of specializing in the treatment of mental health problems, including substance abuse, post-traumatic stress disorder, traumatic brain injury, military sexual trauma, and other related mental health problems.

(e) A defendant granted probation under this section and committed to a residential treatment program shall earn sentence credits for the actual time the defendant serves in residential treatment.

(f) The court shall give preference to a treatment program that has a history of successfully treating veterans who suffer from sexual trauma, traumatic brain injury, PTSD, substance abuse, or mental health problems as a result of that service, including, but not limited to, programs operated by the United States Department of Defense or the United States Veterans Administration.

(g) The court and the assigned treatment program may collaborate with the Department of Veterans Affairs and the United States Veterans Administration to maximize benefits and services provided to the veteran.

SUMMARY:

If a veteran is convicted of a criminal offense where a county jail or state prison sentence could be imposed, the court may allow the defendant to enter a treatment program, only if the following requirements are met:

1. **The criminal offense resulted from sexual trauma, traumatic brain injury, PTSD, substance abuse, or mental health problems.**
2. **The disorder (from the previous list) must stem from service in the military.**
3. **The defendant must be eligible for probation, and the court must place the defendant on probation.**
4. **The defendant must agree to participation in the treatment program.**
5. **An appropriate treatment program exists.**

Colorado Legislation: House Bill 10-1104

SECTION 1. **Legislative declaration** (paraphrased)
This section explains that since veterans both have earned a high degree of honor for their service to our country, and since they experience unique problems as a result of this service, the Colorado general assembly has chosen to assist veterans and members of the military involved in the criminal justice system who have a military-related injury via veterans' treatment courts. The bill references the following mental disorders connected to military service/combat: PTSD, traumatic brain injury, depression, anxiety, acute stress, and the use of drugs and alcohol.

The goal of this bill is to provide an alternative to incarceration to veterans who commit crimes, when feasible, by permitting them access to treatment for mental health and substance abuse problems resulting from military service.

SECTION 2. 13-3-101, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:
13-3-101. State court administrator. (9) THE STATE COURT ADMINISTRATOR IS AUTHORIZED TO SEEK FEDERAL FUNDING AS IT BECOMES AVAILABLE ON BEHALF OF THE STATE COURT SYSTEM FOR THE ESTABLISHMENT, MAINTENANCE, OR EXPANSION OF VETERANS' TREATMENT COURTS.

SECTION 3. Part 1 of article 5 of title 13, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:
13-5-144. Chief judge - veterans treatment court authority. THE CHIEF JUDGE OF A JUDICIAL DISTRICT MAY ESTABLISH AN APPROPRIATE PROGRAM FOR THE TREATMENT OF VETERANS AND MEMBERS OF THE MILITARY.

Illinois

- Section 5
  - Defines the need for Veterans Treatment Courts
- Section 10
  - Definitions
- Section 15
  - The Chief Judge of each judicial circuit may establish a Veterans and Servicemembers Court program including a format under which it operates under this Act.
- Section 20
  - Eligibility – To be eligible,
    - (a) A defendant may be admitted in to a Veterans and Servicemembers Court program only upon the agreement of the prosecutor and the defendant and with the approval of the Court
    - (b) A defendant shall be excluded if any one of the following applies:
      - (1) The crime is a crime of violence as set forth in clause (3) of this subsection (b)
      - (2) The defendant does not demonstrate a willingness to participate in a treatment program
      - (3) The defendant has been convicted of a crime of violence within the past 10 years excluding incarceration time, including but not limited to:
        - First degree murder
        - Second degree murder
        - Predatory criminal sexual assault of a child
        - Aggravated criminal sexual assault
        - Criminal sexual assault
        - Armed robbery
        - Aggravated arson
        - Arson
        - Aggravated kidnapping and kidnapping
        - Aggravated battery resulting in great bodily harm or permanent disability
        - Stalking
        - Aggravated stalking

- OR any offense involving the discharge of a firearm or where occurred serious bodily injury or death to any person
- (4) A defendant has previously completed or has been discharged from a Veterans and Servicemembers Court program within three years of that completion or discharge

- Section 25 – Procedure
  - Court will order defendant to submit to an eligibility screening and an assessment through the VA or the IDVA
  - Defendant will submit to an eligibility screening and mental health and drug/alcohol screening and assessment of the defendant by the VA or the IDVA
  - Defendant will be informed by the judge that failing to meet the conditions for the Court will result in revoked eligibility to participate in the program and the defendant may be sentenced to prosecution continued as provided in the Unified Code of Corrections for the crime charged.
  - Defendant shall sign a written agreement to abide by all the terms and conditions of the program
  - The Court can order the defendant to complete substance abuse treatment in an outpatient, inpatient, residential, or jail-based custodial treatment program
- Section 30
  - The court can offer a network of substance abuse treatment programs representing a continuum of graduated substance abuse treatment options commensurate with the needs of defendants.
- Section 35
  - If the court finds that:
    - The defendant is not performing satisfactorily in the assigned program
    - The defendant is not benefitting from education, treatment, or rehabilitation
    - The defendant has engaged in criminal conduct rendering him or her unsuitable for the program
    - The defendant has otherwise violated the terms and conditions of the program or his or her sentence or is for any reason unable to participate
    - THEN, then Court may impose reasonable sanctions under prior written agreement of the defendant, including but not limited to imprisonment or dismissal of the defendant from the program and the Court may reinstate criminal proceedings against him or her or proceed under Section 5-6-4 of

the Unified Code of Corrections for a violation of probation, conditional discharge, or supervision hearing.

- If the program is successfully completed, the charges may be dismissed or the defendant's sentence may be terminated or otherwise discharge him or her from further proceedings in the original prosecution

- Section 90
  - Fees to pay for the program
  - Fees are to be paid by defendant and they range based on the crime alleged and the number of violations committed
  - It also permits fees to be collected from other courts (Children's Advocacy Center, drug court, teen court, peer court, peer jury, youth court, and other youth diversion programs)

I recommend following Illinois, especially with respect to Section 20 on eligibility and Section 25 on procedure. The statute as a whole does not seem too liberal (which would possibly create a system that is abused), nor does it seem too conservative (keeping potentially eligible veterans away who would benefit from the program due to strict standards).

Oregon

- Section 1
  - Some terms were defined and/or redefined
- Section 2
  - Subsection (1)
  - **Condition 1**: After an accusatory instrument has been filed charging a defendant with commission of a crime (this does not include driving while under the influence of intoxicants); and
  - **Condition 2**: After the DA has considered the factors listed in subsection (2)
  - **Conclusion**: If it appears to the DA that diversion of the defendant would be in the interests of justice and of benefit to the defendant and the community, the DA may propose a diversion agreement to the defendant
  - Subsection (2) – Factors to determine whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community:
    - The nature of the offence (cannot involve physical injury to another person)
    - Special characteristics or difficulties of the offender
    - Whether the defendant is a first-time offender; if the offender has previously participated in diversion, according to the certification of the DOJ, diversion may not be offered
    - Whether there is a probability that the defendant will cooperate with the benefit from alternative treatment
    - Whether the available program is appropriate to the needs of the offender
    - The impact of diversion upon the community
    - Recommendations, if any, of the involved law enforcement agency
    - Recommendations, if any, of the victim
    - Provisions for restitution
    - Any mitigating circumstances
  - Subsection (3) -- Diversion may not be offered is the offense:
    - Involved serious physical injury to another person
    - Is classified as a Class A or B felony and involved physical injury to another person
    - Is described in ORS 163.365, 163.375, 163.395, 163.405, 163.408, 163.411 or 163.427

        - Involved domestic violence as defined in ORS 135.230 and, at the time the offense was committed, the defendant was subject to a protective order in favor of the victim of the offense
    - Subsection (4) – defines (1) physical injury, (2) serious physical injury, and (3) protective order
- Section 3
    - If the DA elects to offer diversion in lieu of further criminal proceedings
    - And the defendant, with the advice of counsel, agrees to the terms of the proposed agreement
        - Including a waiver of the right to a speedy trial
    - The court shall stay further criminal proceedings for a definite period
    - Except as provided by section 5 of this Act,
        - When defendant charged with a felony, the stay shall not exceed 270 days
        - When defendant charged with a misdemeanor, the stay shall not exceed 180 days
    - If the defendant declines diversion, the court shall resume criminal proceedings
- Section 4
    - Section 5 is added and made part of ORS 135.881 to ORS 135.901
- Section 5
    - When the diversion agreement involves domestic violence, then in addition to a waiver of the right to a speedy trial, the agreement must require the servicemember to enter a plea of guilty or no contest to each domestic violence offense charged in the accusatory instrument
    - If the servicemember, with the advice of counsel, agrees to the terms of the agreement and enters a plea of guilty or no contest to each domestic violence offense charged in the accusatory instrument, the court shall stay further criminal proceedings involving the domestic violence offenses for a definite period not to exceed 2 years
- Section 6
    - The addition of section 5 and amendments to sections 1 and 2 apply to offenses for which there has not been an adjudication of guilt on or before the effective date of this Act
- Section 7
    - The Act is necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and the Act takes effect on passage

Texas –S.B. 1940

- **Funding:**
  - allows state employees, and members of the community to contribute to the Texas Veterans Commission
  - provides that the veterans assistance fund is a special fund outside the general revenue fund within the state treasury – the fund is permitted to operate a nonprofit (which was prohibited in the past)
- **Defined: "veterans court program"**
  - a program that has the following essential characteristics:
    (1) the integration of services in the processing of cases in the judicial system;
    (2) the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;
    (3) early identification and prompt placement of eligible participants in the program;
    (4) access to a continuum of alcohol, controlled substance, mental health, and other related treatment and rehabilitative services;
    (5) careful monitoring of treatment and services provided to program participants;
    (6) a coordinated strategy to govern program responses to participants' compliance;
    (7) ongoing judicial interaction with program participants;
    (8) monitoring and evaluation of program goals and effectiveness;
    (9) continuing interdisciplinary education to promote effective program planning, implementation, and operations; and
    (10) Development of partnerships with public agencies and community organizations, including the United States Department of Veterans Affairs.
- If **successful completion** - the court in which the criminal case is pending shall **dismiss the criminal action against the defendant** (with notice and a hearing)
- The commissioners court of a county may establish a veterans court program for persons arrested for or charged with any **misdemeanor** or **felony** offense.
  - **Must have**:
    - **State attorney's consent** to the defendant's participation in the program and
    - **Proof that the defendant:**
      - **Is a veteran** or **current member of the United States armed forces**, including a member of the reserves, national guard, or state guard; and
      - **Suffers from a brain injury, mental illness, or mental disorder, including post-traumatic stress disorder**, that:
        (A) Resulted from the defendant's military service in a combat zone or other similar hazardous duty area; and

(B) Materially affected the defendant's criminal conduct at issue in the case.

- Defendant has the right to choose whether to participate in treatment court or to go through the regular system
- The veterans court program and collect program fees that **do not exceed $1,000**; and a testing, counseling, and treatment fee in an amount necessary
- The fees must be based on ability to pay; and used only for the program.
- **Duties of Veterans Court.**
    (1) ensure a person eligible for the program is provided legal counsel before volunteering to proceed through the program and while participating in the program;
    (2) allow a participant to withdraw from the program at any time before a trial on the merits has been initiated;
    (3) provide a participant with a court-ordered individualized treatment plan indicating the services that will be provided to the participant; and
    (4) ensure that the jurisdiction of the veterans court continues for a period of not less than six months but does not continue beyond the period of community supervision for the offense charged.

West's Annotated California Codes

Penal Code (Refs & Annos)

Part 2. Of Criminal Procedure (Refs & Annos)

Title 7. Of Proceedings After the Commencement of the Trial and Before Judgment

Chapter 4.5. Trial Court Sentencing (Refs & Annos)

Article 1. Initial Sentencing (Refs & Annos)

West's Ann.Cal.Penal Code § 1170.9

§ 1170.9. Veterans convicted of criminal offense; mental health problems stemming from service; treatment during probation; county mental health authority; sentence credits; programs run by and collaboration with Department of Defense, Veterans Administration, and Department of Veterans Affairs

Effective: January 1, 2011
Currentness

(a) In the case of any person convicted of a criminal offense who could otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service. The court may request, through existing resources, an assessment to aid in that determination.

(b) If the court concludes that a defendant convicted of a criminal offense is a person described in subdivision (a), and if the defendant is otherwise eligible for probation and the court places the defendant on probation, the court may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that which the defendant would have served in state prison or county jail, provided the defendant agrees to participate in the program and the court determines that an appropriate treatment program exists.

(c) If a referral is made to the county mental health authority, the county shall be obligated to provide mental health treatment services only to the extent that resources are available for that purpose, as described in paragraph (5) of subdivision (b) of Section 5600.3 of the Welfare and Institutions Code. If mental health treatment services are ordered by the court, the county mental health agency shall coordinate appropriate referral of the defendant to the county veterans service officer, as described in paragraph (5) of subdivision (b) of Section 5600.3 of the Welfare and Institutions Code. The county mental health agency shall not be responsible for providing services outside its traditional scope of services. An order shall be made referring a defendant to a county mental health agency only if that agency has agreed to accept responsibility for the treatment of the defendant.

(d) When determining the "needs of the defendant," for purposes of Section 1202.7, the court shall consider the fact that the defendant is a person described in subdivision (a) in assessing whether the defendant should be placed on probation and ordered into a federal or community-based treatment service program with a demonstrated history of specializing in the treatment of mental health problems, including substance abuse, post-traumatic stress disorder, traumatic brain injury, military sexual trauma, and other related mental health problems.

(e) A defendant granted probation under this section and committed to a residential treatment program shall earn sentence credits for the actual time the defendant serves in residential treatment.

(f) The court, in making an order under this section to commit a defendant to an established treatment program, shall give preference to a treatment program that has a history of successfully treating veterans who suffer from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service, including, but not limited to, programs operated by the United States Department of Defense or the United States Veterans Administration.

(g) The court and the assigned treatment program may collaborate with the Department of Veterans Affairs and the United States Veterans Administration to maximize benefits and services provided to the veteran.

Credits

(Formerly § 1170.8, added by Stats.1982, c. 964, p. 3466, § 1. Renumbered § 1170.9 and amended by Stats.1983, c. 142, § 121. Amended by Stats.2006, c. 788 (A.B.2586), § 2; Stats.2010, c. 347 (A.B.674), § 1.)

Notes of Decisions (15)

Current with urgency legislation through Ch. 192 of 2011 Reg.Sess. and Ch. 8 of 2011-2012 1st Ex.Sess

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HOUSE BILL 10-1107

BY REPRESENTATIVE(S) Looper, Apuan, Baumgardner, Court, DelGrosso, Fischer, Frangas, Gardner B., Gardner C., Kagan, Kefalas, Kerr J., King S., Labuda, Lambert, McFadyen, Middleton, Nikkel, Ryden, Schafer S., Solano, Stephens, Summers, Todd, Massey, Pommer, Primavera;
also SENATOR(S) Williams, Penry, Boyd, Cadman, Heath, Hodge, Hudak, King K., Kopp, Morse, Newell, Romer, Sandoval, Scheffel

CONCERNING AUTHORIZATION FOR THE ESTABLISHMENT OF A VETERANS TREATMENT COURT PROGRAM IN JUDICIAL DISTRICTS.

Be it enacted by the General Assembly of the State of Colorado.

SECTION 1. Legislative declaration. (1) The general assembly finds and declares that:

(a) Historically, the state of Colorado has honored the noble sacrifices that members of the military have made to protect our freedoms by providing veterans and members of the military certain benefits and rehabilitative services;

(b) Studies have shown that combat service may exact a tremendous psychological toll on members of the military who are faced with the

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Capital letters or bold & italic numbers indicate new material to be added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

consistent threat of death or injury over an extended period of time;

(c) Researchers have known that a significant number of the one million six hundred thousand members of the military who have served in Iraq and Afghanistan will suffer, as a result of their military service, mental health injuries, such as post-traumatic stress disorder, traumatic brain injury, depression, anxiety, and substance abuse;

(d) Such combat-related injuries, including the use of drugs and alcohol to cope with such injuries, can lead to encounters with the criminal justice system that would not have otherwise occurred without the combat-related injury;

(e) While the vast majority of returning members of the military do not have contact with the criminal justice system, and most veterans and members of the military are well-disciplined, contributing members of society, psychiatrists and law enforcement officials agree that combat-related injuries have led to instances of criminality; and

(f) As a grateful state, we must continue to honor the military service of our men and women by attempting to provide them with an alternative to incarceration when possible, permitting them instead to access proper treatment for mental health and substance abuse problems resulting from military service.

(2) Therefore, the general assembly finds that it is in the best interests of Colorado citizens to assist veterans and members of the military involved in the criminal justice system who have a military-related injury. In order to achieve this end, the general assembly encourages the establishment of veterans' treatment courts to address the unique challenges veterans face as a result of their honorable service.

SECTION 2. 13-3-101, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

13-3-101. State court administrator. (9) THE STATE COURT ADMINISTRATOR IS AUTHORIZED TO SEEK FEDERAL FUNDING AS IT BECOMES AVAILABLE ON BEHALF OF THE STATE COURT SYSTEM FOR THE ESTABLISHMENT, MAINTENANCE, OR EXPANSION OF VETERANS' TREATMENT COURTS.

Virginia – H 1691

- Amends and reenacts the VA Code
- Establishes that the Department of Veteran's Services is responsible for the establishment, operation, administration, and maintenance of offices and programs related to services Virginia-domiciled veterans and their eligible spouses and dependants.
- Defined Terms includes
    - Active military, naval, or air service members
    - Service-connected
    - Service disabled veteran
    - Service disabled veteran business
    - Veteran
- The Department of Veteran Services in cooperation with the Department of Behavioral Health and Developmental Services and the Department of Rehabilitative Services **shall** establish a program to monitor and coordinate mental health and rehabilitative services support for Virginia veterans, VA National Guard, and VA Armed Forces Reserves.
- "The program **shall** cooperate with localities that **may** establish special treatment procedures for veterans and active duty service members…"
- **FUNDS:** This is all subject to the availability of nongeneral fund revenues, including private donations and federal funds

"To facilitate local involvement and flexibility in responding to the problem of crime in local communities and to effectively treat, counsel, rehabilitate, and supervise veterans and active military service members who are offenders or defendants in the criminal justice system and who need access to proper treatment for mental illness including major depression, alcohol or drug abuse, post traumatic stress disorder, traumatic brain injury or a combination of these, any city, county, or combination thereof, may develop, establish, and maintain policies, procedures, and treatment services for all such offenders who are convicted and sentenced for misdemeanors or felonies that are not felony acts of violence, as defined in § 19.2-297.1. Such policies, procedures, and treatment services shall be designed to provide: "

1. Coordination of treatment and counseling services available to the criminal justice system case processing;
2. Enhanced public safety through offender supervision, counseling, and treatment;
3. Prompt identification and placement of eligible participants;
4. Access to a continuum of treatment, rehabilitation, and counseling services in collaboration with such care providers as are willing and able to provide the services needed;
5. Where appropriate, verified participant abstinence through frequent alcohol and other drug testing;
6. Prompt response to participants' noncompliance with program requirements;
7. Ongoing monitoring and evaluation of program effectiveness and efficiency;
8. Ongoing education and training in support of program effectiveness and efficiency;
9. Ongoing collaboration among public agencies, community-based organizations and the U.S. Department of Veterans Affairs health care networks, the Veterans Benefits

Administration, volunteer veteran mentors, and veterans and military family support organizations; and

10. The creation of a veterans and military service members' advisory council to provide input on the operations of such programs. The council shall include individuals responsible for the criminal justice procedures program along with veterans and, if available, active military service members.

SECTION 3. Part 1 of article 5 of title 13, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

13-5-143. Chief judge - veterans treatment court - authority. THE CHIEF JUDGE OF A JUDICIAL DISTRICT MAY ESTABLISH AN APPROPRIATE PROGRAM FOR THE TREATMENT OF VETERANS AND MEMBERS OF THE MILITARY.

SECTION 4. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Terrance D. Carroll
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Brandon C. Shaffer
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Karen Goldman
SECRETARY OF
THE SENATE

APPROVED _____

Bill Ritter, Jr.
GOVERNOR OF THE STATE OF COLORADO

AN ACT concerning courts.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Short title. This Act may be cited as the Veterans and Servicemembers Court Treatment Act.

Section 5. Purposes. The General Assembly recognizes that veterans and active, Reserve and National Guard servicemembers have provided or are currently providing an invaluable service to our country. In so doing, some may suffer the effects of, including but not limited to, post traumatic stress disorder, traumatic brain injury, depression and may also suffer drug and alcohol dependency or addiction and co-occurring mental illness and substance abuse problems. As a result of this, some veterans or active duty servicemembers come into contact with the criminal justice system and are charged with felony or misdemeanor offenses. There is a critical need for the criminal justice system to recognize these veterans, provide accountability for their wrongdoing, provide for the safety of the public and provide for the treatment of our veterans. It is the intent of the General Assembly to create specialized veteran and servicemember courts or programs with the necessary flexibility to meet the specialized problems faced by these veteran and servicemember defendants.

Section 10. Definitions. In this Act:

"Combination Veterans and Servicemembers Court program" means a court program that includes a pre-adjudicatory and a post-adjudicatory Veterans and Servicemembers court program.

"Court" means Veterans and Servicemembers Court.

"IDVA" means the Illinois Department of Veterans' Affairs.

"Post-adjudicatory Veterans and Servicemembers Court Program" means a program in which the defendant has admitted guilt or has been found guilty and agrees, along with the prosecution, to enter a Veterans and Servicemembers Court program as part of the defendant's sentence.

"Pre-adjudicatory Veterans and Servicemembers Court Program" means a program that allows the defendant with the consent of the prosecution, to expedite the defendant's criminal case before conviction or before filing of a criminal case and requires successful completion of the Veterans and Servicemembers Court programs as part of the agreement.

"Servicemember" means a person who is currently serving in the Army, Air Force, Marines, Navy, or Coast Guard on active duty, reserve status or in the National Guard.

"VA" means the United States Department of Veterans' Affairs.

"Veteran" means a person who served in the active military, naval, or air service and who was discharged or released therefrom under conditions other than dishonorable.

"Veterans and Servicemembers Court professional" means a judge, prosecutor, defense attorney, probation officer, or treatment provider involved with the Court program.

"Veterans and Servicemembers Court" means a court or program with an immediate and highly structured judicial intervention process for substance abuse treatment, mental health, or other assessed treatment needs of eligible veteran and servicemember defendants that brings together substance abuse professionals, mental health professionals, VA professionals, local social programs and intensive judicial monitoring in accordance with the nationally recommended 10 key components of drug courts.

Section 15. Authorization. The Chief Judge of each judicial circuit may establish a Veterans and Servicemembers Court program including a format under which it operates under this Act. The Veterans and Servicemembers Court may, at the discretion of the Chief Judge, be a separate court or a program of a drug court within the Circuit. At the discretion of the Chief Judge, the Veterans and Servicemembers Court program may be operated in one county in the Circuit, and allow veteran and servicemember defendants from all counties within the Circuit to participate.

Section 20. Eligibility. Veterans and Servicemembers are eligible for Veterans and Servicemembers Courts, provided the

following:

(a) A defendant may be admitted into a Veterans and Servicemembers Court program only upon the agreement of the prosecutor and the defendant and with the approval of the Court.

(b) A defendant shall be excluded from Veterans and Servicemembers Court program if any of one of the following applies:

(1) The crime is a crime of violence as set forth in clause (3) of this subsection (b).

(2) The defendant does not demonstrate a willingness to participate in a treatment program.

(3) The defendant has been convicted of a crime of violence within the past 10 years excluding incarceration time, including but not limited to: first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, armed robbery, aggravated arson, arson, aggravated kidnapping and kidnapping, aggravated battery resulting in great bodily harm or permanent disability, stalking, aggravated stalking, or any offense involving the discharge of a firearm or where occurred serious bodily injury or death to any person.

(4) The defendant has previously completed or has been discharged from a Veterans and Servicemembers Court program within three years of that completion or discharge.

Section 25. Procedure.

(a) The Court shall order the defendant to submit to an eligibility screening and an assessment through the VA and/or the IDVA to provide information on the defendant's veteran or servicemember status.

(b) The Court shall order the defendant to submit to an eligibility screening and mental health and drug/alcohol screening and assessment of the defendant by the VA or by the IDVA to provide assessment services for Illinois Courts. The assessment shall include a risks assessment and be based, in part, upon the known availability of treatment resources available to the Veterans and Servicemembers Court. The assessment shall also include recommendations for treatment of the conditions which are indicating a need for treatment under the monitoring of the Court and be reflective of a level of risk assessed for the individual seeking admission. An assessment need not be ordered if the Court finds a valid screening and/or assessment related to the present charge pending against the defendant has been completed within the previous 60 days.

(c) The judge shall inform the defendant that if the defendant fails to meet the conditions of the Veterans and Servicemembers Court program, eligibility to participate in the program may be revoked and the defendant may be sentenced or the prosecution continued as provided in the Unified Code of

Corrections for the crime charged.

(d) The defendant shall execute a written agreement with the Court as to his or her participation in the program and shall agree to all of the terms and conditions of the program, including but not limited to the possibility of sanctions or incarceration for failing to abide or comply with the terms of the program.

(e) In addition to any conditions authorized under the Pretrial Services Act and Section 5-6-3 of the Unified Code of Corrections, the Court may order the defendant to complete substance abuse treatment in an outpatient, inpatient, residential, or jail-based custodial treatment program, order the defendant to complete mental health counseling in an inpatient or outpatient basis, comply with physicians' recommendation regarding medications and all follow up treatment. This treatment may include but is not limited to post-traumatic stress disorder, traumatic brain injury and depression.

Section 30. Mental health and substance abuse treatment.

(a) The Veterans and Servicemembers Court program may maintain a network of substance abuse treatment programs representing a continuum of graduated substance abuse treatment options commensurate with the needs of defendants; these shall include programs with the VA, IDVA, the State of Illinois and community-based programs supported and sanctioned

by either or both.

(b) Any substance abuse treatment program to which defendants are referred must meet all of the rules and governing programs in Parts 2030 and 2060 of Title 77 of the Illinois Administrative Code.

(c) The Veterans and Servicemembers Court program may, in its discretion, employ additional services or interventions, as it deems necessary on a case by case basis.

(d) The Veterans and Servicemembers Court program may maintain or collaborate with a network of mental health treatment programs and, if it is a co-occurring mental health and substance abuse court program, a network of substance abuse treatment programs representing a continuum of treatment options commensurate with the needs of the defendant and available resources including programs with the VA, the IDVA and the State of Illinois.

Section 35. Violation; termination; discharge.

(a) If the Court finds from the evidence presented including but not limited to the reports or proffers of proof from the Veterans and Servicemembers Court professionals that:

(1) the defendant is not performing satisfactorily in the assigned program;

(2) the defendant is not benefitting from education, treatment, or rehabilitation;

(3) the defendant has engaged in criminal conduct

rendering him or her unsuitable for the program; or

(4) the defendant has otherwise violated the terms and conditions of the program or his or her sentence or is for any reason unable to participate; the Court may impose reasonable sanctions under prior written agreement of the defendant, including but not limited to imprisonment or dismissal of the defendant from the program and the Court may reinstate criminal proceedings against him or her or proceed under Section 5-6-4 of the Unified Code of Corrections for a violation of probation, conditional discharge, or supervision hearing.

(b) Upon successful completion of the terms and conditions of the program, the Court may dismiss the original charges against the defendant or successfully terminate the defendant's sentence or otherwise discharge him or her from any further proceedings against him or her in the original prosecution.

Section 90. The Counties Code is amended by changing Section 5-1101 as follows:

(55 ILCS 5/5-1101) (from Ch. 34, par. 5-1101)

Sec. 5-1101. Additional fees to finance court system. A county board may enact by ordinance or resolution the following fees:

(a) A $5 fee to be paid by the defendant on a judgment of

guilty or a grant of supervision for violation of the Illinois Vehicle Code other than Section 11-501 or violations of similar provisions contained in county or municipal ordinances committed in the county, and up to a $30 fee to be paid by the defendant on a judgment of guilty or a grant of supervision for violation of Section 11-501 of the Illinois Vehicle Code or a violation of a similar provision contained in county or municipal ordinances committed in the county.

(b) In the case of a county having a population of 1,000,000 or less, a $5 fee to be collected in all civil cases by the clerk of the circuit court.

(c) A fee to be paid by the defendant on a judgment of guilty or a grant of supervision, as follows:

(1) for a felony, $50;

(2) for a class A misdemeanor, $25;

(3) for a class B or class C misdemeanor, $15;

(4) for a petty offense, $10;

(5) for a business offense, $10.

(d) A $100 fee for the second and subsequent violations of Section 11-501 of the Illinois Vehicle Code or violations of similar provisions contained in county or municipal ordinances committed in the county. The proceeds of this fee shall be placed in the county general fund and used to finance education programs related to driving under the influence of alcohol or drugs.

(d-5) A $10 fee to be paid by the defendant on a judgment

of guilty or a grant of supervision under Section 5-9-1 of the Unified Code of Corrections to be placed in the county general fund and used to finance the county mental health court, the county drug court, the Veterans and Servicemembers Court, or any or all of the above ~~or both~~.

(e) In each county in which a teen court, peer court, peer jury, youth court, or other youth diversion program has been created, a county may adopt a mandatory fee of up to $5 to be assessed as provided in this subsection. Assessments collected by the clerk of the circuit court pursuant to this subsection must be deposited into an account specifically for the operation and administration of a teen court, peer court, peer jury, youth court, or other youth diversion program. The clerk of the circuit court shall collect the fees established in this subsection and must remit the fees to the teen court, peer court, peer jury, youth court, or other youth diversion program monthly, less 5%, which is to be retained as fee income to the office of the clerk of the circuit court. The fees are to be paid as follows:

(1) a fee of up to $5 paid by the defendant on a judgment of guilty or grant of supervision for violation of the Illinois Vehicle Code or violations of similar provisions contained in county or municipal ordinances committed in the county;

(2) a fee of up to $5 paid by the defendant on a judgment of guilty or grant of supervision under Section

5-9-1 of the Unified Code of Corrections for a felony; for a Class A, Class B, or Class C misdemeanor; for a petty offense; and for a business offense.

(f) In each county in which a drug court has been created, the county may adopt a mandatory fee of up to $5 to be assessed as provided in this subsection. Assessments collected by the clerk of the circuit court pursuant to this subsection must be deposited into an account specifically for the operation and administration of the drug court. The clerk of the circuit court shall collect the fees established in this subsection and must remit the fees to the drug court, less 5%, which is to be retained as fee income to the office of the clerk of the circuit court. The fees are to be paid as follows:

(1) a fee of up to $5 paid by the defendant on a judgment of guilty or grant of supervision for a violation of the Illinois Vehicle Code or a violation of a similar provision contained in a county or municipal ordinance committed in the county; or

(2) a fee of up to $5 paid by the defendant on a judgment of guilty or a grant of supervision under Section 5-9-1 of the Unified Code of Corrections for a felony; for a Class A, Class B, or Class C misdemeanor; for a petty offense; and for a business offense.

The clerk of the circuit court shall deposit the 5% retained under this subsection into the Circuit Court Clerk Operation and Administrative Fund to be used to defray the

costs of collection and disbursement of the drug court fee.

(f-5) In each county in which a Children's Advocacy Center provides services, the county board may adopt a mandatory fee of between $5 and $30 to be paid by the defendant on a judgment of guilty or a grant of supervision under Section 5-9-1 of the Unified Code of Corrections for a felony; for a Class A, Class B, or Class C misdemeanor; for a petty offense; and for a business offense. Assessments shall be collected by the clerk of the circuit court and must be deposited into an account specifically for the operation and administration of the Children's Advocacy Center. The clerk of the circuit court shall collect the fees as provided in this subsection, and must remit the fees to the Children's Advocacy Center.

(g) The proceeds of all fees enacted under this Section must, except as provided in subsections (d), (d-5), (e), and (f), be placed in the county general fund and used to finance the court system in the county, unless the fee is subject to disbursement by the circuit clerk as provided under Section 27.5 of the Clerks of Courts Act.

(Source: P.A. 95-103, eff. 1-1-08; 95-331, eff. 8-21-07; 96-328, eff. 8-11-09.)

Section 99. Effective date. This Act takes effect upon becoming law.

75th OREGON LEGISLATIVE ASSEMBLY--2010 Special Session

Enrolled

Senate Bill 999

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Veterans' Affairs)

CHAPTER .....

AN ACT

Relating to diversion; creating new provisions; amending ORS 135.881, 135.886 and 135.896; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 135.881 is amended to read:

135.881. As used in ORS 135.881 to 135.901:

(1) 'District attorney' has the meaning given that term { - by - } { + in + } ORS 131.005 { - (8) - } .

(2) 'Diversion' means referral of a defendant in a criminal case to a supervised performance program prior to adjudication.

(3) 'Diversion agreement' means the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against the defendant dismissed.

{ + (4) 'Servicemember' means a person who:

(a) Is a member of the Armed Forces of the United States, the reserve components of the Armed Forces of the United States or the National Guard; or

(b)(A) Served as a member of the Armed Forces of the United States, the reserve components of the Armed Forces of the United States or the National Guard; and

(B) Received an honorable discharge, a general discharge under honorable conditions or a discharge under other than honorable conditions. + }

SECTION 2. ORS 135.886 is amended to read:

135.886. (1) After an accusatory instrument has been filed charging a defendant with commission of a crime other than driving while under the influence of intoxicants as defined in ORS 813.010, and after the district attorney has considered the factors listed in subsection (2) of this section, if it

appears
to the district attorney that diversion of the defendant would be
in the interests of justice and of benefit to the defendant and
the community, the district attorney may propose a diversion
agreement to the defendant the terms of which are established by
the district attorney in conformance with ORS 135.891. A
diversion agreement under this section is not available to a
defendant charged with the crime of driving while under the
influence of intoxicants as defined in ORS 813.010.

(2) In determining whether diversion of a defendant is in the
interests of justice and of benefit to the defendant and the

community, the district attorney shall consider at least the
following factors:

(a) The nature of the offense; however, { + except as provided
in subsection (3) of this section, + } the offense must not have
involved { + physical + } injury to another person;

(b) Any special characteristics or difficulties of the offender;

(c) Whether the defendant is a first-time offender; if

the
offender has previously participated in diversion,
according to
the certification of the Department of Justice, diversion
{ - shall - } { + may + } not be offered;
(d) Whether there is a probability that the defendant
will
cooperate with and benefit from alternative treatment;
(e) Whether the available program is appropriate to the
needs
of the offender;
(f) The impact of diversion upon the community;
(g) Recommendations, if any, of the involved law
enforcement
agency;
(h) Recommendations, if any, of the victim;
(i) Provisions for restitution; and
(j) Any mitigating circumstances.
{ + (3) In determining whether diversion of a defendant
who
is a servicemember is in the interests of justice and of
benefit
to the defendant and the community, the district attorney
shall
consider all of the factors listed in subsection (2) of
this
section, including the nature of the offense, except that
diversion may not be offered if the offense:
(a) Involved serious physical injury to another person;
(b) Is classified as a Class A or B felony and involved
physical injury to another person;
(c) Is described in ORS 163.365, 163.375, 163.395,
163.405,
163.408, 163.411 or 163.427; or
(d) Involved domestic violence as defined in ORS 135.230
and,

at the time the offense was committed, the defendant was subject to a protective order in favor of the victim of the offense.

(4) As used in this section:

(a) 'Physical injury' and 'serious physical injury' have the meanings given those terms in ORS 161.015.

(b) 'Protective order' means:

(A) An order issued under ORS 30.866, 107.700 to 107.735, 124.005 to 124.040 or 163.730 to 163.750; or

(B) A condition of probation, parole or post-prison supervision, or a release agreement under ORS 135.250, that prohibits the defendant from contacting the victim. + }

SECTION 3. ORS 135.896 is amended to read:

135.896. If the district attorney elects to offer diversion in lieu of further criminal proceedings and the defendant, with the advice of counsel, agrees to the terms of the proposed agreement, including a waiver of the right to a speedy trial, the court shall stay further criminal proceedings for a definite period.

{ + Except as provided in section 5 of this 2010 Act, + } the stay shall not exceed 270 days in the case of a defendant charged with commission of a felony, and shall not exceed 180 days in the case of a defendant charged with the commission of a misdemeanor.

If the defendant declines diversion, the court shall resume criminal proceedings.

SECTION 4. { + Section 5 of this 2010 Act is added to

and made
a part of ORS 135.881 to 135.901. + }

SECTION 5. { + When a diversion agreement authorized under ORS
135.886 (3) involves domestic violence as defined in ORS 135.230,

in addition to a waiver of the right to a speedy trial, the agreement must require the servicemember to enter a plea of guilty or no contest to each domestic violence offense charged in
the accusatory instrument. If the servicemember, with the advice
of counsel, agrees to the terms of the agreement and enters a
plea of guilty or no contest to each domestic violence offense
charged in the accusatory instrument, the court shall stay further criminal proceedings involving the domestic violence
offenses for a definite period not to exceed two years. + }

SECTION 6. { + Section 5 of this 2010 Act and the amendments
to ORS 135.881 and 135.886 by sections 1 and 2 of this 2010 Act
apply to offenses for which there has not been an adjudication of
guilt on or before the effective date of this 2010 Act. + }

SECTION 7. { + This 2010 Act being necessary for the immediate

preservation of the public peace, health and safety, an emergency
is declared to exist, and this 2010 Act takes effect on its passage. + }

Passed by Senate February 16, 2010

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Secretary of Senate

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President of Senate

Passed by House February 23, 2010

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Speaker of House

Received by Governor:

.....M.,....., 2010

Approved:

.....M.,....., 2010

.....

Governor

Filed in Office of Secretary of State:

.....M.,....., 2010

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Secretary of State

HEALTH AND SAFETY CODE

TITLE 7. MENTAL HEALTH AND MENTAL RETARDATION

SUBTITLE E. SPECIAL PROVISIONS RELATING TO MENTAL ILLNESS AND MENTAL RETARDATION

CHAPTER 617. VETERANS COURT PROGRAM

Sec. 617.001. VETERANS COURT PROGRAM DEFINED; PROCEDURES FOR CERTAIN DEFENDANTS. (a) In this chapter, "veterans court program" means a program that has the following essential characteristics:

(1) the integration of services in the processing of cases in the judicial system;

(2) the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;

(3) early identification and prompt placement of eligible participants in the program;

(4) access to a continuum of alcohol, controlled substance, mental health, and other related treatment and rehabilitative services;

(5) careful monitoring of treatment and services provided to program participants;

(6) a coordinated strategy to govern program responses to participants' compliance;

(7) ongoing judicial interaction with program participants;

(8) monitoring and evaluation of program goals and effectiveness;

(9) continuing interdisciplinary education to promote effective program planning, implementation, and operations; and

(10) development of partnerships with public agencies and community organizations, including the United States Department of Veterans Affairs.

(b) If a defendant successfully completes a veterans court program, as authorized under Section 76.011, Government Code, after notice to the attorney representing the state and a hearing in the veterans court at which that court determines that a dismissal is in

the best interest of justice, the court in which the criminal case is pending shall dismiss the criminal action against the defendant. Added by Acts 2009, 81st Leg., R.S., Ch. 840, Sec. 4, eff. June 19, 2009.

Added by Acts 2009, 81st Leg., R.S., Ch. 1103, Sec. 17(a), eff. September 1, 2009.

Sec. 617.002. AUTHORITY TO ESTABLISH PROGRAM; ELIGIBILITY. (a) The commissioners court of a county may establish a veterans court program for persons arrested for or charged with any misdemeanor or felony offense. A defendant is eligible to participate in a veterans court program established under this chapter only if the attorney representing the state consents to the defendant's participation in the program and if the court in which the criminal case is pending finds that the defendant:

(1) is a veteran or current member of the United States armed forces, including a member of the reserves, national guard, or state guard; and

(2) suffers from a brain injury, mental illness, or mental disorder, including post-traumatic stress disorder, that:

(A) resulted from the defendant's military service in a combat zone or other similar hazardous duty area; and

(B) materially affected the defendant's criminal conduct at issue in the case.

(b) The court in which the criminal case is pending shall allow an eligible defendant to choose whether to proceed through the veterans court program or otherwise through the criminal justice system.

(c) Proof of matters described by Subsection (a) may be submitted to the court in which the criminal case is pending in any form the court determines to be appropriate, including military service and medical records, previous determinations of a disability by a veteran's organization or by the United States Department of Veterans Affairs, testimony or affidavits of other veterans or service members, and prior determinations of eligibility for benefits by any state or county veterans office. The court's findings must accompany any docketed case.

Added by Acts 2009, 81st Leg., R.S., Ch. 840, Sec. 4, eff. June 19, 2009.

Added by Acts 2009, 81st Leg., R.S., Ch. 1103, Sec. 17(a), eff. September 1, 2009.

Sec. 617.003. DUTIES OF VETERANS COURT. (a) A veterans court program established under this chapter must:

(1) ensure a person eligible for the program is provided legal counsel before volunteering to proceed through the program and while participating in the program;

(2) allow a participant to withdraw from the program at any time before a trial on the merits has been initiated;

(3) provide a participant with a court-ordered individualized treatment plan indicating the services that will be provided to the participant; and

(4) ensure that the jurisdiction of the veterans court continues for a period of not less than six months but does not continue beyond the period of community supervision for the offense charged.

(b) A veterans court program established under this chapter shall make, establish, and publish local procedures to ensure maximum participation of eligible defendants in the county or counties in which those defendants reside.

(c) This chapter does not prevent the initiation of procedures under Chapter 46B, Code of Criminal Procedure.

Added by Acts 2009, 81st Leg., R.S., Ch. 840, Sec. 4, eff. June 19, 2009.

Added by Acts 2009, 81st Leg., R.S., Ch. 1103, Sec. 17(a), eff. September 1, 2009.

Sec. 617.004. ESTABLISHMENT OF REGIONAL PROGRAM. The commissioners courts of two or more counties may elect to establish a regional veterans court program under this chapter for the participating counties.

Added by Acts 2009, 81st Leg., R.S., Ch. 840, Sec. 4, eff. June 19, 2009.

Added by Acts 2009, 81st Leg., R.S., Ch. 1103, Sec. 17(a), eff.

September 1, 2009.

Sec. 617.005. OVERSIGHT. (a) The lieutenant governor and the speaker of the house of representatives may assign to appropriate legislative committees duties relating to the oversight of veterans court programs established under this chapter.

(b) A legislative committee or the governor may request the state auditor to perform a management, operations, or financial or accounting audit of a veterans court program established under this chapter.

(c) A veterans court program established under this chapter shall:

(1) notify the criminal justice division of the governor's office before or on implementation of the program; and

(2) provide information regarding the performance of the program to that division on request.

Added by Acts 2009, 81st Leg., R.S., Ch. 840, Sec. 4, eff. June 19, 2009.

Added by Acts 2009, 81st Leg., R.S., Ch. 1103, Sec. 17(a), eff. September 1, 2009.

Sec. 617.006. FEES. (a) A veterans court program established under this chapter may collect from a participant in the program:

(1) a reasonable program fee not to exceed $1,000; and

(2) a testing, counseling, and treatment fee in an amount necessary to cover the costs of any testing, counseling, or treatment performed or provided under the program.

(b) Fees collected under this section may be paid on a periodic basis or on a deferred payment schedule at the discretion of the judge, magistrate, or program director administering the program. The fees must be:

(1) based on the participant's ability to pay; and

(2) used only for purposes specific to the program.

Added by Acts 2009, 81st Leg., R.S., Ch. 840, Sec. 4, eff. June 19, 2009.

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Veterans' Courts and Criminal Responsibility: A Problem Solving History & Approach to the Liminality of Combat Trauma

Justin G. Holbrook
Widener University School of Law

trauma of combat—with its attendant post-combat behaviors—which place some veterans at greater risk of engaging in criminal misconduct.

Second, the results of our survey of veterans courts suggest a number of "best practices" essential to veterans courts' success. These include (1) an integrated stakeholder team committed to veterans' rehabilitative interests; (2) an active role for prosecutors in determining participant eligibility; (3) a willingness to maximize the offenses available to be heard in veterans court, provided the interests of the state and any victim are appropriately served; (4) a reliable network to identify potential program participants early in the criminal justice process; and (5) treatment plans and disposition decisions that are both tailored and flexible. Additionally, we conclude on the basis of present data that the efficacy-based outcomes of veterans courts appears to be at least as favorable as those of other specialized treatment courts—a finding which should encourage the creation and development of additional veterans courts throughout the country, as well as research about their practices and efficacy.

points."[140] In our study, survey respondents reported 404 current program participants, 59 graduates, eight early withdrawals, 21 early terminations, and one re-offender. Because of gaps in respondents' data, the number of historical and current participants did not allow us to account for all veterans who had participated in respondents' veterans court programs. Nor can we, based on present data, compare veterans court outcomes to the outcomes of similarly-situated veterans who did not participate in a veterans court program or opted out of a veterans court program.[141] However, present data does support the general conclusion that the recidivism rates of veterans court appears to be no higher (and arguably are much lower) than the recidivism rates of other specialized treatment courts, a finding consistent with Buffalo Veterans Treatment Court's reported recidivism rate of 0 percent.[142]

III. Conclusion

This chapter has explored the rise and development of veterans courts from two perspectives. First, attention has been given to the considerable research exploring the causal connection between combat, PTSD, and post-combat criminal misconduct. While such discussions remain the subject of much debate, the results of numerous studies suggest a strong etiological connection between combat trauma and criminal misbehavior. Because veterans suffer from such trauma at rates higher than the general population, they necessarily appear to offend at rates greater than the general population. Importantly, we do not claim that either military service or combat itself predisposes veterans to later criminal behavior. Rather, it is the

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[140] *Id.* (citations omitted).

[141] At least one research study is currently underway to evaluate the recidivism rates of veterans who have participated in a veterans court program with veterans who have not participated in a veterans court program. *See* University of Alaska Anchorage Justice Center, *Veterans Court Evaluation Project*, http://bit.ly/muwIoA (last visited May 26, 2011) ("The purpose of this project is to establish a control group of veterans charged with felonies or misdemeanors who have *not* used the Veterans Court for comparison of recidivism rates with veterans who *have* participated in the Veterans Court.")

[142] Russell, *supra* note 114, at 370.

observed, "[Veterans] officially enroll when the VA presents a treatment plan and a negotiated plea agreement is entered (alternate plea agreements for graduation or failure)." Another court commented that their program was "linked to terms of probation[.]" Courts were nearly evenly divided between those which disposed of veterans' charges with "a plea and/or conviction prior to enrollment" and those which authorized "dismissal and/or withdrawal of charges upon program completion," an indication of the variety of approaches courts may take in tailoring outcomes to the offense committed, the needs of the veteran, and the interest of the state. Further, most courts appeared to allow at least some program participants to withdraw previously entered guilty pleas following successful completion of their treatment programs in order for the veteran's original charges to be reduced or dismissed.

Finally, survey data suggests that veterans court outcomes are at least as favorable as those of other specialized treatment courts. With respect to drug courts, both independent and state researchers have consistently concluded that such courts reduce future criminal activity for participants and deliver measurable savings for states. A study in California reported re-arrest rates of 41 percent for drug offenders who did not participate in drug court and 29 percent for offenders who did participate in drug court.[138] A similar study in Massachusetts reported that drug court participants "were 13 percent less likely to be re-arrested, 34 percent less likely to be re-convicted, and 24 percent less likely to be re-incarcerated" than those on probation for similar offenses.[139] In four different "meta-analysis" studies, independent researchers have found "that drug courts significantly reduce crime rates an average of approximately 7 to 14 percentage

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[138] C. West Huddleston, et al, *Painting the Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States*, NATIONAL DRUG COURT INSTITUTE 6, May 2008, available at http://bit.ly/bNhOI9 (citation omitted).
[139] *Id.* (citation omitted).

majority heard both misdemeanor (86%) and felony (79%) offenses. Most courts (71%) also heard violent offenses. Of these, the majority (70%) required victim consent prior to enrolling the veteran in the veterans court treatment program. While perhaps controversial, the inclusion of low-level violent offenders in veterans court programs is justified given the research linking PTSD to violent misconduct. Veterans without prior criminal histories whose misconduct stems directly from combat trauma are arguably among those most likely to benefit from a coordinated, rehabilitative treatment plan involving the VA, the court, and local community agencies. Of course, only a minority of courts (36%) reported requiring veterans to have a treatable behavioral health condition, suggesting that most courts' target population was broader than those veterans whose misconduct may be causally related to a prior diagnosis of PTSD or TBI.

Fourth, courts most effectively serve at-risk veterans by carefully working with other justice system stakeholders to implement a reliable, systematic method for identifying and screening potential program participants early in the criminal justice process. Most survey respondents identified potential program participants through multiple means, including arrest (79%), arraignment (64%), and the initial probable cause determination hearing (57%). Further, multiple stakeholders were involved in this early identification process, including police (57%), pre-trial judges (64%), VA officials (64%), and prosecutors (57%). Others involved in identifying veterans included defense attorneys, corrections and probation officers, and court personnel. Recruiting, training, and coordinating with these stakeholders in identifying potential program participants is key.

Fifth, treatment plans and disposition decisions should be both tailored and flexible, with "incentives . . . offered for compliance and sanctions for non-compliance . . . ."[137] As one court

[137] Russell, *supra* note 114, at 369.

The overwhelming majority of survey respondents listed the Department of Veterans Affairs (92%), prosecuting attorneys (85%), and defense attorneys (85%) as essential for their courts' success. Courts also frequently relied on other community agencies to link veterans to community services, including local treatment providers and housing and social service agencies. Coordination among these key stakeholders was seen as critical, with most courts holding regular internal meetings attended by judges, court staff, prosecuting and defense attorneys, and VA personnel. In addition to updating judges about veterans' treatment progress, VA personnel often provide real-time eligibility and enrollment services to program participants. (In one court, veterans not eligible for VA services were connected to local helping agencies.)

Second, prosecuting attorneys should serve as the gatekeeper for who can and cannot be admitted into veterans court and, once admitted, how charges ultimately will be disposed. For example, one survey respondent noted that "the District Attorney's Office screens all cases for the program and eliminates those most serious crimes . . . ." Another commented that the "[district attorney] holds the veto and reviews each case for eligibility[.]" Several underscored that prosecuting attorneys, either in practice or by legislative mandate, function as the approval authority for all admissions into veterans court programs, though they often do so in consultation with defense attorneys and judges. Because prosecuting attorneys are integrally involved in deciding who is admitted into veterans court programs, they are capable of effectively promoting the rehabilitative interests of veterans while protecting the prosecutorial interests of both the state and victims—an important role in maintaining public support of veterans courts.

Third, courts should segregate eligible offenses based on the severity of the offense and the input of the victim—not simply on whether the offense was or was not violent. While nearly all (93%) survey respondents reported limiting eligibility based on type of offense, the vast

operating as a subset of the local mental health court. One court reported having an independent budget to fund its staff and operations. Another court responded:

> The program is funded through a grant by the local VA partner, with budgeted line items for the case manager, who is a GS 11/12 with benefits, and drug testing supplies, which total $51,620 per year for 50 participants. Other services are provided as in-kind contributions from the partnering agencies, from their general operating budgets. These include ancillary services from the local VA partner; the Judge and the Collaborative Court Coordinator, each provided by the Court with an allocation of about ½ day per week to the program; the district attorney and public defender, provided by their respective agencies with an allocation of about ¾ day per week; and the full-time probation officer, provided by that agency.

Five of the responding courts (36%) reported operating out of a general court operating budget. Others relied on local/city funding, state funding, competitive grants, in-kind resources, and donations. Interestingly, when asked whether their court operated pursuant to state legislation, six courts (43%) responded in the affirmative, a response which suggests that states may be passing "goodwill" legislation authorizing the operation of veterans courts without concomitantly authorizing state funding for such programs.

C. Survey Conclusions

Our study provides an initial assessment of the practices and procedures of veterans courts currently in operation, as well as an early indicator of veterans courts' success in treating veterans whose criminal misconduct is attributable, at least in part, to underlying service-connected issues. Because of the study's limited sample size (n=14) and the narrow timeframe of available data (2009–2010), firm conclusions as to the practice and efficacy of veterans courts overall must be qualified. Our generalized findings among survey respondents, however, highlight a number of elements essential to veterans courts' current programs.

First, because veterans courts seek to address criminal misconduct through a rehabilitative rather than punitive model of punishment, key stakeholder involvement is critical.

had new mentors sit in on court sessions and speak with current mentors before being assigned to support a program participant.

With respect to court composition, most courts (92%) were presided over by one judge, though some courts had two or three judges assigned to hear veterans court cases. In nine of twelve courts (69%), the judges were themselves veterans. All responding courts reported working proactively with prosecutors, who often were responsible for approving admission to veterans court and determining disposition of charges following successful completion of the treatment plan. Defense attorneys were also integral to courts' operations. One court reported that the initially assigned defense attorney withdrew after the veteran was successfully admitted to veterans court in order for a dedicated Veterans Court Attorney to be substituted as defense counsel. Another court reported that dedicated public defenders were assigned to the court to represent program participants. Both prosecutors and defense attorneys were active participants throughout veterans' entire treatment programs.

When asked what helping agencies beside the VA were involved in supporting their courts, respondents listed community treatment providers (64%), housing (57%), and social services (50%) agencies. Other helping agencies included local veterans organizations, law enforcement, and jobs programs. Respondents' comments about the role of these agencies centered on the spectrum of treatment services they provided to program participants. "A huge role," one court responded. "[W]e are able to offer services to vets that need it." Another court observed how such helping agencies were key in "[p]lanning, implementation and oversight."

Courts also were asked about their annual budget and the source of their funding, if any. Ten courts (71%) reported not having a separate budget, having a budget of $0, or, in one case,

to the success of their courts' programs, we asked survey respondents to identify those stakeholders they viewed as being essential for their success. As shown in Table 4 below, the community stakeholders most frequently perceived as being required for success were the Department of Veterans Affairs (92%), defense attorneys (85%), and prosecuting attorneys (85%). Mentors (54%) and police (31%) were also listed by multiple courts as essential for their courts' success. Other key stakeholders named by survey respondents included mental health court teams, court clerks, mentor and court coordinators, and domestic abuse stakeholders.

Table 4: Essential Court Participants (n=13)	
Mentors	7
VA	12
Prosecutor	11
Defense	11
Police	4
Other	9

Respondents also were asked whether they utilized mentors as part of their veterans court treatment program, a component the Buffalo Veterans Treatment Court has cited as a key to its success.[136] Eight of eleven courts (72%) responding to this question answered in the affirmative. Of those courts utilizing mentors to assist veterans enrolled in their veterans court treatment programs, all indicated their mentors are unpaid volunteers. Six of the eight courts (75%) utilizing mentors required mentors to be veterans themselves. When asked how courts match mentors to program participants, courts responded that mentors were assigned based on age, branch of service, gender, and past common experiences. Most courts screened or performed a background check on mentors prior to allowing them to participate as a volunteer in their veterans court program. Some courts provided formal training for mentors, while others simply

[136] Russell, *supra* note 114, at 369–70.

reported following a particular court model, with six (46%) reportedly utilizing a drug court model, three (23%) utilizing a mental health court model, and five (38%) utilizing a hybrid drug court/mental health court model. Eight of thirteen respondents (62%) also reported following the same court model as the Buffalo Veterans Treatment Court, an indication of the influence of the Buffalo Veterans Treatment Court's methodological and procedural approach within the veterans court movement. When asked whether they had consulted with other veterans courts in developing their court, ten of twelve courts (83%) reported visiting or communicating with other veterans courts. The Buffalo Veterans Treatment Court was consulted by eight of the ten courts that consulted with other courts in developing their own veterans court program. Respondents also reported consulting veterans courts in California, Oklahoma, Texas, Minnesota, and Michigan.

Because veterans courts routinely work with community stakeholders, we also asked whether survey respondents had executed written memoranda of understanding (MOUs) with community stakeholders. Six of the twelve courts (50%) that responded to this question reported having MOUs with stakeholders, while six did not utilize or had not yet developed MOUs. Among the courts utilizing MOUs, two courts had developed MOUs specifically with the VA. With respect to written operating procedures, five of eleven respondents (45%) reported having written operating procedures, while six did not (55%). Two of the courts without written operating procedures were in the process of developing them.

iii. Community Interests

The veterans court model utilizes a community-based approach to rehabilitative treatment, drawing upon community service providers from both the federal, state, and local levels. Attempting to assess which of these stakeholders veterans courts viewed as most critical

Components.[134] Now a model for other veterans courts, these components have served as guideposts in developing comprehensive treatment plans for veterans throughout the country:

1. Key Component One: Veterans Treatment Court integrates alcohol, drug treatment, and mental health services with justice system case processing

2. Key Component Two: Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights

3. Key Component Three: Eligible participants are identified early and promptly placed in the Veterans Treatment Court program

4. Key Component Four: The Veterans Treatment Court provides access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services

5. Key Component Five: Abstinence is monitored by frequent alcohol and other drug testing

6. Key Component Six: A coordinated strategy governs Veterans Treatment Court responses to participants' compliance

7. Key Component Seven: Ongoing judicial interaction with each veteran is essential

8. Key Component Eight: Monitoring and evaluation measures the achievement of program goals and gauges effectiveness

9. Key Component Nine: Continuing interdisciplinary education promotes effective Veterans Treatment Court planning, implementation, and operation

10. Key Component Ten: Forging partnerships among the Veterans Treatment Court, the VA, public agencies, and community-based organizations generates local support and enhances the Veterans Treatment Court's effectiveness[135]

In an effort to assess the extent to which veterans courts were utilizing this or a similar treatment model, we asked survey respondents whether their veterans court followed a particular court model (i.e., drug court, mental health court, the American Bar Association's veterans treatment court guidelines, etc.). Of the thirteen courts that responded to this question, all

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[134] Russell, *supra* note 114, at 364 (citing NAT'L ASS'N OF DRUG COURT PROF., U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997), available at http://bit.ly/drbEyz).
[135] *Id.* at 365-67.

Table 2: Respondents' Participation and Graduation Rates					
Current Participants	Total Participants	Total Graduates	Early Withdrawals	Early Terminations	Re-Offenders
404	465	59	8	21	1

The number of total veterans served by each veterans court that responded to our survey varied greatly, with courts ranging from having served one veteran to more than 100 veterans. Six of the eleven courts providing participant data had fewer than 30 total program participants, four had between 50 and 70 total program participants, and only one court had more than 100 total participants. With respect to the number of veterans court graduates, only two courts had graduated more than 10 veterans from their veterans court treatment programs. The rest had either graduated none or fewer than 10.

Courts also were asked about the ages of the veterans in their programs. Not all courts provided responsive data, but the eight courts that did respond reported a total of 90 participants ages 18 to 35 years old, 37 participants ages 36 to 50 years old, and 63 participants over 50 years old. Three of these courts reported that the majority of their veterans were older than 50 years of age. The other courts reported that the majority of their veterans were under 35 years of age.

Table 3: Enrolled Participants Ages		
18 – 35	36 – 50	50 +
90	37	63

ii. Methodology / Model

Following in the footsteps of other specialized treatment courts programs, the Buffalo Veterans Treatment Court adopted a modified version of the ten key drug court components the Department of Justice described in its publication, *Defining Drug Courts: The Key*

vocational/rehabilitation training, or simply participation in the program without termination for a specified period of time. The response of one court was indicative of the general approach adopted by the others:

> No positive drug test results (including missed, tampered, or diluted tests) for 180 consecutive days. No unexcused absences from scheduled services for 45 consecutive days. Gainful employment or productive use of time including community service or school attendance. Take non-narcotic medication as directed. Maintain consistent attendance at all court appearances and treatment team appointments. Achievement of stable living arrangements and healthy interpersonal relationships. A definitive aftercare plan, which may include recovery support/self-help meetings. VA outpatient counseling, group attendance at a former residential program, or active participation in a Combat Veterans Court alumni group. Fulfillment of goals as stated in the individual treatment plan. Proof of attendance at all other events or courses as required by the Judge.

Survey respondents indicated they removed program participants from their programs based on voluntary withdrawal or termination for failure to comply with treatment plan requirements (though voluntary withdrawal was not permitted by one court after participants entered the program). Other bases for removal included new charges, arrests, or, in one case, an inability to link the veteran to the appropriate service provider.

Participation and Graduation Rates

Eleven of fourteen courts responding to our survey provided detailed participant enrollment and graduation data. In aggregate, these eleven courts reported a total of 404 current program participants. Since most opened in either 2009 or 2010, the total historical number of program participants among responding courts was only slightly higher at 465 (with one court unable to provide data on total number of historical participants). Responding courts also reported a total of 59 graduates, eight voluntary withdrawals from the program, and 21 early terminations. Of the 59 reported graduates among all responding courts, only one had re-offended following graduation, a recidivism rate under 2 percent.

including at least the judge (100%) and VA representative (100%). Other participants included a veteran-mentor (50%), probation officer (50%), prosecutor (43%), defense attorney (36%), and, in a minority of cases, personnel from Veterans Services Organizations, the local VA Medical Center, and other community service providers. In addition to meeting frequently with the veteran, courts also tended to hold frequent internal meetings with key stakeholders, including veterans court judges, prosecuting attorneys, defense attorneys, VA personnel, probation officers, court clerks, and, in one case, the assigned behavioral health team. One court also included assigned mentors in these internal meetings.

Graduation Criteria

A review of the graduation criteria for survey respondents revealed both similarities and dissimilarities. When asked whether they required participants to complete the veterans court treatment program within a specified time frame, five courts (36%) responded in the affirmative and nine courts (64%) responded in the negative. Of the five courts answering in the affirmative, two required completion within two years, one required completion within 15 months to two years, and one required an initial 12 month probation with three phases followed by a six month post-graduation probation phase. The remaining court simply observed, "They [veterans] have to be on supervision for the duration of their participation in [the] VTC. Each of the phases has a timeframe attached to it; however, we assume that different individuals may take more time in each phase based on their individual issues."

Courts had markedly different graduation criteria for program participants to successfully complete the program. Most courts required program participants to complete a pre-approved treatment plan, which often had distinct phases of progress. Several courts required a lengthy period of sobriety (i.e., one year), consistent employment or significant progress in

for graduation or failure)." Survey respondents uniformly indicated that participation by eligible veterans was voluntary. When asked whether program participants were required to sign a participation "contract," seven courts (50%) responded in the affirmative, five courts (36%) responded in the negative, and two courts (14%) did not respond.

Disposition of Charges

With respect to disposition of charges, courts tended to take an individual approach to cases, with some offering multiple disposition options depending on the veteran and charged offense. For example, seven courts (50%) reported disposing of veterans' charges with "guilty plea and/or conviction prior to enrollment required" and eight courts (57%) reported disposing of veterans' charges through "dismissal and/or withdrawal of charges upon program completion." Based on courts' additional comments, nearly all appeared to allow at least some participants to withdraw any previously entered guilty pleas and have any pending charges dismissed following successful completion of the program. Notable exceptions were one court which did not allow Driving Under the Influence (DUI) charges to be dismissed, and another court which provided for substitution of a lower offense (i.e., felony to misdemeanor, or misdemeanor to ordinance violation) rather than outright dismissal of the initial charge.

Supervision and Coordination

A key component of all respondents was the supervisory role courts played throughout the course of participants' treatment. All courts routinely met with program participants to assess their progress, with courts roughly divided between meeting weekly, bi-weekly, or monthly with enrolled veterans. Several courts utilized a "phase" program in which veterans met with court personnel weekly during Phase I, bi-weekly during Phase II, monthly during Phase III, and as directed during Phase IV. All courts involved multiple stakeholders in these meetings,

condition, such as a mental health or substance abuse issue, to be eligible for participation in veterans court. As one court noted in requiring all program participants to undergo an initial risk assessment, "[I]f the assessment indicates there are no services needed for the individual, then there would be no reason for them to participate in [veterans treatment court]." One court specifically required a nexus between a diagnosed mental health condition and the charged offense before allowing a veteran to enroll in the veterans court program. Another court only accepted veterans which had PTSD or Traumatic Brain Injury (TBI) which required counseling or treatment. Yet another court was willing to accept all veterans except those charged with serious offenses and otherwise ineligible for disposition in veterans court, regardless of whether the veterans' mental health was at issue.

Enrollment

Respondents differed when asked at what stage in the criminal justice process they allowed eligible veterans to enroll in their veterans court treatment programs. Three courts (21%) enrolled veterans solely at the pre-plea stage of criminal proceedings (i.e., before the defendant is required to enter a plea of guilty or not guilty), eight courts (57%) enrolled veterans solely at the post-plea stage of criminal proceedings (i.e., after a plea has been entered), and three courts (21%) allowed veterans to enroll at either the pre-plea or post-plea stages. Generally, courts with post-plea enrollment processes accepted veterans into their veterans court treatment programs as part of a negotiated plea arrangement, in which some or all of the sentence was deferred. For example, one court reported, "The participant is required to enter a guilty plea and as part of the sentence [is] enrolled in the program." Another court similarly commented, "Individuals are referred to the Vet court for screening. They officially enroll when the VA presents a treatment plan and a negotiated plea agreement is entered (alternate plea agreements

dishonorable conditions,[133] ten courts (71%) did not require program participants to be eligible for VA benefits. (Even among these courts, however, VA involvement remained critical. A full 86 percent of responding courts reported that VA representatives are present in court when in session to assist with VA benefits, link veterans to VA services, and provide updates on veterans' progress in VA-supported treatment programs).

Courts also differed in the types of offenses eligible to be heard. Among survey respondents, thirteen courts (93%) reported limiting eligibility based on type of offense. The majority of courts heard both misdemeanor (86%) and felony (79%) cases, including violent offenses (71%), though most courts appeared to base eligibility for felony-level offenses on the severity of the charged offense. For example, at least two courts (14%) would not hear felony offenses with presumptive or mandatory sentences of confinement. One court indicated it heard only lower-level felonies, and one court would not hear any child sexual assault felonies. One court also would not hear drug delivery or manufacturing cases. In their survey comments, courts frequently mentioned screening felony-level offenses for eligibility, with local district attorneys playing a key role in determining which offenses would and would not be referred to veterans court. Of the ten courts that heard violent offenses, seven courts (70%) required prior victim consent. All courts appeared to exclude serious offenses such as sexual assault, felony-level child abuse, stalking and strangulation offenses, and offenses involving serious bodily injury. Depending on the court, eligible offenses included DUI, fleeing from police, terroristic threats, and misdemeanor and felony domestic assaults.

In determining eligibility, courts looked carefully at the nature of veterans' underlying problems, if any. Five courts (36%) required veterans to have a treatable behavioral health

[133] To be eligible for benefits from the Department of Veterans Affairs, veterans must have received a military discharge under other than dishonorable conditions. *See* 38 U.S.C. §1110 (2010).

to submit supplemental comments in order to fully capture their intended response. We also asked participants about their willingness to participate in follow-up interviews about their court.

i. Court Process, Eligibility and Enrollment

Eligibility

Because of the diversity of veterans courts' practices, we first surveyed courts' approaches to identifying and enrolling eligible veterans and disposing of charges against veterans who completed courts' rehabilitative requirements. The majority of survey respondents sought to identify potential program participants at three early stages in the criminal justice process: at arrest (79%), arraignment (64%), and the initial probable cause determination hearing (57%). Other identification points for potential participants included the initial defense attorney meeting, at booking by law enforcement personnel, and after conviction. Similarly, courts relied on multiple stakeholders in identifying potential participants, including the police (57%), pre-trial judges (64%), officials from the Department of Veterans Affairs (64%), and prosecutors (57%). Some courts also were assisted by defense attorneys, corrections officers, probation officers, and court personnel in identifying program participants. Two courts (14%) indicated they accepted self-referrals into their veterans court treatment programs.

Eligibility criteria for program participants differed. In verifying veteran status, eight courts (57%) required veterans to submit a copy of their DD Form 214, Report of Separation, while four courts (29%) did not. Most courts (64%) did not require a veteran to have been discharged with an "honorable" discharge for program consideration, meaning veterans discharged administratively or punitively with less than an "honorable" discharge could be eligible. Similarly, when asked whether program participants must first be eligible for VA benefits, which statutorily are unavailable to veterans who have been discharged under

adjudicating criminal cases.[130] At the national level, legislators in both the U.S. House of Representations and the Senate have introduced legislation to support the creation of additional veterans courts throughout the country.[131] Entitled the Services, Education, and Rehabilitation for Veterans (SERV) Act, the proposed legislation would provide grants to states, state courts, and local courts "for the purpose of developing, implementing, or enhancing veterans' treatment courts or expanding operational drug courts to serve veterans."[132]

B. Survey Results and Veterans Courts Practices

To assess the participant populations and outcome-based efficacy of veterans courts currently in operation, we undertook an assessment of the practices, procedures, and participant populations of veterans courts operating as of March 2011. Of the 53 courts invited to participate in our survey, 14 provided a response by completing either an online or paper survey. Of these, seven also submitted court policies and procedures, participant contracts, plea agreements, and mentor guidelines for our review. Participants were invited to submit "any internal reports, operating procedures, or other information" they believed would be helpful. They also were assured anonymity in published findings and that "[a]ll information collected [would] be used in aggregate" Lastly, participants were informed that aggregate survey results would be shared to encourage courts in adopting best practices. We grouped survey questions into three broad areas: (1) Court Process, Eligibility and Enrollment; (2) Court Methodology/Model; and (3) Community Interests. Where appropriate, we invited participants

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[130] *See* Lewis Griswold, *Valley Vets Get Court of Their Own: Tulare County Offers Victims of PTSD a Second Chance*, FRESNO BEE, June 19, 2010, available at http://bit.ly/d0dKQI; Marc A. Levin, *Policy Brief: Veterans' Court*, TX. PUB. POL. FOUND., Nov. 2009, available at http://bit.ly/b6jQTr; Pratt, *supra* note 124, at 50–51 (discussing California's statute requiring consideration of PTSD in mitigation).

[131] *See* Services, Education, and Rehabilitation for Veterans Act, H.R. 2138, 111th Cong. (2009), available at http://bit.ly/cXT1eW; Services, Education, and Rehabilitation for Veterans Act, S. 902, 111th Cong. (2009), available at http://bit.ly/chSGWZ. *See also* Pratt, supra note 124, at 50 (discussing congressional legislation).

[132] H.R. 2138, 111th Cong. § 2(b)(2009), available at http://bit.ly/cXT1eW.

The focus is on tailoring court outcomes to the offenses committed, the individuals who committed them, and the treatment plans most likely to help veterans avoid future criminal misconduct.

Paralleling developments within state and local judiciaries, policy makers at the community, state and federal levels have proactively encouraged the establishment of veterans treatment courts. For example, the National Association for Drug Court Professionals has created a clearinghouse for information related to veterans treatment courts and launched a cooperative training program between the National Drug Court Institute (NDCI), the Bureau of Justice Assistance (BJA), the U.S. Department of Veterans Affairs (VA), the GAINS Center, the Battered Women's Justice Project, and four "mentor" courts in California, Oklahoma, and New York to assist additional locales in establishing their own veterans treatment court programs. [127] The Department of Veterans Affairs has placed Veterans Justice Outreach officers in each of its regional medical facilities to work with courts in providing frontline mental health and substance services to veteran-defendants in the criminal justice system.[128] Embracing a community-based approach, the American Bar Association House of Delegates adopted a policy in February 2010 supporting veterans courts and setting forth key principles for their establishment.[129]

In addition to these actions, both state and federal legislatures have considered or enacted legislation relating to veterans' courts. At the state level, at least five states—California, Colorado, Illinois, Nevada, and Texas—have passed legislation establishing veterans courts or requiring existing courts to considering military-connected factors, such as PTSD, in

[127] *See* Nat'l Assoc. of Drug Court Prof., Justice for Vets: The Nat'l Clearinghouse for Veterans Treatment Courts, http://bit.ly/bK67tT (last visited May 26, 2011).
[128] *See* Veterans Justice Outreach Initiative, U.S. Dep't of Veterans Affairs, http://bit.ly/beCyd0 (last visited May 26, 2011).
[129] Policy 105A, House of Delegates, American Bar Association, House of Delegates (February 8–9, 2010), available at http://bit.ly/bygdsz [hereinafter ABA Policy]. *See also* Rhonda McMillion, *Lingering Wounds: The ABA Enlists In Efforts to Help Homeless Veterans Deal with their Burdens*, A.B.A. J., Oct. 2010, at 66.

hear low-level violent criminal cases as well.[121] The veterans court in Tarrant County, Texas limits program participants to veterans with brain trauma, mental illness, or a mental disorder such as PTSD.[122] The Buffalo Veterans Treatment Court, by contrast, accepts veterans with either substance dependency or mental illness.[123] In a third iteration, the veterans court in Orange County, California accepts only combat veterans eligible for probation.[124]

In many courts, veterans who successfully complete their treatment program may have the charges against them dismissed. In the Anchorage Veterans Court, for example, "[e]ach criminal case . . . is individually negotiated by the parties. There is no standard resolution. Examples of resolution range from dismissal of charges to charge consolidation or reduction, elimination or reduction of jail time, fines, community work service, etc."[125] In Delaware, program participants also have the opportunity to have their charges dismissed:

> Once a referral is made, the veteran is offered the opportunity to participate in the Court on a voluntary basis. If the veteran chooses to participate, the veteran will have his or her charges deferred pending successful completion of a treatment plan, at which time the charges will be dismissed. To reach this point, veterans must comply with court ordered treatment and appear in court for progress assessments on a regular basis. Failure to comply will result in sanctions which can range from an admonishment all the way to termination from the program.[126]

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[120] *See, e.g.*, LA Opens New Criminal Court for Troubled Veterans, BBC News (Sept. 19, 2010), http://bbc.in/9BI3I2 (last visited May 26, 2011).
[121] *See, e.g.*, Kevin Graman, *Special Courts Divert Wash. Veterans from Jail*, TRI-CITY HERALD, Sept. 19, 2010, available at http://bit.ly/aD4NAB (cases of domestic violence and fourth-degree assault heard by veterans court judge); Amy Gillentine, *4th Judicial District Creating Special Court for Veterans*, CO. SPRINGS BUS. J., Feb. 2, 2010, available at http://bit.ly/cLYdu1 (same); Lewis Griswold, *Valley Vets Get Court of Their Own: Tulare County Offers Victims of PTSD a Second Chance*, FRESNO BEE, June 19, 2010, available at http://bit.ly/d0dKQI (same).
[122] Veterans Court Diversion Program, Tarrant County, Texas, http://bit.ly/axkMDY (last visited Oct. 28, 2010).
[123] *See* Russell, *supra* note 114, at 364.
[124] *See* Melissa Pratt, *New Courts on the Block: Specialized Criminal Courts for Veterans in the United States*, 15 APPEAL 39, 54 (2010).
[125] ANCHORAGE POLICY AND PROCEDURES, supra note 112, at 16.
[126] Delaware Docket, *supra* note 8.

defendants with veteran-mentors and directly link defendants with service providers who understood veterans' unique challenges and needs.[116] Implicit in the methodology of both the Anchorage Veterans Court and the Buffalo Veterans Treatment Court was an understanding that the risk factors for criminal behavior exhibited by some veterans—including alcohol and substance use, homelessness, broken relationships, unemployment, and mental health—would, if left unaddressed, likely result in future involvement with the criminal justice system.[117]

Seeing the Buffalo Veterans Treatment Court's early success, other jurisdictions began implementing their own veterans court programs, including Orange County, California in late 2008 and Cook County, Illinois in early 2009. Since then, approximately 24 states have established some 60 veterans courts across the country, with courts currently operating or under development in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Louisiana, Michigan, Minnesota, Missouri, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Washington, and Wisconsin.[118] The vast majority of these follow the Buffalo Veterans Treatment Court methodology by using the foundational tenets of drug courts to build comprehensive, community-based treatment plans for program participants. Some differences among courts, however, do exist. For example, some veterans courts operate as pre-conviction diversion programs, while others only accept veterans who already have pled guilty.[119] Many hear only non-violent criminal cases,[120] though a few

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[116] *Id.* at 364.
[117] *See id.* at 357-63.
[118] Nat'l Assoc. of Drug Court Prof., Justice for Vets: The Nat'l Clearinghouse for Veterans Treatment Courts, http://bit.ly/bK67tT (last visited May 26, 2011).
[119] For example, the Veterans Court Diversion Program in Tarrant County, Texas, requires admission of guilt before entry to the program. Conditions for Veterans Court Diversion Program, Veterans Court Diversion Program, Tarrant County, Texas, http://bit.ly/9iMKrr (last visited Oct. 28, 2010). By contrast, the veterans court in Delaware, the first state-wide veterans court in the nation, defers charges against participating veterans "pending successful completion of a treatment plan, at which time the charges will be dismissed." Delaware Docket, *supra* note 8.

are lower than reported PTSD incident rates for Vietnam veterans (≥30%),[109] they are markedly higher than those of non-veterans. One author we reviewed placed the lifetime prevalence of PTSD among non-veterans at 5 percent for men and 10.4 percent for women,[110] while another author placed the incident rate of PTSD among the adult population generally at between 1 percent and 2 percent.[111]

II. The Veterans Court Model

A. A Brief History of Veterans Courts

The first veterans court opened in Anchorage, Alaska in 2004 under the direction of District Court Judges Sigurd Murphy and Jack Smith.[112] Concerned by the number of veterans in their court who suffered from behavioral, medical, and socio-economic challenges associated with prior military service, the Anchorage Veterans Court coupled close judicial monitoring with rehabilitative treatment from community service providers to provide alternative sentencing arrangements for troubled veterans.[113] Four years later, Judge Robert T. Russell presided over the first session of the Buffalo Veterans Treatment Court in Buffalo, New York,[114] an idea which grew out of Judge Russell's experience as a sitting judge in city court where he observed that a rising number of defendants on his docket were military veterans.[115] Having seen that veterans in both the Buffalo Drug Treatment Court and the Buffalo Mental Health Court responded more favorably to other veterans, Judge Russell developed a court model designed to pair veteran-

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[109] *See* Hafermeister & Stockey, *supra* note 54, at 100; SHAY, *supra* note 37, at 168
[110] Friel, *supra* note 67, at 65.
[111] Stewart, *supra* note 98, at 85, citing J.E. Helzer, L. N. Robins, and L. McEvoy, *Posttraumatic Stress Disorder in the General Population: Findings of the Epidemiologic Catchment Area survey*, 317 NEW ENG. J. MED. 1630 (1987).
[112] ANCHORAGE VETERANS COURT POLICY AND PROCEDURES 3 (2011) (on file with authors) [hereinafter ANCHORAGE POLICY AND PROCEDURES].
[113] *Id.*
[114] Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 357, 364 (2009).
[115] *Id.* at 363.

correlation key to any discussion of veterans courts because of the high incident rate of PTSD among veterans. In an April 2008 study titled "Invisible Wounds of War," the RAND Corporation approximated that 300,000, or nearly 20 percent, of the 1.64 million veterans who have served in Iraq and Afghanistan since 2001 suffer from PTSD.[103] These figures generally accord with a 2004 study finding that 15.6 to 17.1 percent of veterans of Iraq met the screening criteria for major depression, generalized anxiety, or PTSD.[104] Incident rates of PTSD were directly tied to the number of combat experiences, from a rate of 9.3 percent for soldiers involved in one or two firefights to 19.3 percent for those involved in five or more firefights.[105] This finding directly correlates to the findings of Wilson and Zigelbaum regarding the *combat roles* veterans played and the *severity* of the combat stressors they faced, both of which were critical indicators for later criminal misconduct.[106]

More recently, the Department of Veterans Affairs (VA) disclosed that 44 percent of Iraq and Afghanistan war veterans seeking treatment at VA medical facilities had been diagnosed with mental health disorders, with 23 percent diagnosed with possible PTSD.[107] In 2009, the National Center for PTSD published a bibliography of studies in which it found an overall PTSD rate of 10 to 18 percent for combat troops serving in Iraq and Afghanistan.[108] While these figures

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[103] RAND REPORT, *supra* note 19 at iii. *See also* Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty*, 77 FORDHAM L. REV. 2955, 2958 (2009). For a discussion of the possible over-diagnosis of PTSD, see Harold Merskey and August Piper, *In Debate: Posttraumatic Stress Disorder Is Overloaded*, 52 CAN. J. OF PSYCHIATRY 499 (2007) (discussing, *inter alia*, the evolution of combat trauma diagnosis from shell shock to combat neuroses to PTSD). *See also* Hafermeister & Stockey, *supra* note 54, at 90, n. 12 (same).

[104] Charles W. Hoge, et al, *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 1, 13 (2004).

[105] *Id.* at 13.

[106] Wilson & Zigelbaum, *supra* note 43, at 77–79.

[107] William H. McMichael, *VA Diagnosing Higher Rates of PTSD*, MARINE CORPS TIMES, Jan. 18, 2009, available at http://bit.ly/cA8Qj5.

[108] Brett T. Litz and William E. Schlenger, *PTSD in Service Members and New Veterans of the Iraq and Afghanistan Wars: A Bibliography and Critique*, PTSD RESEARCH QUARTERLY, Winter 2009, at 1–3. By contrast, historical studies on Vietnam veterans following conclusion of the conflict indicate PTSD rates of 30 percent. *See* Hafermeister & Stockey, *supra* note 54, at 100.

without PTSD.[97] Outside the context of criminal misbehavior, numerous researchers have found a significant correlation between combat exposure and alcohol abuse, including binge drinking, daily drinking, and lifetime alcohol dependency.[98]

Not surprisingly, emerging studies of Iraq and Afghanistan veterans show similar trends in post-combat behavior. A longitudinal study of Iraq and Afghanistan veterans six months after deployment revealed that "27 to 35 percent reported symptoms placing them at mental health risk, including symptoms of PTSD, depression, alcohol misuse, and suicidal ideation, as well as self-reported aggression."[99] Other reports have suggested an increase in drug abuse by Iraq and Afghanistan veterans,[100] and noted that veterans between the ages of 20 to 24 years are reportedly four times more likely to commit suicide than their nonveteran counterparts.[101] Without regard to veteran status, individuals who suffer from PTSD are also more likely to report DUI recidivism than the participants who do not suffer from PTSD.[102]

C. Veterans and PTSD Incident Rates

However strongly we might otherwise wish, these studies suggest a statistically significant correlation between combat trauma and post-combat criminal misconduct—a

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[97] Peralme, *supra* note 54, at 14.

[98] *See, e.g.*, Sherry H. Stewart, *Alcohol Abuse in Individuals Exposed to Trauma: A Critical Review*, 120 PSYCHOLOGICAL BULLETIN 83 (1996) (discussing numerous studies involving alcohol abuse and exposure to combat trauma).

[99] Debra A. Pinals, *Veterans and the Justice System: The Next Forensic Frontier*, J. AM. ACAD. PSYCHIATRY AND L. 163, 164 (2010).

[100] *See Serious Psychological Distress and Substance Use Disorder among Veteran*, THE NATIONAL SURVEY ON DRUG USE AND HEALTH REPORT, U.S. DEP'T OF HEALTH & HUMAN SERVICES, Nov. 2007 [hereinafter NSDUH REPORT], available at http://bit.ly/c1uxq9 ("One quarter of veterans age 18 to 25 met the criteria for [substance use disorder] in the past year compared with 11.3 percent of veterans aged 26 to 54 and 4.4 percent of veterans aged 55 or older.").

[101] Rick Little & Stacy Garrick Zimmerman, *Helping Veterans Overcome Homelessness*, 43 CLEARINGHOUSE REV. 292, 295 (2009).

[102] Allyson J. Peller, et al., *PTSD Among a Treatment Sample of Repeat DUI Offenders*, 23 J. OF TRAUMATIC STRESS 468, 471 (2010). Peller reports that among the sampled population "13% qualified for lifetime PTSD" and "12% qualified for past-year PTSD." *Id.* at 470, citing H. J. Shaffer, et al, *The Epidemiology of Psychiatric Disorders Among Repeat DUI Offenders Accepting a Treatment-Sentencing Option*, 75 J. OF CONSULTING AND CLINICAL PSYCHOL. 795 (2008). The leading traumatic events for men were violent crime and combat. *Id.*

combat.[90] Also, an overwhelming majority (>91%) of total inmates at USDB during the study period had been convicted of committing a violent offense.[91] Tying together this data with deployment data from the target population, Daniel concluded by finding a "significant correlation" between PTSD and post-combat violent behavior in incarcerated veterans.[92]

v. Other Studies

Other studies of Vietnam-era veterans suggest a measurable link between PTSD and criminal behavior, with one study finding a heightened disposition toward violent crimes in incarcerated Vietnam veterans compared to incarcerated non-veterans[93] and another finding a relationship between PTSD and "self-reported aggression, hostility, and anger[.]"[94] Researchers elsewhere estimated that 25 percent of Vietnam veterans who experienced heavy combat were charged with committing a criminal offense after returning home.[95] Perhaps the most comprehensive assessment comes from the National Vietnam Veterans Readjustment Study, which determined the rate of violent acts in Vietnam veterans with PTSD to be nearly four times that of veterans without PTSD.[96] Study results further showed nearly half (45.7%) of veterans suffering from PTSD had been arrested or imprisoned, compared to only 11.6 percent of veterans

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[90] *Id.* at 43.
[91] *Id.* at 46.
[92] *Id.* at 46, 53.
[93] Bruce Pentland & James Dwyer, *Incarcerated Viet Nam Veterans*, *in* THE TRAUMA OF WAR: STRESS AND RECOVERY IN VIET NAM VETERANS 406 (1985).
[94] Peralme, *supra* note 54, at 13, citing Natasha B. Lasko, et al., *Aggression and Its Correlates in Vietnam Veterans With and Without Chronic Posttraumatic Stress Disorder*, 35 COMPREHENSIVE PSYCHIATRY 373 (1994). *See also* Elizabeth J. Delgado, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 478-82 (1985).
[95] C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 306 , n. 5 (1984).
[96] Peralme, *supra* note 54, at 14. *See also* Ann R. Auberry, Comment, *PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System*, 68 MAR. L. REV. 647, 650 (1985) (25 percent of Vietnam veterans involved in heavy combat had been charged with a crime, a rate higher than that of veterans not in heavy combat or non-veterans).

Table 1: Comparison of percent of veterans in prisons, 2004[87]				
	State		Federal	
	Veterans	Nonveterans	Veterans	Nonveterans
Violent Offenses	57.4	46.8	19.0	14.1
Homicide	14.9	11.8	3.2	2.3
Sexual Assault	22.5	9.4	3.3	0.6
Gender of victims				
Male	33.2	48.6		
Female	60.4	40.9		
Victim Relationship				
Knew Victim	70.9	54.3		
Did Not Know	29.9	45.7		
Mental Health				
Any Problem	54.4	56.5	42.9	45.0
Recent Services	29.9	23.6	20.7	13.0
Criminal History				
None	29.8	22.8	40.0	34.7
Prior	70.2	77.2	60.0	65.3
Maximum Sentence				
<12 mos.	2.9	3.5	0.9	1.6
12-35 mos.	9.8	14.8	16.4	10.5
36-59 mos.	9.6	14.1	9.3	13.7
60-119 mos.	20.1	23.2	22.9	26.6
120-179 mos.	12.1	11.9	18.7	20.2
180-239 mos.	24.0	16.7	19.1	14.7
Life/death	13.2	8.1	3.1	2.8
Mean[88]	147 mos.	119 mos.	138 mos.	127 mos.

Turning to an examination of veterans incarcerated in military prisons, Daniel then reviewed USDB data from a survey of 440 military inmates. Of those surveyed, 45 percent reported exhibiting one or more symptoms of PTSD.[89] Of the 23 inmates with prior diagnoses of PTSD, 92 percent had been convicted of committing a violent offense and 87 percent had been in

[87] *Id.* at 11–13.
[88] Data in this table excludes sentences to life or death. *See* Noonan and Mumola, *supra* note 84.
[89] Daniel, *supra* note 75, at 42, 46. In answering questions about PTSD, "199 (45%) reported one or more symptoms associated with PTSD, 157 (36%) reported no symptoms and 84 (or 19%) refused to participate in the research." *Id.* at 42. Of those responding to the survey, therefore, 55 percent reported one or more PTSD symptoms.

commission of violent criminal acts."[81] He then reviewed BJS data, citing reports from 1986 to 2007 for the proposition that the percentage of combat veterans in state and federal prisons and, among incarcerated veterans, the percentage convicted of violent acts evidenced a link between combat exposure and violent behavior.[82] Especially troubling to Daniel was the percentages of incarcerated veterans who had little or no prior criminal record and who had been imprisoned for committing violent acts.[83] As shown in Table 1, BJS data published in 2007 suggests that veterans imprisoned in state and federal prisons in 2004 had shorter criminal histories than non-veterans but were more likely than non-veterans to have committed violent offenses, including homicide and sexual assault, leading to longer sentences than non-veterans.[84] Veterans also were less likely than non-veterans to report recent drug use, but were more likely to report recent mental health problems.[85] Finally, veterans were more likely than non-veterans to victimize females they knew.[86]

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[81] *Id.* at 44.
[82] *Id.* at 45. Based on BJS data, Daniel found that 20 percent of veterans incarcerated in state and federal correctional facilities and 21 percent incarcerated in local jails had served in combat. Also, of the incarcerated veterans, over half of those in state facilities and about a quarter of those in federal institutions had been imprisoned for violent acts. *Id.*
[83] *Id.* at 36–38.
[84] Margaret E. Noonan & Christopher J. Mumola, *Veterans in State or Federal Prison, 2004*, Bureau of Justice Statistics, U.S. Dep't of Justice 1, 11–13, May 2007, available at http://bit.ly/dxfBcc.
[85] *Id.* at 1.
[86] *Id.* at 4, 12.

violence which is "mediated either by anger or the core features of PTSD... as well as the phenomenon described... as combat or action addiction."[74]

iv. David Daniel (2008)

In a monograph prepared in 2008 at the United States Army Command and General Staff College, Major David L. Daniel also reviewed the correlation between PTSD and violent behavior among veterans, focusing specifically on veterans who had recently returned from Iraq and Afghanistan.[75] To support his hypothesis of "a correlation between PTSD and criminal behavior in soldiers that [sic] have been incarcerated after returning from the GWOT," Daniel reviewed three primary sources.[76] First, he analyzed the findings of Collins and Bailey, using their study to establish a general causal link between PTSD and violent criminal behavior.[77] Second, he reviewed statistical data compiled by the Bureau of Justice Statistics (BJS) for trends in incarceration rates among veterans.[78] Third, Daniel assessed the validity of his hypothesis using data collected by the administrative and mental health staff of the United States Disciplinary Barracks at Fort Leavenworth, Kansas in a detailed study of 440 military inmates.[79]

After taking a historical look at PTSD,[80] Daniel relied on Collins and Bailey to find "significant causal links between the onset of PTSD symptoms and the increased risk of and

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[74] *Id.* at 81. Combat addiction occurs when a person "seeks to re-experience previous combat experiences by engaging in a repeated pattern of aggressive behavior. The individual effectively 'lives on the edge' both physiologically and psychologically to create a state parallel to the original trauma. These individuals are usually aware that they are engaging in antisocial behavior, and there is not the impairment in reality testing sometimes seen in flashback states." *Id.* at 74.

[75] David L. Daniel, Post-Traumatic Stress Disorder and the Casual Link to Crime: A Looming National Tragedy (2008) (unpublished paper, School of Advanced Military Studies, United States Army Command and General Staff College), available at http://1.usa.gov/iBhUMW.

[76] *Id.* at 44.

[77] *Id.* at 4.

[78] *Id.* at 5.

[79] *Id.* at iii.

[80] Daniel, *supra* note 75, at 8–15.

and neglect on violence,[65] Collins and Bailey concluded by calling for additional studies into the relationship between PTSD and violent behavior.[66]

iii. Friel, White, and Hull (2007)

In 2007, a trio of authors conducted a study of studies generally exploring the link between PTSD and violent behavior.[67] In their article, *Posttraumatic Stress Disorder and Criminal Responsibility*, Andra Friel, Tom White, and Alastair Hull observed that the lifetime prevalence for PTSD was 5 percent for men and 10.4 percent for women.[68] By contrast, the lifetime prevalence of PTSD for Vietnam veterans was 30.9 percent for men and 26.9 percent for women.[69] Individuals with PTSD also had a high comorbidity rate for additional mental health-related disorders, including depression and substance abuse.[70]

Friel, White, and Hull then reviewed eight different studies of combat veterans, each of which examined the relationship between PTSD and violent criminal behavior.[71] Of the eight studies, one found no direct link between PTSD and violent behavior.[72] The remaining seven studies found either a link or possible link, though some cautioned that firm conclusions were difficult to draw because of the presence of additional potentially causal factors.[73] Friel, White, and Hull concluded that there "does appear to be a direct association" between PTSD and

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[65] Collins & Susan Bailey, *supra* note 55, at 218
[66] *Id.*
[67] Andrea Friel, Tom White & Alastair Hull, *Posttraumatic Stress Disorder and Criminal Responsibility*, 19 J. OF FORENSIC PSYCHIATRY & PSYCHOL. 64 (2007).
[68] *Id.* at 65
[69] *Id.*
[70] *Id.* at 66. Comorbidity is generally defined as "two or more coexisting medical conditions or disease processes that are additional to an initial diagnosis." MOSBY'S MEDICAL DICTIONARY, 8th ed., available at http://bit.ly/iBcAKt.
[71] Friel, *supra* note 67, at 71–74.
[72] *Id.* at 71–72, citing D.M. Shaw, C.M. Churchill, R. Noyes & P.L. Loeffelholz, *Criminal behavior and post-traumatic stress disorder in Vietnam veterans*, 28 COMPREHENSIVE PSYCHIATRY 403 (1987).
[73] *Id.* at 71–73.

that 2.3 percent of the studied cohort met the DSM-III criteria for PTSD at some point in their lives.[57] The most prevalent traumatic event witnessed by cohort members was seeing someone hurt or killed.[58] Combat trauma was listed as the second most prevalent traumatic event,[59] despite the fact that only 16 percent of the cohort had served in the military.[60] Including both inmates who did and did not meet the DSM-III diagnostic criteria, 25 percent of the studied cohort reported at least one PTSD symptom, a rate higher than that of the general public.[61] Of inmates reporting at least one PTSD symptom who had been arrested at least once for homicide, rape, or assault, 85 percent first experienced symptoms of PTSD before or during the same year as their violent offense arrest.[62] Significantly, Collins and Bailey found that those with PTSD were 6.75 times more likely than those not diagnosed with PTSD to have been arrested for a violent offense during the year prior to being imprisoned.[63]

Summarizing their findings, Collins and Bailey determined that traumatic experiences—including those related to both combat and non-combat trauma—were "etiologically relevant" to later involvement in violence.[64] Drawing on similar studies detailing the effects of child abuse

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data on criminal history and the type of offense(s) resulting in the current incarceration from North Caroline Department of Corrections; and (3) criminal history records from the N.C. Bureau of Investigation.

[57] *Id.* at 210. 2.3 percent of subjects = 26 inmates.

[58] *Id.* at 210–211. 53.8 percent of subjects with PTSD reported this traumatic event.

[59] *Id.* at 211. 30.8 percent of subjects with PTSD reported this traumatic event. Less than 1 percent without PTSD reported having been in combat duty

[60] Collins & Susan Bailey, *supra* note 55, at 205, 211, Table II. The symptoms reported by research participants were: (1) nightmares/flashbacks, (2) being jumpy and easily startled, (3) hypervigilence, (4) having trouble sleeping and concentrating, (5) having less feeling for others and less interest in activities, (6) being ashamed of still being alive, and (7) avoiding reminders of the traumatic event.

[61] *Id.* at 212. The rate of service for the general public was reported as 15 percent for males in 1987.

[62] *Id.* at 216.

[63] *Id.* at 215.

[64] *Id.* at 218.

Third, a veteran could experience *depression-suicide syndrome*, which is accompanied by feelings of hopelessness, painful imagery, survivor guilt, and psychic numbing.[50] In an effort to end psychic pain, veterans with depression-suicide syndrome sometimes act out violently or recklessly knowing they will be caught or killed as a result of their actions.[51]

Wilson and Zigelbaum concluded by proposing that it is a veteran's "changed psychological state of being" resulting from the stress of combat which "predisposes the onset of a criminal act[.]"[52] Based on their research, they found "a significant relationship between combat role factors, exposure to stressors in Vietnam, and criminal behavior after returning home from the war."[53] Though based on limited data obtained nearly 30 years ago, their study continues to influence discussions of PTSD and criminal responsibility.[54]

ii. Collins & Bailey (1989)

In a 1989 study, James J. Collins and Susan L. Bailey explored the possible connection between PTSD and violence among a cohort of prisoners that included both veterans and non-veterans.[55] Collins and Bailey examined the histories of 1,140 male felons incarcerated in North Carolina prisons, reviewing three sets of data for each prisoner to determine the effect of PTSD on the commission of violent crimes by that prisoner.[56] In their study, Collins and Bailey found

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[50] *Id.* at 74-75.
[51] *Id.*
[52] *Id.* at 82.
[53] *Id.*
[54] *See, e.g.*, Lynne Peralme, Predictors of Post-Combat Violent Behavior in Vietnam Veterans 11-12 (1995) (unpublished Ph.D. dissertation, The Florida State University College of Arts and Sciences); Erin M. Gover, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans,* 28 PACE L. REV. 561, 567 *(2008)*; Thomas L. Hafermeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress* Disorder, 85 IND. L.J. 87, 101 n. 77 (2010).
[55] James J. Collins & Susan Bailey, *Traumatic Stress Disorder and Violent Behavior*, 3 J. OF TRAUMATIC STRESS 203 (1990).
[56] *Id.* at 206. In their study, Collins and Bailey utilized three data sets: (1) A Diagnostic Interview Schedule (DIS) (Version III) to determine DSM-III diagnoses, with demographic and criminal history questions added; (2) detailed

general population,[41] and because PTSD is causally related to criminal misconduct,[42] veterans of combat necessarily appear to offend at rates greater than the general population.

i. Wilson and Zigelbaum (1983)

In an influential study published in 1983, John P. Wilson and Sheldon D. Zigelbaum examined the relationship between PTSD and criminal behavior in 114 combat veterans who had served in Vietnam.[43] In their study, Wilson and Zigelbaum found that combat exposure significantly correlated to the crimes of manslaughter, disorderly conduct, assault, driving under the influence of alcohol, and weapons charges.[44] Study results also indicated a relationship between PTSD and the crimes of driving under the influence of alcohol, disorderly conduct, assault, and weapons charges.[45]

In exploring how combat trauma may induce post-combat criminal behavior by altering the psychological state of veterans, Wilson and Zigelbaum proposed three possible theories. First, a veteran could enter a *dissociative state* in which he "is likely to function predominately in the survivor mode by behaving as he did in combat in Vietnam."[46] Dissociative states are most commonly linked to violent criminal behavior.[47] Second, a veteran could display a *sensation seeking syndrome*, characterized by attempts to seek out the same level of excitement, exhilaration, and stimulation as that experienced in combat.[48] Sensation seeking syndrome often manifests itself in risk-filled activities, such as motorcycle riding, sky diving, and gambling.[49]

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[41] For a discussion of PTSD rates among veterans, *see infra* text accompanying notes 102–110.
[42] *See infra* text accompanying notes 43–100.
[43] John P. Wilson & Sheldon D. Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 BEHAV. SCI. & L. 69, 70 (1983).
[44] *Id.* at 78.
[45] *Id.* at 80.
[46] *Id.* at 73.
[47] *Id.*
[48] Wilson & Zigelbaum, supra note 43, at 74.
[49] *Id.*

homes and the perpetual vision of death, and has brought about a state of moral vertigo[.]"[37] So prevalent were World War I era news reports linking veterans to criminal misconduct that the American Legion requested the press "to subordinate whatever slight news value there may be in playing up the ex-service member angle in stories of crime or offense against the peace."[38] After the conclusion of World War II, researchers in New York City found a substantial increase in violent personal crime, though they disputed whether it was attributable to the effect of combat on returning veterans, or simply the great numbers of returning veterans themselves.[39]

B. PTSD and Veteran Criminality

More recently, numerous studies have explored the relationship between combat trauma suffered by veterans and post-combat criminal misconduct. Summarized below, these studies suggest that veterans who suffer from the trauma now known as PTSD *are* more likely than non-veterans not suffering from PTSD to engage in criminal misbehavior—a conclusion, however unpopular, that is empirically grounded and diagnostically helpful for treatment professionals working with traumatized veterans.[40] Importantly, these studies do not suggest that either military service or military combat, in and of themselves, increase the likelihood of later criminal misconduct. Rather, they indicate that it is the trauma of combat—PTSD—which increases the potential for criminal misbehavior. Because veterans suffer from PTSD at rates greater than the

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[37] Edith Abbot, *Crime and the War*, J. OF AM. INST. OF CRIM. L. & CRIMINOLOGY, at 40 (May 1918) (summarizing the arguments of M. Roux, professor of criminal law at the University of Dijon). *See also* Milton H. Erickson, *Some Aspects of Abandonment, Feeble-Mindedness, and Crime*, AM. J. OF SOC., (Mar. 1931) (finding a statistical correlation between military service and the commission of criminal offenses following World War I); JONATHAN SHAY, ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER, at 23–28 (1994) (discussing impact of war on soldiers' "Social and Moral Horizon").

[38] Sontag and Alvarez, *supra* note 20 (quoting the American Legion Resolution).

[39] Harry Willbach, *Recent Crimes and the Veterans*, J. CRIM. L. AND CRIMINOLOGY, Jan.–Feb. 1948, at 508.

[40] For a historical discussion of combat trauma and PTSD, see Holbrook, *supra* note 8, at 261–266.

character Fabrizio similarly contends, "War makes thieves, and peace hangs them."[32] Edith Abbott, an early 20th century American economist and social worker, noted reports of "crime epidemics" in France after the Revolution of 1848, in France and Germany after the Franco-Prussian War (1870-1871), and in England after the Second Boer War (1899-1902).[33] In a detailed study of post-Civil War data, Abbott found "[a] marked increase occurred . . . in the number of commitments of men to prison during the years following the war."[34] One prison warden of the time concluded that 90 percent of his new prisoners "had been more or less incapacitated and demoralized by an apprenticeship to the trade of war."[35] Another historical commentator, writing in the *North American Review* in 1867, observed:

> A year ago allusion was made in these pages to the rapid filling up of our prisons with men who had seen service in the army or navy. At that time, we were confident, at least two-thirds of all commitments to the state prisons in the loyal states were of this class. . . . If so, there cannot be less than five of six thousand soldiers and sailors who fought for the Union now confined in the state prisons of the Union; to say nothing of the tens of thousands besides, who during the year have been confined in lesser prisons.[36]

While perhaps incomplete, such analyses at least indicate a historical concern with the connection between violent combat and the post-combat behavior of veterans.

Of course, the concern with veterans and criminal misconduct did not end with the Civil War. Following World War I, both France and the United States feared an increase in crime as battle-hardened veterans returned to the home front, with one French criminologist commenting that "[p]ersonal morality . . . has deteriorated during the years of war with the breaking-up of

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[32] NICCOLO MACHIAVELLI, THE ART OF WAR 14 (Christopher Lynch trans., University of Chicago Press 2003) (1520).
[33] Abbott, *supra* note 2, at 212–13.
[34] *Id.* at 216.
[35] *Id.* at 228.
[36] *Id.* at 223, n. 1.

panning Sontag and Alvarez for reviving the "wacko-vet myth."[26] *The Weekly Standard* article, "The Wacko-Vet Myth," echoed Taranto's concern over the methodology Sontag and Alvarez employed,[27] while the *American Thinker* commentary, titled "The Return of the Wacko Vet Media Narrative," critically observed, "[I]t's yet another example of how statistics and facts can be tweaked to push whatever agenda or outcome a person desires."[28] Such criticism echoed concerns voiced earlier by the *Veterans of Foreign Wars* magazine in April 2006, in which Richard K. Kolb commented negatively on media outlets' coverage of veterans returning from the wars in Iraq and Afghanistan.[29] Quoting a New York Post editorial titled, "Return of the 'Wacko-Vet' Myth," Kolb wrote: "That stereotype [of the Vietnam vet] was also a news-media lie to begin with . . . . The myth of the dysfunctional vet that began with Vietnam has been created and spread, in large measure, by groups bitterly opposed to all U.S. military action."[30]

The warp and woof of such rhetoric aside, social observers and community stakeholders have long expressed concern about the potential connection between combat and post-war criminal behavior. Sir Thomas More, writing in *Utopia* in 1516, referred to individuals who, in war, "had so inured themselves to corrupt and wicked manners [ ] that they had taken a delight and pleasure in robbing and stealing[.]"[31] In Machiavelli's *Art of War*, published in 1521, the

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[26] *See* John J. DiLulio, Jr., *The Wacko-Vet Myth: Now Echoed by the New York Times*, WEEKLY STANDARD (Jan. 14, 2008), available at http://bit.ly/jJlbax; David Paulin, *The Return of the Wacko Vet Media Narrative*, AM. THINKER (Feb. 2, 2008), available at http://bit.ly/m31vka.
[27] DiLulio, *supra* note 26.
[28] Paulin, *supra* note 26.
[29] Richard K. Kolb, *Portraying Contemporary War Vets in Popular Culture*, VETERANS OF FOREIGN WARS, at 12–13 (Apr. 2006), available at http://bit.ly/m8VWtp.
[30] *Id.* In his article, Kolb observed that one television show had "resurrected the most damaging stereotypical characteristics" of traumatized veterans, including "psychotic, violent, suicidal, drug addicted, drunken, prone to spousal abuse, guilt-ridden over atrocities and thus anti-war, and finally the pitiful victim." *Id.*
[31] Abbot, *supra* note 2, at 46 (quoting THOMAS MORE, UTOPIA (1516)).

I. COMBAT TRAUMA AND CRIMINAL MISCONDUCT

A. The Myth of Veteran Criminality

In January 2008, Deborah Sontag and Lizette Alvarez of *The New York Times* placed a spotlight on veterans who commit criminal misconduct after returning from war.[20] In an article titled, "Across America, Deadly Echoes of Foreign Battles," Sontag and Alvarez explained how they uncovered "121 cases in which veterans of Iraq and Afghanistan committed a killing in this country, or were charged with one, after their return from war."[21] Based on their research, which included news reports, police, court, and military records, and personal interviews, Sontag and Alaverz found that the domestic homicide rate for active-duty military and recently discharged veterans had increased 89 percent (from 184 cases to 349 cases) from the six years prior to the Afghanistan invasion in 2001 to the six years after the Afghanistan invasion.[22] The vast majority of these offenders had no prior criminal history.[23]

The conclusion Sontag and Alvarez reached—that combat trauma played a causal factor in later criminal misconduct—drew heavy and immediate criticism. *The Wall Street Journal* columnist James Taranto pointed out flaws in Sontag and Alvarez's methodology, arguing their research only proved an increase in news reports of veterans charged with murder, not an increase in such crimes themselves.[24] "[T]he Times is trying to prove the truth of a media stereotype by references to media reports," Taranto wrote. "It might have proved nothing more than that it is a stereotype."[25] Both the *Weekly Standard* and the *American Thinker* concurred,

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[20] Deborah Sontag and Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N. Y. TIMES (Jan. 13, 2008), available at http://nyti.ms/9Mc3zV.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] James Taranto, *We Stand Behind Our Stereotype*, THE WALL ST. J. (Jan. 14, 2008)., available at http://on.wsj.com/kLpD04.
[25] *Id.*

based conclusions about the effectiveness of veterans courts based on their present operations must necessarily be qualified.

This chapter explores these challenging issues in two parts. First, we undertake a discussion of first principle concerns related to veterans courts by reviewing research studies examining the link between veterans and criminal misconduct. The return of 1.6 million veterans from the wars in Iraq and Afghanistan has re-ignited the still unsettled controversy over whether veterans suffering from combat trauma are more likely than their non-veteran counterparts to commit criminal misconduct after returning home.[19] While firm conclusions may be difficult (and unpopular) to draw, the issue warrants attention in any serious discussion about the merits and best practices of veterans court programs. Second, we present early findings from an assessment we conducted of the practices, procedures, and participant populations of certain veterans courts operating as of March 2011. Of the 53 courts invited to participate, 14 provided a response by completing either an online or paper survey. Of these, seven submitted sample policies and procedures, participant contracts, plea agreements, and mentor guidelines for our review. Drawing on these courts' common practices and procedures, we identify key operational components courts should consider in implementing veterans court programs. We also conclude that veterans court outcomes, at least at present, appear at least as favorable as those of other specialized treatment courts.

[19] For a discussion of the number of veterans returning from Iraq and Afghanistan and their PTSD occurrence rates, see RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY iii (Terri Tanielian & Lisa H. Jaycox eds., 2008) [hereinafter RAND REPORT].

individual veterans courts indicate that veterans courts' rehabilitation and recidivism rates compare favorably to those of other specialized treatment courts.[14] Currently, however, little comprehensive research exists regarding the participant populations or outcome-based efficacy of veterans courts. Partly this research gap may be due to the neoteric nature of veterans courts, which garnered widespread attention only in 2008 after Judge Robert T. Russell opened the Buffalo Veterans Treatment Court in Buffalo, New York, often reported as the first court of its kind in the country "that specialized and adapted to meet the specific needs of veterans."[15] The lack of evaluative data also may be attributable to the limited participant pools from which to draw meaningful conclusions. For example, the Buffalo veterans court reported in May 2010 that it had graduated 30 veterans.[16] Similarly, the Orange County veterans court reported in its 2010 annual report it had graduated just seven veterans.[17] Finally, the gap in outcome-based research may be due to the absence of shared reporting objectives and outcome protocols among veterans courts generally. Not all courts, for example, report participant data. Of those that do, some report recidivism rates while others do not.[18] Given such limiting factors, any outcome-

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[14] *Id.* at 270, 282-293.

[15] Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 357, 364 (2009). While the veterans court in Buffalo is often considered the "first" veterans treatment court, a less-well known veterans court had been established by Judge Sigurd Murphy and Judge Jack Smith in 2004 in Anchorage, Alaska four years earlier. *See infra* text accompanying notes 111–112. *See also* ANCHORAGE VETERANS COURT, POLICIES AND PROCEDURES FEBRUARY 2011, 3 (on file with authors) ("The [Anchorage] court was started . . . in 2004 in response to the number of veterans appearing in District Court suffering from medical, behavioral health or other socio-economic issues associated with previous military service."); Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563 (2009) (discussing creation of court for veterans in Alaska in 2004); Steven Berenson, *The Movement Toward Veterans Courts*, 44 CLEARINGHOUSE REV. 37, 39 (2010) ("The first small-scale effort at starting a veterans court took place in Anchorage, Alaska, in 2004, but most commentators locate the beginning of the current movement toward specialty courts for veterans in Buffalo, New York.").

[16] The World, *Trauma Courts for Vets* (PRI radio broadcast May 10, 2010), transcript available at http://bit.ly/a5xCll.

[17] ORANGE COUNTY 2010 REPORT, *supra* note 3, at 28.

[18] For example, the Buffalo Veterans Court reported that none of its 30 graduates as of May 2010 had re-offended. *See* Trauma Courts for Vets, *supra* note 16. The Orange County court did not report recidivism rates of its seven graduates in 2010. *See* ORANGE COUNTY 2010 REPORT, supra note 3, at 28.

professionals might favor the veterans court model of rehabilitation because veterans courts ensure that veterans who engage in criminal misconduct following exposure to combat are evaluated and treated for post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) when these are etiologically related to post-combat criminal misbehavior. Alternately, victims' rights advocates might disfavor the veterans court model if, in practice if not by design, it confers status-based benefits that subordinate the retributive interests of victims to the rehabilitative interests of veterans. Faced with competing concerns, some veterans rights organizations might also oppose veterans courts based on the argument that they perpetuate a stereotype of traumatized veterans committing criminal misconduct after returning home from war—the so-called "wacko-vet myth."[10] On the other hand, other veterans rights organizations might favorably endorse veterans courts because they benefit a population for which, as the Supreme Court recently observed in *Porter v. McCollum*, "[o]ur Nation has a long tradition of according leniency . . . in recognition of their service, especially for those who fought on the front lines . . . ."[11] To date, serious, thoughtful dialogue about such first principle concerns has been sparse.

In addition to these foundational issues are others grounded in the practical effectiveness of the nearly 60 veterans courts currently in operation.[12] Certainly, studies from sister treatment courts (drug courts, community courts, DWI courts, and mental health courts) suggest positive outcomes for veterans courts utilizing tenet methodologies similar to those used in other treatment court models.[13] Additionally, anecdotal evidence and self-reported data from

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[10] *See infra* text accompanying notes 19–29.
[11] Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447, 455 (2009) (per curiam).
[12] *See supra* note 8.
[13] For a discussion of the efficacy of veterans courts in light of other courts' treatment models, see Holbrook, *supra* note 8, at 282–283.

rehabilitative treatment over incarceration for eligible offenders.[4] In 2010, the Orange County veterans court reported 28 new participant admissions (of 43 total participants), seven program graduates, and four early terminations.[5] Along with veterans courts in Buffalo, New York, Tulsa, Oklahoma, and San Jose, California, the Orange County court was selected by the National Drug Court Institute (NDCI) as one of four "mentor courts" nationwide to assist courts in other jurisdictions in developing their own veterans court programs.[6] The court also received feature coverage in the documentary film *Other Than Honorable*, an exploration of veterans caught in the criminal justice system after returning from war.[7] By all accounts, the Orange County veterans court—and dozens of others like it spreading across the country—has shown early promise in rehabilitating veterans whose criminal misconduct is attributable, at least in part, to their military service.[8]

The growing trend within the judicial, treatment, and advocacy communities toward specialized courts for military veterans raises important questions about the effectiveness of such courts in rehabilitating veterans.[9] As a matter of first principles, veterans courts observers may take opposing positions regarding the appropriateness of placing veterans in a specialized, treatment-based court program simply because of their military service. For example, treatment

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[4] *Orange County Veterans Court*, *supra* note 3, at 2; *see also* Cal. Penal Code §1170.9 (2011) (providing for treatment over imprisonment for offenders who are otherwise eligible for probation and who allege they committed an offense "as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military").

[5] ORANGE COUNTY 2010 REPORT, *supra* note 2, at 27-28.

[6] *See id.* at 29; Nat'l Drug Court Institute , *Visit a Mentor Court*, http://bit.ly/kV0k9D (last visited May 5, 2011).

[7] *Id.*; *see also* In Their Boots, *Other than Honorable*, http://bit.ly/mAKIGo (last visited May 5, 2011).

[8] As of May 2011, nearly 60 jurisdictions in 24 states had established veterans courts, up from just over 40 veterans courts in October 2010. *See* Justin Holbrook, *Veterans' Courts and Criminal Responsibility: A Problem Solving History & Approach to the Liminality of Combat Trauma*, TREATING YOUNG VETERANS, DIANN KELLY, ET AL., EDS. 259, 282 (2011); Nat'l Assoc. of Drug Court Prof., Justice for Vets: The Nat'l Clearinghouse for Veterans Treatment Courts, *Veterans Court Treatment and Statistics*, http://bit.ly/lU8ccN (last visited May 5, 2011); Delaware Docket, Delaware Administrative Office of the Courts, *New Court Offers Hope for Veterans with Mental Health or Substance Abuse Issues* (Spring 2011), available at http://bit.ly/lKFL3P [hereinafter Delaware Docket].

[9] For a discussion of the history of veterans courts and their treatment methodologies, see Holbrook, *supra* note 8, at 277–285.

VETERANS COURTS:

EARLY OUTCOMES AND KEY INDICATORS FOR SUCCESS

by Justin Holbrook and Sara Anderson[1]

> Society felt no responsibility for the young men who filled the prisons before the [Civil War]. But when the prisoners of after-war days were the young 'veterans' of those grand armies of the Republic to whom a nation's gratitude was due, there was a genuine desire to get them out if possible . . . .
>
> Edith Abbott, *The Civil War and the Crime Wave of 1865-1870*[2]

INTRODUCTION

In April 2011, the Combat Veterans Court in Orange County, California received a Ralph N. Kleps Award for Improvement in Administration of the Courts, an award presented biennially by the Judicial Council of California to programs at the forefront of judicial innovation.[3] Founded in late 2008, the Orange County veterans court offers "therapeutic treatment instead of incarceration for combat veterans with substance abuse issues or diagnoses of posttraumatic stress disorder, traumatic brain injury, or other psychological problems attributable to their service." By placing troubled veterans under the supervision of a judge, probation officer, and case manager from the Department of Veterans Affairs, veterans "receive intensive mental health and substance abuse treatment" rather than time in prison or jail, a specialized approach to criminal justice encouraged by a 2006 amendment to California Penal Code § 1170.9 authorizing

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[1] Justin Holbrook, Associate Professor of Law and Director, Veterans Law Clinic, Widener Law School. Sara Anderson, B.A., Eastern University, J.D., Widener Law School.

[2] Edith Abbot, *The Civil War and the Crime Wave of 1865-1870*, 1 SOC. SERV. REV. 212, 233 (1927).

[3] Press Release, Judicial Council of California, *California Court Programs Win Top Awards: Judicial Council Honors First Combat Veterans Court and Other Innovative Programs* (Apr. 29, 2011), available at http://bit.ly/m0Ggzi [hereinafter *Orange County Veterans Court*]; COLLABORATIVE COURTS 2010 ANNUAL REPORT, Superior Court of California, County of Orange, at 27, available at http://bit.ly/imKeTS [hereinafter ORANGE COUNTY 2010 REPORT].

VETERANS HOSPITAL WORKER RESPONSIBILITIES

The VA Behavorial health worker assigned to the Court uses a standard Windows xl laptop which is encrypted and uses VISN 2 images. It is connected to the VA network with a Verizon Aircard through Rescue.

The Worker does the following:

-Obtaining and checking on presence of VA Releases of Information (ROI) between court and VA Hospital

-Facilitating VA linkages for services.

-Verifying and making appointments for SATS and Mental Health Clinics

-Checking on VA toxicology testing results

-Coordinating VA Treatment Status Report provision to Court.

-Provided the Judge with accurate VA treatment status updates

-Checking on and assisting with VA eligibility for services

-Case Management, Crisis Management and support for the veteran at the Court visit.

THE VA BEHAVORIAL HEALTH WORKER HAS A SECURE LAPTOP COMPUTER IN THE COURT AND HAS DIRECT COMMUNICATION WITH THE JUDGE, THE PROJECT COORDINATOR AND THE MENTORS.

FEDERAL OFFICE OF VETERANS AFFAIRS

THE FEDERAL OFFICE OF VETERANS AFFAIRS HANDLES PENSION, DISABILITY BENEFITS AND DOES CORRECTIONS ON ERRORS ON DD214S.A WORKER FROM THIS OFFICE HAS JUST BEEN ASSIGNED TO THE COURT AND SITS NEXT TO THE VA HOSPITAL REPRESENTATIVE.

THERE HAVE BEEN MANY INSTANCES OF DEFENDENTS WHO HAVE PROBLEMS GETTING THEIR DISABILITY OF PENSION BENEFITS.EVEN MORE PROGLEMS EXIST WITH INCORRECT DISCHARGE PAPERS WHICH WILL CAUSE PROBLEMS WITH APPLYING FOR THESE BENEFITS.

The Mentor Coordinator will also take into consideration the requests of the mentors and mentees, alike, in making matches.

3.7 Teambuilding

At least once a year all mentors will be recognized for their role in the Buffalo Veterans Treatment Court. The Mentor Coordinator is responsible for planning and implementing recognition activities.
Possible recognition activities include:

- An annual recognition event, where mentors are recognized for their length of service to the mentoring program
- Utilizing outstanding mentors in the recruitment and training of new mentors

3.3 Record-Keeping Policy

Each contact between mentor and mentee is documented in the Veteran Mentoring Log which will be updated at each court appearance by the mentor.

3.9 Confidentiality Policy

Mentors training will include a mandatory confidentiality workshop. Instructions on Federal and State confidentiality policy will be reviewed including but not limited to: what information should be kept confidential, who has access to confidential materials, what confidential information can be used for, how it will be kept confidential, and the limits of confidentiality.
In addition guidelines will be reviewed specific to what information should be included and should not be included in the veteran log as well as how information about the mentors will be protected.

3.10 Unacceptable Behavior Policy

It is the policy of the Buffalo Veteran's Court Diversion Project that unacceptable behaviors will not be tolerated while a mentor is participating in the program. Behaviors that do not match with the mission, vision, goals, or values of the Veteran's Court Diversion Project will be considered unacceptable and are prohibited during court proceedings and mentoring sessions.

Any unacceptable behavior, as determined by the Mentor Coordinator, the Judge, or the project Director, will result in a warning and/or disciplinary action including suspension or termination from the program.

3.4 Screening Policy

Each potential mentor must complete the screening procedure. The Mentor Coordinator will be responsible for walking each applicant through the screening procedure.

This procedure will include:

- Completing a written application form
- Completing a personal interview

The decision to accept or reject an applicant will be made by the Mentor Coordinator, the judge and the Project Director after the screening procedure has been completed.

3.5 Training Policy

All mentors must complete the required initial training procedures.
This procedure will include:

- Observe several court session
- Shadow three mentoring sessions with three different mentors
- Lead three mentoring sessions while being observed
- Discuss lead mentoring sessions and observation forms
- Complete individual supervision with the Mentor Coordinator

It is the responsibility of the Mentor Coordinator to plan, develop, and deliver all training sessions with support from other program staff, current mentors, the judge and the Court Coordinator

3.6 Matching Policy

The Mentor Coordinator will match mentors and participating veterans at each court appearance. As mentors are not always present at each court session the Mentor Coordinator will have to match the available mentors with the mentees in need. Whenever possible the Mentor Coordinator will make matches based on the following criteria:

- Previous sessions where the mentor and mentee were matched
- Matching branch of service
- Specific skill of a mentor matched to the need of a mentee
- Similar age/gender/ethnicity

- Encouraging and supportive
- Tolerant and respectful of individual differences

For more information or an application, please contact the Buffalo Veteran's Court, Mentor Coordinator at 845-2789.

Section 3: Mentoring Program Policies

3.1 Recruitment Policy

The Mentor Coordinator assumes the majority of the responsibly for recruiting new mentors. Other member of the Buffalo Veteran's Court Diversion Project as well as current mentors will support the Mentor Coordinator in these activities when necessary, including attending and hosting informational sessions.

3.2 Inquiry Policy

All inquiries around participation in the mentoring program, outside of an informational session or sharing the application and information sheet, are directed to the Mentor Coordinator. It will be the responsibility of the Mentor Coordinator to contact back any prospective mentors within two weeks of their inquiry.

3.3 Eligibility Policy

Each mentor must meet the eligibility criteria in order to participate in the program. Extenuating circumstances may be reviewed at the discretion of the Mentor Coordinator.

Mentor Eligibility Requirements

- Be a veteran of one of the branches of the United States Military, including the Army, Marine Corp, Navy, Air Force, Coast Guard, or their corresponding Reserve or Guard branches
- To adhere to all of the Buffalo Veteran's Court Diversion Project policies and procedures
- To commit to program participation for a minimum of six months
- To attend court sessions as scheduled
- To complete the screening process
- To complete the required training procedures
- To participate in additional trainings throughout his/her time of service

Veteran's Court proceedings. The Coordinator also must coordinate all activities with the Judge and the Court coordinator

Duties and Responsibilities:

1. Recruit and train volunteer Veteran's Court mentors.
2. Assist in the retention of volunteer mentors.
3. Organize and conduct training for volunteer mentors.
4. Assist in supervision of mentors.
5. Assist in the development of specialized training projects for the program.
6. Perform all other duties as assigned by Project Director and the Judge

2.5 Volunteer Mentor Role Description

The role of the Volunteer Veteran Mentor is to act as a coach, a guide, a role model, an advocate, and a support for the individuals s/he is working with. The mentor is intended to encourage, guide, and support the mentee as s/he progresses through the court process. This will include listening to the concerns of the veteran and making general suggestions, assisting the veteran determine what their needs are, and acting as a support for the veteran at a time when they may feel alone in a way that only another veteran can understand.

Duties and Responsibilities:

- Attend court sessions when scheduled
- Participate in and lead mentoring sessions with veterans when assigned by the Judge.
- Be supportive and understanding of the difficulties veterans face.
- Assist the veterans as much as possible to resolve their concerns around the court procedures as well as interactions with the Veteran's Administration system.
- Be supportive and helpful to the other mentors within the program.

Requirements:

- Be a veteran of one of the branches of the United States Military, including the Army, Marine Corp, Navy, Air Force, Coast Guard, or their corresponding Reserve or Guard branches
- Adhere to all of the Buffalo Veteran's Court Diversion Project policies and procedures
- Commit to program participation for a minimum of six months
- Complete the required training procedures
- Participate in additional trainings throughout time of service

Desirable Qualities:

- Willing listener

2.2 Planning Stage

Initially a meeting was set up by the Court with The Director and the Advisory Board of the VA hospital in Buffalo. From this meeting two major determinations were made. The first was that the local VA hospital agreed to place a Behavioral Health Supervisor and a secure VA computer in the proposed Veterans Treatment Court. This allowed for immediate benefit eligibility checks and for clinical appointments to be made directly on site in the Veterans Court. The second outcome was that a core of mentors was formed from the veteran's advocates that were part of the Medical Center's Advisory Board. This allowed the court to access a group of veterans that were dedicated to the support and care of other veterans.

This initial group of volunteers is the originating members of the Buffalo Veterans Treatment Court Mentoring program. They represented a variety of Veteran Service Organizations including Vietnam Veterans of America, Veterans of Foreign Wars, Paralyzed Veterans of America, Order of the Purple Heart, and AMVETS. Many of this group were also professionals from a number of governmental departments and military instillations including New York State Department of Veterans Affairs, Erie County Departments of Veterans Affairs, Mental Health, and Social Services, the VA Police Force, the Buffalo Police Force, the 107th Air Refueling Wing, and the Niagara Falls Air Force Base. These mentors are veterans from several eras of combat as well as times of peace.

2.3 Mission Statement of the Veteran's Mentoring Program

The Mission of the Veteran's Mentoring Program is to make certain to the best of our abilities that no one is left behind. We will find them, offer them assistance, assess their needs, and help them solve their problems. We will support the veteran through their readjustment to civilian life, assist the veteran navigate through the court, treatment, and VA systems, and act as a mentor, advocate and ally.

2.4 Mentor Coordinator

Essential to the coordination, maintenance and success of the mentoring program is the mentoring Coordinator. The role of the Mentor Coordinator is to recruit, train, supervise, and coordinate mentors within the Veteran's Court Diversion Program. The Mentor Coordinator is responsible for recruiting potential mentors, screening candidates, and selecting individuals to become Veteran Mentors. The Mentor Coordinator will be responsible for training selected candidates in skills to facilitate a mentoring session and skills specific to the Veteran's Court Diversion Program. The Mentor Coordinator will also be responsible for individual and group supervision as well as scheduling mentors to be present during the

provide Veterans with substance abuse, alcoholism and mental health treatment coupled with academic/vocational skills improvement, while actively assisting with residential, outpatient and/or transitional services leading to job placement and job retention.

1.3 How it works

Buffalo's Veterans Treatment Court is handled on a specialized criminal court docket involving veterans charged with typically felony or misdemeanor non-violent criminal offense(s), by diverting eligible veteran-defendants with substance dependency and/or mental illness. The court substitutes a treatment problem solving model for traditional court processing. Veterans are identified through specialized screening and assessments, and voluntarily participate in a judicially supervised treatment plan that a team of court staff, veteran health care professionals, veteran peer mentors, AOD health care professionals and mental health professionals develop. At regular status hearings treatment plans and other conditions are periodically reviewed for appropriateness, incentives are offered to reward adherence to court conditions, and sanctions for non-adherence are handed down. Completion of program is defined according to specific criteria. Upon admission to Veterans Treatment Court, the court staff and mentors assist the veteran with an array of stabilization and other services, such as emergency financial assistance, mental health/trauma counseling, employment and skills training assistance, temporary housing, advocacy, and other referral services.

Section 2: Mentoring Program

2.1 The Buffalo Veterans Court Veteran's Mentoring Program

Our experiences in both the Buffalo Drug Treatment Court and the Buffalo Mental Health Court has shown that veterans were more likely to respond more favorably with another Veteran than with others who did not have similar experiences. It appeared that that when a veteran, who had found his or her way into these courts, was talking to another veteran who was on the Buffalo Drug and or Mental Health Court Team, she/he would be more relaxed and less tense about their situation. It appeared that these conversations between veterans were more on the level of peers rather than from a position of authority or professionalism. This change in demeanor was seen as an opportunity to make a deeper impact on the lives of the veterans that came into these courts. Based on these observations it became clear that if we were to develop a Veterans Treatment Court, peer mentors would be an essential additional to the Treatment Court team. It was anticipated that their active, supportive relationship, maintained throughout treatment would increase the likelihood that a veteran will remain in treatment and improve his or her chances for sobriety and law-abiding behavior.

Section 1: Program Background

1.1 Statement of need Diversion

Our experience with veterans who have participated in either the Buffalo Drug Treatment Court and/or Mental Health Treatment Court have shown that there was a need for greater supervision and support; increased collaboration with law enforcement and the Veterans Administration; speedy identification and referrals of eligible veterans; transferring of cases that traditionally were in either the Drug or Mental Health Treatment Courts to a centralized singular calendar of all eligible veterans; greater focus on veterans' faulty decision-making; and peer to peer, vet to vet mentoring, to help the veterans build and achieve healthy goals. The Buffalo Veterans Court held its first session in January of 2008. The Veterans' Treatment Court presents an opportunity to help veterans in trouble with the law. Many Veterans are known to have a warrior's mentality and often do not address their treatment needs for physical and psychological health care. Many who are referred to the Veterans' Treatment Court are homeless, helpless, in despair, suffering from alcohol or drug addiction, and others have serious mental illnesses. Their lives have been spiraling out of control. Without the collaboration of the VA Health Care Network, Western New York Veterans Project[1], the Veterans' Treatment Court, volunteer veteran mentors and a coalition of Community Health Care providers, many would continue to have their illnesses untreated and would suffer the consequences of the traditional criminal justice system of jail or prison. This Collaboration of unique partners affords the opportunity for these veterans to regain stability in their lives, families are strengthened, the homeless are in housing, the employable are employed, and our society is the beneficiaries.

1.2 Mission

The Mission of The Veterans Treatment Court is to have a coordinated community response through collaboration with the veteran's service delivery system and the Criminal Justice System. The Court provide a means to successfully habilitate veterans by diverting them from the traditional criminal justice system and providing them with the tools they need to lead a productive and law-abiding life through treatment, rehabilitative programming, reinforcement and judicial monitoring. We will find them, offer them assistance, assess their needs, manage their care and help them solve their problems. We will

[1] The purpose of the Western New York Veterans Project is to bring together and coordinate government- and community-based services needed to help and support combat veterans and their families' to transition safely to civilian life. The *Buffalo Veterans Court* is an intense and coordinated effort between the Buffalo Veterans Treatment Court, the WNY Veteran Administration Health System, and the Buffalo Police Department.

The judge is the leader of the Veterans Treatment Court team. This active, supervising relationship, maintained throughout treatment, increases the likelihood that a veteran will remain in treatment and improves the chances for sobriety and law-abiding behavior. Ongoing judicial supervision also communicates to veterans that someone in authority cares about them and is closely watching what they do.

Key Component #8: **Monitoring and evaluation measure the achievement of program goals and gauge effectiveness**

Management and monitoring systems provide timely and accurate information about program progress. Program monitoring provides oversight and periodic measurements of the program's performance against its stated goals and objectives. Information and conclusions developed from periodic monitoring reports, process evaluation activities, and longitudinal evaluation studies may be used to modify program

Key Component #9: **Continuing interdisciplinary education promotes effective Veterans Treatment Court planning, implementation, and operations**

All Veterans Treatment Court staff should be involved in education and training. Interdisciplinary education exposes criminal justice officials to veteran treatment issues, and Veteran Administration, veteran volunteer mentors, and treatment staff to criminal justice issues. It also develops shared understandings of the values, goals, and operating procedures of both the veteran administration, treatment and the justice system components.

Education and training programs help maintain a high level of professionalism, provide a forum for solidifying relationships among criminal justice, Veteran Administration, veteran volunteer mentors, and treatment personnel, and promote a spirit of commitment and collaboration.

Key Component #10: **Forging partnerships among Veterans Treatment Court, Veterans Administration, public agencies, and community-based organizations generates local support and enhances Veteran Treatment Court effectiveness**

Because of its unique position in the criminal justice system, Veterans Treatment Court is well suited to develop coalitions among private community-based organizations, public criminal justice agencies, the Veteran Administration, veterans and veterans families support organizations, and AOD and mental health treatment delivery systems. Forming such coalitions expands the continuum of services available to Veterans Treatment Court participants and informs the community about Veterans Treatment Court concepts. The Veterans Treatment Court fosters system wide involvement through its commitment to share responsibility and participation of program partners.

To facilitate the veterans' progress in treatment, the prosecutor and defense counsel shed their traditional adversarial courtroom relationship and work together as a team. Once a veteran is accepted into the treatment court program, the team's focus is on the veteran's recovery and law-abiding behavior—not on the merits of the pending case.

Key Component #3: **Eligible participants are identified early and promptly placed in the Veterans Treatment Court program**

Early identification of veterans entering the criminal justice system is an integral part of the process of placement in the Veterans Treatment Court program. Arrest can be a traumatic event in a person's life. It creates an immediate crisis and can compel recognition of inappropriate behavior into the open, making denial by the veteran for the need for treatment difficult.

Key Component #4: **Veterans Treatment Court provide access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services**

While primarily concerned with criminal activity, AOD use, and mental illness, the Veterans Treatment Court team also consider co-occurring problems such as primary medical problems, transmittable diseases, homelessness; basic educational deficits, unemployment and poor job preparation; spouse and family troubles—especially domestic violence—and the ongoing effects of war time trauma.

Veteran peer mentors are essential to the Veterans Treatment Court team. Ongoing veteran peer mentors interaction with the Veterans Treatment Court participants is essential. Their active, supportive relationship, maintained throughout treatment, increases the likelihood that a veteran will remain in treatment and improves the chances for sobriety and law-abiding behavior.

Key Component #5: **Abstinence is monitored by frequent alcohol and other drug testing**

Frequent court-ordered AOD testing is essential. An accurate testing program is the most objective and efficient way to establish a framework for accountability and to gauge each participant's progress.

Key Component #6: **A coordinated strategy governs Veterans Treatment Court responses to participants' compliance**

A veteran's progress through the treatment court experience is measured by his or her compliance with the treatment regimen. Veterans Treatment Court reward cooperation as well as respond to noncompliance. Veterans Treatment Court establishes a coordinated strategy, including a continuum of graduated responses, to continuing drug use and other noncompliant behavior.

Key Component #7: **Ongoing judicial interaction with each Veteran is essential**

employable. The treatment court team will find them, offer them assistance, assess their needs, manage their care and help them solve their problems.

Also, assisting the court is a team of twenty volunteer veteran mentors. The pool of veteran mentors includes those who have served in Vietnam, Desert Shield, Operation Enduring Freedom and Operation Iraqi Freedom. While in court, a mentor will be assigned to meet with a veteran participant, discuss any ongoing problems or issues of interest. They work to problem solve existing issues and bring to the attention of the court any issues that the court can assist in resolving. This relationship promotes and fosters through encouragement a "can do" attitude in the veteran, that the veteran can accomplish their goals in treatment, that the veterans are not alone and that the mentors are there for them. Before and since the court operation, the volunteer veteran mentors have not wavered in their commitment, time, or dedication, despite the fact they are not monetarily compensated for their time or expertise. Faithfully they are present, ready to serve at every Veteran's Treatment Court session - without reservation. I am appreciative and proud of their commitment and eagerness to serve.

In conclusion, it is my hope that other jurisdictions will critically examine how they can better serve the veterans that are seen in our criminal court system. As my Project Director Hank Pirowski would say, "It's the right thing to do".

Judge Robert Russell

Veterans Treatment Court Ten Key Components

Buffalo's Veterans Treatment Court has adopted with slight modifications the essential tenements of the ten key components as described in the U.S. Department of Justice Publication entitled *"Defining Drug Courts: The Key Components"*, (Jan.1997). Brief descriptions of these modifications are listed in the ten key components that follow this introduction. Although there are differences between drug courts, mental health courts, and Buffalo's Veterans Treatment Court the *Key Components* provides the foundation in format and content for the *Essential Elements* of each of these courts.

Key Component #1: **Veterans Treatment Court integrate alcohol, drug treatment, and mental health services with justice system case processing**

Buffalo's Veterans Treatment Court promotes sobriety, recovery and stability through a coordinated response to veteran's dependency on alcohol, drugs, and/or management of their mental illness. Realization of these goals requires a team approach. This approach includes the cooperation and collaboration of the traditional partners found in drug treatment courts and mental health treatment courts with the addition of the Veteran Administration Health Care Network, veterans and veterans family support organizations, and veteran volunteer mentors.

Key Component #2: **Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights**

INTRODUCTION

For the past 13 years, whether as presiding Judge of Buffalo's Drug Treatment Court or in Mental Health Treatment Court, it became apparent that veterans faced a number of challenges in addressing their combat related trauma. Approximately 1.6 million American troops have served in Afghanistan (operation enduring freedom) and/or in Iraq (operation Iraqi freedom). Noteworthy are national reports regarding the frequency of these returning veterans with diseases of Mental Illness and/or Substance Addictions. War related illnesses may contribute to escalated suicide attempts, arrest, incarceration, divorce, domestic violence, homelessness and despair. Rather than be reactionary to the anticipated increase of veterans appearing in our criminal courts, we in Buffalo decided to take a pro-active approach, whereby the court embarked on a plan to develop a specialized treatment court to meet the particularized needs of our veterans.

After a year of planning, we established in Buffalo, New York, the first Veterans' Treatment Court in the United States, which began operating on January 15, 2008. The planning process included designing how the court would operate, exploring and obtaining the support needed, and engaging in extensive collaboration with the Veteran's Health Care Network, community health care providers, veterans service organizations, community based agencies and volunteer veteran mentors. A number of community seminars were also conducted acquainting our partners on the trauma of war, associated behavioral health diseases and the resulting side effects thereof.

Veterans Treatment Court seeks to divert eligible veteran-defendants with substance dependency and/or mental illness that are charged with typically felony or misdemeanor non-violent criminal offenses, to a specialized criminal court docket. The court substitutes a treatment problem solving model for traditional court processing. Veterans are identified through evidence based screening and assessments. The veterans voluntarily participate in a judicially supervised treatment plan that a team of court staff, veteran health care professionals, veteran peer mentors, AOD health care professionals and mental health professionals develop with the veteran. At regular status hearings treatment plans and other conditions are periodically reviewed for appropriateness, incentives are offered to reward adherence to court conditions, and sanctions for non-adherence are handed down. Completion of their program is defined according to specific criteria. Many will have their charges dismissed upon successful completions and others are assured of a non-incarcerative sentence upon completion.

Many Veterans are known to have a warrior's mentality and often do not address their treatment needs for physical and psychological health care. Often those who are referred to the Veterans' Treatment Court are homeless, helpless, in despair, suffering from alcohol or drug addiction, and others have serious mental illnesses. Their lives have been spiraling out of control. Without the collaboration of the VA Health Care Network, Western New York Veterans Project, the Veterans' Treatment Court, volunteer veteran mentors and a coalition of community health care providers, many would continue to have their illnesses untreated and would suffer the consequences of the traditional criminal justice system of jail or prison. This Collaboration of unique partners affords the opportunity for these veterans to regain stability in their lives, to have their families strengthened, to have housing for the homeless, and to have employment for the

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and deployments. The purpose of the program is to ensure that adequate and timely assessment, treatment, and support are available to veterans, service members, and affected family members.

The program shall facilitate support for covered individuals to provide timely assessment and treatment for stress-related injuries and traumatic brain injuries resulting from military service, and subject to the availability of public and private funds appropriated for them, case management services, outpatient, family support, and other appropriate behavioral health and brain injury services necessary to provide individual services and support.

The program shall cooperate with localities that may establish special treatment procedures for veterans and active military service members such as authorized by §§ 9.1-173 and 9.1-174. To facilitate local involvement and flexibility in responding to the problem of crime in local communities and to effectively treat, counsel, rehabilitate, and supervise veterans and active military service members who are offenders or defendants in the criminal justice system and who need access to proper treatment for mental illness including major depression, alcohol or drug abuse, post traumatic stress disorder, traumatic brain injury or a combination of these, any city, county, or combination thereof, may develop, establish, and maintain policies, procedures, and treatment services for all such offenders who are convicted and sentenced for misdemeanors or felonies that are not felony acts of violence, as defined in § 19.2-297.1. Such policies, procedures, and treatment services shall be designed to provide:

1. Coordination of treatment and counseling services available to the criminal justice system case processing;

2. Enhanced public safety through offender supervision, counseling, and treatment;

3. Prompt identification and placement of eligible participants;

4. Access to a continuum of treatment, rehabilitation, and counseling services in collaboration with such care providers as are willing and able to provide the services needed;

5. Where appropriate, verified participant abstinence through frequent alcohol and other drug testing;

6. Prompt response to participants' noncompliance with program requirements;

7. Ongoing monitoring and evaluation of program effectiveness and efficiency;

8. Ongoing education and training in support of program effectiveness and efficiency;

9. Ongoing collaboration among public agencies, community-based organizations and the U.S. Department of Veterans Affairs health care networks, the Veterans Benefits Administration, volunteer veteran mentors, and veterans and military family support organizations; and

10. The creation of a veterans and military service members' advisory council to provide input on the operations of such programs. The council shall include individuals responsible for the criminal justice procedures program along with veterans and, if available, active military service members.

§ 9.1-173.1. Procedures for treatment of veterans and active service members.

Localities may establish special treatment procedures for veterans and active military service members pursuant to § 2.2-2001.1.

CHAPTER 772

An Act to amend and reenact §§ 2.2-2001 and 2.2-2001.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 9.1-173.1, relating to criminal justice procedures for veterans and active military service members.

[H 1691]

Approved April 6, 2011

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-2001 and 2.2-2001.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 9.1-173.1 as follows:

§ 2.2-2001. Administrative responsibilities of the Department.

A. The Department shall be responsible for the establishment, operation, administration, and maintenance of offices and programs related to services for Virginia-domiciled veterans of the armed forces of the United States and their eligible spouses, orphans, and dependents. Such services shall include, but not be limited to, benefits claims processing and all medical care centers and cemeteries for veterans owned and operated by the Commonwealth.

Subject to the availability of sufficient nongeneral fund revenues, including, but not limited to, private donations and federal funds, the Department shall work in concert with applicable State and Federal agencies to develop and deploy an automated system for the electronic preparation of veterans' disability claims that ensures the collection of the necessary information to expedite processing of Virginia veterans' disability claims. The Department's development and deployment work shall be appropriately phased to minimize risk and shall include an initial replacement of the Department's existing case management technology, which replacement is required to support highly sophisticated electronic claims preparation. The Commissioner shall ensure that the system is efficient and statutorily compliant.

B. From such funds as may be appropriated or otherwise received for such purpose, the Department shall provide burial vaults at cost to eligible veterans and their family members interred at state-operated veterans cemeteries.

C. The Department shall establish guidelines for the determination of eligibility for Virginia-domiciled veterans and their spouses, orphans, and dependents for participation in programs and benefits administered by the Department. Such guidelines shall meet the intent of the federal statutes and regulations pertaining to the administration of federal programs supporting U.S. Armed Forces veterans and their spouses, orphans, and dependents.

D. The Department shall adopt reasonable regulations to implement a program to certify, upon request of the small business owner, that he holds a "service disabled veteran" status.

E. As used in this chapter, *unless the context requires otherwise*:

"Active military, naval, or air service members" means military service members who perform full-time duty in the armed forces of the United States, or a reserve component thereof, including the National Guard.

"Service-connected" means, with respect to disability that such disability was incurred or aggravated in the line of duty in the active military, naval, or air service.

"Service disabled veteran" means a veteran who (i) served on active duty in the United States military ground, naval, or air service, (ii) was discharged or released under conditions other than dishonorable, and (iii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs.

"Service disabled veteran business" means a business concern that is at least 51% owned by one or more service disabled veterans or, in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more individuals who are service disabled veterans and both the management and daily business operations are controlled by one or more individuals who are service disabled veterans.

"Veteran" means an individual who has served in the active military, naval or air service, and who was discharged or released therefrom under conditions other than dishonorable.

§ 2.2-2001.1. Program for mental health and rehabilitative services.

The Department, in cooperation with the Department of Behavioral Health and Developmental Services and the Department of Rehabilitative Services, shall establish a program to monitor and coordinate mental health and rehabilitative services support for Virginia veterans and members of the Virginia National Guard and Virginia residents in the Armed Forces Reserves not in active federal service. The program shall also support family members affected by covered military members' service

Added by Acts 2009, 81st Leg., R.S., Ch. 1103, Sec. 17(a), eff. September 1, 2009.

Chapter 12
Veterans' Courts and Criminal Responsibility:
A Problem Solving History & Approach to the Liminality of Combat Trauma
Justin Holbrook[1]

> *Society felt no responsibility for the young men who filled the prisons before the [Civil War]. But when the prisoners of after-war days were the young 'veterans' of those grand armies of the Republic to whom a nation's gratitude was due, there was a genuine desire to get them out if possible . . . .*
>
> *Edith Abbott, The Civil War and the Crime Wave of 1865-1870*[2]

In January 2010, Britten Walker was arrested after assaulting a federal police officer and a doctor at the Department of Veterans Affairs (VA) Medical Facility in Buffalo, New York. A 32-year old veteran who had served three combat tours in Iraq and Afghanistan, Walker committed the assaults after threatening to kill a VA worker, bomb several television stations, and bomb cars on the New York State Thruway. "The VA is totally unequipped to handle all the soldiers who are coming back from Iraq and Afghanistan and need help," Walker angrily told reporters when he first appeared in court on federal charges stemming from the assault and threats. "This has been devastating on me and my family. . . . I'm sick of America right now."[3] According to Walker's family, the young veteran had no intention of hurting anyone when he boiled over at the VA. "He suffers from [post-traumatic stress disorder], and he needs help," Walker's twin brother told

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[1] **Justin Holbrook, JD,** is Associate Professor of Law and Director of the Veterans Law Clinic at Widener University Law School, Widener University, Delaware campus, DE. Professor Holbrook served as an active duty judge advocate in the U.S. Air Force from 2004-2010. He deployed twice in support of OEF & OIF, and served as Chief of Military Justice and Chief of International Law in Japan.

[2] Edith Abbot, *The Civil War and the Crime Wave of 1865-1870*, SOC. SERV. REV., June 1927, at 233.

[3] Dan Herbeck, *Arrest Raises Questions on Care at VA; Inadequate Counseling Blamed for Assaults*, BUFF. NEWS, Feb. 21, 2010, at B1, available at http://bit.ly/bwEmgz.

reporters. "For some reason, he hasn't been able to make a connection with the counselors at the VA in Buffalo."[4]

Facing federal felony charges, Walker's case was assigned to U.S. Magistrate Judge Jeremiah McCarthy. Instead of immediately scheduling the case for trial, Judge McCarthy took the unusual step of appointing a psychiatrist to evaluate Walker for combat-related trauma.[5] After reading the psychiatrist's report, the judge released Walker from jail to attend a 30 day treatment program for veterans suffering from post-traumatic stress disorder (PTSD).[6] Once Walker successfully completed the program, the judge turned Walker over to family members on the condition that he attend an outpatient mental health program until the conclusion of his case.[7] "I'm sure you're not going to let yourself or them down, is that correct?"[8] McCarthy asked Walker. "That is correct, your honor," Walker politely answered.[9]

Five months later, Walker's case became the first of its kind in the country to be transferred from federal court to a local veteran's treatment court for final adjudication. After carefully orchestrating the arrangement between the U.S. Attorney's Office, the U.S. Office of Probation & Pretrial Services, the local veterans court, Walker's defense attorney, and veterans advocates, Judge McCarthy dismissed Walker's case without prejudice to allow it to be heard by the

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[4] *Id.*
[5] Dan Herbeck, *Veteran to Undergo Psychiatric Evaluation; Judge Won't Rule Until After Treatment*, BUFF. NEWS, Mar. 12, 2010, at B1, available at http://bit.ly/dtaztg.
[6] *Id.*
[7] Dan Herbeck, *Veteran Held in Assault at VA Wins Approval to Rejoin Family*, BUFF. NEWS, Apr. 18, 2010, at C8, available at http://bit.ly/cSJ1B2.
[8] *Id.*
[9] *Id.*

Buffalo Veterans Treatment Court, a division of Buffalo City Court.[10] The focus of everyone involved, Walker's defense attorney said, was to help the veteran receive the psychiatric counseling he needed.[11] The prosecuting attorney agreed, telling reporters, "We are seeking a better way to provide justice to those veterans who, despite the sacrifices they made for our country, sadly find that they have brought the war home with them."[12]

For those involved in veterans' advocacy and treatment, Walker's case is significant for a number of reasons. First, his is the first criminal case nationwide to be transferred from federal court to a local veterans treatment court where the goal is to treat—rather than simply punish—those facing the liminal effects of military combat. Walker's case may be seen as a key performance indicator of the broadening acceptance of veterans' courts and the success with which they are viewed. Second, the case reignites the still unsettled controversy over whether problem-solving courts generally, and veterans courts specifically, unfairly shift the focus of justice away from the retributive interests of victims to the rehabilitative interests of perpetrators. One can imagine, for example, the victims whom Walker threatened objecting to dismissal of his case without a finding of guilty and imposition of an appropriate sentence. Third, Walker's case serves as a signal reminder to all justice system stakeholders, including parties, judges, attorneys, and treatment professionals, of the potential benefits of sidestepping courtroom adversity in favor of a coordinated effort that seeks to ameliorate victim concerns while advancing treatment opportunities for veterans suffering from combat-related trauma.

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[10] Dan Herbeck, *Veteran Gets 2nd Chance from a Court with a Heart*, BUFF. NEWS, Sept. 14, 2010, at B1, available at http://bit.ly/dve3vq.
[11] *Id.*
[12] *Id.*

This chapter explores these issues in light of the development of veterans' treatment courts around the country. As a backdrop, attention is first given to the history of combat-related trauma as a medical and psychological condition requiring specialized diagnosis. The chapter then reviews combat-related trauma within the social context of criminal responsibility, exploring caselaw from the years following World War I through the Supreme Court's 2009 decision in *Porter v. McCollum.*[13] The recent initiative to create specialized problem-solving courts for veterans is then discussed, as well as the tenet methodologies employed by most veterans courts. Drawing lessons from the long history of combat-related trauma in the United States, the chapter concludes by advocating for increased trial court use of treatment methodologies designed to assist traumatized veterans facing criminal prosecution.

COMBAT TRAUMA AND THE LIMINAL EFFECTS OF WAR: A HISTORY

Though known by various names, accounts of combat trauma extend into the mists of mythology, literature, and history.[14] In Homer's *Odyssey*, Odysseus returns home from the Trojan wars to find himself in a country he does not recognize. Confused, he asks the goddess Athene, "What land is this, what neighborhood is it, what people live here?"[15] In Shakespeare's *Henry IV*, Lady Percy worries over her husband's "thick-eyed musings and cursed melancholy" after he returns home from a bloody battle. "In thy faint slumbers I by thee have watch'd," she tells him, "and heard thee murmur tales of iron wars[.]"[16] Psychologists reviewing historical

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[13] Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447 (2009) (per curiam).
[14] *See generally* DARYL S. PAULSON & STANLEY KRIPPNER, HAUNTED BY COMBAT: UNDERSTANDING PTSD IN WAR VETERANS INCLUDING WOMEN, RESERVISTS, AND THOSE COMING BACK FROM IRAQ 8 (2007).
[15] Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91, 92 n. 6 (1982) [hereinafter *Pandora's Box*] (quoting R. LATTIMORE, THE ODYSSEY OF HOMER ¶ 230, at 204 (1965). For a comparison of the psychological wounds inflicted on soldiers of the Trojan wars and Vietnam war, see generally JONATHAN SHAY, ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER (1994).
[16] WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 2 sc. 3. *See also* SHAY, *supra* note 15, at 165-66 (reviewing the text of Shakespeare's *Henry IV* in light of PTSD symptomatology).

records have discovered PTSD-like symptoms in such historical figures as Alexander the Great (356-323 BC), Captain James Cook (1728-1779), and Florence Nightingale (1820-1910), each of whom was exposed to combat or death.[17]

In the modern era, serious inquiry into the relationship between post-combat behavior and combat trauma began in the late eighteenth century when Dr. Benjamin Rush, widely considered to be the father of American psychiatry, observed in 1786 that soldiers of the Revolutionary War "who enjoyed health during a campaign, were often seized with fevers upon return to the *Vita Mollis* at their respective homes."[18] Civil War-era physicians made similar observations, diagnosing what today arguably would be considered PTSD as "nostalgia" or "soldier's heart" in a statistically significant number of cases.[19] For example, during the first year of the civil war, doctors reported 5,213 cases of "nostalgia," a rate of 2.34 cases per 1,000 soldiers.[20] During the second year of the war, the rate rose to 3.3 per 1,000.[21] In the years after the Civil War's conclusion, Dr. James Mendes DaCosta studied a group of veterans who presented as physically sound but nevertheless "complained of palpitations, increased pain in the cardiac region, tachycardia, cardiac uneasiness, headache, dimness of vision, and giddiness."[22] Describing the condition as a "disturbance of the sympathetic nervous system," Dr. DaCosta labeled it "irritable

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[17] Philip A. Mackowiak & Sonja V. Batten, *Post-Traumatic Stress Reactions before the Advent of Post-Traumatic Stress Disorder*, MIL. MED., Dec. 2008, at 1158.
[18] *Id.* (quoting Benjamin Rush, *Results of Observations*, 7 LONDON MED. J. 77, 99 (1786)).
[19] *See* Louis F. Bishop, Jr., *Soldier's Heart*, AM. J. OF NURSING, Apr. 1942, at 377-380 (describing "soldier's heart" as a cardiac neurosis that "is more than fear—it is an emotional state linked with fear"); Joel D. Howell, *'Soldier's Heart': The Redefinition of Heart Disease and Specialty Formation in Early Twentieth-Century Great Britain*, MED. HIST., Supp. 5, 1985, available at http://bit.ly/9twLJC; PAULSON & KRIPPNER, *supra* note 14, at 9; *Pandora's Box*, *supra* note 15, at 92-93. For in-depth treatment of combat trauma and the Civil War, see ERIC T. DEAN, JR., SHOOK OVER HELL: POST-TRAUMATIC STRESS, VIETNAM, AND THE CIVIL WAR (1997).
[20] Michael J. Davidson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 418 n. 21 (1988) (citing P. BOURNE, MEN STRESS AND VIETNAM 9-10 (1970)).
[21] *Id.*
[22] C.B. SCRIGNAR, POST-TRAUMATIC STRESS DISORDER: DIAGNOSIS, TREATMENT, AND LEGAL ISSUES 2 (1984). *See also* John Talbott, *Combat Trauma in the Civil War*, HIST. TODAY, Mar. 1996, at 41 (providing numerous anecdotal accounts of combat trauma among Civil War soldiers).

heart," a term later used interchangeably with the eponymous diagnosis "DaCosta syndrome."[23] At the same time, European physicians were observing similar symptoms—called "Swiss disease"—among Swiss soldiers who had experienced combat conditions in Europe.[24]

From Soldier's Heart to Shell Shock

By World War I, doctors had begun drawing distinct connections between combat activity and post-combat behavior, though medical investigation remained largely focused on physiological symptoms. British physicians speculated that "muscular exertion" was the primary cause of "soldier's heart," and the cohort of conditions linked to "soldier's heart" and "DaCosta syndrome" began to be called "effort syndrome" in the popular literature.[25] Others, noting both the psychological and physiological elements of the condition, labeled it "neurocirculatory asthenia."[26] The genesis of the condition remained indeterminate, however, with one commentator admitting as late as 1942 that "it is generally agreed that the cause of soldier's heart is obscure."[27]

Simultaneous with these developments, which primarily focused on physiological etiology, another branch of trauma-related inquiry arose as a result of the concussive explosions experienced by soldiers during World War I.[28] Experts initially believed the "shell shock" exhibited by such soldiers resulted from small cerebral hemorrhages.[29] As evidence, doctors

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[23] SCRIGNAR, *supra* note 22, at 2.
[24] PAULSON & KRIPPNER, *supra* note 14, at 9
[25] *See* SCRIGNAR, *supra* note 22, at 2; Bishop, *supra* note 19, at 377.
[26] *See* SCRIGNAR, *supra* note 22, at 2-3; Bishop, *supra* note 19, at 377; Howell, *supra* note 19, at 43.
[27] Bishop, *supra* note 19, at 377.
[28] Perhaps the most thorough treatment of "shell shock" and psychiatry during World War I is BEN SHEPHARD, A WAR OF NERVES (2000).
[29] *See* Howell, *supra* note 19, at 43; *Pandora's Box*, *supra* note 15, at 93 n. 11.

pointed to the presence of blood in the spinal fluid of some patients.[30] Opinions changed, however, when soldiers who had not been exposed to concussive airblasts presented with similar symptoms, and doctors ascribed a psychopathological cause rooted in identifiable personality predispositions.[31] Both "soldier's heart" and "shell shock" were "marked by breathlessness and nervous instability, were less common in men previously accustomed to active, outdoor work, and regularly called into question the possibility of malingering."[32] Even in light of these similar symptoms, the conditions remained diagnostically unique, as did the manner in which the diagnoses were received.[33] Perhaps because of the negative bias then existent toward psychology generally, diagnoses of "shell shock"—or "combat neurosis" as it also was called—were "often equated with malingering or cowardice," while diagnoses of "soldier's heart" received more sympathetic consideration due to their supposed physiological connection.[34] As with the Civil War, cases of "shell shock" among soldiers were significant. By 1916, an estimated 40 percent of British casualties were related to "shell shock," with some 80,000 British

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[30] *See id.*; DEAN, *supra* note 19, at 30. *See also* Sorenson v. State, 188 N.W. 622, 624 (Wis. 1922) (doctor testified "he has found as a result of shell shock and other nervous and mental disturbances originating in battle, actual changes in the central nervous system produced by continuous proximity to shock and concussion caused by heavy artillery, in some cases actually causing more or less permanent derangement of the central nervous system").

[31] *See Pandora's Box*, *supra* note 15, at 94. *See also* SHEPHARD, *supra* note 28, at 31 (observing by 1916 clinicians had concluded "shell shock" may be caused by "an emotional disturbance or mental strain"); Harold Merskey and August Piper, *Posttraumatic Stress Disorder is Overloaded*, CAN. J. OF PSYCHIATRY, Aug. 2008, at 499 (discussing the evolution of combat trauma diagnosis from shell shock to combat neuroses to PTSD); C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 313-14 (1984).

[32] Howell, *supra* note 19, at 43

[33] *See id.*

[34] *Id. See also* DEAN, *supra* note 19, at 31 ("Attitudes toward the psychiatric casualties of the war varied widely over time; initially, many disoriented men at the front were treated as deserters and shot[.]"); Talbott, *supra* note 22, at 41 ("[M]en whom medical officers might have diagnosed for combat trauma in 1916, 1944, or 1968 were hauled before courts martial in 1864, and some of them probably wound up at the end of a noose or in front of a firing squad.").

soldiers treated by the British Army Medical Service for the condition and nearly 200,000 soldiers discharged.[35]

Despite the experience of World War I, by the onset of World War II neither medical practitioners nor military authorities had definitively linked the trauma of combat with the post-combat behaviors observed in veterans. Rather, experts remained convinced that "shell shock" and "soldier's heart" stemmed from personality traits exacerbated by exposure to combat rather than combat itself.[36] Hoping to screen out enlistees exhibiting such traits, U.S. military authorities rejected 1.6 million of 20 million draftees during World War II for psychological reasons, a rejection rate 7.6 times that of World War I.[37] Similarly, soldiers who made it through the screening process but suffered from post-combat trauma were discharged at a rate five times that of World War I.[38]

As the number of discharges exceeded the number of enlistees, the military revised its policy and, by 1943, attempted to treat men suffering from such "combat exhaustion" with rest, food, and sleep rather than discharge.[39] The goal was to return fatigued soldiers to the battlefront as quickly as possible.[40] Notably, the number of casualties reportedly associated with combat

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[35] DEAN, *supra* note 19, at 30-31. Similar efforts to screen out "feeble-minded" and "neurotic" enlistees had been made toward the latter part of World War I. *See* SHEPHARD, *supra* note 28, at 126.
[36] DEAN, *supra* note 19, at 35.
[37] *Id. See also Pandora's Box*, *supra* note 15, at 95.
[38] DEAN, *supra* note 19, at 35.
[39] *See id.*; Erlinder, *supra* note 31, at 314.
[40] The "forward psychiatry" treatment methodologies employed on large scale by the U.S. Army in World War II, which brought psychiatrists to the front to treat soldiers immediately rather than return them rear asylums, had been pioneered in World War I by Dr. Tom Salmon. *See* SHEPHARD, *supra* note 28, at 125-32.

trauma escalated during World War II.[41] In 1944, the rate of soldiers admitted to overseas hospitals for psychological conditions was 47 per 1000. Other estimates place the overall incident rate of psychological casualties at nearly 114 per 1000.[42]

By the time of the Korean conflict, medical and military authorities had established a set of treatment protocols for "combat exhaustion" requiring temporary hospitalization with eventual return to combat conditions.[43] Under the Army's diagnostic criteria, "combat exhaustion" was a type of "transient personality reaction" defined as an "acute psychiatric casualt[y] of combat."[44] Investigators in the war zone undertook an intense study of the psychological and physiological effects of combat, and combat tours were shortened from the duration of the entire war (as had been the case in World War II) to a fixed term of nine months.[45] As a result of these measures, the incident rate of casualties attributed to psychological trauma dropped to 37 per 1000.[46]

Although PTSD entered the popular lexicon in connection with the post-war experiences of Vietnam veterans, the wartime incident rates of psychological casualties during the Vietnam conflict were actually lower than prior conflicts involving U.S. soldiers.[47] One author places the incident rate at 12 per 1000, a significant reduction from both the Korean conflict and World War II.[48] Soldiers reportedly benefited from fixed duty tours of one year, frequent rest and relaxation opportunities, and "the application of modern military psychiatry" in the theater of

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[41] For a detailed review of the possible explanations for the increase in psychiatric casualties in World War II, see *Pandora's Box*, *supra* note 15, at 95 n. 25. Also, at least one expert has "concluded that over ninety percent of chronic war neuroses were both undiagnosed and untreated during World War I." *Id.* at 94.
[42] *Id.* at 95 n. 25, 97 n. 30.
[43] *Id.* at 97.
[44] *Id.* at 95 n. 25 (quoting War Dep't Technical Medical Bulletin (TB MED) 203, issued Oct. 19 1945).
[45] *Id.* at 97-98.
[46] *Pandora's Box*, *supra* note 15, at 97 n. 30.
[47] *See id.* at 98.
[48] *See id.* *See also* DEAN, *supra* note 19, at 40

war.[49] Some commentators argue, however, that despite these advances, soldiers serving in Vietnam faced aggravating stressors distinct from those faced by earlier veterans.

Vietnam-era soldiers on average were 19.2 years old, compared to 26 years old in World War II.[50] Soldiers traveling to and from Vietnam traveled individually rather than as a unit, often arriving and departing on commercial aircraft.[51] Some even returned home on the same day they departed the battlefield.[52] Further, the war's shifting political and military objectives led to uncertainty and disillusionment among soldiers,[53] feelings exacerbated by a U.S. populace that was ambivalent at best and hostile at worst to the entire war effort.[54] With the benefit of historical hindsight, such aggravating factors caution against drawing a firm correlation between the incident rates of wartime psychological casualties and post-war episodes of combat-related trauma—a lesson to be remembered when calculating the potential psychological impact of the Iraq and Afghanistan wars on today's returning soldiers.[55]

Post-Combat Behavior and PTSD

For purposes of this chapter, the critical question is whether and to what extent combat-related trauma suffered by wartime veterans lingers once they returned home from combat and reintegrated into society. Both anecdotal accounts and historical data are revealing. Jason Roberts, a Union soldier who had been a prisoner in Southern prisons during the Civil War,

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[49] *See Pandora's Box*, *supra* note 15, at 98; DEAN, *supra* note 19, at 40. As a result of these advances, a leading psychiatrist concluded at the time, "[T]here is reason to be optimistic that psychiatric casualties need never again become a major cause of attrition in the United States military in a combat zone." *Id.*

[50] Davidson, *supra* note 20, at 416 n. 11.

[51] *See id.*; DEAN, *supra* note 19, at 41; Dennis McLellan, *PTSD-Shellshock Hit Vietnam Vets Hardest: 20 Years After the Fall*, L.A. TIMES, Apr. 27, 1995, at 4, available at http://lat.ms/aEs0YL.

[52] *See Pandora's Box*, *supra* note 15, at 99.

[53] *See* Davidson, *supra* note 20, at 417.

[54] *See Pandora's Box*, *supra* note 15, at 99; DEAN, *supra* note 19, at 41.

[55] *See Pandora's Box*, *supra* note 15, at 99; DEAN, *supra* note 19, at 41.

returned home to his wife and children on a stretcher exhibiting "peculiar actions," "curious" talk, and threatening behaviors.[56] "I kept him a little afraid of me, by threatening him with punishment," his wife said. "He got so that he did not mind me, & I saw that he watched me very closely. He had a wild angry look in his eyes and I got afraid of him at last." She eventually applied to have him committed for "chronic mania."[57] In England, using language not altogether dissimilar from that used to describe today's veterans, an article in the *London Times* from March 1, 1920 documented the haunting post-war experience of World War I veterans when they returned home:

> *Of the many problems calling for solutions, one of the most urgent is that of the man disabled in the war or suffering from shell-shock or neurasthenia. There exists a great army of men suffering from varying degrees of mental instability, and in the ordinary labour market, and particularly in the employment bureaux, such men are at a serious disadvantage. Employers have come to look askance at them.*[58]

Aside from these brief anecdotes, historical data support the conclusion that veterans of prior wars also suffered from both acute and delayed onset of PTSD.[59] In the United States in 1921, the number of U.S. veterans receiving care for psychiatric disorders was 7,499.[60] By 1931, the number had increased to 11,342.[61] Similarly, from 1923 to 1932, benefits paid to World War I

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[56] *Id.* at 84.
[57] *Id.* at 85.
[58] *Id.* at 39.
[59] *Id.* at 70.
[60] DEAN, *supra* note 19, at 39.
[61] *Id.*

veterans for psychiatric disorders jumped from $23,256 to $67,916.[62] Veterans of World War II exhibited similar post-war responses to combat stress. A cohort of veterans followed by researches for twenty years displayed "persistent symptoms of tension, irritability, depression, diffuse anxiety symptoms, headaches, insomnia, and nightmares."[63] Labeling the condition "veteran's chronic stress syndrome," researchers concluded: "These particular veterans cannot blot out their painful memories."[64] Significantly, one researcher observed in 1945 that "[the] majority of psychiatric admissions among returnees are not men who have returned with war neuroses, but those who develop signs of illness after completing a full term of duty."[65]

Like veterans before them, veterans of the Vietnam conflict also suffered from the trauma of war after returning home. Estimates in the 1980's placed the number of Vietnam veterans with PTSD between 500,000 to 1,500,000.[66] Those with significant combat experience had incident rates of suicide, substance abuse, marriage problems, and unemployment higher than those of the general population.[67] Because psychiatrists and psychologists viewed Vietnam veterans' combat and reintegration experiences as unique, however, they adopted new terminology to describe returning veterans' symptomatology—"Vietnam Syndrome," "Post-Vietnam Syndrome (PVS)," "Vietnam-Veteran Syndrome," "Re-Entry Syndrome," or "Post-Viet Nam Psychiatric Syndrome (PVNPS)" were all employed in the literature of the day.[68]

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] DEAN, *supra* note 19, at 39.
[66] Erlinder, *supra* note 31, at 305.
[67] *Id.* at 311.
[68] DEAN, *supra* note 19, at 42.

Too often these labels were reinforced by negative media images of angry, distrustful veterans returning home to an unwelcoming public, scenes far different than the idealized cheery parades and welcoming banners heralding the return of veterans of earlier conflicts. While some commentators have recently disputed the uniqueness of the Vietnam combat experience, arguing that veterans of earlier conflicts similarly suffered from dislocation, unemployment, family disintegration, and recurring trauma after returning from war,[69] the portrayal of troubled Vietnam veterans during the 1970's generated the sympathy needed in both political and medical circles for the advancement of combat trauma as a subject of serious psychological study and treatment.

Accordingly, in 1980, the American Psychological Association (APA) included post-traumatic stress disorder (PTSD) in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III), the major diagnostic manual used by clinicians in treating mental disorders.[70] Earlier editions of the DSM had categorized combat trauma as "gross stress reaction" or "adjustment reactions of adult life," diagnoses which failed to articulate a description of trauma-induced symptoms sufficient to either diagnose or treat veterans.[71] In DSM-III, PTSD was characterized by the development of specific symptoms—including diminished responsiveness, hyperalertness, exaggerated startle response, insomnia, recurrent nightmares, aggressive behavior, depression, and anxiety—exhibited after a "psychologically

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[69] For a comparison of the psychological casualties in Vietnam to those of the Civil War, see DEAN, *supra* note 19, at 181-209.

[70] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. 1980) [hereinafter DSM-III]. *See also* Thomas L. Hafermeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 94 (2010).

[71] Davidson, *supra* note 20, at 419-20. *See also* Erlinder, *supra* note 31, at 315. One of the shortfalls of "gross stress reaction" was that it assumed combat trauma was situational and "would abate with a reduction in exposure to the stressor." *Id.* at 315.

traumatic event that is generally outside the range of usual human experience."[72] Both acute and delayed PTSD were recognized, and combat veterans were specifically referenced in the diagnostic description.[73] The fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) modified the diagnostic criteria, but remained focused on symptoms resulting from traumatic events, including "military combat."[74]

COMBAT TRAUMA AND THE PROBLEM OF CRIMINAL RESPONSIBILITY

In an April 2008 study titled "Invisible Wounds of War," the RAND Corporation approximated that 300,000, or nearly 20 percent, of the 1.64 million veterans who have served in Iraq and Afghanistan since 2001 suffer from PTSD.[75] These figures generally accord with a 2004 study which found that 15.6 to 17.1 percent of veterans of Iraq met the screening criteria for major depression, generalized anxiety, or PTSD.[76] Incident rates of PTSD were directly tied to the number of combat experiences, from a rate of 9.3 percent for soldiers involved in one or two firefights to 19.3 percent for those involved in five or more firefights.[77] More recently, the Department of Veterans Affairs (VA) disclosed that 44 percent of Iraq and Afghanistan war veterans seeking treatment at VA medical facilities had been diagnosed with mental health

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[72] DSM-III, *supra* note 70, at 236.
[73] *Id.*
[74] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463-64 (4th ed. 2000) [hereinafter DSM-IV-TR].
[75] RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY iii (Terri Tanielian & Lisa H. Jaycox eds., 2008) [hereinafter Rand Report]. *See also* Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty*, 77 FORDHAM L. REV. 2955, 2958. For a discussion of the possible over-diagnosis of PTSD, see Merskey and Piper, supra note 31, at 499. *See also* Hafermeister & Stockey, *supra* note 70, at 90 n. 12 (same). This chapter does not discuss Traumatic Brain Injury (TBI), a physiological injury estimated to have occurred in 300,000 combat veterans returning from Iraq and Afghanistan. *See* Giardino at 2598. Veterans suffering from TBI who commit criminal acts, however, also require sympathetic consideration and a problem-solving approach to rehabilitation. Accordingly, arguments supporting specialized courts for veterans with PTSD may be extended to veterans with TBI.
[76] Charles W. Hoge, et al, *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 1, 13 (2004).
[77] *Id.* at 13.

disorders, with 23 percent diagnosed with possible PTSD.[78] In 2009, the National Center for PTSD published a bibliography of studies in which it found an overall PTSD rate of 10 to 18 percent for combat troops serving in Iraq and Afghanistan.[79]

PTSD and Criminal Behavior

The relevance of PTSD rates for justice system stakeholders lies in their correlation to risk factors which, themselves, are routinely linked to incidents of criminal activity. Surveys from the 1980's suggested a measurable link between PTSD and criminal behavior in Vietnam-era veterans,[80] with one study finding a heightened disposition toward violent crimes in incarcerated Vietnam veterans compared to incarcerated non-veterans[81] and another finding a relationship between PTSD and "self-reported aggression, hostility, and anger[.]"[82] Researchers elsewhere estimated that 25 percent of veterans who experienced heavy combat had been charged with committing a criminal offense since returning home.[83] Perhaps the most comprehensive assessment comes from the National Vietnam Veterans Readjustment Study, which determined the rate of violent acts in Vietnam veterans with PTSD to be nearly four times that of veterans without PTSD.[84] Study results further showed nearly half (45.7 percent) of veterans suffering

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[78] William H. McMichael, *VA Diagnosing Higher Rates of PTSD*, MARINE CORPS TIMES, Jan. 18, 2009, available at http://bit.ly/cA8Qj5.

[79] Brett T. Litz and William E. Schlenger, *PTSD in Service Members and New Veterans of the Iraq and Afghanistan Wars: A Bibliography and Critique*, PTSD RESEARCH QUARTERLY, Winter 2009, at 1-3. By contrast, historical studies on Vietnam veterans following conclusion of the conflict indicate PTSD rates of 30 percent. *See* Hafermeister & Stockey, *supra* note 70, at 100.

[80] *See id.* at 101; Elizabeth J. Delgado, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 478-82 (1985); John P. Wilson & Sheldon D. Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 BEHAV. SCI. & L. 69 (1983).

[81] Bruce Pentland & James Dwyer, *Incarcerated Viet Nam Veterans, in* THE TRAUMA OF WAR: STRESS AND RECOVERY IN VIET NAM VETERANS 406 (1985).

[82] Lynne Peralme, Predictors of Post-Combat Violent Behavior in Vietnam Veterans 13 (1995) (unpublished Ph.D. Dissertation, The Florida State University College of Arts and Sciences).

[83] Erlinder, *supra* note 31, at 306 n. 5.

[84] Peralme, *supra* note 82, at 14. *See also* Ann R. Auberry, Comment, *PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System*, 68 MAR. L. REV. 647, 650 (1985) (25 percent of Vietnam veterans involved

from PTSD had been arrested or imprisoned, compared to only 11.6 percent of veterans without PTSD.[85]

Not surprisingly, emerging studies of Iraq and Afghanistan veterans show similar trends. A longitudinal study of Iraq and Afghanistan veterans six months after deployment revealed that "27 to 35 percent reported symptoms placing them at mental health risk, including symptoms of PTSD, depression, alcohol misuse, and suicidal ideation, as well as self-reported aggression."[86] Other reports have suggested an increase in drug abuse by Iraq and Afghanistan veterans,[87] and noted that veterans between the ages of 20 to 24 years are reportedly four times more likely to commit suicide than their nonveteran counterparts.[88]

Although environmental variables between Vietnam veterans and Iraq and Afghanistan veterans prevent direct comparison, current data indicate that Iraq and Afghanistan veterans who display PTSD hyperarousal symptomatology have greater difficulty—like their Vietnam veteran counterparts—in controlling aggressive impulses or urges, managing anger, and controlling violence.[89] These risk factors do not yet appear to have led to an increase in the percentage of

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in heavy combat had been charged with a crime, a rate higher than that of veterans not in heavy combat or non-veterans).

[85] Peralme, *supra* note 82, at 14.

[86] Debra A. Pinals, *Veterans and the Justice System: The Next Forensic Frontier*, J. AM. ACAD. PSYCHIATRY AND L. (June 2010) at 164.

[87] *See Serious Psychological Distress and Substance Use Disorder among Veteran*, THE NATIONAL SURVEY ON DRUG USE AND HEALTH REPORT, U.S. DEP'T OF HEALTH & HUMAN SERVICES, Nov. 2007 [hereinafter NSDUH REPORT], available at http://bit.ly/c1uxq9 ("One quarter of veterans age 18 to 25 met the criteria for [substance use disorder] in the past year compared with 11.3 percent of veterans aged 26 to 54 and 4.4 percent of veterans aged 55 or older.").

[88] Rick Little & Stacy Garrick Zimmerman, *Helping Veterans Overcome Homelessness*, 43 CLEARINGHOUSE REV. 292, 295 (2009). *But see* Margaret E. Noonan & Christopher J. Mumola, *Veterans in State or Federal Prison, 2004*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE 7, May 2007 (finding no link between combat service and mental health problems among incarcerated veteran inmates), available at http://bit.ly/dxfBcc .

[89] Eric B. Elbogen, et al., *Correlates of Anger and Hostility in Iraq and Afghanistan War Veterans*, Am. J. Psychiatry, Sep. 2010, at 1051. *See also* Wilson & Zigelbaum, *supra* note 80, at 73-74; Melissa Pratt, *New Courts*

veterans among prison populations, although the lack of recent data hinders firm conclusion. A 2004 study, the most recent available, found that 10 percent of state prisoners were veterans, a decline from 12 percent in 1997 and 20 percent in 1986.[90] During that same time period, veterans as a percentage of the U.S. population dropped to 11 percent in 2004 from 16 percent in 1985, suggesting that the downward trend of veterans in prison populations mirrors that of the decline of veterans among the populace generally.[91]

Of course, long before either the Vietnam conflict or the wars in Iraq and Afghanistan, writers, policy makers, and researches recognized the potential connection between combat and post-war criminal behavior. Sir Thomas More, writing in *Utopia* in 1516, referred to individuals who, in war, "had so inured themselves to corrupt and wicked manners [ ] that they had taken a delight and pleasure in robbing and stealing[.]"[92] In Machiavelli's *Art of War*, published in 1521, the character Fabrizio similarly contends, "War makes thieves, and peace hangs them."[93] Winston Churchill, in the aftermath of World War I, declared at a London dinner in 1919:

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on the Block: Specialized Criminal Courts for Veterans in the United States, 15 APPEAL 39, 40 (2010); Deborah Sontag and Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N. Y. TIMES, Jan. 13, 2008, available at http://nyti.ms/9Mc3zV. In January 2008, the New York Times uncovered 121 media stories involving veterans of the Iraq and Afghanistan wars who had been accused of committing manslaughter or murder. Id. *See also* Pratt, at 40 (discussing the New York Times story). Many of the accused veterans reportedly suffered from combat trauma or substance dependency. *Id.*

[90] Noonan & Mumola, *supra* note 88.

[91] *Id.* at 2. In January 2000, the U.S. Department of Justice reported that "[m]ale military veterans are incarcerated in the nation's prisons and jails at less than half the rate of non-veterans[.]" Press Release, Bureau of Justice Statistics, U.S. Department of Justice (Jan. 18, 2000), available at http://bit.ly/aASjgn. Notably, the U.S. Department of Justice also reported that "[v]eterans were more likely to be in a state prison for a violent offense (55 percent) . . . than the non-veteran inmate population (46 percent . . .)." *Id.* Non-veterans had a higher incident rate than veterans for drug offenses (22 percent and 14 percent, respectively). *Id.* A study released in 2007 found similar results, though it also noted the incarceration rate was due to the difference in age distribution because prisoners who were veterans were older. Noonan & Mumola, *supra* note 88, at 1-2. *See also* Press Release, Bureau of Justice Statistics, U.S. Department of Justice (Apr. 29, 2007), available at http://bit.ly/acMCLf.

[92] Abbot, *supra* note 2, at 46 (quoting THOMAS MORE, UTOPIA (1516)).

[93] NICCOLO MACHIAVELLI, THE ART OF WAR 14 (Christopher Lynch trans., University of Chicago Press 2003) (1520).

People talk about the world on the morrow of the Great War as if somehow or other we had all been transported into a higher form. We have been transported into a sphere which is definitely lower from almost every point of view than that which we had attained in the days before Armageddon. Never was there a time when people were more disposed to turn to courses of violence, to show scant respect for law and country and tradition and procedure than the present.[94]

Edith Abbott, an early 20th century American economist and social worker, noted reports of "crime epidemics" in France after the Revolution of 1848, in France and Germany after the Franco-Prussian War (1870-1871), and in England after the Second Boer War (1899-1902).[95] In a detailed study of post-Civil War data, Abbott found "[a] marked increase occurred . . . in the number of commitments of men to prison during the years following the war."[96] One prison warden of the time concluded that 90 percent of his new prisoners "had been more or less incapacitated and demoralized by an apprenticeship to the trade of war."[97] Following World War I, both France and the United States feared an increase in crime as battle-hardened veterans returned to the homefront, with one French criminologist commenting that "[p]ersonal morality . . . has deteriorated during the years of war with the breaking-up of homes and the

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[94] Abbot, *supra* note 2, at 212-13 (quoting MANCHESTER GUARDIAN, Nov. 28, 1919). Modern commentators parallel Churchill's remarks. Robert Jay Lifton, a Harvard researcher who has studied PTSD, recently observed: "When they've been in combat, you have to suspect immediately that combat has some effect, especially with people who haven't shown these [criminal] tendencies in the past." Sontag & Alvarez, *supra* note 89. Similarly, William Gentry, an Army reservist and prosecutor in California, remarked: "You are unleashing certain things in a human being we don't allow in civic society, and getting it all back in the box can be difficult for some people." *Id.*
[95] Abbott, *supra* note 2, at 212-13.
[96] *Id.* at 216.
[97] *Id.* at 228.

perpetual vision of death, and has brought about a state of moral vertigo[.]"[98] After the conclusion of World War II, researchers in New York City found a substantial increase in violent personal crime, though they disputed whether it was attributable to the effect of combat on returning veterans, or simply the great volume of returning veterans themselves.[99] It should be noted that these historical studies rarely distinguish between the psychological and behavioral aspects of war, generally ascribing increased criminal activity to the "lost morality" of soldiers brutalized by war. Nevertheless, they provide an insightful connection between war and crime, and support the conclusion that present-day discussions about veterans and criminal behavior are trodding well-worn ground.

PTSD as a Defense Before 1980

While it may be well-settled that PTSD increases the risk factors for certain types of criminal behavior, the extent to which PTSD either excuses or mitigates associated criminal conduct as a matter of law remains a subject of lively concern. One of the earliest cases on point, *People v. Gilberg* (1925), addressed whether a World War I veteran accused of child molestation sufficiently raised insanity as a defense by introducing evidence of "shell shock" incurred during the war.[100] Testifying on the defendant's behalf, experts explained "with minute detail the symptoms of 'shell-shock' and epilepsy and the effect of each upon the nervous organism[.]"[101]

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[98] Edith Abbot, *Crime and the War*, J. OF AM. INST. OF CRIM. L. & CRIMINOLOGY, May 1918, at 40 (summarizing the arguments of M. Roux, professor of criminal law at the University of Dijon). *See also* Milton H. Erickson, *Some Aspects of Abandonment, Feeble-Mindedness, and Crime*, AM. J. OF SOC., Mar. 1931 (finding a statistical correlation between military service and the commission of criminal offenses following World War I); SHAY, *supra* note 15, at 23-28 (discussing impact of war on soldiers' "Social and Moral Horizon").

[99] Harry Willbach, *Recent Crimes and the Veterans*, J. CRIM. L. AND CRIMINOLOGY, Jan.-Feb. 1948, at 508.

[100] People v. Gilberg, 240 P. 1000 (Cal. 1925). Prior to *People v. Gilberg*, several defendants elsewhere also had raised "shell shock" as part of an insanity defense, all without success. *See* State v. Throndson, 191 N.W. 628, 634 (N.D. 1922) (defendant argued mental incapacitation due to shell shock from World War I); Sorenson v. State, 188 N.W. 622, 624 (Wis. 1922) (same); State v. Shobe, 268 S.W. 81 (Mo. 1924) (same).

[101] *Gilberg*, 240 P. at 1002.

The Supreme Court of California, in language reflective of the prevailing view of the time, commented:

> *[The soldier] received no battlefield wounds, but claims to have suffered an injury by falling into a "funk-hole." It appears that he spent considerable time during his enlistment, both overseas and in this country, as a patient in hospitals, under treatment for "shell-shock." "Shell-shock" is not a distinct type of nervous disorder, but a condition produced upon certain organisms by sudden fear or by highly exciting causes. It is a form of neurosis. It is not settled, general insanity, but, according to the testimony of the expert offered by the defense, a functional nervous disease, and not due to organic changes.*[102]

Perhaps because of the nature of the alleged crime, or perhaps because the defendant's in-court antics made his condition appear contrived, the Court upheld the trial court's determination not to submit the matter of insanity to the jury.[103]

In *People v. Danielly* (1949), a World War II veteran attempted to introduce evidence that his conviction for murder should be reduced to manslaughter because he had no recollection of the incident due to his combat-related "nervous" disability.[104] The trial court denied introduction of the evidence and the defendant was convicted of first degree murder. Although the Supreme Court of California upheld the trial court's ruling, it noted that the defendant had been in the Navy 11 years, was wounded on August 18, 1944 "by the explosion of an enemy anti-personnel

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[102] *Id.*
[103] *Id.*
[104] People v. Danielly, 202 P.2d 18 (Cal. 1949).

bomb," and was diagnosed and ultimately discharged from the military for "psychoneurosis neurasthenia."[105] Among other things, the defendant's symptoms included nervousness, tremors, sweating, irritability, insomnia, "easy startle", "battle dreams", and anxiousness.[106] While not rendering the defendant legally insane, the Court found that such symptoms nevertheless warranted sympathy: "[T]hat he is a victim of war in the sense that his original emotional stability and related ability to cope with the vicissitudes and demands of living in normal society have been to some extent impaired seems . . . reasonably certain."[107] At the conclusion of its ruling, the Court specifically commented on the governor's ability to commute sentences for such compassionate purposes.[108]

Finally, in the 1973 case of *Kemp v. State*, a Vietnam veteran pled not guilty by reason of insanity when he shot his wife in bed while dreaming "that he was in Viet Nam and being attacked by the Vietcong[.]"[109] The defendant, who had witnessed multiple companions killed by a land mine in Vietnam, developed "battle fatigue" and "battle neurosis" during his combat tour. He began to drink heavily, experienced amnesia, and had recurring nightmares about the Vietcong. After being discharged from the military, he drifted in and out of VA hospitals and took to sleeping with a weapon beneath his pillow. Five days after being released from outpatient care, he turned up armed and intoxicated at a VA hospital with no recollection of recent events. Later that day, police discovered his wife's body in the couple's bed, the bullets in her body matching the gun the defendant carried into the VA. At trial, six psychiatrists testified. The defendant's psychiatrist and two court-appointed psychiatrists testified the defendant was

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[105] *Id.* at 38-39.
[106] *Id.* at 40.40.
[107] *Id.* at 41.
[108] *Id.*
[109] Kemp v. State, 211 N.W. 2d 793 (Wis. 1973).

legally insane. Two state psychiatrists testified they could not give an opinion. One additional state psychiatrist testified the defendant might be legally insane. Despite their testimony, the jury found the defendant mentally competent and he was convicted of murder. The Supreme Court of Wisconsin disagreed, however, stating, "We believe the weight of the testimony is such that justice has probably miscarried and that it is possible a new trial will result in a contrary finding."[110] Accordingly, the Court ordered a new trial on the issue of the defendant's sanity.[111]

As these cases anecdotally suggest, veterans who relied on combat trauma to prove insanity met with mixed results prior to the recognition of PTSD as a formal diagnostic category in DSM-III. Partly this may be a function of the skepticism with which combat trauma was generally viewed by the public prior to 1980. A more significant reason, however, seems to lay in the fact that clinicians had few diagnostic tools with which to diagnose chronic, delayed onset of combat-related trauma. "Gross Stress Reaction," the diagnostic category in DSM-I recognizing combat stress, was "seen as a situational disorder that would abate with reduction in exposure to the stressor."[112] The more generalized category of "transient situational disturbances" contained in DSM-II offered even less assistance.[113] Without adequate diagnostic tools, veterans facing criminal charges—and psychiatrists testifying on their behalf—had understandable difficulty in establishing the foundational requirement for any insanity defense: the presence of a "mental disease."[114]

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[110] *Id.* at 797. *See also* Erlinder, supra note 31, at 308 n. 21(discussing *Kemp*).
[111] *Kemp*, 211 N.W. 2d at 799.
[112] Erlinder, *supra* note 31, at 315-16.
[113] *Id.*
[114] *See* Hafermeister & Stockey, *supra* note 70, at 113.

With the exception of four states without an insanity defense, states generally employ one of four tests in determining a defendant's insanity, all of which require an initial showing of a "mental disease."[115] Most states have adopted a strain of the *M'Naghten* rule, which articulates two alternative prongs for establishing insanity:[116]

> *[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.*[117]

The U.S. Supreme Court has described these two prongs in terms of a defendant's cognitive capacity (the ability to know the nature and quality of the act) and moral capacity (the ability to know that an act is wrong).[118] Although most states follow the *M'Naghten* rule, other states have recognized that some defendants' mental disorders may prevent them from controlling their actions even if they are aware their actions are wrong. Accordingly, these states utilize an alternative test—often called the Irresistible Impulse Test—based on a defendant's volitional incapacity.[119] Some of these states also follow the Model Penal Code, which combines elements of the Irresistible Impulse Test and the *M'Naghten* rule to obviate criminal responsibility when a defendant, as a result of mental illness, "lacks substantial capacity to appreciate the

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[115] *See* Clark v. Arizona, 548 U.S. 735, 747 (2006); Hafermeister & Stockey, *supra* note 70, at 113.
[116] *See Clark*, 548 U.S. at 747; Hafermeister & Stockey, *supra* note 70, at 109.
[117] *Clark*, 548 U.S. at 747 (quoting M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L.) (1843)).
[118] *Id. See also* Hafermeister & Stockey, *supra* note 70, at 109 n. 130.
[119] *See Clark*, 548 U.S. at 750; Hafermeister & Stockey, *supra* note 70, at 109..

criminality . . . of his conduct or to confirm his conduct to the requirements of [the] law."[120] In addition to these tests, the state of New Hampshire employs a final variant called the Product-Of-Mental-Illness Test, which "simply asks whether a person's action was a product of a mental disease or defect."[121]

PTSD as a Defense After 1980

After PTSD was added to DSM-III, veterans and legal practitioners had substantially more success in raising PTSD as an affirmative or mitigating defense in state and federal court.[122] Literature from the mid-1980s discussed the application of PTSD in defenses of insanity, diminished capacity, automatism (involuntary action), and self-defense.[123] One commentator identified PTSD's successful use in the early to mid-1980s in cases of "murder, attempted murder, kidnapping, and drug smuggling."[124] When offered in mitigation, PTSD similarly proved helpful "for crimes such as drug dealing, manslaughter, assault with intent to commit murder, and even tax fraud."[125] By 1985, the introduction of PTSD evidence at trial was credited

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[120] Hafermeister & Stockey, *supra* note 70, at 110 (quoting MODEL PENAL CODE § 4.01(1) (2001)). Interestingly, this was the test primarily used by federal courts until John Hinkley, Jr. was acquitted on grounds of insanity in the attempted assassination of President Ronald Reagan in 1981. Davidson, *supra* note 20, at 422 n. 53, 427. In the ensuing public firestorm, Congress passed the Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (Supp. II 1985), which eliminated the volitional component of the Model Penal Code test and returned the *M'Naghten* rule to federal court practice. *Id.* at 427.

[121] Clark v. Arizona, 548 U.S. 735, 750 (2006).

[122] *See, e.g.*, Erin M. Gover, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 562 (2008) ("PTSD has been used to prove existing criminal law defenses since 1978. Its use as a defense rose dramatically when the American Psychiatric Association officially recognized it as a mental disorder in 1980.") (citations omitted).

[123] *Id.* (citation omitted). *See also* Hafermeister & Stockey, *supra* note 70, at 123; Adam Caine, *Fallen from Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering From Post Traumatic Stress Disorder*, 78 UMKC L. REV. 215, 222-23 (2009) (discussing insanity, automatism, and mitigation).

[124] Davidson, *supra* note 20, at 422-23 (citations omitted).

[125] *Id.* at 423 (citations omitted). *See also* Comment, *PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System*, 68 MARQ. L. REV. 647, 670 (generally discussing use of PTSD in mitigation).

with helping some 250 Vietnam veterans obtain sentence reductions, treatment opportunities, or outright acquittals at trial.[126]

One representative case is *State v. Heads*, in which a Louisiana jury found the defendant not guilty of murder by reason of insanity due to his PTSD.[127] Charles Heads had served as a Marine in Vietnam, performing 38 reconnaissance missions deep into enemy territory. On his first patrol, he witnessed his platoon commander killed by a land mine. Nine months later, with seven conformed "kills" himself, Heads was shot twice in the stomach and evacuated from the jungle by helicopter.[128] Seven years after returning home and marrying, Heads drove to his brother-in-law's home late one night in search of his wife. He rang the bell and shouted, but no one answered. Walking away, something "hit" Heads and he immediately returned to the house, crashing through the door with a gun in his hand. After firing multiple shots, he returned to his car for a rifle, continued firing, and eventually killed his brother-in-law, who also was holding a gun.[129] When the police arrived moments later, Heads surrendered quietly. [130]

Heads was tried by a Louisiana jury twice. The first trial, in 1977, led to a conviction for first-degree murder. That case was overturned on appeal when the appellate court determined the jury had been improperly instructed.[131] The second trial, in 1981, led to an acquittal by reason of insanity after numerous lay and expert witnesses recreated the horrors of Vietnam and the reality

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[126] *See* Christopher Hawthorne, *Bringing Baghdad Into the Courtroom*, 24 CRIM. JUST. 4, 7 (2009) (citing David Margolick, *New Vietnam Debate: Trauma as Legal Defense*, N.Y. TIMES, May 11, 1985, at A11); Davidson, *supra* note 20, at 422 n. 55.

[127] State v. Heads, No. 106, 126 (1st Jud. Dist. Ct. Caddo Parrish, La. Oct. 10, 1981). For an account of the *Heads* case , see Erlinder, *supra* note 31, at 319-320; MYRA MCPHERSON, LONG TIME PASSING: VIETNAM AND THE HAUNTED GENERATION 219-24 (2002).

[128] *See* MCPHERSON, supra note 127, at 219.

[129] *See* Erlinder, *supra* note 31, at 320.

[130] *See* MCPHERSON, supra note 127, at 219.

[131] *See id.* at 219-20; Erlinder, *supra* note 31, at 320.

of PTSD for jurors. According to Heads' attorney, the difference in the two trials resulted from the addition of PTSD to DSM-III in 1980:

> *I represented Heads the first time when they found him guilty. I was unable to prove that he was suffering from insanity; psychiatrists never found any evidence of any recognized mental disorder. In 1980, after the American Psychiatric Association recognized PTSD, I knew that's what it was--and I had what I needed.*

Relying on the diagnostic criteria of PTSD in DSM-III, Heads' attorney successfully argued the relevance of Heads' military service, combat trauma, and troubled childhood in establishing the presence of a "mental disease." The jury then applied a modified version of the *M'Naghten* rule and, in acquitting Heads, apparently believed his PTSD had caused him to enter a dissociative state in which he could not distinguish right and wrong.[132]

In arguing the range of criminal offenses PTSD arguably could induce, legal practitioners and clinicians of the early 1980s were assisted by a key study presented by John P. Wilson, Ph.D., and Sheldon D. Zigelbaum, M.D., in 1983. Over a period of two years, Wilson and Zigelbaum assessed the relationship between PTSD and criminal behavior in 114 combat veterans.[133] Study results revealed three distinct ways in which PTSD could motivate criminal behavior.

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[132] Erlinder, *supra* note 31, at 320-21.
[133] Wilson & Zigelbaum, *supra* note 80, at 70.

First, a veteran could enter a *dissociative state* in which he "is likely to function predominately in the survivor mode by behaving as he did in combat in Vietnam."[134] Dissociative states are most commonly linked to violent criminal behavior.[135] Second, a veteran could display a *sensation seeking syndrome*, characterized by attempts to seek out the same level of excitement, exhilaration, and stimulation as that experienced in combat.[136] Sensation seeking syndrome often manifests itself in risk-filled activities, such as motorcycle riding, sky diving, and gambling.[137] Third, a veteran could experience *depression-suicide syndrome*, which is accompanied by feelings of hopelessness, painful imagery, survivor guilt, and psychic numbing.[138] In an effort to end psychic pain, veterans with depression-suicide syndrome sometimes act out violently or recklessly knowing they will be caught or killed as a result of their actions.[139] Though based on limited data obtained nearly 30 years ago, the Wilson & Zigelbaum study continues to influence discussions of PTSD and criminal responsibility by providing a useful framework in which to connect particular criminal behaviors with specific PTSD symptoms.[140]

PTSD in Today's Courtroom

By 1985, the success of PTSD as an affirmative defense had begun to wane, as "juries . . . rejected an increasing percentage of stress-related defenses."[141] "It seems there was more receptivity five years ago," Dr. Wilson (of the Wilson and Zigelbaum study) said at the

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[134] *Id.* at 73.
[135] *Id.*
[136] *Id.* at 74.
[137] *Id.*
[138] Wilson & Zigelbaum, *supra* note 80, at 74-75.
[139] *Id.*
[140] *See, e.g.*, Peralme, *supra* note 82, at 11-12; Gover, *supra* note 122, at 567; Hafermeister & Stockey, *supra* note 70, at 101 n. 77.
[141] David Margolick, *New Vietnam Debate: Trauma As Legal Defense*, N.Y. TIMES, May 11, 1985, at A1.

time. "My batting average [as an expert witness] was once about .900 but now it's dropped."[142] Commentators ascribed the decline to shifting public attitudes over Vietnam,[143] overuse of the defense by defense counsel,[144] continued public resentment of the acquittal of John Hinkley, Jr., who had been acquitted on grounds of insanity in the attempted assassination of President Ronald Reagan in 1981,[145] and the public's fear of potentially false PTSD claims.[146]

More recently, however, PTSD as both an affirmative and mitigating defense has re-emerged, largely as a result of a growing national consciousness of the problems faced by veterans returning from the wars in Iraq and Afghanistan.[147] In one of the first successful PTSD cases involving a veteran of the war in Iraq, for example, an Oregon jury in 2009 found a veteran accused of murder "guilty but insane" due to the combat trauma he suffered as a result of his deployment.[148] At trial, the prosecutor argued the 26-year old former Army National Guard soldier had "hunted down and killed" the victim, a man who allegedly raped the defendant's fiancée.[149] In response, the defense attorney put on evidence that the defendant had returned from Iraq a changed man, living in the woods for days at a time patrolling with an assault rifle and unable to stay employed due to his explosive anger. Doctors at the VA had first rejected the defendant's claim of PTSD, then later awarded him a disability rating of 70 percent and then 100 percent. At the time of the shooting, the defendant told his attorney, it was like he was back in

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[142] *Id.*
[143] *See* Hawthorne, *supra* note 126, at 7-8.
[144] *See* Margolick, *supra* note 141; Hafermeister & Stockey, *supra* note 70, at 119.
[145] *See* Davidson, *supra* note 20, at 422 n. 53.
[146] *See* Margolick, *supra* note 141; Hawthorne, *supra* note 126, at 7-8; Gover, *supra* note 122, at 582-83 (discussing People v. Lockett, 121 Misc. 2d 549 (N.Y. Crim. Term. 1983), in which a defendant who had never been in Vietnam misled both defense and state psychiatrists into diagnosing him with PTSD).
[147] *See, e.g.*, Sontag & Alvarez, *supra* note 89; Hafermeister & Stockey, *supra* note 70.
[148] For a discussion of the trial, see Melody Finnemore, *Firestorm on the Horizon*, 70 OR. ST. B. BULL. 19 (2009); Kim Murphy, *Did the War Make Him Do It?*, L.A. TIMES, Nov. 28, 2009, available at http://lat.ms/ckTQua; Sarah Jane Rothenfluch, *Guilty But Insane Due to PTSD* (Or. Public Broadcasting radio broadcast Dec. 11, 2009), transcript available at http://bit.ly/cUs3ri.
[149] Murphy, *supra* note 148.

Kirkuk, "watching murderous events unfold around him. He saw somebody shooting [the victim], emptying all 10 rounds from the clip. [The victim's] 14-year-old nephew was shouting from the front porch, and [the defendant] saw him as an Iraqi woman screaming."[150] Believing the defendant needed treatment—not prison—the jury found him "guilty but insane" under Oregon law, and the defendant eventually was sentenced and moved from county jail to an Oregon state hospital.[151]

Of course, not all cases are as successful, [152] and questions have been raised about the fairness of allowing veterans to sidestep criminal responsibility by placing blame on their combat trauma.[153] The Oregon decision does suggest, however, that judges and juries remain sympathetic to receiving and considering evidence of defendants' combat trauma in determining the scope of criminal responsibility.[154]

A 2009 Supreme Court case, *Porter v. McCollum*, underscores this point.[155] In *Porter*, the Supreme Court addressed whether the defendant's Sixth Amendment right to counsel had been violated when his attorney failed to uncover or introduce at sentencing evidence of his significant combat experience.[156] In 1986, George Porter, a Korean war veteran, shot and killed his former girlfriend and her boyfriend. With standby counsel, he represented himself through most of the prosecution's case, then decided to plead guilty with representation by counsel. The defense attorney put on one sentencing witness. Other than a passing reference, the attorney made no

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[150] *Id.*
[151] *See* Rothenfluch, *supra* note 148.
[152] *See* Hawthorne, *supra* note 126, at 5-6 (comparing two recent cases involving traumatized veterans).
[153] *See infra* text accompanying notes 240-243.
[154] *See* Pratt, *supra* note 89, at 47 (discussing 2009 California case in which a court found a veteran accused of robbing a pharmacy not guilty by reason of insanity based on his PTSD).
[155] Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447 (2009) (per curiam).
[156] *Id.*

mention of Porter's mental health. After being convicted and sentenced to death, Porter filed a petition for post-conviction relief in 1995 and argued his defense counsel had been deficient in introducing mitigating evidence.

At a subsequent two-day hearing, Porter presented extensive evidence of his troubled childhood, history of substance abuse, and, in the Supreme Court's words, "his heroic military service and the trauma he suffered because of it."[157] Evidence from Porter and his former commander established that Porter's unit had been involved in two ferocious battles in Korea. In the first, Porter was shot as his unit protected the withdrawing Eighth Army from the advancing Chinese at Kunuri. In the second, less than three months later, at Chip-yong-ni, Porter's company was ordered to charge a hill under heavy fire. Porter again was wounded, and his unit sustained casualties of more than 50 percent.[158] The battles were "very trying, horrifying experiences," Porter's commander testified.[159] Porter's unit received the Presidential Unit Citation for their heroism at Chip-yong-ni, and Porter personally received two Purple Hearts and the Combat Infantryman Badge.[160] In addition to this evidence, Porter also introduced the testimony of a neuropsychologist who "concluded that Porter suffered from brain damage that could manifest in impulsive, violent behavior."[161] The neuropsychologist further testified that "Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance," both of which warranted mitigation under Florida law.[162]

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[157] *Id.* at 449.
[158] *Id.* at 449-50.
[159] *Id.* at 450.
[160] Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447, 450 (2009) (per curiam).
[161] *Id.* at 451.
[162] *Id.*

In holding that Porter's Sixth Amendment rights had been violated, the Supreme Court strongly chided the defense attorney for failing "to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service,"[163] finding that such evidence could have been offered as both statutory and non-statutory mitigation.[164] The Court then remanded the case for rehearing on sentence.[165]

Two key points readily emerge from the Court's opinion in *Porter v. McCollum*. First, *Porter* reminds both defense counsel and courts of the necessity of introducing and considering evidence of military service—especially when it involves combat—as a mitigating factor in criminal trials. Aside from its success as an affirmative defense, PTSD remains critically relevant in mitigation.[166] Second, far from being averse to PTSD-related evidence, the Court favorably embraced both lay and expert testimony regarding Porter's combat trauma, a point underscored by the language of the decision itself. In an opinion notable for its marked sympathy, the Court began the opinion with these words:

> *Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean war; his combat service unfortunately left him a traumatized, changed man. His*

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[163] *Id.* at 453.
[164] *Id.* at 454-55.
[165] Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447, 456 (2009) (per curiam).
[166] For a discussion of military service as a mitigating factor in caselaw, see Pratt, *supra* note 89, at 45-46 (discussing United States v. Pipich, 688 F. Supp. 191 (D.Md. 1988) (district court judge relied on exemplary military record to lower sentence under sentencing guidelines)). Note, however, that the Sentencing Commission has determined that "military, civic, charitable, or public service; employment-related contributions; and similar good works are not ordinarily relevant" in deciding whether a sentence should deviate from the guidelines. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2007)).

commanding officer's moving description of those two battles was only a fraction of the mitigating evidence that his counsel failed to discover or present during the penalty phase of his trial in 1988.[167]

In its conclusion, the Court adopted a similarly moving tone in explaining the leniency traditionally shown veterans:

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.[168]

It is this historic leniency, coupled with the data linking combat trauma to criminal behavior, which serves as the historical underpinnings to the veterans court movement today.

THE TREND TOWARD VETERANS COURTS

In January 2008, Judge Robert T. Russell presided over the first session of the Buffalo Veterans Treatment Court, the first court of its kind in the country "that specialized and adapted to meet the specific needs of veterans."[169] The idea for the veterans court grew out of Judge Russell's

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[167] Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447, 448 (2009) (per curiam).
[168] *Id.* at 455.
[169] Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 357, 364 (2009). While the veterans court in Buffalo is often considered the "first" veterans treatment court, a less-well known veterans court had been established by two judges in Anchorage, Alaska four

experience as a sitting judge in the Buffalo, New York city court, where he observed that a rising number of defendants on his docket were military veterans.[170] Having seen that veterans in both the Buffalo Drug Treatment Court and the Buffalo Mental Health Court responded more favorably to other veterans, Judge Russell developed a court model designed to pair veteran-defendants with veteran-mentors and directly link defendants with service providers who understood veterans' unique challenges and needs.[171] As Judge Russell explained, the Veterans Treatment Court adopted a comprehensive approach to treatment:

> *The mission driving the Veterans Treatment Court is to successfully habilitate veterans by diverting them from the traditional criminal justice system and providing them with the tools they need in order to lead a productive and law-abiding lifestyle. In hopes of achieving this goal, the program provides veterans suffering from substance abuse issues, alcoholism, mental health issues, and emotional disabilities with treatment, academic and vocational training, job skills, and placement services. The program provides further ancillary services to meet the distinctive needs of each individual participant, such as housing, transportation, medical, dental, and other supportive services.*[172]

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years earlier. *See* Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563 (2009) (discussing creation of court for veterans in Alaska in 2004); Steven Berenson, *The Movement Toward Veterans Courts*, 44 CLEARINGHOUSE REV. 37, 39 (2010) ("The first small-scale effort at starting a veterans court took place in Anchorage, Alaska, in 2004, but most commentators locate the beginning of the current movement toward specialty courts for veterans in Buffalo, New York.").

[170] Russell, *supra* note 169, at 363.

[171] *Id.* at 364.

[172] *Id.* at 364.

Implicit in the Veterans Treatment Court's initial methodology was an understanding that the risk factors for criminal behavior exhibited by some veterans—including alcohol and substance use, homelessness, broken relationships, unemployment, and mental health—would, if left unaddressed, likely result in future involvement with the criminal justice system.[173]

The Buffalo Veterans Treatment Court: A Model of Therapeutic Justice

From an operational perspective, the Buffalo Veterans Treatment Court diverts veterans with substance dependency or mental disorders to its docket by employing a court-initiated screening process.[174] Participation is voluntary, and typical offenders are facing either felony or misdemeanor charges for non-violent crimes.[175] Under the direction of the judge, veterans participating in the program receive a tailored package of cooperative assistance from community partners, including "the VA Health Care Network, the Veterans Benefits Administration, the Western New York Veterans Project, the Veterans Treatment Court teams, volunteer mentors, and a coalition of community health care providers."[176] A VA employee attends every session of court, with a secure laptop allowing immediate access to veterans' VA records.[177] Veterans not already receiving services from the VA may register in court.[178] One-on-one mentoring by a veteran mentor is key. Some forty veterans of the Korean war, the Vietnam war, Operation Desert Shield, Operation Enduring Freedom, and Operation Iraqi Freedom volunteer as mentors, listening, coaching, and helping defendants set and reach

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[173] *See id.* at 357-63.
[174] *Id.* at 367-68.
[175] Russell, *supra* note 169, at 368.
[176] *Id.* at 368-69.
[177] Caine, *supra* note 123, at 233.
[178] *Id.*

goals.[179] The environment is therapeutic, but accountability is required. Veterans in the program must "attend regular status hearings, participate in the development of their treatment plans, and engage in community groups."[180] After completion of the program, which generally lasts at least one year,[181] "not only are veterans sober and stable, many also have their charges reduced or dismissed, or receive a commitment of non-incarceration."[182]

Methodologically, the Buffalo Veterans Treatment Court has adopted a modified version of the ten key components the Department of Justice described in its publication, *Defining Drug Courts: The Key Components.*[183] Now a model for other veterans courts, these components serve as guideposts in developing comprehensive treatment plans for veterans throughout the country:

1. Key Component One: Veterans Treatment Court integrates alcohol, drug treatment, and mental health services with justice system case processing

2. Key Component Two: Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights

3. Key Component Three: Eligible participants are identified early and promptly placed in the Veterans Treatment Court program

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[179] Russell, *supra* note 169, at 369-70. *See also* BUFFALO VETERANS COURT VETERANS MENTOR HANDBOOK § 2.1, available at http://bit.ly/duWdf9; Sergio R. Rodriguez, VA Secretary Eric K Shinseki Visits the Buffalo Veterans Treatment Court, Erie County Veterans' Services: The Buffalo Veterans Treatment Court, http://bit.ly/dc2C8t (last visited Oct. 28, 2010).
[180] Russell, *supra* note 169, at 369.
[181] Caine, *supra* note 123, at 233.
[182] Russell, *supra* note 169, at 369.
[183] *Id.* at 364 (citing NAT'L ASS'N OF DRUG COURT PROF., U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997), available at http://bit.ly/drbEyz).

4. Key Component Four: The Veterans Treatment Court provides access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services

5. Key Component Five: Abstinence is monitored by frequent alcohol and other drug testing

6. Key Component Six: A coordinated strategy governs Veterans Treatment Court responses to participants' compliance

7. Key Component Seven: Ongoing judicial interaction with each veteran is essential

8. Key Component Eight: Monitoring and evaluation measures the achievement of program goals and gauges effectiveness

9. Key Component Nine: Continuing interdisciplinary education promotes effective Veterans Treatment Court planning, implementation, and operation

10. Key Component Ten: Forging partnerships among the Veterans Treatment Court, the VA, public agencies, and community-based organizations generates local support and enhances the Veterans Treatment Court's effectiveness[184]

While data on the Buffalo Treatment Court's success is necessarily limited, initial results are promising. Judge Russell reported in 2009 that only 2 of more than 100 veterans who had

[184] Russell, *supra* note 169, at 365-67.

participated in the program had been returned to regular criminal court.[185] Of the 30 veterans who had graduated as of May 2010, none had been re-arrested.[186] Graduates from the program were free from substance abuse, had obtained adequate housing, and were either employed or were pursuing educational training.[187]

Veterans Courts Across the Country

Seeing the Buffalo Veterans Treatment Court's initial success, approximately 21 states have established more than 40 veterans courts across the country, with courts currently operating or under development in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Michigan, Minnesota, Missouri, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Texas, Washington, and Wisconsin.[188] The vast majority of these follow the Buffalo Veterans Treatment Court treatment methodology by using the tenets of drug courts to build comprehensive, community-based treatment plans. Some differences, however, exist. For example, some veterans courts operate as pre-conviction diversion programs, while others only accept veterans who already have pled guilty.[189] Most hear only non-violent criminal cases,[190] though a few hear low-level violent criminal cases as well.[191] The veterans court in Tarrant

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[185] Berenson, *supra* note 169, at 30 (citing Nicholas Riccardi, *These Courts Give Wayward Veterans a Chance: The First Veterans Court Opened Last Year in Buffalo, N.Y.: Its Success Stories Have Led to More Across the Country*, L.A. TIMES, Mar. 10, 1009, available at http://bit.ly/UiRJr).

[186] Trauma Courts for Vets, The World (PRI radio broadcast May 10, 2010), transcript available at http://bit.ly/a5xCll.

[187] Russell, *supra* note 169, at 370. *See also* Pratt, *supra* note 89, at 52-53 (discussing the successful experiences of two Buffalo Veterans Treatment Court participants).

[188] Nat'l Assoc. of Drug Court Prof., Justice for Vets: The Nat'l Clearinghouse for Veterans Treatment Courts, http://bit.ly/bK67tT (last visited Oct. 28, 2010).

[189] For example, the Veterans Court Diversion Program in Tarrant County, Texas, requires admission of guilt before entry to the program. Conditions for Veterans Court Diversion Program, Veterans Court Diversion Program, Tarrant County, Texas, http://bit.ly/9iMKrr (last visited Oct. 28, 2010).

[190] *See, e.g.*, LA Opens New Criminal Court for Troubled Veterans, BBC News (Sept. 19, 2010), http://bbc.in/9Bl3l2 (last visited Oct. 28, 2010).

[191] *See, e.g.*, Kevin Graman, *Special Courts Divert Wash. Veterans from Jail*, TRI-CITY HERALD, Sept. 19, 2010, available at http://bit.ly/aD4NAB (cases of domestic violence and fourth-degree assault heard by veterans court

County, Texas limits program participants to veterans with brain trauma, mental illness, or a mental disorder such as PTSD.[192] The Buffalo Veterans Treatment Court, by contrast, accepts veterans with either substance dependency or mental illness.[193] In a third iteration, the veterans court in Orange County, California accepts only combat veterans eligible for probation.[194]

Despite these differences, the goals of veterans courts to date have been similar—to provide at risk veterans, especially those with PTSD, with an opportunity to receive individualized help and treatment instead of incarceration. Two examples suffice.[195] In Harris County, Texas, one of the first veterans court participants was a veteran who served a combat tour in Iraq and, after returning, was diagnosed with PTSD.[196] He was "arrested for evading arrest after a small auto accident when he panicked after seeing the police lights."[197] Because his PTSD was a contributing factor to his offense, he was accepted into the veterans court program with the possibility of having his indictment dismissed and his arrest record expunged upon successful completion of the program.[198] In Rochester, New York, a former Marine who fought in Iraq returned home and was arrested for drug use and writing forged checks.[199] Struggling with combat trauma, he had self-medicated with Oxycontin, which in turn led to drug dependency and financial turmoil. By electing to have his case heard in veterans court, he agreed to plead guilty

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judge); Amy Gillentine, *4th Judicial District Creating Special Court for Veterans*, CO. SPRINGS BUS. J., Feb. 2, 2010, available at http://bit.ly/cLYdu1 (same); Lewis Griswold, *Valley Vets Get Court of Their Own: Tulare County Offers Victims of PTSD a Second Chance*, FRESNO BEE, June 19, 2010, available at http://bit.ly/d0dKQI (same).

[192] Veterans Court Diversion Program, Tarrant County, Texas, http://bit.ly/axkMDY (last visited Oct. 28, 2010).

[193] *See* Russell, *supra* note 169, at 364.

[194] *See* Pratt, *supra* note 89, at 54.

[195] In addition to these examples, news outlets have reported many others. *See, e.g.*, John Schwartz, *Defendants Fresh from War Find Service Counts in Court*, N.Y. TIMES, Mar. 15, 2010, available at http://nyti.ms/9q9gpf; Jessica Mador, New Minn. Court Handles Vets Accused of Crimes, National Public Radio, May 12, 2010, http://n.pr/bWSkSG; Griswold, *supra* note 191.

[196] Rodney Ellis, *Veterans Court Is a Dose of Good News*, HOUSTON CHRON., Dec. 20, 2009, available at http://bit.ly/9vqnbf.

[197] *Id.*

[198] *Id.*

[199] Lindsay Goldwert, Tough-Love Judge a Veteran's Lifesaver, CBS News (Mar. 1, 2010), http://bit.ly/8ZjmtL.

and sign a contract with the judge to stay out of trouble for one year.[200] "This isn't a get-out-of-jail-free card," the veterans court judge said when speaking about the court's program. "It's a 'Who are you? What are you doing? What can we do to provide you with the type of treatment to make you a citizen again?"[201]

Community, State and Federal Action

Paralleling developments at the local level, policy makers at the community, state and federal levels have taken proactive steps toward encouraging the establishment of veterans treatment courts. The National Association for Drug Court Professionals has created Justice for Vets, a clearinghouse for information related to veterans treatment courts, and launched a cooperative training program between the National Drug Court Institute (NDCI), the Bureau of Justice Assistance (BJA), the U.S. Department of Veterans Affairs (VA), the GAINS Center, the Battered Women's Justice Project, and numerous existing veterans courts to assist additional locales in establishing their own veterans treatment court programs.[202] The VA has placed Veterans Justice Outreach officers in each of its regional medical facilities to work with courts in providing frontline mental health and substance services to veteran-defendants in the criminal justice system.[203] Embracing a community-based approach, the American Bar Association House of Delegates adopted a policy in February 2010 supporting veterans courts and setting forth key principles for their establishment.[204] Central among the outcomes proposed by the

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[200] *Id.*
[201] *Id.*
[202] *See* Nat'l Assoc. of Drug Court Prof., Justice for Vets: The Nat'l Clearinghouse for Veterans Treatment Courts, http://bit.ly/bK67tT (last visited Oct. 28, 2010).
[203] *See* Veterans Justice Outreach Initiative, U.S. Dep't of Veterans Affairs, http://bit.ly/beCyd0 (last visited Oct. 28, 2010).
[204] Policy 105A, House of Delegates, American Bar Association, House of Delegates (February 8-9, 2010) [hereinafter ABA Policy], http://bit.ly/bygdsz. *See also* Rhonda McMillion, *Lingering Wounds: The ABA Enlists In Efforts to Help Homeless Veterans Deal with their Burdens*, A.B.A. J., Oct. 2010, at 66.

ABA are decreased recidivism, addiction recovery, veteran self-sufficiency, judiciary cost savings, and connection to local and federal service providers.[205]

In addition to these actions, both state and federal legislatures have considered or enacted legislation relating to veterans' courts. At the state level, five states—California, Colorado, Illinois, Nevada, and Texas—have passed legislation establishing veterans courts or requiring existing courts to considering military-connected factors, such as PTSD, in adjudicating criminal cases.[206] In California, for example, legislation enacted in 2006 (modifying earlier legislation applying to Vietnam veterans) authorizes criminal courts to place veteran-defendants facing prison terms into treatment programs if the veteran suffers from "post-traumatic stress disorder, substance abuse, or psychological problems as a result of [military] service" and "alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military[.]"[207] Legislation passed in Texas in 2009 authorizes local establishment of veterans courts and dismissal of criminal charges following completion of a treatment program of at least six months.[208] Focusing on rehabilitation and community coordination, the jurisdiction of such courts is tailored to veterans accused charged with either a misdemeanor or felony who (1) suffer "from brain injury, mental illness, or mental disorder, including post-traumatic stress disorder", (2) that "resulted from the defendant's military service in combat," and (3) "materially affected the defendant's criminal conduct at issue in the case." [209]

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[205] *Id.*
[206] *See* Griswold, *supra* note 191; Marc A. Levin, *Policy Brief: Veterans' Court*, TX. PUB. POL. FOUND., Nov. 2009, available at http://bit.ly/b6jQTr; Pratt, *supra* note 89, at 50-51 (discussing California's statute requiring consideration of PTSD in mitigation).
[207] CA. PENAL CODE §1170.9 (2010). *See also* Pratt, *supra* note 90, at 50 (discussing California legislation).
[208] S.B. 1940, 81st Leg. (Tx. 2009) (enacted), available at http://bit.ly/beOR0R.
[209] *Id.*

At the national level, legislators in both the U.S. House of Representations and the Senate have introduced legislation to support the creation of additional veterans courts throughout the country.[210] Entitled the Services, Education, and Rehabilitation for Veterans (SERV) Act, the proposed legislation authorizes grants to states, state courts, and local courts "for the purpose of developing, implementing, or enhancing veterans' treatment courts or expanding operational drug courts to serve veterans."[211]

Predicting Outcomes for Veterans Treatment Courts

While the lack of available data prevents present analysis of veterans court outcomes, two analogical measures give hope for success. First, veterans convicted of criminal activity appear generally to have lower recidivism rates than non-veterans convicted of criminal activity.[212] A 1993 study reviewing recidivism rates for veterans who were released from two New York correctional facilities after participating in an on-site veterans treatment program found that "[v]eterans who participated in one of the programs for a minimum of 6 months had a significantly lower rate of return to custody than veterans with less than 6 months program experience and those veterans with no program experience."[213] The same study found that "veterans . . . return to the [correctional] system at less than 80 percent of the rate at which similarly situated non-veterans return."[214] In 2000, a report released by the Bureau of Justice

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[210] *See* Services, Education, and Rehabilitation for Veterans Act, H.R. 2138, 111th Cong. (2009), available at http://bit.ly/cXT1eW; Services, Education, and Rehabilitation for Veterans Act, S. 902, 111th Cong. (2009), available at http://bit.ly/chSGWZ. *See also* Pratt, supra note 89, at 50 (discussing congressional legislation).
[211] H.R. 2138, 111th Cong. § 2(b)(2009), available at http://bit.ly/cXT1eW.
[212] *See generally*, Pratt, *supra* note 89, at 40.
[213] K. Canestrini, *Veterans' Program Follow-up July 1993*, N.Y. DEP'T OF CORRECTIONAL SERV., available at http://bit.ly/cwKu1l.
[214] Pratt, supra note 89, at 40 (quoting K. Canestrini, *Veterans' Program Follow-up July 1993*, N.Y. DEP'T OF CORRECTIONAL SERV., available at http://bit.ly/cwKu1l).

Statistics from the U.S. Department comparing criminal history rates of incarcerated veterans to incarcerated non-veterans concluded that "[v]eterans in State prison were less likely than nonveterans to be recidivists."[215] A 2007 follow-up report by the Bureau of Justice Statistics similarly concluded "[v]eterans in State prison had shorter criminal histories than their nonveteran counterparts,"[216] indicating that convicted veterans are less likely than non-veterans to re-offend following release. Other studies also have shown that veterans—especially those who complete treatment programs—have lower recidivism rates than non-veterans.[217] Taken together, these studies suggest that veterans participating in veterans court treatment programs, who are paired with a veteran-mentor and connected with specialized service providers, are less likely to engage in future criminal behavior than those convicted by traditional courts.

Data from drug courts provide a second positive predictor of veterans court outcomes. The initiative to create drug courts, which were the first specialized problem-solving courts in the country, began in 1989 when the first drug court opened in Miami, Florida.[218] Momentum built rapidly, and, by 1995, the number of drug courts had climbed to 75, joined by a variety of other specialized problem-solving courts: a women's drug court in Michigan; a community court in New York; a DWI court in New Mexico; a juvenile drug court in California; and a family drug court in Nevada.[219] By 2007, some 2,147 drug courts were in existence, as well as 1,057 other

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[215] Christopher J. Mumola, *Veterans in Prison or Jail, Jan. 2000*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE 7, Sept. 2000, available at http://bit.ly/8ZSEXL.
[216] Noonan & Mumula, *supra* note 88, at 4.
[217] *See, e.g.*, Pratt, *supra* note 89, at 41 (citing additional studies in Buffalo, New York and King County, Washington).
[218] C. West Huddleston, et al, *Painting the Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States*, NATIONAL DRUG COURT INSTITUTE 1, May 2008, available at http://bit.ly/bNhOI9.
[219] *Id.*

problem-solving courts.[220] Both independent and state researchers have consistently concluded that drug courts reduce future criminal activity for participants and deliver measurable savings for states. A study in California reported re-arrest rates of 41 percent for drug offenders who did not participate in drug court and 29 percent for offenders who did participate in drug court.[221] A similar study in Massachusetts reported that drug court participants "were 13 % less likely to be re-arrested, 34% less likely to be re-convicted, and 24% less likely to be re-incarcerated" than those on probation for similar offenses.[222] In four different "meta-analysis" studies, independent researchers have found "that drug courts significantly reduce crime rates an average of approximately 7 to 14 percentage points."[223] Further, researchers have found that while drug courts have significant start-up costs, they are more cost-effective in the long-run. An analysis of drug courts in Washington State found an average cost of $4,333 per client, but an average savings per client of $4,705 for taxpayers and $4,395 for potential future victims.[224] A study in California found an average cost of $3,000 per client, with an average savings of $11,000 per client.[225] Nationally, drug courts are estimated to save taxpayers $90 million annually.[226] Other studies reveal similar savings.[227]

Given that drug courts utilize the same tenet methodologies as those now employed by veterans courts, drug court outcomes provide a useful comparator in estimating veterans courts' recidivism rates and community savings. Additionally, several commentators have postulated

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[220] *Id.* at 1, 18.
[221] *Id.* at 6 (citation omitted).
[222] *Id.* (citation omitted).
[223] Huddleston, *supra* note 218, at 6 (citations omitted).
[224] *Id.*
[225] *Id.*
[226] Russell, *supra* note 169, at 371.
[227] *See, e.g.*, Berenson, *supra* note 169, at 40 (noting financial savings of drug courts and citing Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts. Empirical Success: Will South Dakota Follow Suit?*, 52 S.D. L. REV. 288, 304 (2007)).

that savings generated by veterans courts should outpace those of drug courts because the Department of Veterans Affairs offers at federal expense many of the support services participants in other problem-solving courts can obtain only at state or community expense.[228]

Advocates and Critics

Proponents of veterans courts primarily base their support of specialized problem-solving courts for veterans on one of three grounds. First, veterans are "a niche population with unique needs."[229] Service-members share experiences which are not common among members of the general public, including the trauma of combat, the strain of deployment, and the discipline inherent in military service. These experiences, proponents argue, can only be leveraged when the justice system both acknowledges and builds upon them.[230] Second, veterans courts equip judges with rehabilitative tools beyond those available in a traditional criminal justice setting, where probation or incarceration are too often the only alternatives following conviction.[231] By including community partners in the process, veterans courts connect troubled veterans to service providers offering a range of veterans benefits, such as the Department of Veterans Affairs,[232] which veterans otherwise may not access.[233] Third, veterans hold a unique position in society because of the patriotic service they have rendered. As a result, they deserve both assistance and leniency whenever possible.[234] This mirrors the "grateful nation" language of earlier eras, most recently echoed by the Supreme Court in *Porter v. McCollum* when it stated, "Our Nation has a

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[228] *See, e.g.*, Graman, *supra* note 191 (discussing cost savings of veterans courts).
[229] Russell, *supra* note 169, at 363.
[230] *See id.* at 363.
[231] *See* Berenson, *supra* note 169, at 38.
[232] *See* Russell, *supra* note 169, at 361; Pratt, *supra* note 89, at 51.
[233] *See* Russell, *supra* note 169, at 361 (veterans reluctant to seek mental health assistance); *id.* at 363 (only 41 percent of soldiers involved in alcohol-related incidents referred to an alcohol program).
[234] *See* Berenson, *supra* note 169, at 40 (arguing veterans deserve special treatment because they "were willing to sacrifice life and limb in service to their country").

long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did."[235] Veterans courts, advocates argue, are the best and most appropriate manifestation of that leniency.

Although muted, some critics have expressed concern that veterans courts unfairly benefit veterans by singling them out as a discrete population.[236] Unlike drug or DWI courts, critics might argue, participation in veterans court is not based on commission of a particular offense, but on membership in a particular group. Should states also create courts for individuals of other like-minded interest groups, such as those sharing similarities in income, religion, or life experience? The ACLU of Nevada made an argument similar to this when it challenged legislation in Nevada creating a court specifically for veterans. According to one ACLU of Nevada representative, the proposed legislation would have provided "an automatic free-pass based on military status to certain criminal-defense rights that others don't have."[237] A representative of ACLU of Colorado agreed, arguing "that the legal category of 'veteran' is both too broad and too narrow, sweeping in both Vietnam and World War II veterans who have very different experiences, but excluding non-veterans who also suffer from PTSD and aren't eligible for any special courts."[238] The national arm of the ACLU avoided weighing in on the issue, but a spokesman for the ACLU in Illinois stated the ACLU had no concern with veterans courts that

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[235] Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447, 448 (2009) (per curiam). *See also* Pratt, *supra* note 89, at 45 (quoting United States v. Pipich, 688 F. Supp. 191 (D. Md. 1988) ("An exemplary military record, such as that possessed by the defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not.")).

[236] *See* Graman, *supra* note 191 (observing "[c]ritics of veterans courts argue that the American justice system should single no one out for special treatment"); Hawkins, *supra* note 169, at 570-71 ("Of particular concern to civil libertarians is the disparity in treatment between non-violent drug offenders who are not veterans and those who are." (citation omitted)).

[237] Dahlia Lithwick, *A Separate Peace: Why Veterans Deserve Special Courts*, NEWSWEEK, Feb. 11, 2010, available at http://bit.ly/chHEMT.

[238] *Id.*

model drug treatment courts. The objections in Nevada, the spokesman said, were that the legislation "automatically" transferred veterans into a special court and "provided some options for lower-level sentences."[239]

Another objection centers on the perception that veterans courts allow veteran-defendants to avoid criminal responsibility by blaming their actions on their PTSD. TESSA, an advocacy group for domestic violence victims, voiced concern on precisely these grounds when a Colorado veterans court included on its docket low-level domestic violence cases. "We know that veterans who serve in combat have some unique, serious mental health issues as a result of that trauma," the group's Executive Director said, but "using PTSD or traumatic brain injury as the reason for violence is wrong[.]"[240] In objecting, TESSA's Executive Director noted that domestic violence victims routinely suffer from PTSD without resorting to violence.[241]

In the 2009 Oregon case discussed earlier, the victim's family objected to the trial's result on similar grounds. as unfair. "We understand he has PTSD," the victim's brother told reporters, "But does that give him the right to just go murder somebody?"[242] At the heart of the family's complaint is a concern that criminal justice system lacks fairness when the perpetrator's rehabilitative interests are placed above the victim's retributive interests. Aside from the relative merits of these arguments, which have been discussed in broader contexts elsewhere,[243] the point

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[239] Debra Cassens Weiss, ACLU Likes Veterans Court—If It Doesn't Include Special Sentencing Deals, A.B.A. J., Jul. 15, 2009, http://bit.ly/aCeb5v.
[240] Amy Gillentine, *4th Judicial District Creating Special Court for Veterans*, CO. SPRINGS. BUS. J., Feb. 2, 2010, available at http://bit.ly/cLYdu1.
[241] *Id.*
[242] Murphy, *supra* note 148.
[243] *See, e.g.*, *The Law of Mental Illness: Mental Health Courts and the Trend Toward a Rehabilitative Justice System*, 121 HARV. L. REV. 1168, 1174-75 (2008) (discussing swing of justice system pendulum between rehabilitative model of treatment and retributive model of punishment for criminal offenses).

they impress on those involved in developing veterans courts is that the interests of *all* justice system stakeholders require consideration in establishing a sustainable treatment program.

Conclusion

Drawing on the history of combat-related trauma and its evolving reception in both the medical and legal communities, several lessons relevant to the establishment of veterans courts present themselves. First, combat-related trauma is neither new nor unique. Three hundred years of military history in the United States provides more than sufficient evidence to conclude that a significant percentage of veterans from the Revolutionary War to the Iraq war (a) have suffered from combat-related trauma, and (b) had difficulty with social reintegration once they returned from combat. In light of this history, medical and social service providers should be proactively engaged in preparing for and treating returning combat veterans whose mental wounds, though invisible, exact an individual and social price no less than real than the physical wounds of war.

Second, combat-related trauma increases the risk that veterans will engage in criminal behavior. As the Wilson and Zigelbaum study suggests, veterans suffering from PTSD may respond by engaging in behaviors that, if left unattended, sometimes lead to criminal activity, including anger, violence, alcoholism, drug dependency, thrill-seeking, and despondency. Knowing this, justice system stakeholders should design criminal court procedures that emphasize treatment and rehabilitation over punishment whenever possible—a course that would result in fiscal benefits by reducing incarceration costs and, more importantly, social benefits by returning to society those members who arguably are among its most valuable and productive.

Third, judicial leniency toward veterans is part of the United States' historical tradition. Though perhaps not always shown, courts have long displayed sympathy for veterans whose military heroism in behalf of their country results in personal sacrifice and suffering, especially when that suffering later contributes to criminal misdeeds. Recognizing the liminal effects of combat in military veterans is thus a judicially appropriate response when the misconduct at issue arises from combat-related trauma.

Fourth, treatment methodologies employed by most problem-solving courts are well-suited to the needs of veterans facing prosecution in veterans courts. Most operating veterans courts adjudge misdemeanor and felony offenses committed by veterans with either substance abuse or mental illness concerns, both of which have been treated with marked success by drug and mental health courts. The ten key components of drug courts emphasize a voluntary, community-based approach to treatment. Coupled with involvement by a caring veteran-mentor and the Department of Veterans Affairs, the success of veterans courts should parallel—if not exceed—that of other problem-solving courts.

Fifth, veterans courts that hear violent offenses should seek to ameliorate victim concerns while advancing treatment opportunities for veterans suffering from combat-related trauma. As a matter of law, combat trauma may provide an affirmative or mitigating defense to criminal responsibility, a matter of concern to critics who view it as an escape hatch for veterans. In veterans courts, therefore, where courtroom adversity is sidestepped in favor of a collaborative, therapeutic approach to rehabilitation, victims' rights should be reconciled with veterans'

interests to the fullest extent possible. Veterans courts rely on community involvement and support. Harmonizing the retributive interests of victims with the rehabilitative interests of veterans provides a pathway for public acceptance of veterans courts' existence and outcomes.

Writing in 1918, Edith Abbott summarized the debt due service members returning from war. "[T]he country is agreed," she wrote, "that no effort shall be spared to make the transition from war to peace as little onerous as possible to the great numbers of young men from whom we are already asking such heavy sacrifices."[244] Continuing, she stated:

> Great pity, kindness, toleration, and infinite patience will be needed on all sides when the men go back from the excitement of war to beat their bayonets into ploughshares, and adequate plans for reconstruction should be got under way if the new peace is to be worthy of those who have sacrificed their youth to secure it.[245]

In many ways, the language Abbott uses echoes from a bygone era. The lessons she urges, however, do not. Within the context of the criminal justice system, the establishment of veterans courts is, perhaps, the best means yet of helping those who sacrificed so much "beat their bayonets into ploughshares"—a necessary repayment from the society that handed veterans their bayonets in the first place.

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[244] Abbott, *supra* note 98, at 45.
[245] *Id.*

Table 1

Key Principles to Veterans Courts

Policy 105A

American Bar Association, House of Delegates,

February 8-9, 2010,

The American Bar Association House of Delegates adopted a policy in February 2010 supporting veterans courts and setting forth key principles for their establishment.[246] The principles identified by the ABA list specific outcomes for measuring veterans courts' success, including decreased recidivism, addiction recovery, veteran self-sufficiency, judiciary cost savings, and connection to local and federal service providers.[247]

1) Participation is voluntary and the constitutional rights of participants are retained.
2) Veterans Treatment Courts or the resources devoted to veterans within existing civil and criminal court models will utilize the participation of a caseworker and legal representative with coordination from federal Veterans Affairs employees, veteran service agencies, community-based service providers, and local agencies to assess the needs of and provide veterans with appropriate housing, treatment, services, job training, and benefits.

[246] ABA Policy, *supra* note 204.
[247] *Id.*

3) Veterans Treatment Courts or the resources devoted to veterans within existing civil and criminal court models include mentoring sessions with other veterans.

4) In the criminal court context, participants in the program have all qualifying charges reduced or dismissed, or traditional sanctions waived, including where appropriate and feasible, more serious charges, commensurate with completion of appropriate treatment and services. Where charges are dismissed, public access to the record is limited, where appropriate and feasible as provided by state or local law, including through expungement.

5) The Veterans Treatment Courts shall address those criminal matters that involve serious violent felonies only at the discretion of local courts.

6) The success of Veterans Treatment Courts or additional resources devoted to veterans within existing civil and criminal court models is measured through the following outcomes:

    a) prevention and reduction of homelessness among veterans;

    b) reduction of recidivism;

    c) recovery achieved through compliance with the individual treatment plan of the veteran;

    d) improved communication and reunification with family members, when appropriate;

    e) successful elimination of legal barriers to self-sufficiency;

    f) reentry to the workforce, enhanced job opportunities, and reintegration with the community;

g) economic savings to the courts, criminal justice and public health systems, and the community;

h) connection to VA benefits, long term supportive housing, and other benefits for participants whose service related disabilities are so severe as to prevent their return to the workforce.[248]

[248] *Id.*