

*Serving Those Who Served:  
Veterans Treatment Courts in Theory and Practice*

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Veterans in the Criminal Justice System  
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## INTRODUCTION

In the words of Judge Wendy Lindley, who presides over the Orange County Veterans Treatment Court, Veterans have “been damaged as a result of their service,” and as beneficiaries of this service, society has a duty: “ethically and morally, we need to respond by offering [Veterans] special services to restore them to who they were.”<sup>1</sup> Veterans Treatment Courts (VTCs) are one way this duty has been fulfilled. Though the VTC model is relatively new, and arguably experimental, it has quickly become an integral component of our American criminal justice system. But four years since its inception, the court model is not without its flaws. Like any new endeavor, we learn as we go.

This paper examines the theoretical and practical aspects of our moral and ethical obligations towards Veterans in the criminal justice system. In Part I, we discuss the policy trends of early VTCs, and consider these policies in light of the kinds of crimes Veterans are being arrested for today. Part II considers the pathophysiology of PTSD and its relationship to criminal propensity. Finally, in Part III, we take a step back and consider the veracity and rationality of the VTC model’s stated justifications. Although the VTC model is indisputably a boon to our society—Veterans and non-Veterans alike—it is important that we execute our intentions in practice as expertly as we talk about them in theory.

## I. VETERANS COURTS AND RESTRICTIONS ON ELIGIBILITY

### A. The Courts

The first Veterans Treatment Court (VTC) was established in Buffalo, New York, in 2008. Less than four years later, there are more than ninety courts in more than thirty states.

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<sup>1</sup> William H. McMichael, *Special Courts Help Vets Regain Discipline*, ARMY TIMES, Feb. 20, 2011, available at <http://www.armytimes.com/news/2011/02/army-courts-help-veterans-regain-discipline-022011w/>.

With plans underway in numerous counties and cities across the country, it is accurate to describe the implementation of the VTC model as “spreading like wildfire.” This rapid proliferation is significant for two reasons: one, it indicates the urgency of the need that the court model addressed. Between 1985 and 2000, the estimated number of Veterans in State and Federal prison rose by more than 50,000, or 53%.<sup>2</sup> Officials in the criminal justice system began to notice the rising incidence of Veteran defendants, and many had the sense that these defendants weren’t simply criminally-inclined individuals, but men and women plagued by mental illness stemming from their military service. These Veteran defendants represented, in the words of Judge Russell, founder of the Buffalo VTC, “a niche population with unique needs”—needs unmet by the traditional responses of criminal courts.<sup>3</sup> As Brian Clubb, director of the Veterans Treatment Court Project of the National Association of Drug Court Professionals, has said, “these offenders have no criminal history, their family says they didn’t have any problems before going to war, and we need to give them a second chance.”<sup>4</sup> Moreover, though there has been some decline in the number of Veterans in the criminal justice system over the past decade,<sup>5</sup> many fear “an emerging storm” as the more than 1.5 million men and women serving in Iraq and Afghanistan begin to return home.<sup>6</sup> Having the appropriate resources to address the needs of this niche population is increasingly urgent.

The second reason that rapid proliferation of the court model is significant is that it

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<sup>2</sup> MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, U.S. DEPT. OF JUSTICE, SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISON 2004 (2007), available at <https://www.ncjrs.gov/app/publications/abstract.aspx?ID=238825>.

<sup>3</sup> Judge Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 357, 364 (2009).

<sup>4</sup> Kristina Shevory, *Why Veterans Should Get Their Own Courts*, THE ATLANTIC, Dec. 2011, available at <http://www.theatlantic.com/magazine/archive/2011/12/why-Veterans-should-get-their-own-courts/8716/>.

<sup>5</sup> NOONAN & MUMOLA, *supra* note 1.

<sup>6</sup> See William B. Brown, *Another Emerging “Storm”: Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System*, 5 JUST. POL. J. (2008).

signals the model's promising (albeit initial) efficacy. Regardless of the need for such a court, if Judge Russell's results in Buffalo had been disappointing—or even uncertain—presumably there would not have been such widespread emulation. But the Buffalo VTC's results were neither disappointing nor uncertain; in the court's first year, after seventy-five Veterans had participated in the program, the court was able to boast a zero percent recidivism rate.<sup>7</sup> In 2010, with one hundred and twenty Veterans enrolled in the Buffalo program and ninety percent of participants having successfully completed it, the recidivism rate was still zero.<sup>8</sup> And other courts across the nation have seen similar results. Eighty-six percent of participants in Cook County had no new arrests, and ninety-five percent saw no new convictions.<sup>9</sup> Additionally, like drug courts, VTC's are attractive because they save money. In one year, the decrease in incarcerated Veterans saved Cook County \$595,206.<sup>10</sup>

### **B. Eligibility requirements: in practice and theory**

Also like drug courts, VTC's have their share of critics. Some allege that VTC's are able to claim their high success rates and low recidivism rates because they “cherry-pick” their cases, excluding more challenging cases that would lower their favorable percentages.<sup>11</sup>

Leaving aside the validity of this criticism for a moment, it is true that Veteran Treatment Courts' employ mechanisms for screening their defendants prior to admission. These screening devices take the form of eligibility requirements. Once a person is arrested and then identified as a Veteran, her eligibility for a Veterans Treatment Court is assessed. Though there is increasing

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<sup>7</sup> Russell, *supra* note 2 at 370.

<sup>8</sup> Dahlia Lithwick, *A Separate Peace*, NEWSWEEK, Feb. 20120, available at <http://www.thedailybeast.com/newsweek/2010/02/10/a-separate-peace.html>.

<sup>9</sup> COOK COUNTY STATE'S ATTORNEY, REPORT ON THE COOK COUNTY VETERANS TREATMENT COURT SYSTEM, 2, Sept. 2011.

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., Fred Minnick, *Veterans Courts Offer Second Chance*, VFW MAGAZINE, March 2011, available at <http://digitaledition.qwinc.com/publication/?i=60281&p=38>.

variation among jurisdictions, the majority of courts still accept only Veterans who have been (1) charged with non-violent crimes, (2) diagnosed with substance abuse or mental health problems, such as PTSD, that are (3) resulting from their military service. Some courts accept only defendants with combat experience, and some require that Veterans plead guilty before being accepted into the program.

The precedent for excluding violent offenders from specialty treatment courts is deeply entrenched; drug and mental health courts—the treatment frameworks upon which VTCs are based—have limited participation to nonviolent offenders since their inception.<sup>12</sup> But the exclusion of violent offenders in the VTC framework is arguably more problematic. Intuitively, it's not difficult to see why: accepting only nonviolent offenders withholds treatment from Veterans whose crimes are perhaps most clearly connected to their combat experiences, which were characterized and defined by violence.<sup>13</sup>

Therefore, some courts have responded to this seemingly incongruent policy by widening the door. Orange County, for example, will consider the eligibility of both violent and nonviolent offenders, on a case-by-case basis.<sup>14</sup> As Judge Lindley of the Orange County VTC said, “if our goal is to protect our communities and make them a safe place, then why wouldn't

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<sup>12</sup> BUFFALO VETERANS TREATMENT COURT, MENTORING AND VETERANS HOSPITAL PROGRAM POLICY AND PROCEDURE MANUAL (2008), *available at* <http://nadcp.org/node/439>. *Note:* This document exhibits little variation from the key components of drug courts, as articulated by the U.S. Department of Justice (*see* U.S. DEPT. OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS, (1997), *available at* <http://www.ncjrs.gov/pdffiles/bja/205621.pdf>).

<sup>13</sup> *See generally* SHARON MORGILLO FREEMAN, BRET A. MOORE, ARTHUR FREEMAN, EDS., LIVING AND SURVIVING IN HARM'S WAY (2009).

<sup>14</sup> Interview with Paul W. Shapiro, Collaborative Courts Officer Orange County Superior Court (Dec. 20, 2011).

we take cases of violence.”<sup>15</sup> Others courts, like that in Erie County, remain faithful to traditional, nonviolent-offenders-only policies, but narrow the definition of what constitutes a “violent offense” so that those charged with domestic violence offenses are eligible.<sup>16</sup> This is a choice born out of necessity, perhaps. Joe Chudoba, Domestic Violence Advocate at the Erie County Sheriff’s Office, is an expert in the connection between returned Veterans and domestic violence. He recalls that in 2009, when over 2,800 vets returned home from overseas to Fort Drum, New York—the most deployed base in the country—there were 286 cases of Domestic Violence reported in the *first 2 weeks* of the mass homecoming.<sup>17</sup> When asked whether domestic violence charges were accepted in the court’s docket despite their exclusion of violent offenders, Mr. Chudoba was surprised. “Of course,” he said, “those offenses constitute the majority of our cases.”<sup>18</sup> Some jurisdictions, like Travis County in Texas, promote restrictive eligibility requirements “on the books,” but are more lenient in practice—willing to consider cases on a individualized basis despite formal policies that accept nonviolent offenders only.<sup>19</sup>

Other jurisdictions, however, are much more conservative. The VTC in Cook County, Illinois, operates with one of the most restrictive admission policies in the country, excluding all violent offenders, including those Veterans charged with domestic violence, as well all convictions of DWI and DUI. Tulsa County, Ohio, one of the oldest VTCs—established soon after Buffalo’s court in 2008—is similarly rigid in their exclusion of violent offenders—both

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<sup>15</sup> William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Vets to help Other Vets*, ABA J., Nov. 1, 2011, *available at* [http://www.abajournal.com/magazine/article/the\\_battle\\_on\\_the\\_home\\_front\\_special\\_courts\\_turn\\_to\\_vets\\_to\\_help\\_other\\_vets/](http://www.abajournal.com/magazine/article/the_battle_on_the_home_front_special_courts_turn_to_vets_to_help_other_vets/).

<sup>16</sup> Other courts that allow domestic violence charges include Porter County in Indiana, and Forrest County in Mississippi.

<sup>17</sup> Interview with Joe Chudoba, Domestic Violence Advocate at the Erie County Sheriff’s Office (Dec. 27, 2011).

<sup>18</sup> *Id.*

<sup>19</sup> Interview with Jackson Glass, Travis County Veterans Treatment Court Manager, (Dec. 19, 2011).

formally and in practice.

Because the advent of VTCs is recent and the court model is relatively young, the criminal justice community is still figuring out what works and what doesn't. The more data we have about the kinds of crimes Veterans are being arrested for—and the reasons why certain propensities may be true—the more difficult it is to justify the restrictive eligibility requirements that many courts adhere to.<sup>20</sup> Whether the motivation for excluding violent offenders reflects legitimate public safety concerns, political pressures, an unwillingness to stray from established specialty court models, or a desire to produce successful results by cherry-picking cases, restrictive eligibility policies are both intuitively and statistically troubling. Intuitively, the policies seem out of line with one of Judge Russell's oft-articulated goals, central to the manifesto of the VTC model—"to overcome the Veteran's 'warrior mentality.'"<sup>21</sup> Statically, the policies ignore what we know to be true about the kinds of crimes Veterans commit, and what we are starting to understand about the connection between PTSD and aggressive behavior. This latter issue—PTSD and criminal propensity—will be discussed in Part II of this paper. But first, a closer look at data from two counties with operating VTCs—Maricopa County in Arizona and Travis County in Texas—underscores the way restrictive policies thwart the central aims of the VTC model.

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<sup>20</sup> Within the past year, this fact has garnered more attention among justice officials and Veterans' rights advocates: the first session at this year's Veterans Treatment Court Summit—a component of the 18<sup>th</sup> NADCP Annual Training Conference—is entitled "Expanding Veterans Treatment Court Admission Criteria." A detailed description of this session includes the following explanation: "Veterans enter the military as law abiding citizens. After serving in combat some Veterans struggle with substance abuse and mental health disorders when they return to their communities. *The combat experience, coupled with years of intense military training, may leave these Veterans susceptible to violence in ways that differ from the civilian population. As a result, some Veterans are appearing before the courts to face violent charges*" (emphasis added). <http://www.nadcp.org/node/833>.

<sup>21</sup> Judge Robert Russell, Post-9/11 Veterans: Who Are They?, Presentation at the Purdue University Battleground to Home II Symposium, (Nov. 2011), available at [http://webcache.googleusercontent.com/search?q=cache:jXc9sw7eZroJ:www.cfs.purdue.edu/mfri/resources/public/presentations/Russell\\_Battlemind\\_2011.pptx+&cd=5&hl=en&ct=clnk&gl=us&client=firefox-a](http://webcache.googleusercontent.com/search?q=cache:jXc9sw7eZroJ:www.cfs.purdue.edu/mfri/resources/public/presentations/Russell_Battlemind_2011.pptx+&cd=5&hl=en&ct=clnk&gl=us&client=firefox-a)

### **C. A Closer Look at the Numbers**

#### *Travis County, Texas*

Constable Maria Canchola was somewhat ahead of the curve when she convened the Veterans Intervention Project (VIP), a group set out to assess the extent of challenges facing Veterans in the Travis County criminal justice system. Her reasons for initiating the project were based on anecdotal evidence: she started noticing the frequency with which Veterans were being booked into Travis County jail each month, and felt that something was owed these service men and women—something more than jail time.<sup>22</sup> VIP's first step was to collect information, and in 2008, they conducted a survey of arrested Veterans over a 90-day period.<sup>23</sup> The survey—of which 458 were collected (about 25% of arrested Veterans were booked and released before answering the survey)—posed questions regarding the Veterans' demographics, service, discharge, and current charge.<sup>24</sup> VIP's research does not compare the prevalence of specific charges against those of the non-Veteran population, but the information collected is useful even absent this comparison.

Significantly, the two most common misdemeanor charges brought against Veterans were DWIs (119 instances) and Assault (71 instances).<sup>25</sup> The two most common felony charges were

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<sup>22</sup> VETERANS INTERVENTION PROJECT, REPORT OF VETERANS ARRESTED AND BOOKED INTO THE TRAVIS COUNTY JAIL, 3 (July 2009), *available at*

[www.co.travis.tx.us/constables/4/pdfs/vip\\_jail\\_survey\\_report.pdf](http://www.co.travis.tx.us/constables/4/pdfs/vip_jail_survey_report.pdf)

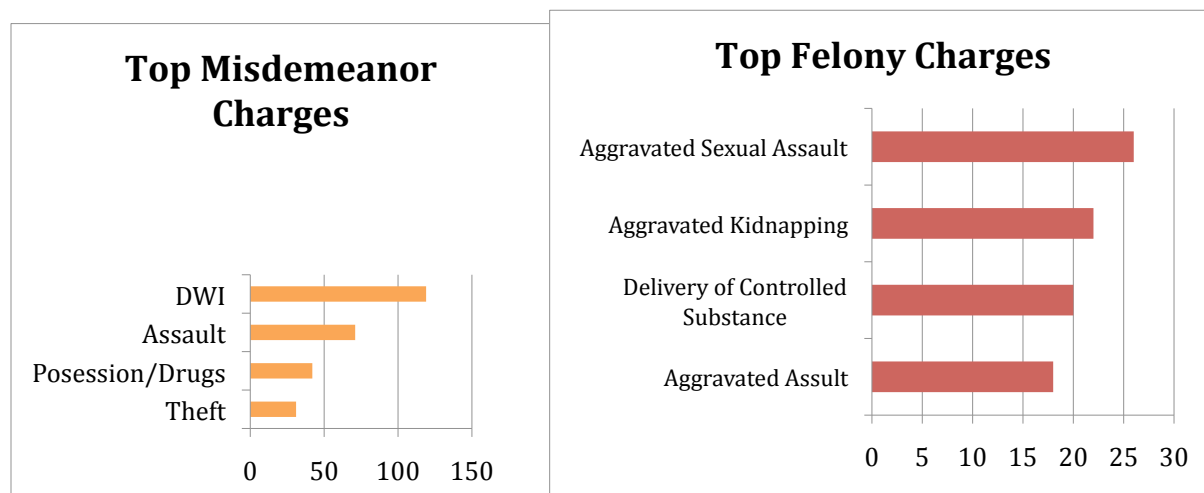
<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 6-7.



Aggravated Sexual Assault (26) and Aggravated Kidnapping (22).<sup>26</sup>



In 2010, Travis County officially opened its Veterans Treatment Court. Although its official policy reads as follows: “Only non-violent misdemeanor charges pending in Travis County are currently eligible,”<sup>27</sup> VTC manager, Jackson Glass, explains that there is in fact more flexibility than the official court policy indicates. “We are willing to look at each case individually,” he notes, adding that some factors considered in the admission decision are “the severity of the violence, as well as the victim’s position on accepting the Vet.” Thankfully, unlike Cook County in Illinois, the VTC does accept DWI cases; “they represent the bulk of our population,” Glass says.<sup>28</sup> The difference between the policy “on the books” and the policy in practice acknowledges what VIP’s study proved true: Veterans commit violent crimes. The next step is, of course, formally acknowledging this fact by expanding eligibility requirements on the books.

#### *Maricopa, Arizona*

In 2009, an exploratory committee was formed to examine the potential creation of a

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

<sup>27</sup> Travis County Veterans Court Program website, <https://www.texvet.org/partners/travis-county-Veterans-court-program>.

<sup>28</sup> Glass interview, *supra* note 18.

Veterans court in Maricopa County, Arizona. The committee was tasked with studying the court model established by Judge Russell in Buffalo, and also with assessing the current status (prevalence, demographic make up, etc.) of Veterans in the local criminal justice system. To this latter end, the committee commissioned research by criminologists at Arizona State University, who used interview data obtained from arrestees at three booking facilities in Maricopa County.<sup>29</sup> Respondents who identified themselves as Veterans were asked questions about their service (date, duration, location and nature), their discharge, their current conviction, criminal history, and their mental health background post-service.<sup>30</sup>

Out of the 2102 completed interviews (all conducted in 2009), 132 interviewees (6.3%) reported military Veteran status.<sup>31</sup> Comparisons between this 6% and the remaining non-Veteran population proved significant. Notably, there existed little difference between the incidence of property crimes and “other” crimes among both groups, but Veterans were more likely to have been arrested for violent offenses than non-Veterans. Indeed, 29.5% of Veterans were arrested on violent charges, compared to only 18.7% of non-Veteran offenders.<sup>32</sup> Veterans also had more extensive criminal histories than non-Veterans,<sup>33</sup> and demonstrated a slightly higher mean number of prior arrests over the past year (1.11 compared to .89 for non-Veterans).<sup>34</sup> Moreover, over half of all Veteran respondents reported problems directly or indirectly related to their service—including PTSD and traumatic brain injuries (and this figure represents only those who

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<sup>29</sup> MICHAEL D. WHITE, ARIZONA STATE U. CEN. FOR VIOLENCE PREV. & COMM. SAFETY, THE PREVALENCE AND PROBLEM OF MILITARY VETERANS IN THE MARICOPA COUNTY ARRESTEE POPULATION, 2 (2010).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 9-10.

<sup>33</sup> *Id.* at 13.

<sup>34</sup> *Id.* at 10.

have been diagnosed and are willing to self-report).<sup>35</sup>

The results of this research were presented to the committee, and memorialized by Michael D. White, Associate Professor of Criminology at Arizona State University, in his 2009 report. Professor White concludes the report with the following recommendation:

Though their number (and percentage) in the jail population is relatively small, the Veterans in this study suffer from a number of service-related problems and are in need of medical and psychological services...Moreover, few of the Veterans in the 2009 arrestee sample have served in the most recent wars in Iraq and Afghanistan. As the military withdraws from these combat zones...the number of Veterans who find themselves in the criminal justice system is likely to increase substantially.<sup>36</sup>

In January 2011, based on the recommendations of the Committee, Maricopa County opened the doors of its new Veterans Treatment Court.<sup>37</sup> And despite the common practice of restricting eligibility to nonviolent offenders, they designed their VTC to accommodate the actual needs of Veterans in their community. Therefore, the Maricopa VTC functions as a “problem-solving court,” focusing on medium-high and high-risk offenders.<sup>38</sup> Tiffany Grissom, VTC supervisor, notes that “most of our cases are felony cases ranging from class 6 felonies to class 2 felonies,” felony crimes ranging from least to most severe, respectively.<sup>39</sup> In this way, Maricopa County serves as a model for other jurisdictions contemplating the implementation of a VTC. They based their court policies on data rather than the status quo.

#### **D. Closing the Gap**

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<sup>35</sup> *Id.* at 13.

<sup>36</sup> *Id.*

<sup>37</sup> Bill Murphy, Jr., *More Cities & States Try Veterans Courts*, STARS AND STRIPES, Mar. 31, 2011, available at <http://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/more-cities-states-try-Veterans-courts-1.139605>.

<sup>38</sup> Interview with Tiffany Grissom, Maricopa County Veterans Treatment Court Supervisor (Apr. 16, 2012).

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

It would behoove the criminal justice system—and American society as a whole—to tailor the eligibility requirements of Veterans courts to what we know is true about the kinds of crimes Veterans commit. A snapshot taken in 2007 indicated that more than half (57%) of Veterans in State prison were serving time for a violent offense, including 15% for homicide and 23% for sexual assault, which included rape.<sup>40</sup> Among non-Veterans, less than half (47%) were in State prison for a violent offense, with 12% held for homicide and 9% for sexual assault.<sup>41</sup> Local snapshots, like those conducted in Travis and Maricopa counties, confirm this national trend, and studies like Professor White’s in Arizona render restrictive requirements less and less excusable. We must close the gap between what we *know* and what we *do*. The next section of this paper speaks to the question of *what we know* by exploring the connection of PTSD to certain kinds of crimes.

## II. PTSD AND CRIME

Many Veterans Treatment Courts (VTCs) function largely as specialized drug courts in that they exclude all (or most, depending on the particular jurisdiction) violent crimes, whether misdemeanor or felony. Although this may be a more politically expedient arrangement, it does not match up with the probable impacts of Post Traumatic Stress Disorder (PTSD) in particular, and stress disorders generally, on affected individuals. While many PTSD sufferers do indeed face issues with substance abuse that the courts in their current form can address, those that turn away all, even relatively minor, violent crimes are neglecting a broad swath of symptomology typical of PTSD, and thus blunting their possible effectiveness.

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<sup>40</sup> MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, U.S. DEPT. OF JUSTICE, SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISON 2004, 1 (2007), *available at* <https://www.ncjrs.gov/app/publications/abstract.aspx?ID=238825>.

<sup>41</sup> *Id.*

## A. Diagnostic Criteria

Any policy discussion concerning PTSD must begin with an overview of the technical diagnosis and recognized symptoms. PTSD arises from exposure to a traumatic event, encompassing both physical danger to the affected individual and witnessing such danger happen to others. Individuals can have vastly different responses to this trauma, but true PTSD results from the exposure only where it provokes an intense emotional response, typically fear, helplessness, or horror.<sup>42</sup> Once these base criteria are established, the patient must also exhibit symptoms from three groupings of responses. The first group is categorized as “intrusive recollections,” and involves recurrent memories or dreams that cause acute emotional distress, occasionally resulting in “flashbacks.”<sup>43</sup> Often these recollections are triggered by superficially mundane events that bear some special significance for the sufferer.<sup>44</sup> The second grouping of responses, classified as avoidant/numbing responses, involve an effort by the individual to avoid thoughts and activities that can trigger the aforementioned intrusive recollections.<sup>45</sup> This avoidance behavior frequently causes varying degrees of emotional numbing, and has predictably deleterious effects on social relationships.<sup>46</sup> The third grouping is related to hyper-arousal. These symptoms are often immediately apparent, and even stereotypical; they can include angry outbursts, hyper-vigilance, an exaggerated startle response, or sleep disturbances.<sup>47</sup>

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<sup>42</sup> DSM Criteria for PTSD, Dept. of Veterans Affairs National Center for PTSD (December 23, 2011), <http://www.ptsd.va.gov/professional/pages/dsm-iv-tr-ptsd.asp>

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

<sup>44</sup> *Id.*; an illustrative example of this would be a hypothetical Vietnam Veteran becoming disturbed by the sound of a overflying news helicopter because it reminds him of a wartime experience that prominently featured helicopters.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

Finally, these symptoms must present themselves for an extended period of time, typically at least a month, and must severely impact an individual's ability to function within society.<sup>48</sup>

### **B. Traumatic Brain Injury (TBI) Co-Morbidity**

It is worth noting the frequent coexistence of a related category of injury prevalent in the current theatres: the Traumatic Brain Injury. The parallel presence of TBI and PTSD is a common feature of blast injuries. Experiencing a TBI is linked to an increase risk of PTSD, as well as other less severe mental health diagnoses.<sup>49</sup> A moderate TBI may produce symptoms for 3-6 months in the average civilian victim, but for 18-24 months in combat injured veterans.<sup>50</sup> Mild TBI often have transient and relatively minor symptoms such as headaches and dizziness. Yet 10-15% of even these mild cases risk developing long lasting cognitive and emotional symptoms, including increased anxiety, irritability, impulsiveness and behavioral dysfunction-symptoms that overlap with PTSD.<sup>51</sup> Ultimately, the long-term effects of TBI from combat blast injuries is unknown, and will likely remain so until large scale studies can be performed on the current generation of veterans. Experts estimate that up to 300,000 troops may have suffered some form of TBI, many of them mild injuries that required no loss of duty.<sup>52</sup> Some experts theorize that service-members who have symptoms that fit both the TBI and PTSD profile elect to self-identify their symptoms as a TBI, because a neurologically based brain injury bears less

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<sup>48</sup> *Id.*

<sup>49</sup> Traumatic Brain Injury and PTSD, Dept. of Veterans Affairs National Center for PTSD (December 23, 2011), <http://www.ptsd.va.gov/professional/pages/traumatic-brain-injury-ptsd.asp>

<sup>50</sup> *Id.*; It should be noted that TBI is a unpredictable injury that may differ greatly from case to case. Depending on severity, TBI can be an injury requiring life long cognitive treatment.

<sup>51</sup> *Id.*

<sup>52</sup> Anthony E. Giardino, Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury, 77 Fordham L. Rev. 2955, 2959 ((2008))

stigma in the military culture than a mental-health issue like PTSD.<sup>53</sup> Establishing a connection between PTSD and TBI was at first controversial, because to suffer a TBI generally entails a loss of consciousness, which, the thinking went, would make it impossible to relive the traumatic event through PTSD. Nonetheless, preliminary data has proven this intuitively rational conclusion incorrect. Through either “social reconstruction” or the subconscious, a substantial proportion of IED blast survivors demonstrate PTSD following a loss-of-consciousness TBI.<sup>54</sup>

### C. Epidemiology

Prior to the Vietnam War-era, government research into PTSD had been almost exclusively interested in front-line breakdowns that directly impeded combat performance, such as the infamous “shell shock” of World War I.<sup>55</sup> Later interventions concerning tended to focus on those symptoms that presented as so-called “explosive behavior,” introducing the emotionally volatile Vietnam Veteran as a pop-culture stock character.<sup>56</sup> It was not until well after Vietnam that greater amounts of research began to explore how broad and multi-faceted the effects of PTSD could be. Accordingly, contemporary research often seeks to understand PTSD within a “holistic, psychopathological model involving multiple human systems with interactions between the individual’s stress, psycho-physiological reactivity, neuro-hormonal responses, and musculoskeletal adaptations.”<sup>57</sup> Because studies concerning Vietnam veterans and related stress disorders have been conducted for nearly 30 years, there is a comparatively comprehensive pool

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<sup>53</sup> An Achievable Vision: Report of the Department of Defense Task Force on Mental Health, Dept. of Defense (December 30, 2011) <http://www.health.mil/dhb/mhtf/MHTF-Report-Final.pdf>, 61

<sup>54</sup> Benjamin R. Karney, et. al., Invisible Wounds of War: Psychological and Cognitive Injuries, Consequences, and Services to Assist Recovery, 126 (Terri Tanielian & Lisa H. Jaycox eds., 2008)

<sup>55</sup> C. Peter Erlinder, Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior, 25 B.C. L. Rev. 305, 317 (1983-1984)

<sup>56</sup> *Id.* at 311; For one of the more entertaining illustrations of this, consider the character Walter Sobchak (played by John Goodman) in the Coen Brothers comedic masterpiece “The Big Lebowski.”

<sup>57</sup> Melissa Hamilton, Reinvigorating Actus Reus: The Case for Involuntary Actions by Combat Veterans With Post-Traumatic Stress Disorder, (Draft) Berkeley J. Crim. L. (Forthcoming), 27. Electronic Copy Available at: <http://ssrn.com/abstract=1861310>

of data. We will examine some of this data, present the more limited and recent findings concerning the OIF/OEF generation, and consider possible digressions between these two populations.

The estimated lifetime prevalence of PTSD (of any duration) in American men is approximately 3.6 percent; the affected percentage of women is generally much higher at 9.7 percent.<sup>58</sup> By contrast, the lifetime PTSD prevalence for male Vietnam veterans is estimated at 30.9 percent.<sup>59</sup> A recent study of OIF/OEF veterans found an approximately 13.8 percent prevalence.<sup>60</sup> Other studies have found up to 20 percent of Marine Corps and Army (which bear the brunt of combat actions) forward deployed personnel meet at least some of the diagnostic criteria for PTSD.<sup>61</sup> Of the approximately 1.7 million forward deployed veterans, estimates predict as many as 30-40% will have some form of serious mental-health injury, with at least 300,000 currently suffering from PTSD.<sup>62</sup> It is also contextually important to consider that PTSD

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<sup>58</sup> Epidemiology of PTSD, Dept. of Veterans Affairs National Center for PTSD (December 23, 2011), <http://www.ptsd.va.gov/professional/pages/epidemiological-facts-ptsd.asp>

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Peter W. Tuerk, et al., Diagnosis and Treatment of PTSD-Related Compulsive Checking Behaviors in Veterans of the Iraq War: The Influence of Military Context on the Expression of PTSD Symptoms, 166 *Am. J. Psychiatry*, 762, 762 (2009) (Issue 7) (<http://ajp.psychiatryonline.org/data/Journals/AJP/3895/09aj0762.PDF>)

<sup>62</sup> Melissa Pratt, New Courts on the Block: Specialized Criminal Courts for Veterans in the United States, 15 *Appeal* 39, 42 (2010) (University of Victoria, Canada); It is worth noting here that studies demonstrating high levels of PTSD rates have been somewhat controversial, and PTSD prevalence can vary dramatically between studies depending on the methodology used. Because firm numbers are not terribly important to our thesis here, we do not dwell on these controversies. For further introductory reading on this topic, see Rajeev Ramchand, et al., Disparate Prevalence Estimates of PTSD Among Service Members Who Served in Iraq and Afghanistan: Possible Explanations, 23 *Journal of Traumatic Stress*, 59 (2010) (Issue 1).



is often diagnosed alongside other products of the traumatic experience such as depression and severe anxiety; this co-morbidity can compound the deleterious impact of PTSD itself.<sup>63</sup>

#### **D. Military Veterans as a Distinct Population**

PTSD acquired within a military context can be differentiated in several ways from the civilian experience. PTSD behaviors are often reinforced by military training or combat experience, while the opposite is generally true of civilian life. Take for example the common symptom of hyper vigilance. While rarely useful in civilian life, hyper vigilance is often a necessary and rewarded component of combat training. Many civilian suffers of PTSD were passive victims in their traumatic experience.<sup>64</sup> By contrast, many combat veterans who develop PTSD were active participants in the traumatic event, having to react and participate in events that survivors of car accidents do not. Finally, many civilian experiences that lead to PTSD entail a single, relatively brief event. Military personnel on the other hand are often subject to repeated traumas over the course of weeks or months during extended combat tours. It does appear that there exist significant differences in demographics, presentation of symptoms, and reaction to treatment between civilian and combat veteran PTSD populations.<sup>65</sup> Current research into exactly how these differences contribute to ultimate outcomes is sparse, but the differences themselves are undeniable.

Combat-related PTSD can have a latency period that may last for years before symptoms develop. However, civilian survivors of horrific car accidents will rarely exhibit a delayed onset,

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<sup>63</sup> Andrea Friel, et al., Posttraumatic Stress Disorder and Criminal Responsibility, 19 Journal of Forensic Psychiatry and Psychology, 64, 65 (2008) (Issue 1)

<sup>64</sup> E.g., the car suddenly swerved into a different lane, or the mugger grabbed the woman's purse and ran

<sup>65</sup> Allan Burstein, et. al., Chronic Vietnam PTSD and Acute Civilian PTSD: A Comparison of Treatment Experiences, 10 General Hospital Psychiatry 245, 245-49 (1988)

and one of comparatively shorter duration if they do.<sup>66</sup> While the cause of this phenomenon is not fully understood, the consequences are becoming clearer. Sub-clinical levels of PTSD, postulated to exist widely within the OIF/OEF veteran populations, may be predictive of developing “full-blown” PTSD later in life.<sup>67</sup> Furthermore, certain behavioral aspects of PTSD, such as underlying anger and aggression, seem to actually worsen over time if untreated.<sup>68</sup> Besides this potentially lengthy latency period, the disorder itself can affect different individuals in widely varying durations. While the diagnostic criteria captures those whose symptoms are transient, 15% of Vietnam veterans with PTSD were estimated to still be suffering chronic episodes 15 years later.<sup>69</sup>

There remains little in the way of published research on how OIF/OEF related PTSD might differentiate from the experiences of previous generations of war fighters. It is uncontested that acknowledgment of, and treatment opportunities for, PTSD are significantly more advanced than in any previous historical period. One study, consistent with this understanding, has shown that OIF/OEF veterans have elevated levels of PTSD symptomology at initial assessment compared to their peers from the Vietnam era, but also that the OIF/OEF population showed greater benefit from treatment than the Vietnam generation.<sup>70</sup> Other data suggests that the Vietnam generation was more acutely affected, even in relation to the ongoing OIF/OEF conflict;

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<sup>66</sup> *Id.* at 248

<sup>67</sup> Matthew Jakupcak, et. al., Anger, Hostility, and Aggression Among Iraq and Afghanistan War Veterans Reporting PTSD and Subthreshold PTSD, 20 *Journal of Traumatic Stress* 945, 946 (2007) (Issue 6)

<sup>68</sup> *Id.* at 950

<sup>69</sup> Andrea Friel et. al., Posttraumatic Stress Disorder and Criminal Responsibility, 19 *The Journal of Forensic Psychiatry & Psychology*, 64, 65 (2008) (Issue 1)

<sup>70</sup> Kenneth M. Chard and Jeremiah A. Schumm, et. al., A Comparison of OEF and OIF Veterans and Vietnam Veterans Receiving Cognitive Processing Therapy, 23 *Journal of Traumatic Stress*, 25, 25 (2010) (Issue 1)

the Vietnam veteran had a more significant risk of both substance abuse and suicide.<sup>71</sup> Salient for our purposes here, half of all Vietnam veterans found to have active PTSD were arrested at least once following their service.<sup>72</sup> Still, generational comparisons have been generally inconclusive. For example, OIF/OEF veterans had proportionally higher PTSD diagnoses among inpatient populations, but not outpatients.<sup>73</sup> Other differences that have not been greatly explored include age and gender disparities between the generations; the Vietnam combat generation was older and included virtually no women.<sup>74</sup> Another notable generational difference is the more extensive use of National Guard and Reservist troops in comparison to the Vietnam conflict. These troops often do not benefit from the same degree of esprit de corps and immersion in military culture prior to deployment as active duty units; it is an open question if they are as prepared both for traumatic events in general, and the psychological after effects in particular.<sup>75</sup> Furthermore, soldiers in the current conflict (particularly those who re-enlist beyond their initial commitments) are more likely to experience multiple tours of combat in one of the two major theatres, whereas Vietnam-era soldiers typically did not unless they volunteered.<sup>76</sup> Both the current fronts in the Global War on Terror and Vietnam share many tactical-level differences from the earlier style of warfare practiced in the World War and Korean War eras. Notably, the lack of a delineated front line creates a more permanent state of anxiety since it is sometimes difficult or impossible for troops to know when they are in a safe area, or whether individuals

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<sup>71</sup> Alan Fontana and Robert Rosenheck, Treatment-Seeking Veterans of Iraq and Afghanistan: Comparison With Veterans of Previous Wars, 196, *The Journal of Nervous and Mental Disease*, 513, 520 (2008) (Issue 7)

<sup>72</sup> Pratt, *supra* at 42

<sup>73</sup> Chard and Schumm, *supra*, at 520

<sup>74</sup> *Id.*

<sup>75</sup> Constantina Aprilakis, The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD, 3 *Georgetown Journal of Law and Public Policy*, 541, 547

<sup>76</sup> Hamilton, *supra* at 24-5

around them are civilians or plainclothes combatants.<sup>77</sup> Other factors that differentiate these two eras from earlier more conventional wars is the greater (particularly in Iraq and Afghanistan) survival rate of wounded troops due to increasingly sophisticated battlefield medicine. It is possible that the chronological distance between other wars as compared to the still-ongoing War on Terror (in all its permutations) is partially at work, and it remains to be seen if the passage of time will bring some of the statistical differences into parity.<sup>78</sup>

### **1. PTSD and Criminal Behavior**

PTSD and other combat-acquired stress disorders can create or contribute to criminal issues in several different ways. Perhaps the most prominent is through substance abuse, often connected to a veteran's desire to self-medicate rather than, or supplementary too, seeking professional assistance. Increased rates of substance abuse predictably lead to both criminal possession charges, and the commission of other crimes associated with drug and alcohol abuse as a risk factor.<sup>79</sup> Up to 80% of PTSD sufferers also misuse substances.<sup>80</sup> However, the issues remain quite distinct. One large study compared two groups of combat veterans: one group suffering from PTSD, and a control group that did not have PTSD, but was involved in alcohol and drug abuse. Only the PTSD group reported increased aggression and an increased risk for firearm related crime.<sup>81</sup> This study refuted a widely read, but significantly smaller (30 versus 1,100 individual sample size), study that had reached the opposite conclusion.<sup>82</sup>

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<sup>77</sup> *Id.* at 22

<sup>78</sup> Chard and Schumm, *supra*, at 520

<sup>79</sup> Pratt, *supra* at 42

<sup>80</sup> Friel, *supra* at 66

<sup>81</sup> *Id.* at 72

<sup>82</sup> *Id.*

Many current veterans' courts are limited to adjudicating non-violent drug offenses. This model limits the efficacy of such courts by depriving them of defendants whose criminal propensities may be related to PTSD. To understand the relation between criminal violence and PTSD, we must first clarify that social scientists attach discrete meanings to "anger," "aggression," and "hostility." Anger describes the familiar emotional state elicited by provocation or frustration, while hostility is an "antagonistic attitude or evaluation of others," and aggression is a pattern of actual anti-social *behavior*.<sup>83</sup> A diagnosis of PTSD correlates with all three traits; this increase in both anger, aggression, and hostility has been observed in both the Vietnam generation and the current OIF/OEF generation, suggesting a diagnosis of PTSD provides a unifying theory across generational lines to explain the presence of impulsive violent acts in veteran offenders.<sup>84</sup>

Military researchers found that not only did PTSD correlate with aggression, but also that it correlated with particular kinds of aggression. Current research often splits aggression into "impulsive" and "pre-meditated" sub-categories. This delineation is self-explanatory and comparable to general criminal mens rea doctrine: impulsive aggression is an uncontrolled emotional response, while pre-meditated aggression is rational and generally in pursuit of a known objective.<sup>85</sup> Recent research using cohorts of Iraq and Afghanistan veterans has found compelling evidence that links impulsive aggression to PTSD, with 70% of veterans diagnosed with PTSD in one sample reporting acts of impulsive aggression; pre-meditated aggression was

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<sup>83</sup> Andra Teten et. al., Characterizing Aggression and Its Association to Anger and Hostility Among Male Veterans With Post-Traumatic Stress Disorder, 175 *Military Medicine* 405, 405 (2010)

<sup>84</sup> *Id.* at 1, 5

<sup>85</sup> *Id.* at 1

significantly less represented.<sup>86</sup> These findings support Vietnam-war conclusions that showed Vietnam veterans with PTSD to have greatly elevated levels of aggression; evidence was also present of chronic hostility more severe compared to veterans who did not suffer from PTSD.<sup>87</sup> Importantly, it was found that this correlation with violent aggression occurred with PTSD, but not just combat experience generally; the amount of combat an individual saw was a poor predictor of aggression compared with a diagnosis of PTSD.<sup>88</sup> The criminal implications of impulsive aggression are wide and varied. One easily intuited scenario is the simple bar fight, where a veteran overreacts to an event that seems hostile to the individual, but is not objectively threatening. This scenario would be a textbook example of PTSD-type dysfunction, yet would be excluded from most VTC regardless of egregiousness.

### *Domestic Violence*

While it is clear that PTSD can lead to impulsive tendencies, there is relatively little data concerning direct connections with particular violent crimes. One study from the 1980s found a correlation between PTSD and four particular crimes: driving while intoxicated, disorderly conduct, weapons charges, and assault.<sup>89</sup> But perhaps the most broadly studied connection is between PTSD and domestic violence. Domestic violence is useful because it is both excluded for eligibility by most veterans courts, and because there has been a relatively substantial amount of research done concerning a connection with PTSD. As a case study, it provides a well-evidenced demonstration that VTC that exclude certain violent crimes are not meeting the needs

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<sup>86</sup> *Id.* at 4; note that the sample size in this study was a relatively small 136 individuals; more expansive study is needed before these findings can be considered conclusive.

<sup>87</sup> Natasha B. Lasko, et. al., Aggression and Its Correlates in Vietnam Veterans With and Without Chronic Posttraumatic Stress Disorder, 35 *Comprehensive Psychiatry*, 373, 379 (1994) (Issue 5)

<sup>88</sup> *Id.*; Jakupcak, et. al., *supra* at 946

<sup>89</sup> Ann R. Auberry, PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System, 68 *Marq. L. Rev.* 647, 654 (1985)

of the community they seek to service. With the Vietnam population, research indicates that veterans with signs of PTSD have a much higher propensity for violent behavior within their intimate relationships.<sup>90</sup> As with more generalized studies of aggression, studies of relationship violence correlated with symptoms of PTSD, but not with amounts of combat exposure generally.<sup>91</sup> In fact, when PTSD is statistically controlled for, at least one study has shown that greater combat exposure alone actually leads to a lower incidence of violence within intimate relationships.<sup>92</sup> According to the National Vietnam Veterans Readjustment Study, a full one-third of male veterans with PTSD perpetrated an act of domestic violence, at least double their non-PTSD affected peers; this data was specific to the year preceding the survey, so the total figure of lifetime domestic violence incidents is probably higher.<sup>93</sup> More recent studies have reinforced this presumption, such as a 2006 finding that veterans with PTSD were at least 5 times more likely to perpetrate a violent domestic incident, and over 26 times more likely to commit an act of severe violence.<sup>94</sup> While the body of research specifically concerning the OIF/OEF population is small, courts should assume at least an elevated level of concern based on post-Vietnam research. And, of course, even where these findings restricted to Vietnam veterans, this population remains a significant portion of defendants in many VTC programs.

### *Driving Under the Influence (DUI)*

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<sup>90</sup> Christina A. Byrne and David S. Riggs, The Cycle of Trauma: Relationship Aggression in Male Vietnam Veterans With Symptoms of Posttraumatic Stress Disorder, 11 *Violence and Victims*, 213, 221 (1996) (Issue 3)

<sup>91</sup> *Id.*

<sup>92</sup> Casey T. Taft, et. al., Risk and Resilience in U.S. Military Families, 197 (Shelley MacDermid Wadsworth and David Riggs eds., 2010)

<sup>93</sup> Casey T. Taft, et. al., Risk Factors for Partner Violence Among a National Sample of Combat Veterans, 73 *Journal of Consulting and Clinical Psychology*, 151, 152 (2005) (Issue 1)

<sup>94</sup> Michelle D. Sherman, et. al., Domestic Violence in Veterans With Posttraumatic Stress Disorder Who Seek Couples Therapy, 32 *Journal of Marital and Family Therapy*, 479, 486 (2006) (Issue 4)

DUI is another crime for which veterans suffering from PTSD have an increased propensity to commit, is relatively minor, yet excluded from most VTC. Many behavioral consequences of PTSD contribute to this offense, and convincing evidence has directly linked its prevalence to PTSD.<sup>95</sup> A lack of respect for authority figures is one common psychological feature of PTSD, which along with the also-common symptom of emotional numbness may lead to thrill-seeking behavior, as the affected individual attempts to self-produce some sort of emotional response.<sup>96</sup> The research currently available tends to support this conclusion. One major Israeli study found that young men repeatedly exposed to terrorist attacks had increased risk-taking behavior as a probable manifestation of PTSD.<sup>97</sup> A similar effect has been described in American troops who have been exposed to combat.<sup>98</sup> Another American study found a clear correlation between PTSD and DUI, noting that individuals with PTSD had a higher recidivism rate.<sup>99</sup> While neither of these studies directly concerned OIF/OEF veterans with diagnosed PTSD, the common implications point in the same direction. They suggest that veterans with PTSD have an increased aptitude for risky behavior in general, and DUI in particular. This is

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<sup>95</sup> Auberry, *supra* at 654

<sup>96</sup> Criminal Behavior and PTSD, Dept. of Veterans Affairs National Center for PTSD (December 23, 2011), <http://www.ptsd.va.gov/public/pages/ptsd-criminal-behavior.asp>; Alternatively, some PTSD researchers have classified this type of non-violent behavior into a “sensation-seeking syndrome,” where the veteran engages in dangerous behavior “in order to maintain control over the traumatic imagery they are experiencing,” where refusing to submit to the thrill-seeking urges causes a resurgence of more severe PTSD symptoms. *See* Gover *supra* at 567

<sup>97</sup> Ruth Pat-Horenczyk, et. al., Risk-Taking Behaviors Among Israeli Adolescents Exposed to Recurrent Terrorism: Provoking Danger Under Continuous Threat?, 164 Am J Psychiatry 66, 71 (2007) (Issue 1)

<sup>98</sup> William D.S. Killgore, et. al., Post-Combat Invincibility: Violent Combat Experiences are Associated With Increased Risk-Taking Propensity Following Deployment, 42 Journal of Psychiatric Research 1112, 1119 (2008) (Issue 13)

<sup>99</sup> Allyson Peller et. al., PTSD Among a Treatment Sample of Repeat DUI Offenders, 23 Journal of traumatic Stress, 468, 472 (2010) (Issue 4)



also consonant with earlier findings that Vietnam veterans with PTSD were more prone to DUI.<sup>100</sup>

## **2. Limits of Diversionary Treatment**

It is necessary to determine what the outer limits of the criminal activity that should be included in the purview of VTCs. Veterans Courts are based largely on two principles: that due to their service and sacrifice in the line of duty, veterans are entitled to some measure of special treatment, and that the psychological ailments produced by this service are peculiarly amenable to treatment in an alternate judicial system.<sup>101</sup> However, some crimes are so severe that society is not willing to mitigate the consequences under any circumstances. When PTSD first emerged as a criminal defense, there was immediate concern that clever attorneys would be able to manipulate the diagnosis beyond its “medically justifiable limits.”<sup>102</sup> Thus in murder cases, to give the most extreme example, PTSD will remain, as it often did before the advent of VTC, as either a mitigating factor in sentencing or a mens rea defense during the case-in-chief. However, most criminal actions simply do not fit the behavioral profile of PTSD within the framework for which special treatment would be effective. Violent crimes properly included are typically “reactive” offenses, stemming from the veteran’s altered perceptions of their environment that causes them to react differently, and often more violently, than a normal person in the same

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<sup>100</sup> Auberry, *supra* at 654

<sup>101</sup> While this is a common rationale, it is not the only one. Other courts, particularly the Santa Clara County program run by Judge Steven Manley have focused on the availability of VA benefits making mentally ill veterans a class of offender the state is able to provide with treatment more effectively and economically than other defendants; in other words, they are simply a mechanism to do the most good for the most people.

<sup>102</sup> C. Peter Erlinder, Post-Traumatic Stress Disorder, Vietnam Veterans and the Law: A Challenge to Effective Representation, 1 Behavioral Sciences and the Law, 25, 27 (1983) (Issue 3)

situation.<sup>103</sup> Crimes that are associated with career criminality, or are indicative of a high degree of logical planning in furtherance of a criminal objective are not typical of offenses associated with PTSD.<sup>104</sup> Offenses related to PTSD are usually spontaneous, often related to an incident or trigger that would seem relatively benign to a normal individual; normal behavioral motivations will often fail to provide an explanation for the criminal conduct.<sup>105</sup> Consequently, the offender themselves will frequently be unable to explain their actions, and will often have a minimal criminal history.<sup>106</sup> Thus, crimes with tangible criminal motivations are likely outside the mission of veteran's courts.<sup>107</sup>

### 3. Inclusivity Issues

The VTC model inherently contains potential problems of over- and under-inclusion. There are at least two ways in which VTC could be over-inclusive. The first concerns an over-broad definition of combat experience that was pervasive for large portions of the Iraq and Afghan wars. To start, the majority of troops sent to Iraq and Afghanistan are support personnel; while such personnel are more often subjected to combat in the asymmetric environment that typifies the modern battlefield, many are still confined to relatively safe bases and compounds.

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<sup>103</sup> Thomas L. Hafemesiter & Nicole A. Stockey, Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder, 85 Indiana Law Journal 87, 127 (2010) (Issue 1)

<sup>104</sup> Auberry, *supra* at 654

<sup>105</sup> *Id.*

<sup>106</sup> Erlinder, *supra* at 33, Some PTSD researchers have classified this as a dissociative response, whereby the individual believes they are in a combat environment, and react accordingly. However, we will adhere to the formal VA definitions of PTSD for our purposes here. *See* Gover, *supra* at 567

<sup>107</sup> Although controversial, PTSD has been used as a (rarely) successful defense to more sophisticated criminal organizations in the past. This was done under the theory that the affected veterans sought out organized criminal activity (in this case, a group of Vietnam Veterans involved in a trans-Atlantic drug trafficking scheme) in order to relive the excitement and danger of combat and achieve a sense of “quasi-military sensation-fraught criminal conduct.” *See United States v. Tindall Cr. No. 79-376* (D. Mass, Sept. 19, 1980) (Federal jury found defendant not guilty by reason of insanity)

Adding to the confusion, the formal definition of combat has changed over time.<sup>108</sup> Further, in response to the paucity of mutual engagements in many operating areas of the Iraq war, the eligibility criteria for combat action ribbons have been expanded.<sup>109</sup> Thus, there may be some unknown percentage of individuals who may have served in the Iraq or Afghanistan theatres, and may even have been awarded combat veteran status, who have not in actuality had the kinds of experiences that would lead to service-connected PTSD. The importance of this depends on whether the motivation of VTC is first and foremost to provide leniency to veterans in recognition of their service, or rather to treat service connected PTSD. If the latter, than this represents a difficulty in establishing who has truly earned eligibility for VTC as an alternative to traditional criminal litigation.

Malingering presents another possibility of over-inclusion.<sup>110</sup> Malingering must be considered anytime a medical diagnosis has the possibility to tangibly benefit an individual; in the case of VTC, the possibility of lenient treatment by the criminal justice system would be well worth the effort to an unscrupulous individual. Unfortunately, PTSD is one of the easiest diagnoses to forge, due both to the subjectivity of its symptoms (and the fact that self-report is the main diagnostic tool) and the widespread dissemination of information - most individuals with no prior medical knowledge of PTSD can successfully pick appropriate symptoms off a

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<sup>108</sup> For an illustrative anecdote, see the U.S.S. Kearsarge, an amphibious assault ship. While docked aside the pier, there was a thwarted terrorist strike attempted that caused no casualties or property damage; all the sailors on board were subsequently awarded a combat action ribbon. Bretta Heath, Kearsarge Awarded Combat Action Ribbon, United States Navy (Dec. 30, 2011) [http://www.navy.mil/search/display.asp?story\\_id=21395](http://www.navy.mil/search/display.asp?story_id=21395)

<sup>109</sup> Announcement of Changes to the Eligibility Criteria for the Combat Action Ribbon, United States Marine Corps, (Dec. 30, 2011) <http://www.marines.mil/news/messages/Pages/2006/ANNOUNCEMENT%20OF%20CHANGES%20TO%20THE%20ELIGIBILITY%20CRITERIA%20FOR%20THE%20COMBAT%20ACTION%20RIBBO> N.aspx

<sup>110</sup> Malingering is generally defined as exaggerating or feigning an illness in order to escape from some duty or responsibility.

diagnostic checklist.<sup>111</sup> Although politically controversial, some clinicians consider it an open secret that the VA has become complicit in allowing potential malingers to obtain a disability rating based on PTSD with little or no investigation.<sup>112</sup> The seriousness of malingering will also vary depending on the mission of a given VTC. If it exists solely to provide a separate adjudication process for veterans regardless of other status, than it is irrelevant. However, if based primarily on a finding of PTSD, it becomes a major issue. There are no reliable estimates for what percentage of PTSD claimants may be malingers. Nonetheless, courts must be aware of it as a possible source of over-inclusion, particularly as true malingers are sometimes more likely to actively seek out treatment in response to favorable treatment, whereas true sufferers often require some amount of pressure to be placed into treatment.<sup>113</sup>

One potential problem of under-inclusivity is the tendency for many military personnel and veterans to deny PTSD and related symptoms even when present. Stigmatization of mental health problems continues to be prevalent in military culture. Of the large numbers of front line personnel from the most recent Iraq conflict who meet at least some diagnostic criterion for mental health problems, less than half had any interest in mental health care, and perhaps less than a quarter actually received any.<sup>114</sup> Soldiers who had positive screenings for mental health problems were more likely than normal to perceive greater stigma associated with mental health; these veterans were also more likely to associate embarrassment and feelings of weakness with

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<sup>111</sup> Phillip J. Resnick, et. al., Clinical Assessment of Malingering and Deception, 113 (Richard Rodgers, ed., 2008)

<sup>112</sup> Gail Poyner, Psychological Evaluations of Veterans Claiming PTSD Disability with the Department of Veterans Affairs: A Clinician's Viewpoint, 3 Psychol. Inj. And Law 130, 130-32 (2010)

<sup>113</sup> Ryan C.W. Hall & Richard C.W. Hall, Malingering of PTSD: Forensic and Diagnostic Characteristics of Malingers and Clinical Presentations, 28 General Hospital Psychiatry 525, 529 (2006)

<sup>114</sup> Thomas W. Britt, et. al., The Stigma of Mental Health Problems in the Military, 172 Military Medicine 157, 157 (2007) (Issue 2)

seeking professional mental health.<sup>115</sup> These views and their continuing prevalence in both the active duty and veteran populations is well documented elsewhere.<sup>116</sup> There is no data to allow for an accurate prediction of how many veterans with PTSD might decline treatment due to social stigma.

#### **4. Closing Thoughts**

It is clear that a VTC program that does not allow even minor violent crimes under its jurisdiction is systematically under-inclusive of the population it seeks to assist. If the idea of the veteran's courts is that PTSD and other mental health issues acquired from the rigors of military service make a treatment based approach more appropriate and efficacious, then the courts as a legislative initiative simply have not taken a proper stock of the likely effects of PTSD on the individual. The dangers of over-inclusion are that some small number of veterans without PTSD is given lenient treatment for relatively minor crimes. The danger of under inclusion is that veterans suffering from service-connected mental health issues are thrown into a system where rehabilitation and treatment are often unavailable. On this balance, we argue that under-inclusion carries the far greater risk of harm to society.

While many veterans with service-connected PTSD do engage in a pattern of substance abuse, this alone is not a sufficiently representative population. At a minimum, minor assaults (including domestic violence) and negligent risk-taking offenses should be included within the system. While the current prevailing permutation of VTC programs is better than nothing, the system will not achieve its envisioned potential until reforms are made. As the minority of

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<sup>115</sup> Robert H. Pietrzak, et. al., Perceived Stigma and Barriers to Mental Health Care Utilization Among OEF-OIF Veterans, 60 *Psychiatric Services*, 1118, 1121 (2009) (Issue 8)

<sup>116</sup> *See Generally* Paul Y. Kim et. al., Stigma, Negative Attitudes About Treatment, and Utilization of Mental Health Care Among Soldiers, 23 *Military Psychology*, 64 (2011) (Issue 1)

VTC programs that conform to our suggests are in operation alongside those that are not for a greater period of time, there will be an opportunity for further research that will present a clearer answer to the questions presented here.

### **III. ALIGNING VETERANS TREATMENT COURT JUSTIFICATIONS WITH POLICY DECISIONS**

Scan the many newspaper and blog articles on the growth of veterans' treatment courts (VTCs) across the country and you're sure to find the same theme again and again: "we owe it to our veterans to give them another chance and help them stay out of jail." While this is a common sentiment and a significant reason for widespread public support of VTCs, it is in reality a poor justification for the specialty courts and an almost useless guide in addressing the questions legislatures and courts must answer when considering whether and how to implement them. How much do we owe our veterans? What do we owe them for? Do we owe all veterans? Do we owe those who were not honorably discharged? Do we owe those who never deployed or those who deployed but never saw combat? Do we owe veterans who commit violent crimes? What about veterans who are repeat offenders? The generic yet popular rationale for VTCs provides precious little guidance in answering these questions, yet these are the types of value judgments that are essential inputs into the decisions about the structure, scope, and authority of VTCs.

More than cliché platitudes, policymakers need clear principles to anchor and guide such innovative programs. It is incumbent upon policymakers and service providers to ensure that they have clear justifications for establishing specialty courts available only to veterans, and that the justifications are properly served by the programs and procedures they establish. While the

continued expansion of VTCs across the country demonstrates widespread public support, it makes it too easy for community leaders to ignore their responsibility to critically assess the rationale for each program and ensure the result is consistent with its underlying justifications. Different communities may have different needs and goals, resulting in different VTC policies and rules. It should be possible for community members to trace the rationales behind those different policies and rules and understand their origins.

This Part evaluates stated and implied justifications for VTCs, and assesses how those justifications are manifested in various programs and eligibility regimes. Its goal is to help policymakers, administrators, and judges, as well as the broader public, think through the connection between the reasons for creating VTCs and the rules that are created to operate them. Section A identifies the various justifications given by legislatures, advocates, and courts for VTCs, and organizes them into categories to facilitate a method of analyzing VTC policy options. Section B describes this method of analysis, organizes VTC policy options into three categories, and demonstrates how this process can aid policymakers in creating VTC eligibility requirements and rules that are consistent with their justifications.

### **A. Veterans Treatment Court Justifications**

With over eighty VTCs in states across the country, it is unsurprising that these disparate jurisdictions lack uniform justifications for creating and operating their specialty courts. Instead, the result is a range of rationales and a diversity of systems all under one label, difficult to distill into consistent essential elements. Furthermore, it is quite difficult to disaggregate justifications that are typically interrelated and overlapping, or applied in different ways.

Despite these difficulties, identifying distinct justifications for VTCs is important for several reasons. First, it helps the community decide whether they want to create a treatment court for veterans. Community support is critical for innovative programs, and meaningful public support requires an understanding of the program, the reasons for its existence, and its objectives. Community members can then weigh those factors against perceived costs, and decide whether, or in what way, to lend their support. Second, and most importantly, it provides an important set of first principles to serve as guides in distinguishing among the many options for eligibility requirements and other operational or implementing rules. There are many ways to run a VTC, and such first principles are extremely important in providing some consistent references when deciding among the options. Third, it provides an important means of evaluating the VTCs along more than simply statistical lines. In other words, statistics may not be the only relevant criteria for evaluating the success of a program, and it is critical to have a clear understanding of the program's purpose in order to evaluate the relative importance of the statistical information.

The first VTC was established in Buffalo, New York under Judge Robert Russell. According to Judge Russell, the VTC began with an empirical observation that the number of veterans in the local mental health and drug courts was growing.<sup>117</sup> “The advent of veterans treatment court came about as a response to a growing number of veterans on court dockets with serious mental-health and substance-abuse issues.”<sup>118</sup> This observation is common, but it is also

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<sup>117</sup> Russell, Robert T. (2009), *Veterans Treatment Courts Developing Throughout the Nation*, p130, available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/spcts&CISOPTR=204> (last accessed April 20, 2012).

<sup>118</sup> *Id.* Unfortunately, Judge Russell cites to various statistics regarding the number of veterans diagnosed with PTSD or identified as needing treatment for illicit drug use, but doesn't provide statistics on the number of *justice-involved* veterans or the number of *justice-involved* veterans with serious mental-health and substance-abuse issues.



difficult to evaluate. The Bureau of Justice Statistics released its most recent report on veterans in state and federal prison in 2007 using data collected in 2004.<sup>119</sup> While the report determined that the overall number of veterans in state and federal prison declined between 2000 and 2004, it unfortunately did not address the number of veterans in jails or serving probation sentences.<sup>120</sup> Even if the number of total veterans involved in the criminal justice system declined, the focus of Judge Russell's observation appears to be an increase in the number of veterans with serious mental health and substance abuse issues.

Regardless of whether he was emphasizing the overall numbers of justice-involved veterans or solely those with mental health and substance abuse issues, neither observation carries much normative weight on its own. There are undeniably certain overrepresented populations in the criminal justice system, and certainly there are particular psychological disorders that are disproportionately represented as well. These facts do not independently compel the creation of an alternative program for these populations; otherwise there would be new specialty courts for every quasi-categorical type of defendant. There must be more to justify such an expansion of the specialty courts, which face some public skepticism specifically because of their distinctiveness from traditional criminal courts. Fortunately, Judge Russell and other advocates of VTCs provide other justifications.

This paper organizes VTC justifications into three categories: pragmatic, mitigation of future harm, and moral. Within each of these three categories are various justifications used by jurisdictions in statutes, regulations, or even simply in their narratives about their VTCs. These categories are not absolute, and some justifications will seem to straddle two or even three

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<sup>119</sup> Bureau of Justice Statistics, *Veterans in State and Federal Prison*, 1, 2004 (2007).

<sup>120</sup> *Id.*

categories. While the distinctions among them may be imperfect, these categories are conceptually helpful in identifying the key justifications for VTCs and conducting a logical evaluation of the policies that best represent and instantiate those justifications. The rest of this Section will discuss these three categories and their constituent justifications.

### *Pragmatic Justifications*

Pragmatic justifications are those that reflect a purely practical approach to the question of why VTCs should exist, without reliance on moral or predictive arguments. Such justifications are both powerful and vulnerable, depending on the audience and the desired effect. Of course, pragmatic justifications appeal to those concerned about efficiency, effectiveness, and cost, but often fail to motivate those looking for emotional resonance. Despite this limitation, pragmatic justifications can be compelling, especially for innovative programs, where the facts underlying the justifications are particularly favorable. In the case of VTCs, the underlying facts provide strong support for pragmatic justifications based on resource availability, cost effectiveness, and the unique common characteristics of veterans.<sup>121</sup>

The strongest pragmatic justification for VTCs is the availability of resources, particularly federal resources, to help establish and run critical components of the programs. For example, the Department of Veterans Affairs (VA) runs 807 community-based outpatient centers, 288 vet centers, 152 VA hospitals, and 56 Veterans Benefits Administration Regional Offices.<sup>122</sup> VTCs tie into the VA system to facilitate defendants' access to services such as mental health and substance abuse evaluation and treatment, Veterans Justice Outreach

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<sup>121</sup> This Part will not dig too deeply into the underlying facts, and instead will simply point out those that are used in support of the various pragmatic justifications for VTCs. While it is important to evaluate the accuracy of these facts and claims, such an analysis is beyond the scope of this paper.

<sup>122</sup> Department of Veterans Affairs, *Statistics at a Glance*, National Center for Veterans Analysis and Statistics, (as of 9/30/2011).

specialists, disability and medical benefits, housing assistance, and more. The availability of such services through the VA (and to a lesser extent other veterans' service providers at the state and local level) is a key reason the VTC model is possible. The VA system provides a federally funded, pre-existing, expert partner for VTCs to use in treating defendants. Without a VA to partner with, states and community organizations would have to find a way to provide those services, and such programs would be far less common. In addition to such direct services, there is also the Veterans Treatment Court Planning Initiative (VTCPI) launched by the White House in 2010 as the first VTC training program in the nation.<sup>123</sup> The Department of Justice's Bureau of Justice Assistance is also now supporting drug courts for veterans with grants under the Adult Discretionary Drug Court Program.<sup>124</sup>

Another pragmatic justification for VTCs is cost effectiveness. There are several components to this standard argument, including low startup and operational costs, savings from VA treatment of qualified defendants, reduced recidivism, and reduced incarceration. Most VTCs are run by existing courts as a special calendar, which keeps new costs low. The Buffalo, New York VTC is a good example of this principle in practice. As Judge Russell wrote about his own court, "Buffalo's veterans treatment court did not have any additional funding to implement the program and to operate its first year. While they are currently seeking funding to staff a veterans-court case manager, the Buffalo court was able to keep costs relatively minimal the first year by using existing drug and mental-health courts staff and resources that were already funded and available. In addition, the peer-mentor program, which is a major component

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<sup>123</sup> <http://www.whitehouse.gov/ondcp/ondcp-fact-sheets/veterans-treatment-courts>;  
[http://www.ndci.org/training/2012\\_VTCPI](http://www.ndci.org/training/2012_VTCPI)

<sup>124</sup> *Justice Department Funds More than \$1 Million to Veteran Treatment Courts*, PR NEWSWIRE (Nov. 10, 2011), [http://www.bizjournals.com/prnewswire/press\\_releases/2011/11/10/DC04605](http://www.bizjournals.com/prnewswire/press_releases/2011/11/10/DC04605).

of Buffalo’s veterans treatment court, is staffed completely by volunteers.”<sup>125</sup> Obviously budget impacts will depend on how each court is organized and operated, but Buffalo’s experience demonstrates that there are ways to minimize costs even while starting a new program.

There is a dearth of empirical studies evaluating the cost-effectiveness of VTCs, likely due to their relative novelty.<sup>126</sup> Advocates of VTCs argue that decreased recidivism resulting from treatment programs and monitoring will yield cost savings in fewer judicial proceedings, lower incarceration costs, and the avoidance of costs (economic and social) associated with criminal behavior. They point to studies indicating such cost savings in adult drug courts, and predict similar results for VTCs.<sup>127</sup> Again, different jurisdictions may find or anticipate diverse results on this front depending on demographics, as well as the narrowness or breadth of eligibility for program participation.

The final pragmatic justification for VTCs is that veterans are more treatable than other segments of the population by virtue of several factors, and so resources are effectively allocated to treatment programs for veterans. Advocates argue that veterans’ unique individual characteristics, experiences, and group dynamics make them an especially treatable population. For example, they claim that veterans’ military training has instilled discipline and the ability to follow orders despite personal hardship. They also argue that veterans have already performed at

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<sup>125</sup> Russell, *supra* note 1.

<sup>126</sup> *Drug and Veterans Treatment Courts: Hearing on Seeking Cost-Effective Solutions for Protecting Public Safety and Reducing Recidivism Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 112th Cong. 5, (2011) (statement of Benjamin Tucker, Deputy Director for the Office of State, Local, and Tribal Affairs, Office of National Drug Control Policy) (“As these courts mature and training continues, we look forward to gathering additional outcome data surrounding their work with justice-involved veterans. Veterans Treatment Courts are showing significant promise in successfully promoting sobriety, recovery, and stability for our Nation’s veterans.”).

<sup>127</sup> Russell, *supra* note 1, at 132 (“Research over the past decade has continuously shown lower rates of recidivism and higher rates of financial return for drug treatment courts than for traditional courts. A cost-benefit analysis of veterans treatment court should rival that of drug court.”).

a high level in the past, and have achieved a position of respect in society. This past performance is a strong foundation to use in moving forward. Furthermore, since the military screens candidates along several parameters before permitting them to join, there is a functional baseline that applies to veterans. This means that each veteran was in good enough condition to pass the screening and join the military at a definable point in time, which should be a favorable factor in evaluating an individual's chances of recovery.

In addition to those individual characteristics, there are certain cultural factors or group dynamics that advocates argue further enhance the likelihood of successful treatment. As Judge Russell of the Buffalo VTC argues, "Veterans derive from a unique culture, with unique experiences and needs. . . . [V]eterans benefit from treatment provided by people who 'are knowledgeable about and able to empathize with the military experience.' Our experience also was that veterans tended to respond more favorably to other veterans in the court."<sup>128</sup> These factors provide opportunities for VTCs to augment and enhance treatment programs with volunteer mentor programs, which many courts do.

### *Mitigation of Future Harm*

The future harm mitigation category describes justifications principally based on predictions about harms caused both by and to veterans without special intervention programs like VTCs. There are two intertwined justifications in this category: veterans as a group disproportionately suffer from psychological problems and substance abuse issues that put them at increased risk of entering the criminal justice system, and incarcerating affected veterans without specialized treatment will likely result in a cycle of incarceration rather than deterrence.

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<sup>128</sup> Russell, *supra* note 1, at 130 (quoting Department of Defense Task Force on Mental Health, *An Achievable Vision*, 41 (2007)).

In addition, individuals with untreated psychological problems are more vulnerable to the criminal activities of others, and thus are more likely to be victimized. The first two justifications really represent two parts of the same argument. That argument is that incarcerating mentally ill veterans instead of treating them is unlikely to result in substantial changes in future conduct because the mental illness is the primary reason for the veterans' involvement with the criminal justice system.<sup>129</sup>

A good example of the first justification in action is the Colorado state legislature's declaration at the beginning of its 2010 authorization of a VTC program.

Studies have shown that combat service may exact a tremendous psychological toll on members of the military who are faced with the constant threat of death or injury over an extended period of time . . . 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 . . . psychiatrists and law enforcement officials agree that combat-related injuries have led to instances of criminality . . . .<sup>130</sup>

The legislation's quoted language emphasizes that the psychological effects of combat experiences may be a strong factor driving some veterans into contact with the criminal justice system. This is useful as both an analytical statement about those veterans currently involved in the criminal justice system, and as a prediction about those veterans who may become justice-involved in the future. This declaration does not explicitly reference the cycle of incarceration justification and instead goes on to focus on the moral justification for VTCs, but the authorization itself incorporates the preference for treatment over incarceration in responding to this recognized heightened risk for veterans in appropriate cases.

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<sup>129</sup> The relevance and significance of the reputed causal connection between combat trauma and criminal activity is discussed in the next section on moral justifications.

<sup>130</sup> H.B. 10-1104, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010).

Another example is drawn from the American Bar Association's Resolution 105A supporting the establishment of VTCs.

Creating a veteran-specific treatment court is based, in part, on the opinion of psychiatrists and law enforcement officials that the traumas of combat result in PTSD that can lead to addiction and erratic behavior that result in criminal charges. . . . With vast numbers of veterans returning from the wars in Iraq and Afghanistan manifesting PTSD and brain trauma at unprecedented levels-and readily available V.A. funded treatment and services, there has never been a more critical need for supporting the efforts of our judiciary in preventing these brave men and women who have put their lives on the line in service of our country from becoming homeless.<sup>131</sup>

Again, this argument in support of VTCs relies on the prediction that veterans with combat-related mental illnesses will be at higher risk of involvement in the criminal justice system, and explicitly emphasizes the current risks related to the high number of combat veterans who have served in Iraq and Afghanistan. Although this argument does not explicitly refer to the cycle of incarceration justification and again goes on to focus on the moral justification, it clearly connects combat-related mental illness with criminal activity and supports the treatment model over incarceration. Additionally, the concern for homelessness among veterans with mental health problems touches on the third justification in this category, the vulnerability of this population without intervention and treatment.

One jurisdiction explicitly severs this rationale from combat, and instead uses much more general language with regard to veterans' mental illnesses and substance abuse issues. California's statute does not make reference to combat experience or combat-related trauma, and instead refers to "mental health problems stemming from

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<sup>131</sup> A.B.A. RESOLUTION 105A (2010), *available at* <http://www.abanow.org/wordpress/wp-content/themes/ABANow/wp-content/uploads/resolution-pdfs/MY2010/105A.pdf>.

service in the United States military” such as “sexual trauma, traumatic brain injury, post-traumatic stress disorder, [and] substance abuse.”<sup>132</sup> The language was amended in 2010 to “eliminate the requirement that the offense be committed as a result of problems stemming from service in a combat theater.”<sup>133</sup> It is important to note that the justification is not necessarily tied to combat experience, but rather allows legislators or rulemakers to make a policy decision about whether to categorically limit the types of mental health problems to those resulting from combat. California’s permissive language allows for variation among different VTCs on this issue. For example, Santa Clara County’s VTC does not impose a combat requirement for eligibility, while the Orange County VTC requires mental health problems connected to actual combat experience.<sup>134</sup>

While thus far state legislative language has avoided explicitly endorsing the cycle of incarceration justification, it regularly appears in the press and in speeches and articles by judges, lawmakers, and advocates. For example, Michigan Supreme Court Chief Justice Marilyn Kelly discussed VTCs in her 2010 State of the Judiciary address. “Its goal is to address underlying problems that, left untreated, will land that person in court again and again, in a revolving cycle of crime and probable incarceration.”<sup>135</sup>

### *Moral Justifications*

The final category for organizing VTC justifications has the most emotional resonance, and is almost always included in one form or another in a discussion of specialty courts for

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<sup>132</sup> Cal. Penal Code § 1170.9 (West).

<sup>133</sup> A.B. 674, 2009-10 Assemb., Reg. Sess. (Ca. 2010).

<sup>134</sup> Correspondence with Kim Parsons, Collaborative Court Coordinator for Orange County, email in author’s possession (April 27, 2012).

<sup>135</sup> Available at <http://www.michbar.org/courts/pdfs/2010%20State%20of%20the%20Judiciary.pdf>.



veterans. This category of moral justifications for VTCs essentially rests on a sense of gratitude owed to veterans for national service, and a sense of collective responsibility for injuries sustained as a result of that service. Under this justification, the beneficiaries of the sacrifices of service members owe it to wounded, disabled, or struggling veterans to help them recover from the negative consequences of their service. A slightly different and less popular formulation argues that as a reward for their service, veterans should be given special treatment for such conditions whether incurred as a result of military service or combat experiences or not.

Examples of these types of justifications abound. The statements of Ohio Supreme Court Justice Evelyn Lundberg Stratton, taken from a recent interview, are illustrative of a common moral justification for VTCs.

“Some people say, ‘Why are we treating them [Vets] differently. They’re criminals just like anybody else.’ And my answer is most of them entered the system, went into the military with no criminal record. There’s a lot of them that never had these issues until they came back from the war. They come out, they’re damaged. They have all sorts of issues they didn’t have before. We damaged them by sending them to defend us. We have this special extra obligation to really reach out and try to make their lives different.”<sup>136</sup>

Note that Justice Stratton takes a stronger position on the debt owed to veterans by the general population, and imports a strong assumption of causality in her argument that will be discussed further below (see Lindley OC article) [is not a necessary component of the basic moral justification].

Other judges have made similar statements using the moral justification for veterans’ specialty courts. According to Judge Charles Porter of the Hennepin County VTC in Minnesota, “Society does owe them a differential treatment. This court is the downside of our freedom as a

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<sup>136</sup> Laura Fong, Justice Stratton: Ohio vets courts recognize what society has demanded (Nov. 11, 2011), *available at* <http://www.wksu.org/news/story/29917>.

nation. We send these guys out to protect our freedom and shit happens to them. They come back different.”<sup>137</sup> Judge Wendy Lindley, of the Orange County, California Combat Veterans Court, appears to focus very heavily on moral justifications for the specialty courts. “We, as a community, have an absolute moral and ethical obligation to restore these human beings to who they were before they went so bravely to fight for the rights that you and I enjoy every single day.”<sup>138</sup> “These guys went off to war and as a result of their service were damaged, and our job is to restore them to who they were.”<sup>139</sup>

## **B. Categories of Justification Should Guide VTC Eligibility/Implementing Rules**

As discussed in the Introduction, there are many different questions that must be answered by the creators of a VTC, many of which concern what kinds of veterans and what kinds of charges are eligible for the specialty court. Each of these questions or factors can be organized into one of three categories: offense, military experience, and medical condition. Questions about whether to take veterans charged with felonies, violent crimes, DUIs, or other crimes all fall under the “offense” category. Those questions regarding whether to restrict eligibility to those with combat experience, deployment history, or certain types of discharge all fall under the “military experience” category. Finally, questions about whether to limit eligibility to those with a diagnosed mental health problem (or specific diagnoses), a service-connected mental health problem, or substance abuse issues all fall under the “medical condition” category.

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<sup>137</sup> Mark Brunswick, Vets court focuses on those struggling after their service (Nov. 20, 2011), *available at* <http://www.startribune.com/local/west/134216858.html>.

<sup>138</sup> Press Release: OC Human Relations Selects Twelve Who Have Helped Combat Prejudice, Intolerance and Discrimination Countywide (Mar. 6, 2012), *available at* [http://egov.ocgov.com/vgnfiles/ocgov/Human%20Relations/Docs/Awards41\\_Recipients\\_PressRelease.pdf](http://egov.ocgov.com/vgnfiles/ocgov/Human%20Relations/Docs/Awards41_Recipients_PressRelease.pdf).

<sup>139</sup> Megan McCloskey, Veterans court takes a chance on violent offenders (Sept. 14, 2010), *available at* <http://www.stripes.com/veterans-court-takes-a-chance-on-violent-offenders-1.118182>.

These three categories represent the possible choices for defining VTC eligibility, but they don't provide any guidance on how to make those important policy decisions. Instead, policymakers need a model they can use to ensure they are making the right choices for their communities and to communicate the reasons for those policies once established. The categories of justifications described in Part I provide a basic foundation for analyzing the options, and help policymakers make rational, consistent decisions about VTC eligibility and other implementing rules. Essentially, policymakers should begin by determining which justifications accurately describe the community's belief in validating the creation of the VTC. Once those primary justifications are clear, an analysis of the three categories of policy choices will reveal which are most relevant and which are unsubstantiated by the justifications. While it is impractical to go through every possible option, a few examples are necessary to illustrate the utility of this method.

It is clear from the quoted statements above that Judge Lindley of the Orange County Combat Veterans Court relies heavily on moral justifications for VTCs. What does that mean in terms of those policy choices required to operate a VTC? Judge Lindley's focus on moral justifications should guide her decision making as she looks at the three categories of policy choices. Of the three categories, "military experience" is likely the most directly implicated by the moral justifications articulated by Judge Lindley. She is concerned about repaying the debt owed to veterans for their service, so a critical question for her is whether any military service is sufficient or if combat experience is required. If she (and her community) holds the minority view that VTCs are justified because military service in itself warrants "special treatment," then she would not require combat experience for VTC eligibility. However, given her focus on the

negative consequences of combat, she likely holds the more common view and would require combat experience for eligibility.

Similarly, her justification affects her approach to the relevance of discharge status. She may believe that those who receive a dishonorable or other than honorable discharge are not deserving of the same treatment as those who served honorably. On the other hand, she may be concerned that the discharge resulted from the same underlying mental health problems driving the veteran into the criminal justice system, and permit a case-by-case analysis of the issue. In either case, her underlying justification provides the guide for making these policy choices, as is true for the other two categories. In the “offense” category, Judge Lindley’s moral justification would not provide a particularly strong basis for limiting eligible offenses. Instead, she should be more concerned about the degree to which the offense is related to mental health problems connected to combat experience or military service. She may want to use a sliding scale that permits more severe offenses if they are more directly connected to such service-related mental health problems.

Of course, that example merely demonstrates the process of using a single justification category to evaluate the various policy options. Policymakers cannot be expected to distill community opinions into a single category, and this model does not require such a feat. Instead, this model allows policymakers to break the process down into smaller components, walk through the analysis of each primary justification, and evaluate the results with a rational method of comparing outcomes and resolving conflicts. The matrix in Appendix A illustrates the likely interactions of these categories of justifications and policy choices, and is included as a guide.

With the continued expansion of VTCs across the country, states and counties face decisions about whether and how to implement a specialty court for veterans. Such decisions are difficult, and consensus among the various interests can be extremely difficult to reach. It is clear that in the end, policy decisions must be justified in a way that not only makes sense to the stakeholders and members of the community, but also reflects the values and priorities of that community. In order to achieve that goal, those values and priorities must be incorporated in the decision making process, instead of rationalized after the decisions have already been made. The model described and recommended in this paper will help policymakers and community members ensure that their VTC's implementing rules accurately represent their values and priorities, and are consistent with the program's popular justifications.

## **CONCLUSION**

With the rapid spread of VTCs across the country, and the continued development of supporting initiatives and infrastructure, it is clear that these courts are here to stay. If these courts are to live up to their potential, their policies must reflect the needs of those they are intended to serve. By tying eligibility requirements to purpose, understanding PTSD-related offenses, and clearly identifying a jurisdiction's motivating justifications for establishing a VTC, policymakers can ensure these courts meet the needs of Veterans and uphold the values of our communities.

## **APPENDIX A:**

| <b>VTC Justification and Policy Matrix</b> |   |  |   |
|--|---|--|---|
|  | <b>Pragmatic</b>  | <b>Future Harm Mitigation</b>  | <b>Moral</b>  |
| <b>Offense</b>                             | Not as concerned about type of crime unless linked to a condition that can't be treated.  | Is it so serious that we're concerned about ability to rehabilitate/treat? Is there a kind of harm to the community if not incarcerated? Is the offense so bad that the chance of a repeat offense is too harmful to risk? | Service-related; less concerned about severity of offense if more connected to service.   |
| <b>Military Experience</b>                 | Discharge status relevant for access to VA resources; combat experience not particularly relevant.  | Discharge status relevant for access to treatment; combat experience not as relevant.  | Combat experience requirement for combat-specific moral justification, or military service more generally sufficient; discharge status likely relevant-only honorable service deserving? Possible case-by-case to determine if other than honorable discharge connected to mental health problems from service. |
| <b>Medical Condition</b>                   | Mainly focused with treatability of condition; mental health diagnosis important; not necessarily important to tie in with military service or combat experience. | Concern with treatability, not as concerned with service-relation; how likely to result in more criminal activity without treatment?   | Service-related; causal connection to offense likely relevant.  |