



# THE VETERANS RESTORATIVE JUSTICE ACT<sup>1</sup>

HELPING BRING MINNESOTA'S JUSTICE-INVOLVED VETERANS THE REST OF THE WAY HOME



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<sup>1</sup> Minnesota Statute Section 609.1056 - MILITARY VETERANS; CRIMES COMMITTED BECAUSE OF CONDITIONS RESULTING FROM SERVICE; DISCHARGE AND DISMISSAL

## I. Introduction

For as long as veterans have returned from war, most have come back stronger and wiser from their experience – immediate assets to their communities. Some, though, have always brought their war home with them, bearing invisible wounds that, today, we call post-traumatic stress. Untreated, these echoes of war – manifesting in self-destructive, reckless and violent behavior – reverberate through society, destroying not only the lives of these troubled heroes, but victimizing their families and the communities they fought to protect. In this way, large numbers of veterans in past generations have fallen into and been left behind in the criminal justice system upon their return home.

### A. A New Generation: Crisis and Opportunity

A new generation of veterans is now returning home and here is good reason to believe more of them will bring their war home with them than ever before, creating the risk of an unprecedented public health and public safety crisis. Unlike previous generations, this one is relatively small, yet it has fought the longest wars in our country's history – simultaneously. Without the draft we have relied on in past wars, the burden of the fighting has fallen on fewer shoulders, with many veterans of this generation serving multiple combat tours – translating into higher rates of post-traumatic stress injuries than previous generations. This generation of returning veterans is also the most lethal in our history. Having honed their modern combat training while fighting fanatical enemies over multiple tours, they pose a unique public safety risk if their trauma goes untreated and they are not properly reintegrated into their communities.

This is also a generation of veterans who, with their immense life experiences and leadership abilities, offer an unprecedented opportunity to be invaluable assets to their communities at a time when our society desperately needs them. These veterans volunteered to risk their lives on our behalf; were indoctrinated into a culture of professionalism, integrity and selfless service; and were given responsibility for national security, human lives, and millions of dollars' worth of equipment at a young age. When

properly reintegrated, veterans are invaluable assets to employers, families, and communities.

The rise and growth of veterans treatment courts (VTCs) and veteran sentencing statutes across the country has been a welcome response to this crisis and they hold the promise to help seize this opportunity for reintegration. Unfortunately, VTCs are still relatively few in number, and they lack consistent protocols and practices, leading to disparate outcomes and many missed opportunities to bring justice-involved veterans the rest of the way home.

## **B. The Process Leading to the Veterans Restorative Justice Act**

The process that led to the Veterans Restorative Justice Act (VRJA) began in 2017, over concerns about growing disparities among Minnesota's VTCs, along with the fact that the majority of Minnesota jurisdictions still lacked any special protocol for veterans. We became aware of dwindling numbers of veterans in several of Minnesota's VTCs, and concerns among staff that their courts would run out of participating veterans and be forced to shut down. Those disparities also led the Minnesota State Public Defenders to pull all their attorneys out of the VTCs, statewide, in 2017, further threatening their viability. This downward trend was particularly concerning, as we were simultaneously witnessing an accelerating flow of veterans into Minnesota's criminal justice system – fueled by the ongoing wars in Iraq, Afghanistan, and elsewhere.

The working group that collaborated to draft the VRJA was convened by Court of Appeals Judge Renee Worke, who had hosted the working group that created Minnesota's first Veterans Treatment Court, in Hennepin County, a decade before. As before, this new working group met monthly at the Judicial Center and ultimately included:

- Judge Renee Worke (Court of Appeals)
- Judge Judith Tilsen (Ramsey County Veterans Court)
- Judge Jenny Walker Jasper (Anoka County Veterans Court)
- Mike Freeman (Hennepin County Attorney)
- David Brown (then-Chief Deputy Hennepin County Attorney)
- John Choi (Ramsey County Attorney)
- Pete Orput (Washington County Attorney)
- Bill Ward (State Public Defender)

- Evan Tsai (Ramsey County Veterans Court Public Defender)
- David Holewinski (U.S. Department of Veterans Affairs)
- Ben Johnson (Minnesota Department of Veterans Affairs)
- Brock Hunter, Ryan Else, John Kingrey and Donn Lindstrom (Veterans Defense Project)

Over the next 18 months, our working group reviewed various Veterans Court protocols from across Minnesota and the rest of the country. Our focus gravitated towards two key issues: the range of offenses that were eligible for consideration and the legal incentives extended to veterans for their participation. We concluded that even some serious and violent offenses should be included for consideration because the veterans committing them are those most in need of intervention and, without it, pose the greatest threat to public safety. We also concluded that a significant legal incentive – a pre-adjudication model – is key to attracting veterans to participate, motivating them to complete difficult treatment, and to set them up to succeed after graduation. A pre-adjudication model would also be necessary to sway the State Public Defenders into returning their attorneys to staffing VTCs, statewide. Finally, we concluded that legislation would be the most effective way to establish a consistent set of criteria for eligibility and incentives across Minnesota’s existing VTCs, as well as to provide a veteran protocol template that jurisdictions without VTCs could immediately follow to begin intervening with Veterans, as they work to establish formal VTCs.

The working group (except for the judges, who cannot directly participate in bill drafting) collaborated to draft the language of the VRJA throughout 2018. We also kept the Judicial Branch apprised of our activities and progress, briefing the Treatment Court Initiative that Spring. Once we had the VRJA drafted, members of the working group met three times with Chief Justice Gildea in 2019. We also met with State Court Administrator, Jeff Shorba, and Inter-Governmental Liaison, Janet Marshall, in early 2020.

Over time, we have gained support for the VRJA from a wide range of stakeholders, including the following organizations:

- Minnesota County Attorneys Association (MCAA)
- State Public Defenders
- Minnesota Association of Criminal Defense Lawyers (MACDL)
- Minnesota Social Services Association

- Violence Free Minnesota
- Veterans of Foreign Wars (VFW)
- American Legion
- Disabled American Veterans (DAV)
- Paralyzed Veterans of America
- American Veterans Association (AMVETS)
- Vietnam Veterans of America (VVA)
- Jewish War Veterans of the United States
- Military Order of the Purple Heart
- Marine Corps League

The VRJA constitutes an admittedly different approach from the status quo, but one that is distilled from hard-won lessons, learned on the front lines of VTCs across Minnesota and the rest of the country over the past decade. In offering veterans charged with a wide range of offenses a path to avoid a criminal conviction, criminal charges become invaluable intervention opportunities.

### **C. Mechanics of the VRJA**

The VRJA effectively addresses four critical issues identified in our survey of the Nation's VTCs: 1) eligibility criteria for admission to VTCs; 2) who is the ultimate decision-maker regarding that eligibility; 3) procedures for ensuring the veteran has benefited sufficiently from the rehabilitative programming ordered by the Court; and, most importantly; 4) what legal benefit are veterans afforded if they volunteer for and successfully graduate from a VTC. A copy of Minn. Stat. 609.1056 is provided as part of the training materials to cross-reference for each step of these procedures.

#### **1) Eligibility Criteria: Eligible Veterans and Eligible Offenses**

To be eligible under the VRJA, a veteran must demonstrate a clear and convincing nexus between their military service and their criminal offense. When the veteran asks to be sentenced under the VRJA, they must release the records of their service and/or a professional evaluation supporting the nexus between their service and the offense under Subd. 2(b). Using this record, the Court determines if the veteran is eligible. Subdivision 2(c) states,

(c) Based on the record, the court shall determine, by clear and convincing evidence, whether the defendant suffers from an applicable condition, whether that condition stems from service in the United States military, and whether the offense was committed as a result of the applicable condition. Within 15 days of the court's findings, either party may file a challenge to the findings and demand a hearing on the defendant's eligibility under this section.

An “applicable condition” is defined under Subd. 1(1) as “sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or a mental health condition.” The nexus requirement is intentionally broad, and does not explicitly require combat exposure, recognizing that military service can negatively impact veterans in a variety of ways, including military sexual trauma, training accidents, and exposure to the horrors of war away from the front lines (i.e. medical personnel caring for the injured, and mortuary personnel cared for the dead).

In addition to demonstrating a nexus, to be presumptively eligible under the VRJA, the veteran’s criminal offense must be of severity level 7 or below to receive a stay of adjudication per Subdivision 1(2). Though very serious crimes of violence, such as murder and criminal sexual conduct are excluded, the VRJA does include range of violent offenses, including some felony assaults, recognizing that veterans committing these offenses are often most in need of therapeutic intervention and, without it, pose the greatest long-term threat to public safety.

The VRJA also allows for consideration of more limited relief even for charges involving a presumptive prison sentence. Offenses that are severity level 8 and higher are eligible for discretionary durational or dispositional departures. Subdivision 4(b) provides for that procedure,

(b) Prior to sentencing, a defendant described in paragraph (a) may present proof to the court that the defendant has, since the commission of the offense, engaged in rehabilitative efforts consistent with those described in this section. If the court determines that the defendant has engaged in substantial rehabilitative efforts and the defendant establishes by clear and convincing evidence that:

- (1) the defendant suffered from an applicable condition at the time of the offense;
- (2) the applicable condition was caused by service in the United States military; and

(3) the offense was committed as a result of the applicable condition; the court may determine that the defendant is particularly amenable to probation and order a mitigated durational or dispositional sentencing departure or a waiver of any statutory mandatory minimum sentence applicable to the defendant.

It is worth noting that under this procedure, the veteran and their counsel are responsible for the treatment programming rather than by court order. It may be worthwhile for judges to indicate to these defendants what programming the court would find clear and convincing evidence of rehabilitation.

Subdivision 7 completely excludes from relief under the VRJA any offense for which predatory offender registration is required.

## **2) Judge as the Decision Maker**

The VRJA gives the judge, rather than the prosecutor, the responsibility for determining eligibility. This approach provides more continuity and political insulation in the decision-making process. The prosecutor still has a voice and can contest eligibility in a public hearing, and at the end of the probation period can again object to the veteran receiving the benefit of the VRJA if they believe the veteran has not held up their end of the bargain or continues to pose a threat to public safety, but the judge is the final decision maker on both counts. Putting this decision-making power into the hands of the judge better insulates the prosecutor – and the process – from public pressure. On a more philosophical level, moving this traditional prosecutorial authority to the judicial branch recognizes the unique responsibility of the government – in sending its citizens to war – to ensure that the predictable side effects of war on those who served are effectively addressed, independent of shifting public sentiments.

In addition to the Court's decision on eligibility discussed above, there are multiple points at which the Court will make determinations critical to what, if any, legal benefit the veteran will receive for their participation in the programming:

- Subdivision 2(g-i): the court will determine what probationary treatment will be ordered for the veteran to complete;

- Subdivision 2(j): the court will determine if the veteran should be supervised by a veterans treatment court in their county of offense, residency, or employment;
- Subdivision 2(f): upon probation violation, the court will determine if adjudication will be entered and, if so, what the appropriate sentence is; and
- Subdivision 3 provides for an end of supervision hearing at which point the court will determine if the veteran has earned the full benefit of dismissal. This process is sufficiently new to Minnesota law that it is worthy of its own discussion below.

### **3) End of Supervision Hearing: Determining if the Veteran is Rehabilitated**

The legal benefit of a “shall” stay of adjudication for offenses up to and including severity level 7 offenses is so great that the drafters of the VRJA agreed there had to be some assurance that the veteran was truly rehabilitated and that the harm of their offense was at least part of the consideration in whether the charges would be dismissed. This guards against the veteran that does not fully commit to treatment and simply checks the boxes of probationary treatment without investing sufficiently to actually gain the benefit of the treatment. It also motivates the veteran to prove to the court that the positive changes are sincere and permanent, so the veteran is no longer a public safety risk. This allows the court to use this end of supervision procedure as leverage to gain enthusiastic compliance with probationary treatment and other rehabilitative efforts throughout supervision by reminding the veteran the dismissal is only available with proven rehabilitation. Finally, it gives a voice to the victim and the state to highlight the harm caused by the offense.

The end of supervision hearing is governed by Subd. 3 of the VRJA. Subdivision 3(a) requires the hearing be held such that the parties can make oral and/or written arguments similar to traditional sentencing practices. Subdivision 3(b) provides for a victim’s right to notice of the hearing and the right to object to the dismissal.

Subdivisions 3(c and d) provide the court with factors in determining if discharge and dismissal is in the interests of justice. Subdivision 3(c) places the burden on the veteran to show by clear and convincing evidence that they (1) complied with conditions of probation, (2) the veteran successfully completed court-ordered treatment, (3) the



veteran does not pose a danger, and (4) the veteran has significantly benefited from the program. Subdivision 3(d) then provides the court with eight factors to weigh in a balancing test to determine if discharge and dismissal is in the interests of justice:

- completion and degree of participation in education, treatment, and rehabilitation;
- the veteran’s progress in formal education;
- the veteran’s development of career potential;
- the veteran’s leadership and personal responsibility efforts;
- the veteran’s contribution of service in support of the community;
- the level of harm to the community from the offense;
- the level of harm to the victim from the offense; and
- the statement of the victim, if any.

Subdivision 3(e) then allows the court to adjudicate guilt and proceed to traditional sentencing if the veteran has not met this clear and convincing evidence threshold. If the veteran has met that burden, Subd. 3(f) directs that the court shall discharge and dismiss the charges with the same process used under the familiar stay of adjudication under Minn. Stat. 152.18 commonly used in drug offenses. This leads to a discussion of why this legal benefit is necessary and appropriate in veterans’ cases.

#### **4) Legal Benefit – the “Disposition Issue”**

The most significant concern addressed by the VRJA is what we call the “disposition issue”: What legal benefit is a veteran offered in exchange for waiving their constitutional right to a trial, submitting to more intensive supervision, and confronting their demons in challenging treatment programs? The VRJA provides eligible veterans with the opportunity to avoid a criminal conviction, recognizing that this path to redemption vastly increases the odds that a veterans will voluntarily submit to the increased demands of a VTC, will complete the required treatment programming, and will successfully reintegrate into their community.

This powerful legal incentive helps overcome many of the barriers that otherwise prevent veterans from participating in VTCs and from reintegrating back into their communities. Many veterans, emerging from the military’s warrior culture, are in denial

of their invisible injuries and resistant to outside help. Many are reluctant to participate in modern trauma therapies, which require them to confront their demons. Many are angry at the government and society that sent them to war and then, from their perspective, left them behind. Finally, many, having been charged with a criminal offense, feel they have lost their honor, see no way to redeem themselves, and give up hope of ever rejoining the fold.

In offering justice-involved veterans a path to avoid a criminal conviction, a criminal charge becomes an invaluable intervention opportunity. It powerfully incentivizes veterans to take responsibility for their actions, to complete challenging treatment programs, to bridge the divide they feel between themselves and society, and to restore their honor and, once again, become an asset to their communities. In doing so, it also best protects public safety in the short and long term.

## **II. Historical Perspective of Combat Trauma and Criminal Behavior**

In order to fully understand the challenges we face in reintegrating this most heavily deployed generation of veterans in our nation's history, it is critical to understand the broader historical context - a pattern of traumatized veterans through the ages bringing their war home with them and acting out against the communities they fought to protect. The following section explores that history and efforts by past societies to reintegrate their troubled returning heroes. For a more detailed exploration, see our book *Defending Veterans in Criminal Court*.<sup>2</sup>

### **A. Vietnam and its Aftermath**

Unfortunately, veterans of past conflicts were often treated quite harshly when their psychological injuries led them into criminal behavior. This was particularly true in the wake of Vietnam, our last major conflict, when hundreds of thousands of psychologically injured veterans returned home to a largely hostile American public who

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<sup>2</sup> THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT (Brockton Hunter & Ryan Else, eds., 2014). To learn more about the *Defending Veterans* book or to obtain a copy, visit the Veterans Defense Project web site at [www.veteransdefenseproject.org](http://www.veteransdefenseproject.org).

had come to blame them for an unpopular war. These veterans were often stigmatized and literally discarded when their psychological injuries led to criminal behavior. Even now, more than 40 years after that war, hundreds of thousands of Vietnam veterans remain incarcerated, homeless, and/or chemically addicted across America.

The psychiatric community and, more importantly, the Veterans Administration did not formally recognize PTSD, until 1980, too late for many psychologically injured Vietnam Veterans. Their lives and their trust in the system were often shattered by that time and many refused treatment when and if it was eventually offered. Ultimately, 31 percent of male Vietnam veterans and 27 percent of female Vietnam veterans have had PTSD in their lifetime.<sup>3</sup>

Our society has paid a staggering price for our abandonment of the Vietnam generation. The side effects of their untreated trauma have cost us in many unforeseen ways. Countless families have been destroyed, jobs lost, and taxpayer dollars spent on treatment that came too late to make a difference for many. This is particularly tragic in the criminal justice context where early criminal charges could have been used as the opportunity for intervention before more serious offenses or destruction occurred, using probationary sentences to ensure compliance with treatment.

The term “Post-Traumatic Stress Disorder” was first coined and formally recognized in the context of treating traumatized Vietnam veterans. This relatively recent formal recognition of the condition has led some to believe Vietnam was the first war to produce psychological casualties. In fact, PTSD has been a constant side effect of war for as long as soldiers have been sent into combat.

## **B. Combat Trauma, From the Greek Classics, to Modern Literature, and Cinema**

Some of the first known chronicles of the psychological costs of war are found in Greek literary classics. Written approximately 3,000 years ago, Homer’s Iliad and Odyssey richly detail the effects of war on soldiers’ psyches and souls. Two modern books, *Achilles in Vietnam* and *Odysseus in America*, by Dr. Jonathan Shay, M.D., draw

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<sup>3</sup> National Center for Post-Traumatic Stress Disorder and The U.S. Department of Veterans Affairs.

insightful parallels between the trauma suffered by Homers' characters and that of modern-day combat veterans.<sup>4</sup>

The Iliad tells the story of the great warrior, Achilles, and his psychological unraveling during the Trojan War. Dr. Shay notes that Achilles' profound grief over the loss of a close comrade, his subsequent "berserker" rage as he mutilates the bodies of his enemies, and his eventual self-destructive unraveling closely parallel the experiences of many of his Vietnam veteran patients.

The Odyssey picks up at the end of the Trojan War and follows the often-criminal adventures of another traumatized Trojan War Veteran, Odysseus (aka "Ulysses") as he makes his way home to Greece. Along the way, notes Dr. Shay, Odysseus and his men raid and then drunkenly pillage the city of Ismarus, battle drug addiction in "Lotus Land," and rob the Cyclops, among other misadventures. Once he reaches home, Odysseus commits a massive act of domestic violence, slaying dozens of suitors who had been courting his wife during his absence and then killing his wife's maidservants.

The primary conclusion of Dr. Shay's scholarship is that, despite the profound changes in warfare brought on by technology, war's effects on the individual soldier, in facing death, taking life and losing comrades, have changed little over the millennia. Dr. Shay' insights have won praise from both military and academic circles. He now regularly lectures at the Navy War College and before other military leaders. He is also the author of Chapter 1 in the Attorney's Guide to Defending Veterans in Criminal Court, directly connecting combat trauma and criminal misconduct.

Like Homer's Odyssey, twentieth century literature and cinema have also explored the connection between combat trauma and criminal behavior. After World War I, novels and plays such as *What Price Glory?*, *They Put a Gun in My Hand*, *All Quiet on the Western Front*, and *The Road Back* described this link. Vietnam-related literature and cinema, such as *Taxi Driver*, *The Deer Hunter*, *Apocalypse Now*, *Full Metal Jacket*, *First Blood*, *Platoon*, and *Born on the 4<sup>th</sup> of July* have done the same. *The Hurt Locker*,

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<sup>4</sup> See JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* (1994); JONATHAN SHAY, *ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING* (2002).

Harsh Times, and Restrepo are modern films that depict combat trauma and adjustment disorders head-on in very stark, gritty terms.

### C. PTSD's Many Names

The affliction we now call PTSD has gone by many names over the centuries. The cluster of symptoms was first medically diagnosed in Europe. It was referred to as “nostalgia” among Swiss soldiers in 1678. German doctors during that period called the condition Heimweh, while the French called it *maladie du pays*—both meant “homesickness.” The Spanish called it *estar roto*, meaning “to be broken.”<sup>5</sup>

Civil War-era Americans gave PTSD poetic names like “soldier’s heart” and “irritable heart.” Out of the horrors of World War I, came “shell shock.” World War II and Korea ushered in the more clinical term, “combat fatigue.”<sup>6</sup>

World War II correspondent and artist, Tom Lea, first coined the term “thousand yard stare” with his painting that was actually entitled “that 2,000 yard stare,” depicting a shell-shocked Marine during fighting on Peleliu in the South Pacific. The term has become part of our cultural lexicon and is often used synonymously with PTSD:<sup>7</sup>



Many veterans have taken issue with the term, Post-Traumatic Stress Disorder. One modern veteran is quoted as saying “PTSD is a name drained of both poetry and blame.”<sup>8</sup> That veteran prefers “soldier’s heart,” because it connotes “a disorder of

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<sup>5</sup> EDWARD TICK, *WAR AND THE SOUL: HEALING OUR NATION’S VETERANS FROM POST-TRAUMATIC STRESS DISORDER* 99 (2005).

<sup>6</sup> *Id.*

<sup>7</sup> Tom Lea, *That 2,000 Yard Stare*, Oil on Canvas, U.S. Army Center for Military History, Washington, D.C. (1944).

<sup>8</sup> Tick, *supra* note 5, at 99 (quoting George Hill, a disabled Marine).

warriors, not men and women who were weak or cowardly but . . . who followed orders and who, at a young age, put their feelings aside and performed unimaginable tasks.”<sup>9</sup>

#### D. Psychiatric Casualties in 20<sup>th</sup> Century Wars

According to Lieutenant Colonel David Grossman, a West Point professor and recognized expert on the psychological effects of combat, “[c]ombat, and the killing that lies at the heart of combat, is an extraordinarily traumatic and psychologically costly endeavor that profoundly impacts all who participate in it. . . . Psychiatric breakdown remains one of the most costly items of war when expressed in human terms.<sup>10</sup> Indeed, for the combatants in every major war fought in this century, there has been a greater probability of becoming a psychiatric casualty than of being killed by enemy fire.<sup>11</sup>

World War I was a watershed period when the effects of “combat stresses” began to be recognized.<sup>12</sup> It was only in World War I that armies first began to experience months of 24-hour combat, leading to vast numbers of psychiatric casualties.<sup>13</sup>

During World War II, 504,000 men were lost from America’s combat forces due to psychiatric collapse—enough to man 50 divisions.<sup>14</sup> At one point in World War II, psychiatric casualties were being discharged from the U.S. Army faster than new recruits were being drafted in.<sup>15</sup> A World War II study of U.S. Army combatants who landed on the beaches of Normandy and fought their way into France found that, after 60 days of continuous combat, 98% of the surviving soldiers had become psychiatric casualties.<sup>16</sup>

The Vietnam War, with its unpredictable “guerrilla” nature and lack of public support is believed to have generated even higher rates of psychological injuries. Though

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<sup>9</sup> Id.

<sup>10</sup> DAVE GROSSMAN & BRUCE K. SIDDLE, PSYCHOLOGICAL EFFECTS OF COMBAT (2000).

<sup>11</sup> Id.

<sup>12</sup> DAVID H. MARLOWE, RAND CORP., PSYCHOLOGICAL AND PSYCHOSOCIAL CONSEQUENCES OF COMBAT AND DEPLOYMENT 32 (2001).

<sup>13</sup> GROSSMAN & SIDDLE, *supra* note 10.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

experts debate the numbers, among the 3.5 million Americans who served in Vietnam, estimates of psychiatric casualties range from 1,000,000 to 1,500,000 cases.<sup>17</sup>

Twentieth century democracies have been better than most at admitting and dealing with their combat psychiatric casualties. Information from non-Western sources is extremely limited, but we now know that America's experience is representative of a universal cost of modern, protracted warfare.<sup>18</sup> Nations around the world have experienced similar mass psychiatric casualties, but many have simply driven these casualties into battle at bayonet point, shooting those who refused or were unable to continue.<sup>19</sup>

### **E. PTSD's Stigma**

Though PTSD has been informally recognized for millennia, approaches to dealing with it have varied widely. After battle, many Native American and other tribal societies segregated their warriors from the rest of the tribe, sometimes for weeks, where they were physically cleansed of the blood from battle, and spiritually cleansed of their traumatic experiences. Some of the rituals were intended to transfer to the stain of "bloodguilt" from the warrior to his people as a whole. This shared responsibility was believed to lift the spiritual weight of combat from the shoulders of the warrior and to ease his transition back into peace. Only when the warrior was ready to reunite with the tribe, and the tribe with the warrior, did the reunion occur.<sup>20</sup>

Industrialized nations and their militaries have historically taken a tougher approach with the psychologically injured. Soldiers suffering psychological injuries have often been stigmatized and even punished. During WWII, General George Patton famously struck at least two psychologically injured soldiers he came across in Army hospitals, calling them cowards and malingerers. The press picked up on the story,

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<sup>17</sup> *Id.*

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

<sup>19</sup> *Id.*

<sup>20</sup> GROSSMAN & SIDDLE, *supra* note 10, at 210–16.

causing a swell of anger among the American people and Patton was nearly relieved of his command.<sup>21</sup>

Some psychologically injured troops received the ultimate punishment. The British government recently issued posthumous pardons to 306 of its soldiers from World War I who were executed without trial at the battlefield for cowardice or desertion, recognizing today that they likely suffered from PTSD.<sup>22</sup>

Not only were psychological injured soldiers killed during WWI, they were also tortured. Dr. Lewis Yealland working at a French hospital was taking over treatment of a 24 year old private who had received nine months worth of the following types of treatment for war-related mental illness: “he had been strapped in a chair for 20 minutes at a time while strong electricity was applied to his neck and throat; lighted cigarettes had been applied to the top of this tongue and hot plates had been placed at the back of his mouth.”<sup>23</sup> According to the medical wisdom of the day, such treatment was “necessary to supply the disciplinary element which must be invoked if the patient is one of those who prefer not to recover.”<sup>24</sup> Dr. Yealland apparently believed that the failures of this young private’s treatment were only the result of too little electro-shock therapy. Speaking of his own treatment of the private, he said “after a few more hours of electricity the patient could say ah, then whisper, then stammer. But just when it seemed to be working, the patient developed a tremor in his left arm. This too was attacked by electricity, but before it disappeared it had to be chased from the right arm, left leg, and finally the right leg with each part similarly treated.”<sup>25</sup>

In the aftermath of WWII, the United States’ VA was guilty of similar treatment of our veterans. The VA had 102,000 hospital beds full and 20,700 patients in waiting, 60 percent of which were in need of psychiatric care.<sup>26</sup> Maintaining these patients could

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<sup>21</sup> Private Wrote Family About Being Cuffed, PORT ARTHUR NEWS, Nov. 24, 1943, at 6; Reprimand for Patton is Denied, FRESNO BEE, Nov. 22, 1943, at 1; Patton Regrets Slapping Soldier, SAN ANTONIO LIGHT, Nov. 23, 1943, at 1; Gen. Patton Slap Haunts Former GI, CHARLESTON DAILY MAIL, Mar. 25, 1970, at 12; GI Slapped by Gen. Patton in Sicily Is Dead, CEDAR RAPIDS GAZETTE, Feb. 2, 1971, at 7.

<sup>22</sup> Richard Norton-Taylor, Executed WWI Soldiers to be Given Pardons, GUARDIAN, Aug. 16, 2006, at 1.

<sup>23</sup> BEN SHEPARD, A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY 77 (2001).

<sup>24</sup> Id. at 76–77.

<sup>25</sup> Id. at 78 (emphasis added).

<sup>26</sup> PENNY COLEMAN, FLASHBACK: POSTTRAUMATIC STRESS DISORDER, SUICIDE, AND THE LESSONS OF WAR 54 (2006).



cost as much as \$35,000 per year, but George Washington University professor Walter Freeman created the ice pick lobotomy to be able to treat certain psychoses.<sup>27</sup> Doctors would use “a hammer to tap a modified ice pick through the patient’s eye socket and into the prefrontal lobe, which was then severed from the rest of the brain.”<sup>28</sup>

World War II’s most decorated soldier, Audie Murphy, is credited with forcing the United States government to study PTSD and extend benefits to psychologically injured Veterans. Audie returned home an American Hero and went on to become a major Hollywood movie star. He also secretly suffered severe PTSD. He became a chronic alcoholic and prescription drug addict who later admitted he slept with a loaded gun under his pillow every night after the war. His wife reported many incidents of domestic violence including an instance in which he held a gun to her head. Audie eventually sought help for his condition and then broke the taboo against publicly discussing war-related psychological injuries.

Today, the military is making strides in removing the stigma of PTSD among its ranks. Troops heading into combat are educated about PTSD and encouraged to seek help if they need it. The military also now deploys “combat stress officers,” basically battlefield psychologists, to the front lines to screen and treat troops as they come out of battle.

Though the military is making progress in removing the stigma, it still has a long way to go. The military is under unprecedented strain as it struggles to meet the demands of two extended conflicts. Military leaders are often caught between a rock and a hard place. Though they are now trained to recognize and encourage treatment of mental health disorders, they are also under pressure to field combat-effective units. Sometimes they relegate mental health treatment to a secondary priority. A series of 2007 media reports found systemic failures in mental health treatment of psychologically injured troops at Ft. Carson, Colorado.<sup>29</sup> The reports found a pattern by leadership of denying their troops’ requests for treatment, stigmatizing those who were getting help

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<sup>27</sup> Id. at 54–55.

<sup>28</sup> Id. at 54.

<sup>29</sup> Daniel Zwerdling, Gaps in Mental Care Persist for Fort Carson Soldiers, NAT’L PUB. RADIO, May 24, 2007.

and even kicking some out of the military. The reports spurred investigations by Congress and the Department of Defense, which confirmed remaining flaws in the military mental health system.<sup>30</sup>

The very culture of the military is also an issue. Military culture, by necessity, puts great value on strength, both physical and mental. Soldiers sent into combat face the most horrific experiences imaginable. Only the strong survive. Over the centuries, military training has become ever more sophisticated in conditioning troops to operate effectively and complete their missions, even when faced with imminent death. A soldier's reputation within a combat unit is largely based on how "cool" they are under fire.

This "warrior" mindset becomes deeply ingrained and many psychologically injured warriors deny they have a problem, even to themselves. The RAND Corporation study, cited above, found that, of the one third of Iraq and Afghan vets who admitted PTSD or TBI-related issues, less than half had sought help. According to RAND, those Veterans who declined help did so out of fear that they would lose the respect of their comrades, jeopardize their security clearance, or harm their chances of promotion.<sup>31</sup> Many veterans carry this value system with them even after they leave the military and come home.

## **F. Today's Military Under Unprecedented Strain**

Over twenty years of war in Iraq and Afghanistan, our military has been under enormous strain. Unlike any other extended conflict in American history, we have not resorted to a draft to ensure a large pool of combatants. Instead, we are fighting this conflict with a relatively small volunteer military force that we are recycling back into combat over and over. Most active-duty troops have now served at least two tours. Many, especially our ground combat troops, have served more. Some are now on their sixth, seventh, eighth, even ninth combat tours. Our National Guard and Reserves have also been tapped to an unprecedented level with some now deploying for their second

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<sup>30</sup> Daniel Zwerdling, Pentagon Report Cites Mental Health Concerns, NAT'L PUB. RADIO, June 15, 2007.

<sup>31</sup> INVISIBLE WOUNDS OF WAR, *supra* note 35.

and even third tours. Compare this with Vietnam, in which the vast majority of draftees served only one 12-month tour.

We have no modern precedent with which to compare our current situation. As of 2012, more than 2.6 million Americans had served in Iraq or Afghanistan.<sup>32</sup> A U.S. government study, released that year estimated that up to 20%, approximately 500,000 of these Veterans are suffering from Post-Traumatic Stress Disorder.<sup>33</sup> The same study also noted, however, that the true numbers are likely higher.<sup>34</sup> A 2008 RAND Corporation study found that 320,000 veterans are suffering from Traumatic Brain Injury (“TBI”).<sup>35</sup> Both reports concluded that less than half of these PTSD or TBI-suffering Veterans had previously reported or sought help for their condition.<sup>36</sup>

One thing is certain: the levels of combat trauma in our armed forces will continue to rise. A recent Army study found that, not surprisingly, the incidence of PTSD among troops rises significantly with each additional combat tour.<sup>37</sup> This will inevitably lead to more veterans in the criminal justice system,

...PTSD is commonly associated with substance abuse, unregulated anger, aggressive behavior, and hazardous use of alcohol, all of which are themselves associated with legal problems and incarceration.<sup>38</sup>

In a 2008 press conference, General George Casey, then-Army Chief of Staff stated, "People aren't designed to be exposed to the horrors of combat repeatedly. And

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<sup>32</sup> INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, TREATMENT FOR POSTTRAUMATIC STRESS DISORDER IN MILITARY AND VETERAN POPULATIONS: INITIAL ASSESSMENT 39 (2012).

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

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

<sup>35</sup> TERRI TANELIAN ET AL., RAND CORP., INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES 64 (2008) [hereinafter INVISIBLE WOUNDS OF WAR].

<sup>36</sup> *Id.*, *Supra* note 2.

<sup>37</sup> OFFICE OF THE SURGEON MULTI-NATIONAL FORCE-IRAQ, OFFICE OF THE COMMAND SURGEON, & OFFICE OF THE SURGEON GEN. U.S. ARMY MED. COMMAND, MENTAL HEALTH ADVISORY TEAM (MHAT) V, OPERATION IRAQI FREEDOM 06-08: IRAQ, OPERATION ENDURING FREEDOM 8: AFGHANISTAN (2008), [http://www.armymedicine.army.mil/reports/mhat/mhat\\_v/MHAT\\_V\\_OIFandOEF-Redacted.pdf](http://www.armymedicine.army.mil/reports/mhat/mhat_v/MHAT_V_OIFandOEF-Redacted.pdf) [hereinafter Mental Health Advisory Team (MHAT) V].

<sup>38</sup> INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, TREATMENT FOR POSTTRAUMATIC STRESS DISORDER IN MILITARY AND VETERAN POPULATIONS: INITIAL ASSESSMENT, 322 (2012).

it wears on them."<sup>39</sup> General Casey was announcing the results of a recent Army study, which found that levels of PTSD climb significantly with repeated combat deployments.<sup>40</sup>

Some believe that because "only" 7,000 American troops have been killed in these conflicts, as opposed to the 58,000 killed in Vietnam, the current conflicts must be less violent. In fact, the lower number of deaths is primarily attributable to today's high-tech body and vehicle armor and modern battlefield medicine techniques that have prevented deaths from injuries that would have killed troops in past wars. The wars in Iraq and Afghanistan have been incredibly violent, especially the up-close urban combat in Iraq.

Evidence indicates that combat operations in Iraq are very intense. According to a 2004 study conducted by the Walter Reed Army Institute of Research, which surveyed combat infantrymen just back from Iraq:

- 94% reported receiving small-arms fire;
- 86% reported knowing someone who was injured or killed;
- 68% reported seeing dead or seriously injured Americans;
- 51% reported handling or uncovering human remains;
- 77% reported shooting or directing fire at the enemy;
- 48% reported being responsible for the death of enemy combatants;
- 28% reported being responsible for the death of a noncombatant.<sup>41</sup>

Note that the above study was conducted in 2004, early in the war and the troops surveyed in that study had only completed one combat tour. Many of those same troops have now likely served two, three, four or more tours and the statistics cited above would certainly be much higher today.

Unfortunately, the Veterans' Administration (VA) was not initially provided sufficient additional funding to handle the large influx of Iraq and Afghan vets seeking PTSD treatment. Several highly publicized scandals, one of which involved a Minnesota Marine who killed himself after reportedly being turned away from a VA hospital, have

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<sup>39</sup>Greg Zoroya, Findings of Army Health Study, Fifth of Soldiers at PTSD Risk, USA TODAY, Mar. 6, 2008, [http://www.usatoday.com/news/world/iraq/2008-03-06-soldier-stress\\_N.htm?csp=34](http://www.usatoday.com/news/world/iraq/2008-03-06-soldier-stress_N.htm?csp=34).

<sup>40</sup> Id. (citing Mental Health Advisory Team (MHAT) V, *supra* note 37).

<sup>41</sup> Charles W. Hoge et al., Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care, 351 NEW ENG. J. MED. 13, 18 (2004).

forced the government to significantly increase resources toward necessary psychological care.<sup>42</sup> Today, care for our psychologically injured veterans is improving.

### III. Links Between Combat Trauma and Criminal Behavior

#### A. Historic Post-War Spikes in Veteran-Committed Crimes

Historical research reveals a pattern of Veteran-committed crime waves following every major conflict. Though scientific studies have only recently been conducted on this issue, a look back at history through this lens clearly reveals this pattern.

Following the American Revolutionary War, one author noted a marked increase in crime that caused many states to institute new laws and penalties in response.<sup>43</sup> A Revolutionary War veteran, describing conditions in South Carolina after the war, wrote, “highway robbery was a common occurrence, and horse-stealing so frequent that the Legislature made it a crime punishable with death.”<sup>44</sup>

Studies conducted after the Civil War, World War I and World War II found a disproportionate number of veterans in the criminal justice system. Following the Civil War a great wave in crime and disorder was documented.<sup>45</sup> One prison in Pennsylvania reported a large influx of prisoners in the last three months of 1865, “most in poor physical condition, and nine-tenths incapacitated and demoralized by the war.”<sup>46</sup> In 1866 they reported an unprecedented influx, three-fourths of whom had fought in the war and were “shattered” by their experiences.<sup>47</sup> Nationwide, in 1866 two-thirds of all

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<sup>42</sup> Kevin Giles, *This Marine’s Death Came After He Served in Iraq: When Jonathan Schulze Came Home From Iraq, He Tried to Live a Normal Life, But the War Kept That From Happening*, MINNEAPOLIS STAR TRIB., Jan. 26, 2007; Charles M. Sennott, *Told to Wait, A Marine Dies: VA Care in Spotlight after Iraq War Veteran’s Suicide*, BOSTON GLOBE, Feb. 11, 2007; Dan Ephron & Sarah Childress, *How the U.S. Is Failing Its War Veterans*, NEWSWEEK, Mar. 5, 2007.

<sup>43</sup> ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789* 454 (1924).

<sup>44</sup> *Id.* (citing JOSEPH JOHNSON, *TRADITIONS AND REMINISCENCES* 400 (1851)).

<sup>45</sup> Edith Abbott, *Crime and the War*, 9 J. AM. INST. CRIM. L & CRIMINOLOGY 41 (1918).

<sup>46</sup> *Id.* at 43.

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

commitments to state prisons in northern states were men who had seen service in the war.<sup>48</sup>

Many Civil War veterans also headed west after the war. In fact, they are largely responsible for putting the “wild” in the “wild west.” Jesse James and his brother Frank, for instance, served in a Confederate guerilla unit similar to today’s special operations forces. When the war ended, they and other members of their unit formed the James Gang and headed west, plying their war-honed skills in robbing trains, stagecoaches and banks.<sup>49</sup>

A similar pattern of veteran-committed crimes was noted in Europe following WWI. In 1920, one English writer observed:

The war has destroyed with a hand more desolating than the Black Death or the most terrible plagues of history. But its consequences do not end with destruction. The people who have taken serious part in it are not the same people as those who went into it. . . . They are changed peoples. They have passed through an experience which has altered habits, temper, outlook, in five years, more than fifty years of ordinary life would have altered them. Some of the consequences of that experience are obviously bad. The epidemic of crimes of violence is the natural sequel of war, for men learn in that school to think little of life. The same increase of crime of this kind followed the Napoleonic Wars both here and in France.<sup>50</sup>

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<sup>48</sup> E.C. Wines & Theodore Dwight, *The Reformation of Prison Discipline*, 105 N. AM. REV., 580–81 (1867), available at [http://books.google.com/books?id=Kn8FAAAAQAAJ&pg=PP7&lpg=PP7&dq=Ticknor+and+Fields,+The+North+American+Review,+Boston,+Vol.+CV,+1867&source=bl&ots=5JWYeUkEQ4&sig=01A0d6Lbo61dQYVxwFXhEvCXwYc&hl=en&sa=X&ei=\\_OSDT-S8Boqk8AST6PjsBw&ved=0CEIQ6AEwBQ#v=onepage&q=Ticknor%20and%20Fields%2C%20The%20North%20American%20Review%2C%20Boston%2C%20Vol.%20CV%2C%201867&f=false](http://books.google.com/books?id=Kn8FAAAAQAAJ&pg=PP7&lpg=PP7&dq=Ticknor+and+Fields,+The+North+American+Review,+Boston,+Vol.+CV,+1867&source=bl&ots=5JWYeUkEQ4&sig=01A0d6Lbo61dQYVxwFXhEvCXwYc&hl=en&sa=X&ei=_OSDT-S8Boqk8AST6PjsBw&ved=0CEIQ6AEwBQ#v=onepage&q=Ticknor%20and%20Fields%2C%20The%20North%20American%20Review%2C%20Boston%2C%20Vol.%20CV%2C%201867&f=false).

<sup>49</sup> “Jesse James Was His Name”; William A. Settle

Deseret News; *Visitors Drawn to Jesse James’ Hometown*; Amy Shafer; July 2000:

<http://www.deseretnews.com/article/772331/Visitors-drawn-to-Jesse-James-hometown.html>

PBS: Interview: Guerilla Tactics: <http://www.pbs.org/wgbh/americanexperience/features/interview/james-guerrilla/>

PBS: Biography: Jesse James: <http://www.pbs.org/wgbh/americanexperience/features/biography/james-jesse/>

The State Historical Society of Missouri: *Jesse James (1847-1882)*:

<http://shs.umsystem.edu/famousmissourians/folklegends/james/>

US News; *How the Civil War Shaped Jesse James*; James M. McPherson:

<http://www.usnews.com/news/articles/2007/06/24/how-the-civil-war-shaped-jesse-james>

<sup>50</sup> Edith Abbott, *The Civil War and the Crime Wave of 1865-70*, 1 Soc. SERV. REV. 212 (Jun., 1927) (citing NATION, XXVI, 498 (Jan. 10, 1920)).

In the United States, post-WWI veteran-committed crimes were also a cause for grave concern. The President of the Institute of Criminal Law and Criminology, in his annual address in 1919, stated:

Last year saw the ending of the War. From England to France, and in our own country, statistics have been gathered which show that serious crime, which had been on the decrease during the period of the War was again stalking in the foreground. . . . The newspapers are filled with accounts of crimes of such daring and boldness as to make the average citizen stand aghast at the manner in which the security of life and rights of property are ruthlessly disregarded and imperiled.”<sup>51</sup>

A study entitled *Military Service and Criminality*,<sup>52</sup> published in 1952, a few years after WWII, tallied the number of men committed to 11 prisons in the upper-Midwest during 1947, 1948 and 1949 and found that fully one third of them were veterans. Similarly, a study of Vietnam veterans receiving care for PTSD in the VA system during the mid-1980’s found that almost half of all Vietnam veterans suffering from PTSD had been arrested or in jail at least once, 34.2 percent more than once, and 11.5 percent reported being convicted of a felony.<sup>53</sup>

In the case of the Vietnam generation, involvement in the criminal justice system has lingered for decades. A 1998 Department of Justice study found that more than 20 years after the war, approximately a quarter million veterans, a large portion from the Vietnam era, were still housed in our nation’s prisons.<sup>54</sup>

Those who attempt to deny the link between war trauma and crime often cite this same 1998 Department of Justice study, pointing out that Veterans are imprisoned in smaller percentages than the civilian population. What they overlook, however, is that since WWI, the military has aggressively screened out those it deems psychologically or

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<sup>51</sup> Betty Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. CRIM. L. & CRIMINOLOGY, 730 (1940) (citing Hugo Pam, Annual Address of the President of the Institute of Criminology, 10 J. OF AM. INST. OF CRIM. L. & CRIMINOLOGY 327 (1919)).

<sup>52</sup> Walter A. Lunden, *Military Service and Criminality*, J. CRIM. L., CRIMINOLOGY, & POLICE SCI., 766–73 (1952).

<sup>53</sup> RICHARD KULKA, ET AL., NATIONAL VIETNAM VETERANS READJUSTMENT STUDY, VII-21-1 (1990).

<sup>54</sup> CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON OR JAIL, NCJ 178888 (2000), <http://www.ojp.usdoj.gov/bjs/>.

morally unfit. During the call-up for World War II, for instance, 1,681,000 men were rejected and excluded from the draft for emotional, mental, or educational disorders or deficiencies.<sup>55</sup> Another 500,000 were subsequently separated from the Army during training on psychiatric or behavioral grounds.<sup>56</sup> This recruit screening continued through Vietnam and into our current conflicts. Thus, any direct comparison of incarceration rates between veterans and the civilian population is flawed. Given the military's screening, the fact that veterans are incarcerated at even close to the same rates as the civilian population is alarming and is prima facie evidence that military service, itself, played a role.

The most recent and definitive tie between combat trauma and criminal behavior comes from the military, itself. In 2009, following a highly publicized wave of homicides and other violent crimes committed by recently returning combat soldiers on and around Fort Carson, Colorado, the Army commissioned a study called the Epidemiological Consultation, or EPICON, for short.<sup>57</sup>

Epidemiology is the branch of medicine that seeks to study the factors affecting the health and illness of entire populations. Most of the time, epidemiologists focus on infectious disease, but increasingly the Army has used its experts to look at behavioral health issues. A team of 24 physicians and Ph.D.s from Walter Reed Institute of Research descended on Ft. Carson, studying soldiers who had acted out violently, looking for common factors.

The EPICON team, first, found that violent crime among the soldiers at Ft. Carson was well outside normal levels of crime in civilian society. The murder rate for Ft. Carson had doubled since the start of the Iraq war. Rape arrests had tripled and stood at nearly twice the rate of other Army posts.<sup>58</sup>

Second, the EPICON team ruled out the “bad seed” theory. Long a favorite of military commanders, the “bad seed” theory posits that the only troops acting out

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<sup>55</sup> Marlowe, *supra* note 12, at 48.

<sup>56</sup> *Id.*

<sup>57</sup> U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTIVE MEDICINE, EPIDEMIOLOGIC CONSULTATION NO. 14-HK-OB1U-09: INVESTIGATION OF HOMICIDES AT FORT CARSON, COLORADO NOVEMBER 2008–MAY 2009, ES-1 (2009).

<sup>58</sup> *Id.* at 10–11.



criminally were troubled before their military service and would have acted out whether they had served or not. The EPICON team found no such common tie. Soldiers who had acted out had disparate pre-service criminal backgrounds and mental health issues. They also came from diverse racial, socioeconomic, and educational backgrounds.

The common thread among all those who had committed violent crimes was that they had seen serious combat. From a public health standpoint, combat seemed to be a contagion. PTSD, drug and alcohol abuse, violence, and murder were just the symptoms. The more soldiers were exposed to combat, the more they showed the effects.

The EPICON study also concluded that the crimes reported on and around Ft. Carson were just the tip of the iceberg. Of the Ft. Carson soldiers surveyed, 40% reported choking, beating, kicking, or pointing a gun at someone—in other words they had committed some kind of felony assault.<sup>59</sup>

In the end, the EPICON team found two major factors contributed to post-deployment violent behavior: (1) repeated deployments and (2) the intensity of combat in those deployments. The study concluded with a carefully worded assertion that “[s]urvey data from this investigation suggest a possible association between increasing levels of combat exposure and risk for negative behavioral outcomes.”<sup>60</sup> In other words, the military finally confirmed what civilian sociologists had long believed: combat contributes to crime. Soldiers come home different. By sending young men and women to war, a country is unintentionally bringing violence back on itself.

Closely linked to the criminal justice system is the homeless population. A 2006 study found that fully 24% of Minnesota’s male homeless population are veterans. More than half of those homeless veterans were deemed to have a “serious mental illness.”<sup>61</sup> Nationally,

An estimated 136,334 veterans spent at least one night in an emergency shelter or transitional housing program between October 1, 2008 and

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<sup>59</sup> Id. at 12–13.

<sup>60</sup> Id. at 18.

<sup>61</sup> WILDER RESEARCH, OVERVIEW OF HOMELESSNESS IN MINNESOTA 2006, 40–41 (2007).

September 30, 2009. This accounts for 1 of every 168 Veterans in the U.S. or 1 out of every 10 veterans living in poverty.<sup>62</sup>

This statistic illustrates just how difficult it can be for veterans to make the transition from military to civilian life.

## **B. How Combat Trauma Sometimes Manifests in Criminal Behavior**

Combat trauma can be linked to criminal behavior in two primary ways. First, symptoms of PTSD can incidentally lead to criminal behavior. Second, offenses can be directly connected to the specific trauma that an individual experienced.<sup>63</sup> Many symptoms of PTSD can lead to behaviors likely to result in criminal behavior and/or sudden outbursts of violence. Individuals with PTSD are often plagued by memories of the trauma, chronically anxious, and unable to sleep without terrifying nightmares. They often self-medicate with drugs and alcohol in an attempt to calm their nerves and sleep. The emotional numbness many trauma survivors experience can lead the survivor to engage in sensation-seeking behavior in an attempt to experience some type of emotion. Some combat Veterans also may seek to recreate the adrenaline rush experienced during combat. “Hypervigilance,” feeling the need to be always “on guard” can cause Veterans to misinterpret benign situations as threatening and cause them to respond with self-protective behavior. Increased baseline physiological arousal results in violent behavior that is out of proportion to the perceived threat. It is common for trauma survivors to feel guilt and to resort to self-destructive behaviors, which can sometimes lead them to commit crimes that will likely result in their apprehension, punishment, serious injury, or death.<sup>64</sup>

A particular traumatic stressor can lead an individual suffering combat trauma to commit a specific crime in three primary ways. First, crimes at times literally or symbolically recreate important aspects of a trauma. The second way that traumatic stressors can be linked to specific crimes is that environmental conditions similar to those

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<sup>62</sup> U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF CMTY. PLANNING & DEV., VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS i (2009).

<sup>63</sup> Claudia Baker & Cessie Alfonso, PTSD and Criminal Behavior: A National Center for PTSD Fact Sheet, <http://www.traumatic-stress-treatment.com/artptsdandcriminalbehavior.html>.

<sup>64</sup> Id.

existing at the time of the trauma can induce behavior similar to that exhibited during the trauma, in particular, violent responses. The final way that traumatic stressors can be linked to specific crimes is that life events immediately preceding the offense can realistically or symbolically force the individual to face unresolved conflicts related to the trauma. This creates a disturbed psychological state in which otherwise unlikely behaviors emerge.<sup>65</sup>

## IV. The Veteran in Modern Criminal Court

There are opportunities to make the veteran's service and service-related trauma relevant throughout the case, from pre-charge to sentence mitigation. If possible, before charges are even filed the prosecutor should be made aware of the veteran's service, any service-related mental health problems, and available treatment options to allow this to be considered in the charging decision. The veteran's service, connection to the community, available treatment resources, and veterans' organizations that may supervise the release can all be used to argue for pretrial release. If the veteran is suffering from service-related PTSD or TBI, the need for treatment and available treatment resources can be used both in plea negotiations and sentencing. When such conditions are present to an extreme degree, they may even be exculpatory in negating the *mens rea* requirements of the crime. These materials will provide an introductory overview of the strategies in defending the military veteran, which are fully addressed in *The Attorney's Guide to Defending Veterans in Criminal Court*.

### A. The Changing Terrain: State Statutes and Veterans Courts

Fortunately, federal, state, and local governments are beginning to recognize the unique situation of combat Veterans in criminal courts. To prevent reliving the mistakes made with the Vietnam generation of veterans, the federal government has made military service a relevant consideration for departures in sentencing;<sup>66</sup> a few states have

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<sup>65</sup> *Id.*

<sup>66</sup> U.S. SENTENCING GUIDELINES MANUAL, § 5H1.11 (2010) ("Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender

passed legislation to expressly allow the Court to consider the Defendant’s service and service-related mental illness at sentencing; and many counties across the country have created veterans specialty courts to directly address veterans’ unique situations and to supervise their rehabilitation.

In 2007 and 2008, along with other Minnesota veterans advocates, we helped draft and pass legislation that encouraged the criminal courts in sentencing psychologically-injured veterans.<sup>67</sup> The law is designed to ensure that mental health diagnoses and available treatment options are taken into account in sentencing a Veteran whose combat trauma played a role in his or her criminal offense. The law does not force a judge to do anything in a particular case. Rather, it gives the judge the tools to make an informed decision, recognizing that probationary treatment is often preferable to a single stint of incarceration in getting to the root of the problem and ensuring long-term public safety. This is not a “get out of jail free card” for veterans. Completion of treatment is a condition of probation and failure to follow through can result in execution of a jail or prison sentence.

In 2007, California also updated past legislation that had been found ineffective at dealing with the Veterans returning from wars in Afghanistan and Iraq.<sup>68</sup> Like the Minnesota statute cited above, California has given judges the express authority to utilize treatment over incarceration while not mandating that the Courts follow any particular type of sentence.

What the Minnesota and California statutes do, in effect, is make the veteran’s service a relevant sentencing consideration, just as the United States Sentencing Guidelines § 5H1.11 did in 2010 in stating that “Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.” This multi-state

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characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”)

<sup>67</sup> Minn. Stat § 609.115 Subd. 10.

<sup>68</sup> Adam Caine, *Fallen from Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering from Post Traumatic Stress Disorder*, 78 U.M.K.C. L. REV. 215, 225–29 (2009).

and federal push for such sentencing mitigation guidelines shows that the public's interests have shifted towards placing a higher priority on the treatment of a Veteran's service-related impairment and less of a priority on a strictly punitive approach to veteran-defendants. It seems that, amidst the recent wars in Iraq and Afghanistan, the American public and the policy makers working on their behalf have made an affirmative decision not to relive the mistakes made when the Vietnam generation of veterans first came in contact with the criminal justice system.

In 2009, the United States Supreme Court, in its landmark decision, *Porter v. McCollum*, weighed in on combat veterans in the criminal justice system for the first time, holding:

Our Nation has a long tradition of according leniency to Veterans in recognition of their service, especially for those who fought on the front lines as [the Defendant] did. Moreover, the relevance of [the Defendant's] extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [the Defendant].<sup>69</sup>

Veterans treatment courts (VTCs) are further evidence of this trend in changing policy interests. The first VTC was established in 2009, in the immediate wake of the *Porter v. McCollum* decision, and their growth has explosive in the decade since. As of 2018, there now more than 400 VTCs in the United States.<sup>70</sup> Texas, California, Colorado, Illinois, Oregon and Virginia have passed legislation specifically permitting the establishment of county VTCs.<sup>71</sup> Other states have done so directly through county court systems.

These courts follow a variety of models, but all offer reduced exposure to incarceration and, sometimes, conviction through diversion to judicially supervised rehabilitation programs if the veteran is willing to accept responsibility for his actions and

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<sup>69</sup> 130 S. Ct. 447, 455 (2009).

<sup>70</sup> Jack Tsai, A National Study of Veterans Treatment Court Participants: Who Benefits and Who Recidivates, *Adm Policy Ment Health*, 2018 Mar; 45(2): 236–244.

<sup>71</sup> Nat'l Ass'n of Drug Court Prof'ls, *Veterans Treatment Court Legislation*, <http://www.nadcp.org/JusticeForVets-Legislation> (last accessed June 1, 2011); CAL. PENAL CODE, § 1170.9 (2010); COL. REV. STAT., §§ 13-3-101; 13-5-144 (2010); 730 ILL. COMP. STAT. ANN. 167 (2010); OR. REV. STAT. § 135.886(2)(j)(3) (2010); TEX. HEALTH & SAFETY CODE, § 617 (2010); VA. CODE, § 2.2-2001.1 (2010).

get help for his underlying conditions, usually PTSD and/or substance abuse. This structure is quite similar to long-used drug and mental health specialty court models, but by using the existing structure and resources of the VA, these courts are an attractive option to districts that are under budget strains. Even in districts where there is not a Veterans problem-solving court, this fiscal reasoning is a strong argument in favor of probationary treatment that is unique to veteran-defendants. These courts are not “get out of jail free” courts that are showing veterans a preferred status. Rather, these courts often use longer terms of probation than the defendant would be exposed to in a standard criminal court in order to provide the court with the proper leverage to ensure the veteran stays committed to the treatment program until rehabilitated. The level of oversight and accountability is often very demanding. By having other veterans hold the veteran-client accountable, these courts “offer the most easily accepted ‘tough love’ support.”<sup>72</sup>

Both the statutes and the veterans courts have arisen out of the recognition that when our Nation is sending young men and women to prepare for and fight wars, as San Diego Prosecutor William C. Gentry so eloquently stated, “you are unleashing certain things in a human being we don’t allow in civic society, and getting it all back in the box can be difficult for some people.”<sup>73</sup> The public and courts nationwide are recognizing that the responsibility for these veterans falls on all of the American public. Thus, even where these statutes are not applicable and these courts are not available, this change in public sentiment should be used to argue to the Court that it, as well, has a duty to show compassion toward, and promote the rehabilitation of, veteran-defendants.

Minnesota’s Veterans Restorative Justice Act represents the next step in the evolution of veterans’ legislation and VTCs, expanding and standardizing the range of eligible offenses and requiring that participating veterans be allowed the opportunity to avoid a criminal conviction. It also ensures that all Minnesota veterans will have access to restorative justice, even if their county does not yet have a formal VTC.

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<sup>72</sup> Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 570 (2010).

<sup>73</sup> *Id.* at 569 (quoting Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008).

