"TO CARE FOR HIM WHO SHALL HAVE BORNE THE BATTLE": THE RECENT DEVELOPMENT OF VETERANS TREATMENT COURTS IN AMERICA

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INTRODUCTION[1]

When Owen Flaherty returned home from war, his family and coworkers described him as detached and angry, his mind would trick him into seeing enemies firing upon him with guns, and his violent episodes resulted in the police being called to his home on numerous occasions.[2] When Nic Gray returned home, he felt "numb and disconnected," was haunted by nightmares, and one night broke down a stranger's front door, smelling of alcohol and shouting gibberish about the military.[3] Their stories of returning home from combat are remarkably similar—but they are separated by more than a century. Owen Flaherty was a Union veteran of the Civil War who returned home in 1865 and was eventually committed to the Indiana Hospital for the Insane in 1876.[4] Nic Gray served in an armored battalion in Iraq and returned home in 2007.[5] In December 2009, his case was one of the first transferred to the new "Veterans Court" in El Paso County, Colorado.[6] In January, he pleaded guilty

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1. The title of this Article quotes from Abraham Lincoln's Second Inaugural Address, given on Saturday, March 4, 1865. The quotation also appears in the handbook for the mentoring program in the Buffalo Veterans Treatment Court, and is used frequently by the Department of Veterans Affairs to describe its mission.

2. ERIC T. DEAN, JR., SHOOK OVER HELL: POST-TRAUMATIC STRESS, VIETNAM, AND THE CIVIL WAR 2 (1997).

3. Joel Warner, *Can a Veterans Court Help Former GIs Find Justice Here at Home?*, DENVER WESTWORD NEWS, Feb. 4, 2010.

4. DEAN, *supra* note 2, at 2-3.

5. Warner, *supra* note 3.

6. *Id.*

to trespassing and received a two-year deferred sentence contingent upon completion of treatment from the Department of Veterans Affairs (VA), community service, restitution, and a letter of apology to his victims.[7]

The story of the psychologically scarred combat veteran struggling to readjust to civilian life is as old as war itself, but since 2001 a combination of factors—including the difficulties of an all-volunteer military, the nature of combat in Iraq and Afghanistan, and advances in medical technology that leave more soldiers alive but severely injured—has focused new attention on the number of veterans who wind up in the criminal justice system.[8] Since January 2008, when the first court opened in Buffalo, New York,[9] "veterans treatment courts" have become an increasingly popular way to address this reemerging problem. Modeled on drug and mental health courts, veterans courts aim to divert low-level offenders whose crimes are tied to the effects of their military service away from incarceration and into treatment. This Article will address whether these courts are the best option for responding to veterans who are charged with crimes. First, I will briefly address the status of American veterans in the criminal justice system and the events since the start of the wars in Afghanistan and Iraq that have drawn increased attention to the problem. Then I will discuss why a separate treatment court for veterans is preferable to including them in existing drug or mental health courts, and provide an overview of how veterans treatment courts operate, what the major criticisms of veterans courts are, and where future developments appear to be headed. Finally, I will discuss other options for veterans charged with crimes, and conclude with some observations about the benefits and drawbacks of treatment courts for both veterans and the criminal justice system as a whole.

PART I. WHY DO WE NEED VETERANS TREATMENT COURTS?

A. Veterans in the American Criminal Justice System since Vietnam

The experience of veterans of the Vietnam War led to the first major research efforts regarding psychological trauma and its impact on criminal activity. The number of soldiers returning from Vietnam with severe and highly publicized mental problems is what led to the diagnosis of post-traumatic stress disorder (PTSD) being added to the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1980.[10] The Bureau of Justice Statistics began

7. *Id.*

8. Many veterans courts also serve active members of the military who are prosecuted through the civilian court system rather than the military justice system. Throughout this Article, I will use the term "veteran" to refer to veterans and current members of the military alike.

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

10. Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal*

keeping track of the number of veterans in federal and state prisons in the early 1980s.[11] The National Vietnam Veterans Readjustment Survey, which consisted of interviews conducted between 1986 and 1988 and is considered the most comprehensive study of Vietnam veterans, found that fifteen percent of all male combat veterans had PTSD, and that of those, nearly half had been arrested at least once.[12] By 1986, veterans accounted for twenty percent of all state prisoners.[13]

Perhaps due in part to the unpopularity of the Vietnam War, there was no widespread response to the specific problem of traumatized veterans coming into contact with the criminal justice system. Many criminal defense lawyers tried—for the most part, unsuccessfully—to use PTSD as an insanity defense for veterans who had committed serious violent crimes.[14] Apart from those individual efforts, the most notable response came from California, which enacted legislation in 1984 allowing Vietnam veterans who were convicted of felonies and suffering from mental health or substance abuse problems to spend their sentences receiving treatment in federal correctional facilities.[15] Unfortunately, however, the federal government never passed implementing legislation allowing federal facilities to take control of those state prisoners, so no offenders ever benefited from the legislation.[16]

As large numbers of veterans from the Vietnam era have aged, the percentage of veterans currently serving time in prison has declined, but studies from the Bureau of Justice Statistics still reveal some interesting trends about

Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder, 85 IND. L.J. 87, 94 (2010) (citing CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISNER, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 20 (5th ed. 2008)).

11. The Bureau of Justice Statistics began asking questions about military service in inmate surveys of local jails in 1983, state prisons in 1986, and federal prisons in 1991. CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: VETERANS IN PRISON OR JAIL 2 (2000).

12. CTR. FOR MENTAL HEALTH SERVS. (CMHS) NAT'L GAINS CTR., RESPONDING TO THE NEEDS OF JUSTICE-INVOLVED COMBAT VETERANS WITH SERVICE-RELATED TRAUMA AND MENTAL HEALTH CONDITIONS 6 (2008). The National GAINS Center operates under the Substance Abuse and Mental Health Services Administration, a subdivision of the U.S. Department of Health and Human Services. The focus of the GAINS Center is on increasing access to community services for adults in the justice system with co-occurring substance abuse and mental health problems. GAINS stands for "gathering information," "assessing what works," "interpreting/integrating the facts," "networking," and "stimulating change." *See About the Center*, SAMHSA NAT'L GAINS CTR., http://gainscenter.samhsa.gov/html/about/default.asp (last visited Dec. 16, 2010).

13. Amanda Ruggeri, *New Courts Give Troubled Veterans a Second Chance*, U.S. NEWS & WORLD REP., Apr. 3, 2009.

14. *See generally* Hafemeister & Stockey, *supra* note 10.

15. Adam Caine, Comment, *Fallen from Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering from Post Traumatic Stress Disorder*, 78 UMKC L. REV. 215, 225 (2009).

16. *Id.* at 226.

veterans in prison as a whole. In 2004, the most recent year for which statistics have been published, ten percent of state prisoners reported prior military service.[17] Perhaps most relevant to this Article, as discussed below in Part II.B, veterans are more likely than other prisoners to have been convicted of a violent crime. Among veterans, fifty-seven percent were convicted of a violent crime, as opposed to forty-seven percent of nonveterans.[18] This statistic is especially interesting given that the military, through its recruitment practices, tries to select against many of the factors that are correlated with committing crime, such as a history of mental illness, a prior criminal record, or a history of drug abuse.[19] Other statistics from the 2004 report appear to corroborate those recruitment efforts; veterans in prison tend to have shorter criminal histories than nonveterans, are more likely to be white, older, and better educated, and are more likely to have been married.[20] Although veterans are just as likely as other prisoners to have mental health or drug abuse problems,[21] it is impossible to tell from these statistics whether those problems began before, during, or after their military service.

B. Unique Challenges for Veterans Returning from Iraq and Afghanistan

The prevalence of veterans in the criminal justice system suggests that all major American conflicts produce veterans who have difficulty readjusting to civilian life and often break the law in the process. However, several unique features of the recent wars in Afghanistan and Iraq, combined with several high-profile crime spurts, have drawn new attention to the problem and prompted a response that is both more widespread and targeted than those that occurred after previous wars.

Undoubtedly, much of the public attention paid to this issue stems from the high-profile reporting of serious violent crimes committed by returning service members. First, within a six-week period in 2002, three sergeants from Fort Bragg, North Carolina, who had recently served in Afghanistan, murdered their wives.[22] Then, at Fort Carson, Colorado, eight homicides were committed in twelve months by six soldiers;[23] ultimately, between 2006 and 2009, ten

17. MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISON 2004 (2007).

18. *Id.*

19. Telephone Interview with Guy Gambill, Soros Senior Justice Fellow, Justice Policy Inst. (Apr. 25, 2010).

20. BUREAU OF JUSTICE STATISTICS, *supra* note 17.

21. *Id.* at 1 nn.17-18 & 20, 4 n.21 & 6.

22. Lizette Alvarez & Deborah Sontag, *When Strains on Military Families Turn Deadly*, N.Y. TIMES, Feb. 15, 2008, at A1.

23. U.S. ARMY CTR. FOR HEALTH PROMOTION AND PREVENTIVE MED., EPIDEMIOLOGIC CONSULTATION NO. 14-HK-OB1U-09, INVESTIGATION OF HOMICIDES AT FORT CARSON, COLORADO, NOVEMBER 2008-MAY 2009 ES1 (2009) [hereinafter FORT CARSON REPORT].

members of a 3500-person brigade at Fort Carson would be charged with murder, attempted murder, or manslaughter.[24] Finally, in early 2008 *The New York Times* published a series of articles detailing at least 121 cases in which veterans of Iraq or Afghanistan were charged with homicide after returning home,[25] and at least 150 cases of fatal domestic violence or child abuse involving service members since the invasion of Afghanistan.[26] An official military report on the murders at Fort Carson found that rates of arrests for major crimes in general had increased throughout the army since 2003.[27]

Around the same time that these events were publicizing the possible violent consequences of combat stress, emerging data suggested that a large percentage of new veterans were suffering from psychological injuries. In 2008, the RAND Corporation published a study entitled "The Invisible Wounds of War," which concluded that of the 1.64 million troops deployed since 2001,[28] fourteen percent were probably suffering from PTSD, fourteen percent from depression, and nineteen percent from traumatic brain injury (TBI).[29] Because these conditions often overlapped, the study estimated that around 300,000 individuals were suffering from PTSD or major depression and that around 320,000 veterans had experienced a likely TBI; ultimately, one-third of those deployed had at least one condition.[30] The study further observed that "[e]xposure to specific combat traumas was the single-best predictor for both PTSD and major depression."[31] Similarly, the report on the murders at Fort Carson found that the "[a]lleged homicide perpetrators were clustered within one [brigade combat team]" that "experienced significantly higher levels of combat intensity" than comparison groups.[32]

The RAND study, news coverage of the crime waves mentioned above, and the official military report on the murders at Fort Carson all identified several characteristics of the Iraq and Afghanistan wars that have contributed to the increase of psychological damage and subsequent crime. These characteristics can be loosely grouped into three categories: the modern structure of the American military, the types of combat and injuries endured in

24. Dave Philipps, *Casualties of War, Part I: The Hell of War Comes Home*, COLO. SPRINGS GAZETTE, July 24, 2009, at A1.

25. *See* Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, at A1.

26. Alvarez & Sontag, *supra* note 22. Some of these cases overlap with the other homicides covered by the *New York Times* series, and it seems from the article that not all of these cases necessarily involve service members who served overseas or saw combat.

27. FORT CARSON REPORT, *supra* note 23, at 10.

28. RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES 1 (2008) [hereinafter INVISIBLE WOUNDS OF WAR].

29. *Id.* at 11.

30. *Id.* at 11-12.

31. *Id.* at 13.

32. FORT CARSON REPORT, *supra* note 23, at ES3.

Iraq and Afghanistan, and the barriers to receiving mental health care upon return home.

The nature of the all-volunteer American military has increased the strain on soldiers serving in major, long-term operations. Without the ability to draft new recruits, professional soldiers are required to serve longer deployments, are often redeployed, and have shorter breaks between redeployments.[33] *The New York Times* estimated that at least a third of the troops in Iraq and Afghanistan have been deployed more than once.[34] These longer and more frequent tours increase the risk of traumatic combat exposure and psychological injury. A 2008 survey found that while only twelve percent of soldiers who had served one tour reported symptoms of PTSD, that number increased to more than twenty-five percent for soldiers who had served three or four tours.[35] The Fort Carson Report similarly concluded that data "suggest a possible association between increasing levels of combat exposure and risk for negative behavioral outcomes."[36] The strains on the all-volunteer active duty military have also required more units to be activated from the Reserves and the National Guard. When soldiers from these units return home, their transition is often more difficult because they are thrust further outside the structure of the military that has grown familiar and often live in suburban or rural areas away from major centers of military resources.[37]

The type of combat experienced in Iraq and Afghanistan, the coping mechanisms that it produces, and the injuries that sometimes result also contribute to the high rates of psychological trauma. The insurgent, guerrilla warfare in both combat zones increases the number of soldiers who are exposed to traumatic experiences; without a traditional front line, even those soldiers who serve in support capacities are often in danger.[38] In order to cope with this environment, many soldiers develop habits that later impede their readjustment to civilian life. As a report from the Center for Mental Health Services National GAINS Center observed, "[b]ehaviors that promote survival within the combat zone may cause difficulties during the transition back to civilian life. Hypervigilance, aggressive driving, carrying weapons at all times, and command and control interactions, all of which may be beneficial in theater, can result in negative and potentially criminal behavior back home."[39] When these survival instincts fail to protect a soldier, the injuries that result are

33. INVISIBLE WOUNDS OF WAR, *supra* note 28, at 1.

34. Sontag & Alvarez, *supra* note 25.

35. Ruggeri, *supra* note 13.

36. FORT CARSON REPORT, *supra* note 23, at ES3.

37. Lizette Alvarez, *After the Battle, Fighting the Bottle at Home*, N.Y. TIMES, July 8, 2008, at A1; *see also* Telephone Interview with Guy Gambill, *supra* note 19.

38. Hafemeister & Stockey, *supra* note 10, at 99; *see also* INVISIBLE WOUNDS OF WAR, *supra* note 28, at 11 (noting that "[c]urrent rates of exposure to combat trauma . . . are relatively high").

39. CMHS NAT'L GAINS CTR., *supra* note 12, at 5.

perhaps more likely than ever to leave a major psychological wound as well. First, as a result of advances in armor and medicine, despite long and repeated deployments the rates of killed or physically wounded soldiers are lower than they have been in previous wars. As a consequence, many service members are surviving combat experiences that would have killed them in prior wars—experiences that are likely to be the most intense and traumatizing.[40] Second, the common use by insurgents of improvised explosive devices (IEDs) has led to at least thirty percent of troops being exposed to blastwaves that result in mild TBI, and thousands of soldiers with more serious brain injuries.[41] Although the long-term effects of mild TBI are still being studied, there is growing concern that it could cause lasting damage to executive brain function.[42]

Once soldiers do return home, they often face barriers to quality mental health care. The RAND study found that of those new veterans suffering from PTSD or major depression, only fifty-three percent had sought professional help in the past year, and only half of those who did seek care received minimally adequate treatment.[43] Of those veterans who had likely experienced TBI, fifty-seven percent were never evaluated by a physician to determine if they had a brain injury.[44]

By far the biggest barrier to treatment is stigma. The fear of being labeled as weak or cowardly for seeking mental health treatment has been a persistent problem in military culture.[45] Of those surveyed by the RAND study who declined to seek treatment, a reason generally cited was a fear about treatment not remaining confidential or harming the soldier's career.[46] News articles covering the Fort Carson murders told multiple anecdotes of sergeants who refused to let soldiers seek help, taunted them for being weak, or punished those who did seek treatment.[47] The official military report on the murders found that stigma persisted at several levels. Junior soldiers expressed fear of retaliation by their peers or their leaders, and were concerned that they would be labeled as weak.[48] More senior soldiers were afraid that seeking treatment would harm their career prospects, and soldiers from all levels expressed a belief that off-base, civilian mental health professionals did not understand the military experience.[49] This last problem is especially relevant for the high numbers of Reserve and National Guard soldiers who have served in Iraq and

40. INVISIBLE WOUNDS OF WAR, *supra* note 28, at 1.
41. *Id.* at 2.
42. Telephone Interview with Guy Gambill, *supra* note 19.
43. INVISIBLE WOUNDS OF WAR, *supra* note 28, at 13-14.
44. *Id.* at 14.
45. Telephone Interview with Guy Gambill, *supra* note 19.
46. INVISIBLE WOUNDS OF WAR, *supra* note 28, at 14.
47. Philipps, *supra* note 24.
48. FORT CARSON REPORT, *supra* note 23, at 16.
49. *Id.*

Afghanistan, because they are more likely to live away from military installations and be limited to civilian health care providers.

The structure and capacity of military mental health resources also create barriers to care. The standard screening mechanisms for psychological injuries are surveys that are given to soldiers right before their return home. But giving the assessment at that point can warp incentives; because many soldiers worry that reporting problems will delay their return, it is possible that they minimize the extent of their symptoms.[50] Furthermore, many symptoms of mental health problems do not appear until months after a soldier comes home, often after a sort of honeymoon period. For that reason, the military re-administers its post-deployment health assessment six months after a soldier's deployment ends. At that six-month mark, positive screens for PTSD increased forty-two percent for active duty army soldiers, and ninety-two percent for Army Guard/Reserve members.[51] But even when screening mechanisms succeed, military mental health services are overburdened when it comes to actually treating patients. The number of soldiers needing psychiatric care increased so rapidly after the start of operations in Iraq and Afghanistan that the military mental health system, having adapted to a long period without major combat operations, was simply unable to keep up. News reports described soldiers waiting weeks or months for an appointment and unable to get individual counseling,[52] and a Pentagon task force concluded that mental health services were overburdened, understaffed, and inadequately financed.[53]

Faced with these barriers, many veterans resort to self-medicating with drugs or alcohol.[54] Between 2005 and 2006, the rate of veterans involved in alcohol-related incidents such as drunk driving, reckless driving, and disorderly conduct increased from 1.73 per 1000 soldiers to 5.71 per 1000 soldiers.[55] At Fort Carson, eighty percent of the soldiers accused of homicide had documented alcohol or drug abuse problems.[56] Like mental health services for combat stress, many soldiers do not receive treatment for substance abuse problems.

C. Why Do Veterans Need a Separate Treatment Court?

The history and data presented above suggest that many crimes committed by veterans are triggered by underlying mental health problems or substance abuse that is a form of self-medication. Because drug and mental health treatment courts already exist in many jurisdictions, a common suggestion is to

50. *See* INVISIBLE WOUNDS OF WAR, *supra* note 28, at 3.
51. CMHS NAT'L GAINS CTR., *supra* note 12, at 5.
52. Philipps, *supra* note 24.
53. Sontag & Alvarez, *supra* note 25.
54. FORT CARSON REPORT, *supra* note 23, at 13.
55. Russell, *supra* note 9, at 363.
56. FORT CARSON REPORT, *supra* note 23, at 17.

simply divert veterans into those programs rather than create a new category of treatment courts entirely.

According to veterans' advocates, that suggestion essentially misses the point. The first veterans court in Buffalo, New York, began because the judge who ran Buffalo's drug and mental health courts, Judge Robert Russell, noticed an increasing number of veterans on his dockets and realized that they shared unique needs that were not being addressed effectively in the existing treatment courts.[57] Treatment courts are designed to address the underlying problem at the root of criminal activity: for drug courts, a substance dependency, or for mental health courts, a mental illness. But for combat veterans, their underlying problem is not their substance abuse, or even their PTSD—it is their combat trauma, and that is something that cannot be addressed as effectively in a traditional drug or mental health court.[58] Many veterans have experienced things that are uncommon or unheard of among civilian defendants. As noted in Part I.B, a common barrier to treatment for veterans is a perception that civilian service providers do not understand what they have been through. As harsh as it might sound, lumping combat veterans in with civilian drug users and schizophrenics might only reinforce that perception.

Specialized veterans treatment courts address that problem in many ways. First, veterans courts explicitly project the attitude that participants should be honored for their service, and that they are being diverted from traditional sentencing because the government is grateful for their sacrifice. Recent legislation in Colorado that will create veterans treatment courts statewide explicitly finds that "as a grateful state, we must continue to honor the military service of our men and women by attempting to provide them with an alternative to incarceration when feasible, permitting them instead to access proper treatment for mental health and substance abuse problems resulting from military service."[59] Instead of unintentionally creating a perception that veterans are being pitied for being addicted to drugs or being mentally ill, this attitude creates a culture of respect and understanding for the veteran's experience.

Second, specialized courts allow the judge, prosecutors, and public defenders involved to develop expertise on veterans issues and to connect participants with service providers that are also familiar with the military experience.[60] Third, when all of the eligible veterans are gathered on the same

57. *See* Russell, *supra* note 9, at 363-64.

58. Telephone Interview with Guy Gambill, *supra* note 19; Telephone Interview with Dr. Stephen Xenakis, Brigadier Gen., ret., U.S. Army (Apr. 25, 2010).

59. H.B. 10-1104, 67th Gen. Assemb., 2d Reg. Sess. § 1(1)(f) (Colo. 2010). This legislation was signed into law on April 15, 2010. Press Release, Office of Governor Bill Ritter, Jr., Gov. Ritter Signs National Guard Armory and Veterans Treatment Court Bills Into Law (Apr. 15, 2010), *available at* http://www.colorado.gov/cs/Satellite/GovRitter/GOVR/1251573904930.

60. *See* Russell, *supra* note 9, at 363-64.

docket and in the same courtroom, they support each other. Seeing other defendants who have similar past experiences and problems helps to break down the stigma associated with treatment, and a program filled with veterans in some ways replicates the camaraderie of the military.[61]

Finally, and perhaps most importantly, most veterans courts have a mentoring program that pairs each participant with a volunteer mentor who comes from a similar background. The mentoring program is the most direct response to the observation that veterans respond better to treatment when they work with other veterans.[62] A wide pool of volunteers (there are currently thirty-five in the Buffalo program)[63] usually allows the court to match a participant with a mentor based on their branch of service, the war they fought in, as well as their age, ethnicity, and gender (something particularly important for the increasing number of women who have seen combat in Iraq and Afghanistan). In the words of Jack O'Connor, the Buffalo mentoring coordinator, "A young marine from Iraq needs to talk to another young Marine from Iraq, and now he does."[64] Some mentors are also paired with participants based on their special skills; for example, in Buffalo, one mentor who was a lawyer assisted his mentee with a case in housing court.[65] Even if a participant has to navigate service providers that are unfamiliar with the military, the mentor can act as an advocate who really understands what the participant has been through, especially in areas where the court is not formally involved. Volunteer mentors in the Buffalo court help participants with everything from getting to appointments, to finding an apartment, to retrieving their cars from impoundment.[66] The mentor's perspective can also alert the court to areas where the participant needs help that a person unfamiliar with the veteran's experience might not notice.[67]

Along with breaking down stigmatic barriers to treatment, diverting veterans into a separate treatment court solves some logistical problems. One benefit for veterans who need treatment is that they often have access to federally funded services that similarly situated civilians do not, and thus securing appropriate treatment does not place an additional burden on their

61. *Id.*; *see also* Telephone Interview with Dr. Stephen Xenakis, *supra* note 58.

62. *See* Russell, *supra* note 9, at 364; *see also* BUFFALO VETERANS TREATMENT COURT, BUFFALO VETERANS COURT AND VETERANS MENTOR HANDBOOK § 2.1 (2010) [hereinafter BUFFALO MENTOR HANDBOOK].

63. *The Value of Establishing Veterans Courts: Hearing Before the H. Comm. on Veterans Affairs*, 111th Cong. 56 (2009) [hereinafter *Hearing*] (statement of Jack O'Connor, Mentor Coordinator, Buffalo Veterans Treatment Court).

64. *Id.*; *see also* BUFFALO VETERANS COURT: MENTORING AND VETERANS HOSPITAL PROGRAM POLICY AND PROCEDURE MANUAL § 3.6 (2010) [hereinafter BUFFALO POLICY MANUAL].

65. *Hearing*, *supra* note 63 (statement of Jack O'Connor, Mentor Coordinator, Buffalo Veterans Treatment Court).

66. *Id.*

67. *See* BUFFALO MENTOR HANDBOOK, *supra* note 62, § 2.3.

local community. In fact, ensuring that veterans get the federal services they are eligible for frees up more state and local resources for civilian participants in drug or mental health courts.[68] But accessing those federal services can be difficult and complicated; for example, Veterans Administration (VA) health system records can only be accessed on certain secure computers.[69] By consolidating all of the veterans into a single docket, the Buffalo court made it worthwhile for the VA to send an employee with a secure VA computer to every court session, which enables the treatment court to immediately check eligibility for benefits, set up appointments, and receive toxicology test results, among other things.[70]

PART II. HOW VETERANS TREATMENT COURTS WORK: DETAILS, CRITICISMS, AND NEW DEVELOPMENTS

A. How Veterans Treatment Courts Operate

The first official veterans treatment court opened in Buffalo, New York in January 2008, although an earlier, informal program was started in Anchorage, Alaska in 2004.[71] Following the publicity and anecdotal success of the Buffalo court, similar treatment courts have spread quickly throughout the country over the past two years. As of October 2010, at least thirty-eight courts were in operation in eighteen states,[72] with a total of twenty to thirty courts opening during 2010.[73]

All of the courts have similar, though not identical, restrictions on which veterans are eligible. As a general matter, most of the courts restrict eligibility to veterans of an active duty branch, a reserve branch, or the National Guard

68. *Hearing*, *supra* note 63 (statement of C. West Huddleston, CEO, National Association of Drug Court Professionals).

69. *See* BUFFALO POLICY MANUAL, *supra* note 64, § 2.2.

70. *Id.*

71. *See* Ruggeri, *supra* note 13.

72. *Justice for Vets: The National Clearinghouse for Veterans Treatment Courts*, NAT'L ASS'N DRUG CT. PROFS. (NADCP), www.nadcp.org/learn/veterans-treatment-court-clearinghouse (last visited October 11, 2010). Courts currently operate in: Montgomery, Alabama; Anchorage, Alaska; Tucson, Arizona; Lonoke County, Arkansas; Los Angeles, California; Orange County, California; San Bernardino, California; Santa Clara, California; Tulane County, California; Colorado Springs, Colorado; Cook County, Illinois; Madison County, Illinois; Ingham County, Michigan; Ionia, Michigan; Oakland County, Michigan; Hennepin County, Minnesota; Kansas City, Missouri; St. Louis, Missouri; Washoe County, Nevada; Amherst, New York; Buffalo, New York; Brooklyn, New York; Rochester, New York; Mansfield, Ohio; Creek County, Oklahoma; Tulsa, Oklahoma; Allegheny County, Pennsylvania; Philadelphia, Pennsylvania; Scranton, Pennsylvania; Dallas County, Texas; El Paso County, Texas; Harris County, Texas; Nueces County, Texas; Tarrant County, Texas; Pierce County, Washington; Spokane County, Washington; Thurston County, Washington; Rock County, Wisconsin.

73. Warner, *supra* note 3.

who were discharged under honorable conditions, although the Buffalo court will also accept family members of veterans.[74] Among current jail and prison inmates who are veterans, about twenty percent received other-than-honorable discharges and thus would not qualify.[75] The requirement that participants have discharges under honorable conditions seems to serve two purposes. First, it reflects the sense that participants deserve the help provided in the treatment court because of their honorable service, as discussed in Part I.C. Second, it ensures that most of the participants will be eligible for federally funded services through the VA (access to VA health care depends in part on discharge status).[76]

Other restrictions vary and usually pertain to the nature of the defendant's crime and how it relates to his military service and any mental health or substance abuse problems. For example, the Anchorage court currently accepts only misdemeanors, but deems veterans eligible so long as their charge is associated with a medical, behavioral, or socio-economic issue that can be treated through the VA.[77] The Buffalo court accepts non-violent felonies and misdemeanors, but requires that eligible defendants have a substance abuse or mental health problem.[78] Almost all of the courts are restricted to non-violent crimes, although it appears that some will accept low-level domestic violence charges.[79]

Different courts also vary as to when in the adjudication process veterans are diverted into the treatment court. In accordance with due process, all courts require that the defendant voluntarily agree to participate in the treatment court program. In Anchorage, veterans are required to plead guilty or no contest to at least one charge before entering the treatment court, and their sentencing is delayed while they complete treatment; if they succeed, their sentence is then reduced.[80] In Buffalo, because the court accepts a wider variety of crimes, some defendants' charges are dismissed upon successful completion of treatment while other defendants are assured of a sentence that will not include

74. *See* Matthew Daneman, *N.Y. Court Gives Veterans Chance to Straighten Out*, USA TODAY, June 1, 2008, at 3A; *see also, e.g.*, Christy Hoppe, *Dallas County Creating Specialized Court for Veterans with Combat Trauma*, DALLAS MORNING NEWS, Mar. 31, 2010; ALASKA COURT SYS., ALASKA VETERANS COURT (2008), *available at* http://www.courts.alaska.gov/forms/pub-121.pdf.

75. CMHS NAT'L GAINS CTR., *supra* note 12, at 3.

76. *Id.* at 4.

77. ALASKA COURT SYS., *supra* note 74; ALASKA COURT SYS., ALASKA VETERANS COURT: POLICIES AND PROCEDURES (forthcoming 2010) (manuscript at 8-9) (on file with author). The Anchorage court is currently in the process of updating its policies and procedures, and is considering accepting felonies on a case-by-case basis.

78. BUFFALO POLICY MANUAL, *supra* note 64, at 2.

79. Tracy Carbasho, *Veterans Court Provides Support and Services for Local Veterans*, J. ALLEGHENY COUNTY B.A., Jan. 29, 2010, at 4.

80. ALASKA COURT SYS., *supra* note 74.

incarceration.[81] In Allegheny County, Pennsylvania, the court postpones adjudication of the charges pending against the defendant until he completes the treatment program.[82] In all of the courts, if a defendant fails to complete treatment, he will go through a traditional adjudication or sentence.

Once a defendant has been accepted into the veterans treatment court, his treatment strongly resembles a program in a drug or mental health court, with the exception of volunteer mentoring by other veterans and the coordination with the VA as described above in Part I.C. The Buffalo court has identified ten "key components" to a veterans treatment court that have been modified from similar protocols for drug and mental health courts: The veteran should receive integrated treatment for alcohol, drugs, or mental health problems; the prosecutor and defense counsel should work together using a non-adversarial approach to protect both public safety and the veteran's rights; the court should try to identify eligible veterans early in the process; the court should provide access to a continuum of rehabilitation services, including "ancillary" services such as primary health care, housing, education, job training, and family counseling; the veteran should be monitored by frequent testing for drugs and alcohol; the court should use a continuum of graduated responses to noncompliance with the treatment program; the court should promote ongoing judicial interaction with the veteran; the court should design monitoring and evaluation to measure the progress of the veteran's achievement; veterans court staff should have ongoing interdisciplinary training; and the court should forge partnerships with interested groups.[83]

B. Criticisms of Veterans Treatment Courts

Although most of the publicity surrounding veterans treatment courts has been positive, they have been criticized by some veterans' advocates and civil libertarians. The criticisms mostly fall into three categories: concerns about the message projected by a court just for veterans, concerns about the fairness to veterans who do choose to participate in the courts, and concerns about the many veterans who are not eligible to participate.

Criticisms in the first category come from two directions. On one hand, groups such as the American Civil Liberties Union (ACLU) have criticized the courts for making it seem like veterans are a special class of defendants who receive a "get out of jail free" card just by virtue of having served in the military. As Mark Silverstein, the legal director of the Colorado ACLU, has pointed out, "veteran" is a term that can be both over- and under-inclusive.[84] Many military veterans served in peacetime and were never exposed to combat

81. BUFFALO POLICY MANUAL, *supra* note 64.
82. *See* Carbasho, *supra* note 79.
83. Russell, *supra* note 9, at 365-67.
84. Warner, *supra* note 3.

trauma; and despite the guerrilla nature of the war in Iraq, there is a wide range of exposure to combat.[85] At the same time, some civilians also suffer from PTSD.[86] In response to the first criticism, some of the newer veterans courts, such as those in Texas and Nevada, are requiring a tighter nexus between a participant's crime and exposure to combat.[87] Regarding the second, civilians whose crimes are related to mental illness are often eligible for specialized mental health treatment courts; as noted above in Part I.C, the same diagnosis in a veteran and a civilian might require different treatment, and moving veterans into a specialized court allocates resources more effectively for both groups.

On the other hand, veterans groups have long opposed the perpetuation in the media of the "wacko vet myth." After all, most soldiers return home from war without problems.[88] Even as far back as World War I, "the American Legion passed a resolution asking the press 'to subordinate whatever slight news value there may be in playing up the ex-service member angle in stories of crime.'"[89] Similarly, modern groups are concerned that special treatment courts might make it seem like the justice system is so overwhelmed by veterans that it has to create a new court system just to handle them.[90]

Criticisms regarding the fairness to veterans who participate in the treatment courts are mostly related to whether diversion takes place before or after a defendant pleads guilty. From a due process perspective, providing diversion and treatment only at sentencing ensures that the intervention occurs after a defendant has had a chance to exercise his normal constitutional rights.[91] But from the perspective of rehabilitation, entering a plea of guilty and having a conviction on the defendant's record—even if it is later expunged and the record sealed—can create collateral consequences that might prevent the veteran from readjusting to a completely normal life.[92] Especially in an era where more jurisdictions are posting criminal records online, and background checks are required for more jobs and other benefits, once certain information is attached to a defendant it can be hard to unring the bell.

The greatest concern about the effectiveness of veterans treatment courts, however, is that they are not helping enough veterans who need their services. First, there are issues of access and eligibility. Veterans courts tend to be created in large metropolitan areas; in the wake of two wars that have relied heavily on Reserve and National Guard units that are more likely to be from

85. *Id.*; Philipps, *supra* note 24.

86. Warner, *supra* note 3.

87. *See infra* Part II.C.

88. INVISIBLE WOUNDS OF WAR, *supra* note 28, at 10.

89. Sontag & Alvarez, *supra* note 25.

90. *See* Ruggeri, *supra* note 13.

91. *See* GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 111-12 (2005).

92. Telephone Interview with Guy Gambill, *supra* note 19.

suburban or rural areas, as noted above in Part I.B, many veterans who fit the proper criteria might not have access to a treatment court.[93] The requirement that veterans have other-than-dishonorable discharges might also arbitrarily shut certain defendants out. For example, if a veteran had PTSD that led to infractions while he was still in the military, he might receive a less-than-honorable discharge and thus be ineligible for treatment in a veterans court. However, if that same soldier received a medical discharge for his PTSD, or if he did not start showing negative behavioral symptoms until he had been discharged, he would remain eligible.[94]

Second, the common limitation to non-violent crimes might fence out many of the veterans whose crimes are most tied to their combat trauma. A common criticism of treatment courts generally is that they "widen the net"; rather than diverting offenders who would otherwise be incarcerated, they provide services to low-level offenders who might be able to seek treatment and recover on their own or through normal probation services. For veterans courts, this problem is exacerbated because the effects of severe combat stress from Iraq and Afghanistan often manifest themselves in violent actions. As discussed above in Part I.B, many soldiers learned in combat to remain hyper-vigilant and to respond to threats with violence. When a veteran returns home, these behaviors can escalate an everyday conflict into a violent confrontation.[95] Similarly, this paranoia can lead many veterans to constantly carry weapons even after they return home, and in many jurisdictions being armed can elevate some offenses into violent crimes. Furthermore, the increasing rates of substance abuse as a coping mechanism lead to many arrests for minor offenses such as bar fights, reckless driving, and domestic violence.[96]

One response to this criticism is that diversion through a treatment court is meant to be an early intervention to prevent criminal behavior from escalating. In a news article reporting on the Fort Carson murders, the commander of Fort Carson spoke of a pattern he called "the crescendo," in which a returning soldier's behavioral problems start out small, but then grow until they "explode."[97] The article provided the example of Jose Barco, who served two tours in Iraq and was badly injured in one. First Jose "was arrested on suspicion of domestic violence. Then drunken driving. Then burglary with a deadly weapon. Then he got divorced. Finally, he was arrested and accused of taking a pistol to a house party."[98] The official Fort Carson Report seemed to corroborate this pattern, noting that eighty percent of the alleged homicide perpetrators who suffered from drug or alcohol problems had been "charged for

93. *Id.*

94. *See* Warner, *supra* note 3; Philipps, *supra* note 24.

95. *See* Warner, *supra* note 3.

96. Alvarez, *supra* note 37.

97. Dave Philipps, *Casualties of War, Part II: Warning Signs*, COLO. SPRINGS GAZETTE, July 28, 2009, at A1.

98. *Id.*

criminal activity while in the military but prior to the alleged homicide."[99] By providing an intensive intervention after a veteran's first offense, the treatment courts hope to prevent the type of crimes that would not qualify for diversion from happening in the first place. But, as the Jose Barco example illustrates, in many cases the veteran's first offense still qualifies as "violent," rendering him ineligible for a treatment court. In fact, many of the soldiers charged with murder at Fort Carson had previously committed minor violent offenses, particularly domestic violence.[100]

Ironically, the focus on low-level offenses might also keep out soldiers whose crimes are too minor for the punishment to provide an incentive to choose treatment. By volunteering to participate in the treatment court, most veterans are agreeing to accept supervision that will last much longer than a conventional sentence. Most participants in the Buffalo court remain in treatment for a year or more,[101] whereas a conventional sentence for a minor crime might only consist of a fine and a few days in jail. One of the first veterans to participate in the Anchorage court had to undergo an eighteen-month treatment program instead of a jail sentence that would have been less than thirty days.[102] Given the choice between a few days in jail or a year or more of intense supervision by a judge and the VA, it is not surprising that some veterans forego the opportunity for treatment. This is of particular concern for veterans of Iraq and Afghanistan, who are often very young and might not be able to appreciate the value of early treatment.[103]

C. Recent and Potential Future Developments for Veterans Treatment Courts

The past two years have seen two major developments for veterans treatment courts. First, several states have passed legislation to implement statewide court programs. Second, federal legislation to finance veterans treatment courts around the country has been proposed. Some of this legislation addresses the concerns set forth in Part II.B, but for the most part it has been subject to the same types of criticisms.

Illinois, Nevada, and Texas have recently passed legislation authorizing the creation of veterans treatment courts statewide.[104] One criticism that both Nevada and Texas address is the concern that "veteran" is over-inclusive. The Nevada legislation requires that substance abuse or mental illness "appear to be related to military service, including, without limitation, any readjustment to

99. FORT CARSON REPORT, *supra* note 23, at 17.

100. *See* Warner, *supra* note 3.

101. Daneman, *supra* note 74.

102. Ruggeri, *supra* note 13.

103. Telephone Interview with Guy Gambill, *supra* note 19.

104. H.R. 4212, 96th Gen. Assemb., Reg. Sess. § 15(e) (Ill. 2010); Assemb. 187, 75th Leg., Reg. Sess. (Nev. 2009); S. 1940, 81st Leg., Reg. Sess. § 617.002(a) (Tex. 2009).

civilian life which is necessary after combat service."[105] Texas goes further and requires that participants "suffer from a brain injury, mental illness, or mental disorder . . . that (A) resulted from . . . military service in a combat zone or other similar hazardous duty area; and (B) materially affected . . . criminal conduct . . . in the case."[106]

Perhaps because they require a tighter nexus between a participant's military service and his culpability, both Nevada and Texas also allow their treatment courts to accept veterans who are charged with a broader range of crimes than, for example, the Anchorage court. The Texas courts are allowed to accept both misdemeanors and felony offenses.[107] Nevada will accept offenses that involved the use or threatened use of force or violence, so long as probation is not prohibited for the offense and the prosecutor stipulates to the defendant's assignment to veterans court.[108]

Nevada's legislation also attempts to address the concern that providing treatment post-guilty plea will nevertheless lead to collateral consequences for the veteran. While the defendant sometimes is still required to plead guilty at first, so long as probation or the suspension of the sentence is not prohibited by statute, the court may then suspend the proceedings without actually entering a judgment of conviction and place the defendant on probation subject to the terms of the treatment program.[109] If the veteran completes treatment, the conviction will never actually be imposed, and three years later all of the documents will be sealed; if he violates the terms, the court can enter the conviction and impose a normal sentence.[110] Proposed statewide legislation in other states reflects similar developments. In Colorado, the judge would be able to suspend proceedings before entering a conviction, and then dismiss the proceedings if the participant completes the treatment program.[111] In California, judges would be provided with flexibility to adjudicate participants in three different ways: they could dismiss the charges so long as a defendant completes a treatment program, they could accept a guilty plea but delay entering it and expunge it upon the defendant's completion of treatment, or they could accept a guilty plea but sentence the defendant to treatment rather than the conventional sentence provided by statute.[112]

At the federal level, Senators Daniel Inouye, John Kerry, and Lisa

105. Nev. Assemb. 187 § 7(2)(b).

106. Tex. S. 1940 § 617.002(a).

107. *Id.*

108. Nev. Assemb. 187 § 8(1)-(2).

109. *Id.* § 8(1).

110. *Id.* §§ 8(3)-(4), 9(1).

111. H.R. 10-1104, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (as introduced), *available at* http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont3/12F20F4D87558DB3872576A80027AE89?open&file=1104_01.pdf.

112. Email from Dr. Stephen Xenakis, Brigadier Gen., U.S. Army, retired, to author (Apr. 26, 2010) (on file with author).

Murkowski have sponsored the Services, Education, and Rehabilitation for Veterans Act (SERV Act),[113] which would authorize the Attorney General to make grants to states, state courts, local courts, local governments, and Indian tribal governments to either develop and implement veterans treatment courts or to expand existing drug courts to better serve veterans.[114] The eligibility requirements provided by the SERV Act basically incorporate the standard criteria from the various courts already in operation: participants must have received an other-than-dishonorable discharge,[115] must have substance abuse or mental health problems,[116] and must be non-violent offenders.[117] However, as discussed above in Part II.B, because a defendant qualifies as a "violent offender" under the law if he "carried, possessed, or used a firearm or dangerous weapon,"[118] that requirement might exclude a large number of veterans who are suffering from serious combat trauma. The SERV Act requires courts that receive grants to meet the previously established federal criteria for drug courts, and to provide the "integrated administration" of oversight measures: mandatory substance abuse testing, substance abuse and mental health treatment, penalties for noncompliance, and aftercare services such as education, vocational training, and housing placement assistance.[119]

PART III. OTHER SENTENCING PROGRAMS FOR VETERANS

Although veterans treatment courts have garnered the most publicity in the past two years, other government efforts to assist veterans involved in the criminal justice system have occurred at both the state and federal levels.

At the state level, both California and Minnesota have passed broader "diversion" legislation intended to provide veterans with treatment instead of incarceration through the regular court system. As discussed earlier in Part I.A, California passed similar legislation after the Vietnam War intending to divert veterans from state prisons into federal treatment facilities, but was unable to secure federal implementation. In 2006, Governor Schwarzenegger signed an updated version of that legislation that went into effect at the start of 2007.[120] The new law requires the court, if the defendant so requests, to conduct a hearing to determine whether the defendant is a veteran who suffers from PTSD, substance abuse, or other psychological problems as a result of combat service.[121] If the defendant meets these criteria and is eligible for probation, the

113. S. 902, 111th Cong. § 1 (2009).
114. *Id.* § 2(b).
115. *Id.* § 7(1).
116. *Id.* § 3(1).
117. *Id.*
118. *Id.* § 7(3)(A)(i).
119. *Id.* § 3(1).
120. *See* Caine, *supra* note 15, at 227-28.
121. *Id.* at 228.

court can then place him on probation and order him into an appropriate treatment program.[122] The treatment period, however, cannot exceed the period that the defendant would have served in prison or jail had he received a traditional sentence.[123] Although that provision may satisfy some due process concerns, in practice it could decrease the effectiveness of the diversion, because length of treatment is an incredibly important factor in the treatment's success.

Legislation passed in Minnesota in 2008 amends the state's procedures for pre-sentence investigations. Rather than conduct a hearing upon the defendant's request as in California, the law mandates that every felony defendant be provided with a pre-sentence investigation that includes an inquiry into military status, and allows the court to order such an investigation for misdemeanor offenses as well.[124] If the court finds that a defendant is a veteran and has been diagnosed with a mental illness, the court may consult the VA as to treatment options for the defendant and consider those options at sentencing.[125] Unlike the California statute, the Minnesota legislation is neutral to the type of offense (it does not require that the defendant be eligible for probation) and is more flexible regarding treatment options (it does not limit treatment to the length of a conventional sentence).

At the federal level, the Veterans Health Administration is in the process of expanding outreach programs to assist veterans at several stages in the criminal justice system. For example, along with involvement after veterans begin court proceedings, the Veterans Justice Outreach (VJO) program aims to divert veterans into appropriate treatment when they first come into contact with law enforcement or emergency services.[126] At the opposite end of the spectrum, the Health Care for Reentry Veterans (HCRV) program targets veterans who are about to leave jail, prison, or psychiatric institutions and return to their communities.[127] Although federal law requires that the correctional institution rather than the VA care for veterans while they are incarcerated, many of them are still eligible for VA benefits once they return home. The VJO and HCRV projects can enter correctional institutions to identify eligible defendants, advise them regarding services, conduct pre-release assessments, and help the veteran design a transition plan.[128] In order to facilitate these programs, the Veterans Health Administration is recommending that every VA medical center

122. *Id.*

123. *Id.*

124. *Id.* at 230-31.

125. *Id.*

126. MICHAEL J. KUSSMAN, DEP'T OF VETERANS AFFAIRS, UNDER SECRETARY FOR HEALTH'S INFORMATION LETTER: INFORMATION AND RECOMMENDATIONS FOR SERVICES PROVIDED BY VHA FACILITIES TO VETERANS IN THE CRIMINAL JUSTICE SYSTEM 2 (2009), *available at* http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=2019.

127. *Id.*

128. *Id.* at 2-7.

appoint a "Veterans Justice Outreach Coordinator" who will be responsible for partnering with local criminal justice authorities.[129] As of 2008, only one-third of VA medical centers were engaged in such cooperation.[130]

A very recent development at the federal level is the decision by the United States Sentencing Commission to promulgate amendments to the federal sentencing guidelines that advise federal judges to take a defendant's military status into account at sentencing. Traditionally, the federal guidelines (although they are now only advisory) have directed judges that factors such as "age, mental and emotional conditions, physical condition, and military service" were "not ordinarily relevant" in determining whether a departure from the guidelines was warranted.[131] The new amendments now instruct judges that such factors are relevant "if they are relevant to an unusual degree and distinguish the case from the typical case."[132] In addition, the new amendments expand by one offense level the zones in the guidelines sentencing table that allow for alternative sentencing options, and provide that a departure from the guidelines may be appropriate where the crime "is related to a treatment issue such as drug or alcohol abuse or significant mental illness and sentencing options such as home or community confinement or intermittent confinement would serve a specific treatment purpose."[133] Taken together, these changes could be very significant for veterans who are charged in the federal system.

The relevance of military service has even been recently noted at the federal constitutional level. In November 2008, the United States Supreme Court unanimously decided, without even hearing oral argument, that a lawyer for a defendant in a capital murder case was constitutionally ineffective for failing to present evidence of his client's service in the Korean War and the trauma he suffered as a result.[134] In reversing the death sentence, the Court found that it was objectively unreasonable for lower courts to have concluded that a jury would not have reached a different result had they heard the combat service evidence.[135]

Finally, many lawyers are using arguments about their clients' combat service in individual criminal cases. Even when there is no diversionary program to take advantage of, or a client's crime is too serious to qualify for treatment at sentencing, attorneys are raising combat trauma in plea

129. CMHS NAT'L GAINS CTR., *supra* note 12, at 3.

130. KUSSMAN, *supra* note 126, at 3.

131. Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes to Send to Congress Guideline Amendments Providing More Alternatives to Incarceration, Increasing Consideration of Certain Specific Offender Characteristics During the Sentencing Process (Apr. 19, 2010), *available at* http://www.ussc.gov/PRESS/rel20100419.htm.

132. *Id.*

133. *Id.*

134. *See* Porter v. McCollum, 130 S. Ct. 447 (2009).

135. *Id.*

negotiations, at sentencing, and as evidence for the defendant's state of mind.[136] However, modern lawyers are generally not trying to excuse culpability with a full-fledged insanity defense, but instead are attempting to explain to the judge or jury the source of the defendant's behavior in hopes of winning understanding and leniency.[137]

CONCLUSIONS AND RECOMMENDATIONS

The rapid development of veterans treatment courts has implications not only for veterans who encounter the criminal justice system, but for all veterans returning from Iraq and Afghanistan, as well as for the development of other types of treatment courts. For those who do participate in veterans treatment courts, the results seem to be positive. Although the courts are too new to have any real data, the earlier version of the Anchorage court had only one re-arrest out of thirty-four graduates in two years,[138] and to date none of the graduates of the Buffalo court have been rearrested.[139] Another good sign is that, like participants in other treatment courts,[140] the veterans tend to stay in treatment longer than voluntary clients. The Buffalo court estimates that ninety-three percent of treatment appointments are kept, compared to a rate of thirty-five percent at general treatment clinics.[141]

But there is a very real concern that veterans treatment courts are not serving enough of the veterans who most need their help. Many combat veterans live outside of the areas served by the treatment courts and cannot access them; many veterans suffering from severe combat stress are ineligible because their first crimes were violent; and focusing on veteran status rather than combat-related stress might not serve the original purpose of the courts. Early data from the Anchorage court presents another potential problem: between 2004 and 2007, seventy-nine percent of veterans who received treatment through the court were between the ages of forty-one and sixty, suggesting that the courts might have trouble reaching younger veterans from current conflicts.[142]

It seems that the ideal program would have two major characteristics. First, it would combine treatment courts in the areas that can support them with

136. Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Taking the Stand*, N.Y. TIMES, Jan. 27, 2008, at A1.

137. *Id.*

138. Ruggeri, *supra* note 13.

139. *Veterans Treatment Court Resources*, NAT'L ASS'N DRUG CT. PROFS. (NADCP), http://www.nadcp.org/learn/veterans-treatment-court-clearinghouse/veterans-treatment-court-resources (last visited May 26, 2009).

140. *See* BERMAN & FEINBLATT, *supra* note 91, at 156.

141. Ruggeri, *supra* note 13.

142. ALASKA VETERANS COURT, 2009 UPDATE WITH JULY 2004-JULY 2007 DATA 2 (2009) (on file with author).

broader diversionary legislation such as Minnesota's. The close supervision and camaraderie of a veterans-only docket is certainly beneficial, but there must be a capacity for judges outside of the treatment court to consider a defendant's combat experience and order him into the appropriate treatment. Second, the ideal program would allow diversion for a broader range of crimes, but require a tighter nexus between the criminal behavior and the defendant's combat experience. Although it might be politically unpopular to allow diversion into treatment for any "violent" criminals, fencing out offenders who carried a gun or got into a bar fight right after coming home from Iraq seems to miss the point. At the same time, requiring that substance or mental health issues be linked to combat trauma would counter the notion that "veterans" are becoming a special class of defendants. An ideal program would also adopt a flexible model for when diversion occurs, as the pending California legislation does. For example, a defendant who is charged with a minor offense could be diverted post-arrest, and the entire case dismissed if he completes treatment, preventing any collateral consequences. On the other hand, a defendant charged with a more serious crime could be required to plead guilty but be promised a reduced sentence or lesser charge if he completes treatment.

Regarding new veterans as a whole, the attention lavished on treatment courts and other interventions in the criminal justice system should not distract from the real problem: that too many soldiers are returning from war without the mental health, substance abuse, and reentry counseling that they need. Ideally, these soldiers should be receiving treatment for combat stress and related substance abuse or ancillary problems before they ever commit a crime. To that end, the initial success of treatment courts should serve as an example of how reentry services for veterans should be coordinated. The positive response to the peer mentoring programs in the courts might also provide an example of how to reach troubled veterans more effectively.

The use of peer mentoring is also the biggest lesson that can perhaps be applied to other forms of treatment courts. It is unsurprising that participants in the veterans treatment courts responded better to mentors who understood their background, and similar tactics are used by programs like Alcoholics Anonymous, which assigns "sponsors" to new members. Although it might be harder to transfer to drug or mental health courts, assigning a participant a mentor who comes from the same neighborhood, or speaks the same language, or is the same age and gender, might improve treatment outcomes for all types of groups. In many ways, veterans are an ideal demographic for developing new types of diversionary treatment programs: there is a serious need for help, veterans are a sympathetic population, and there are already a number of federally-funded services at their disposal. By working to expand and study veterans treatment courts and other sentencing reforms for veterans, advocates and researchers can both help those who sacrificed for their country and learn more about what diversion methods really work.