

# TRAUMA AND BLAMEWORTHINESS IN THE CRIMINAL LEGAL SYSTEM

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*Violence can result in trauma, but so too can trauma lead to violence. Neuroscience offers an increasingly sophisticated understanding of the biology of behavior, including the nexus between trauma and criminal behavior. Yet the criminal legal system consistently fails to account for the traumatic backgrounds of many people charged with crimes. Instead, people who experience trauma as a result of community violence, along with so many others, are ignored or ridiculed when they argue that their traumatic experiences should mitigate their blameworthiness. Military veterans, on the other hand, provide a unique example of a class of people for whom judges, prosecutors, and other actors in the criminal legal system recognize that context and circumstances matter—that even when someone is criminally responsible for a wrongdoing, their traumatic experiences may mitigate their blameworthiness.*

*In this Article, I explore why we treat trauma as a reason for leniency for some people but not for others, and whether it is morally justifiable for us to approach criminal behavior as situational (a result of environmental circumstances) for certain groups, while insisting that it is characterological (the result of individual character traits) for others. Offering a novel perspective on the issue, I contend that what distinguishes military veterans from defendants for whom trauma and other environmental factors are routinely disregarded is not a difference in the kind or degree of the impact of their circumstances, but rather cognitive assumptions about who is and is not a criminal. These assumptions in turn lead to a false dichotomy between people whose criminal behavior we deem characterological, and therefore fully morally blameworthy, and people whose criminal behavior we accept as situational, and therefore less blameworthy. I situate the roots of these categorizations in structural racism and show how this dichotomous thinking perpetuates racial injustice.*

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## INTRODUCTION

Robert Coleman<sup>1</sup> grew up in a poor neighborhood in Boston, where street

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1. Names have been changed. These anecdotes are based on actual cases that I litigated as a public defender in Boston, Massachusetts, from 2012 to 2017. They are also reflective of

violence was a part of daily life. He had an involved family, attended a well-funded high school outside of the neighborhood, and spent his afternoons playing sports. But none of that could shield him from witnessing serious violence in his community. After observing the murder of his best friend, he purchased a handgun.

Allen Rivera joined the U.S. military when he was in his early twenties. He spent multiple years in combat zones in Afghanistan, where he was surrounded by violence. When he returned home, he married his high school sweetheart and tried his best to be a good father to their baby. But he was haunted by the trauma he experienced at war, and he too bought a handgun, which he kept loaded in his bedroom.

Both Robert and Allen were eventually arrested for offenses related to their unlawful possession of firearms. Yet despite their similar histories of trauma and the apparent nexus between their traumatic experiences and criminal offenses, prosecutors and judges could not have treated their cases more differently. Allen's case was diverted to the Boston Veterans Treatment Court, where he was connected to mental health treatment, given assistance finding a job and housing, and offered mentorship. Though Allen was charged with serious felonies that carried mandatory minimum prison sentences, the prosecutor eagerly reduced the felony charges to misdemeanors, and the judge unhesitatingly agreed to sentence him to probation rather than prison.

Robert was shown no similar consideration. Despite months of negotiating by his defense attorneys, the district attorney refused to reduce the charges, and Robert faced the unbearable choice of either taking his case to trial, despite overwhelming evidence against him, or pleading guilty to an offense that carried a mandatory minimum sentence. While the mandatory minimum sentence meant that judges had little power to intervene, their lack of concern regarding Robert's background was evident, and reinforced the district attorney's decision not to reduce the charges.

Robert's situation is far from unique. The criminal legal system consistently fails to account for histories of trauma in the lives of criminal defendants. Like people who experience trauma as a result of community violence, survivors of gender-based violence,<sup>2</sup> people who experience trauma as a result of incarceration,<sup>3</sup> and so many others have been ignored or ridiculed when they argue that

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general trends that I observed throughout my five years as a public defender.

2. The traumatic impact of experiencing gender-based violence is well documented. See, e.g., Mazeda Hossain et al., *The Relationship of Trauma to Mental Disorders Among Trafficked and Sexually Exploited Girls and Women*, 100 AM. J. PUB. HEALTH 2442, 2444-45 (2010) (finding that seventy-seven percent of female sex trafficking victims experienced high levels of PTSD symptoms); Emily R. Dworkin, *Risk for Mental Disorders Associated with Sexual Assault: A Meta-Analysis*, 21 TRAUMA, VIOLENCE & ABUSE 1011, 1018 (2020) (finding that experiencing sexual assault is associated with an increased risk of mental disorders, including PTSD).

3. Incarcerated people are routinely exposed to traumatizing events, including sexual and physical assault. The Prison Rape Elimination Act (PREA) of 2003 was signed into law

their traumatic experiences should mitigate their blameworthiness.<sup>4</sup> Military veterans therefore provide a unique example of a class of people for whom judges, prosecutors, and others in the criminal legal system recognize that context and circumstances matter—that even when someone is criminally responsible for a wrongdoing, their history of trauma may mitigate their blameworthiness.<sup>5</sup>

This disparate treatment of people with histories of trauma raises important questions that have not been adequately addressed by legal scholars: Why do we treat trauma as a reason for leniency for some groups of people, but not for others? And is it morally justifiable for us to approach criminal behavior as situational (a result of environmental circumstances) for certain groups, while insisting that it is characterological (resulting from individual pathology) for others?

This Article identifies a novel answer to these questions. I contend that what distinguishes military veterans from defendants for whom trauma and other environmental factors are routinely disregarded is not a difference in the kind or degree of the impact of their life circumstances, but rather cognitive assumptions about who is and who is not a criminal. These assumptions, in turn, lead to a false dichotomy between people whose criminal behavior we deem characterological, and therefore fully morally blameworthy, and people whose criminal behavior we see as situational, and therefore less blameworthy. I situate the roots of these categorizations in structural racism and show how this dichotomous thinking perpetuates racial injustice.<sup>6</sup>

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based on findings that prison rape is an “epidemic” and a “day-to-day horror.” DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* 186 (2021). As Sklansky notes, Congress found that “at least 13 percent of prison and jail inmates had been sexually assaulted while incarcerated.” *Id.* at 189. As for physical violence, a 2005 survey of more than 7,000 prisoners found that twenty percent had been physically assaulted by other prisoners in the prior six months, and nearly twenty-five percent of male prisoners experienced physical violence from correctional staff. *Id.* at 187. “Even adjusting for the socioeconomic characteristics of the victims, physical assaults are more than ten times more common in prison than in the outside world.” *Id.* This violence is tacitly accepted, if not actively encouraged, by the government and society as a whole. *Id.* at 183, 186. For example, the Department of Justice concluded in 2019 that violence pervaded Alabama’s men’s prison system and that there was reason to believe the state’s deliberate indifference to the situation violated the Eighth Amendment. *Id.* at 188.

4. See, e.g., ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* (1995).

5. In discussing blame, I use legal philosopher Erin Kelly’s definition: “I understand blame to mean the moral condemnation of wrongdoers. Blame reaches beyond an assessment of wrongdoing to a personal appraisal of wrongdoers in view of their actions.” ERIN I. KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* 5 (2018).

6. Americans have a long history of not only associating Black people with criminality but also categorizing such criminality as characterological rather than situational. See SKLANSKY, *supra* note 3, at 121 (“In the public mind, the face of violent crime is the face of a young man of color, and offending by members of racial minorities is more readily attributed to character rather than circumstances.”); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 4 (2011); Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of->

This Article proceeds in four parts. To guide my analysis, I focus on a comparison between military veterans and people who experience trauma as a result of community violence not because survivors of community violence are the only people whose trauma is routinely ignored, but because the similarities between the causes and type of trauma experienced by both groups provide a useful mechanism for illuminating the cognitive dissonance that I argue undergirds this disparate treatment.<sup>7</sup>

In Part I of this Article, I introduce the concept of community violence and explore its disparate impact on poor and predominantly Black communities. I then describe how the government, primarily through its role in segregating residential neighborhoods, bears direct responsibility for the concentration of community violence in particular neighborhoods.

In Part II, I describe the connection between exposure to trauma and cognitive and behavioral issues, including post-traumatic stress disorder (PTSD). I then detail the nexus between trauma and criminal behavior.

In Part III, I contrast the criminal legal system's treatment of people who experience trauma in the military, on the one hand, and people who experience trauma due to community violence, on the other hand. I describe how military veterans are increasingly afforded leniency through veterans treatment courts (VTCs) and sentencing laws, and show that trauma experienced as a result of exposure to community violence is treated as a reason for leniency much less frequently. I contend that what distinguishes these groups is not a difference in their life circumstances, but rather, our cognitive assumptions about who is and

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mass-incarceration/403246; KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 111 (2016); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 889 (2004); Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1952 (Aug. 5, 2014); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1238 (2018).

7. There is, of course, overlap between veterans and people who experience community violence trauma. The main predictors of military enlistment are not class or race—most members of the military come from middle-class neighborhoods, and the military's current racial makeup is roughly that of young Americans as a whole, though African Americans are slightly more likely to serve—but rather whether a person knows someone who has served in the military. See Dave Philippo & Tim Arango, *Who Signs Up to Fight? Makeup of U.S. Recruits Shows Glaring Disparity*, N.Y. TIMES (Jan. 14, 2020), <https://www.nytimes.com/2020/01/10/us/military-enlistment.html>. However, a recent RAND Corporation study found that Junior Reserve Officers' Training Corps (JROTC) programs are overrepresented in poorer schools and schools with higher populations of African American students. CHARLES A. GOLDMAN ET. AL., RAND CORP., *GEOGRAPHIC AND DEMOGRAPHIC REPRESENTATIVENESS OF JUNIOR RESERVE OFFICER TRAINING CORPS* 24-27 (2017), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1700/RR1712/RAND\\_RR1712.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1700/RR1712/RAND_RR1712.pdf). And much has been written about military recruitment highlighting immigration benefits and college tuition relief. See, e.g., Nick Martin, *The Military Views Poor Kids as Fodder for Its Forever Wars*, NEW REPUBLIC (Jan. 7, 2020), <https://newrepublic.com/article/156131/military-views-poor-kids-fodder-forever-wars>.

who is not a criminal—assumptions that translate into an unfounded chasm between people (such as residents of violent neighborhoods) whose criminal behavior we consider characterological, and people (such as veterans) whose criminal behavior we accept as situational.<sup>8</sup> As I contend, this unfounded distinction between law-abiders and law-breakers is troubling in its own right, and all the more problematic because of its racist roots and its ongoing role in perpetuating racially disparate outcomes.

In Part IV, I turn to potential remedies. First and foremost, I contend, it is incumbent upon all criminal legal system actors—and our society more broadly—to acknowledge this false dichotomy for what it is and to work toward more equitable and compassionate treatment of all individuals with histories of trauma, especially when that trauma is the result of government action. The inhumanity with which we treat individuals who have experienced community violence would be inconceivable if it were happening to a different group of people, and a primary goal of this Article is to shine a light on this disparate treatment. With regard to specific policy proposals, I suggest an increased focus on community investment programs to reduce the underlying causes of trauma. I also advocate for a shift toward restorative justice, which prioritizes accountability over blame and makes space for the idea of criminal behavior as the shared responsibility of the individual and the state. Finally, I encourage defense attorneys to continue educating judges about their clients' histories of trauma and the connection between trauma and blameworthiness in their plea bargaining and sentencing arguments.<sup>9</sup>

Reckoning with the injustice of treating crime as characterological for some groups of people and situational for other groups of people is particularly timely given the current rise in violent crime. Even as violence decreased from the early 1990s until the mid 2010s and criminal reforms gained traction, violent crime remained a third rail for reformers. According to a 2020 Prison Policy Initiative report, nearly all the significant criminal justice reform measures passed in the last twenty years explicitly exclude people accused and convicted of violent crimes.<sup>10</sup> At a moment when violent crime rates are increasing,<sup>11</sup> it is all the more

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8. In making this argument, I build on the work of Erin R. Collins, who contends that some problem-solving courts represent a type of moral sorting, through which the criminal legal system accounts for the life circumstances of certain populations who are deemed “more deserving” of treatment. *Erin R. Collins, Status Courts*, 105 GEO. L.J. 1481, 1500 (2017).

9. *See* Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 3 (2018) (arguing that defense attorneys in noncapital cases should create records akin to those in capital cases “explaining why trauma is relevant to their clients’ punishments so that courts will begin to change their approaches to sentencing”).

10. SKLANSKY, *supra* note 3, at 42.

11. According to FBI statistics, in 2020, violent crime was up 5.6 percent compared to 2019. *See* Press Release, Fed. Bureau of Investigation, FBI Releases 2020 Crime Statistics (Sept. 27, 2021), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2020-crime-statistics>. For a critique of the FBI’s statistics, what constitutes a “crime” in the United States,

important for us to address violence head-on, especially when approximately fifty percent of people serving a prison sentence in the United States are already convicted of offenses classified as violent.<sup>12</sup> Rather than minimizing concerns about violence,<sup>13</sup> now is the time to more deeply probe the inconsistent ways in which we treat environmental factors in the narratives of how people come to commit crimes—not only as a matter of fairness for people accused of crimes, but also for the well-being of those who are harmed and the communities most impacted by this harm.

## I. COMMUNITY VIOLENCE AND TRAUMA

### A. Community violence

American cities are the most violent in the developed world.<sup>14</sup> As of 2017, twelve U.S. cities had a murder rate of more than twenty per 100,000 people, the threshold used to identify the world's most violent places.<sup>15</sup> After significant declines in crime rates nationally since the early 1990s, violent crime has gradually increased again since 2014, with a surge in violence in 2020 that continues through today.<sup>16</sup> Even setting aside the possibly anomalous nature of 2020 and 2021, “violence remains a common feature of life throughout much of the United States.”<sup>17</sup> For Black boys and men ages fifteen to thirty-four, in fact, firearm homicide is the leading cause of death.<sup>18</sup>

Much of this crime constitutes what is referred to as community violence—deliberate acts of interpersonal violence committed in public areas against a person in the community.<sup>19</sup> Such violence includes homicides, nonfatal shootings,

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and how we count crimes, see *infra* note 34.

12. SKLANSKY, *supra* note 3, at 3.

13. See Eric Levitz, *Progressives Don't Need to Downplay Rising Homicides*, N.Y. MAG. (July 1, 2021), <https://nymag.com/intelligencer/2021/07/progressives-dont-need-to-downplay-rising-homicides.html>.

14. Richard Florida, *The Geography of Urban Violence*, BLOOMBERG CITYLAB (Aug. 21, 2018), <https://www.bloomberg.com/news/articles/2018-08-21/mapping-urban-violence-in-the-u-s>; see also GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, HEALING COMMUNITIES IN CRISIS: LIFESAVING SOLUTIONS TO THE URBAN GUN VIOLENCE EPIDEMIC 6 (2016), <https://giffords.org/wp-content/uploads/2019/01/Healing-Communities-in-Crisis.pdf> (“[O]ur gun death rates dwarf every other industrialized nation by orders of magnitude.”).

15. Florida, *supra* note 14.

16. Derek Thompson, *Why America's Great Crime Decline Is Over*, ATLANTIC (Mar. 24 2021), <https://www.theatlantic.com/ideas/archive/2021/03/is-americas-great-crime-decline-over/618381>.

17. Patrick Sharkey, *The Long Reach of Violence: A Broader Perspective on Data, Theory, and Evidence on the Prevalence and Consequences of Exposure to Violence*, 1 ANN. REV. CRIMINOLOGY 85, 90 (2018).

18. GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 14, at 11.

19. See *Community Violence*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/trauma-types/community-violence> (last visited Dec. 29, 2021); Michele

weapons attacks, physical fighting, sexual assaults, robberies, and more.<sup>20</sup>

As sociologist Patrick Sharkey explains, community violence has a “long reach.”<sup>21</sup>

The impact of an incident of violence is felt most directly by the individual victim, but it is not limited to that victim. The incident affects those who are present when it occurs and watch it unfold. The impact may extend further, to those who know the victim or perpetrator, to those connected through some affiliation to the actors involved (e.g., family, friend, classmate, ethnic group, gang, neighborhood), and to those in the community who become aware of the incident. That same incident may affect those who are completely unaware of what took place but who walk streets that have a greater police presence, enter schools through metal detectors, and look for jobs in places where business owners are reluctant to open shop.<sup>22</sup>

For people who have not lived or worked in places marked by concentrated community violence, it can be difficult to understand the magnitude of the issue. Journalist Alex Kotlowitz provides a visceral account: “In Chicago, in the twenty years between 1990 and 2010, 14,033 people were killed, another roughly 60,000 wounded by gunfire. And the vast majority of these shootings took place in a very concentrated part of the city.”<sup>23</sup> This death toll, Kotlowitz writes, is “considerably more than the number of American soldiers killed in combat in Afghanistan and Iraq. Combined.”<sup>24</sup>

#### B. Disparate impact of community violence on people of color

Within U.S. cities, murder and other violent crime are highly concentrated in the poorest areas.<sup>25</sup> Crime is not only concentrated in certain neighborhoods, but on certain blocks of certain neighborhoods. In fact, studies find that approximately half of all gun violence is concentrated in about five percent of streets in a given city.<sup>26</sup> In Boston in particular, sociologists found that from 1980 through

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R. Cooley-Quille et al., *Emotional Impact of Children’s Exposure to Community Violence: A Preliminary Study*, 34 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1362, 1362-68 (1995). Some definitions of community violence also specify that it is a type of interpersonal violence in which the perpetrator and the victim are not related to each other.

20. NAT’L CHILD TRAUMATIC STRESS NETWORK, *supra* note 19.

21. Sharkey, *supra* note 17, at 86.

22. *Id.*

23. ALEX KOTLOWITZ, AN AMERICAN SUMMER: LOVE AND DEATH IN CHICAGO 5-6 (2019).

24. *Id.* at 6.

25. Florida, *supra* note 14.

26. Stephen Lurie, *There’s No Such Thing as a Dangerous Neighborhood*, BLOOMBERG CITYLAB (Feb. 25, 2019), <https://www.bloomberg.com/news/articles/2019-02-25/beyond>

2008, less than three percent of the city's "micro places"—defined as street intersections or segments—accounted for more than half of the city's gun violence.<sup>27</sup>

### 1. The concentration of community violence in Black neighborhoods

The places that experience the most violence are overwhelmingly "characterized by poverty, joblessness, institutional decay, and racial and ethnic segregation."<sup>28</sup> Sharkey compares the degree of neighborhood poverty in census tracts with the spatial distribution of homicides in Chicago. He finds that "the concentration of violence goes hand in hand with the concentration of poverty," with a "remarkable spatial clustering" of homicides in and around the poorest neighborhoods.<sup>29</sup>

African Americans are much more likely than whites to live in areas of concentrated violence, the historical reasons for which are discussed below in Section I.C.<sup>30</sup> From 1985 to 2000, Black children were ten times more likely than white children to live in neighborhoods with poverty rates of at least twenty percent.<sup>31</sup> Even today, thirty-one percent of Black children live in neighborhoods where the poverty rate is thirty percent or greater, "a level of poverty that is unknown among white children."<sup>32</sup>

Studies looking directly at violence and the racial demographics of neighborhoods confirm this pattern. Using street crime data from 9,593 neighborhoods in ninety-one large cities, researchers found that predominantly Black neighborhoods, defined as those that consist of more than seventy percent Black residents, "averaged five times as many violent crimes as predominantly white communities."<sup>33</sup> Further, "[p]redominantly Latino neighborhoods averaged about two and

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broken-windows-what-really-drives-urban-crime.

27. *Neighborhoods and Violent Crime*, U.S. DEP'T OF HOUS. & URB. DEV.: EVIDENCE MATTERS, (2016), <https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.htm> 1.

28. Patrick Sharkey & Gerard Torrats-Espinosa, *The Effect of Violent Crime on Economic Mobility*, 102 J. URB. ECON. 22, 23 (2017).

29. PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 30 (2013); *see also* U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 27 (concluding that neighborhoods with more concentrated disadvantage and higher poverty rates tend to experience higher levels of violent crime).

30. As this data on the concentration of crime makes clear, though some areas of poor and predominantly Black neighborhoods are marked by very high levels of violence, "the idea that directly experienced violence is endemic and everywhere, affecting everyone, or even most people—that Black neighborhoods, as a whole, are more dangerous than 'war zones,' to use President Trump's term—is not reality." IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 78 (2019) (criticizing the many stories that "center on violent Black bodies instead of the overwhelming majority of nonviolent Black bodies").

31. SHARKEY, *supra* note 29, at 27-28.

32. *Id.* at 28.

33. U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 27.

a half times as many violent crimes as predominantly white neighborhoods.”<sup>34</sup>

Individual-level statistics also demonstrate the disparate impact of violence on communities of color. While Black men constitute just six percent of the U.S. population, they account for more than fifty percent of all gun homicide victims.<sup>35</sup> The rate of homicide victimization for Black people is more than six times as high as for white people, and over four times as high as for Hispanic people.<sup>36</sup> Likewise, the rate of hospitalization for nonfatal firearm injuries is ten times higher for Black people than for white people.<sup>37</sup>

## 2. Disparate impact of police violence on Black communities

This concentrated community violence is not only the result of civilian-on-civilian crime. As the recent slayings of George Floyd, Breonna Taylor, Daunte Wright, and so many others have highlighted, people of color are significantly more likely than white people to be killed by the police. Analyzing the 5,367 fatal police shooting from 2015 to 2020, researchers at Yale University and the University of Pennsylvania found that for armed victims, compared to white people, Native Americans were three times as likely to be killed by the police, Black people were 2.6 times more likely to be killed, and Latino people were 1.3 times more likely to be killed. For unarmed victims, Black people were killed by the police at three times the rate of white people, and Latino people were killed at 1.45 times the

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34. *Id.* Of course, crime statistics, including data from the widely relied-upon FBI Uniform Crime Reporting (UCR) Program, are not objective facts. The concept of “crime” is constructed by people with power, and “even within categories of acts that are classified as ‘crimes,’ powerful people decide where to look for those acts, when to look for them, and which ones to ignore and which to document.” Alec Karakatsanis, *Why Crime Isn’t the Question and Police Aren’t the Answer*, CURRENT AFFS. (Aug. 10, 2020), <https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer>; *see also* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 872 (Mar. 28, 2019) (contending that choices about what conduct is criminalized, how it is punished, and who is targeted for this punishment are “driven by political, cultural, social, and economic forces” and made by particular groups of people “who bring their life experiences and perspectives to their decisions”); Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1234 (2014) (demonstrating that some crimes, such as rape, are systematically underreported by the police and therefore undercounted in the UCR statistics).

35. GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 14, at 11.

36. Sharkey, *supra* note 17, at 91. According to the FBI Uniform Crime Reporting (UCR) system, as of 2015, the homicide victimization “rate for African Americans (Hispanic and non-Hispanic) was 15.2 per 100,000, the rate for all Hispanics was 3.47 per 100,000, and the rate for whites (Hispanic and non-Hispanic) was 2.29 per 100,000.” *Id.* at 88.

37. *Id.* at 91. For example, in New York City in 2019, over seventy-one percent of shooting victims (fatal and nonfatal) were Black, even though Black people make up only about twenty-three percent of the city population. N.Y. POLICE DEP’T, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY (JAN. 1 - DEC. 31, 2019) 11, B-1 (2019), [https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/year-end-2019-enforcement-report.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2019-enforcement-report.pdf).

rate of whites.<sup>38</sup>

Black people are also disproportionately victimized by nonfatal police use of force. According to a 2018 Bureau of Justice Statistics report, among people who had contact with the police during the prior twelve months, four percent of Black people had been subjected to nonfatal force or the threat of force, whereas only two percent of whites had experienced the threatened or actual use of force.<sup>39</sup> Some city-level statistics paint an even more startling picture. For example, police in Minneapolis used force (including kicks, neck holds, punches, shoves, takedowns, Mace, and Tasers) against Black people at a rate of at least seven times that of white people from 2015 to 2020.<sup>40</sup> Any account of violence in poor, predominantly Black neighborhoods is therefore incomplete without reference to the violence perpetrated by the police.

### C. Government responsibility for community violence

For much of our nation's history, even the Supreme Court has claimed that residential segregation is the result of *de facto*, not *de jure*, segregation. For example, in 1973 in *Milliken v. Bradley*, the Court held that Detroit's white suburbs "could not be included in Detroit's school desegregation plan, because no real evidence existed to show that segregation in the region's schools or neighborhoods was 'in any significant measure caused by governmental activity,'" but rather that "black students were concentrated in Detroit because of 'unknown and perhaps unknowable factors.'"<sup>41</sup>

Yet persuasive scholarship now establishes that we know precisely what caused residential segregation: discriminatory government action at the federal, state, and local level. As Richard Rothstein explains, "[t]oday's residential segregation . . . is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States."<sup>42</sup> This government-sponsored segregation has, in turn, led to a concentration of community violence

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38. Elle Lett et al., *Racial Inequity in Fatal US Police Shootings, 2015-2020*, 75 J. EPIDEMIOLOGY & CMTY. HEALTH 394, 394-95 (2021); see also Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. 16793, 16793-95 (2019) (estimating that one in 1,000 Black men and about one in 2,000 Hispanic men will be killed by police, relative to one in 3,000 white men).

39. ERIKA HARRELL & ELIZABETH DAVIS, U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 - STATISTICAL TABLES 1 (2020), <https://bjs.ojp.gov/library/publications/contacts-between-police-and-public-2018-statistical-tables>.

40. Richard A. Oppel Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html>.

41. Rachel M. Cohen, *Discrimination Is Not De Facto*, SLATE (May 5, 2017, 10:49 AM), <https://slate.com/news-and-politics/2017/05/richard-rothsteins-the-color-of-law-reviewed.html>.

42. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* vii-viii (2017).

in certain predominantly Black neighborhoods.

From the 1930s through the 1960s, the government excluded Black people from the home mortgage market, denying them both the choice of where to live and the ability to accumulate wealth through home ownership.<sup>43</sup> The Federal Housing Administration (FHA), created by Congress in 1934, subsidized the creation of mass-produced housing subdivisions—with the condition that none of the subdivisions' homes be sold to Black families.<sup>44</sup> It also insured private mortgages, giving borrowers the ability to make smaller down payments and to borrow at lower interest rates. But due to a policy of redlining, these benefits were not available to Black people. The federal government's Home Owners' Loan Corporation (HOLC) used color-coded maps and marked neighborhoods where Black people lived in red ink to denote that they were uninsurable.<sup>45</sup> The HOLC also required that any property it insured be covered by a restrictive covenant, "a clause in the deed forbidding the sale of the property to anyone other than whites."<sup>46</sup> The G.I. Bill of 1944, through which veterans could access low-interest mortgages that did not require down payments, imposed similar restrictions.<sup>47</sup> The G.I. Bill was administered by the Veterans Administration, which, like the FHA, guaranteed bank loans only to developers who promised not to sell homes to Black people.<sup>48</sup> As a result, white Americans received nearly all of the loans insured by the government from 1934 to 1962, and Black Americans were prevented from benefitting from the very program that is credited with building the modern middle class.<sup>49</sup>

The federal government then exploited the racial segregation it created.<sup>50</sup> It built racially separate public housing in cities that had not previously been marked by significant segregation, and disproportionately directed Black families who received housing assistance into the segregated neighborhoods it had created.<sup>51</sup> It gave billions of dollars of tax breaks to single family suburban homeowners, while simultaneously declining to invest in transportation networks that could bring Black Americans to better job opportunities.<sup>52</sup> It also urged suburbs

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43. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>.

44. ROTHSTEIN, *supra* note 42, at 11, 64-67.

45. *Id.* at 64.

46. Coates, *supra* note 43.

47. Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America*, N.Y. TIMES MAG. (Aug. 14, 2019) <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>; Coates, *supra* note 43.

48. Lee, *supra* note 47.

49. Nikole Hannah-Jones, *What Is Owed*, N.Y. TIMES MAG. (June 30, 2020), <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html>.

50. ROTHSTEIN, *supra* note 42, at 217.

51. *Id.* at 216-17.

52. *Id.* at 217; *see also* Coates, *supra* note 43 (providing an in-depth account of how "legislatures, mayors, civic associations, banks, and citizens all colluded to pin black people

to adopt exclusionary zoning laws that encouraged white flight.<sup>53</sup>

State and local governments played a direct role in creating and perpetuating racial segregation, too. State courts sanctioned private discrimination by ordering the eviction of African American homeowners in neighborhoods where neighborhood-association rules and restrictive covenants barred their residence.<sup>54</sup> Police encouraged mob violence against Black people who moved into previously white neighborhoods instead of arresting the perpetrators of the violence.<sup>55</sup> And state real estate commissions gave licenses to real estate brokers whose published codes of ethics required that they preserve residential segregation.<sup>56</sup>

Government transportation policies furthered the impact of discriminatory housing laws. Following the Interstate Highway Act of 1956, federal and state highway developers maintained segregation and further disadvantaged Black neighborhoods.<sup>57</sup> The interstate highway system was completed in the early 1970s, and the U.S. Department of Transportation estimates that more than one million people were displaced as a direct result of federal highway building, with millions more left in communities that had been devastated by the construction.<sup>58</sup> As Deborah Archer writes, the transportation policy of the 1950s and 1960s was deliberately designed to reinforce racial inequality, and the neighborhoods that were destroyed were disproportionately Black and poor.<sup>59</sup>

The government also played an instrumental role in segregating the labor market and preventing transfers of wealth to Black people, which in turn exacerbated discriminatory housing policies. Due in part to government labor policies, most African Americans were unable to accumulate the wealth necessary to move to middle-class communities, even if other policies had not prohibited them from doing so.<sup>60</sup> This not only robbed Black families of the opportunity to build wealth through rising home equity, but also contributed to a “spatial mismatch” between where Black Americans lived and where desirable jobs were located.<sup>61</sup> In this way, the federal government operated as “a commanding instrument of white privilege.”<sup>62</sup> As Ira Katznelson contends,

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into ghettos”).

53. See ROTHSTEIN, *supra* note 42, at 52-53.

54. *Id.* at 81-82.

55. *Id.* at 142.

56. *Id.* at 102.

57. Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: Advancing Racial Equity Through Highway Reconstruction, 73 VAND. L. REV. 1259, 1264-65 (2020).

58. *Id.* at 1274.

59. *Id.*

60. RICHARD ROTHSTEIN, ECON. POL’Y INST., THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES 2 (Oct. 15, 2014), <https://www.epi.org/publication/making-ferguson>.

61. *Id.* at 28.

62. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 18 (2005).

[A]t the very moment when a wide array of public policies was providing most white Americans with valuable tools to advance their social welfare—insure their old age, get good jobs, acquire economic security, build assets, and gain middle-class status—most black Americans were left behind or left out.<sup>63</sup>

The role of the government in creating segregated neighborhoods is far from a vestige of the past. The Fair Housing Act of 1968 prohibited future discrimination in housing. However, the government did not compensate Black Americans for past discrimination,<sup>64</sup> and the law continues to perpetuate racial segregation.<sup>65</sup> In part as a direct result of racist government policies before 1968, Black families were denied the benefits of decades of housing price appreciation and left with significantly less wealth than white Americans who owned more valuable houses largely as a result of redlining and other government policies.<sup>66</sup> The racial wealth gap today is staggering. White Americans possess an average of seven times the wealth of Black Americans, and even though “[B]lack people make up nearly thirteen percent of the United States population, they hold less than three percent of the nation’s total wealth.”<sup>67</sup> The median family wealth for white people is \$171,000; the median for Black families, on the other hand, is only \$17,600, and a full nineteen percent of Black families have zero or negative net worth.<sup>68</sup> This massive gap “is almost entirely attributable to federal housing policy implemented through the 20th century.”<sup>69</sup>

Not only have federal and state laws not undone the harms of past legal discrimination, new exclusionary local laws and policies are now being used by predominantly white communities to stave off integration.<sup>70</sup> As Deborah Archer writes, crime-free housing ordinances—local laws that encourage or require private landlords to evict or reject tenants who have had contact with the criminal legal system—continue to keep many Black people out of certain white neighborhoods.<sup>71</sup> Though formally race neutral, these housing ordinances prevent access to people with a criminal history, thereby importing the racial biases of policing and prosecution into housing policy.<sup>72</sup> As such, the ordinances prevent

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63. *Id.* at 23.

64. See Hannah-Jones, *supra* note 49; Coates, *supra* note 43.

65. See Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 175-78 (2019).

66. See Hannah-Jones, *supra* note 49. Private racism likely also played a role.

67. Lee, *supra* note 47.

68. *Id.*

69. Pedro da Costa, *Housing Discrimination Underpins the Staggering Wealth Gap Between Blacks and Whites*, ECON. POL’Y INST.: WORKING ECON. BLOG (Apr. 8, 2019, 8:00 AM), <https://www.epi.org/blog/housing-discrimination-underpins-the-staggering-wealth-gap-between-blacks-and-whites>; see also Hannah-Jones, *supra* note 49.

70. Archer, *supra* note 65, at 178.

71. *Id.* at 173.

72. *Id.* at 179.

Black people from renting in many white communities and force Black people to look for housing in communities that are already segregated. And while there is no evidence that these ordinances reduce crime, they have been adopted in about two thousand municipalities across forty-eight states.<sup>73</sup>

Despite the government's undeniable role in creating racially and economically segregated residential neighborhoods, policymakers all too often maintain that it is the residents of these neighborhoods themselves that are responsible for the continuing poverty, crime, and violence.<sup>74</sup> This ahistorical perspective fails to acknowledge the broader context described above. In reality, the same federal, state, and local policies that created segregated neighborhoods are responsible for the violence that now marks some areas of these neighborhoods.

As I. Bennett Capers writes, “[c]rime tends to be high in minority neighborhoods not because of the presence of minorities, but largely because the neighborhoods themselves tend to be criminogenic due to disproportionate lack of educational opportunities, jobs, services, and concern.”<sup>75</sup> Noni Gaylord-Harden, a psychologist who studies community violence exposure, makes the connection to racism explicit: “Social stratification mechanisms, such as racism, segregation, and oppression marginalize African American boys by situating their development in high-risk contexts characterized by systemic, structural barriers to competence. Structural and institutional racism create segregated communities of concentrated poverty and scarce resources which elevate levels of violent crime.”<sup>76</sup>

## II. THE PSYCHOLOGICAL IMPACT OF TRAUMA

Trauma is commonly equated with military service. While most veterans adjust to civilian life without significant challenges, studies show that eleven to twenty percent of combat veterans involved in the recent wars in Iraq and Afghanistan suffer from PTSD in a given year.<sup>77</sup> Veterans are also disproportionately impacted by depression and substance use disorders, and the U.S. suicide

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73. *Id.* at 175-76.

74. See, e.g., MUHAMMAD, *supra* note 6, at 1 (“Violent crime rates in the nation’s biggest cities are generally understood as a reflection of the presence and behavior of the black men, women, and children who live there.”).

75. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 49 (2009).

76. Jerry Phan et al., *Hyperarousal and Hypervigilance in African American Male Adolescents Exposed to Community Violence*, J. APPLIED DEV. PSYCH., July 29, 2020, at 1 (citations omitted).

77. *How Common Is PTSD in Veterans?*, U.S. DEP’T OF VETERANS AFFS., [https://www.ptsd.va.gov/understand/common/common\\_veterans.asp](https://www.ptsd.va.gov/understand/common/common_veterans.asp) (last visited Mar. 5, 2022). Similarly, approximately twelve percent of Gulf War veterans have PTSD in a given year. *Id.* With regard to Vietnam War veterans, the late 1980s National Vietnam Veterans Readjustment Study (NVVRS) estimated that fifteen percent of veterans had PTSD at the time of the study, and it is estimated that thirty percent of Vietnam veterans have had PTSD at some point in their lifetime. *Id.*

rate for veterans is over fifty percent higher than for non-veterans.<sup>78</sup> This makes sense given the horrors of war and the type of training and psychological conditioning provided to servicemembers.<sup>79</sup> But veterans are not the only group of people who experience disproportionately high rates of trauma. In fact, despite the troubling myth that people who grow up in dangerous neighborhoods are inured to the violence they experience,<sup>80</sup> researchers have documented a clear link between exposure to community violence and PTSD. In fact, some studies show that over forty percent of people who live in areas marked by significant community violence exhibit symptoms of PTSD.<sup>81</sup>

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78. OFF. OF MENTAL HEALTH & SUICIDE PREVENTION, U.S. DEP’T OF VETERANS AFFS., 2021 NATIONAL VETERAN SUICIDE PREVENTION ANNUAL REPORT 5 (Sept. 2021), <https://www.mentalhealth.va.gov/docs/data-sheets/2021/2021-National-Veteran-Suicide-Prevention-Annual-Report-FINAL-9-8-21.pdf>.

79. Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 104-05 (2010). In post-9/11 wars in particular, soldiers have experienced long and repeat deployments, as well as novel threats from improvised explosive devices, which require soldiers to remain constantly vigilant. *Id.* at 106.

80. Eric Klinenberg, *Growing Up With Murder All Around*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/books/review/alex-kotlowitz-american-summer.html> (“For instance, a destructive myth about people who live in Chicago’s most dangerous neighborhoods is that they’ve grown hardened, numb to the atrocities that saturate daily life.”); Lois Beckett, *The PTSD Crisis That’s Being Ignored: Americans Wounded in Their Own Neighborhoods*, PROPUBLICA (Feb. 3, 2014), <http://www.propublica.org/article/the-ptsd-crisis-thats-being-ignored-americans-wounded-in-their-own-neighbor> (quoting a behavioral scientist explaining that “We had people tell us that we’d see a lot of people who were gang-bangers, and they wouldn’t develop PTSD, because they were already hardened to that kind of life.”). Recently, Judge Peter Cahill, who sentenced former Minneapolis police officer Derek Chauvin to 22.5 years in prison for the murder of George Floyd, cited multiple aggravating factors for going above the recommended sentence, but wrote skeptically about the trauma of four minors who had observed Mr. Floyd’s murder. Judge Cahill’s dismissal of the minors’ trauma has been widely criticized, and Attorney General Keith Ellison has since requested that the Judge Cahill modify his sentencing memo to reflect the validity of the minors’ trauma. See Omar Jimenez, *Minnesota Prosecutors Ask Judge in Derek Chauvin’s Trial to Amend Memo that Downplayed Witnesses’ Trauma*, CNN (July 8, 2021), <https://www.cnn.com/2021/07/08/us/derek-chauvin-judge-trauma/index.html>.

81. Steven L. Berman et al., *The Impact of Exposure to Crime and Violence in Urban Youth*, 66 AM. J. ORTHOPSYCHIATRY 329, 332, 334 (1996) (finding that thirty to forty percent of youth exposed to community violence develop PTSD symptoms); see also Charles F. Gillespie et al., *Trauma Exposure and Stress-Related Disorders in Inner City Primary Care Patients*, 31 GEN. HOSP. PSYCHIATRY 505, 510 (2009) (finding that 46.2 percent of surveyed inner-city residents of Atlanta experienced PTSD over the course of their lifetime); Carol Reese et al., *Screening for Traumatic Stress Among Survivors of Urban Trauma*, 73 J. TRAUMA & ACUTE CARE SURGERY 462, 463, 465 (2012) (finding that forty-two percent of patients surveyed at an outpatient clinic in Chicago displayed symptoms of PTSD, and more than half of those who were gunshot-wound victims had signs of PTSD); Beckett, *supra* note 80. While I focus on community violence in this particular Article, I do not mean to suggest that other forms of violence are less impactful, and I hope that scholars and practitioners will build on this Article to advocate for better treatment for all people who have experienced trauma, no matter the cause.

### A. The science of trauma

Scientists have documented measurable differences in brain development and function in individuals who have been exposed to early life adversity. Kathleen Wayland, a clinical psychologist who serves as a mitigation specialist for capital cases, explains:

[T]here is a large and converging body of literature from neuroscience and epidemiology that indicates that exposure to stress during childhood is associated with changes in brain structure, brain chemistry, and brain function. Early childhood stress, especially when it is extreme or prolonged, can impair the development of major neuroregulatory systems, with profound and lasting neurodevelopmental and neurobehavioral consequences over the course of a lifetime.<sup>82</sup>

While experiencing brief stressful situations is a normal part of life, prolonged exposure to stressful environments can pose numerous long-term health risks.<sup>83</sup> The landmark 1998 CDC-Kaiser Permanente Adverse Childhood Experiences Study uncovered a graded relationship between adverse childhood exposures and adult health issues and diseases, with increased exposure to potentially traumatic experiences in childhood significantly correlated with adverse outcomes in adult functioning.<sup>84</sup> In the early 2000s, the National Scientific Council on the Developing Child introduced the term “toxic stress” to describe the effects of the excessive activation of stress response systems on a child’s developing brain and other organ systems.<sup>85</sup> It also expanded the conception of adversity to include systemic causes of stress such as community violence and experiences with racism and chronic poverty.<sup>86</sup>

Although neuroscientific research has revealed an enormous amount about trauma and toxic stress in recent decades, there is still much more that remains unknown. As neurobiologist Robert Sapolsky explains, because scientists still only understand a handful of the internal forces that impact our behavior, they cannot currently predict the results of trauma and other psychological problems in the same way that they can predict the results of, for example, a fractured

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82. Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 935-36 (2008); see also Gohara, *supra* note 9, at 19-23.

83. See Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245, 251 (1998).

84. *Id.*

85. *ACES and Toxic Stress: Frequently Asked Questions*, HARV. UNIV. CTR. ON THE DEVELOPING CHILD, <https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions> (last visited Mar. 5, 2022).

86. *Id.*

bone.<sup>87</sup> This is not because there is “less” biology in the former circumstances; rather, the biology is “qualitatively different”—that is, the biology of behavior is multifactorial, and many of the factors remain unknown.<sup>88</sup> But, “[a]dd enough factors, many of which, possibly most of which, have not yet been discovered, and eventually your multifactorial biological knowledge will give you the same predictive power as in the fractured-bone scenario.”<sup>89</sup>

### B. Posttraumatic stress disorder

PTSD is the primary psychological diagnosis associated with trauma. It has been included in the Diagnostic and Statistical Manual of Mental Disorders, the American Psychiatric Association’s authoritative guide to the diagnosis of mental disorders, since 1980.<sup>90</sup> While it was added to the DSM in part due to advocacy by Vietnam veterans seeking to legitimize the pervasive psychological problems they experienced after combat,<sup>91</sup> the diagnosis is by no means limited to those whose trauma stems from war.

PTSD involves the development of certain characteristic symptoms following exposure to one or more traumatic events.<sup>92</sup> The DSM-5 defines a traumatic event as “actual or threatened death, serious injury, or sexual violence.”<sup>93</sup> Examples of traumatic events listed by the DSM-5 include not just exposure to war, but also the types of events that define community violence—threatened or actual physical assault, including physical attacks, robberies, and muggings.<sup>94</sup> Significantly, individuals need not experience traumatic events directly; rather, according to the DSM, PTSD can also be caused by witnessing traumatic events occur to other people or learning that a close family member or close friend has experienced a traumatic event.<sup>95</sup>

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87. ROBERT SAPOLSKY, *BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST* 601-03 (2017).

88. *Id.* at 602.

89. *Id.* at 603.

90. Wayland, *supra* note 82, at 927-28 n.18.

91. Deidre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 3 (2011).

92. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 271-72 (5th ed. 2013).

93. *Id.* at 271. The DSM-III described traumatic events as “generally outside the range of usual human experience.” However, when the DSM-IV was published in 1994, that definition removed because of research demonstrating that traumatic exposures were significantly more prevalent in the general population than they were previously understood to be. Wayland, *supra* note 82, at 929.

94. AM. PSYCHIATRIC ASS’N, *supra* note 92, at 274-75. Also included in the list of traumatic events are childhood physical abuse, threatened or actual sexual violence, being kidnapped, and severe motor vehicle accidents. *Id.*

95. *Id.*

Symptoms of PTSD fall into four basic categories: re-experiencing, avoidance, negative cognitions and mood, and alterations in arousal.<sup>96</sup> Re-experiencing includes spontaneous memories of the traumatic event, recurrent dreams related to it, dissociative reactions (often referred to as flashbacks), and other intense or prolonged psychological distress. Avoidance refers to the persistent avoidance of stimuli associated with the traumatic event, including distressing memories, feelings or external reminders of the event. Negative cognitions and mood include a persistent and distorted sense of blame, estrangement from others or markedly diminished interest in activities, and an inability to remember key aspects of the event. Arousal refers to aggressive, reckless, or self-destructive behavior, including irritable behavior and angry outbursts, problems with sleep and concentration, hypervigilance, and exaggerated startle response.

Of course, not everyone touched by trauma sustains long-term cognitive impacts. Studies suggest that approximately sixty percent of men and fifty percent of women experience at least one trauma in their lives,<sup>97</sup> but only seven to eight percent of the U.S. population will have PTSD at some point in their lives.<sup>98</sup> This is because some people are able to cope adaptively, especially if the trauma is isolated and the individual's circumstances are otherwise normal.<sup>99</sup> On the other hand, individuals are more likely to experience psychological impairments from trauma that is “severe, prolonged, occurs over several developmental stages, encompasses diverse forms of traumatic experiences, and is accompanied by additional psychiatric, familial, environmental, and social risk factors.”<sup>100</sup>

Many traumatic events, such as car accidents, natural disasters, and even combat trauma, are of a time-limited duration. People witnessing violence in their own communities, on the other hand, are often re-exposed to trauma on a regular basis for years, decades, or even a lifetime.<sup>101</sup> Experts describe “a complex, coherent, and consistent constellation of symptoms—not captured by the diagnosis of PTSD—frequently seen in people exposed to chronic and severe trauma.”<sup>102</sup> Dr. Jocelyn Smith Lee, who investigates trauma, violence, and loss

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96. *Id.*

97. *How Common Is PTSD in Adults?*, U.S. DEP’T OF VETERANS AFFS., [https://www.ptsd.va.gov/understand/common/common\\_adults.asp](https://www.ptsd.va.gov/understand/common/common_adults.asp) (last visited Mar. 28, 2022).

98. *Id.*

99. Wayland, *supra* note 82, at 930.

100. *Id.* at 927; see also Naomi Breslau et al., *Previous Exposure to Trauma and PTSD Effects of Subsequent Trauma: Results from the Detroit Area Survey of Trauma*, 156 AM. J. PSYCHIATRY 902, 906 (1999) (finding that previous exposure to traumatic events is associated with greater vulnerability to the PTSD effects of subsequent trauma).

101. As described in Section I, people exposed to community violence also generally live in the most disadvantaged communities, meaning that their experiences of trauma are compounded by the additional challenges associated with living in under-resourced neighborhoods.

102. Wayland, *supra* note 82, at 944. See generally Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. TRAUMATIC STRESS 377 (1992); Bessel A. van der Kolk & Christine A. Courtois, Editorial Comments, *Complex*

among Black men, explains that despite the use of the “post-traumatic stress” language, “there isn’t a ‘post’ context for [young men who live in violent communities].”<sup>103</sup> The severe psychological harm that occurs with prolonged, repeated trauma is increasingly referred to as complex PTSD or “disorders of extreme stress not otherwise specific” (DESNOS).<sup>104</sup>

PTSD is not the only psychiatric disorder associated with exposure to traumatic events—many people with PTSD also meet the diagnostic criteria for mood, anxiety, and substance use disorders.<sup>105</sup> And for people who experience trauma but do not develop PTSD, “this is by no means an indication that they survived their experiences undamaged.”<sup>106</sup>

### C. Other psychological impacts of trauma

In addition to psychiatric disorders, there is mounting evidence that community violence has a significant consequence on children and young adults’ developmental and academic outcomes, even for individuals who do not directly witness violence. Research shows that when neighborhood violence rises, or “in years in which children feel less safe or report violent victimization,” standardized test scores fall.<sup>107</sup> Similarly, when children are given cognitive skills assessments or standardized tests immediately after extreme local violence, they perform less well compared to other children who have not experienced recent local violence.<sup>108</sup>

Patrick Sharkey’s research demonstrates that local homicides have an acute effect on children’s cognitive performance, even if the violence is not witnessed directly.<sup>109</sup> As Sharkey explains, young people who are “directly or indirectly

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*Developmental Trauma*, 18 J. TRAUMATIC STRESS 385, 385 (2005).

103. Adam Harris, *The Burden of Being ‘On Point’*, ATLANTIC (Apr. 26, 2021) [104. Wayland, \*supra\* note 82, at 944-45. While complex PTSD/DESNOS is not included in the DSM, “\[a\] multitude of studies suggest that complex but consistent patterns of psychological disturbances occur in traumatized children as well as in adults who have been exposed to chronic or severe interpersonal trauma at any time in the lifespan.” van der Kolk & Courtois, \*supra\* note 102, at 385.](https://www.theatlantic.com/politics/archive/2021/04/black-boys-trauma-misunderstood-behavior/618684; cf. Inner-City Oakland Youth Suffering from Post-Traumatic Stress Disorder, CBS LOCAL (May 16, 2014), https://sanfrancisco.cbslocal.com/2014/05/16/hood-disease-inner-city-oakland-youth-suffering-from-post-traumatic-stress-disorder-ptsd-crime-violence-shooting-homicide-murder (describing people living in violent communities as “suffering from a chronic level of trauma that doesn’t have a chance to heal”).</a></p>
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105. Wayland, *supra* note 82, at 941-42.

106. *Id.* at 935.

107. Sharkey & Torrats-Espinosa, *supra* note 28, at 23.

108. *Id.*; see also Seth Gershenson & Erdal Tekin, *The Effect of Community Traumatic Events on Student Achievement: Evidence from the Beltway Sniper Attacks*, 13 EDUC. FIN. & POL’Y 513 (2018) (showing a two to five percent decline in school proficiency rates for Virginia elementary school children living in close proximity to the 2002 Beltway Sniper attacks).

109. Patrick Sharkey, *The Acute Effect of Local Homicides on Children’s Cognitive Performance*, 107 PROC. NAT’L ACAD. SCI. U.S. 11733, 11733, 11737 (2010).

exposed to . . . community violence show increased symptoms related to [PTSD], including disrupted sleep, anxiety, reduced awareness, and difficulty with concentrating,” all of which may lead to impaired cognition.<sup>110</sup> Sharkey builds on these findings by demonstrating that local violence results in lower levels of cognitive performance not only for those children who are victimized or who directly witness an act of violence, but also for children who live proximate to extreme violence.<sup>111</sup> While Sharkey’s research focuses on the near-term effects of violence, given “the spatial concentration” of homicides and violence, he contends that his analysis may also have implications for understanding long-term inequality.<sup>112</sup> This includes the possibility that African American people living in the most violent neighborhoods spend about one week of every month “functioning at a low level” as a result of local homicides.<sup>113</sup> As Sharkey explains, taken together, this suggests that “exposure to neighborhood violence may be a central mechanism by which growing up in areas of concentrated disadvantage affects the life chances of children.”<sup>114</sup>

Alex Kotlowitz’s reporting humanizes these findings:

The thing about Chicago’s violence is it’s public – very public – and so each shooting or its aftermath is witnessed by many, children and adults alike. I’ve met kids who have flashbacks or are easily startled or have trouble sleeping. I once visited [a school] shortly after two of its students had been killed in separate incidents. The school’s principal . . . told me that students would stop her in the hall, and tell her, *I’m going to be next*. She told me that the kids were in such a heightened state of arousal they were unable to learn. One boy had to be hospitalized after experiencing auditory hallucinations that one of the deceased students was talking to him.<sup>115</sup>

#### D. The psychological consequences of police violence

As discussed in Section I.B.2, concentrated community violence results not only from civilian-on-civilian crime, but also from police-on-civilian crime. So too do the psychological ramifications of community violence also stem from violence perpetrated by the police. Research published in *The Lancet* finds an elevated prevalence of depression and PTSD among Black people living in communities where police killings of unarmed Black Americans have occurred. At the population level, “police killings of unarmed black Americans might cause 55 million excess poor mental health days per year among black American

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110. *Id.* at 11733.

111. *Id.* at 11737.

112. *Id.* at 11736.

113. *Id.*

114. Sharkey & Torrats-Espinosa, *supra* note 28, at 22.

115. KOTLOWITZ, *supra* note 23, at 112.

adults.”<sup>116</sup>

New research from economist Desmond Ang suggests that the killing of civilians by police officers has a striking social and psychological impact on young people living in close proximity to the violence.<sup>117</sup> Using detailed information about every high school student in Los Angeles and incident-level data on police killings of civilians from 2002 to 2016, Ang determines the exact geographic proximity of every student to police violence and “compare[s] changes in well-being among students who lived very close to a killing to students from the same neighborhood who lived slightly farther away.”<sup>118</sup> Ang finds that each police killing of a civilian affects an average of more than 300 students.<sup>119</sup> In the days immediately after such a killing, absenteeism increased significantly among nearby students.<sup>120</sup> Nearby students’ GPAs also decreased for several semesters, and these students were fifteen percent more likely to be diagnosed with emotional disturbance.<sup>121</sup> Longer-term, ninth grade students who lived very close to the killing of a civilian by a police officer were about 3.5 percent less likely to graduate and 2.5 percent less likely to go to college.<sup>122</sup> These effects were “driven entirely by [B]lack and Hispanic students in response to police killings of other underrepresented minorities.”<sup>123</sup> Taken together, Ang’s findings suggest that, “on average, each officer-involved killing in Los Angeles caused three students of color to drop out of high school.”<sup>124</sup>

And fatal shootings constitute less than one-tenth of one percent of all police incidents involving the use of force.<sup>125</sup> Research shows that “low level” police encounters that are not generally considered violent are also associated with mental health symptoms. In *Terry v. Ohio*, the Supreme Court acknowledged that frisks are “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.”<sup>126</sup> As scholars have concluded, “[t]he tactic is inherently violent.”<sup>127</sup> Paul Butler provides a disturbing description of how stop and frisk encounters can play out for Black men: police jump out of a car with their guns drawn, order men to face the wall with their hands

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116. Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 LANCET 302, 303 (July 2018).

117. Desmond Ang, *The Effects of Police Violence on Inner-City Students*, 136 Q.J. ECON. 115 (2021).

118. *Id.* at 117.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 118.

124. *Id.* at 119.

125. *Id.*

126. *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

127. SKLANSKY, *supra* note 3, at 103.

up, and then “put their hands roughly all over your body” or “kick your feet to spread your legs wider” and “pat you up and down” and “touch your private parts.”<sup>128</sup> It is therefore unsurprising that a recent survey of 1,261 New York City men ages eighteen to twenty-six found that those who reported more interactions with the police also reported experiencing higher levels of trauma, anxiety, and symptoms consistent with PTSD, even when controlling for demographics and criminal histories.<sup>129</sup>

#### E. The nexus between trauma and criminal behavior

While violence leads to trauma, trauma also leads to violence. As the saying goes, “hurt people hurt people.” In fact, research from fields including “epidemiology, psychology, psychiatry, developmental psychopathology, and neuroscience” now “clarifies the process by which exposure to psychological trauma leads to a host of devastating psychological and behavioral consequences—including violence—through multiple common pathways.”<sup>130</sup>

In a 1983 study of Vietnam combat veterans, researchers confirmed a significant relationship between the PTSD caused by wartime combat and criminal behavior.<sup>131</sup> PTSD correlated in particular with weapons charges, driving under the influence, disorderly conduct, and assault charges.<sup>132</sup> A few years later, the 1988 National Vietnam Veterans Readjustment Survey “showed that 45.7 percent of male Vietnam combat veterans with active PTSD had been arrested at least once, compared to only 11.6 percent of veterans without PTSD, and that the rate of violent acts (among veterans with PTSD) was almost four times that of veterans without PTSD.”<sup>133</sup> Veterans’ traumatic experiences were also linked with misconduct even absent a formal diagnosis of PTSD.<sup>134</sup>

Researchers have also established a causal link between PTSD that is *not* the result of military combat and criminal behavior. A 1990 study examined the relationship between PTSD and violence in men convicted of felony crimes.<sup>135</sup> Compared to imprisoned people without PTSD, those with PTSD were almost seven times more likely to have been arrested for a violent crime in the year before their imprisonment.<sup>136</sup> The study finds evidence that PTSD causes violent

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128. *Id.* (citing Paul Butler, *Sexual Torture: American Policing and the Harassment of Black Men*, GUARDIAN (Aug. 4, 2017)).

129. Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321-22 (2014).

130. Wayland, *supra* note 82, at 927.

131. Kristine A. Huskey, *Reconceptualizing “The Crime” in Veterans Treatment Courts*, 27 FED. SENT’G REV. 178, 180-81 (2015).

132. *Id.* at 180.

133. *Id.*

134. *Id.* at 181.

135. *Id.* at 180-81.

136. *Id.*

behavior.<sup>137</sup> A 2012 study confirmed that civilians with PTSD are much more likely to be arrested, imprisoned, and charged with a violent crime.<sup>138</sup>

This connection makes sense when we consider the common symptoms of PTSD: “experiencing flashbacks, increased perception of threats, anger, hyper-vigilance, exaggerated startle responses, emotional numbing or heightened emotional responses, all of which may lead to criminal behavior.”<sup>139</sup> Studying Vietnam War veterans in 1983, researchers proposed that “veterans with PTSD essentially reexperience trauma in ‘survivor mode,’ which manifests in three distinct ways,” each of which is associated with behavior that tends toward criminality: dissociative syndrome, which is accompanied by aggressive behavior; sensation-seeking syndrome, which leads to risk-taking behavior; and depression-suicide syndrome, which is associated with “reacting violently toward oneself or others.”<sup>140</sup>

More recent research focuses on chronic hyperarousal, or “the distorted sense of always being under extreme threat,” and how that can lead to increased aggression and violent behavior.<sup>141</sup> According to researchers, when individuals are exposed to community violence and other forms of trauma, they may experience physiological changes that include hyperarousal and hypervigilance.<sup>142</sup> This, in turn, may make people more likely to misinterpret benign or ambiguous circumstances as threatening and can broaden the range of situations in which they feel that they need to react aggressively.<sup>143</sup>

Studies also show that people with symptoms of PTSD may be “more likely to carry a weapon in order to ‘restore feelings of safety.’”<sup>144</sup> Exposure to gun violence, defined as being shot, being shot at, or witnessing a shooting, doubles the likelihood that a young person will commit a violent act in the following two years.<sup>145</sup> A 2020 report from the Center for Court Innovation provides unique insight into why some young New Yorkers carry guns. The report relied on in-depth interviews with 330 sixteen- to twenty-four-year-olds from three neighborhoods with histories of significant gun violence.<sup>146</sup> Researchers found that

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137. *Id.*

138. Sachiko Donley et al., *Civilian PTSD Symptoms and Risk for Involvement in the Criminal Justice System*, 40 AM. ACAD. PSYCHIATRY & L. 522 (2012).

139. Huskey, *supra* note 131, at 181.

140. *Id.*

141. Beckett, *supra* note 80.

142. Phan et al., *supra* note 76 (citing Ladislav Pavic, *Alterations in Brain Activation in Posttraumatic Stress Disorder Patients with Severe Hyperarousal Symptoms and Impulsive Aggressiveness*, 253 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 80 (2003)).

143. *Id.*

144. Beckett, *supra* note 80.

145. *Intervention Strategies*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/intervention-strategies/> (last visited Mar. 5, 2022).

146. RACHEL SWANER ET AL., CTR. FOR CT. INNOVATION, ‘GOTTA MAKE YOUR OWN HEAVEN’: GUNS, SAFETY, AND THE EDGE OF ADULTHOOD IN NEW YORK CITY (Aug. 2020),

participants were “mostly carrying to increase their feelings of safety.”<sup>147</sup> This need to increase safety stemmed from participants’ “widespread belief that they could be victimized at any time, and guns served to protect them from real or perceived threats from other gun carriers—rival gang members, residents of different housing projects, and the police.”<sup>148</sup> This fear of victimization, in turn, seemed to stem from hypervigilance, which the researchers note “may constructively be understood as a trauma reaction, in a causal relationship to the death and threat-of-death they live with daily.”<sup>149</sup>

Danielle Sered, executive director of Common Justice, an alternative-to-incarceration and victim-service program that focuses on violent felonies, provides an example of how PTSD in individuals who live in neighborhoods marked by significant community violence can lead to criminal behavior:

Say a young man is suffering from hypervigilance and lives in a neighborhood where several people have been shot in the past week. He is walking down the street and hears someone approaching behind him. Before his traumatic experience, he was able to wait until that person was closer, get a feel for that person’s intentions, adjust his body language to convey that he was not looking for trouble, and let the man pass. But now his mind and body are telling him that the danger he perceives is more substantial and more immediate than it is. If he believes that the man approaching him from behind means him harm, he cannot just wait for the person to reach him. He has to protect his life. So he turns. He says something aggressive to try to indicate that he is not someone this man should consider hurting. He throws the first punch. He shoots the first bullet. He does not experience this as an act of unprovoked aggression; he experiences it as self-defense. And his body tells him that is exactly what it is.<sup>150</sup>

This connection between trauma and criminal behavior does not mean that a person’s life trajectory is predetermined by traumatic experiences.<sup>151</sup> Rather, as described in Part IV, it reinforces the need to expand access to effective treatment for people who have experienced trauma and to remedy the inequities that produce this exposure to traumatic events in the first place.

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[https://www.courtinnovation.org/sites/default/files/media/document/2020/Report\\_GunControlStudy\\_08052020.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2020/Report_GunControlStudy_08052020.pdf).

147. *Id.* at xi-xii.

148. *Id.* at 41.

149. *Id.*

150. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 198-99 (2019).

151. See, e.g., SAPOLSKY, *supra* note 87, at 601–05 (describing the multifactorial nature of behavior and the current inability of neuroscientists to accurately predict criminality).

### III. DISPARATE TREATMENT OF TRAUMA IN THE CRIMINAL LEGAL SYSTEM

#### A. Accounting for trauma amongst military veterans

As the introductory stories of Allen Rivera and Robert Coleman demonstrate, while the connection between trauma and criminal behavior is not specific to people whose trauma stems from military service, criminal legal system actors all too often fail to acknowledge and account for trauma that is not related to military service. Allen, who experienced trauma in combat, and Robert, whose exposure to trauma stemmed from community violence, were treated very differently upon being charged with similar offenses for unlawfully possessing firearms. Allen's case was diverted to Veterans Treatment Court. Though Allen was charged with serious felonies that carried mandatory minimum sentences, the assistant district attorney eagerly reduced the felony charges to misdemeanors, and the judge did not hesitate to sentence him to probation rather than prison. In Veterans Treatment Court, Allen was given a mentor, set up with mental health treatment, assisted in his search for a job and housing, and provided with help enrolling in government benefits. Robert, on the other hand, was shown no such leniency. During months of negotiation, his defense team highlighted how Robert had been impacted by community violence. But the same district attorney's office that exercised leniency toward Allen refused to reduce the charges against Robert, leaving Robert with the agonizing choice of either taking his case to trial despite overwhelming evidence against him, or pleading guilty to an offense that carried a mandatory minimum sentence.

The disparate treatment of Allen and Robert is representative of general trends across the country.<sup>152</sup> State and federal jurisdictions increasingly recog-

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152. For additional examples of serious and/or violent offenses being resolved through VTCs, *see, e.g.*, Jessica Prokop, *Navy Vet First to Finish Clark County's Veterans Therapeutic Court During COVID*, COLUMBIAN (May 31, 2021, 6:05 AM), <https://www.columbian.com/news/2021/may/31/navy-vet-first-to-finish-clark-countys-veterans-therapeutic-court-during-covid/> (veteran's felony charge for stealing firearms dismissed upon his graduation from VTC); Melinda Henneberger, *Veterans Court Program Helps Warriors Battle Addiction, Mental Health Crises*, WASH. POST (Dec. 2, 2013), [https://www.washingtonpost.com/politics/veterans-court-program-helps-warriors-battle-addiction-mental-health-crises/2013/12/02/d44cf352-5b6c-11e3-bf7e-f567ee61ae21\\_story.html](https://www.washingtonpost.com/politics/veterans-court-program-helps-warriors-battle-addiction-mental-health-crises/2013/12/02/d44cf352-5b6c-11e3-bf7e-f567ee61ae21_story.html) (veteran charged with driving under the influence, evading arrest, and assault on a police officer after he led police on a 26-minute car chase, was able to resolve his case through a California VTC); Sara Pagones, *Military Veterans in Trouble with Law Get Second Chance at North Shore's Veterans Court*, NOLA.COM (Dec. 29, 2019, 5:54 PM ), [https://www.nola.com/news/courts/article\\_bb6e661e-2351-11ea-8341-dbcd0966bd78.html](https://www.nola.com/news/courts/article_bb6e661e-2351-11ea-8341-dbcd0966bd78.html) (veteran's aggravated burglary charged was reduced to simple battery and unauthorized entry of a dwelling, enabling him to resolve his case with treatment rather than incarceration through a Louisiana VTC); Heath Druzin, *Having Veterans as Mentors Is Key to Treatment Court Success Stories*, STARS & STRIPES (July 29, 2015), <https://www.stripes.com/having-veterans-as-mentors-is-key-to-treatment-court-success-stories-1.360274> (road rage attack resolved through a Pennsylvania VTC); Kurt Rivera, *'What Truly Matters Is Who You Are Today': Court Program Gives Veterans a Second*

nize the impact of trauma on military veterans. The primary mechanism for accounting for this trauma is the diversion of cases to veterans treatment courts. Military-related trauma is also accounted for in some state and federal sentencing schemes. In contrast, trauma experienced as a result of exposure to community violence is rarely treated as a mitigating factor within the criminal legal system, and, to the contrary, is sometimes used as a basis for harsher sentencing.

### 1. Veterans treatment courts

Veterans treatment courts (VTCs) are the most visible manner in which military veterans receive preferential treatment in the criminal legal system. The first VTC opened in Buffalo, New York, in 2008.<sup>153</sup> Since then, the number of VTCs has grown tremendously. As of 2017, there were at least 461 VTCs operating across the nation.<sup>154</sup> The first federal VTC opened in Utah in 2010,<sup>155</sup> and more have followed.<sup>156</sup> The proliferation of VTCs continues to this day. In March 2021, for example, Governor Andrew Cuomo signed legislation authorizing the establishment of additional VTCs throughout New York and allowing certain veterans who are charged with offenses in a county without a VTC to have their cases transferred to a neighboring county's VTC.<sup>157</sup>

VTCs are problem-solving courts that operate within the criminal legal system but prioritize treatment over incarceration for military veterans.<sup>158</sup> VTCs

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*Chance*, 13 NEWS NOW (Oct. 5, 2020, 10:01 PM), <https://www.13newsnow.com/article/news/health/court-program-gives-veterans-a-second-chance/103-34328bec-046c-4b0f-aeb6-1dfe34792c1a> (domestic violence charges resolved through a California VTC); Sadie Hunter, *A Second Chance: County Court Growing Rapidly, Helping Veterans*, CURRENT (Jan. 14, 2020) <https://www.youarecurrent.com/2020/01/14/a-second-chance-county-court-growing-rapidly-helping-veterans/> (felony intimidation and assault on a police officer charge resolved through a North Carolina VTC).

153. Robert T. Russell, *Veterans Treatment Courts*, 31 Touro L. Rev. 385, 387 (2015).

154. Jack Tsai et al., *A National Study of Veterans Treatment Court Participants: Who Benefits and Who Recidivates*, 45 ADMIN. POL'Y MENTAL HEALTH 236 (2018). Given the decentralized nature of VTCs and the piecemeal data on state and local court systems, the exact number of VTCs in operation today is unknown, but a recent Department of Veterans Affairs fact sheet notes that, as of 2020, Veterans Justice Outreach specialists served in 601 VTCs and other veteran-focused court programs. *Veterans Treatment Courts and Other Veteran-Focused Courts Served by VA Veterans Justice Outreach Specialists*, U.S. DEP'T. OF VETERANS AFS. (Jan. 2021), <https://www.va.gov/HOMELESS/docs/VJO/Veterans-Treatment-Court-Inventory-Update-Fact-Sheet-Jan-2021.pdf>.

155. *Veterans Court*, U.S. PROB. & PRETRIAL SERVS. DIST. UTAH, <https://www.utp.uscourts.gov/veterans-court> (last visited Feb. 23, 2022).

156. U.S. SENT'G COMM'N, FEDERAL OFFENDERS WHO SERVED IN THE ARMED FORCES 21 (Oct. 2021), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211028\\_armed-forces.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211028_armed-forces.pdf) (last visited Dec. 29, 2021) (noting that there are at least five federal VTC programs).

157. *Legislation Expanding Access to Veterans Treatment Courts*, NIAGARA FRONTIER PUBL'NS (Mar. 30, 2021), <https://www.wnypapers.com/news/article/current/2021/03/30/146042/legislation-expanding-access-to-veterans-treatment-courts>.

158. Collins, *supra* note 8, at 1492.

were adapted from the broader problem-solving court model and generally follow a therapeutic justice philosophy.<sup>159</sup> As in other specialized courts, including drug courts and mental health courts, the approach is more individualized, collaborative, and multi-disciplinary, and is intended to result in a flexible treatment plan that addresses the root causes of court-involvement.<sup>160</sup>

Most VTCs extend eligibility to, at a minimum, all U.S. military veterans who have received general or honorable discharge, as well as reservists and national guard members with combat experience.<sup>161</sup> About sixty percent also accept veterans who have been dishonorably discharged.<sup>162</sup> According to a 2016 inventory of VTCs, sixty-six percent of programs accept veterans with either misdemeanor or felony charges, and all but sixteen percent of programs accept veterans charged with at least some violent offenses.<sup>163</sup> Some but not all VTCs require a causal nexus between a diagnosed service-related mental health challenge and the alleged crime committed.<sup>164</sup>

Participation in VTC programs can offer significant benefits to veterans charged with crimes. Some VTCs intervene during the pre-pleading stage and successful completion of the treatment plan erases criminal charges altogether.<sup>165</sup> The majority of jurisdictions offer access to VTCs after a conditional guilty plea and allow for the dismissal of charges upon successful completion of the treatment program.<sup>166</sup> Others offer access to VTCs after adjudication or as an alternative for veterans who are accused of probation violations.<sup>167</sup> In addition to providing for more lenient sentences and the avoidance of serious criminal records, many VTCs also offer mental health and substance abuse services, housing

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159. *Id.* at 1493. However, as Erin Collins points out, VTCs differ from other problem-solving courts in that VTC participants and offenses are not treated as systemic “problems” to be “solved.” *Id.* at 1481 Rather, VTCs honor participants’ military experiences and strengthen their association with the military. *Id.* As such, Collins posits that these programs are better classified as “status courts.” *Id.* at 1483.

160. See Robert T. Russell, *supra* note 153, at 388-92; see also Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1608-09 (2012) (describing VTCs’ reliance on mental health services and medical treatment); Huskey, *supra* note 131, at 178.

161. AM. UNIV. SCH. PUB. AFFS., VETERANS TREATMENT COURTS BJA DRUG TECHNICAL ASSISTANCE PROJECT: 2015 SURVEY RESULTS (Nov. 2016), <https://www.american.edu/spa/jpo/initiatives/drug-court/upload/Veterans-Treatment-Courts-2015-Survey-Results.pdf>. However, an empirical study characterized the majority of participants in VTCs as “[w]hite, unmarried, male, in their 40s, with at least a high school education, and a monthly income above \$1000.” Tsai et al., *supra* note 154, at 239.

162. AM. UNIV. SCH. PUB. AFFS., *supra* note 161, at 14.

163. Tsai et al., *supra* note 154, at 237.

164. AM. UNIV. SCH. PUB. AFFS., *supra* note 161, at 14.

165. *Id.* at 13-14.

166. *Id.* at 13 (explaining that fifty-eight percent of VTC programs welcome participants after a plea or deferred judgment and allow for the charge(s) to then be dismissed if the participant successfully completes the program).

167. *Id.* at 13.

and employment assistance, and help accessing medical care and veterans benefits.<sup>168</sup>

## 2. Leniency in sentencing for veterans

Federal and state sentencing schemes also provide for leniency based on trauma and other mental conditions that stem from military service.<sup>169</sup> In *Porter v. McCollum*, the United States Supreme Court held in 2009 that a defense attorney's failure to present evidence of PTSD connected to military service during the sentencing phase of a capital case constituted ineffective assistance of counsel.<sup>170</sup> Mr. Porter was convicted of murder and sentenced to death for shooting his former girlfriend.<sup>171</sup> The lawyer for the penalty phase of Mr. Porter's trial failed to investigate and present evidence that Mr. Porter was a decorated Korean War veteran who had been wounded and traumatized by his participation in multiple intense battles.<sup>172</sup> "Our Nation has a long tradition of accordin leniency to veterans in recognition of their service, especially for those who fought on the front lines," the Court wrote in a unanimous *per curium* decision.<sup>173</sup> "[T]he jury might find mitigating the intense stress and mental and emotional toll that combat took."<sup>174</sup>

The *Porter* case is particularly significant given how infrequently ineffective assistance of counsel claims succeed. The Supreme Court has found ineffective assistance only rarely since 1984, when *Strickland v. Washington* began requiring defendants to prove that there was a "reasonable probability" that the outcome would have been different but for the ineffective assistance.<sup>175</sup> Moreover, as a result of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, when an ineffective assistance claim is made in a habeas corpus petition in federal court, as it was in *Porter*, the defendant must show that the state court's decision was not only mistaken on its own terms, but that it was contrary to, or

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168. *Id.* at 10; *The Ten Key Components of Veterans Treatment Courts*, JUST. FOR VETS (2017), <https://justiceforvets.org/wp-content/uploads/2017/02/The-Ten-Key-Components-of-Veterans-Treatment-Courts.pdf>.

169. I focus on sentencing mitigation, rather than legally recognized justifications or excuses such as lack of criminal responsibility (insanity) or duress, because such mechanisms are very narrowly defined and "typically rely on a reasonable person standard in a way that does not permit as relevant a consideration of a defendant's moral incapacity or diminished moral capacity." KELLY, *supra* note 5, at 31. For example, the legal category of insanity is much narrower than the medical category of mental illness, with no more than one quarter of one percent of terminated felony prosecutions involving an insanity acquittal. *Id.* at 35.

170. *Porter v. McCollum*, 558 U.S. 30 (2009).

171. *Id.* at 31.

172. *Id.* at 33-35.

173. *Id.* at 43.

174. *Id.* at 43-44.

175. Linda Greenhouse, *Selective Empathy*, N.Y. TIMES (Dec. 3, 2009, 9:11 PM), <https://opinionator.blogs.nytimes.com/2009/12/03/selective-empathy/>.

involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court.<sup>176</sup> Yet in *Porter*, all nine justices not only concluded that Mr. Porter met this onerous standard, they did so without even hearing arguments in the case.<sup>177</sup> Mr. Porter’s military background seems to have weighed particularly heavily on the Court.<sup>178</sup>

Following *Porter*, the federal sentencing guidelines were amended in 2010 to give greater deference to military service. According to the revised guidelines, “[m]ilitary 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.”<sup>179</sup> Previously, military service was treated like civic, charitable, or public service, which the guidelines deem irrelevant in determining whether a departure is warranted.<sup>180</sup>

In recent years, a host of states have also passed laws that call for leniency in sentencing based on trauma stemming from military service.<sup>181</sup> For example,

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176. 28 U.S.C. § 2254.

177. Greenhouse, *supra* note 175.

178. Despite the *Porter* Court’s recognition of military-related trauma as a potential mitigating factor, the Death Penalty Information Center (DPIC) estimates that at least ten percent of people currently sentenced to death in the U.S. (about three hundred people) are veterans, many of whom have documented trauma disorders. Richard C. Dieter, *Battle Scars: Military Veterans and the Death Penalty*, DEATH PENALTY INFO. CTR. 9 (Nov. 2015), <https://files.death-penaltyinfo.org/documents/pdf/BattleScars.fl1560295684.pdf>. According to DPIC, in the death penalty trials of many of these veterans, their military service and related illnesses were barely touched on. Rather,

Defense attorneys failed to investigate this critical area of mitigation; prosecutors dismissed, or even belittled, their claims of mental trauma from the war; judges discounted such evidence on appeal; and governors passed on their opportunity to bestow the country’s mercy. In older cases, some of that dismissiveness might be attributed to ignorance about PTSD and related problems. But many of those death sentences still stand today when the country knows better.

*Id.* at 2. Moreover, jurors all too often treat mental illness as an aggravating factor rather than a mitigating factor. See Ellen F. Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 299 (1989).

179. U.S. SENT’G COMM’N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.11 (2011), <https://www.ussc.gov/guidelines/archive/2011-federal-sentencing-guidelines-manual>.

180. See U.S. SENT’G COMM’N, 2009 FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.3 (2009), <https://www.ussc.gov/guidelines/2015-guidelines-manual/archive/2009-5h13> (“Mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted . . . .”); U.S. SENT’G COMM’N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.11 (2011), <https://www.ussc.gov/guidelines/archive/2011-federal-sentencing-guidelines-manual> (“Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure if warranted.”).

181. Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 67 (2012).

California law requires a presentencing investigation into a veteran's mental health whenever a veteran claims that PTSD played a role in their behavior.<sup>182</sup> It also gives courts the discretion to order treatment instead of incarceration if the defendant is otherwise eligible for probation.<sup>183</sup> A similar law in Minnesota calls for an investigation into veteran defendants' mental health, and gives courts the discretion to order treatment instead of prison.<sup>184</sup> North Carolina law calls for mitigation of a defendant's sentence if the defendant has been honorably discharged.<sup>185</sup> In Massachusetts, the 2012 Valor Act permits veterans to have certain offenses dismissed under a diversionary program.<sup>186</sup> Even in states where sentencing laws do not explicitly call for leniency for military veterans, courts have read leniency based on military service into catch-all provisions.<sup>187</sup>

### 3. Public justifications for special treatment of veterans

In order to analyze the leniency that is increasingly afforded to military veterans, it is helpful to understand the public justifications for this treatment. To this end, commentary on the creation of VTCs is particularly useful. While VTCs are decentralized and often created by state and local actors who have their own unique reasoning,<sup>188</sup> the public justifications for their creation can be grouped into two general categories, which I refer to as government responsibility and unique needs.

#### a. Government responsibility

One of the primary public justifications for VTCs is rooted in the government's role in exposing veterans to the trauma of war. Veterans, it is argued, are deserving of leniency because the government is partially responsible for their predicament. As Erin Collins notes, "proponents of veterans courts explicitly invoke a sense of national responsibility for 'breaking' these individuals by sending them into combat and a corresponding duty to 'fix' them instead of punishing them."<sup>189</sup>

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182. CAL. PENAL CODE § 1170.9(a) (West 2011).

183. *Id.* § 1170.9(b)(2).

184. MINN. STAT. ANN. § 609.115(10)(b)(1) (West 2021).

185. N.C. GEN. STAT. § 15A-1340.16 (2021).

186. MASS. GEN. LAWS ANN. ch. 276A, §§ 10-11 (West 2012).

187. Grey, *supra* note 181, at 67 (citing State v. Overton, No. 02C019510-CC00303, 1997 WL 287665, at \*3 (Tenn. Crim. App. June 2, 1997) ("With respect to [a defendant's] military service, honorable military service may always be considered as a mitigating factor consistent with the purposes of the 1989 Sentencing Act."); State v. Arterberry, 449 So. 2d 1179, 1181 (La. Ct. App. 1984) (explaining that "good military history" tends to mitigate offenses)).

188. See, e.g., Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 358-63 (2009).

189. Collins, *supra* note 8, at 1521.

According to the U.S. Department of Justice's National Institute of Corrections, proponents and practitioners support VTCs because "they are the right thing to do" for combat veterans.<sup>190</sup> When the Syracuse, New York VTC opened in 2019, the chief administrative judge described the participants as individuals "to whom we owe so much for their service," and another judge noted the importance of giving veterans "the help they need and deserve."<sup>191</sup> The presiding judge of a Colorado VTC argues that PTSD is "a predictable result of sending people into combat," and that we therefore have an "obligation" to help veterans.<sup>192</sup> An Ohio Supreme Court justice described the concept succinctly: "They come out [of war], they're damaged. They have all sorts of issues they didn't have before. We damaged them by sending them to defend us. We have this special extra obligation to really reach out and try to make their lives different."<sup>193</sup>

Judges acknowledge this obligation even in the case of veterans who commit serious violent offenses. As one local judge said regarding the 2013 opening of an Oakland, Michigan, VTC, "We engage these individuals to go into combat and the next thing you know they have a knife to the throat of their wife from Post-Traumatic Stress Disorder. We owe them a commitment to habilitate [them]."<sup>194</sup> The government's role in exposing veterans to trauma, according to these judges, not only justifies, but demands, that preferential treatment be afforded to veterans who are charged with criminal offenses.

#### b. Unique needs

Proponents of VTCs also justify the programs based on the idea that veterans' unique circumstances render the normal solutions offered by the criminal legal system poorly suited for addressing their underlying issues. Judge Robert Russell, who opened the nation's first VTC in Buffalo, NY in 2008, was motivated by his observation that veterans are "a niche population with unique needs" who require "tailored care."<sup>195</sup> The proliferation of VTCs has been led by judges who continue to observe that a growing number of veterans in the criminal legal

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190. NAT'L INST. OF CORR., U.S. DEP'T OF JUST., VETERANS TREATMENT COURTS: A SECOND CHANCE FOR VETS WHO HAVE LOST THEIR WAY iii (2016), <https://info.nicic.gov/jiv/sites/info.nicic.gov.jiv/files/030018.pdf>.

191. Press Release, N.Y. State Unified Ct. Sys., Court Tailored to Justice-Involved Veterans Opens in Syracuse (June 5, 2019), [https://ww2.nycourts.gov/sites/default/files/document/files/2019-06/PR19\\_11.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2019-06/PR19_11.pdf).

192. NAT'L INST. OF CORR., *supra* note 190, at 6, 27.

193. Collins, *supra* note 8, at 1521 n.230 (citing Laura Fong, *Justice Stratton: Ohio Vets Courts Recognize What Society Has Demanded*, WKSU 89.7 (Nov. 11, 2011), <http://www.wksu.org/news/story/29917>).

194. Collins, *supra* note 8, at 1521 n.230 (2017) (citing Carol Hopkins, 'We Owe Them a Debt': Veterans Courts on the Rise in Oakland County, OAKLAND PRESS (June 29, 2013, 12:01 AM), <http://www.theoaklandpress.com/article/OP/20130629/NEWS/306299977> [<https://perma.cc/J8TN-ETHP>]).

195. Russell, *supra* note 188, at 363.

system have untreated symptoms of combat-related trauma.<sup>196</sup> Veterans' unique needs are said to stem from the traumatic and potentially criminogenic impact of military service,<sup>197</sup> and proponents of VTCs believe that traditional community services are not properly equipped to provide high-quality prevention and treatment tailored to the needs of veterans.<sup>198</sup>

Part of this critique focuses on what proponents view as the unique role of "warrior mentality" in preventing veterans from receiving mental health treatment.<sup>199</sup> Warrior mentality refers to the military culture that deems mental illness and mental health treatment as signs of weakness. VTC proponents suggest that by placing veterans in social service programs alongside other veterans, VTCs can help remove the stigma surrounding mental health care that prevents many veterans from seeking help. As such, many VTCs have peer mentorship programs based on the theory that veterans are best situated to support the needs of other veterans because of their shared insights around military culture and the ability to break down stigmas that impede access to services.<sup>200</sup>

#### B. Failure to acknowledge and account for community violence trauma

While VTCs have spread throughout the United States and trauma resulting from military service is increasingly treated as a mitigating factor in sentencing decisions, outside of the realm of veterans, defendants' histories of trauma continue to be largely ignored—or worse yet, treated as aggravating factors in sentencing. Given the data linking all kinds of traumatic experiences and PTSD to future criminal behavior, it is imperative that we interrogate the basis for this cognitive dissonance.

Even though the federal sentencing guidelines were amended in 2010 to give greater deference to military service,<sup>201</sup> the guidelines continue to declare that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is

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196. See, e.g., Zel M. Fischer, Chief Just., Sup. Ct. of Mo., State of the Judiciary Address (Jan. 30, 2019), <https://www.courts.mo.gov/page.jsp?id=136253> (noting the importance of recognizing the "unique challenges" faced by veterans that may lead them to criminal behavior); *Judiciary Hosts Hawaii's First Veterans Treatment Court Conference*, HAW. STATE JUDICIARY (Aug. 12, 2016), [https://www.courts.state.hi.us/news\\_and\\_reports/featured\\_news/2016/08/judiciary-hosts-hawaiis-first-veterans-treatment-court-conference](https://www.courts.state.hi.us/news_and_reports/featured_news/2016/08/judiciary-hosts-hawaiis-first-veterans-treatment-court-conference).

197. See Collins, *supra* note 8, at 1492.

198. See *id.*; see also J. Rick Carnaroli, *A Community Steps Up: The Birth of the Sixth District Veterans Treatment Court*, ADVOC., June/July 2015, at 32 ("Veterans needing drug court or mental health court services routinely failed to complete the existing problem-solving court programs because their specific treatment needs were not being adequately addressed.").

199. Russell, *supra* note 188, at 361 ("Many veterans are reluctant to seek assistance for their mental health needs. This reluctance may be linked in part to the veterans' 'warrior mentality.'").

200. See *id.* at 361, 370.

201. See *supra* text accompanying note 179.

warranted.”<sup>202</sup> Since 2010, the guidelines allow for the consideration of “[m]ental and emotional conditions,” but the requirement that such conditions be “present to an unusual degree and distinguish the case from the typical cases covered by the guidelines”<sup>203</sup> is limiting given the prevalence of mental illness among criminal defendants.

Moreover, anti-gang laws have now been enacted in all fifty states and at the federal level.<sup>204</sup> These laws increase penalties or upgrade crime classifications for offenses committed by alleged gang members or affiliates. They also disproportionately target young men of color<sup>205</sup>—the same population that is most affected by community violence.

At the federal level, the Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted in 1970 to dismantle the Mafia and other organized crime enterprises, but is now frequently used to prosecute street-level gangs.<sup>206</sup> There are serious questions as to whether the commerce clause provides the federal government with constitutional authority to prosecute these gangs, which generally do not substantially affect interstate commerce.<sup>207</sup> Unsurprisingly, these prosecutions have largely targeted Black, Latino, and Asian groups and individuals.<sup>208</sup>

RICO paved the way for the proliferation of state gang laws “based on a

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202. *Id.* § 5H1.12 (2018); *see also* Gohara, *supra* note 9, at 25 (“To this day, evidence of childhood trauma is not ordinarily relevant in determining whether a federal sentence warrants downward departure or variance from the applicable Guidelines range.”).

203. *Id.* § 5H1.3 (2011). Prior to 2010, the guidelines declared that, “[m]ental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted.” U.S. SENT’G COMM’N, 2009 FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.3 (2009), <https://www.ussc.gov/guidelines/archive/2009-federal-sentencing-guidelines-manual>.

204. SKLANSKY, *supra* note 3, at 164.

205. Daniel Alarcón, *How Do You Define a Gang Member?*, N.Y. TIMES MAG. (May 27, 2015), [https://www.nytimes.com/2015/05/31/magazine/how-do-you-define-a-gang-member.html?\\_r=0](https://www.nytimes.com/2015/05/31/magazine/how-do-you-define-a-gang-member.html?_r=0) (“Researchers have found that white gang membership tends to be underestimated and undercounted, while the opposite is true for black and Latino youth.”). Gang databases form the foundation of many gang-related prosecutions, and have an immensely disparate impact on communities of color. For example, ninety-nine percent of people in the New York Police Department gang database are Black or Latino. Daryl Khan, *New York City’s Gang Database is 99% People of Color, Chief of Detectives Testifies*, JUV. JUST. INFO. EXCH. (June 14, 2018), <https://jjie.org/2018/06/14/new-york-citys-gang-database-is-99-people-of-color-chief-of-detectives-testifies>. In California, as of 2020, less than eight percent of people in the CalGang database were white. CAL. DEP’T OF JUST., ATTORNEY GENERAL’S ANNUAL REPORT ON CALGANG FOR 2020 (2020), <https://oag.ca.gov/sites/all/files/ag-web/pdfs/calgang/ag-annual-report-calgang-2020.pdf>. In Chicago, seventy percent of people in the gang database are Black, twenty-five percent are Latino, and less than five percent are white. UNIV. ILL. CHI. POLICING IN CHI. RSCH. GRP., EXPANSIVE AND FOCUSED SURVEILLANCE: NEW FINDINGS ON CHICAGO’S GANG DATABASE 1 (2018), [http://erasethedatabase.com/wp-content/uploads/2018/07/Expansive-and-Focused-Surveillance-June-2018\\_final.pdf](http://erasethedatabase.com/wp-content/uploads/2018/07/Expansive-and-Focused-Surveillance-June-2018_final.pdf).

206. Jordan B. Woods, *Systemic Racial Bias and RICO’s Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 304-07 (2012).

207. *Id.* at 305-06.

208. *Id.* at 307.

racialized myth of gang violence unsupported by actual statistics.”<sup>209</sup> Gang laws punish individuals who participate in a gang and commit an enumerated crime in furtherance of that gang—meaning “that a person can be tried and punished twice for a single crime.”<sup>210</sup> They can also increase the severity of an offense’s classification and create an aggravating factor in sentencing.<sup>211</sup> California’s Street Terrorism Enforcement and Protection (STEP) Act of 1988 was one of the first such gang statutes.<sup>212</sup> In 2015, roughly seven percent of the prison population in California, or 115,000 people, was serving extra time due to this statute.<sup>213</sup> Half of those people were serving at least an extra ten years, and ninety percent were Black or Latino.<sup>214</sup>

While gang enhancement laws turn traumatic experiences into aggravating factors used against criminal defendants who have been exposed to community violence, there are few examples of trauma resulting in leniency for this population. Many diversion programs include eligibility criteria that limit participation to individuals with first-time offenses or misdemeanor-only offenses, excluding individuals charged with violent offenses and those with criminal histories and more complex behavior health needs.<sup>215</sup> For example, according to a 2019 report by the Center for Court Innovation, only four percent of prosecutor-led diversion programs consider violent felonies.<sup>216</sup> And diversion programs nearly always exclude individuals charged with gun offenses, even unlawful possession offenses that do not involve any alleged use of the weapon.<sup>217</sup>

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209. Fareed Nassor Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. DISCOURSE 18, 34 (2021).

210. *Id.* at 20.

211. Alarcón, *supra* note 205. See, e.g., ALASKA STAT. § 12.55.137 (2021) (turning a Class B misdemeanor into a Class A misdemeanor where gang membership is involved, and a Class A misdemeanor into a Class C felony where gang membership is involved); ALA. CODE § 12-25-32(15)7 (2021) (classifying compelling street gang membership as a violent felony offense).

212. CAL. PENAL CODE § 186.22 (West 2022); Alarcón, *supra* note 205.

213. Alarcón, *supra* note 205.

214. *Id.* This disparate impact of gang laws on Black and Latino communities is reflective of trends across the country. For example, in Mississippi, one hundred percent of people arrested under the state’s gang law from 2010 to 2017 were Black, despite the fact that fifty-three percent of “verified gang members” in the state were white as of 2017. Donna Ladd, *Only Black People Prosecuted Under Mississippi Gang Law Since 2010*, JACKSON FREE PRESS (Mar. 29, 2018, 1:32 PM), <http://www.jacksonfreepress.com/news/2018/mar/29/only-black-people-prosecuted-under-mississippi-gan>.

215. See Pamela F. Rodriguez et. al., CTR. FOR HEALTH & JUST. AT TASC, NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES 28 (2013), [https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report\\_web.pdf](https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report_web.pdf).

216. Michela Lowry & Ashmini Kerodal, CTR. FOR CT. INNOVATION, PROSECUTOR-LED DIVERSION: A NATIONAL SURVEY 14 (2019), [https://www.courtinnovation.org/sites/default/files/media/document/2019/prosecutor-led\\_diversion.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/prosecutor-led_diversion.pdf).

217. GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, A SECOND CHANCE: THE CASE FOR GUN DIVERSION PROGRAMS (2021),

The few diversion programs that do address violent charges or weapons offenses seem largely responsive to the recent political push to reduce incarceration numbers, rather than any sense of moral obligation toward those individuals who have experienced trauma outside of the military context. While the motivation for such programs does not necessarily detract from the benefits bestowed upon program participants, it does foreshadow a likelihood that such programs will be eliminated when the political tide turns. For example, in Brooklyn, District Attorney Eric Gonzalez oversees a diversion program that allows fourteen- to twenty-two-year-olds who plead guilty to offenses including weapons-possession charges to participate in an eighteen- to twenty-four-month education program as an alternative to incarceration.<sup>218</sup> But as gun violence has increased in recent years, so too has criticism of this program. During his 2019 presidential campaign, for example, Mayor Bill de Blasio disparaged the program, arguing that while diversion programs are a “valid tool” for non-violent offenses, they should not be available when guns are involved.<sup>219</sup> In response, District Attorney Gonzalez defended the program.<sup>220</sup> But he also declared that nobody who uses a gun in a violent crime “should ever be diverted.”<sup>221</sup> And his spokesperson highlighted the low number of defendants who were admitted to the program.<sup>222</sup>

Yet there is a strong argument that the two primary justifications for the more lenient treatment of people who have experienced trauma as a result of military service also apply to people who have experienced trauma as a result of community violence. As described in Section I.C, just as the government sends soldiers to war, so too has the government played an essential role in causing people to live in communities where they are at an increased risk for exposure to community violence. Similarly, people who experience trauma as a result of community violence, like people who experience trauma in the military, have unique and often unmet needs.

The concept of “warrior mentality”—the military culture that perceives mental health treatment as a sign of weakness—is not unique to veterans. To the

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<https://giffords.org/lawcenter/report/a-second-chance-the-case-for-gun-diversion-programs/> (explaining that there are only “a small handful” of diversion programs that serve people charged with nonviolent gun possession offenses); *see also* MELISSA LABRIOLA ET AL., CTR. FOR CT. INNOVATION, PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS 26 (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251664.pdf>.

218. *Youth Diversion*, BROOK. DIST. ATT’Y’S OFF., <http://www.brooklyn.ynda.org/youth-diversion/> (last visited Mar. 25, 2022).

219. See Emily Bazelon, *De Blasio Doesn’t Get It. Not Everyone Who Carries a Gun Is a Shooter.*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/opinion/deblasio-guns-prison.html>.

220. Aidan Graham, *District Attorney Spars with NYPD Over Increase in Northern Brooklyn Shootings*, BROOK. PAPER (July 12, 2019), <https://www.brooklynpaper.com/district-attorney-spars-with-nypd-over-increase-in-northern-brooklyn-shootings/#>.

221. Sam Raskin, *DA Eric Gonzalez Defends Diversion Program NYPD Says Is Used Too Often When Guns Are Involved*, BROOK. PAPER (July 19, 2019), <https://bklyner.com/da-eric-gonzalez-defends-diversion-program-nypd-says-is-used-too-often-when-guns-are-involved/>.

222. See Graham, *supra* note 220.

contrary, research by Michael Lindsey shows that Black youth are also brought up in a culture where they perceive a need to “tough it out” and be self-reliant, rather than ask for help.<sup>223</sup> In part because of cultural norms about what it means to be a “man”, as well as popular misconceptions about what a “victim” looks like, the term “victim” does not resonate with many young men of color even when they are harmed.<sup>224</sup> For example, the Vera Institute of Justice conducted a focus group about cycles of violence with sixteen- to eighteen-year-old men of color who were returning from serving sentences at Rikers Island jail. Despite most if not all of these men having been harmed by criminal activity, they did not identify themselves as “victims.” When the participants were asked generally if they had been “victims of crime,” they all said no. But when they were asked if they had “had something taken from them by force or been robbed,” nine of the ten participants said yes. The same number responded in the affirmative when asked whether they had been “jumped, seriously hurt in a fight they didn’t initiate, or assaulted.” And when asked whether they had “had something taken from their home by someone they didn’t know or been burglarized,” eight of the ten said yes.<sup>225</sup>

Young men of color who have experienced violence in their communities also frequently go without needed help.<sup>226</sup> Services for crime victims have expanded significantly in recent decades, and specialized services, such as shelters, counseling programs, and other therapeutic interventions, have been created for certain populations considered to have unique needs, such as survivors of domestic violence and sexual assault.<sup>227</sup> Yet the needs of victims who are young men of color continue to go unmet. Victim services organizations rarely address the “specific culture, experiences, and needs” of this demographic.<sup>228</sup> Providers are often not trained or experienced in addressing this group’s particular needs, and programs often fail to incorporate trauma-informed models.<sup>229</sup> And providers are frequently linked—physically or institutionally—to law enforcement agencies.<sup>230</sup> Compounding the issue, there are few services in general for victims of crimes that young men of color are most likely to experience—such as robbery

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223. Michael A. Lindsey et al., *Understanding the Behavioral Determinants of Mental Health Service Use by Urban, Under-Resourced Black Youth: Adolescent and Caregiver Perspectives*, 22 J. CHILD & FAM. STUD. 107, 118 (2013).

224. DANIELLE SERED, VERA INST. OF JUST., YOUNG MEN OF COLOR AND THE OTHER SIDE OF HARM: ADDRESSING DISPARITIES IN OUR RESPONSES TO VIOLENCE 9 nn.38-39 (Dec. 2014), [https://www.vera.org/downloads/Publications/young-men-of-color-and-the-other-side-of-harm-addressing-disparities-in-our-responses-to-violence/legacy\\_downloads/men-of-color-as-victims-of-violence-v3.pdf](https://www.vera.org/downloads/Publications/young-men-of-color-and-the-other-side-of-harm-addressing-disparities-in-our-responses-to-violence/legacy_downloads/men-of-color-as-victims-of-violence-v3.pdf).

225. *Id.* at 9.

226. *Id.*

227. *Id.* at 6.

228. *Id.*

229. *Id.* at 8.

230. *Id.* at 9.

and stranger assault.<sup>231</sup> In fact, the DOJ's Office of Victims of Crime identifies young men of color as one of the groups for which services may be unavailable, inadequate, or difficult to access.<sup>232</sup>

### C. The injustice of disparate treatment: a false dichotomy between characterological behavior and situational behavior

I contend that what distinguishes military veterans from defendants for whom trauma and other environmental factors are routinely disregarded is not a difference in the kind or degree of the impact of their life circumstances, but rather cognitive assumptions about who is and is not a criminal—assumptions that lead to a false dichotomy between people whose criminal behavior we deem characterological, and people whose criminal behavior we view as situational. In this construct, decision-makers view military veterans as a class of people who are non-criminals. When a veteran commits a crime, the cognitive preconceptions of decision-makers lead them to conclude that the veteran's behavior is primarily the result of exculpatory circumstances. On the other hand, when individuals who commit crimes belong to classes of people who decision-makers categorize as criminal, such as residents of violent communities, their behavior is viewed largely as characterological, and therefore fully morally blameworthy.

This cognitive dissonance is something that I observed frequently as a public defender. As discussed above, this dichotomous thinking was apparent in how clients such as Robert Coleman and Allen Rivera were treated in court sessions. It was all the more pronounced in the team meetings that I participated in as a result of my representation of clients in veterans treatment court and drug treatment court programs. Team meetings generally occurred before each session of the problem-solving court program, and provided an opportunity for judges, prosecutors, defense attorneys, probation officers, and treatment providers to discuss each participant's progress. In these meetings, judges and prosecutors who normally appeared unmoved by narratives about trauma often went to great lengths to justify participants' behavior as the understandable results of environmental factors. Missed court dates, positive drug tests, new criminal behavior—transgressions at all levels that would normally be met with the revocation of bail or a probation violation hearing, were now being met with compassion and understanding. In fact, within these meetings, judges and assistant district attorneys were making the same arguments that my colleagues and I normally made in defense of our clients—so often unsuccessfully to this same audience.

Scholars have explored this false dichotomy between law-abiders and law-breakers for decades. Criminologist Jerome Skolnick introduced the concept of the “symbolic assailant” in the 1960s to explain how police officers associate

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231. *Id.* at 8.

232. OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., VISION 21: TRANSFORMING VICTIM SERVICES FINAL REPORT 18 (May 2013).

certain groups of people with criminality.<sup>233</sup> According to Skolnick's theory, gestures, language, and attire translate into a "perceptual shorthand" for police officers to decide who and what to look for as "suspicious" while on patrol.<sup>234</sup> Sociologist Tony Poveda built on this idea, examining the image of the criminal at the societal level.<sup>235</sup> Poveda contends that individuals create a mental image of what a "criminal" looks like, with this mental image deriving not from all law-breaking people, but from those who threaten our established power system.<sup>236</sup> While Poveda's conception focused on what he referred to as "lower class criminality,"<sup>237</sup> scholars continue to build on the symbolic assailant theory, more recently with a focus on the racialization of criminality.<sup>238</sup>

I argue that this false binary between law-abiders and law-breakers in turn creates an unfounded dichotomy between people whose criminal behavior is deemed situational and people whose behavior is categorized as characterological. In the situational view of criminal behavior, sentencing leniency is accepted by those in power. In the characterological view of behavior, however, an individual's act does not reflect environmental factors such as exposure to trauma, but instead "reveals more or less permanent aspects of that individual's character or personhood."<sup>239</sup> The person is thus fully morally blameworthy, and retribution—including stigmatization, incarceration, and denial of benefits and opportunities—is justified.<sup>240</sup> As Erin Kelly explains,

Because we see a person's choice to commit a crime as a sufficient trigger for moral blame, we exaggerate the difference between 'offenders' and ordinary people, we gloss over differences in the severity of

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233. See JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 44-47 (4th ed. 2011).

234. *Id.* at 43.

235. Tony G. Poveda, *The Image of the Criminal: A Critique of Crime and Delinquency Theories*, 5 ISSUES IN CRIMINOLOGY 59, 61 (1970).

236. *Id.*

237. *Id.* at 63.

238. See, e.g., I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 691 (2018) (exploring citizenship expectations for people who, "simply by virtue of skin color," are often marked as a "symbolic assailant"); Jeannine Bell, *Dead Canaries in the Coal Mines: The Symbolic Assailant Revisited*, 34 GA. STATE U. L. REV. 513, 516-17 (2018) (discussing the racialization of policing and arguing that 'Blackness' has become the symbolic assailant). The concept of the "deserving poor" reflects a similar racialized binary. According to this theory, the public supports welfare programs that are imagined to assist people whose poverty is viewed as resulting from environmental circumstances rather than through personal fault—for example, children, widows, and the disabled. On the other hand, the public opposes programs that help those people who are imaged to be poor because of individual behavioral or moral deficiencies, a class referred to as the "undeserving poor." Khiaara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1075-78 (2017).

239. KELLY, *supra* note 5, at 9.

240. *See id.*

offenses, and we carelessly aggregate people who have committed crimes into a single, stigmatized social class.<sup>241</sup>

The Supreme Court has acknowledged this binary approach to blame in the context of differentiating between the procedural due process requirements for juveniles and adults. In *McKeiver v. Pennsylvania*, the Court held that, unlike adult criminal defendants, minors in juvenile court are not entitled to jury trials.<sup>242</sup> Justice White, concurring, explained:

The criminal law proceeds on the theory that defendants have a will and are responsible for their actions. A finding of guilt establishes that they have chosen to engage in conduct so reprehensible and injurious to others that they must be punished to deter them and others from crime. Guilty defendants are considered blameworthy; they are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system.

For the most part, the juvenile justice system rests on more deterministic assumptions. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties.<sup>243</sup>

Yet as I have shown in my comparison of people who experience trauma in the military and people who experience trauma as a result of community violence, this categorization of behavior as either situational or characterological is far from straightforward.<sup>244</sup> Evidence shows that community violence can cause trauma similar to that which results from military service. Proponents of leniency

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241. *Id.* at 9-10.

242. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

243. *Id.* at 551-52 (White, J., concurring).

244. Our treatment of police violence provides an interesting example of this dichotomy. See SKLANSKY, *supra* note 3, at 115-17, 234. Many times, even when police officers are caught on video assaulting a civilian, they are able to successfully defend themselves by focusing on the dangers faced by officers and the split-second decisions they must make. When cast in this situational frame, we refer to police violence euphemistically as “use of force.” *Id.* at 115. Other times, when this same behavior is categorized as characterological, we refer to it as “police brutality,” and officers are singled out as “bad apples.” *Id.* at 116.

for veterans argue that veterans deserve special treatment because the government is responsible for their trauma and because standard services and procedures are ill-suited for their needs—justifications which also apply to those who experience trauma as a result of community violence and so many other causes. As such, I suggest that what distinguishes individuals who experience trauma as a result of war and individuals who experience trauma as a result of violence in their own neighborhoods is not any difference in the kind or degree of the trauma sustained by the two groups, but rather, false distinctions between military veterans as law-abiders and residents of violent communities as law-breakers.

While the unfounded distinction between law-abiders and law-breakers is troubling in its own right, this distortion of blameworthiness is all the more problematic because of its deep roots in racism and the ongoing role of such false dichotomies in perpetuating racially disparate outcomes for Black people.

Americans have a long history of associating Black people with criminality and categorizing such criminality as characterological rather than situational. “In the public mind, the face of violent crime is the face of a young man of color, and offending by members of racial minorities is more readily attributed to character rather than circumstances,” writes David Alan Sklansky.<sup>245</sup>

Ta-Nehisi Coates traces the idea of Black criminality to the founding of our nation, explaining that “Black criminality is literally written into the American Constitution” through the Fugitive Slave Clause. Drawing a line from slavery to mass incarceration, Coates writes, “It is impossible to conceive of the Gray Wastes without first conceiving of a large swath of its inhabitants as both more than criminal and less than human. These inhabitants, black people, are the preeminent outlaws of the American imagination.”<sup>246</sup> Khalil Gibran Muhammad grounds the concept of Black criminality in the 1890s, when, for white Americans, “African American criminality became one the most widely accepted bases for justifying prejudicial thinking, discriminatory treatment, and/or acceptance of racial violence as an instrument of public safety.”<sup>247</sup> As Muhammad explains, the response to crime and violence in white communities has been redistribution and compassion.<sup>248</sup> When Black people engage in criminal behavior, on the other hand, the language of personal responsibility is invoked, and the response has been retribution and condemnation.<sup>249</sup>

The idea of Black criminality has infected every aspect of the criminal legal system. As Frederick Douglass explained in relation to convict leasing, “the

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245. SKLANSKY, *supra* note 3, at 121 (2021); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 249 (2010) (“[M]ass incarceration is predicated on the notion that an extraordinary number of African Americans (but not all) have freely chosen a life of crime and thus belong behind bars . . . their imprisonment can be interpreted as their own fault.”).

246. Coates, *supra* note 43.

247. MUHAMMAD, *supra* note 6, at 4.

248. *Id.* at xxix.

249. *Id.* at xv.

judges, juries and other officials of the courts are white men who share these prejudices. They also make the laws. It is wholly in their power to extend clemency to white criminals and mete severe punishment to black criminals for the same or lesser crimes.”<sup>250</sup> The same can be said of those in power today. Research shows strong unconscious associations between Blackness and criminality.<sup>251</sup> In fact, the more Black people that Americans believed accounted for the prison population, the more they supported harsh criminal justice policies.<sup>252</sup> These racist and racialized views of criminality affect all stages of criminal prosecutions, including plea bargaining and sentencing.<sup>253</sup>

When it comes to the disparate treatment of military veterans and people who have experienced trauma as a result of community violence, the issue of racism cannot be ignored. To borrow from Sklansky’s critique of the labeling of crime as violent or non-violent, cognitive siloing is “more complicated and more contingent than we often realize,” and, “when employed inconsistently, can mask racism and other toxic biases.”<sup>254</sup> As discussed in Section I.B, the burden of concentrated community violence falls primarily on people of color. According to a 2000 study, predominantly African-American neighborhoods average five times as many violent crimes as predominantly white communities, and predominantly Latino neighborhoods average about two and a half times as many violent crimes as predominantly white neighborhoods.<sup>255</sup> At the individual level, Black people are murdered at over six times the rate of white people,<sup>256</sup> and hospitalized for nonfatal firearm injuries at ten times the rate of whites.<sup>257</sup> On the other hand, the

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250. TAYLOR, *supra* note 6, at 111.

251. See Eberhardt et al., *supra* note 6, at 14.

252. Hetey & Eberhardt, *supra* note 6, at 1949.

253. The racial disparities in policing and prosecution have been well documented. Black people accounted for twenty-seven percent of all arrests in the United States in 2016, even though they make up only approximately thirteen percent of the population. SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 2 (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>. Following arrest, African American individuals are incarcerated in local jails at 3.5 times the rate of non-Hispanic white individuals in 2016. *Id.* at 6. The imprisonment rates for Black and Hispanic adults are 5.9 and 3.1 times the rate for white adults, respectively. *Id.* at 1. And a recent study found that among defendants with no prior record, white people were over twenty-five percent more likely than Black people to have their charges reduced. Berdejó, *supra* note 6, at 1216.

254. SKLANSKY, *supra* note 3, at 157.

255. U.S. DEP’T OF HOUS. & URB. DEV., *supra* note 27.

256. Sharkey, *supra* note 17, at 91. According to the FBI Uniform Crime Reporting system, as of 2015, the homicide rate for African American people (Hispanic and non-Hispanic) was 15.2 per 100,000, the rate for all Hispanic people was 3.47 per 100,000, and the rate for white people (Hispanic and non-Hispanic) was 2.29 per 100,000. *Id.* at 88.

257. *Id.* at 91. For example, as mentioned above, in New York City in 2019, over seventy-one percent of shooting victims (fatal and nonfatal) were Black, even though Black people make up only about twenty-three percent of the city population. N.Y. POLICE DEP’T, *supra*

current share of veterans who are Black is thirteen percent, roughly equal to the percent of Americans who are Black.<sup>258</sup> Likewise, the military's current racial makeup is roughly that of young Americans as a whole, though African Americans are slightly more likely to serve.<sup>259</sup>

In this moment when people and institutions across the nation claim to be reckoning with structural racism, it is incumbent upon all criminal legal system actors to acknowledge this false dichotomy for what it is and to work toward more equitable and compassionate treatment for all individuals with histories of trauma, especially when that trauma is the result of government action.<sup>260</sup>

This reconceptualization is not without historical basis. Since the 1970s, the criminal legal system has been governed by a philosophy of retributivism, and people who engage in criminal behavior are largely viewed as rational actors who make independent choices uninfluenced by extrinsic factors.<sup>261</sup> Punishment is therefore based on behavior, not an individual's circumstances. "By framing structural influences as irrelevant to the offender's calculation, retributivism absolved the state of responsibility for creating conditions that encourage criminal behavior."<sup>262</sup>

But retributivism has not always been the dominant theory of punishment. From the late 1800s until the 1970s, the U.S. criminal legal system was governed

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note 37, at 11, B-1.

258. Katherine Schaeffer, *The Changing Face of America's Veteran Population*, PEW RSCH. CTR. Apr. 5, 2021), <https://www.pewresearch.org/fact-tank/2021/04/05/the-changing-face-of-americas-veteran-population/>; *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/US> (last visited Mar. 25, 2022) (showing that as of July 1, 2021, 13.4 percent of the U.S. population is Black or African-American).

259. Dave Philipps & Tim Arango, *Who Signs Up to Fight? Makeup of U.S. Recruits Shows Glaring Disparity*, N.Y. TIMES (Jan. 10, 2020), <https://www.nytimes.com/2020/01/10/us/military-enlistment.html> (explaining that the main predictors of military enrollment are not class or race, but instead a person's familiarity with the military); OFF. OF THE UNDER SEC'Y OF DEF., PERS. & READINESS, U.S. DEP'T OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES: FISCAL YEAR 2017 SUMMARY REPORT 25 (2017), <https://www.cna.org/pop-rep/2017/summary/summary.pdf> (showing that Black people account for 17.8 percent of military accessions and represent 15.1 percent of the eighteen- to twenty-four-year-old civilian population). That said, there is a long history of discrimination against Black servicemembers and veterans. See, e.g., EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: TARGETING BLACK VETERANS 7-9 (2017), <https://eji.org/wp-content/uploads/2019/10/lynching-in-america-targeting-black-veterans-web.pdf> (describing how throughout the lynching era, rather than being honored for their service, many Black veterans were seen as a threat to the South's racial caste system and "targeted for mistreatment, violence, and murder because of their race and status as veterans").

260. Of course, in this push to treat like cases alike, we must take care to ratchet punishment down, rather than up.

261. Collins, *supra* note 8, at 1484; see also Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 64 (2002) (noting "the failure of traditional courts to address the individual circumstances of each offender's life").

262. Collins, *supra* note 8, at 1515.

by the ideology of penal-welfarism, which prioritized rehabilitation over punishment.<sup>263</sup> As David Garland explains, crime was treated as the shared responsibility of the offender and the state and perceived “as a *social problem* that manifested itself in the form of individual, criminal acts.”<sup>264</sup> Under this conception of criminal behavior, while individual rehabilitation was addressed, “the ultimate ‘cure’ . . . required ameliorative state action, including the ‘expansion of prosperity and the provision of social welfare.’”<sup>265</sup>

Particularly in the context of specialized courts, the criminal legal system has begun to show a renewed willingness to acknowledge that external forces impact individual behavior.<sup>266</sup> Rather than treating defendants as “disembodied rational actors who independently choose to commit criminal activity,” specialized courts “advance a contextualized definition of offenders that acknowledges that criminal behavior originates in a ‘structural causal setting’ and results from a complex combination of interrelated factors.”<sup>267</sup>

The Supreme Court has also recognized the role of structural factors in assessing a defendant’s moral culpability in some limited circumstances.<sup>268</sup> In 2002, the Court in *Atkins v. Virginia* barred the execution of people with intellectual disabilities, reasoning in part that they “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”<sup>269</sup> The Court has also shown some increased level of understanding toward juveniles. In 2005, in *Roper v. Simmons*, the Court struck down the death penalty for people under age eighteen, explaining that young people’s “vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences

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263. Collins, *supra* note 8, at 1513 (citing DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 34 (2001)).

264. Collins, *supra* note 8, at 1514 (citing GARLAND, *supra* note 263, at 41).

265. Collins, *supra* note 8 (quoting GARLAND, *supra* note 263, at 43).

266. While problem-solving courts’ shift away from retributivism is certainly important, practitioners and scholars alike have raised substantive, ethical, and procedural concerns with problem-solving court programs. These courts generally operate in the shadow of the criminal legal system and threaten to simply create new forms of the same punishment and control, while also widening and deepening the net and perpetuating racial disparities. See, e.g., Shanda Sibley, *Procedural Fairness in Criminal Specialty Court Selection*, \_\_ CARDOZO L. REV. \_\_ (forthcoming) (criticizing some problem-solving courts for reducing defendants’ substantive and procedural rights, resulting in longer periods of state supervision for participants, and widening the nets of the criminal legal system); Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1577 (2021) (arguing that treatment courts have not developed methodically, but instead have spread quickly and without time for meaningful reflection and empirical scrutiny). There is no principled reason why this reconceptualization should be limited to the specialized court context.

267. Collins, *supra* note 8, at 1521; see also Huskey, *supra* note 124, at 179 (explaining that in VTCs, “our ‘nation’s warriors’ are not regarded as criminals,” but “[r]ather, the underlying condition or conditions are viewed as the culprit and addressed accordingly”).

268. KELLY, *supra* note 5, at 39.

269. *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

in their whole environment.”<sup>270</sup> The Court then barred life without parole sentences for people under eighteen convicted of non-homicide crimes,<sup>271</sup> and later extended the bar on life without parole as a mandatory minimum sentence for anyone under the age of eighteen, regardless of the crime.<sup>272</sup>

When it comes to the most severe penalties, the Court has also demonstrated some sensitivity to questions of moral blameworthiness for broader swaths of defendants. For example, in *Wiggins v. Smith*, the Court held that a defense attorney was ineffective for failing to adequately investigate and present mitigating evidence of the defendant’s history of severe physical and sexual abuse at the penalty phase of his capital trial.<sup>273</sup>

But this understanding has largely been cabined to the context of cases involving the death penalty and life without parole, and even in matters involving extreme punishments, there are significant limits.<sup>274</sup> Juveniles can still be tried as adults in many situations, and “even the severely mentally ill and disabled can be convicted and punished very harshly for criminal behavior.”<sup>275</sup> And for every case like *Wiggins v. Smith*, there are many more in which the legal system looks the other way when confronted with evidence of trauma.<sup>276</sup>

Yet, despite these limits, our nation’s past embrace of penal-welfarism, and more recent Supreme Court cases acknowledging the role of environmental factors in mitigating moral culpability, provide some hope for broader recognition of the role of trauma in mitigating blameworthiness.<sup>277</sup>

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270. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

271. *Graham v. Florida*, 560 U.S. 48 (2010).

272. *Miller v. Alabama*, 567 U.S. 460 (2012).

273. *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003).

274. See *Gohara, supra* note 9, at 27 (explaining that “courts have declined to consider even extreme and brutal abuse to be mitigating in noncapital cases”).

275. KELLY, *supra* note 5, at 41. For example, experts estimate that at least twenty percent of people on death row have a serious mental illness. *Position Statement 54: Death Penalty and People with Mental Illnesses*, MENTAL HEALTH AM. (June 14, 2016), <https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses>. This includes veterans, who make up ten percent of people on death row, many of whom suffer from documented trauma disorders. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., BATTLE SCARS: MILITARY VETERANS AND THE DEATH PENALTY 4 (Nov. 2015), <https://files.deathpenaltyinfo.org/documents/pdf/BattleScars.f1560295684.pdf>.

276. For example, in *Bobby v. Van Hook*, 558 U.S. 4, 10-12 (2009) (per curiam), decided just a few weeks before *Porter v. McCollum*, 558 U.S. 30 (2009), discussed above, the Supreme Court reinstated the death sentence for a man with a history of serious trauma, finding that although his counsel could have unearthed additional mitigating evidence about his background, Van Hook nonetheless failed to meet the standard for ineffective assistance of counsel.

277. As Miriam Gohara explains, “[t]he relevance of trauma to sentencing is ripe for extension to noncapital cases, beyond juvenile life without parole, where attorneys have already skillfully demonstrated the applicability of the capital doctrine’s logic to juvenile sentences.” *Gohara, supra* note 9, at 44.

#### IV. ACKNOWLEDGING AND ACCOUNTING FOR COMMUNITY VIOLENCE TRAUMA

Individuals who experience trauma as a result of community violence deserve to have their trauma acknowledged and accounted for just as much as people who experience trauma as a result of military service. The inhumanity with which we treat individuals who experience community violence would be inconceivable if it were happening to a different group of people, and a primary goal of this Article is to shine a light on this disparate treatment.

With regard to specific remedies, as a starting point, it is incumbent upon criminal legal system actors—and those in power more broadly—to acknowledge this false dichotomy for what it is. Decision-makers must recognize that crime does not stem solely from the choices of individual people, but also from the circumstances in which people find themselves, including circumstances for which the government bears responsibility. Without direct acknowledgment of the unfairness of the current approach, meaningful change is unlikely. On the other hand, if we name this disparate treatment and its racist foundations, we can begin to work toward the more equal and compassionate treatment of all people charged with crimes.<sup>278</sup>

Of course, acknowledgement alone is insufficient; we must also take action. I suggest three specific measures: first, a focus on community investment programs; second, a shift toward restorative justice; and third, continued advocacy by defense attorneys to nudge judges and district attorneys away from their current dichotomous thinking.

##### A. Community investment

###### 1. Traditional investments

As described in Section I.C, concentrated poverty and scarce resources con-

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278. This is all the more critical in the current moment, as violent crime rates are increasing. See Fed. Bureau of Investigation, *supra* note 11. Even though violent crime decreased significantly from 1990 to 2014, according to a 2020 Prison Policy Initiative report, nearly all of the major criminal justice reform measures passed in the last twenty years explicitly exclude people accused and convicted of violent crimes. SKLANSKY, *supra* note 3, at 42. Even as reforms ranging from decriminalizing drugs and reducing mandatory minimum sentences to electing progressive prosecutors and addressing police brutality grew in popularity, violent crime remained a third rail for reformers. *Id.* Now, rather than downplaying the current increase in violent crime, reformers should instead focus on the devastating causes and effects of community violence and continue to probe the inconsistent ways in which we treat trauma and structural environmental factors in the narratives of how people come to commit violent crimes—not only for the benefit of those who cause harm, but also for the well-being of those who are harmed and the communities most impacted by this harm. See Levitz, *supra* note 13.

tribute to community violence, and the existence of neighborhoods with concentrated poverty and violence results from structural and institutional racism.<sup>279</sup> This includes discriminatory government action at the federal, state, and local level. Acknowledging the government's role in creating neighborhoods where racial minorities are disproportionately exposed to community violence demands action. Rather than responding to community violence with control and punishment at the back end, the government has an obligation to provide affirmative improvements in resources at the front end.<sup>280</sup> This includes access to quality schools, housing, jobs, health care, mental health and substance use treatment,<sup>281</sup> as well as freedom from police violence.

As Khalil Gibran Muhammad describes, this is exactly what we have done for other groups. "When white communities, past and present, faced individual acts of crime and violence in a structurally unjust society, liberals chose to rebuild the economic and political infrastructure of white communities. They chose redistribution over retribution, and compassion over condemnation."<sup>282</sup> When Irish, Italian, and Eastern European immigrants engaged in high rates of criminal offending in the early twentieth century, society recognized this behavior as a result of the situations in which immigrants were placed,<sup>283</sup> and the crime was framed as a symptom of class oppression.<sup>284</sup> Rather than fighting crime with harsh policing tactics or excessive punishments, progressives responded with housing and jobs programs, improved labor laws, and new criminal justice policies.<sup>285</sup> Likewise, the current opioid crisis has been labeled—and at least to some extent, treated as—a "public health emergency."<sup>286</sup>

Community investment is also consistent with the goals of survivors of harm. Crime victims report that they want to live in safer neighborhoods, where

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279. Phan et al., *supra* note 76, at 1; Capers, *supra* note 75, at 49.

280. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1476 (2016) (advocating for a "Third Reconstruction" in which society "stop[s] addressing violence and crime in African-American and Latino communities primarily through criminal justice, and instead treat[s] those issues as they would if they were primarily associated with white people").

281. SERED, *supra* note 150, at 179.

282. MUHAMMAD, *supra* note 6, at xxix.

283. SKLANSKY, *supra* note 3, at 87.

284. MUHAMMAD, *supra* note 6, at xxii.

285. *Id.* at xxii.

286. *Id.* at xxv n.15. In 2018 President Donald Trump announced a one billion dollar investment for prevention, treatment, and recovery services for drug users, touting the "tremendous amounts of money and care" being dedicated to help heroin users and lauding the fact that "people are hiring these inmates." *Id.* More recently, President Biden has declared that people should not be incarcerated for drug use and should be offered treatment instead. OFF. OF NAT'L DRUG CONTROL POL'Y, EXEC. OFF. OF THE PRESIDENT, THE BIDEN-HARRIS ADMINISTRATION'S STATEMENT OF DRUG POLICY PRIORITIES FOR YEAR ONE at 1 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/03/BidenHarris-Statement-of-Drug-Policy-Priorities-April-1.pdf>.

fewer people are driven to criminal behavior, not just to be kept safe from specific people.<sup>287</sup> As sociologist Bruce Western explains, “justice is not achieved through the punishment of the offender but through the abatement of violent contexts. In violent contexts, victims and offenders are not distinct classes of people, but roles produced by the social conditions of poverty.”<sup>288</sup>

## 2. Investments in violence intervention programs

Investments in impacted communities should also include funding for community intervention programs aimed specifically at reducing gun violence. This is essential to address the negative feedback loop between violence and economic opportunity:

In neighborhoods with high levels of gun violence, economic opportunity is suppressed, property values lowered, and general health is heavily impacted as community members become afraid to walk the streets. . . . This fear creates a particularly problematic negative feedback loop: gun violence is often driven by the desperation that comes with lack of economic opportunity, yet shootings scare away potential businesses. Until the violence stops, efforts at economic revival are suppressed, further impoverishing already struggling communities.<sup>289</sup>

Violence intervention is also, of course, critical to the people who are being impacted by violence in the present—both people who are causing harm and experiencing harm—who cannot wait for the long-term benefits of broad-scale community investments. Funding should be directed toward programs that achieve this end without increasing reliance on the police or exacerbating the problems of mass incarceration. Examples of such programs include Cure Violence and hospital-based violence intervention programs (HVIPs).<sup>290</sup>

Cure Violence programs treat gun violence as a communicable disease and work to interrupt the transmission of gun violence among community members through behavioral changes in a small group of people.<sup>291</sup> This approach is based on evidence regarding the overlap between people who perpetrate gun violence and people who are the victims of gun violence, including research showing that exposure to gun violence (being shot, shot at, or witnessing a shooting) doubles

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287. SERED, *supra* note 150, at 230.

288. Bruce Western, *Lifetimes of Violence in a Sample of Released Prisoners*, RUSSELL SAGE FOUND. J. SOC. SCIS. 14, 28 (2015).

289. GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 14, at 12.

290. *Id.* at 14-15.

291. *Id.* at 16; see Ben Green et al., *Modeling Contagion Through Social Networks to Explain and Predict Gunshot Violence in Chicago, 2006 to 2014*, 177 JAMA INTERNAL MED. 326, 331 (2017) (finding that gun violence is concentrated within certain populations and “the diffusion of violence follows an epidemic-like process of social contagion that is transmitted through networks by social interactions”).

the probability that a young person will commit a violent act within two years.<sup>292</sup> Cure Violence uses violence interrupters to identify and mediate conflicts and outreach workers to connect individuals with social support services.

Independent studies have shown that Cure Violence programs are effective. A study of Cure Violence in Chicago found a thirty-eight percent greater decrease in homicides and a fifteen percent greater decrease in shootings in districts that received the intervention.<sup>293</sup> New York City neighborhoods served by a city-operated violence interruption network averaged a forty percent reduction in shootings between 2010 and 2019.<sup>294</sup> A similar program in Oakland, California contributed to a fifty percent reduction in homicides between 2009 and 2018.<sup>295</sup>

Hospital-based violence intervention programs (HVIPs) also appear to be promising. These programs, built on the premise that one of the strongest risk factors for violent injury is a history of violent injury and that being a victim of violence significantly increases the chances of becoming a perpetrator of violence, provide young adults recovering from violent injuries like gunshot wounds with culturally competent caseworkers who can identify their needs and connect them with appropriate resources.<sup>296</sup>

As with Cure Violence, HVIPs have also proven effective. For example, clients of an Oakland, California, HVIP were seventy percent less likely to be arrested and sixty percent less likely to have any criminal involvement compared to a control group.<sup>297</sup> The efficacy of community violence intervention programs is consistent with research by Patrick Sharkey, which suggests that in a typical city with approximately 100,000 people, each additional nonprofit devoted to combatting violence led to an about one percentage point drop in the city's murder rate.<sup>298</sup>

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292. GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 14, at 30 (explaining that those most likely to perpetrate gun violence are also those most likely to be victims of gun violence); Jeffery B. Bingenheimer et al., *Firearm Violence, Exposure and Serious Violent Behavior*, 308 SCI. 1323, 1326 (2005) (finding that exposure to gun violence approximately doubles the probability that an adolescent will perpetrate serious violence in the next two years).

293. GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 14, at 15.

294. *Interventions*, N.Y.C. OFF. TO PREVENT GUN VIOLENCE, <https://www1.nyc.gov/site/peacencyc/interventions/crisis-management.page> (last visited Mar. 5, 2022).

295. *Lessons from Oakland's Citywide Effort that Dramatically Reduced Gun Violence*, GIFFORDS (Apr. 24, 2019), <https://giffords.org/press-release/2019/04/ugv-a-case-study-in-hope/>.

296. GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 14, at 37.

297. Marla G. Becker et al., *Caught in the Crossfire: The Effects of a Peer-based Intervention Program for Violently Injured Youth*, 34 J. ADOLESCENT HEALTH 177, 177 (2004).

298. Patrick Sharkey, *Two Lessons of the Urban Crime Decline*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/opinion/sunday/two-lessons-of-the-urban-crime-decline.html>; Patrick Sharkey et al., *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOCIO. REV. 1214, 1234 (2017) (finding

While funding for community violence intervention programs has long been a problem, President Biden has acknowledged the value of these initiatives and taken promising early steps to support their expansion. Biden's American Jobs Plan, unveiled in March 2021, calls for five billion dollars over eight years to support community violence intervention programs that train at-risk individuals for jobs and provide other wraparound services to prevent violence and assist victims.<sup>299</sup> Likewise, in July 2021, Governor Andrew Cuomo declared a gun violence emergency in New York State and committed \$139 million to intervention and prevention programs.<sup>300</sup>

As Erin Collins explains,

[C]hanging how we envision criminal offenders should change the kinds of economic investments we make. . . . The ways in which the population that is to be punished is imagined by policy makers, court personnel, penal administrators, and others who are in the business of state punishment necessarily shapes the kinds of investments states have made in their penal machinery.<sup>301</sup>

In other words, the funding of services for veterans, just like the creation of specialty courts for veterans, reflects our society's notion of who is deserving of treatment. Funding exists for veterans because society has deemed them worthy of such funding; if we accept that people who are impacted by community violence are also deserving of support, funding should become available for this population too. The recent calls for significant investments in violence intervention programs by Biden and Cuomo provide examples of this shift.

#### B. Restorative justice

The decades of discrimination that contributed to certain neighborhoods being marked by concentrated community violence cannot be reversed overnight. In addition to committing to expanding access to basic social services such as quality schools, housing, jobs, and health care, we must also think critically about how to respond to the harms that do occur and that will continue to occur.

While there is no single solution to a criminal legal system that reflects and

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strong evidence that the creation of community nonprofits has a significant negative effect on murder, violent crime, and property crime).

299. *Fact Sheet: More Details on the Biden-Harris Administration's Investments in Community Violence Interventions*, WHITE HOUSE (Apr. 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-more-details-on-the-biden-harris-administrations-investments-in-community-violence-interventions/>.

300. Ashley Southall, *Cuomo Declares a Gun Violence Emergency in New York State*, N.Y. TIMES (Aug. 2, 2021), <https://www.nytimes.com/2021/07/06/nyregion/new-york-gun-violence-emergency.html>.

301. Collins, *supra* note 8, at 1527.

perpetuates decades of racial discrimination, a turn toward restorative justice offers promise as we work toward acknowledging the role of trauma in criminal behavior and commit to recognizing the full humanity of all people who engage in criminal behavior.

Restorative justice represents a paradigm shift in which the typical focus on punishment and retribution gives way to a focus on relational harms and collective healing and accountability.<sup>302</sup> The traditional criminal legal system asks three basic questions: What law was broken? Who broke it? And how should that person be punished? Restorative justice asks a different set of questions, including: Who was harmed? What does the harmed person need? Whose obligation it is to meet those needs? Who has a stake in the situation? What are the causes? And what is the appropriate process to involve stakeholders in an effort to make things right and address underlying causes?<sup>303</sup>

As Danielle Sered explains,

Restorative justice allows us to acknowledge that the context in which harm takes place is almost never right or fair, and still, even within that context, each one of us is responsible for carving out the most ethical, most righteous lives we can. It honors each person's dynamism and self-determination while never pretending that we exist independent of our context or our (often unjust) constraints.<sup>304</sup>

In this way, restorative justice offers a method by which an individual's environment, including a background of trauma, can be taken into account, and the revolving door between people who cause harm and people who experience harm can be addressed.<sup>305</sup>

Restorative justice specifically interrogates the underlying causes of criminal behavior and the appropriate process to address those underlying causes. In this way, restorative justice makes space for the idea that criminal conduct can

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302. Howard Zehr, often considered the pioneer of modern restorative practices, set forth this conception of restorative justice in his 1990 book *Changing Lenses*. HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE (3rd ed., 2005); see also Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020); *The Ezra Klein Show: The Transformative Power of Restorative Justice* (with sujatha baliga), VOX (June 2020) (downloaded using iTunes).

303. RESTORATIVE JUST. PROJECT, RJD PROGRAM OVERVIEW AND ELEMENTS 3 [https://rjdtoolkit.impactjustice.org/wp-content/uploads/2019/04/Resource\\_-RJD-Program-Overview-\\_-Elements.pdf?eType=EmailBlastContent&eId=eba4d861-d470-4041-bb9e-99d351c77b5f](https://rjdtoolkit.impactjustice.org/wp-content/uploads/2019/04/Resource_-RJD-Program-Overview-_-Elements.pdf?eType=EmailBlastContent&eId=eba4d861-d470-4041-bb9e-99d351c77b5f) (last visited Mar. 5, 2022).

304. SERED, *supra* note 150, at 154.

305. Of course, restorative justice is not without potential problems. For example, some argue that unless restorative justice takes place fully outside of the criminal legal system, there is a coercive element to it. There is also a concern that the expansion of restorative justice programs could widen and deepen the net of the criminal legal system. See González, *supra* note 302, at 1149 n.6. While these concerns must be tended to carefully, restorative justice nonetheless offers a promising path forward.

be tragic for everyone involved—including defendants and their families—and that “we can take wrongdoing seriously without morally blaming wrongdoers.”<sup>306</sup> Restorative justice also allows us to move away from the practice of insisting on an individual’s responsibility while at the same time ignoring the role of social injustice and the state itself in the harm that has occurred.<sup>307</sup>

When there appears to be a nexus between criminal behavior and trauma, restorative justice also makes space for treatment for the psychological impacts of the traumatic exposures. Evidence suggests that the link between severe mental illness and criminal behavior exists largely when mental illness goes untreated.<sup>308</sup> According to the American Psychological Association and National Alliance on Mental Illness (NAMI), when people with mental illness engage in acts of violence, it is usually the result of a lack of needed mental health services.<sup>309</sup> Most mental health organizations believe that early screening, diagnosis, and effective treatment are the best way to prevent violence by people with severe mental illness.<sup>310</sup> Treatment, including psychotherapy and medications, have been shown to be effective for people with PTSD and other psychological problems resulting from trauma.<sup>311</sup> Restorative justice, then, offers an opportunity to hold individuals accountable while also addressing underlying causes of behavior.

### C. The role of defense attorneys: changing narratives

Storytelling can be a powerful method for disrupting the stereotypes that contribute to the law’s perpetuation and reinforcement of systems of power. When used intentionally, storytelling may be able to combat the biases and cognitive assumptions that underly the disparate treatment described in this Article.

Lindsay Webb writes about the importance of storytelling in litigation and social movements.<sup>312</sup> In particular, Webb advocates for criminal defense lawyers to explicitly address conditions of confinement in sentencing hearings. As Webb contends, raising oft-ignored conditions of confinement at sentencing can

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306. KELLY, *supra* note 5, at 75.

307. KELLY, *supra* note 5, at 156 (“Just as the permissible use of criminal punishment depends on the minimal rationality of defendants, it also depends on social conditions of basic distributive justice. When these conditions are not satisfied, the state lacks standing to administer punishment on the basis of anything like desert and retribution.”).

308. A.B.A. DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 18 (Dec. 2016), <https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/severe-mental-illness-death-penalty-white-paper>.

309. *Id.*

310. *Id.*

311. *PTSD Treatment Basics*, U.S. DEP’T OF VETERANS AFFS., [https://www.ptsd.va.gov/understand\\_tx/tx\\_basics.asp](https://www.ptsd.va.gov/understand_tx/tx_basics.asp) (last visited Mar. 5, 2022).

312. Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 128 (2018).

strengthen defense attorneys' advocacy for their individual clients and simultaneously empower defense attorneys to act as agents of prison abolition.<sup>313</sup>

So too can defense attorneys both strengthen their sentencing advocacy for individual clients and work toward broader-scale change by incorporating arguments about situational versus characterological approaches to behavior in their plea bargaining and sentencing arguments. Sentencing hearings often focus on the details of the specific defendant, crime, and victim, rather than structural injustices.<sup>314</sup> Defense attorneys can lead the way in shifting this focus. While recognizing that there are hazards to this approach and that risks may outweigh the benefits in some cases,<sup>315</sup> defense attorneys should consider the utility of educating decision-makers about the environmental context of their client's behavior and how such circumstances are accounted for in relation to other defendants.<sup>316</sup> This type of storytelling is consistent with a criminal defense attorney's duty to both advocate for their clients with "courage and devotion" and "to seek to reform and improve the administration of criminal justice."<sup>317</sup> It also offers an important immediate response to the issues raised in this Article.

#### CONCLUSION

Allen Rivera successfully completed Veterans Treatment Court. The path was not easy, and there were setbacks along the way, but by the time he graduated from the program, he had stable housing and a decent job and was actively engaged in mental health treatment. While this result was achieved through Veterans Treatment Court, I contend that it was not the program itself, but rather the judge and district attorney's view of Allen's behavior as situational, that allowed for Allen's positive outcome.

Robert Coleman, on the other hand, opted to take his case to trial rather than

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313. *Id.* While there are limitations on judicial discretion, as discussed above in the case of Robert Coleman, judges do retain significant autonomy over sentencing in many situations. In *United States v. Booker*, 543 U.S. 220, 245-46 (2005), the Supreme Court ruled that the federal sentencing guidelines are discretionary rather than mandatory, and there has been a general movement away from mandatory minimum sentences. Webb, *supra* note 312, at 135-36.

314. Webb, *supra* note 312, at 137.

315. For example, attorneys must guard against the nexus between community violence and criminal behavior being used to support racist policies or stereotypes. As Miriam Gohara describes, there are also instances in which retributive and rehabilitative goals may be in tension with each other—for example, while a judge may agree that an individual with a history of trauma is less culpable under a retributive theory of justice, the judge may also believe that the traumatized individual is less amenable to treatment under a rehabilitative theory. See Gohara, *supra* note 9, at 9.

316. See Gohara, *supra* note 9, at 33 ("the bench needs examples of thorough social history mitigation in order for judges to apprehend the powerful and often overlooked factors, such as abusive homes and violence-torn neighborhoods, that explain many defendants' offenses"). For a discussion of how to operationalize this work, see *supra* note 9, at 35-39.

317. Webb, *supra* note 312, at 141.

plead guilty to an offense that carried a mandatory minimum sentence. Despite considerable evidence against him, Robert was found not guilty at trial. But six months after his acquittal, Robert was shot to death on the sidewalk near his home. While judges and the district attorney had refused to acknowledge Robert's life circumstances as relevant to his criminal case, Robert and his family could not escape these conditions. Community violence not only led Robert to the criminal legal system; it also took his life.

In this Article, I have argued that what distinguishes military veterans like Allen, whose trauma was acknowledged by decision-makers, from people like Robert, whose trauma was disregarded, is not a difference in the impact of their life circumstances, but rather cognitive assumptions about who is and is not a criminal—assumptions that lead to a false dichotomy between people whose criminal behavior we deem characterological and people whose criminal behavior we accept as situational. As psychologists and neuroscientists Joshua Green and Jonathan Cohen write:

[A]dvances in neuroscience are likely to change the way people think about human action and criminal responsibility by vividly illustrating lessons that some people appreciated long ago. Free will as we ordinarily understand it is an illusion generated by our cognitive architecture. Retributivist notions of criminal responsibility ultimately depend on this illusion, and, if we are lucky, they will give way to consequentialist ones, thus radically transforming our approach to criminal justice. At this time, the law deals firmly but mercifully with individuals whose behaviour is obviously the product of forces that are ultimately beyond their control. Some day, the law may treat all convicted criminals this way. That is, humanely.<sup>318</sup>

Individuals ensnared in the criminal legal system cannot continue to wait. It is incumbent upon all criminal legal system actors to acknowledge the false dichotomy between characterological and situational behavior for what it is and to work toward more compassionate treatment of all individuals with histories of trauma.

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318. Joshua Green & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 1775, 1784 (2004).