

ARTICLE

NEW COURTS ON THE BLOCK: SPECIALIZED CRIMINAL COURTS FOR VETERANS IN THE UNITED STATES

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INTRODUCTION

“To deny the frequent connection between combat trauma and subsequent criminal behavior is to deny one of the direct societal costs of war and to discard another generation of troubled heroes.”¹

Over 1.7 million American military service members have been deployed to Iraq and Afghanistan in support of the Global War on Terror (GWOT) since the start of combat operations in 2001.² Approximately one third of those individuals have been deployed more than once.³ With plans to withdraw all but 50,000 of the service members from Iraq by August 2010,⁴ the United States will face a massive influx of veterans returning from war. It has been estimated that 30 to 40 percent of the 1.7 million Iraq and Afghanistan veterans

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1. Deborah Sontag & Lizette Alvarez, “Across America, Deadly Echoes of Foreign Battles” *N.Y. Times* (13 January 2008), online: NYTimes.com <http://www.nytimes.com/2008/01/13/us/13vets.html?_r=1> (quoting Brockton D. Hunter, criminal defense attorney) [“Deadly Echoes”].
2. *VA Fact Sheet: Impact of Iraq and Afghanistan Wars*, online: Veterans for Common Sense <<http://veterans.house.gov/Media/File/110/2-7-08/VA-DoDfactsheet.htm>>. See also *Military Personnel Statistics*, online: Statistical Information Analysis Division of the Dept. of Defense <<http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm>>.
3. *Responding to the Needs of Justice-Involved Combat Veterans with Service-Related Trauma and Mental Health Conditions*, online: Center for Mental Health Services National GAINS Center <http://www.gainscenter.samhsa.gov/pdfs/veterans/CVTJS_Report.pdf> at 4 [GAINS Report].
4. Julian E. Barnes & Greg Miller, “Obama Orders More Troops to Afghanistan” *The Los Angeles Times* (18 February 2009), online: latimes.com <<http://www.latimes.com/news/nationworld/world/la-fg-afghan-troops18-2009feb18,0,1590275.story>> [“More Troops”].

(“GWOT veterans”) will “face serious mental-health injuries” such as Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI).⁵ These disorders can lead to higher rates of drug and alcohol abuse, because many veterans will try to “self-medicate” to help deal with their problems.⁶ Higher rates of drug and alcohol abuse often lead to additional drug offences, theft, and ultimately incarceration.⁷ As well, the *New York Times* reported in January 2008 that there had been at least 121 cases in which veterans of Iraq and Afghanistan were charged with killings ranging from involuntary manslaughter to first-degree murder, since the return of the first veterans from Afghanistan in 2002.⁸ Combat trauma and substance abuse played a part in many of the cases.⁹ However, these violent crimes are just a small percentage of the larger estimated number of crimes that veterans will commit.¹⁰

At the same time, several studies have shown that veterans convicted of crimes have a much lower recidivism rate than other criminals.¹¹ A 1993 study by the New York Department of Correctional Services indicates that “veterans . . . return to the [correctional] system at less than 80 percent of the rate at which similarly situated non-veterans return.”¹² A 2000 re-

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5. Terri Tanielian & Lisa H. Jaycox, *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans*, online: RAND Corporation <http://rand.org/pubs/monographs/2008/RAND_MG720.pdf> at 2 [RAND Report]. The essential feature of PTSD “is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.” American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington D.C.: American Psychiatric Association, 2000) at 465 [Manual of Mental Disorders]. TBI “occurs when a sudden trauma causes damage to the brain. TBI can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue.” *Traumatic Brain Injury: Hope Through Research*, online: National Institute of Neurological Disorders & Stroke <http://www.ninds.nih.gov/disorders/tbi/tbi_htr.pdf> at 3. There is a strong association between TBI and PTSD. In 2006, the New England Journal of Medicine conducted an anonymous study of 2,525 Army infantry soldiers and found that “of those reporting loss of consciousness, 43.9% met criteria for post-traumatic stress disorder (PTSD), as compared with 27.3% of those reporting altered mental status, 16.2% with other injuries, and 9.1% with no injury. Charles Hoge *et al.*, “Mild Traumatic Brain Injury in U.S. Soldiers Returning from Iraq,” (2008) 358 *New England J. Medicine* 453, at 453.
 6. Claudia Baker & Cessie Alfonso, “PTSD and Criminal Behavior” in “National Center for PTSD Fact Sheet 1”, online: National Center for PTSD <http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_legal.html?printable-template=factsheet> [PTSD Fact Sheet].
 7. P.T. Bean & C.K. Wilkinson, “Drug Taking, Crime and the Illicit Supply System” (1988) 83 *British J. Addiction* 533.
 8. “Deadly Echoes”, *supra* note 1.
 9. *Ibid.*
 10. *Ibid.*
 11. e.g. One study was based on “personal interviews conducted through the 1997 Survey of Inmates in State and Federal Correctional Facilities and the 1996 Survey of Inmates in Local Jails.” Christopher J. Mumola, “Veterans in Prison or Jail”, online: U.S. Dept. of Justice <<http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf>> at 14 [Veterans in Prison]. However, the authors of the study noted that the accuracy of the report may suffer from sampling errors, as well as non-sampling errors (for example, the study relied on inmates to provide their own personal information which resulted in non-responses, different interpretations of the questions, and recall difficulties); but see Dane Archer & Rosemary Gartner, “Violent Acts and Violent Times: A Comparative Approach to Post-war Homicide Rates” (1976) 41 *Am. Soc. Rev.* 937 at 956: “Direct evidence of whether veterans are overrepresented in the commission of homicide is difficult to obtain.”
 12. *Veterans' Program Follow-Up July 1993*, online: State of N.Y. Dept. of Correction Services <<http://www.ncjrs.gov/app/publications/Abstract.aspx?id=149419>>.

port from the Bureau of Justice Statistics concluded that, as a group, incarcerated veterans were less likely to commit future crimes than incarcerated non-veterans.¹³

Additionally, other recent studies have shown that veterans who have completed specialized treatment programs have an even lower recidivism rate, which suggests that veterans would be optimal candidates for rehabilitation and decreased sentencing.¹⁴ Arguably, criminal defendants who are also veterans may require, or benefit from, differential treatment by the criminal justice system.

States are beginning to respond to the increasing numbers of GWOT veterans turning up in their courtrooms.¹⁵ Judges, prosecutors, public defenders, US Department of Veterans Affairs officials, and volunteers are joining forces “to create courts with veterans-only case proceedings, because they have seen a common thread” of PTSD, TBI, substance abuse, and mental illness underlying the veterans’ crimes.¹⁶

This article describes the creation of specialized courts for veterans accused of nonviolent crimes. It argues that such courts are an efficient and appropriate way for the US criminal justice system to streamline the anticipated influx of veterans who may find themselves facing incarceration, providing them with the chance to rebuild their lives.

I. MAGNITUDE OF THE PROBLEM

There is no foreseeable end to the United States’ involvement in the GWOT. Although plans have been set in motion to reduce the force in Iraq, the number of U.S. troops in Afghanistan is going to increase, and there is no indication of a complete withdrawal of American forces from either country.¹⁷ Until the GWOT is over, the United States will continue to send men and women into a combat environment, and a percentage of these soldiers will continue to return with PTSD, TBI, or other mental health problems.¹⁸ Veterans who have not received adequate treatment (and even some who have) will continue to find themselves in trouble with the law.

13. Veterans in Prison, *supra* note 11, at 7; see also “U.S. Sentencing Commission on Recidivism and the First Offender”, online: United States Sentencing Commission <<http://www.ussc.gov/publicat/RecidivismFirstOffender.pdf>> at 23 [First Offender]: (indicating that offenders with prior military service make up a higher proportion of federal offenders with little or no prior criminal history than of federal offenders with lengthier criminal records).

14. The first veterans court in Buffalo, New York reports that of the more than 100 veterans who have passed through its program, only two had to be returned to the traditional criminal court system because they could not quit narcotics or criminal behavior. Nicholas Riccardi, “These Courts Give Wayward Veterans a Chance” *Los Angeles Times* (10 March 2009), online: latimes.com <<http://www.latimes.com/news/nationworld/nation/la-na-veteranscourt102009mar10,0,5067070.story?page=2>>. A 2007 RAND Corp. study of the county mental health court in Buffalo, New York, showed that only 14 percent of participants committed a crime after going through the program. The Buffalo veterans court is modeled after its mental health and drug courts. The report claims that the recidivism rate for the general population of inmates is 67 percent. RAND Report, *supra* note 5, at 2. King County, Washington reports a recidivism rate of 16 percent for convicted veterans who have completed their prison time, compared to the current recidivism rate of over 50 percent for the general population. *Veterans’ Program Client Services*, online: King County Dept. of Community & Human Services <<http://www.metrokc.gov/DCHS/CSD/Veteran/Client.htm>>.

15. Lynne Marek, “Courts for Veterans Spreading Across U.S.”, online: (2008) National L. J. <<http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426915992>> [Marek].

16. *Ibid.*

17. “More Troops”, *supra* note 4.

18. RAND Report, *supra* note 5 at 2.

A RAND Corporation study estimates that 300,000 GWOT veterans are currently suffering from PTSD or depression, and about 320,000 may have experienced a Traumatic Brain Injury during deployment.¹⁹ In an effort to identify soldiers who are at risk for, or who are already suffering from PTSD and other mental health disorders, the Department of Defense (DoD) has enacted certain post-deployment protocols. The DoD requires that a Post-Deployment Health Assessment be administered to all service members at the end of deployment.²⁰ Three to six months later, the assessment is re-administered.²¹ In 2007, during a random-dial survey, the GAINS Center found that of those surveyed, from the time of the initial assessment to the reassessment, positive screens for PTSD jumped 42 percent for those who served in the active Army (from 12% to 17%) and 92 percent for Army National Guard and Army Reserve members (from 13% to 25%).²² Depression screens increased as well, with Army National Guard and Army Reserve members reporting higher rates than those who were active Army.²³ It is estimated that only around 50 percent of veterans who need treatment for depression, PTSD, or TBI seek it, and only slightly more than half who receive treatment get even “minimally adequate care.”²⁴

There are no comprehensive statistics on how often veterans get in trouble with the law, and many will never become entangled with the legal system. But psychiatrists, law enforcement officials, and commentators agree that the traumas of combat can lead to addiction and criminality. According to the most recent data available on incarcerated veterans, ten percent of federal and state prisoners were veterans in 2004, before GWOT veterans began returning in large numbers.²⁵ At that time, veterans were not overrepresented in the justice system in comparison to their proportion in the general population.²⁶ However, as more veterans with PTSD, TBI, and other mental health disorders are returning from war, the growing concern is that the underlying conditions which cause veterans to become involved with the justice system are not being treated.²⁷ These conditions in turn cause more veterans to become involved with the criminal justice system, ultimately leading to more veterans ending up in prison.

The best predictor of justice system involvement for veterans comes from the National Vietnam Veterans Readjustment Study (NVVRS).²⁸ Based on interviews conducted between 1986 and 1988, the NVVRS found that among male combat veterans of Vietnam with current PTSD (about 15% of all male combat veterans of Vietnam), nearly half had been arrested one or more times.²⁹ At the time of the study, this represented approximately

19. *Ibid.* at 2.

20. Dept. of Defense Instruction 6490.03 [11 August 2006], online: <www.dtic.mil/whs/directives/corres/pdf/649003p.pdf>.

21. *Ibid.*

22. RAND Report, *supra* note 5 at 5.

23. *Ibid.*

24. *Ibid.* at 2.

25. Margaret E. Noonan & Christopher J. Mumola, *Bureau of Justice Statistics Special Report: Veterans in State and Federal Prison* (Washington, D.C.: U.S. Dept. of Justice, 2007) at 1.

26. *Ibid.*

27. GAINS Report, *supra* note 3 at 1.

28. Richard A. Kulka *et al.*, *Trauma and the Vietnam War Generation: Report of Findings from the National Vietnam Veterans Readjustment Study* (New York: Brunner/Mazel, 1990) at xxiii.

29. *Ibid.* at 186.

223,000 people.³⁰ If GWOT veterans with PTSD follow the same percentage of justice-involvement as Vietnam veterans, approximately 127,000 of the current 1.7 million veterans will find themselves facing criminal charges.

Based on the serious problems facing GWOT veterans, and the underlying reason why they are facing these problems – their traumatic combat experiences – the United States must recognize these problems and find a solution. American society places a relatively high value on military service. Veterans receive special consideration in a variety of contexts, including employment,³¹ education,³² naturalization,³³ voting rights,³⁴ medical care,³⁵ housing loans,³⁶ and small business loans.³⁷ That special consideration is given to veterans in large measure as recognition for the service they provided to their country. One current consequence of that service is that large numbers of GWOT veterans will suffer from PTSD, TBI, or other mental health disorders. Many will face substantial obstacles in obtaining healthcare.³⁸ Others will face difficulties obtaining service-connected compensation,³⁹ while some will be denied compensation and healthcare altogether.⁴⁰ Self-medication and drug and alcohol abuse can exacerbate PTSD symptoms.⁴¹ Additionally, the post-deployment transition is often complicated by adaptive behaviors developed during combat to promote survival.⁴² Behaviours that are learned in order to survive in a combat zone can cause difficulties during the transition back to civilian life.⁴³ Undoubtedly, this is a recipe for disaster.

30. *Ibid.* at 60, 186.

31. See 5 U.S.C. §§ 2108, 3309 (2009); 38 U.S.C. § 4214 (2009).

32. See 38 U.S.C. §§ 3001-3036 (2009).

33. See 8 U.S.C. §§ 1439-1440 (2009).

34. Miss. Code Ann. § 99-19-37 (West 2009) (restoring the right of suffrage to persons who lost such right by reason of criminal conviction, but who thereafter honorably served in the military during World War I or World War II).

35. See 38 U.S.C. §§1701-1774 (2009).

36. See 38 U.S.C. §§3701-3775 (2009).

37. See 38 U.S.C. §§3117(b), 3701-3775; 15 U.S.C. § 633(b)(1) (2009).

38. The backlog of Veterans Benefits Administration (VBA) compensation claims has been growing since the mid-1990s, but over the past few years, the disability claims backlog has exploded. At the beginning of January 2004, the backlog was around 470,000, and by the end of March 2009, the backlog had reached 697,000. *2009 Monday Morning Workload Reports*, online: U.S. Dept. of Veterans Affairs <<http://www.vba.va.gov/reports/mmwr/>>.

39. Without an approved service-connected disability rating from the VBA, veterans will not be able to receive certain benefits that come with a service-connected disability. More importantly, a veteran who does not have a service-connected rating will have a lower priority for receiving care at Veterans Affairs (VA) Health Care facilities. *VA Health Care Eligibility & Enrollment*, online: U.S. Dept. of Veterans Affairs <<http://www.va.gov/healtheligibility/eligibility/PriorityGroups.asp>>.

40. As of March 2008, veterans who do not currently have a service-connected disability, applied for care after January 16, 2003, and have a certain level of income for the previous year, can no longer enroll for care from the VA. *Ibid.*

41. A study conducted ten years after the end of the Vietnam War found that approximately 75 percent of Vietnam veterans with PTSD also “had a lifetime alcohol abuse or dependence disorder.” Kulka, *supra* note 28 at 124.

42. GAINS Report, *supra* note 3 at 5.

43. “Hypervigilance, aggressive driving, carrying weapons at all times, and command and control interactions, all of which may be beneficial in theater, can result in negative and potentially criminal behavior back home.” *Ibid.*

II. ATTEMPTS TO SOLVE THE PROBLEM

Several different attempts have been made to address the increasing numbers of veterans suffering from PTSD, or other mental health concerns, who find themselves in trouble with the law as a result of their conditions. Some state and federal courts have taken veteran status into account during the sentencing stage, as a mitigating factor. Other states have allowed PTSD to be used as a diminished capacity defense. Both houses of the US Congress have proposed bills that would create or sustain funding for programs that assist veterans involved with the criminal justice system. The most recent attempt, and the focus of this article, is the creation of courts exclusively for veterans.

Regardless of the specific approach adopted, this article contends that courts should always take a defendant's veteran status and underlying conditions into account. Many courts do not inquire into an individual's veteran status until the sentencing stage, if at all.⁴⁴ However, this inquiry should be made at the beginning of any criminal proceeding. If a defendant is found to be a combat veteran, additional inquiries should be made into whether the veteran suffers from a mental-health condition or substance-abuse problem as a result of their combat experience. If the veteran is found to have one of these conditions, and it can be demonstrated that the condition caused the veteran to commit the crime he or she is accused of, the state should offer the veteran probation and treatment for his or her condition. This approach may not be suitable for the most serious crimes, such as murder, but if the veteran is eligible for probation under the applicable state or federal statute, probation and treatment should be offered. This would avoid the apparent costs with creating a new court, by simply modifying the existing procedures.

A. Veteran Status as a Mitigating Factor During the Sentencing Stage

One way to accommodate the special needs of veterans accused of criminal offenses might be to raise a defendant's veteran status during the trial, to show "good character." Under federal and most state laws, a defendant's prior bad acts, such as previous convictions, are generally excluded from evidence at trial.⁴⁵ However, evidence of a defendant's good character is almost always admissible.⁴⁶ The theory behind excluding prior bad acts is that a jury is likely to improperly conclude that an individual who has committed a crime in the past is more likely to have committed the offense of which he or she is presently accused.⁴⁷ This could lead the jury to convict the defendant for reasons other than whether the individual committed the offense in question.⁴⁸ However, a defendant is permitted to introduce evidence of good character in an attempt to establish that he or she did not commit the crime in question.⁴⁹ The prosecutor can respond by introducing evidence of bad character, but

44. See Carissa Byrne Hessick, "Why Are Only Bad Acts Good Sentencing Factors?" (2008) B.U.L. Rev. 88 at 1109 [Hessick].

45. Fed. R. Evid. 404(b).

46. Fed. R. Evid. 404(a).

47. John W. Strong *et al.*, *McCormick on Evidence*, vol. 1, 5th ed. (St. Paul: West Group, 1999) § 191.

48. *Ibid.*

49. *Ibid.*

only to rebut the evidence of good character.⁵⁰ This bias in favour of good character evidence at trial has a long history and is well settled.

During the sentencing phase of a trial (post-conviction), the opposite bias exists: prior convictions are considered relevant to determine the proper punishment.⁵¹ The issue of what role prior good acts should play at this stage is much less certain.⁵² Not many jurisdictions explicitly recognize prior good acts as a mitigating sentencing factor, and even fewer recognize military service as one of these factors.⁵³ Occasionally, trial judges have reduced a defendant's sentence on the basis of prior good actions that are unrelated to the conviction, such as military service or charitable work.⁵⁴ But these decisions have met resistance from the US Sentencing Commission and federal appellate courts, and various scholars have expressed the view that prior good acts should not be considered at sentencing.⁵⁵

Federal law on prior good acts for mitigation is inconsistent. Before the Federal Sentencing Guidelines were enacted, oftentimes a defendant's prior good acts were raised and considered at sentencing.⁵⁶ However, when Congress formed the US Sentencing Commission to develop the Guidelines, it did not mention an offender's prior good works as a sentencing factor. The Commission was left to decide whether various factors "have any relevance to ... an appropriate sentence," and the Commission was directed by Congress to "take them into account only to the extent that they do have relevance."⁵⁷ The original Sentencing Guidelines classified many of the factors as not normally relevant in determining a defendant's level of offense but did not mention a defendant's prior good works.

In *United States v. Pipich*⁵⁸ ("Pipich"), the district court gave a defendant a below-Guidelines sentence, on the basis that:

An exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loy-

50. "The prosecution ... generally is forbidden to initiate evidence of the bad character of the defendant Yet, when the table is turned and the defendant in a criminal case seeks to offer evidence of his good character to imply that he is unlikely to have committed a crime, the general rule against propensity evidence is not applied." *Ibid.*

51. Hessick, *supra* note 44 at 1110.

52. *Ibid.* at 1111.

53. See e.g., N.C. Gen. Stat. § 15A-1340.16(e)(14) (2007) (felony sentencing statute providing for the mitigation of a defendant's sentence if he "has been honorably discharged from the United States armed services"); Tenn. Code Ann. § 40-35-113(13) (2007) (Tennessee trial courts are permitted to consider prior military service as a mitigating factor, but they are under no obligation to mitigate an offender's sentence on that basis; it is not a statutorily defined mitigating factor, but is available under the "catch-all" provision of the annotated statute); but see *People v. Duncan*, 5 Cal. Rptr. 3d 413, 414 (Ct. App. 2003) (observing that the trial court rejected "defendant's claim that his military service should be treated as a factor in mitigation").

54. See e.g., *United States v. Pipich*, 688 F. Supp. 191 (D. Md. 1988) [*Pipich*]; *State v. Kayer*, 984 P.2d 31, 46-47 (Ariz. 1999) ("We have on rare occasions found that a defendant's military record warranted consideration as a mitigating circumstance"); *State v. Anderson*, 631 So. 2d 80, 83 (La. Ct. App. 1994); *State v. Arterberry*, 449 So. 2d 1179, 1181 (La. Ct. App. 1984).

55. See Andrew Ashworth, *Sentencing and Criminal Justice*, 3d ed. (New York: Cambridge U.P., 2000) at 151; Dan Markel, "Against Mercy" (2004) 88 Minn. L. Rev. 1421 at 1437-38; Andrew von Hirsch, "Desert and Previous Convictions in Sentencing" (1980) 65 Minn. L. Rev. 591 at 608.

56. Christina Chiafolo Montgomery, "Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines" (1993) 20 New Eng. J. on Crim. & Civ. Confinement 27 at 37-38.

57. 28 U.S.C. § 994(d) (2000). Some of the factors to be considered were previous employment record, community ties, and criminal history.

58. *Pipich*, *supra* note 54.

alty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence. This American tradition is itself the descendant of the far more ancient tradition of the noble Romans, as exemplified by Cincinnatus.⁵⁹

In opposition to *Pipich* and other decisions, the Sentencing Commission adopted a new Guideline mandating that “military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining” whether to impose a sentence outside the Guideline range.⁶⁰ Currently, although a district court may consider a defendant’s prior good acts in selecting a sentence within the applicable Guideline range, the court may only sentence a defendant below that range when a defendant’s prior military service, charitable acts, or other good works are “exceptional.”⁶¹

Additionally, if states were to take veteran status into account as a “good” factor during sentencing, the larger problem of a veteran’s underlying condition would still exist. The veteran would still be incarcerated, albeit for a lesser amount of time, and would still suffer from PTSD. Rather than getting treatment, incarceration will likely seriously exacerbate PTSD symptoms and cause the person’s level of functioning to deteriorate.⁶² Counseling and treatment are generally sub-par in a prison environment, and PTSD sufferers will generally not recover on their own.⁶³

Veterans, by and large, are unlikely to benefit from mitigated sentencing approaches. Not only is the law inconsistent and the outcome uncertain, but PTSD symptoms are likely to be exacerbated in prison, and veterans will not be returned to society as law-abiding and functioning citizens.

B. PTSD or Mental Health as an Affirmative Defense

In certain cases, such as for violent crimes and felonies, it is possible for veterans to use their PTSD or other mental-health conditions as an affirmative defense. PTSD has been used by veterans to prove existing criminal law defenses since 1978.⁶⁴ After the American Psychiatric Association officially recognized PTSD as a mental disorder in 1980,⁶⁵ the use

59. *Ibid.* at 193. Under the then-existing mandatory sentencing guidelines, district courts had the authority to give sentences outside the mandatory range when they found that “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b) (2000).

60. United States Sentencing Commission, *Guidelines Manual* (Washington D.C.: United States Sentencing Commission, 2007) at § 5H1.11.

61. *Koon v. United States*, 518 U.S. 81, 95-96 (1996).

62. PTSD is a chronic condition, but with the proper treatment and education, its symptoms can usually be successfully managed. It is unlikely that PTSD sufferers receive the proper treatment during incarceration. In fact, because prison life may re-traumatize a person, a lengthy incarceration will likely seriously exacerbate PTSD symptoms and cause the person’s level of functioning to deteriorate. PTSD Fact Sheet, *supra* note 6 at 1.

63. *Ibid.*

64. Samuel P. Menefee, “The ‘Vietnam Syndrome’ Defense: A ‘G.I. Bill of Criminal Rights?’” (1985) *Army Law*. 1 at 27.

65. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3d ed. (Washington, D.C.: American Psychiatric Association, 1980) at 236-39.

of PTSD as a defense dramatically increased.⁶⁶ Depending on the jurisdiction, PTSD can be used to prove a defense of insanity, unconsciousness, diminished capacity, or self defense.⁶⁷ If PTSD is successfully used as an insanity defense, the veteran will be committed to a mental health institution.⁶⁸ If the veteran succeeds with an unconsciousness defense, due to PTSD, the usual result will be a complete acquittal.⁶⁹ A diminished capacity defense yields the same result in other jurisdictions.⁷⁰ Although there are a wide variety of plausible defenses available to a veteran suffering from PTSD, none of these defenses can fully address the symptoms and results of PTSD. For example, in order to succeed with the unconsciousness defense, the veteran must experience a dissociative state,⁷¹ which is often very difficult to prove.⁷²

In California, a veteran recently succeeded with an affirmative defense of PTSD. In January 2009, a former Army Captain, Sargent Binkley, was accused of robbing a pharmacy at gunpoint.⁷³ Binkley had been diagnosed with PTSD after serving in Bosnia and Honduras, and developed an addiction to painkillers after a hip injury that went untreated for years.⁷⁴ He was found not guilty by reason of insanity, based on his diagnosis of PTSD.⁷⁵ As a result of the verdict, he will be treated in a state hospital, rather than facing 12 to 23 years in prison.⁷⁶

However, Binkley's story is an exception to the rule. In recent years, the overall use of the insanity defense⁷⁷ has decreased significantly, and its successful use has also diminished.⁷⁸ The rise of the concept of the "moral agent,"⁷⁹ the absence of a uniform application,⁸⁰ and

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66. C. Peter Erlinder, "Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior" (1984) 25 B.C. L. Rev. 305 at 317 (explaining that "once PTSD was recognized as a disorder that could be isolated and diagnosed by psychiatrists and psychologists, it became a legitimate issue to be raised in legal proceedings. After the publication of DSM III, therefore, PTSD was raised in several cases as an explanation for a defendant's criminal conduct").
67. Ann R. Auberry, "PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System" (1985) 68 Marq. L. Rev. 647.
68. *Ibid.* at 665 ("In many jurisdictions an acquittal based upon an insanity defense creates a situation of automatic commitment to a mental institution").
69. *Ibid.* at 668-69.
70. See e.g., *United States v. Fishman*, 743 F. Supp. 713, 721 (N.D. Cal. 1990).
71. Elizabeth J. Delgado, "Vietnam Stress Syndrome and the Criminal Defendant," (1986) 19 Loy. L.A. L. Rev. 473 at 484.
72. Erlinder, *supra* note 66 at 307.
73. Tracey Kaplan, "Ex-Army Officer Found Not Guilty by Reason of Insanity in Robbery," *San Jose Mercury News* (13 January 2009), online: MercuryNews.com <http://www.mercurynews.com/ci_11444149?iADID>.
74. Daniel DeBolt, "Binkley Avoids Jail Sentence," *Mountain View Voice* (13 January 2009), online: Mountain View Voice <http://www.mv-voice.com/news/show_story.php?id=1101>.
75. *Ibid.*
76. *Ibid.*
77. This is largely analogous to the plea of "Not Criminally Responsible on Account of Mental Disorder" in Canada.
78. Stephen G. Valdes, "Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations" (2005) 153 U. Pa. L. Rev. 1709 at 1722-25.
79. Stephen J. Morse, "Crazy Reasons" (1999) 10 J. Contemp. Legal Issues 189 at 192.
80. Ellen Byers, "Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?" (2004) 57 Ark. L. Rev. 447 at 449.

increased public disapproval of the insanity defense,⁸¹ have created a legal environment that is disapproving of defenses based on mental illnesses. Thus, most veteran defendants will likely not be able to present a successful insanity defense.⁸²

Another obstacle to the use of PTSD as a defense is the subjective nature of symptoms in PTSD sufferers. As a result, it is sometimes challenging to establish the presence of PTSD in any particular defendant. In particular, lack of credibility remains a sizable obstacle in the use of PTSD to aid veterans facing criminal charges.⁸³ Diagnoses of mental health disorders are based on the defendant's own account, and are therefore vulnerable to skepticism in the legal context,⁸⁴ especially when a diagnosis would be self-serving when used by a defendant in a criminal case. This skepticism is undoubtedly compounded when a defendant asserts a defense based on PTSD, since no one but the defendant is able to recount and describe the symptoms and behavior that resulted from PTSD and led to the criminal conduct.⁸⁵ Oftentimes, a defendant's substance abuse, which is often a by-product of PTSD itself, undermines the defendant's credibility and enables prosecutors to point to a cause of the defendant's behavior apart from his or her mental illness.⁸⁶ Thus, credibility remains a significant concern in cases involving evidence of PTSD.

Creating an even bigger obstacle when it comes to credibility is the fact that defendants can easily fake PTSD.⁸⁷ With a wealth of information available on the Internet and elsewhere about PTSD, it is all too easy for individuals to use PTSD as an excuse, when they do not in fact suffer from the disorder. PTSD is widely regarded as an easy condition to fake.⁸⁸ False claims of PTSD have resulted in criminal acquittals, and have undoubtedly made it more difficult for genuine PTSD sufferers to succeed with a PTSD defense. In *State v. Lockett*⁸⁹ ("Lockett"), the defendant asserted a defense of "not responsible due to PTSD" as a result of his service in Vietnam, which the Court accepted. However, it was later revealed that Lockett had never actually served in Vietnam.⁹⁰ The Court set aside the plea, holding that a defendant "may not use alleged statutory or constitutional rights as a protection for fraud after he put that service in issue."⁹¹ As a result of *Lockett* and other cases involving

81. This is particularly a result of the public uproar over the acquittal of John Hinckley. See V.F. Nourse, "Reconceptualizing Criminal Law Defenses" (2003) 151 U. Pa. L. Rev. 1691 at 1721 (referring to the Hinckley verdict as "the most notorious of the modern insanity cases" and claiming that the "public rebelled" as a result of the acquittal).

82. Constantina Aprilakis, "The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD" (2005) 3 Geo. J.L. & Pub. Policy 541 at 542.

83. Daniel E. Speir, "Application and Use of Post-Traumatic Stress Disorder as a Defense to Criminal Conduct" (1989) Army Law. 17 at 18-19 [Speir].

84. M. Keane et al., "Forensic Psychological Assessment in PTSD" in Robert I. Simon, ed., *Posttraumatic Stress Disorder in Litigation: Guidelines for Forensic Assessment* (Washington, D.C.: American Psychiatric Publishing, 2003) 119 at 136.

85. Speir, *supra* note 83 at 18-19.

86. *Ibid.* at 18.

87. *Ibid.* at 19.

88. *Ibid.*; see also Betsy Streisand, "Treating War's Toll on the Mind" *U.S. News & World Report* (1 October 2006), online: usnews.com <http://health.usnews.com/usnews/health/articles/061001/9ptsd_7.htm>.

89. *State v. Lockett*, 468 N.Y.S.2d 802 at 803, 805 (1983) (Lockett based his plea of not responsible due to the PTSD he suffered as a result of his service in the United States Air Force in Vietnam. In particular, Lockett asserted "I fought in the jungles in Vietnam" and "I am still a soldier there.")

90. *Ibid.*

91. *Ibid.* at 807.

defendants faking PTSD symptoms, prosecutors and judges will probably be more skeptical of defendants' claims of PTSD.

Additionally, this attaches a stigma to PTSD. As with the Vietnam veterans, society may begin to look at modern veterans as loose cannons. If every veteran with PTSD could be considered "insane," many veterans will be motivated to hide their illness, and will avoid seeking help when they know they are suffering. Already, many veterans avoid seeking help for their mental health problems. The military culture that veterans are a part of insists that psychological injuries "are a sign of weakness."⁹² As a result, many veterans are discouraged from asking for help, and do not realize that PTSD is a medically-recognized mental health disorder that many others are suffering from as well.⁹³

The majority of veterans are unlikely to benefit from the PTSD defense. Although it has been used successfully in some cases, it is difficult to prove, juries are skeptical of it, and defendants face challenging credibility obstacles in proving this defense.

C. Federal and State Initiatives

Several bills have been proposed in Congress that would have provided special funding for programs that treat veterans involved with the justice system. The *Second Chance for America's Veterans Act*, proposed in 2007, would have extended and provided additional funding for the Incarcerated Veterans Transition Program (IVTP).⁹⁴ During its pilot phase from 1989 to 2007, IVTP claimed it reduced recidivism rates amongst participants by 90 percent.⁹⁵ IVTP also recorded that 90 percent of its participants were moved into permanent housing, and 72 percent became gainfully employed.⁹⁶ On the basis of this data, IVTP claimed it saved taxpayers millions of dollars per year in incarceration costs and stimulated local job growth and economic development by providing former offenders with jobs.⁹⁷ However, the pilot program stopped receiving funding as of September 2007. The bill that would have extended funding for the program was sponsored by Kentucky Representative John Yarmuth, and was introduced in August 2007.⁹⁸ After the bill was introduced, it was referred to the House Committee, but no further action was taken on the bill, and funding has consequently ceased.⁹⁹

It is not entirely clear why this bill did not become law. However, in a statement before a House subcommittee by Keith Pedigo, an Associate Deputy for the Veterans Benefits Administration (VBA), Pedigo noted that most of the services proposed under H.R. 3467 could be provided through the *Second Chance Act*, which the President had signed into law the previous week.¹⁰⁰ The *Second Chance Act* formally authorized key features of the

92. Ilona Meagher, *Moving a Nation to Care: Post-Traumatic Stress Disorder and America's Returning Troops* (Brooklyn: Ig Publishing 2007) at xiii.

93. *Ibid.*

94. H.R. 3467, 110th Cong. (2007).

95. *Ibid.*

96. *Ibid.*

97. *Ibid.*

98. *Ibid.*

99. *Ibid.*

100. Keith Pedigo, Address (Statement before the Subcommittee on Economic Opportunity House Committee on Veterans' Affairs Hearing of Legislation Affecting Veterans' Benefit Programs), online: U.S. Dept. of Veterans Affairs, Congressional and Legislative Affairs <<http://www.va.gov/OCA/testimony/hvac/seo/080416KP.asp>>.

Prisoner Re-entry Initiative, which provides recently released ex-offenders, including veterans, the support and services they need to successfully reintegrate into mainstream society.¹⁰¹ Although there is nothing to indicate that this testimony was the reason the bill was never enacted, it can be inferred that Pedigo's statement in his capacity as a VBA representative had a detrimental effect on the bill's future.

The *Services, Education, and Rehabilitation for Veterans Act*, proposed by Rhode Island Representative Patrick Kennedy in 2008, would have authorized the Attorney General to make grants to states and other entities: "(1) to develop, implement, or enhance veteran's treatment courts or to expand operational drug courts to serve veterans; and (2) for programs that involve continuing judicial supervision over nonviolent offenders with substance abuse or mental health problems who have served in the U.S. military."¹⁰² This bill would have provided funding for up to 75 percent of the cost for states to create veterans courts, but the bill was not passed. This has left funding for such treatment programs up to individual states. Currently, there have been no attempts to reintroduce the bill or create a similar initiative.

The California legislature understands the need to address the problems faced by veterans who return from combat in Iraq or Afghanistan with psychological problems brought on by their war-time experience. The state recently amended its penal code to provide special relief from harsh sentencing policies specifically for service members with PTSD or substance abuse problems.¹⁰³ The State had enacted a similar provision in the past, in response to the influx of Vietnam veterans into the criminal justice system.¹⁰⁴ However, the previous law was found to be ineffective in providing any sort of special relief to veterans, because there was no federal statute that authorized the Federal Bureau of Prisons to house Vietnam veterans serving state sentences.¹⁰⁵ The new amended law applies to:

[A]ny person convicted of a criminal offense who would otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military.¹⁰⁶

After a defendant makes a claim, a court must then hold a hearing to determine whether the person was in fact a combat veteran, and must assess whether he or she suffers from PTSD, substance abuse, or psychological problems as a result of their combat service.¹⁰⁷ If the court finds that the veteran satisfies those requirements, and if the veteran is otherwise

101. *Ibid.*

102. H.R. 7149, 110th Cong. (2008).

103. Cal. Penal Code § 1170.9 (West 2009).

104. Cal. Penal Code § 1170.8 (West 2005).

105. *People v. Abdullah*, 9 Cal. Rptr. 2d 131 (Cal. Ct. App. 1992).

106. Cal. Penal Code § 1170.9(a) (West 2009).

107. *Ibid.*

eligible for probation,¹⁰⁸ the court will then place the veteran on probation, and may order the veteran into an appropriate (local, state, federal, or private nonprofit) treatment program.¹⁰⁹ If the veteran is granted probation and is committed to a residential treatment program, he or she will earn sentence credits for the actual time served in treatment.¹¹⁰ Although federal attempts at a comprehensive solution have failed so far, states such as California have recognized that there is a problem, and have attempted to solve the problem by creating laws that provide for the treatment of veterans who suffer from PTSD, mental health disorders, or substance abuse.

III. SPECIALIZED VETERANS COURTS

Veterans courts are the newest addition to the larger theory of “therapeutic justice” and “problem-solving courts.” Therapeutic justice addresses the root cause of an offender’s criminality and treats the offender to remove the problems and returns the offender to the community as a responsible citizen.¹¹¹ Problem-solving courts are “specialized courts that seek to respond to persistent social, human, and legal problems, such as addiction, family dysfunction, domestic violence, mental illness, and quality-of-life crime.”¹¹²

While traditional courts focus on processing the cases that come before them, resulting in a revolving door syndrome, problem-solving courts focus on achieving positive outcomes for victims, defendants, and communities.¹¹³ Generally, the new veterans courts have been modeled after the mental health and drug courts that sprung up in the late 1980s.¹¹⁴ Mental health courts, for example, attempt to “achieve two separate but interrelated outcomes by linking offenders with mental illness to treatment as an alternative to incarceration: improved psychiatric stability for the offenders and improved public safety.”¹¹⁵ Building on the model of drug and mental health courts, veterans courts seek to work with mental health agencies, veteran mentors, substance abuse treatment programs, housing providers, and others to help veterans lead a crime-free life in the community.

Similar to the drug and mental health courts, most of the veterans courts that have been created do not allow defendants accused of violent crimes to participate in their pro-

108. Defendants are eligible for probation as long as they do not fall within one of the categories restricting the availability of probation. Under California law, probation is precluded primarily for those who commit violent crimes or serious drug offenses, or are recidivist serious offenders. Most of the mandatory provisions are included in the probation provisions of the Penal Code. Cal. Penal Code §§ 1203.06-1203.09 (West 2009). A non-exhaustive list of criminal charges that preclude a defendant from probation are: murder, robbery, kidnapping, lewd acts, first degree burglary, rape, carjacking, torture, and anyone who was previously convicted of one of the aforementioned crimes. Cal. Penal Code § 1203.06 (West 2009).

109. Cal. Penal Code § 1170.9(b) (West 2009).

110. Cal. Penal Code § 1170.9(e) (West 2009).

111. Teresa W. Carns *et al.*, “Therapeutic Justice in Alaska’s Courts” (2002) 19 Alaska L. Rev. 1 at 5.

112. John Feinblatt *et al.*, “Judicial Innovation at the Crossroads: The Future of Problem Solving Courts” (2000) 15 Ct. Manager 28 at 29.

113. Carol Fisler, “Building Trust and Managing Risk: A Look at a Felony Mental Health Court” (2005) 11 Psychol. Pub. Policy & I. 587 at 589 [Fisler].

114. Michael C. Dorf & Jeffrey A. Fagan, “Community Courts and Community Justice: Foreword: Problem-Solving Courts: From Innovation to Institutionalization” (2003) 40 Am. Crim. L. Rev. 1501 at 1502-03. The first of the modern drug courts opened in Miami in 1989 and included Janet Reno among its key participants. As Attorney General, she provided seed money for drug courts nationwide, and today there are over 1000 operating drug courts. *Ibid.*

115. Fisler, *supra* note 113 at 590.

grams.¹¹⁶ Judges are naturally apprehensive about releasing violent offenders back into society, even if they are participating in some kind of treatment program.

The bulk of the funding for the existing veterans courts comes from Veterans Affairs,¹¹⁷ but other funding has come from the Substance Abuse and Mental Health Services Administration of the US Department of Health and Human Services.¹¹⁸

Currently, the two best-developed programs are in Buffalo, New York, and Orange County, California, both of which began operations in 2008.¹¹⁹ Other veterans courts have been proposed or already started in Pennsylvania, Wisconsin, Oklahoma, Massachusetts, Arizona, and Illinois.¹²⁰ A review of these programs demonstrates their superiority to the alternatives already explored (taking a defendant's veteran status into account only at the sentencing stage, or using PTSD as an affirmative defense).¹²¹

A. Buffalo, New York

In early 2008, Buffalo City Court Judge Robert Russell established the first-ever specialized court for veterans accused of nonviolent felonies and misdemeanors.¹²² Judge Russell began the program after he noticed a significant increase in veterans (300 in one year), many with drug and psychiatric problems, coming through the system.¹²³ The program offers defendants an opportunity to avoid incarceration or more serious charges in return for entering addiction or mental health treatment and taking other steps to right their lives.¹²⁴ Judge Russell "believed [the veterans] might benefit from being in the courtroom together, given the military's strong sense of camaraderie."¹²⁵ The court meets once or twice a week, and veterans are required to report back once a month to report on their progress.¹²⁶ Most veterans will be required to stay in the treatment program for at least a year, in order to make enough progress to have their charges diminished or dismissed.¹²⁷ Since it began, 82 veterans have enrolled in the program, 65 percent of whom are Iraq or Afghanistan veterans.¹²⁸ So far, only two veterans have been unable to avoid incarceration, and only one has been re-arrested.¹²⁹

Several success stories from the Buffalo Veterans Court have been reported. Tom Irish, a Vietnam War veteran, was charged with a felony weapons possession, after he pointed a

116. Matthew Daneman, "N.Y. Court Gives Veterans Chance to Straighten Out" *USA Today* (1 June 2008), online: http://www.usatoday.com/news/nation/2008-06-01-veterans-court_N.htm ["Chance to Straighten Out"]; but see *Superior Court of California County of Orange, Veterans Court Participant's Handbook* (on file with author, 2008) at 25 [Orange County Veterans Handbook].

117. Marek, *supra* note 15.

118. *Ibid.*

119. *Ibid.*

120. *Ibid.*

121. See Part III above.

122. "Chance to Straighten Out", *supra* note 116.

123. *Ibid.*

124. *Ibid.*

125. Marek, *supra* note 15.

126. *Ibid.*

127. *Ibid.*

128. *Ibid.*

129. *Ibid.*

loaded shotgun at police who were responding to a disturbance call at his home.¹³⁰ Irish was drunk during the incident, and claimed that he was suffering from a flashback; he didn't see the police officers during the incident, but instead saw Viet Cong soldiers.¹³¹ Instead of time behind bars, Irish was allowed to participate in the Buffalo Veterans Court.¹³² He is undergoing counseling, and the charges against him will likely be dropped if he completes everything that is required by the court.¹³³

Thomas Zaborowski, a Korean War veteran, suffered for many years with the aftermath of his experiences from the war.¹³⁴ Shortly after returning from war, he found himself facing criminal charges for impaired driving, marijuana possession, and criminal mischief.¹³⁵ After his third arrest, he was given the option of going to the Buffalo Veterans Court, rather than spending ten days in jail.¹³⁶ After his participation in the program, Zaborowski is now sober and plans to attend college next spring, a first in his family.¹³⁷ He plans to use funds that are available to him as a veteran, something he did not know about until the veterans court provided him with the information.¹³⁸

B. Orange County, California

The first of its kind in California, the Orange County Veterans Court began operating in November 2008. The court was an expansion of the county's already-existing collaborative court system.¹³⁹ Orange County Superior Court Judge Wendy Lindley, who oversees the mental health and drug courts, helped to start the new veterans court after a young Iraq veteran died of a drug overdose, shortly after passing through her criminal courtroom.¹⁴⁰ She first approached her superiors with the idea of a veterans court, with the newly amended California penal code¹⁴¹ as support.¹⁴² In order to get a better idea of what the new court would entail, Judge Lindley flew to New York, to talk to Buffalo City Court Judge Robert Russell and observe his court.¹⁴³ With the information from the Buffalo Veterans Court and the assistance of the Center for Court Innovation, Judge Lindley helped to successfully create California's first veterans court.¹⁴⁴

130. "Chance to Straighten Out", *supra* note 116.

131. *Ibid.*

132. *Ibid.*

133. *Ibid.*

134. Amanda Ruggeri, "New Courts Give Troubled Veterans a Second Chance" *U.S. News & World Report* (3 April 2009), online: usnews.com <<http://www.usnews.com/articles/news/national/2009/04/03/new-courts-give-troubledveterans-a-second-chance.html?PageNr=3>>.

135. *Ibid.*

136. *Ibid.*

137. *Ibid.*

138. *Ibid.*

139. Orange County has various specialized courts all under one roof: Drug Court, Homeless Outreach Court, Co-Occurring Disorders Court, Domestic Violence Court and the newest addition – Veterans Court. See, *Collaborative Courts*, online: Superior Court of California – County of Orange <<http://www.occourts.org/directory/collaborative-courts/index.html>>.

140. Interview of Judge Wendy Lindley (14 April 2009), in Orange County Superior Court, Santa Ana, Cal. [Interview of Judge Lindley].

141. Cal. Penal Code § 1170.9 (West 2009).

142. Interview of Judge Lindley, *supra* note 140.

143. *Ibid.*

144. *Ibid.*

The mission of the Orange County Veterans Court “is to provide an inter-agency, collaborative, nonadversarial treatment strategy for [v]eterans in the criminal justice system who suffer from PTSD, psychological, or substance abuse problems as a result of having served in a combat theater.”¹⁴⁵ It was developed to help veterans achieve abstinence from illegal drugs, avoid criminal activity, and to address their mental health issues.¹⁴⁶ The court was “designed to promote self-sufficiency and to return [veterans] to the community as . . . productive and responsible citizen[s].”¹⁴⁷ The program “is a court-supervised, comprehensive treatment collaborative, whose goal is to help [veterans] address the issues that led to [their] contact with the criminal justice system.”¹⁴⁸ The program is voluntary for qualified veterans and includes regular court appearances before a designated veterans court Judge.¹⁴⁹

After an individual is arrested and is found to be eligible for the program (he or she must be a combat veteran and eligible for probation), the veteran is advised about and offered a choice between prosecution on the pending charges or the veterans court program.¹⁵⁰ Entry into the program requires the defendant to enter a guilty plea.¹⁵¹ The “[f]inal determination of entry into the program [is] made by the Judge, with the concurrence of the District Attorney, VA, defense counsel, Probation, law enforcement, and other agencies as appropriate.”¹⁵²

The court meets weekly, and before the calendar is called a meeting is held with the Orange County Veterans Court Judge, the District Attorney, the public defender or the defendant’s own private counsel, and a VA representative, where they discuss each individual that is seeking entry into the program.¹⁵³ They review the veteran’s case file, the charges against him or her, and any other pertinent information.¹⁵⁴ If the parties agree that the veteran is an optimal candidate, the judge then admits the veteran into the program.¹⁵⁵ A few examples of defendants who will typically not be admitted into the program are those charged with domestic violence or those who are charged with possession of drugs with intent to sell.¹⁵⁶ The court does not have appropriate treatment programs for domestic violence offenders, and the risk of having a drug dealer in the program is too high.¹⁵⁷ The primary purpose of the court is to treat veterans who are suffering from substance abuse, PTSD, or other mental health disorders.¹⁵⁸ If one of these conditions can be reasonably found to underlie the charges the veteran is facing, then he or she will be admitted into the program.¹⁵⁹

After the veteran pleads guilty to the charges and is admitted into the program, the veteran is then placed on “formal probation” for three years, and immediately reports to the Pro-

145. *Orange County Veterans Court Brochure* at 2 (on file with author, 2008).

146. *Orange County Veterans Handbook*, *supra* note 116 at 25.

147. *Ibid.*

148. *Ibid.* at 2.

149. *Ibid.*

150. *Ibid.* at 3.

151. *Ibid.*

152. *Ibid.*

153. Interview of Judge Lindley, *supra* note 140.

154. *Ibid.*

155. *Ibid.*

156. *Ibid.*

157. *Ibid.*

158. *Ibid.*

159. *Ibid.*

bation Department.¹⁶⁰ There is a 14-day window during which time the veteran can withdraw his or her guilty plea, presumably resulting in prosecution on the original charges.¹⁶¹ Additionally, failure or discharge from the program will result in imposition of sentence for the original charges.¹⁶² However, successful completion of the program avoids incarceration, allows the veteran to receive the counseling and help that he or she needs, and “may result in having the charges dismissed.”¹⁶³ However, the dismissal of charges does not automatically occur. It happens on a case-by-case basis, depending on the degree of the crime (felony or misdemeanor), and whether the attorneys and judge agree that dismissal would be appropriate.¹⁶⁴ Generally, most felonies will be reduced to misdemeanors, and most misdemeanor charges will be dismissed.¹⁶⁵

During participation in the program, the veteran is required to adhere to specific terms and conditions, including abstinence from drugs and alcohol.¹⁶⁶ The veteran’s probation officer is responsible for supervision and enforcement of the probation terms and conditions.¹⁶⁷ Probation supervision includes unannounced home visits, searches of the veteran and his or her residence, and may include random drug or alcohol testing (if appropriate).¹⁶⁸ The majority of the participants in April 2009 were subjected to weekly drug testing.¹⁶⁹ If a veteran violates the requirements of the program, sanctions will be imposed on him or her.¹⁷⁰ For example, if a veteran fails a weekly drug test, he or she may be incarcerated, for a period of time determined by the judge.¹⁷¹ Other examples of sanctions that may be imposed include an admonishment from the court, increased frequency of court appearances, increased drug testing, demotion to an earlier phase in the program, or a finding of a formal probation violation.¹⁷² If a veteran continually violates the program’s requirements, the veteran will be dismissed from the program and will likely face prosecution on the original charges.¹⁷³ Most veterans are required to report to the court on a weekly basis, and give the judge an update on their progress.¹⁷⁴ The District Attorney, the defense attorney, and the VA representative will also give the judge an update on the veteran’s progress.¹⁷⁵

Treatment during the program includes “individual and group counseling, drug testing, and regular attendance at self-help meetings if appropriate (such as Narcotics Anonymous or Alcoholics Anonymous), [and] is provided through the combined effort of the Probation Department.”

160. Orange County Veterans Handbook, *supra* note 116 at 3.

161. *Ibid.*

162. *Ibid.*

163. *Ibid.*

164. Interview of Judge Lindley, *supra* note 140.

165. The types of charges that will not be dismissed are DUIs, and other crimes that would constitute a “prior” if the defendant were to re-offend. *Ibid.*

166. Orange County Veterans Handbook, *supra* note 116 at 3.

167. *Ibid.*

168. *Ibid.*

169. Interview of Judge Lindley, *supra* note 140.

170. Orange County Veterans Handbook, *supra* note 116 at 22.

171. *Ibid.*

172. *Ibid.* at 22-23.

173. *Ibid.*

174. Interview of Judge Lindley, *supra* note 140.

175. *Ibid.*

tion Department, the Veterans Administration, and other agencies.”¹⁷⁶ Those agencies also help the veterans “with obtaining education and skills assessments and ... provide referrals for vocational training, education and/or job placement services.”¹⁷⁷ The program lasts at least 18 months, but is determined by each participant’s progress.¹⁷⁸ Additionally, ongoing aftercare services are available to all who complete the program.¹⁷⁹

CONCLUSION: THE FUTURE OF VETERANS COURTS

Although it may be argued that specialized courts, such as veterans, drug, or mental health courts, are fundamentally unfair because they provide a sort of selective justice to the participants, ultimately the good provided by these courts greatly outweighs any of these concerns. Numerous specialized courts have been created over the years, beyond those mentioned above, and there is a significant amount of literature regarding the success of those courts. Drug and mental health courts have been operating in the United States since the late 1980s, and have had significant success. Although the legal system is an adversarial one, which may require treating all defendants the same, American society has come to realize that all defendants are not the same. This is why certain defenses have become more widely accepted over the years, why mitigating factors are taken into account at sentencing, and more importantly, why specialized courts are created and needed.

No one is arguing that veterans should receive a “free pass” after committing a crime. However, veterans who suffer from PTSD should be treated differently in a criminal context. Although sentence mitigation, affirmative defenses, and other efforts may assist in certain circumstances, they are not the most effective way to deal with the massive influx of veteran defendants that the courts will see over the next decade. By creating veterans courts, states will be able to adjudicate veteran defendants, while simultaneously providing treatment and returning them to society as law-abiding citizens. This does not equate to preferential treatment or a lack of justice.

The United States must recognize and confront the problem of hundreds of thousands of veterans returning with mental health issues and subsequently committing crimes as a result of their conditions. With no clear guidance or federal funding, states will have to decide how and whether to confront the issue and try to solve the problem of justice-involved veterans. The Buffalo Court, as the first veterans court, provides the most data for the success of these courts. However, there is limited data on the precise procedures and eligibility requirements of this court. The Orange County Veterans Court, modeled on the Buffalo Court, is so new that it has no data on the success rate of its veterans, but provides a significant amount of information on creating one of these courts.

Nevertheless, states should model their veterans courts after the Buffalo and Orange County courts. Both courts were created with the assistance of the Center for Court Innovation, and are modeled after the highly successful drug and mental health courts that have flourished across the country. Although the Orange County Veterans Court does not specifically require that a veteran be diagnosed with PTSD in order to be eligible for the

176. Orange County Veterans Handbook, *supra* note 116 at 2.

177. *Ibid.*

178. *Ibid.*

179. *Ibid.*

program, a mandatory evaluation of each participant has revealed that most participants suffer from some type of mental-health disorder. States looking to create their own veterans court should require that an evaluation of possible participants reveal some kind of mental-health disorder or substance abuse problem that is causing their criminal behavior. Otherwise, all veterans would conceivably be eligible for the program, when there is no reason for them to be in the treatment program.

The creation of specialized courts for veterans is an innovative idea that will assist many veterans in overcoming their legal problems that have resulted from PTSD and other service-related issues. It is impossible to deny the frequent connection between combat trauma and subsequent criminal behavior. The United States must recognize this as a direct societal cost of war and do everything it can to rehabilitate veterans and return them to society as law-abiding citizens. Veterans courts are the best step in this direction.