

HOW TO TRANSFORM THE JUDICIAL SYSTEM: LESSONS FROM THE INSTITUTIONALIZATION OF VETERANS' TREATMENT COURTS

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This Article examines the stunning growth of specialized treatment courts for military veterans in the criminal justice system. The nation's first veterans' treatment court ("VTC") convened in Anchorage, Alaska, in 2004. Since then, a wholesale transformation of the nation's criminal justice system has taken place; there are now nearly 500 VTCs diverting veterans from traditional criminal prosecution and general drug courts. The institutionalization of VTCs offers valuable insights to those interested in criminal justice reform. Why did this reform movement flourish while so many others have floundered? In this Article, we argue that courts have not established VTCs because they work; indeed, there is limited evidence that they are more effective than the alternatives. Instead, we argue that VTCs take advantage of existing federal services that address the unique needs of veterans, thereby shifting some of the significant costs of caring for veterans with mental health and substance abuse problems from the states to the federal government. Moving forward, states must resolve a number of VTC eligibility issues that bring the rehabilitative mission of these courts into conflict with the potential for cost shifting.

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INTRODUCTION

Over the last ten years, veterans' treatment courts ("VTCs") have become an integral part of the American judicial system. How has this movement transformed our court system so quickly? Our state court systems, which are decentralized, bound to tradition, and strapped for resources, are notoriously difficult to reform. Moreover, as we will show, there is very little evidence that VTCs are any more effective than alternatives they replace. Nevertheless, there are now more than 400 VTCs in operation and that number is bound to increase. We hope to provide a better understanding of this remarkable transformation. It is an important part of contemporary judicial politics and may provide reformers a model for advancing other court reforms.

In Part I, we examine the origins and growth of VTCs. Most prior articles get the story wrong by skipping over the earliest years of the VTC movement. Correcting the record, we believe, is important not

just to give proper credit to the Alaskan judges who established the nation's first VTC to serve their fellow veterans, but also to emphasize the difference between having an idea and leading a reform movement. By stripping Buffalo of its "first veterans' court" title, we highlight its real, essential contributions to this remarkable movement.

In Part II, we explore the special challenges that members of the United States Armed Forces face when they leave the service. Veterans are a unique demographic who present both special challenges and unique opportunities for outreach and treatment. These defining characteristics of the veteran population have justified establishing specialized treatment courts that are only available to veterans.

In Part III, we discuss the procedures VTCs use to connect veterans in the criminal justice system to treatment services for mental health and substance abuse problems. VTC procedures embody the principles of therapeutic jurisprudence.

In Part IV, we review the limited body of empirical research on the effectiveness of veterans' courts. VTCs proliferated without any real proof of their effectiveness or plans for systematic assessment. There are few methodologically sound studies of the impact of VTCs on important outcomes like recidivism, sobriety, mental health, and family stability. The evidence does not yet show that VTCs are more effective at reducing recidivism than general treatment courts, but there is a growing consensus that VTCs improve the quality of veterans' lives more than general treatment courts do.

Finally, in Part V, we conclude by identifying some of the key issues VTCs must address in the years ahead. The immediate issues center on eligibility criteria and defining who can participate in VTCs and who makes eligibility decisions. The broader issue in these debates is the extent to which practical considerations justify specialized treatment in a criminal justice system premised on treating defendants equally.

I.

THE RAPID GROWTH OF VETERANS' TREATMENT COURTS IN THE UNITED STATES

Over the course of the last ten years, veterans' treatment courts have blossomed from the seed of an idea into a significant feature of the American judicial landscape. Such rapid change may be the norm in some private sector industries, but state court systems are hardly a

hotbed of innovation and experimentation.¹ Why have VTCs flourished while other potentially useful reforms remain dormant? To answer this question, it helps to clear up a popular misconception.

A. *First VTC Established in Anchorage*

Many scholars have incorrectly stated that VTCs originated in Buffalo, New York.² In reality, Judges Sigurd Murphy and Jack Smith created the first specialized VTC program in Anchorage, Alaska, in July of 2004.³ Alaska's VTC was created in response to the influx of servicemembers appearing before treatment courts in Alaska.⁴ The Alaska Veterans Court, which started as a one-year pilot program and is now a permanent division, gave veterans charged with misdemean-

1. DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, *JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES* 114 (4th ed. 2007); *see also* MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* 5 (2013); WAYNE N. WELSH & PHILIP W. HARRIS, *CRIMINAL JUSTICE POLICY AND PLANNING: PLANNED CHANGE* 10 (5th ed. 2016) (“Regardless of the specific change proposed, universal consensus is rare; resistance is the norm.”). For general discussion of rapid, technology-driven change in the private sector, see BILL GATES & COLLINS HEMINGWAY, *BUSINESS @ THE SPEED OF THOUGHT: USING A DIGITAL NERVOUS SYSTEM* (1999).

2. *See, e.g.*, Tiffany Cartwright, “To Care for Him Who Shall Have Borne the Battle”: *The Recent Development of Veterans Treatment Courts in America*, 22 *STAN. L. & POL’Y REV.* 295, 303 (2011) (“The first veterans court in Buffalo.”); Alana Frederick, *Veterans Treatment Courts: Analysis and Recommendations*, 38 *LAW & PSYCHOL. REV.* 211, 216 (2014) (“Judge Robert Russell founded the first veterans treatment court in 2008 in Buffalo, New York.”); Paul A. Lucas & Kathleen J. Hanrahan, *No Soldier Left Behind: The Veterans Court Solution*, 45 *INT’L J. L. & PSYCHIATRY* 52, 53 (2016) (“The first veterans court was developed in Buffalo.”); William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Those Who Served to Help Troubled Vets Regain Discipline, Camaraderie*, 97 *A.B.A. J.* 42, 45 (2011) (“The nation’s first veterans treatment court was established in Buffalo in early 2008.”); Michael D. White et al., *Hero’s Welcome? Exploring the Prevalence and Problems of Military Veterans in the Arrestee Population*, 29 *JUST. Q.* 258, 265 (2012) (describing Buffalo’s Veterans Court as “first in the nation.”); Jillian M. Cavanaugh, Note, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 *NEW ENG. L. REV.* 463, 464 n.3 (2011) (“The first veterans treatment court was established in Buffalo, New York . . .”).

3. Judge Smith would later write: “Judge Murphy sought to establish a specialized court within the Alaska Court System designed to help military veterans facing criminal charges by utilizing the benefits they earned and were entitled to through the [Department of Veterans Affairs].” Jack W. Smith, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004—December 31, 2010*, 29 *ALASKA L. REV.* 93, 96 (2012).

4. It is no mere coincidence that Alaska has the largest per capita veteran population in the United States. *See* NAT’L CTR. FOR VETERANS ANALYSIS & STATISTICS, U.S. DEP’T OF VETERANS AFFAIRS, *PROFILE OF VETERANS: 2016*, at 23 (2018), https://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2016.pdf.

ors an opportunity to participate in treatment programs managed by the Department of Veterans Affairs ("VA") rather than general treatment courts or traditional punishments.⁵ Murphy and Smith created a new division of the existing drug and mental health courts especially for veterans. This new division would take advantage of veterans' eligibility for a range of VA services not available to the general population, and the special relationship among veterans.⁶

Judges Murphy and Smith, both retired military, faced numerous obstacles when they were creating VTCs.⁷ Because drug treatment courts had already been well established in Alaska, some were skeptical of the need to create a more specialized treatment court and reluctant to fund it.⁸ They designed the court to operate without funding. According to Judge Smith, "the driving factor was we had resources available, and it didn't require anybody to go ask for funding."⁹ At a press conference announcing the creation of the specialized court (see Figure 1), Judges Murphy and Smith stated they received no financial support for the project. They, along with court and VA staff, volunteered their time.¹⁰

5. Smith, *supra* note 3, at 99–100. The Court started as a one-year pilot project. See Matt Volz, *Veterans Court Offers Rehab Option: The Program Aims to Get Those Who Served Out of Cycle of Crime*, ANCHORAGE DAILY NEWS, Aug. 9, 2004, at B1.

6. *Id.* at 101–02.

7. *Id.* at 97–99. Judge Smith was a Colonel in the U.S. Air Force and a former Judge Advocate. Judge Murphy was Commander of Alaska's Army National Guard. See Jane Gross, *A Rhodes Scholar's Strength Is Forged in the Torment of His Father's Scandal*, N.Y. TIMES (Jan. 15, 1997), <http://www.nytimes.com/1997/01/15/nyregion/a-rhodes-scholar-s-strength-is-forged-in-the-torment-of-his-father-s-scandal.html>.

8. Smith, *supra* note 3, at 98.

9. Volz, *supra* note 5.

10. Sheila Toomey, *Diversion Program for Vets Is Offered: Aim Is to Break Cycle of Anti-Social Behavior Leading to Crime*, ANCHORAGE DAILY NEWS, July 14, 2004, at B1.

FIGURE 1.
PRESS CONFERENCE ANNOUNCING ANCHORAGE VETERANS
TREATMENT COURT



Photo credit: Erik Hill and the Anchorage Daily News (© 2004).¹¹

In hindsight, given the widespread institutionalization of VTCs, the lack of support for the first veterans' treatment court in Anchorage seems shortsighted, but in 2004 there was no evidence that a specialized court for veterans would work any better than the treatment courts already in place.¹² Judges Murphy and Smith created a prototype but did not promote their invention to a wider audience. The press conference photograph that appeared in their local paper (above) was the apex of their media coverage. They did not document their

11. This photo was originally captioned:

Anchorage Mayor Mark Begich, left, Alaska Veterans Affairs Director Alex Spector, center left, and Judge Jack Smith, right, listen as Judge Sigurd Murphy explains the workings of the new Alaska Veterans Court at a press conference Tuesday afternoon in the Nesbett Courthouse. Murphy and Smith will oversee the therapeutic court, intended to provide veterans charged with misdemeanors the means and incentive to undergo rehabilitation.

Toomey, *supra* note 10. The authors thank Anne Raup, Visuals Editor of the *Anchorage Daily News*, for locating this image in the newspaper photo archives.

12. Interestingly, in 2004, Judge Murphy apparently told a newspaper that the Anchorage VTC was based on a similar program operating for eight years with good results in King County in Washington State and followed the opening of a Veterans' Court in San Diego. See Volz, *supra* note 5. King County and San Diego did not launch VTCs until much later.

court's rules and procedures to enable others to create similar courts. Four years would pass before the establishment of another VTC.¹³

B. Buffalo's VTC Launched a Movement

In January of 2008, Judge Robert T. Russell established a VTC in Buffalo, New York.¹⁴ Buffalo's VTC has been the role model for VTCs all over the country.¹⁵ The Buffalo VTC played such a seminal role in the history of veterans' courts that many observers (mistakenly) identify it as the first VTC in the country.¹⁶ Buffalo's VTC achieved far greater visibility and formalization than its predecessor in Anchorage. For example, Judge Russell is considered the "Godfather" of the VTC Movement.¹⁷

Judge Russell began presiding over Buffalo's drug treatment court in 1995 and its mental health treatment court in 2002.¹⁸ Seeing that veterans were prevalent in his general treatment courts, he proceeded to develop a VTC.¹⁹ The rationale behind the development of the court was that veterans constituted a special population within the

13. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 566 (2010).

14. ROBERT T. RUSSELL, HANK PIROWSKI & JACK O'CONNOR, *FFALO VETERAN'S COURT AND VETERANS MENTOR HANDBOOK* (on file with the N.Y.U. J. Legis. & Pub. Pol'y).

15. Michael Mroziak, *At 10 Years Old, Buffalo's Veteran Treatment Court Now Serves as Mentor for Similar Programs*, WBFO (Oct. 9, 2018), <https://news.wbfo.org/post/10-years-old-buffalos-veteran-treatment-court-now-serves-mentor-similar-programs>; see also BERNARD EDELMAN, THOMAS J. BERGER & GREGORY CRAWFORD, NAT'L INST. OF CORR., *VETERANS TREATMENT COURTS: A SECOND CHANCE FOR VETS WHO HAVE LOST THEIR WAY* 15 (2016), <https://info.nicic.gov/jiv/sites/info.nicic.gov/jiv/files/030018.pdf>; Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 357, 372 (2009); Michelle Slattery et al., *Catch, Treat, and Release: Veteran Treatment Courts Address the Challenges of Returning Home*, 48 SUBSTANCE USE & MISUSE 922, 923 (2013). The Buffalo Veterans Treatment Court operates a mentoring group to help other jurisdictions start VTCs. See BUFFALO VETERANS TREATMENT CT., <http://buffaloveterans-treatmentcourt.org> (last visited Apr. 1, 2019).

16. See sources cited *supra* note 2. There is no indication that Judge Russell was aware of the Anchorage VTC at the time he started the Buffalo VTC.

17. EDELMAN, BERGER & CRAWFORD, *supra* note 15, at 15.

18. Russell still presides over those courts. He has also served as Chairman of the Board of Directors of the National Association of Drug Court Professionals. See *Judge Russell Bio*, BUFFALO VETERANS TREATMENT CT., <http://www.buffaloveterans-treatmentcourt.org/about/judge-russell-bio> (last visited Apr. 1, 2019); Harvard Law Sch., *Disabled American Veterans (DAV) Distinguished Lecture Series—Judge Robert Russell*, YOUTUBE (Nov. 17, 2016), https://www.youtube.com/watch?time_continue=10&v=srZzWOCpC5g.

19. Harvard Law Sch., *supra* note 18.

justice system, with unique needs and life circumstances.²⁰ Judge Russell found in the military's "strong sense of camaraderie" a possible access point for correction.²¹ The intersection of mental health and substance abuse issues among veterans prompted Judge Russell to conclude that the veteran population could not be adequately represented through drug or mental health courts.²²

Judge Russell made at least two critical contributions to the VTC movement. First, he documented his work in the Buffalo Veterans Court Handbook to provide a blueprint for establishing VTCs in other jurisdictions.²³ This framework has been at the core of most subsequent VTC programs, which largely follow the Buffalo Court model.²⁴ Specifically, he developed Buffalo's VTC by adapting the "Ten Key Components" of drug courts for veterans.²⁵ The modifications of the drug court model include: 1) adding a mental health component to the areas of treatment addressed, including access to clinical resources; 2) direct support from the U.S. Department of Veterans' Affairs and coordination with VA programs, healthcare, and specialists; 3) consideration of a more expansive list of possible co-occurring problems, especially combat-related issues; 4) and peer-mentorship from other veterans with similar backgrounds and combat/deployment experiences.²⁶

Judge Russell's second critical contribution to the VTC movement was publicity. Coverage of the Anchorage VTC was limited to the local news section of the *Anchorage Daily Journal*, but Russell

20. Russell, *supra* note 15, at 363.

21. Lynne Marek, *Courts for Veterans Spreading Across U.S.*, NAT'L L.J. (Dec. 22, 2008), <https://www.law.com/nationallawjournal/almID/1202426915992/>.

22. Russell, *supra* note 15; *see also* Robert T. Russell, *Veterans Treatment Courts Developing Throughout the Nation*, in *FUTURE TRENDS IN STATE COURTS 2009*, at 130 (Carol R. Flango et al. eds., 2009).

23. RUSSELL, *supra* note 14. The Buffalo model is so widely emulated that its web site now features a "Start a Court" page for prospective reformers. *See Start a Court*, BUFFALO VETERANS TREATMENT CT., <http://www.buffaloveteranstreatmentcourt.org/about/start-a-court> (last visited Apr. 1, 2019).

24. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS*, at iii (1997), <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>.

25. Russell, *supra* note 20; *Buffalo Veterans Court Is First of Its Kind in U.S.: Judge Russell, Bar Committee Help Vets Readjust*, BAR ASS'N OF ERIE COUNTY BULL. (Oct. 2008), http://www.eriebar.org/files/bulletin/bulletin_october_2008.pdf.

26. Russell, *supra* note 20. For an explanation of drug court procedures and key components, see Shannon M. Carey, Juliette R. Mackin & Michael W. Finigan, *What Works? The Ten Key Components of Drug Court: Research-Based Best Practices*, 8 *DRUG CT. REV.* 6, 6-42 (2012).

and the Buffalo VTC received significant national media attention.²⁷ Russell recalled, "It was successful beyond our expectations. Word spread quickly."²⁸ NBC News, The Today Show, NPR, and other outlets broadcast stories of veterans helping one another to recover from drug abuse and mental health problems to the entire nation.²⁹ These reports emphasized the moral imperative to help veterans who have suffered in their service to the country. Russell may not have created the first VTC, but he played a critical role promoting VTCs as a viable idea, capable of expansion.³⁰

C. Exponential Growth of VTCs

Since the establishment of the Buffalo VTC, veterans' court programs around the country have surged.³¹ VTCs are the fastest growing type of specialty court in the country.³² In 2008, the year that the Buffalo VTC was created, three additional VTCs were created.³³ By the

27. The authors searched the Lexis-Nexis database for newspaper stories about the Anchorage VTC published in 2004 and found only two stories. See Sheila Toomey, *Diversion Program for Vets Is Offered: Aim Is to Break Cycle of Anti-Social Behavior Leading to Crime*, ANCHORAGE DAILY NEWS, July 14, 2004, at B1; Matt Volz, *Veterans Court Offers Rehab Option: The Program Aims to Get Those Who Served Out of Cycle of Crime*, ANCHORAGE DAILY NEWS, Aug. 9, 2004, at B1. The founding of the Buffalo VTC, in contrast, was widely publicized. See sources cited *infra* note 29.

28. Robert T. Russell, *Veterans Treatment Courts*, 31 *TOURO L. REV.* 385, 387 (2015).

29. Lizette Alvarez, *After the Battle, Fighting the Bottle at Home*, N.Y. TIMES (July 8, 2008), <https://www.nytimes.com/2008/07/08/us/08vets.html>; Cheryl Corley, *Judge: Keep Vets out of Jail*, NPR (June 18, 2008, 12:00 PM), <https://www.npr.org/templates/story/story.php?storyId=91633166>; Matthew Daneman, *Court in N.Y. Gives Vets Chance to Straighten Out: First-of-Its-Kind System Considers "Specialized Needs" of Former Troops*, USA TODAY, June 2, 2008, at 3A, <https://jpo.wrlc.org/handle/11204/2905>; Editorial, *A Court for Veterans*, N.Y. TIMES (June 4, 2008), <https://www.nytimes.com/2008/06/04/opinion/04wed4.html>; Libby Lewis, *Court Aims to Help Vets with Legal Troubles*, NPR (Apr. 29, 2008, 12:11 AM), <https://www.npr.org/templates/story/story.php?storyId=90016059>; *Municipal Court in Buffalo, New York, That Only Deals with Veterans* (NBC television broadcast Oct. 22, 2008) (transcript available on Lexis-Nexis); *Vets in Legal Trouble Find Help in Buffalo Court*, NPR (May 7, 2008, 10:00 AM), <https://www.npr.org/templates/story/story.php?storyId=90254410>.

30. On the role of connectors and salesmen in the spread of ideas, see MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 30–88 (2000).

31. R. Scott Johnson et al., *US Veterans' Court Programs: An Inventory and Analysis of National Survey Data*, 52 *CMTY. MENTAL HEALTH J.* 180, 181 (2016).

32. Richard D. Hartley & Julie Marie Baldwin, *Waging War on Recidivism Among Justice-Involved Veterans: An Impact Evaluation of a Large Urban Veterans Treatment Court*, 30 *CRIM. JUST. POL'Y REV.* 52, 53 (2016).

33. U.S. DEP'T OF VETERANS AFFAIRS, *VETERANS COURT INVENTORY 2014 UPDATE: CHARACTERISTICS OF AND VA INVOLVEMENT IN VETERANS TREATMENT COURTS, DOCKETS, AND TRACKS FROM THE VETERANS JUSTICE OUTREACH SPECIALIST*

end of 2009, there were twenty-five VTCs in operation.³⁴ According to the VA's 2016 *Veterans Court Inventory Update*, the most recent data available, there are now 461 VTCs in the United States.³⁵

A recent comprehensive survey of VTCs, conducted by the Department of Justice's, Bureau of Justice Assistance (BJA) in concert with American University, shows that forty-five states have established VTCs.³⁶ Three-quarters of responding VTC programs are independent courts, with the remaining quarter as tracks within established mental health or drug treatment programs.³⁷

PERSPECTIVE 2 (2016), <https://www.va.gov/HOMELESS/docs/VTC-Inventory-Fact-Sheet-0216.pdf>.

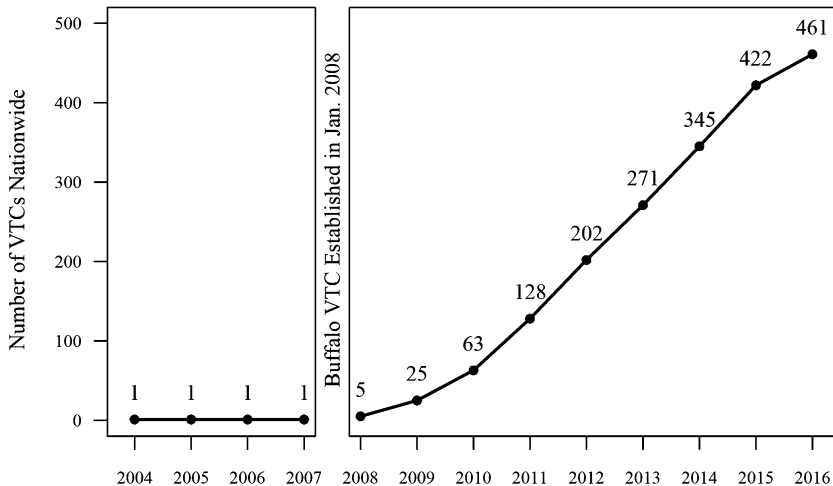
34. U.S. DEP'T OF VETERANS AFFAIRS, VETERANS COURT INVENTORY 2016 UPDATE: CHARACTERISTICS OF AND VA INVOLVEMENT IN VETERANS TREATMENT COURTS AND OTHER VETERAN-FOCUSED COURT PROGRAMS FROM THE VETERANS JUSTICE OUTREACH SPECIALIST PERSPECTIVE 2 (2017), <https://www.va.gov/HOMELESS/docs/VJO/2016-Veterans-Court-Inventory-Update-VJO-Fact-Sheet.pdf>.

35. *Id.* The number of courts established surged at the beginning, tempering out later, with the curve becoming flatter.

36. As of July 2016, VTCs were operating in all states except Connecticut, Nebraska, New Jersey, North Dakota, and Vermont. See AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, VETERANS TREATMENT COURTS: 2015 SURVEY RESULTS 5 (2016), <https://www.american.edu/spa/jpo/initiatives/drug-court/upload/Veterans-Treatment-Courts-2015-Survey-Results.pdf>. Since that time, Nebraska and New Jersey have established VTCs, raising the number of states with VTCs to forty-seven. See Christopher Burbach, "Honor Restored" Ceremony Salutes First Graduates of Diversion Program for Veterans, OMAHA WORLD-HERALD (June 27, 2018), https://www.omaha.com/news/courts/honor-restored-ceremony-salutes-first-graduates-of-diversion-program-for/article_aaa4a749-1cac-54e7-850a-cc73eba49399.html; Lilo Stainton, New Jersey to Create Diversion Program to Keep Vets Out of Court, Jail, NJ SPOTLIGHT (May 2, 2017), <https://www.njspotlight.com/stories/17/05/01/new-jersey-to-create-diversion-program-to-keep-vets-out-of-court-jail/>.

37. AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, *supra* note 36, at 5.

FIGURE 2.
NUMBER OF VTCs NATIONWIDE, 2004–2016



Source: U.S. Dep't of Veterans Affairs, Veterans Court Inventory 2016 Update: Characteristics of and VA Involvement in Veterans Treatment Courts and Other Veteran-Focused Court Programs from the Veterans Justice Outreach Specialist Perspective 2 (2017) (*see supra* note 34).

This rapid growth of VTCs is unprecedented. To put this growth rate in context, consider the growth of two of America's most popular retail chains: Wal-Mart and Starbucks. While they provide different services than courts do, retailers also must identify locations, train managers, and establish community relations. Sam Walton opened the first Wal-Mart store in 1962 and the 400th store approximately twenty years later.³⁸ Starbucks opened its first store in 1971 and its 425th store in 1994, more than twenty years later.³⁹ Cash infusions from stock sales propelled the growth of these retailers.⁴⁰ Despite having

38. We approximate the time Wal-Mart opened its 400th store based on its opening its 276th store in 1979 and 1500th store in 1990. *See Wal-Mart Stores*, ADAGE ENCYCLOPEDIA (Sept. 15, 2003), <http://adage.com/article/adage-encyclopedia/wal-mart-stores/98925/>; Nathan Yau, *Watch the Growth of Walmart and Sam's Club*, FLOWINGDATA (Apr. 7, 2010), <http://projects.flowingdata.com/walmart/>.

39. *See Starbucks Company Timeline*, STARBUCKS COFFEE CO. (June 28, 2015), <https://www.starbucks.com/about-us/company-information/starbucks-company-timeline>.

40. Wal-Mart held its initial public stock offering in 1970 and raised the equivalent of \$31 million dollars. *See Demitrios Kalogeropoulos, Wal-Mart Stock History: How the World's Biggest Retailer Created So Much Wealth for Investors*, MOTLEY FOOL (Jan. 1, 2017, 4:59 PM), <https://www.fool.com/investing/2017/01/01/wal-mart-stock-history-how-the-worlds-biggest-retai.aspx>. Starbucks' initial public offering raised \$25 million in 1992 (equivalent to \$45 million in today's dollars). *See Megan Sanks, 7 Fun Facts About Starbucks in Honor of Its IPO's 25th Anniversary*, NASDAQ (June 26, 2017, 6:48 PM), <https://www.nasdaq.com/article/7-fun-facts-about-starbucks-in-honor-of-its-ipo-25th-anniversary-cm808396>.

fewer financial resources for expansion, VTCs have expanded much faster than either Wal-Mart or Starbucks did. There were over 400 VTCs in operation eleven years after the Anchorage VTC started hearing cases and only seven years after Judge Russell's court caught national attention.⁴¹

The rapid proliferation of VTCs throughout the country is surprising because state courts are historically resistant to change.⁴² Courts tend to rigidly adhere to tradition and precedent.⁴³ Proposals to reform and reorganize state court systems are typically met with disinterest from the public and resistance from judges and court administrators.⁴⁴

One reason VTCs have flourished, despite the judiciary's resistance to reform, is their practical modesty. Establishing a VTC does not require constructing a new courthouse or even a new courtroom. Typically, a VTC meets in the same courtroom as other treatment courts one day a week or a couple days each month.⁴⁵ The establishment of a treatment court is generally an action undertaken by a judge, working with partners from across the justice system (e.g., judges, prosecutors, court-appointed counsel, probation officers, diversionary program officials, etc.) as well as community-based resources and, in the case of VTCs, the local VA office.⁴⁶ Many of these judges have personal connections to the military.⁴⁷ As we discuss in Section Three, VTCs potentially save cash-strapped state court systems a lot of money which can overcome courts' reluctance to fund new projects.⁴⁸

41. See *supra* Figure 2; U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 34.

42. See NEUBAUER & MEINHOLD, *supra* note 1, at 99; WELSH & HARRIS, *supra* note 1, at 10.

43. See Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 86–88 (2016).

44. See FEELEY, *supra* note 1; NEUBAUER & MEINHOLD, *supra* note 1, at 99; WELSH & HARRIS, *supra* note 1, at 10.

45. JULIE M. BALDWIN, EXECUTIVE SUMMARY: NATIONAL SURVEY OF VETERANS TREATMENT COURTS 23, https://jpo.wrlc.org/bitstream/handle/11204/2403/Executive%20Summary_National%20Survey%20of%20Veterans%20Treatment%20Courts.pdf?sequence=3&isAllowed=Y (last visited Apr. 1, 2019).

46. See EDELMAN, BERGER & CRAWFORD, *supra* note 17, at v–vi; see also *Veterans Treatment Courts Are a “Game Changer” and Easy to Implement, Judges Say*, ABA: NEWS (Aug. 15, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/veterans_treatmentc.html.

47. Bianca Easterly, *The Ties That Bind Beyond the Battlefield: An Examination of the Diffusion Patterns of Veterans Treatment Courts*, 98 SOC. SCI. Q. 1622, 1623, 1632 (2017) (“Early-court-adopting states were 82 percent more likely to have presiding judges who were either in the military themselves or have an immediate family member than later-adopting states.”).

48. See *infra* notes 239–251 and accompanying text.

D. VTCs and the Concept of Therapeutic Jurisprudence

The treatment, or problem-solving court model, sometimes referred to as therapeutic justice is not entirely new.⁴⁹ As discussed above, VTC procedures are derived from drug court principles.⁵⁰ The roots of the treatment court approach can be traced to development of juvenile courts at the end of the 19th century.⁵¹ In therapeutic jurisprudence, Wexler observes, “the law itself can be seen to function as a kind of therapist or therapeutic agent,” with “legal rules, legal procedures, and the roles of legal actors” working to “constitute social forces.”⁵²

The modern emergence of therapeutic justice in the criminal justice context was a response to the shortcomings of traditional processes, including the “revolving door”⁵³ of punishment, release, and return and “McJustice” processing.⁵⁴ The pressures on the system created by the war on drugs⁵⁵ and mandatory sentencing flooded courts, stacked dockets, and stretched resources and justice profes-

49. See Teresa W. Carns, Michael G. Hotchkin & Elaine M. Andrews, *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 2 (2002) (identifying Roscoe Pound and Oliver Wendell Holmes as early proponents of concepts central to the therapeutic jurisprudence movement); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL., PUB. POL'Y, & L. 184, 184 (1997) (discussing “the relationship between therapeutic jurisprudence and other schools of jurisprudence”).

50. Drug courts started in 1989 in Miami. There are now more than 3,000 drug courts operating in the United States. See U.S. DEP'T OF JUSTICE, DRUG COURT FLYER 1 (2018), <https://www.ncjrs.gov/pdffiles1/nij/238527.pdf>. The number of drug courts did not start increasing steadily until 1991, however, when there were only five courts. Between 1991 and 1997, the number of drug courts roughly doubled every year, an astounding rate of growth. See WEST HUDDLESTON & DOUGLAS B. MARLOWE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 5–6 (2011).

51. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1464 (2004) (“In many ways, the juvenile courts were the original problem-solving courts and any discussion of modern forms of discretionary judging should include reference to the history of the juvenile courts.”).

52. David B. Wexler, *Therapeutic Jurisprudence in a Comparative Law Context*, 15 BEHAV. SCI. & L. 233, 233 (1997).

53. Greg Berman & John Feinblatt, *Problem Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 129 (2001).

54. *Id.* at 130.

55. Lawrence Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445, 451 (2006) (arguing that the bulk of the rapid increase since 1980 in physical incarceration rates can be traced to the “War on Drugs”); see also DAVID W. RASMUSSEN & BRUCE L. BENSON, *THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS* 23 (1994) (arguing that increased enforcement of drug policy results in crowding of public law enforcement resources “at all levels of the criminal justice system”).

sionals thin.⁵⁶ Discontent with the status quo came from across the justice spectrum and from both sides of the bench.⁵⁷ With the growing realization that the justice system in its current state was not adequately protecting public interests, judges, as well as other agents in the justice system (e.g., prosecutors, lawyers, probation officers, etc.), began innovating in the field and creating a more responsive justice process.⁵⁸ Judges were seeing an increasing number of cases, defined primarily by conflicts with origins in medical concerns, such as substance abuse and mental health crises.⁵⁹ This warranted a clinical approach rather than a punitive one.⁶⁰ As a result, judges became more active in taking on the underlying issues that culminated in the criminal act, and using an interdisciplinary approach to address the problem.⁶¹ Therapeutic jurisprudence emphasizes a medical orientation, such as rehabilitation and treatment, rather than a retribution orientation based on isolation and punishment.⁶²

The principles of therapeutic jurisprudence, upon which VTCs and other treatment court models loosely rest, call for the realization of justice values first and foremost.⁶³ In the treatment/problem-solving model, laws and judicial processes are meant to solve problems. Law

56. Robert M. Bohm, "McJustice": *On the McDonaldization of Criminal Justice*, 23 JUST. Q. 127, 134 (2007) ("Most employees of McDonaldized institutions 'are expected to do a lot of work, very quickly, for low pay.'") (internal citations omitted) (quoting GEORGE RITZER, *THE McDONALDIZATION OF SOCIETY* 14 (rev. new century ed. 2004)).

57. *Id.* at 130.

58. Berman & Feinblatt, *supra* note 53; Bruce J. Winick, *Problem Solving Courts: Therapeutic Jurisprudence in Practice*, in *PROBLEM SOLVING COURTS: SOCIAL SCIENCE AND LEGAL PERSPECTIVES* 211, 212 (Richard L. Wiener & Eve M. Brank eds., 2013).

59. Russell, *supra* note 15, at 362–63.

60. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL., PUB. POL'Y, & L. 184, 213 (1997).

61. *Id.* at 220.

62. See David B. Wexler, *Therapeutic Jurisprudence in a Comparative Law Context*, 15 BEHAV. SCI. & L. 233, 234–35 (1997) (distinguishing between law-based and psychology-based approaches to therapeutic jurisprudence).

63. See David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517, 518 (1992). The term "therapeutic jurisprudence" was coined by professors David B. Wexler and Bruce J. Winick as the "study of the role of the law as a therapeutic agent" with a focus on "law and legal codes and actors as the instrumentation of rehabilitation." David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 3, 8 (David B. Wexler & Bruce J. Winick eds., 1991); see generally DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990).

is and should be “a healing profession.”⁶⁴ “[T]herapeutic goals should be achieved only within the limits of considerations of justice.”⁶⁵ “[T]he law should be applied fairly, evenhandedly, and nondiscriminatorily. Legal actors should seek to apply the law therapeutically but only when consistent with these values.”⁶⁶ Effective justice attends to the entirety of an individual, including the circumstances that lead to crime. Rather than compromising traditional views of the justice process, this approach enriches it further, making the law a more effective tool by increasing the likelihood for law-abiding behavior.⁶⁷

What is particularly significant about the growth of therapeutic justice and the treatment model is the fundamental shift in the view of the “penal subject.”⁶⁸ Criminology professor and penal researcher Mona Lynch identifies three evolutionary stages for the criminal, or “penal subject,” from which emerged distinct representations of criminality: (1) an early, treatable subject; (2) a transitional, menacing subject; and a final, (3) “wholly irredeemable other.”⁶⁹ These shifts in the portrayal of criminality coincided with shifts in the popular perception of crime and the criminal, particularly in racial terms, from treatment and rehabilitation to containment and isolation.⁷⁰ Lynch finds that the early, pre-1960s penal subject, was characterized as “a reformable being” with crime just a single aspect of an identity construct, whereas later characterizations portrayed the penal subject as someone “who need not be understood or corrected but who must at any cost be con-

64. Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEEP. DISP. RESOL. L.J. 1, 2, 4 (2006) (identifying therapeutic jurisprudence as part of the comprehensive law movement with aims of “healing, wholeness, harmony, or optimal human functioning”).

65. Winick, *supra* note 49, at 203.

66. *Id.*

67. *Id.*

68. Mona Lynch, *The Contemporary Penal Subject(s)*, in AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 89, 94–98 (Mary Louise Frampton, Ian Haney López & Jonathan Simon eds., 2008) (using the term “penal subject” loosely to refer to evolving ideological constructions of the targets of criminal legal sanctions).

69. *Id.* at 90–93.

70. See Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 709–11 (2010); Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as “Law and Order” in Postwar America*, in RACE AND AMERICAN POLITICAL DEVELOPMENT 234, 235 (Joseph Lowndes et al. eds., 2008); see generally KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997).

tained and disempowered,” and for whom crime defines their identity.⁷¹

Many courts now proudly bear the distinction of therapeutic or treatment institutions. Judicial practitioners, scholars of the law, and agents of the legal system, now take interest in the development of practice and theory that formalizes the treatment model.⁷² Practice and theory have coalesced into a more formal body of legal philosophy referred to as therapeutic jurisprudence.⁷³ The revival of a treatment model of the penal subject seems to be emerging from the expansion of therapeutic justice as a theory and an increase in outcome-oriented legal processes.⁷⁴ Public and professional views of the law and its subjects have shifted such that the treatment or “healing” approach is gaining traction on the punitive one.⁷⁵ The emergence of VTCs mirrors a general cultural shift toward medicalizing “problem” behaviors that has been underway for some time.⁷⁶ Problem-solving and therapeutic frameworks are becoming more commonplace across the judicial system.⁷⁷ The growth of VTCs is, in part, the judicial reflection of

71. Lynch, *supra* note 68, at 94.

72. See Winick, *supra* note 49, at 201–03.

73. See generally Winick, *supra* note 49.

74. But see Arie Freiberg, *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms*, 8 EUR. J. CRIMINOLOGY 82, 90, 95 (2011) (noting that the concept of therapeutic justice “has been readily adapted to legal systems around the world” but also that “[d]espite its influence and popularity in academic circles, [restorative justice] is still of marginal importance in practice and deals with relatively few cases” in non-adversarial legal systems in Europe).

75. Daicoff, *supra* note 64, at 41. Documenting this shift, Wexler points to the “mainstreaming” of the treatment model in the joint resolution prepared by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) in 2000, “endors[ing] the notion of ‘problem-solving courts’ and their use of the principles of therapeutic jurisprudence.” David B. Wexler, *Therapeutic Jurisprudence: It’s Not Just for Problem-Solving Courts and Calendars Anymore*, in FUTURE TRENDS IN STATE COURTS 2004, at 87 (Carol R. Flango et al. eds., 2004), <https://nscs.contentdm.oclc.org/digital/collection/ctadmin/id/424>.

76. The inclusion of school resource officers who serve as quasi-counselors-cum-law-enforcement and the rise of ADHD as a diagnostic tool to increasingly frame hyperactivity and disruptive behaviors in school as medical conditions are two examples of the general shift toward medicalization of deviant behaviors. See generally PETER CONRAD, *THE MEDICALIZATION OF SOCIETY: ON THE TRANSFORMATION OF HUMAN CONDITIONS INTO TREATABLE DISORDERS* (2007).

77. The public and legal policy realms in the United States are slowly emerging from the punitive culture, and so-called “penal populism.” See Daicoff, *supra* note 64 at 38–39; Wexler, *supra* note 75, at 87–88; see generally BETTINA MUENSTER & JENNIFER TRONE, *WHY IS AMERICA SO PUNITIVE? A REPORT ON THE DELIBERATIONS OF THE INTERDISCIPLINARY ROUNDTABLE ON PUNITIVENESS IN AMERICA* (2016), https://www.jjay.cuny.edu/sites/default/files/news/Punitiveness_in_America_Report_March2016.pdf. Penal populism or populist punitiveness refers to the public’s perceived punitive stance. See David A. Green, *Feeding Wolves:*

the strong cultural support for America's military veterans. Therefore, it is appropriate that veterans lead the way in judicial reforms that embody empathy.

II.

IDENTITY, MASCULINITY, AND THE POTENTIAL FOR TROUBLE IN THE CIVILIAN WORLD

There are approximately twenty million military veterans in the United States representing roughly seven percent of the U.S. population.⁷⁸ Roughly seventy-five percent of veterans have served in war-time.⁷⁹ America's involvement in several combat theatres, for a protracted length of time, has created a large wave of military veterans over the last decade and a half.⁸⁰ Over 2.5 million servicemen and women have served in Iraq and Afghanistan since 2001.⁸¹ Gulf War Era veterans now represent the largest share of veterans, followed by Vietnam War Era veterans.⁸²

A. *Physical and Emotional Injuries from Combat*

Warfighting exposes servicemembers to both physical and mental traumas. Many of those who endure combat will have a permanent

Punitiveness and Culture, 6 EUR. J. CRIMINOLOGY 517, 521 (2009). Canada, Australia, New Zealand, and several European countries have worked towards integrating therapeutic justice as a guiding judicial principal, "sometimes skipping altogether the creation of problem-solving courts." Wexler, *supra* note 75, at 88; *see also* Arie Freiberg, *Problem-Oriented Courts: Innovative Solutions to Intractable Problems?*, 11 J. JUD. ADMIN. 8, 14–20 (2001) (discussing the development of problem-solving courts in Australia).

78. PETER J. AHN, DEP'T OF VETERANS AFFAIRS, EXECUTIVE SUMMARY: VETERAN POPULATION PROJECTION MODEL 2016, at 2 (2016), https://www.va.gov/vetdata/docs/Demographics/New_Vetpop_Model/Vetpop16_Executive_Summary.pdf.

79. *See* NAT'L CTR. FOR VETERANS ANALYSIS & STATISTICS, U.S. DEP'T OF VETERANS AFFAIRS, VETERANS BY PERIOD SERVED, https://www.va.gov/vetdata/docs/Demographics/New_Vetpop_Model/2L_VetPop2016_POS_National.xlsx (last visited Apr. 1, 2019). There are approximately 1.3 million active duty members of the military. *See* K.K. Rebecca Lai et al., *Is America's Military Big Enough?*, N.Y. TIMES (Mar. 22, 2017) <https://www.nytimes.com/interactive/2017/03/22/us/is-americas-military-big-enough.html>.

80. *See* Jerry M. Sollinger, Gail Fisher & Karen N. Metscher, *The Wars in Afghanistan and Iraq: An Overview*, in *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* 19 (Terri Tanielian & Lisa H. Jaycox eds., 2008).

81. KERWIN HENDERSON & KEVIN STEWART, VETERANS TREATMENT COURTS 1 (2016), <http://www.american.edu/spa/jpo/initiatives/drug-court/upload/Fact-Sheet-on-Veterans-Treatment-Courts.pdf>.

82. Kristen Bialik, *The Changing Face of America's Veteran Population*, PEW RES. CTR. (Nov. 10, 2017), <http://www.pewresearch.org/fact-tank/2017/11/10/the-changing-face-of-americas-veteran-population/>.

disability.⁸³ The full extent of injuries may not be known for several decades after hostilities are over, but current estimates provide some clue.

VA data estimates that some 34.1% of male post-9/11 veterans and 33.9% of female post-9/11 veterans have at least one compensable service-connected disability.⁸⁴ Among those veterans with a service-connected disability, twenty-nine percent had a disability rating of less than thirty percent with another thirty-seven percent having a rating of sixty percent or higher.⁸⁵ The most common permanent injuries are to the musculoskeletal system, with conditions such as chronic low-back pain, bone and joint injuries, and arthritis leading to activity-limitations for veterans.⁸⁶ The wars in Afghanistan and Iraq also introduced the improvised explosive device (“IED”) to the American lexicon along with a growing awareness of long-term consequences of the “signature injuries” of these wars, blast-induced traumatic brain injury and Posttraumatic Stress Disorder (“PTSD”).⁸⁷ Traumatic brain injuries (“TBI”) are physical insults that manifest psychosocially and can be particularly difficult to treat because concussive symptoms express in nonspecific ways and because of the high rates of co-occurrence with PTSD and depression that can complicate accurate diagnosis.⁸⁸

Less obvious than physical injuries are the psychological traumas of war. The National Vietnam Veterans Readjustment Study found

83. Ramon Hinojosa, *Cardiovascular Disease Among United States Military Veterans: Evidence of a Waning Healthy Soldier Effect Using the National Health Interview Survey*, CHRONIC ILLNESS 2 (2018), doi.org/10.1177/174239531878523; Ramon Hinojosa, Melanie S. Hinojosa & Jenny Nguyen, *Military Service and Physical Capital: Framing Musculoskeletal Disorders Among American Military Veterans Using Pierre Bourdieu's Theory of Cultural Capital*, 45 ARMED FORCES & SOC'Y 268, 269 (2017); Ramon Hinojosa & Melanie S. Hinojosa, *Activity-Limiting Musculoskeletal Conditions in US Veterans Compared to Non-Veterans: Results from the 2013 National Health Interview Survey*, PLOS ONE, Dec. 22, 2016, at 11.

84. NAT'L CTR. FOR VETERANS ANALYSIS & STATISTICS, U.S. DEP'T OF VETERANS AFFAIRS, PROFILE OF POST-9/11 VETERANS: 2015, at 22 (2017), https://www.va.gov/vetdata/docs/SpecialReports/Post_911_Veterans_Profile_2015.pdf.

85. A disability rating is a crude measure of physical impairment and is used by the Department of Veterans Affairs to assess disability benefits. See *Compensation*, U.S. DEP'T VETERANS AFF., <http://www.benefits.va.gov/compensation/rates-index.asp> (last updated Dec. 7, 2018).

86. See Hinojosa, Hinojosa & Nguyen, *supra* note 83, at 272; Hinojosa & Hinojosa, *supra* note 83.

87. Frances I. Snell & Margaret J. Halter, *A Signature Wound of War: Mild Traumatic Brain Injury*, 48 J. PSYCHOL. NURSING & MENTAL HEALTH SERV. 22, 23–26 (2010).

88. Sandra B. Morissette et al., *Deployment-Related TBI, Persistent Postconcussive Symptoms, PTSD, and Depression in OEF/OIF Veterans*, 56 REHAB. PSYCHOL. 340, 341 (2011).

that 15% of male veterans and 8.5% of female veterans met the diagnostic criteria for PTSD, with approximately 30% of all Vietnam veterans suffering full-blown symptoms of post-traumatic stress at some point in their lives.⁸⁹ For Gulf War/Desert Storm veterans, the rate of PTSD is around twelve percent.⁹⁰ Iraq and Afghanistan veterans are estimated to have a rate of PTSD between eleven percent and twenty percent, although some estimates are as high as thirty percent.⁹¹ There is also growing awareness that military sexual trauma is a significant risk factor for female veterans. The VA estimates that some twenty-three percent of women veterans utilizing VA services report sexual assault in the military, and an estimated fifty-five percent report having experienced traumatizing sexual harassment.⁹² These estimates do not capture the true psychological costs of war, as many veterans suffer stress and anxiety disorders that are undiagnosed or subclinical.⁹³

Data from a 2017 Department of Veterans Affairs report shows that about fifty-eight percent of Gulf War Era veterans receiving care at VA Medical Centers were treated for mental health disorders.⁹⁴ In fact, mental health treatment is one of the top three reasons for treatment within the VA medical system.⁹⁵ Rates of PTSD diagnosis may be higher than presented in the report because only the dominant diag-

89. Richard A. Kulka et al., *TRAUMA AND THE VIETNAM WAR GENERATION: REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY* 52–53 (1990). Rates of PTSD depend upon 1) era of military service and 2) receiving a diagnosis. Researchers believe that PTSD is under-diagnosed in military veterans because of the stigma associated with mental health disorders.

90. *How Common is PTSD in Veterans?*, U.S. DEP'T OF VETERANS AFF., https://www.ptsd.va.gov/understand/common/common_veterans.asp (last updated Sept. 24, 2018).

91. *Id.*

92. *Id.*

93. Andrew S. Pomerantz, *Treating PTSD in Primary Care: One Small Step is One Giant Leap*, 35 *FAM., SYS., & HEALTH* 505, 506 (2017).

94. EPIDEMIOLOGY PROGRAM, U.S. DEP'T OF VETERANS AFFAIRS, *ANALYSIS OF VA HEALTH CARE UTILIZATION AMONG OPERATION ENDURING FREEDOM (OEF), OPERATION IRAQI FREEDOM (OIF), AND OPERATION NEW DAWN (OND) VETERANS* 10 (2017), <https://www.publichealth.va.gov/docs/epidemiology/healthcare-utilization-report-fy2015-qtr3.pdf>.

95. *Id.* at 9. The ten most common disorders Veterans are treated for are post-traumatic stress disorder, or PTSD (ICD-9 CM Code 309.81), followed by depressive disorders (311), neurotic disorders (300), affective psychoses (296), and alcohol dependence syndrome (303). *Id.* at 11. The remaining five are nondependent abuse of drugs (305), special symptoms, not elsewhere specified (307), drug dependence (304), sexual deviation and disorders (302), and specific nonpsychotic mental disorder due to organic brain damage (310). *Id.* Diseases of Musculoskeletal System Connective Tissue (ICD-9-CM codes 710-739) and Symptoms, Signs and Ill Defined Conditions (ICD-9-CM codes 780-799) are the other most commonly treated diagnosis in the VA Healthcare system. *Id.*

nosis is taken into account; veterans often have co-existing, or comorbid conditions and many have multiple needs for which they are being treated.

Repeated trauma exposure elevates the risks of developing PTSD, but some individuals develop the disorder after one traumatic exposure while others may not develop it even after repeated exposures.⁹⁶ Symptoms can appear immediately or not until years later. The National Center for PTSD estimates that sixty percent of men and fifty percent of women experience at least one traumatic event during their lifetime, but roughly seven to eight percent of the American population (compared to eleven to thirty percent of the veteran population) is diagnosed with PTSD sometime during their lives.⁹⁷ These estimates understate the problem; an individual can experience psychosocial distress related to trauma exposure, but not have an official diagnosis of PTSD.⁹⁸ Too often, PTSD goes undiagnosed because its symptoms are attributed to other mental health disorders like depression.⁹⁹ It is easy to see how an undiagnosed TBI or the negative behavioral expressions of substance use can complicate the diagnosis of PTSD among veterans by presenting similar symptoms. At the very least, the social and behavioral expression of symptoms can distract from the underlying causes and may lead to misdiagnosis, lack of treatment, or both, and in ways that can delay proper treatment.

The neuroendocrinal processes involved in stress disorders, like PTSD, help to understand some of the unique needs of military veterans. In response to traumatic experiences, like combat violence or sexual assault, the hypothalamic-pituitary-adrenal system, or HPA-axis triggers a physiological process, referred to as flight-or-fight, that prepares the human body to deal with the threat, either by running away or confronting the threat.¹⁰⁰ Extreme fright, terror, or feelings of hopelessness in the face of a threat blast the HPA-axis into action. The HPA-axis efficiently prepares the body for action by raising blood pressure, elevating the heart rate, tensing muscles, slowing digestion, and dumping adrenaline into the blood stream.¹⁰¹ After exposure to a traumatic event, the neuro-pathways that prepare the body for fight-or-

96. WILLIAM R. LOVALLO, *STRESS & HEALTH: BIOLOGICAL AND PSYCHOLOGICAL INTERACTIONS* 122 (2d ed. 2005).

97. *How Common is PTSD in Veterans?*, *supra* note 90.

98. *See* Pomerantz, *supra* note 93, at 506.

99. Catrin Lewis et al., *Trauma Exposure and Undetected Posttraumatic Stress Disorder Among Adults with a Mental Disorder*, 35 *DEPRESSION & ANXIETY* 178, 183 (2018).

100. LOVALLO, *supra* note 96, at 123.

101. *Id.*

flight become increasingly efficient to better meet the next threat. The threshold for triggering threat-based hyperarousal is lowered so that any stressor, large or small, can trigger the fight-or-flight response.¹⁰² This process is adaptive in threat-rich environments, like combat, and aids in survival.¹⁰³

Back in the civilian world, this adaptive stress response does not work so well. The 'threats' that trigger the stress response are often not life threatening or even traumatic. Daily stressors associated with life, such as traffic jams, the inability to pay bills, or interpersonal conflict can all trigger a stress response in someone with PTSD. Anger, hostility, and aggression, the 'fight' in 'fight-or-flight,' are protective responses to threats to one's life during service, but in the civilian world, may result in a seemingly disproportionate response to the situation. For individuals without PTSD, when a threat is removed, they return to homeostasis, the normal state of physiological functioning, and their blood pressure and heart rate drop, tense muscles relax, and neuroendocrine secretions returns to normal levels.¹⁰⁴ Individuals who suffer from PTSD, in contrast, can remain in a state of hyperarousal for hours after a triggering event and may have trouble calming down; PTSD is after all, a disorder of the stress response system.¹⁰⁵ Left untreated, veterans may find themselves in situations in which their biological stress response system works against them, and they can remain angry, irritable, and hostile and look for threatening situations—real or imagined.

B. PTSD and Problems in Civilian Life

In the relatively low-threat environments of everyday civilian life, continued hyperarousal can be problematic. At its worst, chronic PTSD contributes to heart disease and greater mortality from cardiovascular problems.¹⁰⁶ Aside from the physical health complications,

102. *Id.*; see also *How Common is PTSD in Veterans?*, *supra* note 90.

103. Kate Murphy, *Outsmarting Our Primitive Responses to Fear*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/well/live/fear-anxiety-therapy.html>; Whitney Tucker, *PTSD Specialist Explains Stress Science*, AIR FORCE SPECIAL OPERATIONS COMMAND (Aug. 12, 2013), <https://www.afsoc.af.mil/News/Article-Display/Article/495179/ptsd-specialist-explains-stress-science>.

104. LOVALLO, *supra* note 96, at 123.

105. Chris R. Brewin, Bernice Andrews & John D. Valentine, *Meta-Analysis of Risk Factors for Posttraumatic Stress Disorder in Trauma-Exposed Adults*, 68 J. CONSULTING & CLINICAL PSYCHOL. 748, 748 (2000).

106. Joseph A. Boscarino, *A Prospective Study of PTSD and Early-Age Heart Disease Mortality Among Vietnam Veterans: Implications for Surveillance and Prevention*, 70 PSYCHOSOMATIC MED. 668, 668 (2008); Donald Edmondson et al., *Posttraumatic Stress Disorder and Risk for Coronary Heart Disease: A Meta-Analytic*

PTSD is a mood disorder. Intrusive thoughts, avoidance, irritability, anger, and mood lability are common symptoms.¹⁰⁷ Research links PTSD to an elevated risk of incarceration, specifically incarceration resulting from the use of violence and aggression.¹⁰⁸

A comprehensive clinical review of service-connected trauma, disorders, and violent behavior conducted by Sreenivasan et al., clearly establishes a link between high levels of combat exposure and post-deployment violence in civilian settings up to and including homicide.¹⁰⁹ Citing a recent survey of inmates at a military detention barracks, Sreenivasan indicates “that 92 percent of the inmates with an established PTSD diagnosis by record had committed a violent offense.”¹¹⁰

For those who are not familiar with PTSD, the violence and anger often seem to come out of the blue, with no reason or warning. The arrest of former Marine Sgt. Maj. Damien Rodriguez is a common story for many incarcerated veterans. On April 26, 2017, Rodriguez, a combat veteran with four deployments under his belt, walked into the DarSalam Iraqi restaurant in Portland, Oregon, and sat for a time without ordering, quietly looking at photos of Iraq decorating the wall.¹¹¹ “After about a half-hour, he got up, walked over to the cash register, began cursing about Iraq, and threw a chair at a waiter’s head, sending him dazed to the floor,” reported the *New York Times*.¹¹² He was arrested and charged with felony assault.¹¹³ It was not immediately clear what triggered Sgt. Rodriguez’s violent outburst, but it is not uncommon for veterans with PTSD to find that pictures, music, smells, or people that remind them of a traumatic event can trigger a strong stress response. Once triggered, the stress response can overwhelm rational thought as the ‘threat’ is dealt with. Family members told the

Review, 166 AM. HEART J. 806, 814 (2013); Joel R. Grossband et al., *Relationships Among Veteran Status, Gender, and Key Health Indicators in a National Young Adult Sample*, 64 PSYCHIATRIC SERV. 547, 555 (2013).

107. *How Common is PTSD in Veterans?*, *supra* note 90.

108. Patrick S. Calhoun et al., *Severity of Posttraumatic Stress Disorder and Involvement with the Criminal Justice System*, 3 J. TRAUMA PRAC. 1, 2 (2005).

109. See Shoba Sreenivasan et al., *Critical Concerns in Iraq/Afghanistan War Veteran-Forensic Interface: Combat-Related Postdeployment Criminal Violence*, 41 J. AM. ACAD. PSYCHIATRY L. 263, 263–64 (2013) (but also highlighting that the “link between combat exposure and postdevelopment violence may not be as linear as media accounts represent”).

110. *Id.* at 267.

111. See Dave Philipps, *A Marine Attacked an Iraqi Restaurant. But Was It a Hate Crime or PTSD?*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/us/damien-rodriiguez-marine-portland.html>.

112. *Id.*

113. *Id.*

reporter covering the story that Sgt. Rodriguez needed help for his untreated PTSD, not jail time.¹¹⁴ His defense attorney successfully presented evidence that Sgt. Rodriguez suffered from PTSD resulting from his combat experiences in Iraq, and prosecutors recognized that PTSD and alcohol abuse were motivating factors in his actions in the restaurant that day.¹¹⁵ Sgt. Rodriguez was sentenced to five years of probation rather than prison and treated for PTSD and substance abuse.¹¹⁶

Sgt. Rodriguez is not the only veteran whose problems adjusting to civilian life have involved the criminal justice system. Overall, veterans are less likely to be imprisoned than non-veterans, and they represent only about eight percent of the total incarcerated population.¹¹⁷ However, veterans are more likely than non-veterans to be sentenced for violent offenses, with some sixty-four percent of veterans incarcerated for violent offenses compared to forty-eight percent of non-veterans.¹¹⁸ Incarcerated veterans are much more likely to have mental health problems, like PTSD, depression, and substance use disorders than non-veterans are, although these conditions are often not diagnosed or treated.¹¹⁹

Veterans are more likely than civilians to suffer from mental health problems like posttraumatic stress disorder, depression, and

114. *Id.* Similar observations can be made about Army veteran Albert Wong who killed three women who worked at a recovery residence for veterans with PTSD and himself in 2018. See Thomas Fuller, *Violence Strikes a Veterans Program That Stroved to Prevent It*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/us/yountville-veterans-pathway-shooting.html>.

115. See Phillipps, *supra* note 111.

116. See Aimee Green, *Marine Who Hit Iraqi Restaurant Employee with Chair Avoids Prison*, OREGONLIVE.COM (Mar. 2, 2018), http://www.oregonlive.com/portland/index.ssf/2018/03/marine_who_smashed_chair_onto.html/.

117. In 2011 to 2012, the total incarceration rate for veterans was 882 per 100,000 veterans in the United States compared to non-veterans, whose incarceration rate was 948 per 100,000 U.S. residents. JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON AND JAIL, 2011–12, at 2 (2015), <https://www.bjs.gov/content/pub/pdf/vpjl112.pdf>.

118. *Id.* at 1, 9.

119. According to Bronson et al., forty-eight percent of incarcerated veterans have been told they have a mental disorder by a mental health profession, and twenty-three percent have been told they have PTSD; among incarcerated non-veterans, the corresponding figures are thirty-six percent and eleven percent. *Id.* at 9 tbl.8; see also Andrea K. Finlay et al., *Sex Differences in Mental Health and Substance Use Disorders and Treatment Among Justice-Involved Veterans in the Veterans Health Administration*, 53 MED. CARE S105, S108 (2015) (finding that VHA patients who are women suffer from more mental health problems than their men counterparts and concluding that, for women VHA patients, mental health treatment is both of greater availability and use than substance use disorder treatment).

anxiety.¹²⁰ Granted, having posttraumatic stress does not excuse violent and aggressive behavior, but it is increasingly recognized that PTSD plays a role in veteran arrests.¹²¹ Chronic PTSD can lead the sufferer to systematically withdraw from social situations that are stressful.¹²² They may avoid friends and family, limiting interaction to a few close relationships.¹²³ As they withdraw, or as others are pushed away by seemingly inappropriate anger and constant irritability, the social support networks that could provide emotional support are increasingly unavailable.¹²⁴ The loss of supportive, loving relationships can further exacerbate these mental health problems.¹²⁵ In turn, increased mental health problems can mean increased anger, irritability, and hostility as veterans spiral into self-isolating, self-destructive behaviors resulting from unrecognized and undertreated PTSD.¹²⁶ Mental health problems can also adversely impact veterans' chances of attaining stable living conditions, employment, and educational op-

120. Jennifer M. Gierisch et al., *Tobacco Use Among Iraq and Afghanistan Era Veterans: A Qualitative Study of Barriers, Facilitators, and Treatment Preferences*, 9 PREVENTING CHRONIC DISEASE: PUB. HEALTH RES. PRAC. & POL'Y 58, 62 (2012); Kim Hamlett-Berry et al., *Evidence-Based National Initiatives to Address Tobacco Use as a Public Health Priority in the Veterans Health Administration*, 174 MIL. MED. 29, 30 (2009) (based on one report, VHA facilities seeing veteran patients between 2001 and 2005 reported thirty-one percent were given a mental health or psycho-social diagnosis); Monina R. Klevens et al., *The Association Between Veteran Status and Cigarette-Smoking Behaviors*, 11 AM. J. PREVENTIVE MED. 245, 245 (1995); Bailey A. Wentworth et al., *Post-Traumatic Stress Disorder: A Fast Track to Premature Cardiovascular Disease?*, 21 CARDIOLOGY IN REV. 16, 17 (2013).

121. See *Veterans With PTSD in the Justice System*, U.S. DEP'T OF VETERANS AFF., https://www.ptsd.va.gov/professional/treat/care/vets_justice_system.asp (last updated Sept. 24, 2018) (creating opportunities for veterans' mental health treatment through treatment courts, when they otherwise would be processed through the criminal justice system); see also Jack Tsai & Emma Ogden, *A New Court System to Rehabilitate Veterans*, PUB. HEALTH POST (Apr. 25, 2018), <https://www.publichealthpost.org/research/rehabilitating-veterans-in-the-criminal-justice-system> (describing veteran treatment courts as a "hybrid of mental health and drug courts . . . address[ing] the needs of veterans who have been charged with criminal offenses").

122. See Ramon Hinojosa & Melanie Sberna Hinojosa, *Using Military Friendships to Optimize Postdeployment Reintegration for Male Operation Iraqi Freedom/Operation Enduring Freedom Veterans*, 48 J. REHABILITATION RES. & DEV. 1145, 1151–52 (2011) (recounting interviews with postdeployment veterans on their social and family lives).

123. *Id.*

124. *Id.*; see also Zahava Solomon et al., *Loneliness Trajectories: The Role of Post-traumatic Symptoms and Social Support*, 20 J. LOSS & TRAUMA 1, 3–4, 14–16 (2015).

125. See Ramon Hinojosa, Melanie Sberna Hinojosa & Robin S. Högnäs, *Problems with Veteran-Family Communication During Operation Enduring Freedom/Operation Iraqi Freedom Military Deployment*, 177 MIL. MED. 191, 195 (2012) (negative family environments and lack of communication are linked with "negative mental health outcomes").

126. *Id.*

portunities. This leads to homelessness, joblessness, and lower likelihoods of continued education and skills training.¹²⁷

C. *Loss of Military Identity*

The unique nature of the military experience justifies treating veterans as a unique population.¹²⁸ The U.S. Supreme Court has characterized military law as a “jurisprudence which exists separate and apart” from laws governing civilians.¹²⁹ A military identity is strengthened by living for a time in isolation from the civilian community in a *total institution*, or an institutional environment characterized by rigorous external control of physical and social freedoms.¹³⁰

While on active duty, service members' individual identities are tightly regulated through restrictions in dress, speech, actions, and interactions with others.¹³¹ Deviations in codes of conduct are penalized with physical, social, or financial sanctions.¹³² Troops have little or no

127. Cf. Ellen L. Edens et al., *Association of Substance Use and VA Service-Connected Disability Benefits with Risk of Homelessness Among Veterans*, 20 AM. J. ON ADDICTIONS 412, 413–15 (2011) (correlating personality disorders and substance use in veterans with homelessness, among other factors); Alison B. Hamilton et al., “*Homelessness and Trauma Go Hand-in-Hand*”: Pathways to Homelessness Among Women Veterans, 21 WOMEN'S HEALTH ISSUES S203 (2011) (identifying causal pathways of veteran homelessness based on individual accounts); Paula P. Schnurr, *Post-traumatic Stress Disorder and Quality of Life: Extensions of Findings to Veterans of the Wars in Iraq and Afghanistan*, 29 CLINICAL PSYCHOL. REV. 727 (2009) (finding that veterans with PTSD have lower quality of life outcomes, including unemployment and homelessness, than do veterans without PTSD).

128. See ANGELA HOLVORSON, UNDERSTANDING THE MILITARY: THE INSTITUTION, THE CULTURE, AND THE PEOPLE 19–24 (2010), https://www.samhsa.gov/sites/default/files/military_white_paper_final.pdf.

129. Burns v. Wilson, 346 U.S. 137, 140 (1953). On the unique and separate status of military law, see James Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 63 N.C. L. REV. 177, 178 (1984); Donald Zillman & Edward Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 397, 397–98 (1976) (quoting majority opinion in the 1974 Supreme Court decision *Parker v. Levy*).

130. For definition of total institution, see ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATIONS OF MENTAL PATIENTS AND OTHER INMATES 1 (1961).

131. See, e.g., 10 U.S.C. §§ 771–777a (2012) (laws governing military uniforms); Anderson v. Laird, 437 F.2d 912, 915 (7th Cir. 1971) (upholding Army requirement that reservists keep their hair cut short); Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 WM. & MARY BILL RTS. J. 315 (2007).

132. When norms of conduct are violated in the military, service members are punished with push-ups, sit-ups, runs, shouted at in front of peers, or made to do other things that ostracize them (i.e., wear unpolished boots around their necks, collect cigarette butts from the base grounds, stand on one leg, etc.). See Ramon Hinojosa, “Recruiting” the Self: The Military and the Making of Masculinities 27–28, 135 (2007) (unpublished Ph.D. dissertation, University of Florida), http://etd.fcla.edu/UF/UF0021114/hinojosa_r.pdf. Soldiers who deviate from the military's norms of con-

control over work and leisure schedules and activities, and their cultural and physical environments are closely monitored by higher ranking military authorities. Physical and social isolation from family, friends, and other civilian populations is enforced.¹³³ These restrictions are necessary from an operational standpoint, but the consequence of living within the total institution of the military is that the military identity takes on a central importance for many service members as they learn to rely heavily on unit mates for emotional and social support. Many individuals form strong bonds with other military members under such restrictions.

Central to understanding the special challenges faced by veterans is the concept of *role exit*, or leaving an identity that is central to one's self-concept.¹³⁴ Identities are cognitive schemas individuals form about who and what they are, "based on enduring, normative, reciprocal relationships with other people."¹³⁵ Identity is threatened when others do not support an individual's identity concept or when an individual leaves behind the institutional resources necessary to continue constructing an identity, as can happen during role exit.¹³⁶ When an identity threat is present, individuals have negative emotional responses.¹³⁷ Thus, identity threats can be a significant source of stress and can exacerbate any latent or existing mental health issues.¹³⁸

Demobilization (i.e., de-activation and redeployment home) tends to mean the loss of access to the institutional environment in which military-oriented identities are constructed, supported, and valued by others. The physical and social isolation from civilians and reliance on unit members that builds unit cohesion can mean the loss of an important social support network when veterans leave the military.¹³⁹ Sepa-

duct can also be charged with Article 15 violations, which often come with monetary fines. See James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 193-94 (2002).

133. Hinojosa, *supra* note 132, at 101; see also Hinojosa & Hinojosa, *supra* note 122; Hinojosa, Hinojosa & Högnäs, *supra* note 125.

134. See Helen Rose Fuchs Ebaugh, *BECOMING AN EX: THE PROCESS OF ROLE EXIT* 1-6 (1988).

135. Peggy A. Thoits, *On Merging Identity Theory and Stress Research*, 54 SOC. PSYCHOL. Q. 101, 103 (1991).

136. See Jennifer L. Petriglieri, *Under Threat: Responses to and the Consequences of Threats to Individuals' Identities*, 36 ACAD. MGMT. REV. 641, 644-47 (2011); Ebaugh, *supra* note 134.

137. See Petriglieri, *supra* note 136, at 647-48.

138. Robin W. Simon, *The Meanings Individuals Attach to Role Identities and Their Implications for Mental Health*, 38 J. HEALTH & SOCIAL BEHAV. 256, 257-260 (1997).

139. Hinojosa & Hinojosa, *supra* note 122; Hinojosa, Hinojosa & Högnäs, *supra* note 125.

ration from the military can be perceived as an identity threat, particularly when non-veteran civilians do not value, support, or recognize a veteran's military service hardships as valid. When problems arise, veterans may feel they have nowhere to turn for support.¹⁴⁰

Many deployed military personnel return to a home life where they are neither viewed as a military member nor as a "complete" family member.¹⁴¹ To the extent either the military or the family identity is important, this ambiguous state of relations represents the potential for an identity threat and can become an additional psychosocial stressor.¹⁴² When the social and community environment is hostile, distrust and alienation can create mental states that are prone to negative mental health outcomes.¹⁴³ Mental health problems have a profoundly negative effect on family relations. Family disruption for veterans often comes at the end of a causal pathway leading from combat to traumatic event to mental health problems.¹⁴⁴ Mental health problems are often associated with family and marital instability, higher rates of relationship distress, and more negative interpersonal relationships with partners and with children.¹⁴⁵ Relationship conflict and dissolution can lead to veteran homelessness as the strains of interpersonal family conflict push the veteran out of the family and, for some, the family home.¹⁴⁶ Family dissolution means the loss of

140. Hinojosa & Hinojosa, *supra* note 122.

141. See Anthony J. Faber et al., *Ambiguous Absence, Ambiguous Presence: A Qualitative Study of Military Reserve Families in Wartime*, 22 J. FAM. PSYCHOL. 222, 226 (2008).

142. See JAMES HOSEK, JENNIFER KAVANAGH & LAURA MILLER, HOW DEPLOYMENTS AFFECT SERVICE MEMBERS 44–45 (2006) (ebook); see also R. Tyson Smith & Gala True, *Warring Identities: Identity Conflict and the Mental Distress of American Veterans of the Wars in Iraq and Afghanistan*, 4 SOC'Y & MENTAL HEALTH 147 (2014).

143. See Lynda A. King et al., *Resilience-Recovery Factors in Post-Traumatic Stress Disorder Among Female and Male Vietnam Veterans: Hardiness, Postwar Social Support, and Additional Stressful Life Events*, 74 J. PERSONALITY & SOC. PSYCHOL. 420, 430 (1998) (explaining that social support can moderate some negative mental health outcomes among veterans).

144. Susan L. Ray & Meredith Vanstone, *The Impact of PTSD on Veterans' Family Relationships: An Interpretative Phenomenological Inquiry*, 46 INT'L J. NURSING STUD. 838 (2009).

145. See Nancy L. McElwain & Brenda L. Volling, *Depressed Mood and Marital Conflict: Relations to Maternal and Paternal Intrusiveness with One-Year-Old Infants*, 20 J. APPLIED DEVELOPMENTAL PSYCHOL. 63, 77, 79–80 (1999); Alexander C. McFarlane, *Military Deployment: The Impact on Children and Family Adjustment and the Need for Care*, 22 CURRENT OPINION IN PSYCHIATRY 369, 370 (2009).

146. HOSEK, KAVANAGH & MILLER, *supra* note 142, at 485; Alison B. Hamilton et al., *supra* note 127, at S206. The concern over veteran homelessness is dire enough that substantial VA resources are currently directed toward improving veterans' access to mental health care and community support. There was a public outcry in late

important social support networks provided by the family. For some veterans, the burdens of poor mental health can render them unable to independently maintain a home.

Another source of identity threat is the perceived loss of masculinity. Veterans see themselves as physically strong, aggressive, and mentally tough.¹⁴⁷ The military, as an institution, demands it of them, and this is true irrespective of whether the service member is a man or a woman.¹⁴⁸ The same archetypical characteristics expected of military service personnel are also qualities that are in line with a gender construct known as hegemonic masculinities.¹⁴⁹ Identities in line with hegemonic or culturally and socially dominant constructs of masculinities tend to garner the greatest societal resources, like power, income, wealth, and social esteem, and so there are distinct social advantages to constructing identities in this manner.¹⁵⁰ Veterans who have been discharged and who have physical, psychological, or spiritual injuries may be frustrated in their attempts to fully claim a military identity or a masculine identity.

2017 when the Trump Administration inquired about reallocating \$460 million in funding for the voucher and treatment programs that support veterans. This plan was dropped, and the earmark for veteran homeless programs in the 2018 budget was increased by \$66 million. See Leo Shane III, *VA Reverses Course, Won't Alter Homeless Program Funding*, ARMY TIMES (Dec. 6, 2017), <https://www.armytimes.com/veterans/2017/12/07/va-reverses-course-wont-alter-homeless-program-funding/>.

147. See Ramon Hinojosa, *Doing Hegemony: Military, Men, and Constructing a Hegemonic Masculinity*, 18 J. MEN'S STUD. 179, 180 (2010) (finding that military provides soldiers symbolic and material resources to construct masculine identity).

148. See John Hockey, "Head Down, Bergen On, Mind in Neutral": *The Infantry Body*, 30 J. POL. & MIL. SOC. 148, 155 (2002); see also Stefan Dudink & Karen Hagemann, *Masculinity in Politics and War in the Age of Democratic Revolutions 1750–1850*, in MASCULINITIES IN POLITICS AND WAR: GENDERING MODERN HISTORY 3, 18–19 (Stefan Dudink, Karen Hagemann & Josh Tosh eds., 2004); Paul Higate & John Hopton, *War, Militarism, and Masculinities*, in HANDBOOK OF STUDIES ON MEN & MASCULINITIES 432, 437 (Michael S. Kimmel, Jeff Hearn & R.W. Connell eds., 2004).

149. The literature on hegemonic masculinity is extensive. See R.W. CONNELL, GENDER AND POWER: SOCIETY, THE PERSON, AND SEXUAL POLITICS 183 (1987); R.W. CONNELL, MASCULINITIES 10–11 (2d ed. 1995); R.W. Connell, *Globalization, Imperialism, and Masculinities*, in HANDBOOK OF STUDIES ON MEN & MASCULINITIES 71 (Michael S. Kimmel, Jeff Hearn & R.W. Connell eds., 2004); MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY 18, 40 (1992); Michael A. Messner, *Still a Man's World? Studying Masculinities and Sport*, in HANDBOOK OF STUDIES ON MEN & MASCULINITIES 313, 314 (Michael S. Kimmel, Jeff Hearn & R.W. Connell eds., 2005).

150. Connell, *Globalization, Imperialism, and Masculinities*, in HANDBOOK OF STUDIES ON MEN & MASCULINITIES, *supra* note 149, at 82–83.

Women veterans face similar challenges returning to civilian life.¹⁵¹ A military-oriented identity construct, like “veteran,” is derived from involvement with the military-as-institution. Physical, mental, and emotional toughness are expected of all service members.¹⁵² In this way, “masculine” characteristics (traditionally speaking) are institutionalized.¹⁵³ Said another way, a core component of the “veteran identity” is a sense that one is physically and mentally tough (the same characteristics traditionally associated with hegemonic masculinities).¹⁵⁴ Being a veteran, to some extent, means identifying with one’s military training and military experiences, of which toughness is central. This applies equally to men and women who successfully navigate the military-as-institution.¹⁵⁵ In a very real way, “veteran” status becomes “genderless” because the identity standards apply equally to women and men.

Being physically injured can mean having to rely on others, which is the very opposite of self-sufficiency. Being psychologically or spirituality wounded is often taken as a sign of mental weakness, and for the veteran steeped in the culture and traditions of military toughness, this can be a significant source of stress.¹⁵⁶ Since self-sufficiency and toughness are also components of dominant masculinities, veterans stand to suffer threats not just to a military identity, but also to their sense of gender identity. As previously discussed, situations like this can aggravate any mental health problems that are already

151. For an overview of this literature, see Gina Maiocco & Mary Jane Smith, *The Experience of Women Veterans Coming Back from War*, 30 ARCHIVES PSYCHIATRIC NURSING 393 (2016).

152. See Kacy Crowley & Michelle Sandhoff, *Just a Girl in the Army: U.S. Iraq War Veterans Negotiating Femininity in a Culture of Masculinity*, 43 ARMED FORCES & SOC’Y 221, 224–26 (2016).

153. *Id.*

154. See Hinojosa, *supra* note 147.

155. See WALTER REED ARMY INST. OF RESEARCH, BATTLEMIND TRAINING I: TRANSITIONING FROM COMBAT TO HOME (2006). Although we think the “veteran identity” is uniform, we recognize that women veterans face unique challenges navigating gender roles in the military and in civilian life. A full analysis of these issues is beyond the scope of this Article. For further reference, see Christina D. Dodds & Matthew D. Kiernan, *Hidden Veterans: A Review of the Literature on Women Veterans in Contemporary Society*, ILLNESS, CRISIS & LOSS (Mar. 4, 2019), <https://journals.sagepub.com/doi/full/10.1177/1054137319834775>.

156. See M. Audrey Burnam et al., *Systems of Care: Challenges and Opportunities to Improve Access to High Quality Care*, in INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 245, 278–79 (Terri Tanielian & Lisa H. Jaycox eds., 2008).

present.¹⁵⁷ Some research indicates that the return to civilian life is particularly challenging for women veterans who may suffer mental health problems at higher rates than men do.¹⁵⁸

It is also important to remember that military training shapes veterans' responses to situations that, while on duty, can reduce the risk of being harmed or killed. However, after discharge, the same behaviors may be problematic, or illegal.¹⁵⁹ In particular, the deployment mindset known as BATTLEMIND has been particularly problematic for newly reintegrated veterans.¹⁶⁰ BATTLEMIND stands for: Buddies (unit cohesion), Accountability, Targeted aggression, Tactical awareness, Lethally armed, Emotional control, Mission operation security, Individual responsibility, Non-Defensive (combat) driving, and Discipline and order.¹⁶¹ Tactical (or hyper) awareness, targeted aggression, driving aggressively (or non-defensively), suppressing emotion, and remaining secretive (maintaining operational security) do not work well in a civilian environment and can land veterans in trouble. Training designed to optimize soldier preparedness and survival in combat zone makes veterans more susceptible to aggressive, or even violent, behavior, especially when compounded by significant clinical and psychological stressors.¹⁶²

Research shows that veterans are more likely to use and abuse drugs and alcohol, which can increase the likelihood of inappropriately using violence or aggression, which increases the likelihood of arrest.¹⁶³ Veterans with untreated mental health problems are particu-

157. Hinojosa, Hinojosa & Högnäs, *supra* note 125; *see generally* Ramon Hinojosa et al., *Veteran Family Reintegration and Primary Care Needs*, 23 J. AM. BOARD FAMILY MED. 770 (2010).

158. Tom Vanden Brook, *Army Lifts Ban on Waivers for Recruits with History of Some Mental Health Issues*, USA TODAY (Nov. 12, 2017, 12:00 PM), <https://www.usatoday.com/story/news/politics/2017/11/12/army-lifts-ban-recruits-history-self-mutilation-other-mental-health-issues/853131001/>; Christopher Woody, *The Army Has Started Giving Waivers for Mental-Health Conditions to Attract More Recruits*, BUS. INSIDER (Nov. 13, 2017, 5:37 PM), <http://www.businessinsider.com/army-mental-health-waivers-attract-recruits-2017-11>; *see* Gina Maiocco & Mary Jane Smith, *The Experience of Women Veterans Coming Back from War*, 30 ARCHIVES PSYCHIATRIC NURSING 393, 393–94 (2016).

159. Cartwright, *supra* note 2, at 300; *see also* Sreenivasan et al., *supra* note 109, at 267 tbl.1.

160. Hinojosa & Hinojosa, *supra* note 122.

161. WALTER REED ARMY INST. OF RESEARCH, BATTLEMIND TRAINING I: TRANSITIONING FROM COMBAT TO HOME (2006).

162. Hinojosa & Hinojosa, *supra* note 122; Sreenivasan et al., *supra* note 109, at 267–68.

163. *See generally* Joel R. Grossband et al., *Relationships Among Veteran Status, Gender, and Key Health Indicators in a National Young Adult Sample*, 64 PSYCHIATRIC SERV. 547 (2013).

larly prone to self-medicate with drugs and alcohol, and as a group, veterans are more likely to use and abuse alcohol and illegal drugs, leading them to have higher rates of substance-use disorders secondary to their mental health condition.¹⁶⁴ The number of veterans with co-morbid substance use and mental health disorders has increased dramatically, with two-thirds (sixty-three percent) to three-quarters (seventy-six percent) of Gulf War Era veterans who used VA health-care having a diagnosis for both.¹⁶⁵ PTSD and substance use disorders are independent factors predicting increased social and behavioral difficulties; when presenting together, individuals have increased difficulties with legal, financial, social, and behavioral issues, and tend to have much poorer medical outcomes.¹⁶⁶

Outside of substance use, other known factors, such as being younger, being male, having a history of arrests, or witnessing family violence at a young age are all significantly related to veterans' likelihood of being arrested.¹⁶⁷ Taken together, the loss of important social supports, the loss of important identities, re-entry into a civilian world that does not understand veterans' experiences, and training to deal with threats that are illegal under most civil laws may set some veterans up for poor legal outcomes.

D. Underutilization of VA Services

Although most veterans are eligible for VA medical services that address mental health and substance abuse problems, their utilization of VA services is very low. One of the main challenges is connecting veterans who need treatment with VA services. Most veterans are not

164. *Id.*; Sreenivasan et al., *supra* note 109, at 266. Compounding these post-service conditions, are pre-existing, pre-service conditions which recruits are increasingly being accepted into military service with. In 2017, the military lifted a ban put in place in 2009 on accepting recruits with mental health concerns, including bi-polar disorder, depression, and drug and alcohol abuse. *See supra* note 158 and accompanying text.

165. *See generally* Karen H. Seal et al., *Substance Use Disorders in Iraq and Afghanistan Veterans in VA Healthcare, 2001–2010: Implications for Screening, Diagnosis and Treatment*, 116 *DRUG & ALCOHOL DEPENDENCE* 93, 96 (2011).

166. Meghan E. McDevitt-Murphy et al., *PTSD Symptoms, Hazardous Drinking, and Health Functioning Among U.S. OEF and OIF Veterans Presenting to Primary Care*, 23 *J. TRAUMATIC STRESS* 108, 110–11 (2010); Cynthia A. Stappenbeck et al., *The Effects of Alcohol Problems, PTSD, and Combat Exposure on Nonphysical and Physical Aggression Among Iraq and Afghanistan War Veterans*, 6 *PSYCHOL. TRAUMA: THEORY RES. PRAC. & POL'Y* 65, 68 (2014); Susan R. Tate et al., *Health Problems of Substance-Dependent Veterans with and Those Without Trauma History*, 33 *J. SUBSTANCE ABUSE TREATMENT* 25, 30 (2007).

167. Eric B. Elbogen et al., *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, 80 *J. CONSULTING & CLINICAL PSYCHOL.* 1097, 1100–01 (2012).

enrolled in VA health care services.¹⁶⁸ Estimates show that somewhere between forty-three and forty-eight percent of eligible veterans use any VA services.¹⁶⁹

There are no solid estimates of the costs associated with providing mental health and substance abuse treatments to veterans owing to the variety of agencies that provide care.¹⁷⁰ Those on active duty use healthcare insurance for military personnel and their families provided by the Department of Defense Military Treatment Facilities and TRICARE. Veterans use the VA and TRICARE, but may also use private or employer-based insurance, which makes it difficult to accurately track utilization and treatment costs. Despite some of these limitations, the Congressional Budget Office has estimated that the costs of providing health care for the two signature injuries of the wars in Iraq and Afghanistan (PTSD and TBI) are much higher than providing healthcare for veterans without PTSD or TBI, pushing the overall average yearly cost for providing health care up to \$9,100 per veteran.¹⁷¹ Table 1 does not accurately capture the costs for all types of mental health and substance abuse care, but does indicate that veterans with co-morbid mental health and other conditions (like TBI) have significant healthcare costs.

TABLE 1.
COST TO TREAT RECENT COMBAT VETERANS DIAGNOSED
WITH PTSD, TBI, OR BOTH

<i>Diagnosis</i>	<i>Average Cost for First Year of Treatment</i>
PTSD	\$8,300
TBI	\$11,700
PTSD and TBI	\$13,800
Neither condition	\$2,400
Average (all veterans)	\$9,100

Source: CONG. BUDGET OFFICE, PUB. NO. 4097, THE VETERANS HEALTH ADMINISTRATION'S TREATMENT OF PTSD AND TRAUMATIC BRAIN INJURY AMONG RECENT COMBAT VETERANS 18 (2012) (see *supra* note 171).

168. Molly Clever & David R. Segal, *The Demographics of Military Children and Families*, 23 *FUTURE CHILD*. 13, 31 (2013).

169. The forty-three percent usage rate in FY 2016 is an increase over prior years. See NAT'L CTR. FOR VETERANS ANALYSIS AND STATISTICS, U.S. DEP'T OF VETERANS AFFAIRS, UNIQUE VETERAN USERS REPORT FY 2014, at 3, 6 (2016), https://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Unique_Veteran_Users_2014.pdf.

170. Jomana H. Amara, *Military and Veterans' Health, Health Care, and Wellbeing*, 29 *DEF. & PEACE ECON.* 1, 2 (2018).

171. CONG. BUDGET OFFICE, PUB. NO. 4097, THE VETERANS HEALTH ADMINISTRATION'S TREATMENT OF PTSD AND TRAUMATIC BRAIN INJURY AMONG RECENT COMBAT VETERANS 18 (2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/02-09-PTSD_0.pdf.

The 2019 VA budget requests \$198.6 billion, a \$12.1 billion increase over the 2018 budget. Most of these funds will flow to health care and benefits, with \$382 million earmarked for opioid treatment, \$1.8 billion for homeless and at-risk veteran programs, and \$8.6 billion allocated for mental health services.¹⁷² For mental health services, there is a proposed \$468 million increase from FY2018 to improve PTSD screening, support suicide risk management, and to expand VA services to veterans with 'Other than Honorable' discharge status.¹⁷³

Despite the general increase in funding for VA treatment, it appears that a substantial percentage of veterans end up in jail instead of seeking treatment for substance abuse and mental health problems at the VA. The *Report of Veterans Arrested and Booked in Travis County Jail* found that eighty-six percent of veterans in jail were honorably discharged and eligible for VA services, but only thirty-five percent of arrested veterans had received any VA services.¹⁷⁴

Why are VA services underutilized? As discussed in the previous section, veterans see themselves as physically tough and mentally resilient. Asking for assistance can be seen as weakness and stands at odds with both a military identity and a gender identity built around self-sufficient mental strength. Many veterans view treatment, particularly the insistence on processing feelings with strangers in therapy sessions, as emasculating and threatening.¹⁷⁵ Despite eligibility for potentially useful services, some veterans lose their way in the civilian world and turn to violence, aggression, and substance use to cope with these identity threats. These behaviors can result in crimes that land them in jail. VTCs were created, in large part, to be sensitive to the unique needs of military veterans and in recognition of the need to connect them to the services that have the potential to address their needs on multiple fronts.

172. Press Release, U.S. Dep't of Veterans Affairs, President Trump Seeks \$12B Increase in FY2019 VA Budget to Support Nation's Veterans (Feb. 12, 2018), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=4007>.

173. *Id.*

174. This unique report attempted to determine how many veterans are arrested each month, the extent of their charges, and their use of VA services. TRAVIS CTY. VETERANS INTERVENTION PROJECT, REPORT OF VETERANS ARRESTED AND BOOKED IN TRAVIS COUNTY JAIL 5, 8 (2009), https://www.traviscountytx.gov/images/constables/Doc/vip_jail_survey_report.pdf.

175. On the stigma associated with mental health services, see Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 16 (2004).

III.

VETERANS' TREATMENT COURTS CONNECT VETERANS TO
FEDERAL SERVICES

The significant physical and mental health problems of America's veterans present challenges for policy makers, but obviously veterans are not the only segment of the population that faces significant challenges. If significant needs alone were sufficient to spur court reform, we would observe other reforms proceed with the success of VTCs.¹⁷⁶ The challenges detailed in the preceding section are part of the story, but a key factor in the growth of VTCs is their ability to supply needed services to state criminal justice systems without imposing additional costs on those systems.¹⁷⁷

VTCs are often seen as an alternative to traditional criminal prosecution for veterans with substance abuse and mental health issues.¹⁷⁸ VTCs do offer an alternative to traditional criminal prosecution but in most jurisdictions, the practical effect of establishing a VTC is creating an alternative to general treatment courts. VTCs combine the drug and mental health court models, adding specialist staff such as veteran mentors and VA representatives.¹⁷⁹ In this section, we identify some of the key differences between general treatment courts and VTCs. The guiding principle of VTCs appears to be making the greatest possible use of federal resources for the benefit of veterans arrested by state and local governments.

A. Identifying Veterans in the Criminal Justice System

As discussed in the prior section, veterans often have a tough time adjusting to civilian life. Veterans who are eligible for VA services to treat mental health and substance abuse issues often do not use these services.¹⁸⁰ When mental health and substance abuse get out of control and entangle veterans with the criminal justice system, authorities may not know that the offender is a veteran. Authorities do not routinely ask about past military service during processing and defendants may not volunteer this information.¹⁸¹

176. Similar observations could be made about teenagers in foster care, unwed pregnant women, unemployed young males in inner cities, etc.

177. See *infra* notes 239–51 and accompanying text.

178. Cavanaugh, *supra* note 2, at 465.

179. Russell, *supra* note 15, at 364–65.

180. TRAVIS CTY. VETERANS INTERVENTION PROJECT, *supra* note 174; see also *supra* notes 168–75 and accompanying text.

181. It is not routine to ask arrestees about veteran status. See TRAVIS CTY. VETERANS INTERVENTION PROJECT, *supra* note 174, at 3; Julie Marie Baldwin, *Whom Do*

Prior to the development of VTCs, the VA's outreach to veterans with severe mental health and substance abuse issues was limited.¹⁸² Part of establishing a VTC is instituting a process to systematically identify veterans in the general population of criminal defendants.¹⁸³ By identifying veterans and diverting them to a special docket, VTCs provide VA Justice Outreach specialists opportunities to connect VTC participants to VA services that potentially address the underlying causes of their legal problems.¹⁸⁴ Program specialists work as team members with VTCs to provide TBI, PTSD, and other clinical assessments and case management for veterans.¹⁸⁵

A basic profile of VTC participants is helpful. The overwhelming majority of VTC participants are men.¹⁸⁶ This is especially true for programs that limit eligibility to those with combat-related trauma.¹⁸⁷ Hennepin County found ninety-seven percent of its VTC participants were males.¹⁸⁸ The percentage of women in these programs can be expected to increase given the rising percentage of women in the military and in combat, but there will be a significant time lag. Typical VTC participants are not young men recently returned from battle, though the number of younger participants is growing.¹⁸⁹ The

They Serve? A National Examination of Veterans Treatment Court Participants and Their Challenges, 28 CRIM. JUST. POL'Y REV. 515, 537 (2017).

182. Anne S. Douds et al., *Varieties of Veterans' Courts: A Statewide Assessment of Veterans' Treatment Court Components*, 28 CRIM. JUST. POL'Y REV. 740, 740–41 (2017).

183. JUSTICE PROGRAMS OFFICE, AM. UNIV. SCH. OF PUB. AFFAIRS, FREQUENTLY ASKED QUESTIONS SERIES: STRATEGIES FOR IDENTIFYING DEFENDANTS WHO ARE VETERANS FOR POTENTIAL PARTICIPATION IN VETERANS COURT PROGRAMS 1 (2013), <https://nicic.gov/frequently-asked-questions-series-strategies-identifying-defendants-whoare-veterans-potential>.

184. *Veterans Justice Outreach Program*, U.S. DEP'T OF VETERANS AFF., <https://www.va.gov/homeless/vjo.asp> (last updated Mar. 13, 2018).

185. KIERRA ZOELICK, THE ROLE OF VETERANS JUSTICE OUTREACH SPECIALISTS IN VETERANS TREATMENT COURTS 1–2, <https://www.american.edu/spa/jpo/videos/upload/The-Role-of-Veterans-Justice-Outreach-Specialists-in-VTCs-Fact-Sheet.pdf>.

186. Baldwin, *supra* note 181, at 528.

187. Women have only been allowed to serve in combat since 2015. See Matthew Rosenberg & Dave Philipps, *All Combat Roles Now Open to Women, Defense Secretary Says*, N.Y. TIMES (Dec. 3, 2015), <https://www.nytimes.com/2015/12/04/us/politics/combata-military-women-ash-carter.html>.

188. ANNE CARON, FOURTH JUDICIAL DISTRICT VETERANS COURT—TWO YEAR REVIEW: JULY 2010–JUNE 2012, at 12 (2013), http://www.mncourts.gov/Documents/4/Public/Research/Veterans_Court_Two_Year_Review.pdf.

189. Baldwin, *supra* note 181, at 529 tbl.2. Recognition of and increased emphasis on PTSD diagnosis and treatment by the VA may account for greater OIF/OEF/OND veteran participation in rehabilitative programs, including VTCs, as compared to Vietnam and Desert Storm era veterans. See generally Bradley E. Karlin et al., *Dissemination of Evidence-Based Psychological Treatments for Posttraumatic Stress Disorder in the Veterans Health Administration*, 23 J. TRAUMATIC STRESS 663 (2010) (discuss-

problems that land veterans in jail may not arise for many years. Mental health and substance abuse problems may not become unmanageable for years or decades after active duty. According to a Minnesota study, the average age of veteran court participants was forty-four years old.¹⁹⁰ Similarly, data from the Anchorage, Alaska, VTC indicated that seventy-nine percent of veterans participating in that program were between the ages of forty-one and sixty.¹⁹¹

Some veterans cannot benefit from being connected to the VA. The most common VA benefit disqualifications are serving fewer than two years of active duty or being dishonorably discharged from the service.¹⁹² Importantly, if a veteran serves less than the qualifying period because of service-connected injury or trauma, he or she remains eligible for medical benefits.¹⁹³

B. Eligibility Guidelines

Only a portion of veterans who commit crimes are eligible to have their cases referred to VTCs. Veterans' access to court-supervised treatment depends on eligibility criteria used by VTCs. All veterans' courts require participants to have either a substance use disorder or a treatable psychiatric condition.¹⁹⁴ Beyond that common criteria, there is substantial variation in eligibility criterion among

ing the VA's recent expansion of PTSD-related services for veterans); *40 Years Later: Addressing PTSD Among Older Combat Veterans*, COUNSELING@NORTHWESTERN: BLOG (Feb. 22 2018), <https://counseling.northwestern.edu/blog/addressing-PTSD-among-older-combat-veterans/>; Press Release, U.S. Dep't of Veterans Affairs, Dep't of Def., VA Establish Two Multi-Institutional Consortia to Research PTSD and TBI (Aug. 10, 2013), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2473>.

190. CARON, *supra* note 188, at 3.

191. Disability claims by veterans for service-related injuries tend to peak thirty years after their service ends. See Cartwright, *supra* note 2, at 315.

192. Because applicable laws and regulations have been revised over time, the length of service requirement depends on when a veteran served in the military and nature of his or her commission (i.e., active duty or reserve, combat or non-combat). There are other disqualifying circumstances and numerous exceptions. For more information on eligibility for VA medical services, see SIDATH V. PANANGALA, CONG. RESEARCH SERV., R42747, HEALTH CARE FOR VETERANS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 4 n.24 (2016), <https://fas.org/sgp/crs/misc/R42747.pdf>; Evan Seamone, Questionnaire for a Rough Estimate of a VTC Participant's Eligibility for VA Benefits (2012), <https://jpo.wrlc.org/bitstream/handle/11204/4322/Questionnaire%20for%20a%20Rough%20Estimate%20of%20a%20VTC%20Participants%20Eligibility%20for%20VA%20Benefits.pdf?sequence=1&isAllowed=Y>. There is a complex administrative appeal process for those denied benefits. One of the services provided by VA outreach is helping veterans establish eligibility for treatment, if not a full range of VA benefits.

193. PANANGALA, *supra* note 192, at 4 n.24.

194. R. Scott Johnson et al., *Predictors of Incarceration of Veterans Participating in U.S. Veterans' Courts*, 68 PSYCHIATRIC SERVS. 144, 144 (2017).

VTCs.¹⁹⁵ The jurisdictional requirements of VTCs reflect the different rationale for affording special treatment to veterans.¹⁹⁶ Some eligibility criteria are related to the unique public service provided by armed forces while other eligibility criteria are used to take full advantage of VA healthcare benefits.

Over twenty percent of VTC programs require potentially eligible participants to show a “nexus between their current charge and their military service.”¹⁹⁷ This does not mean that the offense was committed while the defendant was performing military service, but rather that some service-connected disability was a significant cause of his offense.¹⁹⁸ This service-connection requirement can be satisfied through diagnosis of a common service-related condition, such as PTSD or TBI.¹⁹⁹ In the absence of an official diagnosis, meeting the service-connected disability requirement can be complicated, requiring testimony from a treating physician, the veteran, or an expert witness establishing a link between the offense and prior military service.²⁰⁰

Twelve percent of VTCs make combat experience a program requirement.²⁰¹ This can be problematic given the changing nature of warfare in which there are no clear front-lines and everyone within a deployment zone can be subject to combat conditions even if an individual is not in the combat arms (i.e. infantry, armor, or artillery).²⁰² Some VTCs combine the service-connection and combat experience

195. U.S. DEP'T OF VETERANS AFFAIRS, VETERANS COURT INVENTORY 2016 UPDATE: CHARACTERISTICS OF AND VA INVOLVEMENT IN VETERANS TREATMENT COURTS AND OTHER VETERAN-FOCUSED COURT PROGRAMS FROM THE VETERANS JUSTICE OUTREACH SPECIALIST PERSPECTIVE 3 (2017), <https://www.va.gov/HOMELESS/docs/VJO/2016-Veterans-Court-Inventory-Update-VJO-Fact-Sheet.pdf>.

196. State criminal courts do not violate the Equal Protection Clause by discriminating between veterans and non-veterans because veteran status is not a suspect classification. See Eric Merriam, *Non-Uniform Justice: An Equal Protection Analysis of Veterans Treatment Courts' Exclusionary Qualification Requirements*, 84 Miss. L.J. 685, 700 (2015).

197. AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, *supra* note 36, at 14.

198. *Id.*

199. *Id.* at 2, 14.

200. *Id.* at 14.

201. U.S. DEP'T OF VETERANS AFFAIRS, VETERANS COURT INVENTORY 2014 UPDATE: CHARACTERISTICS OF AND VA INVOLVEMENT IN VETERANS TREATMENT COURTS, DOCKETS, AND TRACKS FROM THE VETERANS JUSTICE OUTREACH SPECIALIST PERSPECTIVE 3 (2016), <https://www.va.gov/HOMELESS/docs/VTC-Inventory-Fact-Sheet-0216.pdf>.

202. See Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 3–4 (2010).

requirements and limit eligibility to veterans whose criminal behavior occurred because of trauma suffered in a combat zone or hazardous duty area.²⁰³ This requirement can preclude veterans whose service, and traumatic experiences, fell outside a designated combat zone, like women who experience military sexual trauma while serving state-side.²⁰⁴

These strict eligibility requirements reflect the moral justification for VTCs: special treatment should be afforded to those who have sacrificed their physical and mental health to serve their country. The service-connection and combat experience requirements are not imposed to make maximum use of federal resources. Except in the case of dishonorably discharged veterans, whether a veteran's need for mental health and/or substance abuse treatment arises from a service-connected injury sustained in combat does not affect VA benefit eligibility.²⁰⁵

VTCs frequently exclude veterans who were dishonorably discharged from the military. Approximately forty percent of VTCs exclude veterans who were dishonorably discharged even if there is no relationship between the discharge and the criminal offense.²⁰⁶ Timko et al. found that more than one-third of VTCs only accept veterans eligible for VA health benefits.²⁰⁷ VTC-eligibility criteria related to discharge status and benefit eligibility are driven by practical concerns about covering the cost of treatment programs.²⁰⁸

Veterans' access to health care through the VA depends on how he or she was discharged from the military.²⁰⁹ The VA may limit, or bar, access to healthcare benefits for veterans whose discharge is dishonorable.²¹⁰ A service member may be dishonorably discharged and barred from receiving VA health benefits for committing offenses that are unique to the military (i.e., desertion and being absent without

203. Cavanaugh, *supra* note 2, at 479.

204. See U.S. DEP'T OF VETERANS AFFAIRS, COMBAT VETERAN ELIGIBILITY 1 (2015), https://www.va.gov/HEALTHBENEFITS/resources/publications/IB10-438_combat_veteran_eligibility.pdf.

205. See *infra* notes 209–11 and accompanying text.

206. AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, *supra* note 36, at 14.

207. Christine Timko et al., *A Longitudinal Examination of Veterans Treatment Courts' Characteristics and Eligibility Criteria*, 17 JUST. RES. & POL'Y 123, 129 (2016). The Hennepin County VTC allows veterans who are not eligible for VA services to participate in the Court and they receive community-based treatments. See CARON, *supra* note 188, at 8.

208. For cost of treatment estimates, see CONG. BUDGET OFFICE, *supra* note 171.

209. Timko et al., *supra* note 207, at 126.

210. *Id.*

leave) as well as general offenses involving moral turpitude, and willful and persistent misconduct.²¹¹ If a service member is discharged for committing a felony or multiple misdemeanors, he or she is generally not eligible for VA benefits.²¹² However, dishonorably discharged veterans are still eligible to receive VA medical care for disability or injuries suffered during active duty.²¹³ For example, if a service-connected injury, like PTSD, caused a service member to commit a general offense, like a felony assault, that resulted in a dishonorable discharge, that individual may be eligible for VA treatment for PTSD (but not VA medical care for health conditions unrelated to service like veterans who meet eligibility requirements).

A potential downside to the “no dishonorable discharge” criteria exists for survivors of military sexual assault. A 2016 Department of Defense report details the use of administrative discharge in retaliation for filing formal complaints against commanders for sexual harassment and abuse.²¹⁴ Additionally, some soldiers with untreated PTSD have also been dishonorably discharged for poor conduct, a situation that has led veterans to file lawsuits to upgrade their discharge status.²¹⁵ The number of veterans dishonorably discharged in this manner is unknown, but the problem is widespread enough to warrant reports to Congress.²¹⁶

The common bar to eligibility is the exclusion of those who have committed violent crimes, including domestic violence.²¹⁷ While there is growing awareness of the link between military service, service-connected disabilities, and domestic violence, only 21.8% of VTCs

211. UMAR MOULTA-ALI & SIDATH V. PANANGALA, CONG. RESEARCH SERV., R43928, VETERANS' BENEFITS: THE IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY 8–9 (2015).

212. See 38 C.F.R. § 3.12(d)(3)–(4) (2018).

213. OFFICE OF PUB. AFFAIRS MEDIA RELATIONS, U.S. DEP'T. OF VETERANS AFFAIRS, EMERGENT MENTAL HEALTH CARE FOR FORMER SERVICE MEMBERS 1 (2017).

214. SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, U.S. DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2016, at 32–33 (2017).

215. Meghann Myers, *Veterans with PTSD Are Suing the Army to Have Their Discharges Upgraded*, ARMY TIMES (Apr. 17, 2017), <https://www.armytimes.com/news/your-army/2017/04/17/veterans-with-ptsd-are-suing-the-army-to-have-their-discharges-upgraded>.

216. See National Defense Authorization Act, Pub. L. No. 115-91, § 1051, 131 Stat. 1560, 1560–68 (2017); see also Quil Lawrence, *More Vets Who Are Coping with PTSD from Sexual Assaults Get Honorable Discharges*, NPR (June 1, 2018, 10:44 PM), <https://www.npr.org/sections/thetwo-way/2018/06/01/616259732/more-vets-coping-with-ptsd-after-sexual-assaults-get-honorable-discharges>.

217. Timko et al., *supra* note 207, at 130.

allow veterans with a domestic violence charge.²¹⁸ This percentage may be increasing.²¹⁹ Part of the problem is identifying a nexus between domestic violence and a defendant's military record which is largely unavailable to criminal courts.²²⁰ Though generally characterized by offenses at the extreme end of the spectrum, such as homicide and rape, the definition of what constitutes a violent offense is fairly wide and subject to ongoing litigation.²²¹

For judicially-established VTCs, the court makes its own eligibility rules.²²² VTCs established under legislative initiative tend to have more rigidity, codifying specific requirements.²²³ Out of sixteen established state legislative initiatives (thirteen surveyed²²⁴ and three post-survey legislative initiatives in Tennessee,²²⁵ Utah,²²⁶ and Virginia²²⁷), eight require proof of service-connection, while ten codify some specific eligibility criteria.²²⁸ If a VTC was created by the judiciary, presiding judges generally have greater discretion to decide whether veterans who have committed violent crimes are eligible for VTCs compared to VTCs created by the legislature.²²⁹

218. *Id.* On the military response to domestic violence, see generally Simeon Stamm, Note, *Intimate Partner Violence in the Military: Securing Our Country, Starting with the Home*, 47 *FAM. CT. REV.* 321 (2009). For arguments in favor of making violent offenders eligible for VTCs, see Cavanaugh, *supra* note 2, at 486–87.

219. Eligibility requirements may be getting laxer. See Jack Tsai et al., *Diversion of Veterans with Criminal Justice Involvement to Treatment Courts: Participant Characteristics and Outcomes*, 68 *PSYCHIATRIC SERVS.* 375, 379–80 (2017).

220. Amy Fairweather et al., *Veterans in the Justice System: Treatment of Violent Offenders*, L.A. *DAILY J.*, Aug. 17, 2010, at 7, http://www.bwjp.org/assets/documents/pdfs/veterans_in_the_justice_system_treatment_of_violent_offenders.pdf.

221. 34 U.S.C. § 10613 (2012) (defining “violent offender” for purposes of drug court grant programs); see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (finding term “aggravated felony” unconstitutionally vague for purposes of alien removal proceedings).

222. See generally Russell, *supra* note 15 (describing how the Buffalo, New York, VTC was set up).

223. See TENN. ADMIN. OFFICE OF THE COURTS, *VETERANS TREATMENT COURTS LEGISLATIVE REPORT* 3–4 (2012), http://www.tncourts.gov/sites/default/files/docs/vtc_report_-_final.pdf; Timko et al., *supra* note 207, at 125–26. For a list of VTCs established by state statutes, see AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, *supra* note 36, at 31–35.

224. AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, *supra* note 36, at 31–35.

225. TENN. CODE ANN. § 16-6-101 (2015).

226. UTAH CODE ANN. § 78A-5-301 (West 2015).

227. VA. CODE ANN. § 16.1-266.1 (2016).

228. AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, *supra* note 36, at 31–35.

229. See Sohil Shah, *Authorization Required: Veterans Treatment Courts, the Need for Democratic Legitimacy, and the Separation of Powers Doctrine*, 23 *S. CAL. INTERDISC. L.J.* 67, 70 (2014).

C. Peer Mentoring

Arguably, the most important divergence from the general treatment court model is the use of veteran peer mentors, whose support of veterans through the program is thought to be essential to rehabilitation and successful program completion.²³⁰ Over eighty percent of VTC programs utilize peer mentors.²³¹ A more recent survey by Timko et al. found that less than two-thirds of VTCs have a peer mentorship component.²³² Timko et al. note that those courts with active peer-mentorship “had a higher participant census and a longer duration of participants’ time under Court supervision than Courts without this component.”²³³ Peer mentors with common experiences in military settings help motivate VTC participants to make treatment appointments and complete their programs.²³⁴ Judge Robert Russell, a key figure in the VTC movement, has called peer-mentoring the “secret sauce” for VTC success.²³⁵

Another difference between VTCs and drug courts is how they are organized and budgeted within state court systems. Over half of VTCs operate within existing court budgets, and receive no additional funding.²³⁶ VTCs have been established in jurisdictions with existing, successful therapeutic courts.²³⁷ In addition, most VTC judges are not assigned exclusively to veterans’ courts, but rather split their time,

230. Russell, *supra* note 22, at 131–32; *see also* Russell, *supra* note 28, at 400 (peer mentors reduce stigma of mental health treatment for those with warrior mentality).

231. AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, *supra* note 36, at 10.

232. Timko et al., *supra* note 223, at 130.

233. *Id.* at 124.

234. Slattery et al., *supra* note 15, at 928; *see also* Eileen M. Ahlin & Anne S. Douds, *Military Socialization: A Motivating Factor for Seeking Treatment in a Veterans’ Treatment Court*, 41 AM. J. CRIM. JUST. 83, 89–92 (2016); Tyler J. Vaughan et al., *Exploring Therapeutic and Militaristic Contexts in a Veteran Treatment Court*, 30 CRIM. JUST. POL’Y REV. 79, 97 (2019).

235. *See* Bryan Lett, *Veterans Court Mentors Aim to Change Lives*, DISABLED AMERICAN VETERANS (Mar. 15, 2017), <https://www.dav.org/learn-more/news/2017/veterans-court-mentors-aim-change-lives/>; Hon. Robert Russell Reflects on the Founding and Future of Veterans Treatment Courts, HARV. L. TODAY (Dec. 5, 2016), <https://today.law.harvard.edu/hon-robert-russell-reflects-founding-future-veterans-treatment-courts/>.

236. Julie Marie Baldwin, *Investigating the Programmatic Attack: A National Survey of Veterans Treatment Courts*, 105 J. CRIM. L. & CRIMINOLOGY 705, 724 (2015).

237. *See* Anne S. Douds et al., *Varieties of Veterans’ Courts: A Statewide Assessment of Veterans’ Treatment Court Components*, 28 CRIM. JUST. POL’Y REV. 740, 742 (2017). Our research indicates that no court system has created a VTC without first establishing a drug court.

presiding over one or more other treatment court dockets.²³⁸ Thus, a court system can establish a VTC without disrupting its operations and antagonizing other judges.

D. Services Available from the VA

The key difference between veterans and others eligible for treatment courts is the resources available to veterans. The VA serves as a “single payer” for medical care for veterans.²³⁹ Partnering with the VA can help local authorities provide needed service to some defendants without depleting state resources.²⁴⁰ Working with the VA, VTCs can provide veterans a comprehensive treatment program that addresses mental health and substance abuse issues along with housing and job training.²⁴¹ This highly structured approach, which gives veterans direction in many aspects of their lives, is helpful for those accustomed to strictly regimented military life.²⁴² According to a recent study of VTC implementation and performance, the availability of VA services and referrals are critical to the success of VTCs.²⁴³

Treating mental health and substance abuse problems requires a significant investment of resources. As noted in Table 1, average first year treatment costs for veterans with PTSD and/or TBI range from \$8,300 to \$13,800 per veteran depending on diagnosis.²⁴⁴ Effective treatment for substance abuse often requires medically-supervised detoxification; if an alcoholic is locked up in jail, he may go through delirium tremens (DTs) and die.²⁴⁵ For those with both mental illness

238. See Baldwin, *supra* note 236, at 746 (62.8% of VTC judges preside over other specialty courts).

239. Suzanne Gordon, *America's Biggest Publicly Funded, Fully Integrated Health-Care System Is Under Attack*, NATION (July 17, 2017), <https://www.thenation.com/article/americas-biggest-publicly-funded-fully-integrated-health-care-system-is-under-attack>.

240. Drug courts work more with community-based treatment programs, including local twelve-step recovery programs.

241. EDELMAN, THOMAS J. BERGER & GREGORY CRAWFORD, NAT'L INST. OF CORR., VETERANS TREATMENT COURTS: A SECOND CHANCE FOR VETS WHO HAVE LOST THEIR WAY 11, 73 (2016), <https://info.nicic.gov/jiv/sites/info.nicic.gov/jiv/files/030018.pdf>.

242. Lisa M. Shannon et al., *Examining Implementation and Preliminary Performance Indicators of Veterans Treatment Courts: The Kentucky Experience*, 63 EVALUATION & PROGRAM PLAN. 54, 64 (2017).

243. *Id.*

244. CONG. BUDGET OFFICE, *supra* note 171.

245. Kevin Fiscella et al., *Benign Neglect or Neglected Abuse: Drug and Alcohol Withdrawal in U.S. Jails*, 32 J.L. MED. & ETHICS 129, 129–30 (2004). On the challenges of treating substance abuse in the criminal justice context, see Tracy D. Gunter & Sandra K. Antoniak, *Evaluating and Treating Substance Use Disorders*, in HANDBOOK OF CORRECTIONAL MENTAL HEALTH 167 (Charles L. Scott ed., 2010); Redonna

and alcoholism/addiction, detoxification is necessary to establish a clinical baseline for diagnosis and to prescribe a medication regimen. In the criminal justice context, the patient may present a danger to himself and others, requiring security supervision in addition to medical staff, further increasing the cost of care.²⁴⁶ Long-term recovery may require regular psychiatric care, behavior therapy, social services, and outpatient care.²⁴⁷ On average, it takes VTC participants about fourteen months to complete their court-supervised treatment programs.²⁴⁸ This kind of treatment is very expensive and state criminal justice systems cannot afford to provide it in most cases.²⁴⁹

While many criminal offenders suffer from psychological and substance abuse issues, veterans are backed by a single payer health care system and others are not. By enlisting the help of the VA, state and local court programs can reduce the costs of treating substance abuse and mental health problems.²⁵⁰ Costs that have traditionally been borne by state and local governments can be addressed using federal resources.²⁵¹ To the extent that VTCs provide state courts opportunities to use federal resources to address some percentage of unmet need for treatment in the criminal justice system, they are a financial windfall for state governments.

K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 J. AM. MED. ASS'N 183, 183, 185 (2009).

246. See Gunter & Antoniak, *supra* note 245, for detailed cases demonstrating such challenges and associated costs.

247. KIRSTEN J. COLELLO & SIDATH VIRANGA PANANGALA, CONG. RESEARCH SERV., R44697, LONG-TERM CARE SERVICES FOR VETERANS 7–8 (2017), <https://fas.org/sgpp/crs/misc/R44697.pdf>.

248. ANNE CARON, FOURTH JUDICIAL DISTRICT VETERANS COURT—TWO YEAR REVIEW: JULY 2010–JUNE 2012, at 16 (2013), http://www.mncourts.gov/Documents/4/Public/Research/Veterans_Court_Two_Year_Review.pdf. Average length of time to graduate is more than one year, longer than it would take to serve the sentence for the underlying offense. See John W. Erickson Jr., *Veterans Treatment Courts: A Case Study of Their Efficacy for Veterans' Needs*, 49 INT'L J.L. & PSYCHIATRY 221, 223 (2016).

249. At present, it is estimated that only ten percent of state inmates receive any kind of drug treatment. See Steven Belenko & Jordan Peugh, *Estimating Drug Treatment Needs Among State Prison Inmates*, 77 DRUG & ALCOHOL DEPENDENCE 269, 276 (2005). Even if treating substance abuse problems is cost effective in the long run, state criminal justice systems do not have sufficient resources to meet needs.

250. See generally Slattery et al., *supra* note 15.

251. KERWIN HENDERSON & KEVIN STEWART, VETERANS TREATMENT COURTS 4 (2016), <http://www.american.edu/spa/jpo/initiatives/drug-court/upload/Fact-Sheet-on-Veterans-Treatment-Courts.pdf>.

IV.

EMPIRICAL RESEARCH ON THE EFFECTIVENESS OF
VETERANS' COURTS

In this section we review existing literature on the effectiveness of veterans' treatment courts. Data on VTC outcomes is "extremely limited" as many VTCs are too new to provide useful data.²⁵² VTCs are only now beginning to systematically collect data on eligibility, participation, recidivism, and other records relevant to evaluating effectiveness.²⁵³ The variety of VTCs makes it hard to reach definitive conclusions about their efficacy.²⁵⁴ As discussed in the previous section, there is significant variation in VTCs which makes it difficult to generalize about their effectiveness.²⁵⁵ Because empirical research on the effectiveness of VTCs is so limited in duration, geographic scope, and outcomes measured, we must attempt to piece together all the available evidence to gain some perspective on how effective they are.

It is stunning how quickly the VTC model has been adopted by state courts given the limited empirical evidence that they work better than drug courts or traditional criminal prosecution. When Judge Russell published his 2009 article on the Buffalo VTC, which proclaimed a zero percent recidivism rate among graduates, that program had only *three graduates*.²⁵⁶ These three veterans had just graduated and had little time to recidivate.²⁵⁷ In 2008, when state court systems began following Buffalo's lead, there was almost no empirical evidence that the VTC model improved upon general treatment courts. The movement started based on a few inspiring stories reported by the news media.²⁵⁸ VTCs were established first and assessed later.

Even if empirical evidence of effectiveness is not a key factor in the expansion of VTCs, it is still important to consider whether they are effective. Shifting costs to the federal government may benefit state and local governments, but it does not yield net savings and may be an inefficient use of public resources. Additionally, given the harm caused by untreated mental health and substance abuse problems

252. Ashok P. Yerramsetti et al., *Veteran Treatment Courts: A Promising Solution*, 35 BEHAV. SCI. & L. 512, 518 (2017); Cartwright, *supra* note 2, at 315.

253. Erickson, *supra* note 248, at 223.

254. *See generally* Baldwin, *supra* note 181.

255. Timko et al., *supra* note 207, at 125.

256. Russell, *supra* note 15, at 370.

257. Russell reported the zero percent recidivism as of December 2008. *Id.* Given the average time to complete a VTC program is over a year and the Buffalo VTC started in January 2008, its three graduates had only recently completed the program.

258. *See supra* note 29 and accompanying text.

among veterans, it is important to assess whether VTCs are a more effective alternative than general treatment courts.

A. *Early Assessments of VTCs Were Overly Optimistic*

Most early reports on the effectiveness of VTCs focus on recidivism rates and rely on the recollections of judges who started the programs. As noted above, Judge Russell reported that the one-year recidivism rate of the first cohort of Buffalo VTC graduates was zero percent.²⁵⁹ After eighteen months, the Buffalo program had 130 participants, fourteen graduates, none of whom recidivated within a year.²⁶⁰ Self-reported recidivism rates from other VTCs yield similarly impressive statistics. According to Judge Merrigan of Broward County, Florida, with 264 active cases, the recidivism rate of program participants was less than three percent.²⁶¹ In the first three years of operation of its pilot program, the San Diego VTC claimed a zero percent recidivism rate for thirty-five graduates.²⁶² The recidivism rates of VTCs in Colorado Springs, Colorado and Harris County, Texas are thought to be very low as well.²⁶³ Based on responses of eleven VTCs to an online survey about program graduation and recidivism, only one out of fifty-nine total graduates recidivated.²⁶⁴

Claims of single-digit recidivism rates among VTC graduates are simply not credible. These claims are the product of very small sample sizes, selective memory, and lack of systematic data collection. New court programs are often launched by particularly passionate judges. When others attempt to replicate the success of early adopters in less enthusiastic settings, they may not achieve the same results.²⁶⁵ If the literature on the effectiveness of drug courts is any indication, we

259. Russell, *supra* note 15, at 370.

260. Hawkins, *supra* note 13.

261. Erickson, *supra* note 248.

262. Raquel M. Derrick et al., *Serving Those Who Served: Outcomes from the San Diego Veterans Treatment Review Calendar (SDVTRC) Pilot Program*, 11 PSYCHOL. INJ. & L. 171, 178 (2018).

263. On the success of the Colorado Springs VTC, *see* Erickson, *supra* note 248, at 223; *Colorado Springs Court for Veterans Persists 5 Years On*, DENVER POST (June 6, 2015), <https://www.denverpost.com/2015/06/06/colorado-springs-court-for-veterans-persists-5-years-on>. For an early view on the success of the Harris County VTC, *see* Yerramsetti et al., *supra* note 252, at 518–19.

264. Justin Holbrook & Sara Anderson, *Veterans Courts: Early Outcomes and Key Indicators for Success* 30 (Widener L. Sch. Legal Studies Research Paper Series, Paper No. 11-25, 2011), <http://www.cvltf.org/files/96565777.pdf>.

265. Barry C. Edwards, *Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs*, 18 HARV. NEGOT. L. REV. 281, 286–87 (2013).

should expect the euphoria surrounding VTCs to subside and mixed reviews to emerge.²⁶⁶

More extensive analyses of mature programs point to modest, yet consistent, improvements in recidivism rates compared to the recidivism rates of those who are incarcerated or go through general treatment courts.²⁶⁷ A study of the first one hundred participants in the Harris County, Texas, VTC shows that those who stayed in the program longer were less likely to be arrested than those who were terminated or withdrew from participation earlier.²⁶⁸ A careful analysis of the Hennepin County, Minnesota, VTC over a two-year period found that the VTC was at least as effective, and probably more effective, than other problem-solving courts.²⁶⁹ Participants committed fewer offenses six months, one year, and two years after graduating from the VTC than they did in the corresponding times prior to participating.²⁷⁰ Within one year of graduation, 24.4% of forty-one veterans faced new criminal charges.²⁷¹ Analyzing outcomes from the first seven years of the Anchorage VTC, Judge Smith reported that forty-five percent of thirty-eight graduates faced new charges or revocation of probation.²⁷² Smith also reported that the recidivism rate of program graduates was actually higher than the recidivism rate of those who did not finish the program (thirty-one percent) and those who were eligible but did not participate (forty-one percent), but still lower than the state average (50.4%).²⁷³ These are small samples, but they show it is unreasonable

266. There is a growing body of literature that challenges the purported benefits of drug courts. See, e.g., Morris D. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT'G REP. 172, 172 (2002); John Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 97 (2007); Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 465 (2009).

267. Based on a 2012 national survey of seventy-nine VTCs on the outcomes of 3,649 participants, Baldwin reports that less than two percent of VTC program participants returned to the same VTC after committing another offense. This is an impressive statistic for VTC, but the study did not consider veterans' other contacts with the criminal justice system. See Baldwin, *supra* note 181, at 531.

268. R. Scott Johnson et al., *An Analysis of Successful Outcomes and Associated Contributing Factors in Veterans' Court*, 79 BULL. MENNINGER CLINIC 166, 172 (2015). This study does not report the program's overall recidivism rate.

269. CARON, *supra* note 188, at 17–18.

270. *Id.*

271. *Id.* at 18. The two-year recidivism rate (44.4%) is based on only eighteen graduates, so it is not discussed in the text.

272. Jack W. Smith, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004–December 31, 2010*, 29 ALASKA L. REV. 93, 107 (2012).

273. *Id.* at 107–08.

to promote VTCs as a silver bullet solution and expect single-digit recidivism rates.

B. Methodological Challenges

One of the most challenging issues in assessing whether VTCs are effective is establishing a baseline for making comparisons. While reporting data on outcomes, few researchers explicitly identify a “control group.” One might first consider recidivism rates of a comparable cohort in the general population of convicts. Age is a key factor: older offenders are less likely to recidivate. The typical VTC participant is a non-violent offender in his forties.²⁷⁴ According to the U.S. Sentencing Commission, 43.2% of offenders released between the ages of forty and forty-nine are re-arrested within eight years.²⁷⁵ Roughly twelve percent of this cohort is re-arrested within one year.²⁷⁶ Recidivism rates are higher for state offenders. The U.S. Sentencing Commission data suggest the recidivism rate for state offenders could be double that of federal offenders.²⁷⁷ The Florida Department of Corrections reports that nine percent of offenders between the ages of thirty-five and forty-nine upon release recidivated within one year.²⁷⁸

The overall recidivism rate of non-violent offenders in their forties is not an ideal control group for comparative purposes but can serve as a general reference point for what outcomes may be expected in the absence of targeted interventions.²⁷⁹ To evaluate the effectiveness of VTCs in the most rigorous manner possible, a researcher would conduct a randomized experiment on those eligible to participate in VTCs, randomly assigning some veterans to VTCs and others to traditional criminal punishments (and perhaps another group to other treat-

274. See *infra* Table 2; see also CARON, *supra* note 188, at 12 (finding that VTC participants average 44.4 years of age).

275. Based on a sample size of 5,894. See KIM STEVEN HUNT & BILLY EASLEY II, U.S. SENTENCING COMM’N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 22 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf.

276. *Id.* at 25–26. This figure includes all types of federal crimes, some far more serious than anything comparable among VTC participants. Further limiting the comparison group to federal offenders ages forty to forty-nine at release who were sentenced to probation or fine only (27.7%), probation and confinement (26.6%), up to six months in confinement (28.9%), Category I criminal history (25.9%).

277. *Id.* at 27.

278. See OFFICE OF STRATEGIC INITIATIVES, FLA. DEP’T OF CORR., FLORIDA PRISON RECIDIVISM REPORT: RELEASES FROM 2010 TO 2016, at 11 (2018), <http://www.dc.state.fl.us/pub/recidivism/RecidivismReport2018.pdf>.

279. The recidivism rate of those released from prison is problematic because VTC participants commit relatively minor crimes that would result in little or no time in prison.

ment courts). The veterans randomly assigned to VTCs would have, on average, the same characteristics as those assigned to other processes, allowing the researcher to rule out age, criminal history, and other factors correlated with recidivism. Of course, it would be unconscionable to randomly send veterans to jail to conduct research; the “ideal” experiment would impose arbitrary punishments and violate defendants’ due process rights. As a conceptual exercise, thinking about an ideal experiment underscores the major challenge of evaluating the effectiveness of VTCs: the group that receives treatment from VTCs is different than the group that does not receive treatment from VTCs.

Several sources of selection bias make it difficult to assess the effectiveness of VTCs with observational data. First, there are eligibility criteria. Only veterans can participate in VTCs, which makes comparisons to the general population problematic. VTCs may further limit participation to veterans who have committed non-violent offenses or misdemeanors, are eligible for VA benefits, and have treatable conditions. VTCs are looking for the best treatment prospects and, therefore, one might expect those eligible for VTCs to have better outcomes than those who are not eligible regardless of VTC programming.

Second, for those who are eligible for VTCs, participation is voluntary. Some veterans may voluntarily withdraw from participation before graduation. Are participants and non-participants similar? Research by Tsai suggests that veterans who participate in treatment courts are not very different than those who do not participate in treatment courts in terms of demographic characteristics and personal history, but the intake data they analyze do not measure veterans’ willingness to change behavior or social support.²⁸⁰

Third, VTCs can terminate participants who fail to meet program guidelines. Roughly seventy percent of VTC participants eventually graduate.²⁸¹ Evidence suggests that VTC graduates have fewer substance abuse problems and subsequent incarcerations than those who do not participate in or are terminated from VTCs.²⁸² However, be-

280. Tsai et al., *supra* note 219. For thoughtful discussion of the effect of participant motivation, see Hartley & Baldwin, *supra* note 32, at 62–63.

281. Jim McGuire et al., An Inventory of VA Involvement in Veterans Courts, Dockets and Tracks 7 (Feb. 7, 2013) (unpublished manuscript), https://justiceforvets.org/wp-content/uploads/An%20Inventory%20of%20VA%20involvement%20in%20Veterans%20Courts_1.pdf; see also Johnson et al., *supra* note 268. These authors looked at the percentage of participants terminated from their programs.

282. Johnson et al. report that incarceration rates are lower for those who complete the program compared to those who do not. Those who receive treatment for sub-

cause VTCs can terminate participants who repeatedly fail drug tests, graduates are, by definition, those who exhibit fewer substance abuse problems compared to non-graduates. Similarly, abstaining from criminal activity is required by most VTCs. Thus, the causal arrow points both ways. Abstaining from drug, alcohol, and crime may be positive effects of VTCs programs, but they also are the conditions that enable participants to graduate.

These compositional differences, including eligibility characteristics, willingness to participate, and program conduct, are significant because they correlate with the outcomes of interest.²⁸³ Veterans who are eligible for VTCs, willing to participate, and comply with program rules can be expected to enjoy better outcomes than other veterans independent of any benefit directly attributable to VTCs. For these reasons, it does not make sense to compare the outcomes of those who participate in VTCs with those who either cannot or choose not to participate in these programs without taking compositional differences between these groups into account.

C. *Recent Research Shows Moderate Effectiveness*

Two recent studies on the impact of VTCs on recidivism rates warrant special attention. Tsai analyzed national data from the VA's Veterans Justice Outreach program.²⁸⁴ The VJO program, which works to connect veterans to services, conducts in-person assessment interviews when veterans enroll in the program and when they exit the program. This VJO data features intake and exit data for 22,708 veterans: 8,083 participated in VTCs, 680 participated in other treatment courts, and 13,945 did not participate in any kind of treatment court.²⁸⁵ One outcome of interest is veterans' subsequent involvement with the justice system. The authors report that veterans who participate in a VTC were more likely to go to jail than veterans who opted for traditional punishment rather than a VTC.²⁸⁶ At the same time, however, the authors found that VTC participants were more likely to

stance abuse and mental health disorders are less likely to be incarcerated than those who do not. See R. Scott Johnson et al., *Predictors of Incarceration of Veterans Participating in U.S. Veterans' Courts*, 68 *PSYCHIATRIC SERVS.* 144, 148 (2017).

283. For a general discussion of the effect of compositional differences in observational research, see PHILIP H. POLLOCK III, *THE ESSENTIALS OF POLITICAL ANALYSIS* 84–86 (5th ed. 2016).

284. Tsai et al., *supra* note 219, at 376.

285. *Id.*

286. *Id.* Tsai et al. assessed outcomes like subsequent arrest or incarceration at the time veterans exited programs; they did not look at outcomes one or two years later like a traditional recidivism study.

be housed in their own place, employed, and receiving VA benefits compared to veterans who participated in other treatment courts or faced traditional criminal sanctions. Table 2 summarizes the study's key findings.²⁸⁷

TABLE 2.
COMPARING PARTICIPANT CHARACTERISTICS AND OUTCOMES

	Veterans' Treatment Courts	Other Treatment Courts	Traditional Criminal Process
<i>Participant Characteristics:</i>			
Mean age	43.7	45.8	45.0
Mean years education	13.2	13.0	12.9
Male	94.8%	95.0%	95.6%
Unemployed	25.3%	26.4%	28.2%
Chronic homelessness	12.7%	15.0%	17.9%
Violent offender	21.5%	18.2%	25.9%
Combat exposure	48.6%	38.5%	39.1%
Service-related disability	36.2%	32.8%	29.1%
PTSD diagnosis	37.5%	34.9%	34.0%
Alcohol use disorder	55.0%	57.2%	55.1%
Drug use disorder	37.7%	54.4%	41.8%
<i>Outcomes:</i>			
Housing in own place	66.7%	52.4%	41.0%
Employed	32.8%	20.7%	15.9%
Receiving VA benefits	64.0%	57.8%	57.9%
Mean monthly income	\$952.90	\$663.00	\$469.00
No new arrests	86.9%	86.5%	91.1%
No new incarcerations	86.0%	83.7%	90.4%
Sample Size (N):	8,083	680	13,945

Importantly, Tsai used multiple regression analysis to evaluate differences in program outcomes controlling for varying sites and participant characteristics.²⁸⁸ In their controlled statistical analysis, they find no statistically significant differences between VTCs and other treatment courts, except VTC participants are more likely to be housed in their own place compared to veterans in other treatment courts.²⁸⁹ Controlling for site differences and participant characteristics, they find that VTC participants fare better than veterans in traditional criminal processes in terms of housing, employment, receiving VA benefits, and higher monthly incomes but are more likely to be arrested or incarcerated.²⁹⁰

287. *See id.* at 378–79 tbl.1; *id.* at 380 tbl.2; *id.* at 381 tbl.3.

288. *Id.* at 377.

289. *Id.* at 382 tbl.4.

290. *Id.*

Another rigorous analysis of the impact of VTC on recidivism rates comes from Richard Hartley and Julie Baldwin.²⁹¹ Hartley and Baldwin analyzed re-arrest rates of veterans who participated in a large urban VTC. Notably, these authors carefully defined both their treatment and control groups, comparing the recidivism rates for veterans who participated in a VTC to veterans who were eligible and accepted into the program but opted not to participate.²⁹² This design addresses some potentially confounding differences between the treatment and control groups: all subjects were veterans, and eligible for and accepted by a VTC. According to these authors, veterans who participated in VTCs rather than traditional criminal processes were significantly less likely to recidivate.²⁹³

While most empirical research on the effectiveness of VTCs focus on recidivism rates, there are other important outcomes to assess. It would be a mistake to evaluate these programs primarily in terms of recidivism because VTCs target non-violent veterans with limited criminal histories who are beyond the prime years of criminality. The real outcomes of interest are quality of life indicators such as mental health, sobriety, employment, housing, and family and personal stability. These outcomes may be correlated to avoiding criminal activity, but they should be considered in their own right.

The available empirical evidence suggests that VTCs improve participants' lives in meaningful ways. A pilot study of veterans in an Ohio VTC program reported that those who participated had higher quality of life on a number of dimensions.²⁹⁴ Research shows VTC participants experience significant improvements in PTSD and substance abuse issues,²⁹⁵ and there is evidence participants experience a decrease in clinical symptoms.²⁹⁶ Tsai et al.'s large sample research finds that VTCs yield positive results with respect to housing and employment.²⁹⁷

In summary, the empirical research does not clearly show that VTCs work better than other treatment courts or traditional criminal

291. Hartley & Baldwin, *supra* note 32, at 57–58.

292. *Id.* at 58–60.

293. *Id.* at 63–70.

294. Kraig J. Knudsen & Scott Wingenfeld, *A Specialized Treatment Court for Veterans with Trauma Exposure: Implications for the Field*, 52 COMMUNITY MENTAL HEALTH J. 127, 131, 133 (2016).

295. Slattery et al., *supra* note 15, at 928.

296. Raquel M. Derrick et al., *Serving Those Who Served: Outcomes from the San Diego Veterans Treatment Review Calendar (SDVTRC) Pilot Program*, 11 PSYCHOL. INJ. & L. 171, 177 & tbl.4 (2018).

297. Tsai et al., *supra* note 219, at 382 tbl.4.

sanctions at preventing crimes. On this important outcome, VTCs may not be that different than similarly situated treatment courts.²⁹⁸ At the same time, the empirical research does indicate that veterans who participate in VTCs fare better than veterans who face traditional sanctions in terms of quality of life measures. These comparative advantages are important because VTCs are primarily intended to help treat mental health and substance abuse issues among veterans, and not designed to fight crime. VTCs, in their recognition of veterans' unique needs, help veterans avoid deep entanglement in the judicial system, thereby helping them avoid new legal, economic, and social strains that can add to the psychosocial stressors that aggravate mental health problems.

While this assessment of VTCs is far less rosy than the early reports of zero percent recidivism, it is important to keep two important considerations in mind. First, recovering from substance abuse and mental health problems is challenging. Many trauma victims, whether they are veterans or civilians, either do not recognize, or have a hard time accepting the need for treatment. They may also have difficulty following through on recovery programs given the tendency to self-isolate and avoid stressors. If recovery were simply a matter of getting the right information from a peer with similar life experiences, many veterans would have recovered long before coming into contact with a VTC. The VTC is no silver bullet because there are no silver bullets. Given the scale of mental health and substance abuse problems among veterans, minor systemic improvements can yield significant benefits. Second, for a state court system considering whether to create a VTC, results comparable to general treatment courts or traditional criminal sanctions may be sufficient justification for VTCs because connecting veterans to federal services can significantly reduce the costs of treating mental health and substance abuse problems among state offenders. For state court administrators, if VTCs can reduce operating expenses without significantly worsening outcomes, they are advantageous.

V.

ISSUES FOR VTCs MOVING FORWARD

As VTCs mature and expand, several controversies have emerged over eligibility guidelines that define the jurisdiction of these courts. Which veterans should be eligible to participate in VTCs? There is a robust and ongoing debate over allowing certain cases into VTCs, in-

298. Erickson, *supra* note 248, at 223–24.

cluding those involving dishonorably discharged veterans, offenses unrelated to military service, and violent crimes.²⁹⁹

A. *Eligibility Guidelines and the Justification for Special Treatment*

Ongoing eligibility debates³⁰⁰ raise the larger question of what justifies treating veterans differently than others who have committed similar offenses. Do VTCs exist to help those who have suffered mentally and physically while fighting to keep the country safe? If VTCs serve this moral imperative, eligibility criteria should be narrowly defined and tailored to veterans injured as the result of military duty. Others may take the more pragmatic view that VTCs save financially-strapped state courts' resources. If so, the criteria for admission to VTCs should adhere as closely as possible to the criteria for receiving VA benefits.

VTCs are divided over the admission of dishonorably discharged veterans. According to the 2015 Survey of Veterans Treatment Courts, dishonorably discharged veterans are eligible for sixty percent of VTC programs nationwide.³⁰¹ Excluding dishonorably discharged veterans from VTCs is not a moral judgment; after all, VTC participants have committed crimes and face criminal sanctions because of their behavior. This eligibility criteria reflects pragmatic concerns. As discussed above, dishonorably discharged veterans are not eligible to receive VA services so VTCs cannot provide them significantly greater support than general treatment courts can. But as also mentioned above, there are veterans whose discharge may not have been fairly decided,³⁰² stemming from retaliatory action or as the result of an undiagnosed mental health condition. If VTCs are to reflect the cultural reverence accorded to military veterans, then all veterans should be eligible irrespective of discharge status.

299. Another eligibility issue we do not discuss in the text is whether veterans should be required to plead guilty to participate in veterans' courts. This may reduce the number of veterans who voluntarily participate because the length of time required to complete a VTC program is typically longer than the punishments imposed otherwise. *See id.* at 223.

300. *See supra* notes 194–229 and accompanying text.

301. AM. UNIV. SCH. OF PUB. AFFAIRS JUSTICE PROGRAMS OFFICE, *supra* note 36, at 14.

302. Meghann Myers, *Veterans with PTSD Are Suing the Army to Have Their Discharges Upgraded*, ARMY TIMES (Apr. 17, 2017), <https://www.armytimes.com/news/your-army/2017/04/17/veterans-with-ptsd-are-suing-the-army-to-have-their-discharges-upgraded>.

VTCs are also split on whether participation should be limited to veterans who can show a nexus exists between their current charge(s) and their past military service. The service-connection requirement was meant to help focus public resources on those who most need them.³⁰³ In practice, however, this standard complicates the process, instead of streamlining it.³⁰⁴ When would a crime be connected to prior military service? Crimes, by definition, are outside the scope of a soldier's military employment.³⁰⁵ The connection between offense and military service is at best remote and indirect. For example, domestic violence may have started with an argument over financial problems which were caused by losing a job due to untreated symptoms of PTSD acquired from repeated exposure to stressful situations in combat. There are several links on the causal chain between domestic violence and military service. Even if the VTC admitted violent offenders, the nexus between past military service and domestic violence committed stateside is not self-evident and requires factual findings.³⁰⁶

The causal nexus analysis is problematic because domestic violence, drug abuse, and other criminal offenses are multifaceted problems. Many acts and omissions may intervene between the defendant's offense and prior military service. It is difficult to determine why someone commits a criminal act; the defendant may not even know. How strong does the nexus between prior service and the current offense need to be? Does military service need to be the predominate cause or is a minimal connection sufficient to establish VTC jurisdiction? Even if one can articulate the proper causal standard, it is not clear who should make the determination, when it should be made, or what evidentiary standards should apply. The more stringent and careful the procedures used, the less efficient VTCs are.

The service-connection requirement may prove unworkable in the long run. Veterans' healthcare benefits were originally limited to those with service-connected disabilities.³⁰⁷ The service-connection

303. Frederick, *supra* note 2, at 228.

304. Erickson, *supra* note 248.

305. As a general rule, an employee's crimes are outside the scope of his or her employment and do not further the employer's interests. See John C. North, *Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717, 718 (1976-1977).

306. See *supra* notes 217-19 and accompanying text on eligibility of violent offenders for VTC.

307. Kenneth W. Kizer, Maria L. Fonseca & Laurel M. Long, *The Veterans Healthcare System: Preparing for the Twenty-First Century*, 42 HOSP. & HEALTH SERVS. ADMIN. 283, 286 (1997).

requirement was thought to effectively divide responsibility between the VA and civilian healthcare providers and control costs, but it led to a fragmented, confusing, and inefficient healthcare system. The VA abandoned the restrictive standard in 1996 and now treats all conditions afflicting veterans regardless of whether they were service-connected.³⁰⁸

In addition to the honorable discharge and service-connection criteria, VTCs are divided over the admission of veterans who have committed violent offenses. The stigma surrounding “violent crime” can present a significant psychological, if not rule-based, barrier to participation in a VTC.³⁰⁹ Excluding violent offenders is problematic for the simple purpose that violence is intrinsic to the military experience.³¹⁰ As Jacobs et al. suggest, “whether the motivation for excluding violent offenders reflects legitimate public safety concerns, political pressures, an unwillingness to stray from established specialty court models, or a desire to produce successful results by cherry-picking cases, restrictive eligibility policies are both intuitively and statistically troubling.”³¹¹ Jacobs et al. recommend eligibility criteria “tailor[ed] to what we know is true about the kinds of crimes Veterans commit.”³¹² Of the currently incarcerated veteran population, fifty-seven percent are serving time for violent offenses, which is larger than the percentage of the same in the general population.³¹³

Violent offenders are typically not eligible for general drug courts.³¹⁴ Violent offenders are incarcerated even if they suffer from mental illness (short of insanity) or have substance abuse problems.³¹⁵

308. See *id.* at 319–20; Kenneth W. Kizer, *Reengineering the Veterans Healthcare System*, in *ADVANCING FEDERAL SECTOR HEALTH CARE: A MODEL FOR TECHNOLOGY TRANSFER* 79, 85 (Peter Ramsaroop et al. eds., 2001); Kenneth W. Kizer, John G. Demakis & John R. Feussner, *Reinventing VA Health Care: Systematizing Quality Improvement and Quality Innovation*, 38 *MED. CARE (SUPPLEMENT I)* I-7, I-9 (2000).

309. Gavriel Jacobs et al., *Serving Those Who Served: Veterans Treatment Courts in Theory and Practice* 22–23, 29 (2012) (unpublished manuscript), https://www.law.stanford.edu/sites/default/files/child-page/266901/doc/slspublic/Jacobs_McFarland_Ledeem.pdf.

310. Cartwright, *supra* note 2, at 309.

311. Jacobs et al., *supra* note 309, at 7.

312. *Id.* at 12.

313. *Id.*

314. Christine A. Saum & Matthew L. Hiller, *Should Violent Offenders Be Excluded from Drug Court Participation? An Examination of the Recidivism of Violent and Nonviolent Drug Court Participants*, 33 *CRIM. JUST. REV.* 291, 292 (2008).

315. If a defendant's mental illness is so extreme he could not distinguish right and wrong or could not conform his behavior to the law, his offense may be excused due to insanity. If, after committing the offense, the defendant loses capacity to participate in his defense or understand why he is being punished, he should not be tried or incarcerated. In these cases, the defendant may be confined at a mental institution. See

The violent offender who is mentally ill or addicted to drugs may be more of a threat to public safety than one who commits a crime of passion because of a higher likelihood of recidivism.³¹⁶ It is hard to argue that veterans have “earned a pass” to commit violent crimes, despite their having treatment options unavailable to other violent offenders.³¹⁷ Again, the moral justification for giving veterans special treatment conflicts with the financial incentives of passing rehabilitation costs on to the federal government. To resolve these eligibility issues, policymakers need to decide whether the primary justification for VTCs is repaying veterans for their sacrifices or saving state resources.

The ongoing VTC eligibility debates should also force policymakers to think about the limits of treatment court specialization. In addition to specialized treatment courts for veterans, some jurisdictions have created specialized treatment courts for juveniles, college students, and other groups.³¹⁸ At what point does treating defendants equally outweigh the practical benefits of specialized treatment courts? As discussed above, VTCs have been developed to take advantage of veterans’ federal health insurance. If cost savings and treatment effectiveness justify creating specialized courts for veterans, it would seem expedient to differentiate between defendants with private health insurance and those who rely on government assistance. States could potentially save resources by coordinating treatment for mental health and substance abuse problems with private medical insurance the same way they coordinate treatment for veterans with the VA Justice Outreach Program, but such a blatantly two-tiered justice system based on financial resources violates fundamental principles of equality in criminal justice.

generally Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885 (2011).

316. See Redonna K. Chandler, Bennet W. Fletcher & Nora D. Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 J. AM. MED. ASS’N 183 (2009); Amy B. Wilson et al., *Examining the Impact of Mental Illness and Substance Use on Recidivism in a County Jail*, 34 INT’L J.L. & PSYCHIATRY 264 (2011).

317. Pamela Kravetz, *Way Off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 163, 179 (2012).

318. As of 2017, the varieties of drug courts in Florida include adult felony, adult misdemeanor, juvenile, family dependency, and DUI. See *Drug Courts*, FLA. CTS., <http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/drug-courts/> (last visited Apr. 1, 2019). On the creation of drug courts for college students, see Cheryl L. Asmus, *A Campus Drug Court: Colorado State University*, 4 DRUG CT. REV. 1, 5 (2002); Jill M. Dutmers, *Campus Drug Courts: How Universities May Be Best Equipped to Tackle Crime and Substance Abuse in Young Adults*, 41 LAW & PSYCHOL. REV. 191 (2017).

B. Codification of VTC Practices

VTCs were first established informally by entrepreneurial judges, but the growth of VTCs across the country is in large part due to documenting specific procedures, giving other judges the ability to replicate the Buffalo VTC model. In many respects, including ongoing debates over eligibility criteria, there is still tension between giving local courts discretion over procedures and formalizing VTC practices for greater consistency.³¹⁹

Treatment courts challenge judges' traditional roles in the criminal justice system.³²⁰ "Proactive judging," Freiberg argues, "threatens some of the core judicial values such as impartiality, fairness, certainty and the separation of powers between the judiciary and the executive."³²¹ In some cases, treatment court judges are asked to decide the limits of their own power.³²² In *Alexander v. State*, for example, a drug court participant who was eliminated from the program challenged his expulsion in a trial court proceeding before the same judge, arguing that his right for the case to be reviewed before a fair and impartial arbiter was violated.³²³ The drug court judge also sat on the trial court and reviewed termination requests.³²⁴ The appeals court concluded that the judge did not afford the defendant his due process rights, ordering any future requests for recusal to be granted.³²⁵

James L. Nolan, Jr. is particularly critical of treatment courts, arguing that they strip the judicial process of impartiality and undermine the adversarial nature of the justice system.³²⁶ In response to

319. This is due in part to veterans' high rate of dispersion across the country and the fact that a large percentage of veterans (24.1%) live in rural areas where funding and services are already limited. See KELLY ANN HOLDER, U.S. CENSUS BUREAU, VETERANS IN RURAL AMERICA: AMERICAN COMMUNITY SURVEY REPORTS 1 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-36.pdf>.

320. For a view of how the adversarial system has been affected by diversionary programs and bargaining, see Berman & Feinblatt, *supra* note 53; Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338 (1982); Stephen Landsman, *The Decline of the Adversarial System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFF. L. REV. 487, 505–06 (1980); Michele Sviridoff et. al., *Dispensing Justice Locally: The Impacts, Cost and Benefits of the Midtown Community Court 1.1, 1.8* (Jan. 17, 2002) (unpublished manuscript), <https://www.ncjrs.gov/pdffiles1/nij/grants/196397.pdf>; see also JAMES R. ACKER & DAVID C. BRODY, *CRIMINAL PROCEDURE: A CONTEMPORARY PERSPECTIVE* (2d ed. 2004).

321. Freiberg, *supra* note 77, at 23.

322. Shah, *supra* note 229, at 67.

323. *Alexander v. State*, 48 P.3d 110, 112 (Okla. Crim. App. 2002).

324. *Id.*

325. *Id.*

326. James L. Nolan, Jr., *Redefining Criminal Courts: Problem Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1543, 1554 (2003).

Nolan, Greg Berman recognizes the “bad practices” in the system, but is quick to point out that these issues are hardly specific to treatment courts, whose processes, he argues, “actually reduce the potential for judges and other court players to run amok.”³²⁷ “Any system staffed by idiosyncratic and fallible humans” Berman states, “will occasionally result in bad practice.”³²⁸ Lawyers are not short-changed in treatment courts; most state courts operate through a collaborative process where “[p]rosecutors and defenders have effectively been transformed into negotiators and deal-makers rather than adversarial litigators.”³²⁹ In traditional state courts plea bargaining, probation, and other intermediate sanctions (such as community service and pre-trial diversion) have long been the rule rather than the exception.³³⁰

Going beyond specific examples and particular sides, Timothy Casey advances one of the most comprehensive analyses of treatment court legitimacy.³³¹ Casey uses the juvenile court system—“the original problem-solving courts”³³²—as an early representation of treatment courts because of its sociological underpinnings and wide employ of judicial discretion.³³³ While Casey’s analysis substantiates many criticisms of treatment courts (i.e., possible constitutional conflict, neutrality, uniformity, conflicting standards, etc.), it acknowledges the state of the practice as “experimental” and suggests that the success of the experiment is incumbent upon its gaining legitimacy.³³⁴ The juvenile court model, Casey argues, was rehabilitative at its inception, but the introduction of punitive aspects “destroy[ed] the treatment ideal.”³³⁵ However, Casey is more optimistic about treatment courts, having “the capacity to adapt in ways that increase their legitimacy” because they are “inherently capable of self-reflection, monitoring and adaptation.”³³⁶

327. Greg Berman, Commentary, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 41 AM. CRIM. L. REV. 1313, 1314 (2004).

328. *Id.*

329. *Id.* at 1317.

330. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 205–06 (1992).

331. Casey, *supra* note 51, at 1461–88.

332. *Id.* at 1517.

333. For a discussion on how juvenile courts fall under the guise of treatment courts, see David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42 (Margaret K. Rosenheim et al. eds., 2002).

334. See Casey, *supra* note 51, at 1489–1502, 1503–04.

335. *Id.* at 1481; see also Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 821 (1988).

336. Casey, *supra* note 51, at 1519.

VTCs are unique in that, unlike other treatment courts, they are connected to a federal agency—the Department of Veterans Affairs—servicing that particular population (veterans), whose responsibility for that population is comprehensive rather than arising from an offense.³³⁷ That distinction is important as contact between regular citizens and the courts, even in treatment settings, is offense-related (probation officers, pre-trial diversion programs, court-mandated drug tests, behavioral treatment, etc.).³³⁸ The unique background, shared experiences, and military identity of the veteran population may also present an avenue for access and treatment that is not similarly uniform for other treatment court-involved populations.³³⁹

Some argue that codifying treatment court practices is necessary to increase consistency and appropriately guide judicial discretion.³⁴⁰ Shah argues that codification provides VTCs with “democratic legitimacy” and creates “political accountability” for the courts, limiting somewhat the unchecked discretionary power exercised by judges.³⁴¹ Shah also addresses some of the criticisms about legislative initiatives, including that they codify ill-researched practices and make it more difficult for program administrators to act responsively.³⁴² Some treatment court practitioners criticize legislative initiatives because of their restrictive nature.³⁴³ Shah maintains that these conflicts are easily remedied through broadly structured legislation, and are not as significant as those that exist from a lack of legislation.³⁴⁴ Legislative initiatives also create independent budgets for VTC programs, and provide opportunities for judicial designation and greater access to resources.³⁴⁵

337. *U.S. Department of Veterans Affairs Structure*, U.S. DEP'T OF VETERANS AFF., <https://www.ruralhealth.va.gov/aboutus/structure.asp> (last updated Mar. 21, 2018).

338. For an overview of involved agencies in the drug court treatment process, see BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS 27* (1997), <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>. Behavioral health services are generally connected to juvenile court referrals, see NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *IMPLEMENTING JUVENILE JUSTICE REFORM: THE FEDERAL ROLE 64* (2014).

339. ANGELA HOLVORSON, *UNDERSTANDING THE MILITARY: THE INSTITUTION, THE CULTURE, AND THE PEOPLE*, at 19–24 (2010), https://www.samhsa.gov/sites/default/files/military_white_paper_final.pdf.

340. Shah, *supra* note 229.

341. *Id.* at 73.

342. *Id.* at 99.

343. See generally Sean Clark et al., *Development of Veterans Treatment Courts: Local and Legislative Initiatives*, 7 *DRUG CT. REV.* 171 (2010).

344. Shah, *supra* note 229, at 99–100.

345. *Id.*; see also Claudia Arno, *Proportional Response: The Need for More—and More Standardized—Veterans' Courts*, 48 *U. MICH. J.L. REFORM* 1039, 1040 (2015).

A number of states are codifying VTC practices. In 2016, Illinois became the first state to *mandate* establishment of VTCs in each judicial circuit—after some success with individual VTCs in various parts of the state.³⁴⁶ Prior to that, Illinois established a unique certification process for VTCs, implemented through the Administrative Office of the Illinois Courts.³⁴⁷ This program required all problem-solving courts to be state-certified before hearing cases.³⁴⁸

These developments are favorable, not only for consistency, but also for providing a process for the identification and implementation of best practices.³⁴⁹ The institutionalization of VTCs, which confers greater legitimacy and provides better resources, should depend on proving the effectiveness of these programs.³⁵⁰ As more data on VTCs is collected and analyzed, the possibility for a robust system that better satisfies the legal and rehabilitative mandates may yet emerge.

C. *End of the Growth Phase*

This Article has examined the rapid development of specialized treatment courts for military veterans in the American criminal justice system. The nation's first VTC opened quietly in Anchorage in 2004; now, there are nearly five hundred VTCs offering veterans an alternative to traditional criminal prosecution and general drug courts. How did this transformation happen? Reformers identified a glaring need to help veterans in the criminal justice system address mental health and substance abuse issues. Judge Robert Russell of the Buffalo VTC helped draw national attention to the veterans' cause. In this Article, we have argued that VTCs have succeeded, not because they are more effective than the alternatives, but instead because they connect veterans to existing VA services, thereby shifting some of the significant costs of treating mental health and substance abuse problems from the states to the federal government. The popularity of the cause, combined with the expediency of the solution, has propelled a transformation of the American judicial system. With VTCs becoming a fixture

346. John Adams et al., *The Illinois Veterans Treatment Court Mandate: From Concept to Success 2* (The Simon Review, Paper No. 48, Oct. 2016), https://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1054&context=ppi_papers.

347. *Id.* at 2.

348. *Id.*

349. *Id.* at 10; see also Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1506 (2003).

350. *Id.* at 1503.

in state court systems, states must now confront the conflict between the rehabilitative mission of these courts and the potential for cost shifting.