

# Veterans Treatment Courts: Do Status-Based Problem-Solving Courts Create an Improper Privileged Class of Criminal Defendants?

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## I. INTRODUCTION

August 9, 2010, went from bad to worse for Army Staff Sergeant Brad Eifert, a veteran of Operation Iraqi Freedom.<sup>1</sup> He was struggling, like so many of his colleagues, to reacclimate to civilian life in his suburban hometown of Okemos, Michigan.<sup>2</sup> After a sleepless night, having heard of an attack on a friend's base in Afghanistan, Eifert spent the day drinking and sinking into a deep depression.<sup>3</sup> Eifert called his commanding officers for help.<sup>4</sup> He was on his way to the hospital for a mental health evaluation, accompanied by his Army chaperone, when he snatched his keys away from his chaperone, tore the stripes off of his uniform, and fled home.<sup>5</sup> After warning his wife and children to stay away from him, Eifert retrieved three guns and retreated to the nearby woods, intent on ending his life for the second time that year.<sup>6</sup> Police officers called to the scene kept their weapons trained on Eifert, and a standoff

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1. Erica Goode, *Coming Together to Fight for a Troubled Veteran*, N.Y. TIMES, July 17, 2011, available at <http://www.nytimes.com/2011/07/18/us/18vets.html?pagewanted=all&r=0>. In preparing this Note for publication, the author learned that Staff Sergeant Eifert was found dead on September 4, 2012. Mark Bashore, *In Memoriam: Brad Eifert, U.S. Army Veteran*, WKAR (Sept. 7, 2012), <http://wkar.org/post/memoriam-brad-eifert-us-army-veteran>. His contribution to the national dialogue on the legal and policy responses to challenges facing military veterans is greatly appreciated.

2. Goode, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

ensued.<sup>7</sup> In a haze of alcohol and adrenaline, Eifert was unable to pull the trigger of the gun he had pointed at his own head, and instead aimed and fired his gun at what he perceived to be tree trunks in his field of compromised vision.<sup>8</sup> In actuality, Eifert fired nine rounds at the four police officers who surrounded him.<sup>9</sup> He then abandoned his weapons and ran towards the street, shouting “Shoot me!” until the officers were able to subdue him.<sup>10</sup>

Facing five counts of assault with intent to murder and five possible life sentences in the traditional criminal justice system, Eifert received an enormous break when his story caught the attention of Judge David Jordan, founder of the Veterans Treatment Court in East Lansing.<sup>11</sup> A recent innovation, veterans treatment courts are an outgrowth of the drug and mental health “specialty” or “problem-solving” court models, which create alternative sentencing and punishment structures emphasizing community-based treatment in lieu of incarceration for offenders whose criminal activity arises out of substance addiction or mental illness.<sup>12</sup> Launched in response to the rising number of military veterans in the criminal justice system, veterans treatment courts are the result of a collaborative effort by sponsoring judges, prosecutors, public defenders, Veterans Administration (VA) health care providers, and often victims.<sup>13</sup>

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Eifert’s actions are representative of a growing number of Iraq and Afghanistan veterans whose post-traumatic dysfunction leads to fraught encounters with law enforcement following instances of domestic violence, assaults, and suicide attempts, including “suicides by cop.” *Id.*

11. *Id.*

12. Drug courts were first conceived and implemented in the 1980s in response to growing court and incarceration costs resulting from tough sentencing restrictions for drug crimes. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-53, ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS 1 (Dec. 2011), available at <http://www.gao.gov/assets/590/586793.pdf> [hereinafter GAO-12-53]; CELINDA FRANCO, CONG. RESEARCH SERV., R41448, DRUG COURTS: BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONG. 3 (Oct. 12, 2010), available at <http://www.fas.org/sgp/crs/misc/R41448.pdf>. Other problem-solving courts have grown from the drug court model, including mental health courts and veterans treatment courts. *Id.* at 6. These problem-solving courts seek to treat the underlying causes of criminal activity by mandating court-supervised treatment and imposing incarceration only if those treatment requirements go unmet. See *id.* at 9–12.

13. Goode, *supra* note 1.

These treatment courts are designed to rehabilitate, in non-correctional settings, veterans who commit combat stress-related crimes.<sup>14</sup> For Staff Sergeant Eifert, the veterans treatment court program allowed him to remain with his family while adhering to a strict, court-monitored course of treatment and sobriety established by VA mental health professionals.<sup>15</sup> It also meant he would be featured on the front page of the *New York Times* as a dual exemplar of the devastating potential effects of combat trauma and of the promise of the veterans treatment court model as a community-based path to rehabilitation.<sup>16</sup>

Despite the potential for better long-term outcomes for Eifert and other veterans treatment court participants, there remain untested, and therefore unresolved, legal concerns regarding this new form of problem-solving court.<sup>17</sup> For example, eligibility for traditional drug and mental health court participation requires a diagnosis related to drug addiction or mental health, and a causal connection between that diagnosis and the offense in question.<sup>18</sup> In contrast, eligibility for participation in veterans treatment court programs is contingent on veteran or active military status.<sup>19</sup> In most cases, it is assumed that veteran status serves as a proxy for mental health or substance use disorder diagnoses, given the high rates of these disorders among

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14. *Id.*

15. *Id.* Eifert pled guilty to a felony weapons charge to qualify for veterans court participation. *Id.* If he complied with the treatment and monitoring terms imposed by the court over a twelve to eighteen month period, his sentence would be reduced to a misdemeanor or dismissed entirely. *Id.*

16. *Id.* Despite the prominence of Eifert's story, the article also highlights that his case is somewhat unusual among veterans treatment court cases because of the violence of his offense. *Id.* Many veterans courts, and the previously proposed federal legislation that could expand funding for such programs, restrict participation to non-violent offenders. *Id.*; see also Services, Education, and Rehabilitation for Veterans Act, H.R. 2026, 112th Cong. (2011). The East Lansing veterans treatment program was similarly limited to non-violent offenses, but Judge Jordan persuaded the prosecutor and law enforcement officers to waive their objections and allow a sentence of treatment in lieu of prison. Goode, *supra* note 1.

17. See Dahlia Lithwick, *A Separate Peace*, SLATE (Feb. 11, 2010), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/02/a\\_separate\\_peace.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/a_separate_peace.html).

18. See GAO-12-53, *supra* note 12, at 5.

19. Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 357, 363 (2009).

veterans.<sup>20</sup> However, the novelty of and lack of uniformity among these programs has led some concerned observers to question whether these courts provide a veterans-only sentencing track, offering preferential treatment for similarly situated criminal defendants based solely on their status as veterans, rather than on a demonstration of acute combat stress or a similarly qualifying disorder.<sup>21</sup>

Although veterans treatment courts themselves are a recent and developing innovation, veteran status and its intersection with criminal sentencing considerations has an increasingly substantial legal basis to draw on. Prior to the expansion of problem-solving courts to reach veterans, many state-level trial court judges already considered military service-related disorders as potential mitigating factors.<sup>22</sup> More recently, several states have either passed or proposed legislation designating veteran or active military status as a statutory mitigating factor,<sup>23</sup> and current federal sentencing guidelines follow a 2009 Supreme Court decision affirming the proper role of a defendant's military history in the penalty phase.<sup>24</sup> Given the weight of political and legal decisions supporting veteran status as a mitigating factor in criminal cases, veterans treatment courts might ultimately demonstrate the advantages of treatment as an alternative to incarceration.

Part II of this Note examines the origins and current operations of veterans treatment courts, and outlines the policy arguments articulated in their favor and the legal concerns raised by critics. Part III discusses the treatment of veteran status in sentencing outside of the specialty court context, highlighting statutory and non-statutory state sentencing guidelines and the recent federal response to military service-related crime. Part IV provides an analysis of the propriety of

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20. *Id.* at 360–63, 365–68 (discussing the prevalence of mental health and substance use disorders among veterans, and how eligibility is initially determined by identification of veterans entering the criminal justice system followed by screening for mental or substance use disorders).

21. Lithwick, *supra* note 17.

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

23. See *infra* Part III.A.

24. See *infra* Part III.B.1.

the veterans court model in light of the current state of the law outlined in Part III, and proposes a path forward for veterans courts, taking both legal sources of support and public criticism into consideration.

## II. HISTORY

### A. *Development of Veterans Treatment Courts*

In January 2008, municipal Judge Robert Russell launched the Buffalo, New York, Veterans Treatment Court.<sup>25</sup> Judge Russell established the court in response to the growing number of veterans appearing before him in the drug and mental health courts he had also founded and has presided over since 1995.<sup>26</sup> Asserting that existing problem-solving courts did not adequately meet the needs of veteran-status participants, “a niche population with unique needs”<sup>27</sup> resulting from its military history, Judge Russell sought to create a blended drug and mental health court program tailored to those unique needs and to the military culture that veterans involved in the criminal justice system were more familiar with.<sup>28</sup> Failure to create this court program, Russell argued, would violate the principles of the problem-solving court model, in which future criminal behavior is curbed by directly addressing the underlying health conditions that lead to criminal activity.<sup>29</sup> For military veterans, that underlying condition is

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25. Amanda Ruggeri, *New Courts Give Troubled Veterans a Second Chance*, U.S. NEWS & WORLD REP. (Apr. 3, 2009), <http://www.usnews.com/news/national/articles/2009/04/03/new-courts-give-troubled-veterans-a-second-chance>.

26. *Id.* There appears to be some dispute as to whether the Buffalo Veterans Treatment Court, widely touted as the first in the nation, was in fact predicated by a specialty court targeting veterans launched in Anchorage, Alaska, in 2004. The Anchorage court was founded by two judges, themselves military veterans, who, like Judge Russell, were concerned about the increasing number of veterans appearing before them on charges arising out of drug and mental health conditions. Some reports, while acknowledging the Anchorage court’s existence, suggest the Anchorage court was less formally structured than the Buffalo court and therefore not properly designated as the first veterans treatment court. *Id.* But see 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) (noting the Buffalo court was established after the veterans court in Anchorage and has no formal structure).

27. Russell, *supra* note 19, at 363.

28. *Id.* at 365.

29. *Id.* at 363–64.

not only substance use disorder, post-traumatic stress, or major depression, for example, but often the combat or other military-related trauma that gives rise to addiction and mental illness.<sup>30</sup>

The Buffalo Veterans Treatment Court has quickly become the model for dozens of new veterans treatment court programs.<sup>31</sup> As of June 30, 2012, a reported 104 veterans treatment court programs had been established in twenty-seven states.<sup>32</sup> Legislative initiatives at the federal and state levels indicate that veterans courts are likely to expand further. Colorado, Florida, Illinois, Maine, Michigan, and Texas have enacted legislation permitting the establishment of county and municipal-level veterans treatment courts.<sup>33</sup> At the federal level, the Services, Education, and Rehabilitation for Veterans (SERV) Act was introduced in Congress in 2009, 2010, and 2011, and sought to establish federal grants to fund veterans treatment courts.<sup>34</sup>

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30. *Id.*

31. Ruggeri, *supra* note 25.

32. *The History*, JUSTICE FOR VETS, <http://www.justiceforvets.org/vtc-history> (last visited Apr. 11, 2013). In October 2010, NADCP reported thirty-eight veterans courts in eighteen states, indicating these programs more than doubled nationwide in less than two years. See Tiffany Cartwright, Note, “*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, 305 (2011).

33. *Veterans Treatment Court State Legislation*, JUSTICE FOR VETS, <http://www.justiceforvets.org/state-legislation> (last visited Apr. 11, 2013).

34. See H.R. 2026, 112th Cong. (2011). Initially introduced by Senator John Kerry, the SERV Act:

[a]uthorize[d] the Attorney General to make grants to states and other entities: (1) to develop, implement, or enhance veteran’s treatment courts or to expand operational drug courts to serve veterans; and (2) for programs that involve continuing judicial supervision over nonviolent offenders with substance abuse or mental health problems who have served in the U.S. military. Requires such programs to include mandatory periodic testing for the use of drugs, substance abuse and mental health treatment, opportunities for diversion, probation, or supervised release, and programmatic, offender management, and aftercare services.

*Id.* H.R. 2026 and identical bills proposed in 2009 and 2010 in both the House of Representatives and the Senate died in committee. See H.R. 7149, 110th Cong. (2009); S. 3379, 110th Cong. (2009); H.R. 2138, 111th Cong. (2010); S. 902, 111th Cong. (2010). At the time of writing, the SERV Act had not been reintroduced in either chamber in the 113th Congress.

*B. The Veterans Treatment Court Model*

While there is significant variation in the program models currently implemented by courts across municipalities, they are generally based on the drug court model endorsed by the National Association of Drug Court Professionals, which in turn has endorsed the Buffalo Veterans Treatment Court model for national replication.<sup>35</sup> A typical case begins with screening for veteran status at arrest.<sup>36</sup> If the arrestee self-identifies as a veteran, he or she is screened for treatment court and VA benefits eligibility.<sup>37</sup> In most jurisdictions, only those offenders charged with non-violent crimes with a demonstrated need for mental health or substance use treatment are eligible to participate in the veterans treatment court.<sup>38</sup> Participation in veterans treatment court is voluntary, although the incentives to participate are substantial. Most veterans courts accept participants facing felony convictions and lengthy jail terms, for whom the option of community-based rehabilitative treatment in lieu of incarceration is clearly preferable.<sup>39</sup> Mental health professionals assess participating veterans, usually through Veterans Health Administration (VHA) services, and determine treatment needs.<sup>40</sup>

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35. The design of the Buffalo Veterans Treatment Court was based closely on the National Association of Drug Court Professional's (NADCP) list of "10 Key Components of a Drug Court," and the Bureau of Justice Assistance's "Ten Essential Elements of a Mental Health Court." Russell, *supra* note 19, at 364–65. The resulting hybrid veterans treatment court model identifies the following ten key elements: 1) integrate alcohol, drug treatment, and mental health services with justice system case processing; 2) a nonadversarial approach; 3) early eligibility screening and placement; 4) access to a continuum of alcohol, drug, mental health, and other related treatment and rehabilitation services; 5) frequent alcohol and other drug testing; 6) a coordinated strategy governing participant compliance; 7) ongoing judicial interaction with each veteran; 8) monitoring and evaluation of program effectiveness; 9) continuing interdisciplinary education; and 10) forging partnerships among relevant agencies and community organizations. See BUFFALO VETERAN'S COURT, MENTORING & VETERANS HOSPITAL PROGRAM POL'Y & PROCEDURE MANUAL, available at <http://www.justiceforvets.org/sites/default/files/Buffalo%20policy%20and%20procedure%20manual.pdf> (last visited Apr. 11, 2013).

36. See TINA CRENSHAW, U.S. DEP'T OF VETERANS AFFAIRS NAT'L CTR. FOR PTSD, VETERANS WITH PTSD IN THE JUSTICE SYS. (Aug. 16, 2010), <http://www.ptsd.va.gov/professional/pages/veterans-PTSD-justice-system.asp> [hereinafter CRENSHAW].

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

Participants remain in the community, with progress toward treatment goals monitored by a case management team, including probation officers, VHA providers, and the veterans court judges.<sup>41</sup> Failure to comply with the requirements of the program, by failing a regular drug screen or missing a court appearance, results in the imposition of sanctions.<sup>42</sup> Typical sanctions include community service, fines, jail time, or re-arrest, followed by a transfer back to the traditional criminal justice system.<sup>43</sup> While broad-based, longitudinal evaluation data on the effectiveness of veterans treatment courts is not yet available, the Buffalo Veterans Treatment Court has famously maintained a zero percent recidivism rate since its inception.<sup>44</sup> Other programs have demonstrated less dramatic results but still indicate lower recidivism rates among program graduates than for offenders processed through the traditional criminal justice system.<sup>45</sup>

### *C. Policy Rationale for Veterans Courts*

The policy arguments in favor of separate treatment courts for military veterans can be distilled into three central points. First, proponents argue that the service and sacrifice performed by these veterans makes them uniquely deserving of a court that recognizes that sacrifice.<sup>46</sup> Second, heightened recognition of the substance use and mental health effects of combat experience, which can in some cases lead to criminal activity, has made rehabilitation in lieu of incarceration a more viable political option.<sup>47</sup> Finally, practitioner consensus finds that veterans are better engaged by a specialty court

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41. *See id.*

42. *See id.*

43. *See id.*

44. See Neale Gulley, *Nation's First Veterans Court Counts Its Successes*, REUTERS, Jan. 9, 2011, available at <http://www.reuters.com/article/2011/01/09/us-court-veterans-idUSTRE7082U020110109>.

45. See Jack W. Smith, Comment, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004–December 31, 2010*, 29 ALASKA L. REV. 93, 107–08 (2012). This small-scale (n=38) study found a recidivism rate of 45 percent for graduates of the Anchorage veterans treatment court, compared with a 50.4 percent recidivism rate for Alaska offenders overall. *Id.*

46. Russell, *supra* note 19, at 364.

47. *Id.* at 363–64.

sensitive to military culture and connected with the VA medical services for which many participants are already eligible.<sup>48</sup>

The trauma-based “unique needs” that served as both inspiration and justification for the creation of new veteran status-based treatment courts are generally described in the context of the most recent United States military conflicts, Operation Enduring Freedom in Afghanistan and Operations Iraqi Freedom and New Dawn in Iraq.<sup>49</sup> Indeed, the in-theater military experience of these operations stands in some contrast to those experienced by veterans of earlier conflicts. The length and frequency of deployments to Iraq and Afghanistan were unprecedented in American military history,<sup>50</sup> and reliance on an all-volunteer fighting force meant breaks between deployments were truncated.<sup>51</sup> Although post-traumatic stress and related chronic anxiety disorders have long been associated with combat experience,<sup>52</sup> the changing nature of warfare and twenty-first century medical and technological advances are likely to have increased the survival rate for combat troops experiencing trauma.<sup>53</sup> By extension, the societal challenges faced by these service members when they transition back into civilian life have likewise expanded.<sup>54</sup>

In 2004, approximately 10 percent of federal and state prisoners reported prior service in the U.S. Armed Forces, with 4 percent having served in the Iraq and Afghanistan conflicts.<sup>55</sup> Symptoms of post-traumatic stress disorder (PTSD) can contribute to the likelihood that persons with the disorder will engage in illegal conduct. Three

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48. *Id.*

49. See Crenshaw, *supra* note 36.

50. TERRI TANIELIAN ET AL., RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: SUMMARY & RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL & COGNITIVE INJURIES 1 (2008), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND\\_MG720.1.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.1.pdf) [hereinafter TANIELIAN].

51. VANESSA WILLIAMSON & ERIN MULHALL, IRAQ & AFG. VETERANS OF AM., INVISIBLE WOUNDS: PSYCHOLOGICAL & NEUROLOGICAL INJURIES CONFRONT A NEW GENERATION OF VETERANS 6 (Jan. 2009), available at [http://iava.org/files/IAVA\\_invisible\\_wounds\\_0.pdf](http://iava.org/files/IAVA_invisible_wounds_0.pdf).

52. As early as 1919, scientists identified and researched the symptoms of “shell shock,” or “war neuroses,” on French veterans of World War I. *Id.* at 1.

53. TANIELIAN, *supra* note 50, at 1.

54. *Id.*

55. MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: VETERANS IN STATE & FED. PRISON 2004 1 (2007), available at <http://bjs.gov/content/pub/pdf/vsfp04.pdf>.

key domains of functioning are negatively impacted by PTSD symptoms: cognition, physiological arousal, and emotions.<sup>56</sup> Cognitive changes include flashbacks to traumatic events, an inclination to improperly perceive events as threatening, and strong present-day orientation resulting in a failure to plan for the future.<sup>57</sup> Heightened psychophysiological arousal may manifest in anger and irritability, hypervigilance, and a heightened startle response.<sup>58</sup> Emotional effects of PTSD are characterized by high levels of psychological distress, including chronic negative emotions, as well as emotional numbing resulting in impaired empathic responses.<sup>59</sup> The cumulative effect of these symptoms can prompt individuals with PTSD to act aggressively or impulsively out of self-preservation, without full appreciation of the harmful consequences to oneself and others.<sup>60</sup> PTSD might be, therefore, a root cause of some violent, criminal conduct.

The return of veterans from Iraq and Afghanistan has coincided with high-profile cases of violent criminal activity by former combatants experiencing post-traumatic stress and related disorders.<sup>61</sup> The general public response to trauma-related crimes following the

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56. See U.S. DEP'T OF VETERANS AFFAIRS NAT'L CTR. FOR PTSD, DSM CRITERIA FOR PTSD (July 7, 2007), <http://www.ptsd.va.gov/professional/pages/dsm-iv-tr-ptsd.asp>.

57. See *id.*

58. See *id.*

59. *Id.*

60. The National Vietnam Veterans Readjustment Study found male veterans diagnosed with PTSD committed more violent acts against others than veterans without a PTSD diagnosis: 13.3 violent acts in one year, compared to 3.54 acts for those without PTSD. See Cathy Ho Hartsfield, Note, *Deportation of Veterans: The Silent Battle for Naturalization*, 64 RUTGERS L. REV. 835, 851 n.143 (2012). Other studies have found the rate of PTSD diagnosis among prison inmates to be higher than in the general population, although this data supports correlation only and not a causal link. See, e.g., Andrea Friel et al., *Posttraumatic Stress Disorder and Criminal Responsibility*, 19 J. OF FORENSIC PSYCHIATRY & PSYCHOL. 64, 70–71 (2008).

61. Most notably, fourteen Iraq veterans stationed at or living near Fort Carson, the nation's third-largest Army base, located near Colorado Springs, were charged or convicted of eleven murders between 2005 and 2009. L. Christopher Smith, *The Fort Carson Murder Spree*, ROLLING STONE, Nov. 12, 2009, at 52, available at <http://www.rollingstone.com/politics/news/the-fort-carson-murder-spree-20091112>. Numerous additional news accounts of Iraq and Afghanistan veterans invading neighbors' homes or attempting suicide by cop have brought the issue widespread national attention. See, e.g., Goode, *supra* note 1; Lizette Alvarez & Deborah Sontag, *When Strains on Military Families Turn Deadly*, N.Y. TIMES, Feb. 15, 2008, available at [http://www.nytimes.com/2008/02/15/us/15vets.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/02/15/us/15vets.html?pagewanted=all&_r=0); Lizette Alvarez & Deborah Sontag, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, available at <http://www.nytimes.com/2008/01/13/us/13vets.html?pagewanted=all>.

Vietnam War tended to favor incarceration and institutionalization of those unable to lawfully transition back into civilian society.<sup>62</sup> In contrast, increased recognition of the effects of combat trauma by military branches, the Department of Veterans Affairs, and the general public led to increased support for incorporating treatment modalities into the handling of Iraq and Afghanistan veterans' criminal cases.<sup>63</sup> Policy responses to combat trauma-related crime extend beyond the veterans treatment court intervention model adopted by the states and municipalities. The Department of Veterans Affairs launched the Veterans Justice Outreach Initiative in 2009 to serve as a liaison between justice-involved veterans and law enforcement agencies and courts, to promote the provision of mental health treatment services among veteran offenders.<sup>64</sup>

In addition to the cultural and health benefits resulting from veterans treatment courts, specialty courts in general are lauded for their cost-effectiveness relative to incarceration.<sup>65</sup> Practitioners advocating for a cheaper and more efficient penalty system in light of current economic constraints estimate that problem-solving courts provide cost savings of \$4,000 to \$12,000 per offender.<sup>66</sup>

#### *D. Controversy*

While lawmakers and media outlets generally praise veterans treatment courts as smart policy,<sup>67</sup> watchdog groups and concerned

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62. Lithwick, *supra* note 17.

63. *Id.*

64. See *About the Initiative*, U.S. DEP'T VETERANS AFF., [http://www.va.gov/HOMELESS/about\\_the\\_initiative.asp](http://www.va.gov/HOMELESS/about_the_initiative.asp) (last visited Apr. 12, 2013).

65. Chief Justice Randall T. Shepard, *The Great Recession as a Catalyst for More Effective Sentencing*, 23 FED. SENT'G REP. 146, 147 (2010).

66. *Id.* Shepard asserts the savings resulting from Indiana's establishment of drug courts reached \$7 million in 2010, when including savings on incarceration, reduced recidivism, and reduced costs to victims. *Id.* at 148. At the time of writing, no nationwide cost comparison statistics were available for veterans treatment courts specifically. At the state level, however, some jurisdictions that had undertaken a cost-benefit analysis of mandating the implementation of veterans treatment courts concluded the added burden on judges, prosecutors, and defense attorneys would outweigh program benefits. See TENN. ADMIN. OFFICE OF THE COURTS, VETERANS TREATMENT COURT LEGISLATIVE REPORT, PUB. CHAPTER 943, 7 (2012), available at <http://www.documentcloud.org/documents/560248-report-on-veterans-treatment-courts.html>.

67. See Goode, *supra* note 1. Despite the rapid growth of veterans courts nationwide, reluctance to participate on the part of prosecutors persists. The Platte County, Missouri,

jurists have raised legal objections questioning the constitutionality of creating a special legal class of criminal defendants based solely on veteran status.<sup>68</sup> Specifically, state-level American Civil Liberties Union (ACLU) organizations have raised concerns over the establishment of new veterans courts in their states. Lee Rowland of the ACLU of Nevada opposed the establishment of a state veterans treatment court program on the grounds that it granted “an automatic free pass based on military status to certain criminal defense rights that others don’t have.”<sup>69</sup> Similarly, Mark Silverstein of the Colorado ACLU objected to a local veterans court by arguing that veteran status is both over- and under-inclusive, available to Vietnam and World War II veterans who have widely varying combat experiences, while nonveterans diagnosed with PTSD are excluded. Silverstein questioned why “the criminal justice system take[s] into account PTSD when it arises from military service but disregard[s] it when it stems from different but nevertheless horrific life experiences?”<sup>70</sup>

While the ACLU did not elect to test these courts through litigation, preferring instead to endorse courts that require a tighter nexus between combat stress and criminal charges,<sup>71</sup> the issue of unfair preferential treatment as a violation of equal justice principles remains. Connecticut Supreme Court Justice Barry Schaller, in

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prosecutor refused to consider treatment alternatives for a local veteran involved in an armed standoff with police, saying: “P.T.S.D. is not a get out of jail free card.” *Id.*

68. Lithwick, *supra* note 17. It bears noting that, apart from the unique characteristics of veterans treatment courts, the general specialty court model has generated a significant amount of controversy, particularly from criminal defense practitioners concerned about the ethics and procedural anomalies of representation in a non-adversarial, treatment-focused setting. See, e.g., Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL’Y 57, 64–65 (2009). Additionally, commentators have questioned the appropriateness of the treatment court model in cases of intimate partner violence and sexual assault. For an argument that veterans treatment courts specifically should not hear intimate partner violence cases, see Pamela Kravetz, Note, *Way Off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162 (2012).

69. Lithwick, *supra* note 17.

70. *Id.*

71. The ACLU of Illinois distinguished the Cook County veterans treatment court from those in Nevada, asserting Nevada “automatically transferred” offenders with veteran status into the program and provided special treatment in the form of reduced sentences. Matthew Walberg, *Cook County Veterans Court Offers Helping Hand*, CHI. TRIB., July 15, 2009, available at [http://articles.chicagotribune.com/2009-07-15/news/0907140761\\_1\\_special-court-newveterans-helping](http://articles.chicagotribune.com/2009-07-15/news/0907140761_1_special-court-newveterans-helping).

supporting diversion programs over problem-solving courts for veterans, expressed unease regarding the constitutionality of veterans-only courts: “Courts have to be open to everyone and provide equal opportunity, equal access. . . . The courts can provide special opportunities for veterans without jeopardizing the justice mandate.”<sup>72</sup>

### III. VETERAN STATUS OUTSIDE THE PROBLEM-SOLVING COURT MODEL

These constitutional objections highlight the key distinction between veterans courts and the drug court model they have grown out of: veterans courts appear to create a special, arguably preferential, class within the criminal justice system based on veteran status rather than on a condition of mental illness or addiction out of which criminal activity arises.<sup>73</sup> Formalization of veteran status as a special class of criminal defendants predates veterans treatment courts, however, as does a court’s consideration of combat experience as a mitigating factor in criminal sentencing.

#### A. State Statutes

##### 1. North Carolina

North Carolina appears to be one of the first states to statutorily enshrine veteran status as a mitigating factor in felony sentencing. Section 15A-1340.16(e)(14) of the North Carolina General Statute requires criminal courts to consider whether “[t]he defendant has been honorably discharged from the Armed Forces of the United States.”<sup>74</sup> Court enforcement of this provision can be seen as early as 1983.<sup>75</sup> In *State v. Blackwelder*, the court remanded, finding, *inter alia*, “if, at resentencing, evidence establishes that defendant was

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72. Elliot Blair Smith, *War Heroes Gone Bad Divided by Courts Favoring Prison or Healing*, BLOOMBERG NEWS (Nov. 2, 2012), <http://www.businessweek.com/news/2012-11-02/war-heroes-gone-bad-divided-by-courts-favoring-prison-or-healing#p1>.

73. Lithwick, *supra* note 17.

74. N.C. GEN. STAT. § 15a-1340.16(e)(14) (2012).

75. See *State v. Blackwelder*, 306 S.E.2d. 783 (N.C. 1983).

honorable discharge from armed services, that factor would be required to be found in mitigation.”<sup>76</sup> While evidencing an early recognition of the relevance of prior military service to criminal sentencing, North Carolina’s statute is narrowly drawn—limiting the benefit only to those honorably discharged—and has not since been revised to reflect evolving understandings of combat trauma and its effects on behavior.

## 2. California

In 1984, California established statutory sentencing guidelines for veterans.<sup>77</sup> Section 1170.9 of the California Penal Code, in contrast to the North Carolina statute, explicitly contemplated combat trauma and directed:

In the case of any person convicted of a felony who would otherwise be sentenced to state prison the court shall consider whether the defendant was a member of the military forces of the United States who served in combat in Vietnam and who suffers from substance abuse or psychological problems resulting from that service.<sup>78</sup>

The statute provided the option of treatment in federal facilities in lieu of incarceration for felony defendants who met the requirement of Vietnam combat experience and could establish a causal link between their mental illness or substance use and combat stress.<sup>79</sup> While groundbreaking in its early recognition of PTSD as a contributing factor in criminal activity, coming only four years after the inclusion of PTSD in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM III),<sup>80</sup>

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76. *Blackwelder*, 306 S.E.2d. at 783.

77. CAL. PENAL CODE § 1170.9 (1984).

78. *Id.* Section 1170.9 followed a 1982 California statute calling for greater cooperation between the Department of Corrections and federal, state, and local veterans service providers. See 1982 Cal. Stat. 964.

79. § 1170.9.

80. See Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 928 n.18 (2008) (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 236–38 (3d ed. 1980)).

section 1170.9 had a relatively minimal impact on veteran sentencing because courts found the participation of federal facilities to be impractical.<sup>81</sup>

The California Legislature proposed and enacted a number of revisions to section 1170.9 in 2006, to expand applicability of special sentencing considerations to veterans of the contemporary conflicts in Iraq and Afghanistan.<sup>82</sup> Additionally, the revised statute made a pre-sentencing hearing mandatory, rather than discretionary, where the defendant “alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in combat in the United States military.”<sup>83</sup> While expanding the reach of alternative sentencing options for veterans, however, the 2006 revisions highlighted two key limitations. First, while the statute now authorized sentencing treatment in lieu of incarceration, imposing such a sentence remained within the discretion of the sentencing body.<sup>84</sup> Second, section 1(f) of the 2006 act reads: “It is not the intent of the Legislature to expand probation eligibility for veterans who commit crimes pursuant to these provisions.”<sup>85</sup> The latter provision ensured that treatment sentences would be available primarily to non-violent, non-repeat offenders.<sup>86</sup>

The California legislature enacted additional revisions to section 1170.9 in 2010, which further expanded the reach of the statute while maintaining the probation-eligibility limitation.<sup>87</sup> The legislature added military sexual trauma and traumatic brain injury to the list of diagnoses contemplated under the alternative sentencing provisions.<sup>88</sup> Significantly, the 2010 version also eliminated the

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81. Caine, *supra* note 22, at 226.

82. 2006 Cal. Legis. Serv. Ch. 788, 2586 (West).

83. *Id.*

84. *Id.*

85. *Id.*

86. See *People v. Ferguson*, 124 Cal. Rptr. 3d 182, 200 (Ct. App. 2011) (interpreting the probation requirement broadly to bar veterans “technically eligible” for probation where probation is inappropriate given the violent nature or seriousness of the crime).

87. 2010 Cal. Legis. Serv. Ch. 347, 674 (West).

88. *Id.*

requirement that the precipitating disorder result from combat experience, making it contingent on military service only.<sup>89</sup>

### 3. Minnesota

Unlike the California statute, which expanded longstanding special provisions for veteran defendants in sentencing, the Minnesota statute incorporated military service provisions into a general presentencing report.<sup>90</sup> Minnesota Statutes section 609.115 requires the preparation of a post-conviction, presentencing report, to include the offender's "individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community."<sup>91</sup> A 2008 amendment to the statute added veteran status to the list of characteristics that the presentence investigation must inquire into:<sup>92</sup> "[w]hen a defendant appears in court and is convicted of a crime, the court shall inquire whether the defendant is currently serving in or is a veteran of the armed forces of the United States."<sup>93</sup> If the court finds the defendant to be in active military service or a military veteran with a diagnosed mental illness, the court is authorized, but not required, to consult with Veterans Administration health providers or other service providers to determine a course of treatment.<sup>94</sup>

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89. *Id.* The elimination of the combat requirement can be seen, in light of the contemporaneous revisions, as expanding the provision's reach to include female service members, who rarely serve on the front lines but experience military sexual trauma and its resulting mental health and substance use disorders at high rates. See Erin Mulhall, *Women Warriors: Supporting She 'Who has Borne the Battle,'* IRAQ & AFG. VETERANS AM. 6 (Oct. 2009), available at [http://media.iava.org/IAVA\\_WomensReport\\_2009.pdf](http://media.iava.org/IAVA_WomensReport_2009.pdf). However, the California courts have yet to encounter a case requiring interpretation of the revised statutory language and its applicability to non-combat veterans generally.

90. Caine, *supra* note 22, at 231.

91. MINN. STAT. § 609.115 (2012).

92. *Id.* Other specific characteristics enumerated in the statute include current and prior chemical dependency history and a compulsive gambling assessment for theft-related convictions. *Id.*

93. *Id.*

94. *Id.*

#### 4. Notable State Bills

In recent years, a number of states have proposed similar legislation to formalize prior military service as a consideration in criminal sentencing,<sup>95</sup> reflecting a growing consensus on the relevance of veteran and active military status in the evaluation of criminal responsibility. Ohio's proposed legislation amends the state sentencing statute as follows:

The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses.<sup>96</sup>

The Ohio bill is significant in its combination of a holistic approach to the potential effects of military service on behavior (i.e., combat service is not a requirement here) and in its mandatory language.

#### *B. Federal Courts' Consideration of Veteran Status*

Outside of the veterans specialty court model and those states that have formalized veteran status within their criminal sentencing regimes, courts have considered military experience, and its increasingly well-known psychological consequences, in sentencing decisions on a case-by-case basis. While military service has previously been found inapplicable as a mitigating factor,<sup>97</sup> a recent United States Supreme Court decision and its reflection in federal sentencing guidelines suggests that federal courts have joined the states in the growing consensus that veteran status should be considered in at least some criminal sentencing contexts.

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95. See, e.g., Assem. No. 2663, 215th Leg. (N.J. 2012) (amending the statute to include the following language: "The defendant suffers from post-traumatic stress disorder, substance abuse, psychiatric, or psychological problems resulting from service as a member of the United States Armed Forces in a combat theater of operations during a time of war or emergency.").

96. S.B. No. 330, 129th Gen. Assem., Reg. Sess. (Ohio 2012).

97. See, e.g., U.S. v. Lett, 483 F.3d 782 (11th Cir. 2007), cert. denied, 555 U.S. 811 (2008) (reversing the trial court's downward adjustment of an active duty soldier's drug-related sentence, even where the Army advocated for sentence mitigation).

### 1. *Porter v. McCollum*

The United States Supreme Court, in a 2009 *per curiam* decision, elevated the importance of combat experience to sentencing determinations in death penalty cases, requiring defense counsel to present such evidence where it exists.<sup>98</sup> Petitioner George Porter was a Korean War veteran who had served in two of the bloodiest battles of the conflict.<sup>99</sup> Throughout his tour of duty in Korea, his return to the United States, and after his discharge from the Army, Porter demonstrated signs of mental agitation and psychological distress by repeatedly going absent without leave, reporting frequent and severe nightmares, and developing alcohol dependency.<sup>100</sup> In 1986, Porter was convicted of two counts of first degree murder for shooting and killing his former girlfriend and her boyfriend.<sup>101</sup> He was sentenced to death.<sup>102</sup> At issue before the Court was defense counsel's failure to present evidence of Porter's combat experience and subsequent trauma during the penalty phase of the murder trial.<sup>103</sup>

Reversing the Eleventh Circuit, the Court held the failure of Porter's attorney to present this mitigating evidence constituted ineffective assistance of counsel and a violation of Porter's Sixth Amendment rights.<sup>104</sup> While the Court highlighted several sources of trauma specific to Porter's life experience as reasonable mitigating factors,<sup>105</sup> the opinion's general recognition of the relevance of

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98. See *Porter v. McCollum*, 558 U.S. 30, (2009) (per curiam).

99. *Id.* at 30. During Porter's appeal, his commanding officer testified as to the extreme conditions Porter and his company endured during the battles at Kunu-ri and Chip'yong-ni. *Id.* at 34–35. Both battles involved several days of engagement with the enemy without rest. *Id.* The casualty rate at Chip'yong-ni was over 50 percent. *Id.* Porter himself was wounded in both battles, sustaining a gunshot wound at Kunu-ri and subsequently receiving two Purple Hearts. *Id.*

100. *Id.* at 35–36. Porter's family testified on appeal that they had resorted to hiding the knives in the family home to prevent him from climbing his bedroom walls with them during his nighttime terrors. *Id.*

101. *Id.* at 35–36.

102. *Id.*

103. *Id.* Porter's attorney presented the following limited mitigating evidence: a statement from Porter's ex-wife that his relationship with his son was a good one, that Porter "ha[d] other handicaps that weren't apparent during the trial," and that Porter was not "mentally healthy." *Id.*

104. *Id.* The Court denied Porter's request that his conviction be overturned. *Id.*

105. *Id.* at 33–34. In addition to Porter's combat trauma, the Court asserted that evidence of severe physical abuse by Porter's father during his childhood should have been presented as a

military service and PTSD to the commission of criminal acts suggests application beyond the *Porter* case facts. Specifically, the Court stated:

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.<sup>106</sup>

Linking Porter's circumstances with those of veterans of the contemporary conflicts in Iraq and Afghanistan, the Court noted that PTSD is "not uncommon among veterans returning from combat,"<sup>107</sup> as evidenced by VA Secretary Eric Shinseki's testimony that 23 percent of recent veterans had a preliminary diagnosis of PTSD.<sup>108</sup>

## 2. Federal Sentencing Guidelines

In 2010, the Federal Sentencing Guidelines incorporated the *Porter* holding with the following amendment: "Military service may be relevant in determining whether a departure [from sentencing

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possible mitigating factor, finding it "unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with [the victim]." *Id.* at 43. Additionally, the Court found relevant the medical testimony offered on appeal that Porter had suffered brain damage that could result in "impulsive, violent behavior." *Id.* at 36.

The combination of mitigating factors in Porter's case (i.e. child abuse, brain injury, and combat trauma) has perhaps contributed to the inconsistency of *Porter*'s application in subsequent cases. *Compare Payton v. Cullen*, 658 F.3d 890 (9th Cir. 2011) (finding insufficient mitigating evidence to reverse a death sentence where defendant had witnessed and experienced sexual and verbal abuse during childhood, but demonstrated no evidence of brain injury and had served only twenty-two days in Vietnam), *with James v. Schriro*, 659 F.3d 855 (9th Cir. 2011) (relying on *Porter* to find ineffective assistance of counsel where evidence of non-veteran defendant's childhood abuse, drug use, and suicide attempts was not offered during the penalty phase).

106. *Porter*, 558 U.S. at 43–44 (internal citation omitted).

107. *Id.* at 35 n.4.

108. *Id.* (citing Hearing on Fiscal Year 2010 Budget for Veterans' Programs before the Senate Committee on Veterans' Affairs, 111th Cong., 1st Sess., 63 (2009)).

guidelines] is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”<sup>109</sup> This amendment marked a significant departure from the way prior Guidelines addressed military service: “Military, civic, charitable, or public service; employment-related contributions, and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.”<sup>110</sup> The Commission specifically cited *Porter* in its notes to the 2010 amendments, while asserting that military service was recognized as a “traditional mitigating factor” in sentencing.<sup>111</sup> Notably, the revised Guidelines do not specify combat experience but contemplate military service generally.<sup>112</sup>

### 3. Non-statutory State Sentencing Practices

Although the instant analysis does not undertake a comprehensive state-level survey of the role of veteran status as a non-statutory mitigating factor in sentencing, it is appropriate to note that a criminal defendant’s military history is generally recognized as a relevant factor in penalty determinations.<sup>113</sup> In addition to state court judges’ broad discretion in sentencing and consideration of mitigating and aggravating factors in adjusting a sentence, twenty-one states empanel advisory committees on sentencing to produce and distribute to judges a set of guidelines analogous in scope and authority to the Federal Sentencing Guidelines referenced above.<sup>114</sup> Like the Federal Sentencing Commission, state commissions have retreated from high rates of incarceration in the name of sentencing consistency, and

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109. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (1991) (amended 2010).

110. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (1991) (amended 2004).

111. U.S. SENTENCING GUIDELINES MANUAL app. C amend. 739 (2010). As with *Porter*, the impact of including military service as a permissible reason for departure from the Federal Sentencing Guidelines is unclear, given the 2005 shift in the Guidelines’ status from mandatory to advisory. *See U.S. v. Booker*, 543 U.S. 220 (2005).

112. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (1991) (amended 2010).

113. *See, e.g.*, *State v. Fontenot*, 532 So. 2d 412, 414 (La. Ct. App. 1988) (upholding a conviction, but finding a trial court’s failure to allow evidence of veteran status as a mitigating factor in error).

114. NEAL B. KAUDER & BRIAN J. OSTROM, NAT’L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (July 2008).

trend towards flexibility and judicial discretion as the new sentencing paradigm.<sup>115</sup>

#### IV. ANALYSIS

##### *A. Do Veterans Treatment Courts Conform with the Current Criminal Sentencing Landscape?*

Veterans treatment courts and their eligibility criteria do not constitute a departure from the general recognition by state legislatures, courts, and sentencing commissions that former military service is an appropriate line of inquiry in the penalty phase of criminal prosecutions. In the absence of a direct legal challenge to the veterans treatment court process, the trends in this area of law and in each of the examined fora are most relevant to an analysis of the legal basis for veterans courts. The national trend is toward mandatory inquiry into and consideration of prior military experience, and does not limit consideration solely to combat experience. The statutory mitigation created by the recent amendments to California's section 1170.9, while jurisdictionally limited, illustrates broader policy developments regarding the treatment of veteran offenders.<sup>116</sup> The original discretionary provision targeting Vietnam combat veterans has become, by amendment, a *mandatory* hearing trigger for all defendants with a military service record of any kind who claim a causal link between their service and their crime.<sup>117</sup> The Minnesota statute, as amended to include military veterans, similarly *requires* courts to inquire into veteran status and possible treatment needs prior to sentencing, and to consider the treatment options and recommendations of the Veterans Administration as part of the sentencing process.<sup>118</sup> The recent legislation proposed in Ohio similarly requires consideration of an expansive range of

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115. See Caine, *supra* note 22, at 236; see also Booker, 543 U.S. at 224.

116. 2006 Cal. Legis. Serv. Ch. 788, 2586 (West); 2010 Cal. Legis. Serv. Ch. 347, 674 (West).

117. CAL. PENAL CODE § 1170.9 (1984). See 1982 Cal. Stat. 964, for the original, more limited statutory provision for Vietnam-era combat veterans.

118. MINN. STAT. § 609.115 (2012).

psychological and behavioral effects of military service.<sup>119</sup> Veterans treatment courts, allowing for some variation in procedure between different individual programs, generally conform with these principles: pre- and post-conviction referrals are made on the broad basis of a military service record, and enrollment in a program depends on treatment for a precipitating condition.<sup>120</sup>

Equally instructive from a chronological perspective are the recent federal court endorsements of veteran status as a sentencing consideration, via the 2009 *Porter* decision and the 2010 Federal Sentencing Guidelines amendments.<sup>121</sup> That these two significant developments—the former mandating the presentation of military experience evidence in capital cases, and the latter constituting a direct reversal of prior federal policy to ignore military service in sentencing—followed the rapid growth of veterans courts between 2008 and 2010 can be seen as a tacit endorsement of veterans courts' eligibility standards.<sup>122</sup> One might read the case facts in *Porter* as limiting the reach of that decision to instances of extreme and verifiable combat trauma, thus distinguishing the holding from a sentencing framework based on status rather than trauma. The dicta, however, explicitly endorses what the Court identifies as a long and appropriate history of criminal leniency for veterans in recognition of their service and sacrifice.<sup>123</sup>

The 2010 Federal Sentencing Guidelines, which apply to military service status generally, may be understood as a direct outgrowth of both a broad interpretation of *Porter* and the veterans treatment court movement, since the Federal Sentencing Commission could hardly have been ignorant of these programs at the time it drafted the

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119. S.B. No. 330, 129th Gen. Assem., Reg. Sess. (Ohio 2012).

120. See CRENshaw, *supra* note 36.

121. *Porter*, 558 U.S. at 30; U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (1991) (amended 2010).

122. *Porter*, 558 U.S. at 30; U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (1991) (amended 2010); Russell, *supra* note 19, at 363.

123. *Porter*, 558 U.S. at 43–44. The Court does not discount the relevance of combat experience in assessing the appropriateness of extending leniency, arguing for courts' special recognition of "those who fought on the front lines." *Id.* While demonstrable combat trauma clearly elevates a leniency claim in the Court's analysis, the Court's language does not make leniency exclusively available to combat veterans, but appears to contemplate military service generally as a reason for leniency. *Id.* *Porter*'s procedural posture, however, might limit its application to capital cases only.

Guidelines.<sup>124</sup> Indeed, even more than *Porter*, section 5H1.11 reflects the national trend towards broadly defined, unqualified consideration of a defendant's military history in sentencing.<sup>125</sup> Within this expansive and expanding framework, veterans treatment courts appear to be on increasingly solid legal ground.<sup>126</sup>

### *B. Are Veterans Courts Good Public Policy?*

The favorable public policy considerations arising out of veterans treatment courts include: the potential for more cost-effective rehabilitation, an increased military cultural competency, reduced recidivism, and political viability.<sup>127</sup> These benefits compete against concerns about sentencing inconsistency and the lack of access to alternative sentencing paradigms by those experiencing the effects of non-military-related trauma.<sup>128</sup> The balancing of these public policy considerations strongly favors veterans treatment courts. First, as noted above, both federal and state sentencing commissions have recently promulgated guidelines that tolerate greater inconsistency in exchange for greater flexibility in tailoring penalties to individual defendants.<sup>129</sup> Additionally, some commentators suggest veterans courts may pave the way for increased access to treatment-based sentencing alternatives for a broader group of defendants, including

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124. For a sample of prominent news articles published between 2009 and 2010 addressing the veterans treatment court model, *see supra* notes 17 and 25.

125. *See U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (1991) (amended 2010).*

126. In answer to the ACLU concerns about the lack of a causal nexus requirement between the offense and the offender's military history, the veterans treatment court model might, in fact, hew closer to that causal nexus than do the general sentencing guidelines proffered by the federal courts system. The fact that participation requires treatment also implies the existence of a treatable condition. The Sentencing Guidelines, in contrast, allow for military service in isolation to be a factor in criminal sentencing.

Note that the healthy veteran-felon receiving a more lenient sentence on the basis of his or her military service alone is likely to be no more than a hypothetical scenario. The practical relevance of military history is its effect on the offender's psychological or physical health. However, detrimental effects need not stem from combat experience, but may result from other abuse or trauma experienced during the course of military service, as the California mitigation statute recognized with its addition of military sexual trauma to the statutory provision. 2010 Cal. Legis. Serv. Ch. 347, 674 (West).

127. *See supra* Part II.B–C.

128. *See supra* Part II.D.

129. *See supra* Part III.B.2–3.

civilians.<sup>130</sup> While veteran-friendly programs are politically popular, demonstrated successes in community-based rehabilitation for veteran offenders with PTSD might justify expanding such treatment offerings to non-veteran residents in areas of concentrated urban poverty and crime, for example, who also experience PTSD in high rates.<sup>131</sup>

### *C. How Should Veterans Treatment Court Programs Proceed in Consideration of Criticisms?*

Finding a solid legal foundation for veteran status as an eligibility criterion in problem-solving courts need not be the end of the inquiry. Given the concerns publicly raised by the ACLU and others, veterans treatment court programs nationwide might choose to address these criticisms by adopting a collective and uniform legal position based on the federal and state authorities outlined above.<sup>132</sup> However, a declaration of the legal relevance of veteran status in criminal sentencing need not be exclusive of a simultaneous affirmation of the fundamental purpose of the traditional problem-solving court model—to connect offenders experiencing drug addiction and mental illness with treatment in order to reduce recidivism.<sup>133</sup> Veterans treatment court judges and other supporters, by virtue of the strong legal and political backing for this model, are uniquely positioned to advocate for further expansion of these programs to reach traumatized populations beyond the military veteran community. Where mental health and substance use treatment providers are accessible, as they are within the VA health system, treatment and case management in lieu of incarceration can dramatically reduce

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130. Lithwick argues: “We have known for years that treatment works better than incarceration when it comes to criminal defendants with drug and mental-health problems. . . . You don’t have to oppose veterans’ court to want that type of justice for all.” Lithwick, *supra* note 17.

131. See Naomi Breslau et al., *Traumatic Events and Posttraumatic Stress Disorder in an Urban Population of Young Adults*, 48(3) ARCHIVES OF GEN. PSYCHIATRY 216, 220–21 (1991).

132. A move to endorse status-based justifications for veterans treatment courts would depart from the strategies employed to date by individual veterans court programs seeking to bypass ACLU scrutiny. See, e.g., SEATTLE MUN. COURT, VETERANS TREATMENT COURT., available at [www.seattle.gov/courts/vtc/vtc\\_guidelines.docx](http://www.seattle.gov/courts/vtc/vtc_guidelines.docx) (asserting that “[v]eteran status alone is insufficient to support entry into VTC”).

133. See *supra* notes 44–45 and accompanying text.

recidivism while simultaneously lowering the costs of rehabilitation for society.<sup>134</sup> The success of the veterans court model provides a strong argument for a new intervention paradigm whereby the criminal justice system invests in greater access to health services instead of perpetuating existing problems of mass incarceration—a shift in keeping with the increased willingness of courts and legislatures to consider and address common disorders underlying criminal activity.

#### V. CONCLUSION

At the heart of the debate over veteran status as a mitigating factor, and the aligning state and federal responses to that controversy, lies an unsettled conception of fairness and equal treatment. Critics identify a real and concerning disparity in access to problem-solving courts created by programs designated for veterans only. Apart from equal access concerns, the high court in *Porter*, the Federal Sentencing Commission, and a growing number of state legislatures have found that fairness also dictates that the sacrifices inherent in military service deserve special consideration in the criminal sentencing context. As suggested above, however, these conceptions of fairness are not mutually exclusive. Justice and society are better served by veterans courts that extend appropriate treatment options to offenders in need of that treatment. When veterans treatment courts become an evidence-based and politically-viable vehicle for extending treatment to a broader subset of offenders in the coming years, it is hoped the benefits of treatment in lieu of incarceration will become systemic.

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134. See *supra* note 64 and accompanying text.