
ECHOES OF WAR

The Combat Veteran in Criminal Court



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I. Overview

Approximately 2.5 million Americans have now served in Iraq or Afghanistan. A 2008 RAND Corporation study found that, of the 1.7 million who had served in the war zones at that time, over 300,000 were suffering from Post-Traumatic Stress Disorder (“PTSD”), and another 320,000 from Traumatic Brain Injury (“TBI”).¹ Only about half of these troops, it found, had reported or sought help for their condition.² Untreated, many of these psychologically-injured veterans are acting out in reckless, self-destructive and, sometimes, violent ways that bring them into contact with the criminal justice system. History tells us that as the wars in Iraq and Afghanistan wind down, the numbers of troubled veterans flooding into our criminal courts will swell.

Pioneered by Judge Robert Russell, in Buffalo, New York, Veterans Treatment Courts are springing up in every state in the country. These courts are modeled on other specialty courts, with the addition of the Veterans Administration as a partner, providing all of the treatment and programming. Unlike the VA of the past, the 21st century VA is going out of its way to work with the criminal courts, recognizing that, often, the veterans in need of help first land in the criminal justice system. Today, the VA will partner with the court, recommending specific treatment and notifying the court if the veteran is not following through.

In 2008, Minnesota enacted Statute § 609.115, Subd. 10, legislation that encourages treatment over incarceration for veterans whose criminal offenses are linked to their psychological injuries. Minnesota was the second state in the nation to pass such legislation, after California, and has since served as a model for numerous other states in passing their own. Minnesota’s and California’s veteran sentencing laws were cited by the U.S. Supreme Court in its 2009 landmark decision, *Porter v. McCollum*, which, for the first time, requires a veteran’s military service and psychological injuries to be taken into consideration at sentencing.³

The sentencing statutes in Minnesota, California and other states allow any judge, in the absence of a formal Veterans Treatment Court, to follow the same principles of VA-provided and probation-monitored treatment, and mitigated sentencing in handling a veteran’s case. This is crucial particularly in rural jurisdictions where low budgets and volume of veterans make formal Veterans Treatment Court unfeasible.

Whether an formal urban Veterans Court or a rural Veterans Court Process, this is not a “get out of jail free card” for veterans. Veteran participants must agree to take

¹ T. TANIELIAN, L.H. JAYCOX, T.L. SCHELL, G.N. MARSHALL, M.A. BURNAM, C. EIBNER, B.R. KARNEY, L.S. MEREDITH, J.S. RINGEL, M.E. VAIANA, AND THE INVISIBLE WOUNDS STUDY TEAM, RAND CORPORATION, MG-720/1-CCF, INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES 64 (2008) [hereinafter INVISIBLE WOUNDS OF WAR].

² *Id.*

³ *Porter v. McCollum*, 130 S.Ct. 447, (See Footnote 9).

responsibility for themselves and commit to getting all needed treatment. Failure to complete treatment or remain law abiding carries consequences up to and including the imposition of jail time.

PTSD's Emerging History

Emerging historical research reveals a pattern of traumatized combat veterans surfacing in the criminal justice system following every major American conflict. Though many people at the time were aware of the problem, open discussion was considered taboo and substantial efforts were often made to sweep the issue under the rug.

Unfortunately, veterans of past conflicts were sometimes treated quite harshly when their psychological injuries led them into criminal behavior. This was particularly true in the wake of Vietnam when hundreds of thousands of psychologically-injured veterans returned home to a largely hostile American public who had come to blame them for an unpopular war. These veterans were often stigmatized and literally discarded when their psychological injuries led to criminal behavior. Even now, more than 30 years after that war, hundreds of thousands of Vietnam veterans remain incarcerated, homeless, and/or chemically-addicted across America. Our society has paid a staggering price for our abandonment of the Vietnam generation. The side-effects of their untreated trauma have cost us in many unforeseen ways. Countless families have been destroyed, jobs lost, and taxpayer dollars spent on treatment that came too late to make a difference for many.

Today, Americans appear to have learned valuable lessons from the Vietnam experience. We recognize that in a democracy our elected leaders bear the responsibility for strategic policies, not the servicemen and women who dutifully and selflessly carry them out. We are also awakening to the tragic long-term consequences the Vietnam generation's abandonment and are embracing them with long-overdue recognition of their sacrifices.

Today's Military Under-Strain

After eight years of war in Iraq and Afghanistan, our military is now under enormous strain. Unlike any other extended conflict in American history, we have not resorted to a draft to ensure a large pool of combatants. Instead, we are fighting this conflict with a relatively small military force that we are recycling back into combat over and over. Most active duty troops have now served at least two tours. Many, especially our ground combat troops have served more. Some are now on their sixth, seventh, even eighth combat tours. Our National Guard and Reserves have also been tapped to an unprecedented level with some now deploying for their second and even third tours. Compare this with Vietnam, in which the vast majority of draftees served only one 12-month tour.

We have no modern precedent with which to compare our current situation and the end of the current conflicts are not yet in sight. One thing is certain: the levels of combat

trauma in our armed forces will continue to rise. A recent Army study found that, not surprisingly, the incidence of PTSD among troops rises significantly with each additional combat tour.⁴

PTSD's Stigma

Though initially unprepared for the wave of psychological injuries from Iraq and Afghanistan, the military is now doing more than ever to identify and treat psychological casualties on the battlefield. The VA was also initially overwhelmed but, with the help of significant recent funding by Congress, is rapidly expanding its treatment capacity. PTSD treatment methods have also evolved rapidly in the past few years. Cutting edge therapies are showing great promise. The key to long term recovery, experts say, is early intervention and treatment.

Unfortunately, PTSD still carries significant stigma within the military. The military's "warrior" culture necessarily instills, demands and rewards strength, both physical and mental. Troops are expected to operate effectively and complete their mission under unimaginably stressful life or death situations. Within a combat unit, a soldier's standing and reputation is largely based on how "cool" they are under fire. This mindset becomes deeply ingrained and many psychologically-injured combat veterans deny they have a problem, even to themselves. Others refuse available help out of fear that they will lose the respect of their comrades, jeopardize their security clearance or harm their chances of promotion.⁵ Many veterans carry this value system with them even after they leave the military and come home.

Untreated, psychologically injured veterans often resort to self-medication with drugs or, more often, alcohol, in order to calm their nerves and sleep. In the long run, however, these substances only exacerbate their symptoms, often leading to self-destructive, reckless or violent behavior. In this way, many troubled veterans first surface in the criminal justice system.

A New Approach

The question we now face in criminal courts across the country is, what to do with Iraq and Afghan War veterans whose criminal offenses are tied to their untreated psychological war injuries and related addictions? Do we repeat the mistakes of the past,

⁴ OFFICE OF THE SURGEON MULTI-NATIONAL FORCE-IRAQ, OFFICE OF THE COMMAND SURGEON, AND OFFICE OF THE SURGEON GENERAL U.S. ARMY MEDICAL COMMAND, MENTAL HEALTH ADVISORY TEAM (MHAT) V, OPERATION IRAQI FREEDOM 06-08: IRAQ, OPERATION ENDURING FREEDOM 8: AFGHANISTAN (14 February 2008) (available at: http://www.armymedicine.army.mil/reports/mhat/mhat_v/MHAT_V_OIFandOEF-Redacted.pdf) [hereinafter MENTAL HEALTH ADVISORY TEAM (MHAT) V]

⁵ INVISIBLE WOUNDS OF WAR, *supra* note 1.

demonizing and discarding this generation as we did the Vietnam generation before them? Or do we pursue a more informed approach, one that focuses on intervention and treatment over conviction and incarceration?

Growing numbers of Americans are reflecting on the mistakes made with the Vietnam generation and are professing a commitment to “support our troops” this time, whether we personally support the current conflicts or not. We are recognizing that to truly “support our troops” we need to apply our lessons from history and newfound knowledge about PTSD to help the most troubled of our returning veterans when they come into contact with the criminal justice system. We are recognizing that to deny the frequent connection between combat trauma and subsequent criminal behavior is to deny the evidence and to discard another generation of troubled heroes.

This paper reviews the history of combat trauma and its links to subsequent criminal behavior. It then reviews unique issues we face in dealing with these veterans in the criminal courts and how Veterans Treatment Courts can properly address them.

II. Historical Perspective of PTSD

The term “Post-Traumatic Stress Disorder” was first coined and formally recognized in the context of treating traumatized Vietnam veterans. This relatively recent formal recognition of the condition has led some to believe Vietnam was the first war to produce psychological casualties. In fact, PTSD has been a constant side effect of war for as long as soldiers have been sent into combat.

A. Combat Trauma in the Greek Classics

Some of the first known chronicles of the psychological costs of war are found in Greek literary classics. Written approximately 3,000 years ago, Homer’s *Iliad* and *Odyssey* richly detail the effects of war on soldiers’ psyches and souls. Two recent books, *Achilles in Vietnam* and *Odysseus in America*, by Dr. Jonathan Shay, M.D., a former VA psychiatrist with twenty years of experience treating Vietnam veterans, draw insightful parallels between the trauma suffered by Homers’ characters and that of modern day combat veterans.⁶

The *Iliad* tells the story of the great warrior, Achilles, and his psychological unraveling during the Trojan War. Dr. Shay notes that Achilles’ profound grief over the loss of a close comrade, his subsequent “berserker” rage as he mutilates the bodies of his enemies, and his eventual self-destructive unraveling closely parallel the experiences of many of his Vietnam veteran patients.

The *Odyssey* picks up at the end of the Trojan War and follows the often-criminal adventures of another traumatized Trojan War veteran, Odysseus (aka “Ulysses”) as he

⁶ JONATHAN SHAY, M.D., PH.D., *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* (1994); JONATHAN SHAY, M.D., PH.D., *ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING* (2002).

makes his way home to Greece. Along the way, notes Dr. Shay, Odysseus and his men raid and then drunkenly pillage the city of Ismarus, battle drug addiction in “Lotus Land,” and rob the Cyclops, among other misadventures. Once he reaches home, Odysseus commits a massive act of domestic violence, slaying dozens of suitors who had been courting his wife during his absence and then killing his wife’s maidservants.

The primary conclusion of Dr. Shay’s scholarship is that, despite the profound changes in warfare brought on by technology, war’s effects on the individual soldier, in facing death, taking life and losing comrades, have changed little over the millennia. Dr. Shay’ insights have won praise from both military and academic circles. He is now regularly lectures at the Navy War College and before other military leaders.

B. PTSD’s Many Names

The affliction we now call PTSD has gone by many names over the centuries. The cluster of symptoms was first medically diagnosed in Europe. It was referred to as “nostalgia” among Swiss soldiers in 1678. German doctors during that period called the condition *Heimweh*, while the French called it *maladie du pays* -- both meant “homesickness.” The Spanish called it *estar roto*, meaning “to be broken.”⁷

Civil War-era Americans gave PTSD poetic names like “soldier’s heart,” “irritable heart.” Out of the horrors of World War I, came “shell shock.” World War II and Korea ushered in the more clinical term, “combat fatigue.”⁸

World War II correspondent and artist, Tom Lea, first coined the term “thousand yard stare” with his painting that was actually entitled “*that 2,000 yard stare*”, depicting a shell-shocked Marine during fighting on Peleliu in the South Pacific. The term has become part of our cultural lexicon and is often used synonymously with PTSD:⁹



Many veterans have taken issue with the term, Post-Traumatic Stress Disorder. One modern veteran is quoted as saying “PTSD is a name drained of both poetry and blame.”¹⁰ That veteran prefers “soldier’s heart,” because it is “a disorder of warriors, not men and

⁷ EDWARD TICK, PH.D., *WAR AND THE SOUL: HEALING OUR NATION’S VETERANS FROM POST-TRAUMATIC STRESS DISORDER* 99 (2005).

⁸ *Id.*

⁹ *That 2,000 Yard Stare*, Tom Lea – 1944 Oil on Canvas, U.S. Army Center for Military History, Washington, D.C.

¹⁰ TICK, *supra* at 100, quoting George Hill, a disabled Marine (citing STEIDLE, ZACEK, AND ZACEK, EDS., *SOLDIER’S HEART: SURVIVOR’S VIEW OF COMBAT TRAUMA* xiii (1995)).

women who were weak or cowardly but . . . who followed orders and who, at a young age, put their feelings aside and performed unimaginable tasks.”¹¹

C. Psychiatric Casualties in 20th Century Wars

According to Lt. Colonel David Grossman a West Point professor and recognized expert on the psychological effects of combat, “[c]ombat, and the killing that lies at the heart of combat, is an extraordinarily traumatic and psychologically costly endeavor that profoundly impacts all who participate in it.”¹² “Psychiatric breakdown remains one of the most costly items of war when expressed in human terms,” he notes.¹³ Indeed, for the combatants in every major war fought in this century, there has been a greater probability of becoming a psychiatric casualty than of being killed by enemy fire.¹⁴

World War I was a watershed period when the effects of “combat stresses” began to be recognized.¹⁵ It was only in World War I that armies began to experience months of 24-hour combat, leading to vast numbers of psychiatric casualties.¹⁶

During World War II, 504,000 men were lost from America's combat forces due to psychiatric collapse--enough to man 50 divisions.¹⁷ At one point in World War II, psychiatric casualties were being discharged from the U.S. Army faster than new recruits were being drafted in.¹⁸ A World War II study of US Army combatants on the beaches of Normandy found that after 60 days of continuous combat, 98% of the surviving soldiers had become psychiatric casualties.¹⁹

The Vietnam War, with its unpredictable “guerrilla” nature and lack of public support is believed to have generated even higher rates of psychological injuries. Though experts debate the numbers, among the 3.5 million Americans who served in Vietnam, estimates of psychiatric casualties range from 1,000,000 to 1,500,000 cases.²⁰

Twentieth century democracies have been better than most at admitting and dealing with their combat psychiatric casualties. Information from non-Western sources is extremely limited, but we now know that America's experience is representative of a universal cost of modern, protracted warfare.²¹ Nations around the world have

¹¹ *Id.*

¹² DAVE GROSSMAN AND BRUCE K. SIDDLE, *PSYCHOLOGICAL EFFECTS OF COMBAT* (2000).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ DAVID H. MARLOWE, RAND CORPORATION, *PSYCHOLOGICAL AND PSYCHOSOCIAL CONSEQUENCES OF COMBAT AND DEPLOYMENT* 32 (2001)

¹⁶ GROSSMAN AND SIDDLE, *supra* note 12.

¹⁷ R. L Swank and W.E. Marchand, *Combat neuroses: development of combat exhaustion*, *ARCHIVES OF NEUROLOGY AND PSYCHOLOGY*, 1946, at 55, 236-247.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ GROSSMAN AND SIDDLE, *supra* note 12.

²¹ GROSSMAN AND SIDDLE, *supra* note 12.

experienced similar mass psychiatric casualties, but many have simply driven these casualties into battle at bayonet point, shooting those who refused or were unable to continue.²²

D. PTSD's Stigma

Though PTSD has been informally recognized for millennia, approaches to dealing with it have varied widely. After battle, many Native American and other tribal societies segregated their warriors from the rest of the tribe, sometimes for weeks, where they were physically cleansed of the blood from battle, and spiritually cleansed of their traumatic experiences. Some of the rituals were intended to transfer to the stain of "bloodguilt" from the warrior to his people as a whole. This shared responsibility was believed to lift the spiritual weight of combat from the shoulders of the warrior and to ease his transition back into peace. Only when the warrior was ready to reunite with the tribe, and the tribe with the warrior, did the reunion occur.²³

Industrialized nations and their militaries have historically taken a tougher approach with the psychologically-injured. Soldiers suffering psychological injuries have often been stigmatized and even punished. During WWII, General George Patton famously struck at least two psychologically-injured soldiers he came across in Army hospitals, calling them cowards and malingerers. The press picked up on the story, causing a swell of anger among the American people and Patton was nearly relieved of his command.²⁴

Some psychologically-injured troops received the ultimate punishment. The British government recently issued posthumous pardons to 306 of its soldiers from World War I who were executed without trial at the battle front for cowardice or desertion, recognizing today that they likely suffered from PTSD.²⁵

World War II's most decorated soldier, Audie Murphy, is credited with forcing the United States government to study PTSD and extend benefits to psychologically injured veterans. Audie returned home an American Hero and went on to become a major Hollywood movie star. He also secretly suffered severe PTSD. He became a chronic alcoholic and prescription drug addict who later admitted he slept with a loaded gun under his pillow every night after the war. His wife reported many incidents of domestic violence including an instance in which he held a gun to her head. Audie eventually sought help for his condition and then broke the taboo against publicly discussing war-related psychological injuries.

²² *Id.*

²³ *Id.* at 210 – 216.

²⁴ *Private Wrote Family About Being Cuffed*, THE PORT ARTHUR NEWS, Nov. 24, 1943, at p6; *Reprimand for Patton is Denied*, THE FRESNO BEE, Nov. 22, 1943, at p1; *Patton Regrets Slapping Soldier*, SAN ANTONIO LIGHT, Nov. 23, 1943, at p1; *Gen. Patton Slap Haunts Former GI*, CHARLESTON DAILY MAIL, March 25, 1970, at p12; *GI Slapped by Gen. Patton in Sicily Is Dead*, THE CEDAR RAPIDS GAZETTE, Feb. 2, 1971, at p7.

²⁵ *Executed WWI Soldiers to be Given Pardons*, Richard Norton-Taylor, THE GUARDIAN, Aug. 16, 2006, at p. 1.

Today, the military is making strides in removing the stigma of PTSD among its ranks. Troops heading into combat are educated about PTSD and encouraged to seek help if they need it. The military also now deploys “combat stress officers,” basically battlefield psychologists, to the front lines to screen and treat troops as they come out of battle.

Though the military is making progress in removing the stigma, it still has a long way to go. The military is under unprecedented strain as it struggles to meet the demands of two extended conflicts. Military leaders are often caught between a rock and a hard place. Though they are now trained to recognize and encourage treatment of mental health disorders, they are also under pressure to field combat-effective units. Sometimes they relegate mental health treatment to a secondary (or lower) priority. A series of 2007 media reports found systemic failures in mental health treatment of psychologically injured troops at Ft. Carson, Colorado.²⁶ The reports found a pattern by leadership of denying their troops’ requests for treatment, stigmatizing those who were getting help and even kicking some out of the military. The reports spurred investigations by Congress and the Department of Defense which confirmed remaining flaws in the military mental health system.²⁷

The very culture of the military is also an issue. Military culture, by necessity, puts great value on strength, both physical and mental. Soldiers sent into combat face the most horrific experiences imaginable. Only the strong survive. Over the centuries, military training has become ever-more sophisticated in conditioning troops to operate effectively and complete their missions, even when faced with imminent death. A soldier’s reputation within a combat unit is largely based on how “cool” they are under fire.

This “warrior” mindset becomes deeply ingrained and many psychologically injured warriors deny they have a problem, even to themselves. The RAND Corporation study, cited above, found that, of the one third of Iraq and Afghan vets who admitted PTSD or TBI-related issues, less than half had sought help. According to RAND, those veterans who declined help did so out of fear that they will lose the respect of their comrades, jeopardize their security clearance or harm their chances of promotion.²⁸ Many veterans carry this value system with them even after they leave the military and come home.

E. Iraq and Afghan Veterans

Nearly 2.5 million Americans have now served in Iraq and Afghanistan. A recent RAND Corporation study found that, of the 1.8 million who had served at that time, over

²⁶ Daniel Zwerdling, *Gaps in Mental Care Persist for Fort Carson Soldiers*, NATIONAL PUBLIC RADIO, May 24, 2007.

²⁷ Daniel Zwerdling, *Pentagon Report Cites Mental Health Concerns*, NATIONAL PUBLIC RADIO, June 15, 2007.

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

300,000 of those troops report symptoms of PTSD, and 320,000 more suffer from TBI.²⁹ Less than half of these troops had reported or sought help for their condition.³⁰

The vast majority of Vietnam veterans served a single 12 month tour in-country while many veterans of Iraq/Afghanistan will have served two, three, four or more tours. "People aren't designed to be exposed to the horrors of combat repeatedly. And it wears on them," General George Casey, Army chief of Staff, stated in a 2008 press conference.³¹ General Casey was announcing the results of a recent Army study which found that levels of PTSD climb significantly with repeated combat deployments.³²

Evidence indicates that combat operations in Iraq are very intense. According to a 2004 study conducted by the Walter Reed Army Institute of Research, which surveyed combat infantrymen just back from Iraq:

- 94 percent reported receiving small-arms fire;
- 86 percent reported knowing someone who was injured or killed;
- 68 percent reported seeing dead or seriously injured Americans;
- 51 percent reported handling or uncovering human remains;
- 77 percent reported shooting or directing fire at the enemy;
- 48 percent reported being responsible for the death of an enemy combatants;
- 28 percent reported being responsible for the death of a noncombatant.³³

Note that the above-study was conducted in 2004, early in the war and the troops surveyed in that study had only completed one combat tour. Many of those same troops have now likely served two, three, four or more tours and the statistics cited above would certainly be much higher today.

Unfortunately, the Veterans' Administration ("VA") was not initially provided sufficient additional funding to handle the large influx of Iraq and Afghan vets seeking PTSD treatment. Several highly publicized scandals, one of which involved a Minnesota Marine who killed himself after reportedly being turned away from a VA hospital, have

²⁹ *Id.*

³⁰ *Id.*

³¹ Greg Zoroya, *Findings of Army Health Study, Fifth of Soldiers at PTSD Risk*, USA TODAY, (available at: http://www.usatoday.com/news/world/iraq/2008-03-06-soldier-stress_N.htm?csp=34).

³² *Id.* (citing MENTAL HEALTH ADVISORY TEAM (MHAT) V, *supra* note 4).

³³ Charles W. Hoge, M.D., Carl A. Castro, Ph.D., Stephen C. Messer, Ph.D., Dennis McGurk, Ph.D., Dave I. Cotting, Ph.D., and Robert L. Koffman, M.D., M.P.H., Department of Psychiatry and Behavioral Sciences, Walter Reed Army Institute of Research, *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. OF MED. 13-22 (2004)

forced the government to significantly increase resources toward necessary psychological care.³⁴ Today, care for our psychologically injured veterans is improving.

III. Links Between Combat Trauma and Criminal Behavior

A. Historic Post-War Spikes in Veteran-Committed Crimes

Historic research reveals a pattern of veteran-committed crime waves following every major conflict. Though scientific studies have only recently been conducted on this issue, a look back at history through this lens clearly reveals this pattern. It was, for instance, largely Civil War veterans who put the “wild” in the “wild west.”

Following the American Revolutionary War, one author noted a marked increase in crime that caused many states to institute new laws and penalties in response.³⁵ A Revolutionary veteran, describing conditions in South Carolina after the war, wrote, “. . . highway robbery was a common occurrence, and horse-stealing so frequent that the Legislature made it a crime punishable with death.”³⁶

Studies conducted after the Civil War, World War I and World War II found a disproportionate number of veterans in the criminal justice system. Following the Civil War a great wave in crime and disorder was documented.³⁷ One prison in Pennsylvania reported a large influx of prisoners in the last three months of 1865, “most in poor physical condition, and nine-tenths incapacitated and demoralized by the war.”³⁸ In 1866 they reported an unprecedented influx, three-fourths of whom had fought in the war and were “shattered” by their experiences.³⁹ Nationwide, in 1866 two-thirds of all commitments to state prisons in northern states were men who had seen service in the war.⁴⁰

A similar pattern of veteran-committed crimes was noted in Europe following WWI. In 1920, one English writer observed:

The war has destroyed with a hand more desolating than the Black Death or the most terrible plagues of history. But its consequences do not end with destruction. The people who have taken serious part in it are not the same people as those who

³⁴ Kevin Giles, *This Marine's Death Came After He Served in Iraq: When Jonathan Schulze Came Home From Iraq, He Tried to Live a Normal Life, But the War Kept That From Happening*, MINNEAPOLIS STAR TRIBUNE, January 26, 2007; Charles M. Sennott, *Told to Wait, A Marine Dies: VA Care in Spotlight after Iraq War Veteran's Suicide*, THE BOSTON GLOBE, February 11, 2007; Dan Ephron and Sarah Childress, *How the U.S. Is Failing Its War Veterans*, NEWSWEEK, March 5, 2007.

³⁵ *The American States During and After the Revolution, 1775-1789*, Allan Nevins, The Macmillan Co., New York, 1924, p. 454.

³⁶ *Id.*, citing “Traditions and Reminiscences,” Joseph Johnson, p. 400.

³⁷ “Crime and the War,” Edith Abbott, *Journal of the American Institute of Criminal Law and Criminology*, Vol. 9, No. 1, May, 1918, p. 41.

³⁸ *Id.* at 43.

³⁹ *Id.*

⁴⁰ Ticknor and Fields, *The North American Review*, Boston, Vol. CV, 1867, pp. 580-581.

went into it. . . . They are changed peoples. They have passed through an experience which has altered habits, temper, outlook, in five year, more than fifty years of ordinary life would have altered them. Some of the consequences of that experience are obviously bad. The epidemic of crimes of violence is the natural sequel of war, for men learn in that school to think little of life. The same increase of crime of this kind followed the Napoleonic Wars both here and in France.⁴¹

In the United States, post-WWI veteran-committed crimes were also a cause for grave concern. The President of the Institute of Criminal Law and Criminology, in his annual address in 1919, stated:

Last year saw the ending of the War. From England to France, and in our own country, statistics have been gathered which show that serious crime, which had been on the decrease during the period of the War was again stalking in the foreground. . . . The newspapers are filled with accounts of crimes of such daring and boldness as to make the average citizen stand aghast at the manner in which the security of life and rights of property are ruthlessly disregarded and imperiled."⁴²

A study entitled *Military Service and Criminality*,⁴³ published in 1952, a few years after WWII, tallied the number of men committed to 11 prisons in the upper-Midwest during 1947, 1948 and 1949 and found that fully one third of them were veterans.

Similarly, a study of Vietnam veterans receiving care for PTSD in the VA system during the mid-1980's found that almost half of all Vietnam veterans suffering from PTSD had been arrested or in jail at least once, 34.2 percent more than once, and 11.5 percent reported being convicted of a felony.⁴⁴

In the case of the Vietnam generation, involvement in the criminal justice system has lingered for decades. A 1998 Department of Justice study found that, more than 20 years after the war, approximately a quarter million veterans, a large portion from the Vietnam era, were still housed in our nation's prisons.⁴⁵

Those who attempt to deny the link between war trauma and crime often cite this same 1998 Department of Justice study cited above, pointing out that veterans are imprisoned in smaller percentages than the civilian population. What they overlook, however, is that since WWI, the military has aggressively screened out those it deems

⁴¹ *The Civil War and the Crime Wave of 1865-70*, Edith Abbott, *The Social Service Review*, Vol. 1, No. 2 (Jun., 1927), p. 212, citing Nation, XXVI (London, January 10, 1920), 498.

⁴² *The Relationship Between War and Crime in the United States*, Betty B. Rosenbaum, *Journal of Criminal Law and Criminology* (1931-1951), Vol. 30, No. 5 (Jan. – Feb. 1940), p. 730, citing *Annual Address of the President of the Institute of Criminology*, Hugo Pam, Jr. of Am. Inst. of Cr. Law and Crim., Vol. X, No. 3, Nov., 1919, p. 327.

⁴³ Walter A. Lunden, *Military Service and Criminality*, *J. CRIM. L., CRIMINOLOGY, AND POLICE SCIENCE*, March – April 1952, at 766-773.

⁴⁴ Richard Kulka, et al., NATIONAL VIETNAM VETERANS READJUSTMENT STUDY VII-21-1 (1990)

⁴⁵ *Veterans in Prison or Jail*, BUREAU OF JUSTICE STATISTICS, NCJ 178888, Jan. 2000 (available at <http://www.ojp.usdoj.gov/bjs/>)

psychologically or morally unfit. During the call-up for World War II, for instance, 1,681,000 men were rejected and excluded from the draft for emotional, mental, or educational disorders or deficiencies.⁴⁶ Another 500,000 were subsequently separated from the Army during training on psychiatric or behavioral grounds.⁴⁷ This recruit screening continued through Vietnam and into our current conflicts. Thus, any direct comparison of incarceration rates between veterans and the civilian population is flawed. Given the military's screening, the fact that veterans are incarcerated at even close to the same rates as the civilian population is alarming and is prima facie evidence that military service, itself, played a role.

The most recent and definitive tie between combat trauma and criminal behavior comes from the military, itself. In 2009, following a highly-publicized wave of homicides and other violent crimes committed by recently-returning combat soldiers on and around Fort Carson, Colorado, the Army commissioned a study called the Epidemiological Consultation, or EPICON, for short.⁴⁸

Epidemiology is the branch of medicine that seeks to study the factors affecting the health and illness of entire populations. Most of the time, epidemiologists focus on infectious disease, but increasingly the Army has used its experts to look at behavioral health issues. A team of 24 physicians and Ph.D.s from Walter Reed Institute of Research descended on Ft. Carson, studying soldiers who had acted out violently, looking for common factors.

The EPICON team, first, found that violent crime among the soldiers at Ft. Carson was well outside normal levels of crime in civilian society. The murder rate for Ft. Carson had doubled since the start of the Iraq war. Rape arrests had tripled and stood at nearly twice the rate of other Army posts.⁴⁹

Second, the EPICON team ruled out the "bad seed" theory. Long a favorite of military commanders, the "bad seed" theory posits that the only troops acting out criminally were troubled before their military service and would have acted out whether they had served or not. The EPICON team found no such common tie. Soldiers who had acted out had disparate pre-service criminal backgrounds and mental health issues. They also came from diverse racial, socioeconomic and educational backgrounds.

The common thread among all those who had committed violent crimes was that they had seen serious combat. From a public health standpoint, combat seemed to be a contagion. PTSD, drug and alcohol abuse, violence and murder were just the symptoms. The more soldiers were exposed to combat, the more they showed the effects.

⁴⁶ MARLOWE, *supra* note 15 at 48.

⁴⁷ *Id.*

⁴⁸ Epidemiological Consultation 14-HK-OB1U-09, *Investigation of Homicidees at Fort Carson, Colorado*, U.S. Army Center for Health Promotion and Preventative Medicine, July 2009.

⁴⁹ *Id.*

The EPICON study also concluded that the crimes reported on and around Ft. Carson were just the tip of the iceberg. Of the Ft. Carson soldiers surveyed, 40% reported choking, beating, kicking, or pointing a gun at someone – in other words they had committed some kind of felony assault.⁵⁰

In the end, the EPICON team found two major factors – repeated deployments and the intensity of combat in those deployments – contributed to post-deployment violent behavior. The study concluded with a carefully-worded assertion that “survey data from this investigation suggest a possible association between increasing levels of combat exposure and risk for negative behavioral outcomes.”⁵¹ In other words, the military finally confirmed what civilian sociologists had long believed: combat contributes to crime. Soldiers come home different. By sending young men and women to war, a country is unintentionally bringing violence back on itself.

Closely linked to the criminal justice system is the homeless population. A 2006 study found that fully 24% of Minnesota’s male homeless population are veterans. More than half of those homeless veterans were deemed to have a “serious mental illness.”⁵²

B. How Combat Trauma Sometimes Manifests in Criminal Behavior

Combat trauma can be linked to criminal behavior in two primary ways. First, symptoms of PTSD can incidentally lead to criminal behavior. Second, offenses can be directly connected to the specific trauma that an individual experienced.⁵³

Many symptoms of PTSD can lead to behaviors likely to result in criminal behavior and/or sudden outbursts of violence. Individuals with PTSD are often plagued by memories of the trauma, chronically anxious and unable to sleep without terrifying nightmares. They often self-medicate with drugs and alcohol in an attempt to calm their nerves and sleep. The emotional numbness many trauma survivors experience can lead the survivor to engage in sensation-seeking behavior in an attempt to experience some type of emotion. Some combat veterans also may seek to recreate the adrenaline rush experienced during combat. “Hypervigilance,” feeling the need to be always “on guard” can cause veterans to misinterpret benign situations as threatening and cause them to respond with self-protective behavior. Increased baseline physiological arousal results in violent behavior that is out of proportion to the perceived threat. It is common for trauma survivors to feel

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² WILDER RESEARCH, OVERVIEW OF HOMELESSNESS IN MINNESOTA 2006 40-41 (2007).

⁵³ Claudia Baker, MSW, MPH and Cessie Alfonso, LCSW, *PTSD and Criminal Behavior: A National Center for PTSD Fact Sheet* (available at: <http://www.traumatic-stress-treatment.com/artptsdandcriminalbehavior.html>)

guilt and to resort to self-destructive behaviors, which can sometimes lead them to commit crimes that will likely result in their apprehension, punishment, serious injury, or death.⁵⁴

A particular traumatic stressor can lead an individual suffering combat trauma to commit a specific crime in three primary ways. First, crimes at times literally or symbolically recreate important aspects of a trauma. The second way that traumatic stressors can be linked to specific crimes is that environmental conditions similar to those existing at the time of the trauma can induce behavior (in particular, violent responses) similar to that exhibited during the trauma. The final way that traumatic stressors can be linked to specific crimes is that life events immediately preceding the offense can realistically or symbolically force the individual to face unresolved conflicts related to the trauma. This creates a disturbed psychological state in which otherwise unlikely behaviors emerge.⁵⁵

C. War Trauma-Crime Connection in Literature and the Cinema

Like Homer's *Odyssey*, twentieth century literature and cinema have also explored the connection between combat trauma and criminal behavior. After World War I, novels and plays such as *What Price Glory?*, *They Put a Gun in My Hand*, *All Quiet on the Western Front* and *The Road Back* described this link. Vietnam-related literature and cinema, such as *Taxi Driver*, *The Deer Hunter*, *Apocalypse Now*, *Full Metal Jacket*, *First Blood*, *Platoon*, and *Born on the 4th of July* have done the same.

D. Iraq/Afghan War PTSD-Related Criminal Cases

A survey of national news stories during the wars in Afghanistan and Iraq reveals the classic pattern of PTSD-related criminal behavior by troubled returning veterans. The issue first received the national spotlight when Army Special Forces troops ("Green Berets") involved in the initial post-9/11 invasion of Afghanistan, returned home to Ft. Bragg, North Carolina in the summer of 2002. During a one month period after their homecoming, three of these elite soldiers shot and killed their wives during domestic altercations.⁵⁶ Two of the three then turned the gun on himself.

In 2008 the New York Times published a heavily-researched series entitled "*War-Torn*," which examined homicides committed by Iraq and Afghan veterans after their return home from war.⁵⁷ A year-long investigation by authors, Lizette Alvarez and Deborah Sontag led to the identification of a total of 121 Iraq/Afghan veteran-committed homicides. Anthony Klecker, a Minnesota Marine charged criminal vehicular homicide after his return

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Fort Bragg Killings Raise Alarm about Stress*, CNN, July 19, 2002.

⁵⁷ Deborah Sontag and Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, NEW YORK TIMES, Jan. 13, 2008; Deborah Sontag, *An Iraq Vet's Descent, A Prosecutor's Choice*, NEW YORK TIMES, Jan. 20, 2008; Deborah Sontag and Lizette Alvarez, *In More Cases, Combat Trauma Taking the Stand*, NEW YORK TIMES, Jan. 27, 2008; Deborah Sontag and Lizette Alvarez, *When Strains on Military Families Turn Deadly*, NEW YORK TIMES, Feb. 15, 2008; Deborah Sontag and Lizette Alvarez, *After the Battle, Fighting the Battle at Home*, NEW YORK TIMES, July 8, 2008.

from Iraq, was among the handful of veterans whose case the *Times* chose to profile in-depth.⁵⁸ This writer represented Mr. Klecker in his case.

In addition to an alarming number of homicides, even larger numbers of suicides, serious assaults, robberies, and thefts have been attributed to Iraq and Afghan veterans. Countless more DWI's, domestic altercations and other less serious incidents have, no doubt, gone unreported in the media.

IV. Special Problems in Dealing with Combat Veterans in Criminal Court

A. Recognizing a Potential Issue

Many combat veterans will not readily identify themselves as such when they appear in court on a criminal charge. They are often humble regarding their service and do not want to call attention to themselves. Often, the more combat a veteran has seen, the less likely they are to talk about it. Discussing their combat experiences can trigger anxiety and other symptoms of PTSD, thus it is often avoided.

Few courts inquire about veteran status. Many troubled veterans likely slip through the cracks. A mechanism must be established to ensure veterans are identified and screened for potential psychological injuries when they surface in criminal court.

B. Overcoming the Stigma of PTSD

Veterans are returning to the civilian world from a "warrior culture" with very different rules, values and ideals. A fundamental goal of military combat training is to psychologically condition soldiers so they can function effectively in unimaginably stressful, life-threatening circumstances.

When soldiers experience PTSD, they often deny their symptoms to others, even to themselves. They often fear they will be labeled as "weak" by their comrades or that their military career will suffer. Though the military has come a long way in confronting this problem, many front-line combat units, faced with the pressure of maintaining combat readiness through multiple deployments, still implicitly discourage claims of PTSD.

Once a soldier leaves the military, they often carry their warrior values into civilian life. They strive to overcome PTSD symptoms on their own, reasoning that if they could survive combat, they can handle "mere mental problems" without outside assistance. Some, tragically, feel guilt for surviving the war when their buddies did not and are committed to slowly drinking and/or drugging themselves to death.

⁵⁸ *Id.*

A criminal charge in this context can sometimes actually be helpful in forcing a troubled veteran to admit that he or she has a problem and needs help. These are typically very proud, honorable people who are deeply troubled by their criminal behavior and resulting charge. They are often more willing to admit they have a psychological problem related to their combat service rather than to be labeled a “criminal.”

The opportunity to avoid a criminal conviction or a lengthy jail sentence can be a key to a veteran embracing their condition and the treatment available to them. In this way, a criminal charge can often be an effective tool to get troubled veterans the help they need.

C. Lack of Communication Between Criminal Courts and the VA System

Historically, there have been no formal lines of communication between the criminal courts and the VA. Most courts are not aware of treatment options available to veterans through the VA and do not know where to go to find out. Unfortunately, this leads to disparate treatment of similarly situated veterans.

In the worst case, the veteran moves through the system without being identified as such, or worse, is demonized for his or her criminal behavior without any heed paid to its underlying cause. No effort is made to explore treatment options. The veteran is convicted and/or locked up and does not receive the treatment he or she needs. Most are eventually released back into society in even worse condition, posing an even greater threat to public safety.

In the best case, the court ensures that all treatment options at the VA are explored and, where appropriate, determines that specialized treatment is the more logical and just alternative to a jail sentence. The court orders the veteran into treatment as a condition of probation. Failure to complete that treatment exposes the veteran to jail time.

When handled properly, a criminal charge can often be a win-win for all involved. Troubled veterans are identified and given the opportunity to avoid a criminal sanction on the condition that they obtain treatment, benefiting them, personally, and enhancing public safety.

V. Minnesota’s Approach

A. Veterans Sentencing Legislation

In 2007 and 2008, this writer and a small group of other veterans drafted and passed legislation that addresses deficiencies in the way the Minnesota's criminal courts deal with psychologically-injured veterans.⁵⁹ The new law is designed to ensure that a mental health diagnosis and available treatment options are taken into account in sentencing a veteran whose combat trauma played a role in his or her criminal offense. The law does not force a judge to do anything in a particular case, rather, it gives the judge the tools to make an informed decision, recognizing that treatment and probation is often preferable to a single stint of incarceration in getting to the root of the problem and ensuring long term public safety. This is not a "get out of jail free card" for veterans. Completion of treatment is a condition of probation and failure to follow through can result in jail.

Support for this Minnesota initiative was broad and bi-partisan. Backers included Republican Governor, Tim Pawlenty, state law makers from both sides of the political isle, the Minnesota Department of Veterans Affairs, the Minnesota County Attorneys Association, the Minnesota Association of Criminal Defense Lawyers, the Minnesota State Public Defenders, the Minnesota Chapter of the Veterans of Foreign Wars, and the Minnesota Chapter of the Order of the Purple Heart.

The greatest challenge in passing the bill was fiscal. We introduced the bill the same week the Legislature learned it was facing an unprecedented \$1 billion dollar budget deficit. As we pushed the bill through committees, it became apparent that we would have to strip it of certain provisions that would trigger fiscal notes and prevent its passage. In the end, we reluctantly agreed to remove provisions that would have tracked the number of veterans coming through the criminal courts and that would have provided for a psychological evaluation of troubled veterans who had not yet been diagnosed with PTSD or related condition.

The language of the new Minnesota law reads as follows:

(a) When 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.

(b) If the defendant is currently serving in the military or is a veteran and has been diagnosed as having a mental illness by a qualified psychiatrist or clinical psychologist or physician, the court may:

(1) order that the officer preparing the report under subdivision 1 consult with the United States Department of Veterans Affairs, Minnesota Department of Veterans Affairs, or another agency or person with suitable knowledge or experience, for the purpose of providing the court with information regarding treatment options available to the defendant, including federal, state, and local programming; and

(2) consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing

⁵⁹ Minn. Stat § 609.115 Subd 10.

sentence.⁶⁰

The lack of a built-in psychological evaluation in the law means that attorneys and/or corrections officers will have to ensure that a veteran who appears to be suffering from a psychological injury gets assessed and diagnosed. This can most easily be done by sending the veteran to the VA for an assessment. This has the added advantage that they will start receiving needed treatment immediately. If the veteran is incarcerated the VA will not be able to do the assessment. In this case, a judge may be convinced to order a pre-sentence psychological evaluation. Short of that, the veteran may still be able to obtain a valid diagnosis through a Rule 20 competency evaluation or a private evaluation. The VA has indicated it will accept a PTSD diagnosis from a private psychiatrist, psychologist, or medical doctor, so long as they are licensed.

If the evaluation results in a diagnosed psychological injury, the probation officer conducting the pre-sentence investigation will contact the VA and obtain a list of recommended treatment options that are available for the veteran/defendant. Those options will be included in the pre-sentence investigation report for the judge's consideration at sentencing.

California veterans and criminal justice advocates led a similar initiative that resulted in passage of a similar law during California's 2007 legislative session. The California law provides judges with a basis to depart from presumptive prison sentences in case involving veterans with PTSD. Veterans are professionally screened for PTSD and, if suitable, are ordered to treatment in lieu of prison or jail.⁶¹

Other states have followed Minnesota's lead. In 2009, Illinois passed a nearly identical law and, in 2010, New Hampshire did the same. Iowa, Kansas, Texas and Wisconsin, among others, are currently considering similar legislation.

The U.S. Supreme Court has also recently recognized Minnesota's veteran sentencing law. In *Porter v. McCollum*, (No. 08-10537. Nov. 30, 2009) the Court unanimously reversed a Korean War veteran's death sentence because evidence of his war service and psychological injuries were not taken into account during his trial. Citing to Minn. Stat. § 609.115, Subd. 10, the Court noted that "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines," and that juries "might find mitigating the intense stress and mental and emotional toll that combat" can have on the veteran.

B. Veterans Treatment Court Established in Minneapolis

Minnesota took its next major step in its new approach to veterans in the justice system when it launched the Hennepin County Veterans Court in July, 2010. This new specialty court brings an unprecedented level of expertise and resources to bear to assist troubled veterans in getting back on their feet, recognizing that treatment and probation is

⁶⁰ Minn. Stat § 609.115 Subd 10.

⁶¹ Cal. Penal Code § 1170.9.

often preferable to a single stint of incarceration in getting to the root of the veteran's problem and ensuring long term public safety.

Other jurisdictions across Minnesota are now moving to implement some form of Veterans Court Process. The 8th Judicial District, comprised of 13 counties in rural West-central Minnesota is leading the charge, aiming to create the nation's first operational rural Veterans Court Process. They are finding that they can do the job without additional funding. The key is training for court personnel and establishing working relationships with the nearest VA medical center. The federally-funded VA provides all of the treatment and programming and communicates with the court if a veteran is not following through with their ordered treatment.

With help, many troubled veterans can get back on their feet and stay there, putting their life experiences to work and becoming assets to their communities. Untreated, many will continue to act out for the rest of their lives, destroying their families, presenting an ongoing threat to public safety and a financial burden to their communities. The choice is ours.



Brockton Hunter is a Minneapolis-based attorney. Prior to becoming an attorney, Brock served in the U.S. Army as a Recon Scout and now represents many veterans who find themselves charged with criminal offenses. In 2008, Brock drafted and led passage of Minnesota's Veterans Sentencing Legislation. He has since been recognized nationally for his work on behalf of veterans in the criminal courts, helping to brief the Obama Presidential Transition Team, speaking before leadership of the Department of Defense and Department of Veterans Affairs, and training thousands of judges, prosecutors, defense attorneys and law enforcement officers. Brock is also the lead editor and co-author of the [Attorneys Guide to Defending Veterans in Criminal Court](http://www.veteransdefensebook.com) – www.veteransdefensebook.com.