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# John Brown Went Off to War: Considering Veterans' Courts as Problem-Solving Courts

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# “JOHN BROWN WENT OFF TO WAR”: CONSIDERING VETERANS COURTS AS PROBLEM-SOLVING COURTS

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MICHAEL L. PERLIN\*

## I. INTRODUCTION

I am a child of the 60s. This is no surprise to anyone who has talked to me for more than five minutes or who has read any of my writings about Bob Dylan. But it is much more than musical nostalgia. I was involved, seriously involved, in the anti-war movement in college and in law school (my friends even know about the late night visit from FBI agents urging me to change the tone of anti-war editorials I had been writing when I was editor of the Rutgers Daily Targum in 1965–1966).<sup>1</sup> After I passed the written bar examination, it took me over a year to be admitted to practice in New Jersey,

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1. This followed a widely-covered university “teach-in” at which Rutgers Professor Eugene Genovese stated, “I do not fear or regret the impending Vietcong victory in Vietnam. I welcome it.” Douglas Martin, *Eugene D. Genovese, 82, Historian of South, Dies*, N.Y. TIMES, Sept. 30, 2012, at A36. My editorials cited Voltaire in the defense of his right to free speech.

as members of the “character and fitness committee” in my home county had questions about anti-war petitions I had signed when I was a law student (I solved the problem by moving to a new county). But during all that time, I never “got” the enmity that so many of my contemporaries leveled at those who were serving in the Army (many of whom, of course, were doing so involuntarily). Truth be known, at all the marches, rallies, and demonstrations I attended, I never once heard the “baby killer” phrase that was allegedly a common cry at that time (I expect that, like the bra-burning that never took place, it simply served as a rallying symbol). But, it was always clear to me that, once Vietnam veterans returned home, the transition to civilian society was not an easy one.

The Vietnam War ended in 1975. A year prior to that, the State of New Jersey created a new office, the Department of the Public Advocate,<sup>2</sup> to provide legal representation to those who had been ignored by the justice system, a “voice for the voiceless.”<sup>3</sup> As part of this department, a Division of Mental Health Advocacy was created,<sup>4</sup> and at the embarrassingly-young age of twenty eight, I became the first director of that division. We represented persons in individual matters in civil commitment cases, post-insanity acquittal release hearings, refusal of treatment cases, and the full range of law reform and test case litigation that challenged the way patients were treated in state hospitals and in community settings.<sup>5</sup>

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2. See George W. Conk, *People's Electric: Engaged Legal Education at Rutgers-Newark Law School in the 1960s and 1970s*, 40 FORDHAM URB. L.J. 503, 513 n. 40 (2012).

3. DIV. OF DISABILITY SERVS., N.J. DEP'T OF HUMAN SERVS., NEW JERSEY 2009 RESOURCES 15 (2009), available at [http://www.state.nj.us/humanservices/dds/documents/RD\\_09%283%29.pdf](http://www.state.nj.us/humanservices/dds/documents/RD_09%283%29.pdf). The public advocate was initially dismantled by Governor Christine Whitman, Cynthia N. McKee, *Resurrecting Mount Laurel: Using Title VIII Litigation to Achieve the Ultimate Mount Laurel Goal of Integration*, 27 SETON HALL L. REV. 1338, 1345 n.58 (1997), was revived in 2005, and then once more abolished in 2010, *Public Advocate (2005-2010)*, N.J. ST. LIBR., <https://dspace.njstatelib.org/xmlui/handle/10929/19052> (last visited Apr. 21, 2013).

4. N.J. GEN. ASSEMBLY, LEGISLATIVE FISCAL ESTIMATE TO ASSEMBLY, NO. 15, A.52:27E-1, at 1 (1994), available at [http://law.njstatelib.org/law\\_files/njlh/lh1994/L1994c58.pdf](http://law.njstatelib.org/law_files/njlh/lh1994/L1994c58.pdf). This Division survived the dismantling of the rest of the Public Advocate's office and is now housed in the Office of the Public Defender. *Id.* “The bill transfers the functions performed by the Division of Mental Health Advocacy and the Division of Advocacy for the Developmentally Disabled within the Department of the Public Advocate to the Office of the Public Defender . . .” *Id.*

5. Michael L. Perlin, *Mental Patient Advocacy by a Patient Advocate*, 54 PSYCHIATRIC Q. 169, 170–71 (1982); 5 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 14-7, at 119–21 (2d ed. 2002) [hereinafter 5 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL] (reprinting the final order of *Dixon v. Cahill*, No. L.30977/y-71 P.W. (N.J. Super. Ct. Law Div. 1973)); see Michael L. Perlin, “Justice's Beautiful Face”: *Bob Sadoff and the Redemptive Promise of Therapeutic Jurisprudence*, 40 J. PSYCHIATRY & L. 265,

One of the facilities in our jurisdictional ambit at the time was the Veterans Hospital in Lyons, New Jersey. Initially, our staff attorneys went there to represent individuals at commitment and periodic review hearings; but, after a time, it was clear that there was other work that needed to be done. The hospital was a dreary place (not as bad, certainly, as Greystone Park Psychiatric Hospital that remains, after nearly forty years, the most wretched facility I have ever seen in the United States),<sup>6</sup> but dreary nonetheless: not particularly clean, not particularly well-staffed, and with very little sense of *life*.

But, there was more to it than that. We realized—and this took a little while to sink in—that *within* the hospital, there were clearly hierarchical tiers. Veterans of World War II (and the few remaining from World War I) and the Korean War were, by and large, treated far better than were the Vietnam veterans. This perplexed me—I certainly never spoke to a staff member who had been active in the anti-war movement at any level—and troubled me greatly.

Why did this happen? The Vietnam veterans were much younger than the others, of course, and were certainly more likely to be dually diagnosed as mentally ill *and* drug-dependent. Many more had brushes with criminal law—usually low-level misdemeanors, though there were some who were charged with more serious offenses—and many more were disaffected with the world to which they came back. There were no ticker-tape parades for these veterans, no jubilant crowds, no iconic photographs of welcome-home kisses. And these veterans were far, far angrier than veterans of other wars—staff told me that the older vets were so *grateful* and this cohort was not. The more we explored this, the more it became clear that there was a dual system at play: Vietnam vets and everyone else. We also discovered that some of the rights that we had been litigating so tirelessly for at the state and county hospitals were not available in the federally funded Department of Veterans Affairs (“VA”) hospitals—and that just did not seem right for so many reasons.

So, we filed *Falter v. Veterans’ Administration (Falter I)*,<sup>7</sup> a class action suit on behalf of all the residents of the VA.<sup>8</sup> Following the litigation in

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265, 278 n.2 (2012); Michael L. Perlin, “*May You Stay Forever Young*”: *Robert Sadoff and the History of Mental Disability Law*, 33 J. AM. ACAD. PSYCHIATRY & L. 236, 236–37 (2005).

6. See *Doe v. Klein*, 1 Mental Disability L. Rep. 475, 475 (N.J. Super. Ct. Law Div. 1977) (institutional right to treatment consent order); see also Michael L. Perlin, “*Abandoned Love*”: *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 123 n.21 (2011).

7. 502 F. Supp. 1178 (D.N.J. 1980).

8. *Id.* at 1178–79.

the *Falter I* case, the VA promulgated the first Patients' Bill of Rights on behalf of persons in its facilities,<sup>9</sup> and attention was paid to substantive areas of patients' rights that all too often were previously ignored.<sup>10</sup>

Writing some five years ago about the notion of "equality" in the context of mental disability law, I said this about the *Falter* case:

But, what has lasted with me most vividly from *Falter I* was one line of Judge Harold Ackerman's initial decision: In this opinion, "I am referring to how [plaintiffs] are treated as human beings."<sup>11</sup> I read that line in the slip opinion, and for a moment, my breath stopped. Prior to that time, I had been representing persons with mental disabilities for nearly a decade, and litigated other class actions that truly had a vast impact on the New Jersey mental health system.<sup>12</sup> But never before had a judge written a line like this in an opinion in one of my cases.<sup>13</sup>

I begin my presentation today with this anecdote, because I think it is totally on-point with regard to this entire Symposium. In my paper, I will seek to contextualize veterans courts in light of the therapeutic jurisprudence (TJ) movement, the turn to problem-solving courts of all sorts (especially focusing on mental health courts), but also, and certainly not least in terms of importance, the societal ambivalence that we have shown to veterans in the four decades since the Vietnam War.

I will discuss the meaning of TJ, and then argue that its focus on the actual impact of law on people's lives, on the law's influence on emotional life and psychological well-being, and on the need for law to value psychological health and avoid the imposition of anti-therapeutic consequences whenever possible can serve as a template for a veterans court model—if we are to expand these courts robustly. TJ is the explicit inspiration for many of the most important problem-solving courts (including Judge Ginger Lerner-

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9. *Falter v. Veterans Admin. (Falter II)*, 632 F. Supp. 196, 203 (D.N.J. 1986) ("In December 1982, the V.A. Patients' Bill of Rights was promulgated.").

10. See *id.* at 203, 205–08 (noting patients' rights such as rights to privacy while using telephones, to privacy in reading mail, to visitation, and to attend religious services).

11. *Falter I*, 502 F. Supp. at 1185.

12. See 5 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 5, § 14–4, at 66–74 (discussing the stipulation settlement of *Schindenwolf v. Klein*, No. L41293-75 P.W. (N.J. Super. Ct. Law Div. 1975)); 2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 3C-7.1i, at 442 (2d ed. 1999) (discussing the right of patients to participate in voluntary, therapeutic, compensated work programs as an aspect of the right to treatment); see also *Rennie v. Klein*, 720 F.2d 266, 269 (3d Cir. 1983) (discussing the right of institutionalized psychiatric patients to refuse treatment).

13. Michael L. Perlín & John Douard, "Equality, I Spoke That Word/As If a Wedding Vow": *Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y.L. SCH. L. REV. 9, 10 (2008–2009) (discussing this aspect of *Falter I*); see also *Falter I*, 502 F. Supp. at 1178, 1185.

Wren's mental health court in Broward County),<sup>14</sup> but it is also clear that many such courts—specifically, some drug courts—do not follow TJ principles, existing instead in a *due process-free zone*—implicitly rejecting the basic TJ “premise that therapeutic outcomes cannot trump due process.”<sup>15</sup> Just as mental health courts should ensure that defendants receive dignity and respect and are given a sense of voice and validation, so should veterans courts. And this must be done in the specific context of veterans who have returned—not just from Vietnam, but from the first Gulf War, the later Iraqi War, and the ongoing Afghanistani War—veterans who have been diagnosed with posttraumatic stress disorder (PTSD) at frightening rates<sup>16</sup> and who continue to bear the *invisible wounds* of battle.<sup>17</sup>

This must all be weighed through the filter of the way that our treatment of injured war veterans provides a vivid example of society's general ambivalence toward guaranteeing robust social rights, an ambivalence reflected in my experiences in the VA hospitals some thirty years ago. I believe that Judge Ackerman's observation must be at the forefront of any assessment of veterans courts.

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14. See Michael L. Perlin, “*There Are No Trials Inside the Gates of Eden*”: *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: LAW AND POLICY 193, 206–07 (Bernadette McSherry & Ian Freckelton eds., 2013) [hereinafter PERLIN, “*THERE ARE NO TRIALS INSIDE THE GATES OF EDEN*”].

15. See *id.* at 207; Andrew Fulkerson, *How Much Process Is Due in the Drug Court?*, CRIM. L. BULL. (Thomson Reuters), Summer 2012 (“The answer is the same due process that is provided in any other case wherein a defendant faces revocation of probation.”). For criticism of a court decision holding that a defendant had no right to counsel at a hearing to terminate him from a drug program, see *Dunson v. Commonwealth*, 57 S.W.3d 847, 850 (Ky. Ct. App. 2001) and Fulkerson, *supra*, note 15 (“The *Dunson* holding renders the drug court a court in name only and thus is not required to provide any of the formalities and due process protections of a *real court*.”).

16. On how the Iraqi and Afghan war experiences, for these purposes, have been significantly different from the experiences of veterans in other wars, see Steven Berenson, *The Movement Toward Veterans Courts*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y, May–June 2010, at 37, 37–38.

First, individual servicemembers have been subjected to more frequent and longer deployments to the front than in previous conflicts. Second, the counterinsurgency type of warfare blurs periods of battle and periods of rest, prompting the stressful constant vigilance that can lead to psychological ailments. Third, improvements in protective equipment and battlefield medicine have allowed more victims of battlefield trauma to survive but often with lingering effects from their injuries. And, fourth, the signature weapon of the opposition—the improvised explosive device—often causes traumatic brain injuries that are difficult to diagnose and treat and may not present symptoms until well after the injury.

*Id.* at 38 (footnotes omitted).

17. See *id.* at 37.

Despite generally low recidivism rates,<sup>18</sup> veterans courts have received criticism, as some have argued that they provide veterans with a hall pass “to certain criminal-defense rights that others don’t have,” and that, from an entirely different perspective, they are stigmatizing because they “perpetuate the stereotype that veterans are returning ‘war-crazy.’”<sup>19</sup> I will address these and other criticisms in my paper.

One issue that has received almost no attention is a critical one that we are just beginning to take seriously in the mental health courts context: How can we assure that there is experienced, dedicated, and knowledgeable counsel assigned to represent defendants in such tribunals? We know that if there has been any constant in modern mental disability law in its thirty-five year history, it is the near-universal reality that counsel assigned to represent individuals at involuntary civil commitment cases is likely to be ineffective. How can we be sure that counsel in these cases will become more effective?

I will conclude by offering some conclusions and suggestions for those jurisdictions that are implementing veterans courts, so as to optimally assure adherence to TJ values in a court setting that continues to provide litigants with the full range of constitutional rights to which they are entitled.

Bob Dylan recorded *John Brown* in 1963.<sup>20</sup> The song is a “biting screed demolishing Hollywood conceptions of war heroes”<sup>21</sup> that “links the antiwar mentality with the generation gap.”<sup>22</sup> It begins:

John Brown went off to war to fight on a foreign shore  
His mama sure was proud of him!  
He stood straight and tall in his uniform and all  
His mama’s face broke out all in a grin,<sup>23</sup>

but, later, when he returns home:

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18. See Cathy Ho Hartsfield, Note, *Deportation of Veterans: The Silent Battle for Naturalization*, 64 RUTGERS L. REV. 835, 859 (2012) (concluding that veterans courts “have seen great success in reducing recidivism rates”). But see Jack W. Smith, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004–December 31, 2010*, 29 ALASKA L. REV. 93, 107 (2012) (noting the recidivism rate is only “slightly better” in the Anchorage Veterans Court).

19. These arguments are summarized in Hartsfield, *supra* note 18, at 860. See also *infra* Part III.

20. OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 339 (Bob Nirkind & Marian Appellof eds., 2004).

21. *Id.* at 338.

22. TIM RILEY, HARD RAIN: A DYLAN COMMENTARY 51 (1992).

23. BOB DYLAN, *John Brown*, on THE BOOTLEG SERIES VOL. 9–THE WITMARK DEMOS: 1962–1964 (Columbia Records 2010).

Oh his face was all shot up and his hand was all blown off  
 And he wore a metal brace around his waist  
 He whispered kind of slow, in a voice she did not know  
 While she couldn't even recognize his face!<sup>24</sup>

and ends:

As he turned away to walk, his Ma was still in shock  
 At seein' the metal brace that helped him stand  
 But as he turned to go, he called his mother close  
 And he dropped his medals down into her hand.<sup>25</sup>

The song—the *showstopper* of Dylan's 2001 tour “as U.S. bombs were falling on Kabul”<sup>26</sup>—tells the listener “of the deception of war, and its true effects on the individual,”<sup>27</sup> and is a song “to come [on Memorial Day] after we sweep up from the parades and put away the speakers' microphones.”<sup>28</sup> If there were a soundtrack to this Symposium, it would include this song.

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24. *Id.*

25. *Id.*

26. TRAGER, *supra* note 20, at 339. I *may* have heard Dylan sing this in the 1960s; I honestly do not remember. I do know that I have seen him sing it at least five times in more recent years, last in Brooklyn in August 2008, during the heat of the Obama/McCain campaign. My review of the concert notes the political connection: “The high points of the night were \*John Brown\* and \*Masters of War\*, both musically and politically. Here was Bob, in Brooklyn . . . with an audience as blue state as he'll ever get, and he hammered home the reminder that we do, indeed, live in a political world.” Michael Perlin, *Reviews: Brooklyn, New York, Prospect Park Bandshell*, BOBLINKS.COM, <http://www.boblinks.com/081208r.html#10> (last visited April 21, 2013).

27. Amy Blanton, *Bob Dylan: An Impact on American Society in the 1960's* 8 (Apr. 10, 2001) (unpublished student paper, University of North Carolina at Chapel Hill), *available at* <http://www.unc.edu/~ablanton/BobDylan.pdf>.

28. *A Memorial Day Song: John Brown*, NIGHTLY SONG (May 27, 2011), <http://nightlysong.com/category/bob-dylan/>.



## II. THERAPEUTIC JURISPRUDENCE<sup>29</sup>

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of TJ.<sup>30</sup> Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, TJ presents a new model for assessing the “impact of case law and legislation,” recognizing that, as a therapeutic agent, the law can have “therapeutic or anti-therapeutic consequences.”<sup>31</sup> The ultimate aim of TJ is to determine whether legal “rules, procedures, and [lawyer] roles can or should be reshaped . . . to enhance their therapeutic potential [while not] subordinating due process principles.”<sup>32</sup>

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29. This section is largely adapted from Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159, 1183–89 (2013) [hereinafter Perlin, “*Striking for the Guardians and Protectors of the Mind*”] and Michael L. Perlin, *Understanding the Intersection Between International Human Rights and Mental Disability Law: THE ROLE OF DIGNITY*, IN THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191, 199 (Bruce Arrigo & Heather Bersot eds., 2013) [hereinafter PERLIN, UNDERSTANDING THE INTERSECTION].

30. See David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 587, 588 (David B. Wexler & Bruce J. Winick eds., 1996); see also 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2D-3, at 534–39 (2d ed. 1989); DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3–4 (1990); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 7 (2005) [hereinafter WINICK, CIVIL COMMITMENT]; David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 19 (2008). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 32–33 (1992).

31. Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009); see Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in DISPUTES & DILEMMAS IN HEALTH LAW 91, 91–92 (Ian Freckelton & Kerry Petersen eds., 2006).

32. Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 719 n.195 (2003) [hereinafter Perlin, “*You Have Discussed Lepers and Crooks*”]; see Michael L. Perlin, “*And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 752–53 (2005) [hereinafter Perlin, “*And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got*”]; Michael L. Perlin, “*Everybody is Making Love/or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 489–90 (2008) [hereinafter Perlin, “*Everybody is Making Love/or Else Expecting Rain*”]. On how TJ “might be a redemptive tool in efforts to combat sanism, as a means of ‘strip[ping] bare the law’s sanist façade,’” see Michael L. Perlin, “*Baby, Look Inside*

There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] imping[e] upon justice concerns."<sup>33</sup> As I have written elsewhere, "an inquiry into therapeutic outcomes does *not* mean that therapeutic concerns 'trump' civil rights and civil liberties."<sup>34</sup>

TJ "asks us to look at law as it actually impacts people's lives"<sup>35</sup> and "focuses on the law's [influence] on emotional life and psychological well-being."<sup>36</sup> It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness."<sup>37</sup> TJ understands that, "when attorneys fail to acknowledge their clients' negative emotional reactions to the judicial process, the clients are inclined to regard the lawyer as indifferent and a part of a criminal system bent on punishment."<sup>38</sup> By way of example, TJ "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage."<sup>39</sup>

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*Your Mirror*": *The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 591 (2008) [hereinafter Perlin, "Baby, Look Inside Your Mirror"]. See also Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585–86 (2008); Bernard P. Perlmuter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.111 (2005).

33. David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see also David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179, 179–80 (1996).

34. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, "Where the Winds Hit Heavy on the Borderline": *Mental Disability Law, Theory and Practice*, "Us" and "Them", 31 LOY. L.A. L. REV. 775, 782 (1998).

35. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

36. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in *Practicing THERAPEUTIC JURISPRUDENCE: Law as a Helping Profession* 45, 45 (Dennis P. Stolle et al. eds., 2000).

37. Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in *INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT* 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

38. Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 59 (2010).

39. Claire B. Steinberger, *Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 65 (2003). The most thoughtful, sympathetic critique of TJ remains Christopher Slobogin's *Therapeutic Jurisprudence: Five Dilemmas to Ponder*. See Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 195, 218–19 (1995).

In recent years, scholars have considered a vast range of topics through a TJ lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.<sup>40</sup> As Ian Freckelton has noted, “it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications.”<sup>41</sup> It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.<sup>42</sup> These alternative approaches optimize the psychological well-being of individuals, relationships, and communities dealing with a legal matter, and acknowledge concerns beyond strict legal rights, duties, and obligations.<sup>43</sup> In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described “as a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasise[s] psychological wellness over adversarial triumphalism.”<sup>44</sup> That is, TJ supports an ethic of care.<sup>45</sup>

One of the central principles of TJ is a commitment to dignity.<sup>46</sup> Professor Amy Ronner describes the “three Vs”—voice, validation, and voluntariness<sup>47</sup>—arguing:

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40. See Michael L. Perlin, “Things Have Changed”: Looking at Non-Institutional Mental Disability Law Through the Sanism Filter, 46 N.Y.L. SCH. L. REV. 535, 543–45 (2002–2003).

41. Freckelton, *supra* note 32, at 576.

42. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465, 465 (Dennis P. Stolle et al. eds., 2000).

43. See *id.* at 468.

44. Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); see also Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006). The use of the phrase TJ dates to CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 100 (1982).

45. See, e.g., Gregory Baker, *Do You Hear the Knocking at the Door? A “Therapeutic” Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); Brookbanks, *supra* note 44, at 328–30; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Winick & Wexler, *supra* note 44, at 607.

46. See WINICK, CIVIL COMMITMENT, *supra* note 30, at 161.

What “the three Vs” commend is pretty basic: [L]itigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.<sup>48</sup>

Problem-solving courts grew out of an interdisciplinary approach—an approach immersed in TJ—to address the underlying problem, not just the symptoms, of social issues such as substance abuse, domestic violence, child abuse, and mental illness.<sup>49</sup> The creation of these courts “acknowledge[s] that the one-size-fits-all structure of the American criminal justice system often leaves much to be desired.”<sup>50</sup> There is an extensive literature on the relationship between TJ and problem-solving courts in general,<sup>51</sup> between TJ and mental health courts<sup>52</sup> and drug courts<sup>53</sup> in particular, and, more globally,

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47. Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 *TOURO L. REV.* 601, 627 (2008). On the importance of voice, see Freckelton, *supra* note 32, at 588.

48. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 *U. CIN. L. REV.* 89, 94–95 (2002) (footnotes omitted); see also AMY D. RONNER, *LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE* 23 (2010).

49. See, e.g., Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1060 (2003); see also Peggy Fulton Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits*, 2 *CHAPMAN J. CRIM. JUST.* 7, 7–8 (2011); Salmon A. Shomade & Roger E. Hartley, *The Application of Network Analysis to the Study of Trial Courts*, 31 *JUST. SYS. J.* 144, 146 (2010).

50. PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 207.

51. See Hora, *supra* note 49, at 7, 10; see generally Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem-Solving Practices Positively Impact Clients, the Justice Systems and Communities They Serve*, 17 *ST. THOMAS L. REV.* 781 (2005).

52. See, e.g., Nicola Ferencz & James McGuire, *Mental Health Review Tribunals in the UK: Applying a Therapeutic Jurisprudence Perspective*, *CT. REV. (Am. Judges Ass’n)*, Spring 2000, at 48, 51; Thomas L. Hafemeister et al., *Forging Links and Renewing Ties:*

between TJ and judging,<sup>54</sup> and TJ and lawyering<sup>55</sup> in these contexts. But there has been very little written about the specific question of the role of TJ in veterans courts.<sup>56</sup> The question to pose here is this: Do such courts make it more likely that Professor Ronner's vision—of voice, voluntariness, and validation—will be fulfilled?

### III. VETERANS COURTS

Veterans courts have been established as part of an effort to seek “systemic solutions that would allow the [judicial system] a greater range of tools to help struggling veterans than the traditional criminal justice alternatives of conviction and incarceration.”<sup>57</sup> Explicitly, “[t]he rationale for veterans’ courts is based on the combat-related stress, financial instability, and other difficulties adjusting to life that confront many soldiers returning home from Iraq and Afghanistan.”<sup>58</sup> “The focus [of such courts] is on treatment, not

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*Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 183–84 (2012).

53. See, e.g., Salmon A. Shomade, *Case Disposition in the Drug Court: Who Is the Most Central Actor?*, 31 JUST. SYS. J. 74, 74–75, 78–79 (2010); Pamela L. Simmons, Comment, *Solving the Nation’s Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 GONZ. L. REV. 237, 258 (1999–2000). The extent to which many drug courts actually do incorporate TJ principles is not at all clear. See Michael S. King, *Therapeutic Jurisprudence’s Challenge to the Judiciary*, 1 ALASKA J. DISP. RESOL. 1, 2 (2011) [hereinafter King, *Therapeutic Jurisprudence’s Challenge to the Judiciary*] (critiquing some drug courts as not fulfilling TJ values); PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 216–17.

54. See, e.g., King, *Therapeutic Jurisprudence’s Challenge to the Judiciary*, *supra* note 53, at 3.

55. See, e.g., Paul Holland, *Lawyering and Learning in Problem-Solving Courts*, 34 WASH. U. J.L. & POL’Y 185, 187 (2010); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 750 (2005).

56. But see Evan R. Seamone, *The Veterans’ Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 188 (2009) [hereinafter Seamone, *The Veterans’ Lawyer as Counselor*]; Samantha Walls, *The Need for Special Veteran Courts*, 39 DENV. J. INT’L L. & POL’Y 695, 716 (2011). Professor David Wexler, one of the creators of TJ, has noted that TJ principles are now being employed in veterans courts. See David B. Wexler, *That’s What Friends Are For: Mentors, LAP Lawyers, Therapeutic Jurisprudence, and Clients with Mental Illness* 3 (Mar. 2012) (unpublished manuscript) [hereinafter Wexler, *That’s What Friends Are For*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1962725](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962725).

57. Berenson, *supra* note 16, at 39.

58. Marta Hoes, Comment, *Invisible Wounds: What Texas Should Be Doing for the Mental Health of Its Veterans*, 13 TEX. TECH ADMIN. L.J. 369, 378 (2012).

punishment, and on getting [to] the root cause of anti-social behavior.”<sup>59</sup> Importantly, the courts “are premised on the assumption that, when possible, veterans should receive treatment for PTSD.”<sup>60</sup> Many of the veterans courts consciously “utilize the therapeutic jurisprudence ideology in creating the treatment-rehabilitate model.”<sup>61</sup>

Although the first veterans court was started in Anchorage, Alaska, in 2004,<sup>62</sup> most commentators pinpoint the start of the veterans court movement to the creation of the Buffalo Veterans Treatment Court in 2008.<sup>63</sup> As described by that court’s founding judge:

The mission driving the Veterans Treatment Court is to successfully habilitate veterans by diverting them from the traditional criminal justice system and providing them with the tools they need in order to lead a productive and law-abiding lifestyle. In hopes of achieving this goal, the program provides veterans suffering from substance abuse issues, alcoholism, mental health issues, and emotional disabilities with treatment, academic and vocational training, job skills, and placement services. The program provides further ancillary services to meet the distinctive needs of each individual participant, such as housing, transportation, medical, dental, and other supportive services.<sup>64</sup>

At this point in time, there are at least eighty such courts,<sup>65</sup> and hundreds are in the planning process.<sup>66</sup> Potential participants are screened to weed out any individual who does not “show a willingness to undergo treat-

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59. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 570 (2010).

60. 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, 239 (2009).

61. Walls, *supra* note 56, at 716.

62. Hawkins, *supra* note 59, at 565.

63. Berenson, *supra* note 16, at 39; Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 364 (2009).

64. Russell, *supra* note 63, at 357 n.†, 364.

65. William H. McMichael, *The Battle on the Home Front*, A.B.A. J., Nov. 2011, at 42, 44. For descriptions of other courts, see Stuart Ditzen, *Supreme Court, Veterans Administration Host First Veterans’ Task Force Mtg.*, LAW. J. (Allegheny Cnty. Bar Ass’n), Mar. 12, 2010, at 5, 5; Hawkins, *supra* note 59, at 565; Art Heinz, *Nation’s First Online Training for Veterans Courts Mentors Launched by Supreme Court of Pennsylvania*, LAW. J. (Allegheny Cnty. Bar Ass’n), Dec. 16, 2011, at 5, 5; Judy L. Marchman, *Veterans Courts in Texas*, 75 TEX. B.J. 616, 616 (2012); Smith, *supra* note 18, at 93.

66. *The History*, JUST. FOR VETS, <http://www.justiceforvets.org/vtc-history> (last visited Apr. 21, 2013).

ment for his PTSD.”<sup>67</sup> Most such courts accept only defendants charged with misdemeanors or non-violent felonies,<sup>68</sup> although some allow defendants charged with violent felonies to participate.<sup>69</sup> While there has been pointed criticism at the inclusion of some offenses (specifically, domestic violence) in the *eligibility column*,<sup>70</sup> others take the position that precluding violent offenders in these courts is like having “a Veterans Court without veterans.”<sup>71</sup> In some veterans courts, “violent cases are not precluded from diversion [specifically] because ‘combat veterans’ PTSD issues often manifest in aggressive behavior.”<sup>72</sup> Often, however, “[w]hen [veterans courts] do enroll violent offenders, many programs can, and do, require victim input prior to the admittance decision.”<sup>73</sup>

These courts are often staffed with “a Veterans Service Representative (VSR), a fellow veteran whose role is similar to that of a caseworker,” and who “works as a counselor, develop[ing] a treatment plan, and refer[ring] . . . defendant[s] to alcohol, drug dependency, or mental health treatment centers

67. Walls, *supra* note 56, at 718. See *infra* Part III.A. for a discussion of the significance of PTSD diagnoses in the creation and implementation of these courts.

68. See Berenson, *supra* note 16, at 39.

69. Pamela Kravetz, Note, *Way off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 183 & n.109 (2012); Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42, 49.

70. See Kravetz, *supra* note 69, at 186; see also *infra* Part V.E.

71. John Baker, *John Baker: We Need Veterans Courts in Minnesota. Here's Why.*, TWINCITIES.COM (Aug. 29, 2010, 12:01 AM), [http://www.twincities.com/opinion/ci\\_15916530](http://www.twincities.com/opinion/ci_15916530) (observing that “domestic-abuse case[s], bar fights, assault and battery, hit and run cases that result in injury, and DWI cases that result in injury[]” are largely “the types of cases that bring veterans into the criminal justice system in the first place”); see also Dahlia Lithwick, *Specialized Courts for War Veterans Work Wonders. But Why Stop at Veterans?*, SLATE (Feb. 11, 2010, 1:33 PM), [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):

Robert Alvarez, a psychotherapist with the Wounded Warrior program at Fort Carson, recently told a Denver newspaper that it's a mistake to carve the most violent offenders out of the proposed veterans court in Colorado: “The violent offenders need help more than anybody. . . . [T]he very skills these people are taught to follow in combat are the skills that are a risk at home. They're trained to react instantly to a threat, because if not, people die.” So as we continue to create specialized courts for our war veterans, one question worth probing is how it makes sense to give special services to those with the least to lose while withholding special services from those with the worst problems.

*Id.* (alteration in original).

72. Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 7 n.9 (2011) [hereinafter Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*].

73. *Id.* at 8 n.9.

[where] necessary.”<sup>74</sup> David Wexler has underscored that having such a mentor is an *essential feature* of such courts.<sup>75</sup>

#### A. *Issues Related to PTSD*

The story of General George Patton slapping a soldier in World War II is legendary.

During the action in Sicily, General Patton visited an evacuation hospital. He was conducted to the receiving tent, where [fifteen] casualties had just come in from the front.

“Where Were You Hurt?” The General went down the line, asking each patient where he had been hurt. On the edge of the fourth bed sat a soldier with no visible wounds. He had been sent back by his divisional medical officer, tentatively diagnosed as a severe case of psychoneurosis. He was still in battle dress.

The General asked him the routine question. The soldier answered: “It’s my nerves. I can hear the shells come over but I can’t hear them burst.”

Patton turned to the medical officer and asked, “What’s this man talking about? What’s wrong with him--if anything?” Patton began to shout at the man. His high voice rose to a scream, in such language as: “You dirty no-good-----! You cowardly--! You’re a disgrace to the Army and you’re going right back to the front to fight, although that’s too good for you. . . .” Patton reached for his white-handled single-action Colt.

The man sat quivering on his cot. Patton slapped him sharply across the face, turned to the commanding medical officer who had come in when he heard Patton’s high-pitched imprecations. “I want you to get that man out of here right away. I won’t have these other brave boys seeing such a bastard babied.”<sup>76</sup>

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74. Hartsfield, *supra* note 18, at 859; *see also* Hawkins, *supra* note 59, at 565.

75. Wexler, *That’s What Friends Are For*, *supra* note 56, at 3. On the value of the use of psychological techniques in such court settings, *see* Seamone, *The Veterans’ Lawyer as Counselor*, *supra* note 56, at 198.

76. Michael E. McCarthy, Essay, *Diversionary Tactics: Alternative Procedures for the Prosecution of Military Veterans*, 50 DUQ. L. REV. 475, 477–78 (2012).



One of the first law review articles to discuss PTSD characterized this—"the slap heard round the world"<sup>77</sup>—as "[a]n extreme example of military intolerance for warrior weakness."<sup>78</sup> There is little question that, "[b]efore Vietnam, no single event contributed more to public awareness of PTSD"<sup>79</sup> than this incident.

PTSD is "a condition under which a person 'experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or that a threat to the physical integrity of self or others' and, 'the person's response involved intense fear, helplessness, or horror.'"<sup>80</sup> "Symptoms of PTSD may include recurrent nightmares, difficulty falling asleep, hyper-vigilance . . . outbursts of anger," exaggerated startle response, and memory impairment.<sup>81</sup> "Individuals who suffer from this syndrome often show increased irritability, impulsive behavior and unpredictable explosions of aggression with little or no provocation."<sup>82</sup> Persons with PTSD often also have "panic disorders, obsessive-compulsive disorders, social phobias, and major depressive disorders."<sup>83</sup> "Combat is one of the most severe [PTSD] stressors."<sup>84</sup> Although it has been suggested that PTSD symptoms are relatively easy to feign,<sup>85</sup> the use of new neuroscience tech-

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77. Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars,"* 73 GEO. L.J. 931, 972 n.284 (1985).

78. Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 434 n.151 (1988).

79. John Lockman, *The Thousand Yard Stare: Post Traumatic Stress Disorder, the Invisible Casualty of War*, ERNESTBECKERFOUND. (Apr. 7, 2011, 6:59 PM), [http://www.ernestbecker.org/index.php?option=com\\_content&view=article&id=452:the-thousand-yard-stare-post-traumatic-stress-disorder-the-invisible-casualty-of-war-&catid=7:news-archives&Itemid=33](http://www.ernestbecker.org/index.php?option=com_content&view=article&id=452:the-thousand-yard-stare-post-traumatic-stress-disorder-the-invisible-casualty-of-war-&catid=7:news-archives&Itemid=33).

80. 4 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 9A-9.3b, at 271 (2d ed. 2002) [hereinafter 4 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL]; see also AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR]; Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. MED. & ETHICS 745, 746 (2010) ("[T]he recent movement to establish specialized 'mental health courts' for mentally ill defendants whose psychiatric conditions contributed in some measure to the conduct leading to arrest reflects the infusion of psychiatry into the criminal justice system.").

81. DSM-IV-TR, *supra* note 80, at 464; Olympia Duhart, *Soldier Suicides and OutCrit Jurisprudence: An Anti-Subordination Analysis*, 44 CREIGHTON L. REV. 883, 887 (2011) [hereinafter Duhart, *Soldier Suicides*].

82. 4 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 80, § 9A-9.3b, at 272; see also DSM-IV-TR, *supra* note 80, at 464.

83. Duhart, *Soldier Suicides*, *supra* note 81, at 887.

84. *Id.*

85. See, e.g., Erin M. Gover, Comment, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 581 (2008).

niques in the development of external measures of assessment should obviate most of these concerns.<sup>86</sup>

Through the post-Vietnam era, fact finders were “generally reluctant to accept the validity” of PTSD both in insanity defense cases and in sentencing mitigation cases.<sup>87</sup> Thus, while at least one court characterized the evidence of PTSD in the case of a Vietnam war veteran as highly persuasive,<sup>88</sup> in the course of an opinion affirming a jury’s rejection of the defendant’s insanity defense based largely on the defendant’s own testimony,<sup>89</sup> other courts have narrowly ruled on the scope of expert witnesses who may permissibly testify as to the syndrome’s effects.<sup>90</sup> “Similarly, defendants [were] mostly . . . ‘surprisingly unsuccessful’<sup>91</sup> in their attempts to use Vietnam stress syndrome or PTSD as a ground for the granting of a new trial in cases where the original convictions predated the formal recognition of the existence of Vietnam stress syndrome.”<sup>92</sup> Some defendants have been successful in their

86. Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 104 (2012). On the new uses of neuroscience in criminal law in general, see Michael L. Perlin, “*And I See Through Your Brain*”: *Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process*, STAN. TECH. L. REV. (2009), <http://sclr.stanford.edu/pdf/perlin-and-i-see.pdf>, and see also Perlin, “*There Are No Trials Inside the Gates of Eden*,” *supra* note 14; Michael L. Perlin & Valerie R. McClain, *Unasked (and Unanswered) Questions About the Role of Neuroimaging in the Criminal Trial Process*, 28 AM. J. FORENSIC PSYCHOL. 4 (2010).

87. 4 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 80, § 9A-9.3b, at 273–74. For a recent reconsideration, see Caine, *supra* note 60. In one of the most poignant examples, a jury explained to a trial judge why it rejected an insanity defense plea in the case of a Vietnam veteran charged with murder:

We, the Jury, recognize the contribution of our Viet Nam [sic] veterans and those who lost their lives in Viet Nam [sic]. We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans.

Through long and careful deliberation, through exposure to all the evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thompkins’ life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans.

State v. Felde, 422 So. 2d 370, 380 n.9 (La. 1982).

88. Felde, 422 So. 2d at 380.

89. *Id.* at 380, 398; see also State v. Sharp, 418 So. 2d 1344, 1348 (La. 1982) (testimony admissible, but jury rejected insanity defense); State v. Cone, 665 S.W.2d 87, 92 (Tenn. 1984) (defendant’s pattern of conduct raised “serious doubts” about expert witness’ opinions), *cert. granted sub nom.*, Bell v. Cone, 534 U.S. 1064 (2001), and *rev’d*, 535 U.S. 685 (2002).

90. See, e.g., United States v. Crosby, 713 F.2d 1066, 1076–77 (5th Cir. 1983).

91. Elizabeth J. Delgado, Note, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 495 (1985).

92. 4 PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 80, § 9A–9.3b, at 273.

arguments that evidence of PTSD should be admissible at sentencing;<sup>93</sup> however, a student author has concluded that the courts' decisions in admitting the evidence appear "to be based on the nature of the crime and the defendant's success in rehabilitation," rather than the underlying syndrome.<sup>94</sup> Interestingly, the Supreme Court of the United States has relatively recently ruled, in a death penalty case, that attorneys are required to present evidence of PTSD when it is available.<sup>95</sup> There, although the defendant had been a decorated Korean War veteran, his court-appointed counsel presented no evidence whatsoever of his military service to the jury.<sup>96</sup> The court noted that had such evidence been presented, "the jury might [have found] mitigating the intense stress and mental and emotional toll that combat took on Porter."<sup>97</sup> The Court added language especially relevant to the inquiry we are focusing upon today: "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."<sup>98</sup>

One of the clearly articulated reasons for the surge in popularity in veterans courts has been the number of veterans diagnosed with PTSD who have become involved with the criminal justice system.<sup>99</sup> A startling 30% of all male soldiers who served in Vietnam "experienced PTSD at some point in their lives,"<sup>100</sup> and it is estimated that, already, between 10-20% of all veterans returning from the wars in Iraq and Afghanistan exhibit characteristics of PTSD.<sup>101</sup> Estimates of the percentage of those who have sought treatment for this condition range from 23-40%.<sup>102</sup>

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93. *E.g.*, *State v. Spawr*, 653 S.W.2d 404, 406 (Tenn. 1983); Geraldine L. Brotherton, Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91, 91 n.1 (1981–1982) (listing early unreported cases in which PTSD was asserted as a sentence-mitigation factor). *But see* *United States v. Kruschewski*, 541 F. Supp. 142, 142–43 (D. Mass. 1982); *State v. Pettit*, 661 P.2d 767, 769 (Idaho Ct. App. 1983); *State v. Watson*, 316 S.E.2d 293, 296 (N.C. 1984).

94. Delgado, *supra* note 91, at 500.

95. *Porter v. McCollum*, 558 U.S. 30, 43–44 (2009) (per curiam).

96. *Id.* at 40.

97. *Id.* at 43–44.

98. *Id.* at 43.

99. Grey, *supra* note 86, at 72.

One final aspect of the increasing acceptance of mitigation for veterans who suffer from PTSD can be found in the recent popularity of veterans' courts. These courts are designed to keep veterans with mental health issues, including PTSD, who are charged with criminal behavior out of the traditional justice system and place them into treatment programs instead.

*Id.*

100. F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 11 (2010).

101. *Id.* at 12; *see also* Hartsfield, *supra* note 18, at 851; Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG.

“Veterans who suffer from PTSD may face criminal charges because the symptoms that they suffer from can consequently lead them to commit criminal offenses.”<sup>103</sup> “The relationship between PTSD and criminal offending is considered to be so significant that the president of the National Veterans Federation . . . warns that the criminal justice system is facing an epidemic of veterans with PTSD being charged with crimes.”<sup>104</sup> This relationship is “well-recognized by researchers and psychologists,” and increasingly, by the courts.<sup>105</sup> Of course, so many of the clients of veterans courts have been diagnosed with PTSD.<sup>106</sup>

#### IV. SOCIETAL AMBIVALENCE

The scar left on the national psyche by the war in Vietnam has never healed; it likely never will.<sup>107</sup> We know that the societal ambivalence that followed the end of the war—ambivalence reflected in areas as disparate as decision-making with regard to returning all the American war dead to the U.S.,<sup>108</sup> Supreme Court cases about draft card burning,<sup>109</sup> the relationship

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J. MED. 13, 13 (2004), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMoa040603>; McCarthy, *supra* note 76, at 479; *One in Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORP. (Apr. 17, 2008), <http://www.rand.org/news/press/2008/04/17.html>.

102. Hartsfield, *supra* note 18, at 851.

103. Jillian M. Cavanaugh, Note, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 468 (2011).

104. Melissa Hamilton, *Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 BERKELEY J. CRIM. L. 340, 341 (2011).

105. Walls, *supra* note 56, at 712.

106. Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 155 (2009); Seamone, *The Veterans' Lawyer as Counselor*, *supra* note 56, at 186; Wexler, *That's What Friends Are For*, *supra* note 56, at 13.

107. For a comprehensive account, see MELVIN SMALL, *AT THE WATER'S EDGE: AMERICAN POLITICS AND THE VIETNAM WAR* (2005), and see *id.* at 217–24 for a comprehensive bibliography of sources.

108. G. KURT PIEHLER, *REMEMBERING WAR THE AMERICAN WAY* 168 (1995); see also Mary L. Clark, *Keep Your Hands off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45, 58–59 (2005).

109. See Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 814 (2004) (discussing how the Court's decision in *United States v. O'Brien* “reveals an ambivalence that may reflect the divisiveness of the Vietnam War”).

between American colleges and the military,<sup>110</sup> the designs of war memorials,<sup>111</sup> social attitudes toward “obedience to established authority, duty, subordination, and [drug-related] criminal activity,”<sup>112</sup> and in the military’s pursuit of the war itself<sup>113</sup>—has played out in many ways, including, specifically, how we treat Vietnam veterans in the criminal justice system. The ambivalence of the jurors in *State v. Felde*<sup>114</sup> is a perfect reflection of the ambivalence of the general public,<sup>115</sup> and it is a factor we cannot ignore in our analysis of the underlying issues being discussed.<sup>116</sup>

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110. See Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL RTS. J. 205, 236–38 (2004).

111. See Robin Wagner-Pacifici & Barry Schwartz, *The Vietnam Veterans Memorial: Commemorating a Difficult Past*, 97 AM. J. SOC. 376, 377–78, 381 (1991).

112. See James B. Thwing, *Service Connection: A Bridge Over Troubled Waters* (pt. 2), ARMY LAW., June 1986, at 26, 26.

113. See, e.g., Francis Dymond, Book Note, *Choosing War: The Lost Chance for Peace and the Escalation of War in Vietnam*, 168 MIL. L. REV. 220, 220 (2001).

114. 422 So. 2d 370 (La. 1982); see also *supra* note 88.

115. *Id.* at 380 & n.9.

116. Such ambivalence on the part of general public is also clear regarding the legitimacy of the wars in Iraq and Afghanistan. See Olympia Duhart, *PTSD and Women Warriors: Causes, Controls and a Congressional Cure*, 18 CARDOZO J.L. & GENDER 327, 336–37 (2012). On the ambivalence of the “United States and other occupying forces in Iraq ‘toward human rights and humanitarian law concerns,’” see Karima Bennouna, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT’L L. & POL’Y 171, 217–18 (2004), and Joe Stork & Fred Abrahams, *Sidelined: Human Rights in Postwar Iraq*, in HUMAN RIGHTS WATCH WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 93, 93–94 (2004).

V. CRITICISMS OF VETERANS COURTS<sup>117</sup>

As noted earlier, there has been a series of criticisms leveled at the creation of veterans courts.<sup>118</sup> In this section, I will discuss these criticisms and explain why I find them wanting.

A. *The “Free Pass” Argument*

“The American Civil Liberties Union (ACLU) has opposed [v]eterans [c]ourts, arguing that veterans are provided ‘an automatic free pass based on military status to certain criminal-defense rights that others don’t have.’”<sup>119</sup> This argument tracks a statement attributed to “Judge Charles B. Kornmann of the U.S. District Court for South Dakota [who] ‘cautioned [a] jury that nobody got “a free pass to shoot somebody” because they “went to Iraq or Afghanistan or the moon.”’”<sup>120</sup>

I believe this argument is misguided, for the reasons stated by Jillian Cavanaugh:

[T]here is no “free pass” when it comes to admitting veterans into a veterans treatment court; their eligibility is based *not* upon their status as a military veteran, but rather upon the notion that their

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117. There is some irony here that for years there have been veterans administrative courts to adjudicate questions of benefits payments, *see, e.g.*, Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The “New Paternalism,”* 1 VETERANS L. REV. 2, 2 (2009), and that the existence of these courts has never, to the best of my knowledge, been raised in the debate about the courts under discussion here. Such courts—the United States Court of Appeals for Veterans Claims—are Article I courts; they may “(1) decide any relevant questions of law that arise in a benefits proceeding, (2) compel VA action unlawfully withheld or unreasonably delayed, (3) hold unlawful or set aside actions or regulations adopted by the VA, and (4) reverse the VA’s fact-finding if it is clearly erroneous.” Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 AM. U. L. REV. 1201, 1209 (2011); *see also* 38 U.S.C. § 7261(a)(1)–(4) (2006). An interesting parallel can be made to the mental health courts debate. We discuss extensively the pros and cons of such courts, while ignoring the reality that there are other *mental health courts* in which individuals are regularly committed to psychiatric hospitals with virtually no due process protections. *See* PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 193–195, 212 (comparing problem-solving based mental health courts to “non-specialized [courts that] I have observed across the nation, in which persons with mental disabilities are regularly treated as third-class citizens by (at the best) bored or (at the worst) malevolent trial judges”).

118. *See supra* Parts I, III.

119. Hartsfield, *supra* note 18, at 860.

120. Anthony E. Giardino, Essay, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2962 n.38 (2009).

criminal conduct was caused by an underlying physical or psychological injury that was incurred during military service in a combat zone.<sup>121</sup>

### B. *The Disparity Argument*

"Other concerns are that [v]eterans [c]ourts exclude non-veterans who suffer from PTSD but are not eligible for special provisions through these problem-solving courts,"<sup>122</sup> resulting in "disparity in treatment between," for example, "non-violent drug offenders who are not veterans and those who are."<sup>123</sup> I am in partial agreement with Samantha Walls's response to this—that non-veteran drug offenders, in most jurisdictions, "can take advantage of . . . drug-court programs"<sup>124</sup>—but my concern about the quality of many drug programs<sup>125</sup> makes me uneasy to endorse it without qualification. My position here is rather the same one that I have used in support of mental health courts when parallel arguments have been raised: By increasing the likelihood of a person with mental disability being diverted out of the criminal justice system—where he is likely to be treated as a third or fourth class citizen if those terms have any meaningful content or context—such courts

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121. Cavanaugh, *supra* note 103, at 479.

It is important to understand that veterans in veterans treatment courts do not enjoy a privilege based upon their status as a military service member. "The [veterans treatment court] won't be a free pass for men and women accused of crimes just because they happen to have a military background."

*Id.* at 479–80 n.123 (quoting "Mitch Lyles, director of adult probation for Denton County"); see also B.J. Lewis, *Denton Program Allows Alternate Court Sentencing for Veterans*, DALLASNEWS.COM (Dec. 22, 2009, 2:36 AM), <http://www.dallasnews.com/news/community-news/denton/headlines/20091222-Denton-program-allows-alternate-court-sentencing-8915.ece>.

Consider one concern expressed by an American Civil Liberties Union spokesman comparing a proposed veterans treatment court in Nevada with the veterans treatment court established in Cook County, Illinois: "The concern expressed in Nevada was that individuals who served in the military were sort of automatically transferred into this special court and were provided some options for lower-level sentences. It was based on the [military] status rather than the crime."

Cavanaugh, *supra* note 103, at 480 n.123 (emphasis omitted).

122. Hartsfield, *supra* note 18, at 860.

123. Hawkins, *supra* note 59, at 571; see also Walls, *supra* note 56, at 721 ("The government is arguably creating a first-class and second-class criminal-justice system, based upon determining who is more deserving of treatment: [N]on-veterans who suffer from PTSD or veterans who suffer from PTSD.").

124. Walls, *supra* note 56, at 721.

125. See PERLIN, "THERE ARE NO TRIALS INSIDE THE GATES OF EDEN," *supra* note 14, at 207, 216; see also Holland, *supra* note 55, at 187 (discussing the position of the National Association of Criminal Defense Lawyers as being "[r]elatively sanguine about mental health courts, [but] . . . thoroughly repudiat[ing] drug courts, calling for their abolition").

make it less likely that the person with mental disabilities will suffer at the hands of others because of that status.<sup>126</sup> As Steven Berenson noted, “veterans receive not a ‘special treatment’ through veterans courts but the appropriate treatment that all defendants would receive through our criminal justice system in an ideal system.”<sup>127</sup>

### C. *The Stereotype Perpetuation Argument*

“Critics also say that [v]eterans [c]ourts perpetuate the stereotype that veterans are returning ‘war-crazy.’”<sup>128</sup> In responding to this argument, Professor Steven Berenson concludes that “the burden should seem to be on veterans’ advocates better to publicize the successes of returning veterans than to deny necessary assistance to veterans who have not enjoyed any such successes.”<sup>129</sup> While I agree that such publicity would be helpful, it seems to me that the issue here is much deeper, and reflects the malignancy of sanism—“an irrational prejudice . . . of the same quality and character of other [irrational prejudices that cause and are reflected in] prevailing [social attitudes of] racism, sexism, [homophobia], and ethnic bigotry”<sup>130</sup>—and its impact on all of society.<sup>131</sup> General Patton’s famous *slap*<sup>132</sup> was a perfect exemplar of the ravages of sanism.<sup>133</sup> If anything, the existence of veterans courts—premised on the acknowledged reality that persons with mental disabilities are victimized by prejudice and discrimination—will serve as a way of, eventually, remediating some of the stereotypes that exist about *crazy* soldiers returning home from war.<sup>134</sup> Almost thirty years ago, this issue was raised in the specific context of Vietnam veterans charged with crimes that appeared related to diagnoses of PTSD: “[L]awyers on both sides do fear

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126. See PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 202–06. On issues of fairness and procedural justice in hearings before such courts, see Terry Carney et al., *Mental Health Tribunals: “TJ” Implications of Weighing Fairness, Freedom, Protection and Treatment*, 17 J. JUD. ADMIN. 46, 53–54 (2007); Risdon N. Slate, *From the Jailhouse to Capitol Hill: Impacting Mental Health Court Legislation and Defining What Constitutes a Mental Health Court*, 49 CRIME & DELINQ. 6, 12, 15–16 (2003).

127. Berenson, *supra* note 16, at 40.

128. Hartsfield, *supra* note 18, at 860.

129. Berenson, *supra* note 16, at 41.

130. See Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 374 (1992).

131. See Perlin, “*And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got,*” *supra* note 32, at 750; Perlin, “*Everybody Is Making Love/or Else Expecting Rain,*” *supra* note 32, at 502; Perlin, “*You Have Discussed Lepers and Crooks,*” *supra* note 32, at 688.

132. See McCarthy, *supra* note 76, at 477–78.

133. See *id.*; see also Peter Blanck, “*The Right to Live in the World*”: *Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367, 377 (2008).

134. See Blanck, *supra* note 133, at 377; Hartsfield, *supra* note 18, at 860–61.



that P-TDS [sic] cases could become litmus tests of attitudes about the war and the warriors. Veterans often assume civilians will not understand their experiences, and jurors may worry that a guilty verdict proves they are ungrateful to the soldiers."<sup>135</sup> Professor Peter Blanck has noted that "veterans with [PTSD] and mental conditions are among those with the highest war-related injuries and most stigmatized impairments."<sup>136</sup> Elsewhere, I have described the roots of stigma facing persons with mental disabilities as being based on sanism, through which "'able-bodied society feels existential anxiety towards people with [mental] disabilities, and that anxiety's at the core of . . . irrational prejudices that cause and are reflected in prevailing social attitudes.'"<sup>137</sup> If anything, veterans courts will diminish the stigma faced by such veterans and will help reduce the sanism prevalent in our treatment of them.

#### D. *The Costs Argument*

"Veterans [c]ourts have been criticized for being more costly than traditional courts."<sup>138</sup> My response here is a demurrer. So what? Like all problem-solving courts, these "courts offer a much wider range of services than their traditional counterparts, [and thus] tend to be more expensive than traditional courts" in terms of court operations.<sup>139</sup> "However, the financial cost of problem-solving courts is still [significantly] less than the financial costs of incarceration and recidivism."<sup>140</sup> I think that Cathy Ho Hartsfield is precisely right when she concludes, on this point, "[p]roblem-solving courts, such as [v]eterans [c]ourts, should be viewed as a long-term solution, and thus, the long-term cost-efficient benefits are well worth the initial investment."<sup>141</sup>

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135. Samuel Pyeatt Menefee, *The "Vietnam Syndrome" Defense: A "G.I. Bill of Criminal Rights?"*, ARMY LAW., Feb. 1985, at 1, 26 & n.171.

136. Blanck, *supra* note 133, at 377.

137. *Id.* (alteration in original); see also Michael L. Perlin, "Through the Wild Cathedral Evening": *Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities*, 13 TEX. J. C.L. & C.R. 413, 416 (2008) (discussing Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, INDEP. LIVING INST., para. 24 (1985), <http://www.independentliving.org/docs4/hahn2.html>); Michael Ashley Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607, 631-32 (2002) (book review); Harlan Hahn, *Civil Rights for Disabled Americans: The Foundation of a Political Agenda*, in IMAGES OF THE DISABLED, DISABLING IMAGES 181, 182 (Alan Gartner & Tom Joe eds., 1987).

138. Hartsfield, *supra* note 18, at 860.

139. Berenson, *supra* note 16, at 40.

140. *Id.*

141. Hartsfield, *supra* note 18, at 862.

### E. *The Domestic Violence Critique*

Advocates for victims of domestic violence have opposed including such offenses within the ambit of veterans courts at all, “noting the escalating nature of those offenses.”<sup>142</sup> Pamela Kravetz has argued that all such cases should be excluded from the courts’ jurisdictional ambit, arguing that their inclusion “makes difficult and highly volatile situations even worse due to mixed messages about criminal responsibility, emphasis on treatment, and the risk of victim coercion.”<sup>143</sup> Although this is an argument with surface appeal, I believe it fails as well. In a discussion of problem-solving courts, Professor David Wexler and Judge Michael King have noted how, “for reasons of political acceptability,” those charged with serious offenses are typically excluded from newly-created drug and mental health courts,<sup>144</sup> but that, as time goes on, offenders charged with violent offenses are more likely to be accepted into these courts, and that offenders charged with domestic violence are now being included in some mental health courts, as long as the victim consents.<sup>145</sup>

If the purpose of these courts is to “help struggling veterans [more] than the traditional criminal justice alternatives of conviction and incarceration,”<sup>146</sup> then it makes no logical sense to exclude certain crimes from their jurisdictional ambit, especially crimes that, logically, may often be a manifestation of the PTSD with which eligible veterans have been diagnosed.<sup>147</sup> And of course, there are currently domestic violence problem-solving courts in many jurisdictions, many of which were begun in recognition of the reality that “traditional approaches have failed in addressing the underlying problems in areas such as . . . domestic violence.”<sup>148</sup>

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142. Hawkins, *supra* note 59, at 570.

143. Kravetz, *supra* note 69, at 201.

144. David B. Wexler & Michael S. King, *Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence*, in COURT SUPERVISED TREATMENT ALTERNATIVES TO INCARCERATION FOR DRUG-DEPENDENT OFFENDERS: THE DRUG POLICY AGENDA (forthcoming) (manuscript at 1, 5), available at <http://ssrn.com/abstract=1722278>. I discuss this phenomenon in PERLIN, “THERE ARE NO TRIALS INSIDE THE GATES OF EDEN,” *supra* note 14, at 206.

145. Wexler & King, *supra* note 144 (manuscript at 5 n.17).

146. Berenson, *supra* note 16, at 39.

147. See Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice*, *supra* note 72, at 6, 7 & n.9.

148. Erin McGrath, Note, *Reentry Courts: Providing a Second Chance for Incarcerated Mothers and Their Children*, 50 FAM. CT. REV. 113, 118 (2012).

### F. The “Cherry Picking” Argument

Other opponents accuse such courts of “cherry picking” low-risk candidates, leaving potentially higher-risk offenders behind to be sentenced through the traditional criminal justice system.<sup>149</sup> Other critics argue that the creation of such courts would disproportionately divert resources from other criminal courts “because judges already have the ability to take service-connected disabilities like PTSD into consideration in all aspects of the criminal justice system, including sentencing.”<sup>150</sup>

The literature that raises these arguments, however, does not point out any evidence that this has actually happened.<sup>151</sup> And while this certainly *may* happen in cases where courts have the discretion to accept violent offenders, it does not seem to be an appropriate concern with regard to the vast majority of courts that jurisdictionally only serve nonviolent offenders. Also, in some jurisdictions, *any* individual charged with a statutorily-listed offense who is a veteran under federal law may opt in.<sup>152</sup> And, I have an additional response here: Our correctional system is broken, badly broken, and perhaps beyond repair, especially in cases of persons with serious mental disabilities who have been convicted of crime.<sup>153</sup> Any alternative to the system that diverts *anyone* out (and into potentially redemptive treatment programs) is a good alternative. This point has been made most effectively by legal journalist Dahlia Lithwick:

But the fact that veterans courts seem to work as well as they do suggests a more fundamental lesson about correcting what’s broken in the criminal justice system. Whether we really want to go down the road of creating first- and second-class criminal court systems and whether we can truly draw any principled line between special judicial treatment for nonviolent veterans but not the violent ones are not easy political questions. They are thorny legal

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149. Caine, *supra* note 60, at 235–36.

150. Hawkins, *supra* note 59, at 571.

151. See Caine, *supra* note 60, at 236; Hawkins, *supra* note 59, at 571.

152. Smith, *supra* note 18, at 99 & n.32 (discussing court in Anchorage, Alaska).

153. See MICHAEL L. PERLIN & HENRY A. DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS: CASES AND MATERIALS 3–4 (2008) [hereinafter PERLIN & DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS]; John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in America’s Prisons*, 22 WASH. U. J.L. & POL’Y 385, 402 (2006) (“[M]ost correctional systems are set up to fail.”). John J. Gibbons is a retired Third Circuit Court of Appeals Judge; Nicholas de B. Katzenbach was the former Attorney General of the United States.

ones. You don't have to oppose veterans' court to want that type of justice for all.<sup>154</sup>

### G. *The "We Have Other Courts" Argument*

"Because drug and mental health treatment courts already exist in many jurisdictions, a common suggestion is to simply divert veterans into those programs rather than create a new category of treatment courts entirely."<sup>155</sup> Tiffany Cartwright responds ably to this critique:

[F]or combat veterans, their underlying problem is not their substance abuse, or even their PTSD—it is their combat trauma, and that is something that cannot be addressed as effectively in a traditional drug or mental health court. Many veterans have experienced things that are uncommon or unheard of among civilian defendants.<sup>156</sup>

### H. *The "Already Lenient" Argument*

Some "believe that veteran courts are unnecessary due to the already present leniency towards veterans in the court process."<sup>157</sup> There is little hard non-anecdotal evidence, however, that this actually happens, notwithstanding the Supreme Court's dicta in *Porter v. McCollum*,<sup>158</sup> discussed earlier in this paper.<sup>159</sup> An amendment to the Federal Sentencing Guidelines has made federal sentencing more hospitable to PTSD claims by military veterans, noting that military service may be an appropriate mitigating factor "in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines,"<sup>160</sup> yet a recent search has revealed that there are few re-

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154. Lithwick, *supra* note 71.

155. Tiffany Cartwright, "To Care for Him Who Shall Have Borne the Battle": The Recent Development of Veterans Treatment Courts in America, 22 STAN. L. & POL'Y REV. 295, 302–03 (2011).

156. *Id.* at 303 (footnotes omitted).

157. Walls, *supra* note 56, at 721.

158. 558 U.S. 30 (2009) (per curiam).

159. See *supra* text accompanying notes 95–98. "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." *Porter*, 558 U.S. at 43.

160. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2011); see also Grey, *supra* note 86, at 70.

ported cases interpreting this provision.<sup>161</sup> And, of course, not all states use guidelines modeled on the federal law.<sup>162</sup>

Mental health defenses based upon PTSD are typically unsuccessful, and even where mitigation is deemed warranted, the veteran-defendant will still face incarceration—often lengthy incarceration.<sup>163</sup> And, if incarcerated, it is likely that this cohort will not receive the necessary psychological treatment.<sup>164</sup> The leniency argument is not reality-based.

In short, none of the arguments offered in opposition to the creation of these courts is persuasive.

## VI. COUNSEL AND JUDICIARY ISSUES

There has been little commentary on the question of the quality of counsel made available to defendants in veterans court proceedings. I believe, though, that consideration of counsel effectiveness in other problem-solving court venues may be relevant to this discussion. We know that the quality of counsel made available to criminal defendants with mental disabilities is often tragically substandard.<sup>165</sup> At least one court has ruled, by way of example, that failure of counsel to pursue a PTSD defense did not deny effective assistance of counsel, characterizing Vietnam stress syndrome as a *novel defense* which need not be explored by counsel.<sup>166</sup> Others have rejected *Strickland v. Washington*<sup>167</sup> based arguments<sup>168</sup> where PTSD was not raised

161. Grey, *supra* note 86, at 70 & n.80.

162. See, e.g., Caine, *supra* note 60, at 230–31; see also Grey, *supra* note 86, at 69, 70.

163. See *supra* text accompanying notes 87–98; see also Michael L. Perlin & Henry A. Dlugacz, “It’s Doom Alone That Counts”: *Can International Human Rights Law Be an Effective Source of Rights in Correctional Conditions Litigation?*, 27 BEHAV. SCI. & L. 675, 676, 680–81 (2009) [hereinafter Perlin & Dlugacz, “It’s Doom Alone That Counts”]; PERLIN & DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS, *supra* note 153, at 3.

164. Perlin & Dlugacz, “It’s Doom Alone That Counts,” *supra* note 163, at 681.

165. See MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW (2013); see also Michael L. Perlin, “The Executioner’s Face Is Always Well-Hidden”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 202–05, 207 (1996-1997); MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 126 (2013) [hereinafter PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY].

166. See Miller v. State, 338 N.W.2d 673, 678 (S.D. 1983). But see *id.* at 682 (Henderson, J., dissenting).

167. 466 U.S. 668 (1984).

168. *Id.* at 686 (test for adequacy is “whether counsel’s conduct so undermined the proper function[] of the adversarial process that the trial [court] cannot be relied on as having produced a just result”). I discuss *Strickland* extensively in PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY, *supra* note 165, at 129–31.

at the sentencing phase of death penalty trials.<sup>169</sup> Although there is some evidence that, at the current time, more defendants have successfully used PTSD defenses in sentence mitigation efforts,<sup>170</sup> there is no evidence that the criminal defense bar, in the aggregate, *gets* the full meaning and potential range of PTSD defenses.<sup>171</sup> At the very least, such lawyers must begin to “apprise themselves of their clients’ military experience and mental health background so as to protect and best advocate for the best interests of their clients.”<sup>172</sup>

How can we be confident that counsel will be adequate in cases involving similar issues before veterans courts when much less is at stake (than in the death penalty context)? Dr. Steven Erickson and his colleagues have expressed “concern[] as to whether defendants in mental health courts receive adequate representation by their attorneys.”<sup>173</sup> Terry Carney characterizes the assumption that adequate counsel will be present at hearings to guarantee liberty values as a “false hope.”<sup>174</sup>

Henry Dlugacz and Christopher Wimmer summarize the salient issues:

It is not reasonable to expect a client to repose trust in an attorney unless she is confident that he is acting in accordance with her wishes. The client with mental illness may already doubt the

169. See, e.g., *Vasquez v. Thaler*, 389 F. App’x 419, 421, 425, 429, 432 (5th Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 2445 (2011) (holding that defense counsel’s failures to investigate and present evidence of petitioner’s PTSD, attention deficit disorder, drug addiction, fetal alcohol syndrome, learning disabilities, and borderline I.Q. did not prejudice him); *Jordan v. Epps*, 740 F. Supp. 2d 802, 814, 853–56 (S.D. Miss. 2010) (finding that determination that petitioner was not prejudiced by trial counsel’s failure to obtain mental health examiner in capital murder prosecution was not contrary to, nor unreasonable application of, clearly established federal law; there was no connection between petitioner’s alleged PTSD from his military service and his criminal behavior that would have required evaluation by mental health examiner).

170. Nidiffer & Leach, *supra* note 100, at 16.

171. See Daniel Burgess et al., *Reviving the “Vietnam Defense”: Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, DEV. MENTAL HEALTH L., Jan. 2010, at 59, 77–78 (discussing the Supreme Court’s decision in *Porter v. McCollum*, 558 U.S. 30, 43 (2009) (per curiam), stating that “such a ruling places a burden on the defense bar to ascertain clients’ military background and subsequent related issues when defending them in capital cases.”).

172. *Id.* at 79.

173. Steven K. Erickson et al., *Variations in Mental Health Courts: Challenges, Opportunities, and a Call for Caution*, 42 COMMUNITY MENTAL HEALTH J. 335, 340 (2006).

174. Terry Carney, *The Mental Health Service Crisis of Neoliberalism—An Antipodean Perspective*, 31 INT’L J. L. & PSYCHIATRY 101, 105 (2008); see also Terry Carney, *Best Interests or Legal Rectitude?: Australian Mental Health Tribunal Stakeholder & Case-Flow Implications* 33 (Nov. 2009) (unpublished manuscript), available at [http://www.mhcirl.ie/Training\\_Development/Professor\\_Terry\\_Carney\\_Best\\_Interests\\_or\\_Legal\\_Rectitude\\_Paper.pdf](http://www.mhcirl.ie/Training_Development/Professor_Terry_Carney_Best_Interests_or_Legal_Rectitude_Paper.pdf) (“The issue of legal advocacy before [mental health tribunals] . . . is a vexed one.”).

attorney's loyalty. This risk is exacerbated when the attorney is appointed by the court. The client may wonder whether the attorney has been assigned in order to zealously represent her, or instead to facilitate her processing through the legal system. . . . There are . . . strong personal disincentives to thorough preparation, even for the committed attorney. . . . There are also institutional pressures: The attorney who depends on the goodwill of others in the system (e.g., judges, state attorneys, or prosecutors) may pull his punches, even unwittingly, in order to retain credibility for future interactions (which he would put to use for his future clients). Judges want cases resolved.<sup>175</sup>

Some solutions—largely drawing upon TJ imperatives<sup>176</sup>—have been offered. Bruce Winick has argued that “lawyers should adequately counsel their clients about the advantages and disadvantages of accepting diversion to mental health court.”<sup>177</sup> “As a result, judges and defense counsel in mental health courts should ensure that defendants receive dignity and respect, [and] are given a sense of voice and validation.”<sup>178</sup> Further, it is essential that counsel has “a background in mental health issues and in communicating with individuals who may be in crisis.”<sup>179</sup> Tiffany Cartwright has even recommended that “the prosecutor and defense counsel should work together using a non-adversarial approach to protect both public safety and the veteran’s rights.”<sup>180</sup>

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175. Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 331, 353–54 (2011). On the need for lawyers taking a TJ approach to view their clients *holistically*, see Wexler & King, *supra* note 144.

176. See Deen Potter, *Lawyer, Social Worker, Psychologist and More: The Role of the Defence Lawyer in Therapeutic Jurisprudence*, AM. U. SCH. PUB. AFF., 96–97 (Jan. 2005), [www1.spa.american.edu/justice/documents/105/pdf](http://www1.spa.american.edu/justice/documents/105/pdf). (on the challenges inherent in a therapeutic jurisprudence practice). On how the use of TJ can improve public defender practices in general, see Clarke & Neuhard, *supra* note 51, at 786–800, 803–04.

177. Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL’Y & L. 507, 523 (2005).

178. *Id.* at 516.

179. Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System’s Unfair Treatment of People with Mental Illnesses*, 11 PSYCHOL. PUB. POL’Y & L. 570, 576 (2005); see also M. Carmela Epright, *Coercing Future Freedom: Consent and Capacities for Autonomous Choice*, 38 J.L. MED. & ETHICS 799, 801 (2010) (“‘Ideally, in mental health courts all courtroom personnel—i.e., judge, prosecutor, defense counsel and other relevant professionals—have experience and training in mental health issues and available community resources.’”).

180. Cartwright, *supra* note 155, at 307. Her suggestion appears to track, *sub silentio*, much of the restorative justice literature that urges solutions by which to “restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.”

What about the role of judges? Judge Michael King has written eloquently about the need for judges to become experts in the interpersonal aspects of judging, noting that, depending on the circumstances, judging may require “particular listening and communication skills, the expression of empathy, the use of techniques of persuasion or motivational interviewing, the use of techniques to settle child witnesses and collaborative problem-solving techniques.”<sup>181</sup> Certainly, the need for these skills is intensified in problem-solving courts, such as veterans courts.<sup>182</sup>

## VII. CONCLUSION

I began by quoting Judge Ackerman’s decision in the *Falter* case that the litigation there was about how the plaintiffs—VA residents—“are treated as human beings.”<sup>183</sup> Writing recently about the role of the judiciary in problem-solving courts in general, Australian Judge Michael S. King quoted a judge involved in the creation of the first drug court in Miami, Florida, as referring to his work as “a statement of our belief in the redemption of human beings.”<sup>184</sup> I believe this is where we must start.

David Wexler and Judge King set out an important list of key TJ strategies that all problem-solving courts should incorporate:<sup>185</sup>

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*Id.*; John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999); see also JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 11 (2002) (“Restorative justice is a process whereby all the parties with a stake in [the] . . . offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”).

181. Michael King, *Realising the Potential of Judging*, 37 MONASH U. L. REV. 171, 171–72 (2011) [hereinafter King, *Realising the Potential of Judging*].

182. See *id.* at 176; Michael S. King, *New Directions in the Courts’ Response to Drug and Alcohol Related Legal Problems: Interdisciplinary Collaboration 2* (2012) (unpublished manuscript) [hereinafter King, *New Directions*], available at <http://ssrn.com/abstract=2130343>; see also Astrid Birgden & Michael L. Perlin, *Tolling for the Luckless, the Abandoned and Forsaken’: Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 231, 234 (2008); Astrid Birgden & Michael L. Perlin, *“Where the Home in the Valley Meets the Damp Dirty Prison”: A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings*, 14 AGGRESSION & VIOLENT BEHAV. 256, 257 (2009); Perlin, *“Baby, Look Inside Your Mirror,”* *supra* note 32, at 606; Perlin, *“Striking for the Guardians and Protectors of the Mind,”* *supra* note 29, at 1184; PERLIN, *UNDERSTANDING THE INTERSECTION*, *supra* note 29, at 200–02.

183. *Falter I*, 502 F. Supp. 1178, 1185 (D.N.J. 1980).

184. King, *New Directions*, *supra* note 182, at 17–18.

185. Wexler & King, *supra* note 144 (manuscript at 12–15). Judge King prefers “solution-focused courts” to “problem-solving courts” as the proper descriptor. *Id.* at 12; see also King, *New Directions*, *supra* note 182, at 17.



- ✓ Promoting participant choice wherever possible.
- ✓ Asking participants to formulate rehabilitation plans setting out their goals for their time in the program and beyond and the strategies they intend to pursue in order to achieve these goals.
- ✓ Including participants' rehabilitation plans as part of behavioral contracts.
- ✓ Having positive (but realistic) expectations concerning participant achievement.
- ✓ Promoting self-efficacy. Self-efficacy refers to a person's belief in his or her ability to function competently.
- ✓ As far as possible avoiding a coercive and/or paternalistic approach to addressing problems with participants' performance while engaging in the DTC program.
- ✓ The use of non-confrontational methods of engagement with participants in order to promote behavioral change—such as motivational interviewing techniques and persuasion.<sup>186</sup>

These prescriptions strike me as a perfect starting place at which veterans court judges should begin. In a recent article on the potential of judging, Judge King concludes by noting:

The interpersonal dimension of judging has received particular note through the exercise of facilitative, change-oriented and inclusive judging practices in problem-solving courts and in the use of therapeutic jurisprudence in other contexts. It has also been exemplified in the acknowledgment within the judiciary of the necessity to be more aware of and sensitive to the needs of individuals from diverse backgrounds, who come before the court in various capacities.<sup>187</sup>

This sort of *awareness* is absolutely crucial if veterans courts are, in fact, going to succeed and if they can ameliorate the transition of returning veterans into civil society.<sup>188</sup> And it is an awareness that needs to be undertaken,

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186. Wexler & King, *supra* note 144 (manuscript at 12–15).

187. King, *Realising the Potential of Judging*, *supra* note 181, at 186.

188. See Hawkins, *supra* note 59, at 570–72.

in the words of Judge Michael Daly Hawkins, a Ninth Circuit federal judge, “with an understanding heart, a firm hand, and a watchful eye.”<sup>189</sup>

In Dylan’s song *John Brown*, upon return from the war, the eponymous narrator tells his mother:

“And I couldn’t help but think, through the thunder rolling and  
stink. That I was just a puppet in a play  
And through the roar and smoke, this string is finally broke  
And a cannonball blew my eyes away.”<sup>190</sup>

The extent to which our returning servicemen and servicewomen have been *puppets in a play* is a question that will be debated for decades, at least. As Dahlia Lithwick has perceptively noted, “[v]eterans return from war having seen and survived unspeakable things, then try to adjust to civilian life with inadequate resources and support.”<sup>191</sup> The very least we can do is to acknowledge what they have faced, the impact that their experiences at war have had, and restructure the judicial system to provide at least some of the needed *resources and support*.

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189. *Id.* at 563 n.\*, 572.

190. DYLAN, *supra* note 23.

191. Lithwick, *supra* note 71.

