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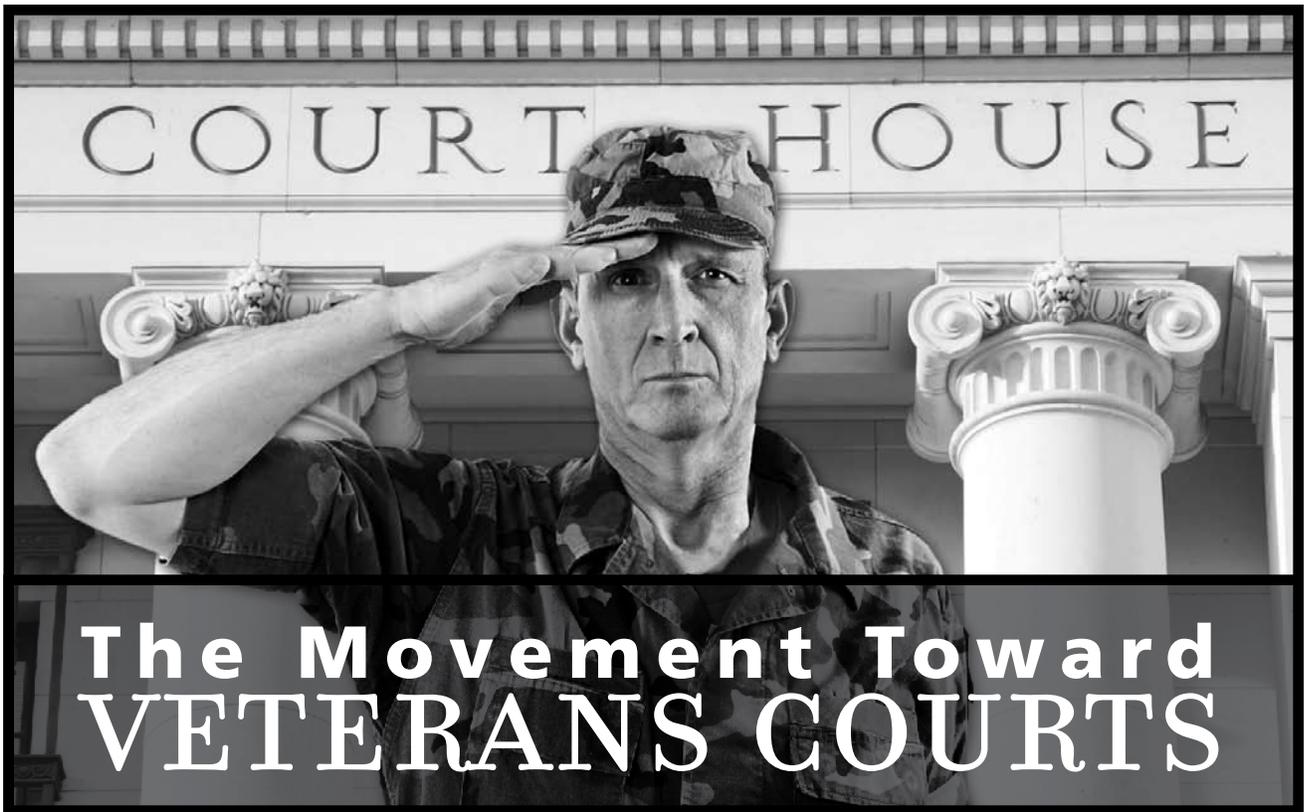
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The Movement Toward VETERANS COURTS

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Though difficult, if not impossible, to calculate precisely, the costs of the wars in Iraq and Afghanistan are staggering. In terms of dollars, the Congressional Research Service estimated that by July 2009 \$944 billion had been spent in prosecuting the two wars and on other activities related to the “war on terror.”¹ In Afghanistan the funding for additional troops requested by President Obama will push that figure above \$1 trillion, and the Congressional Budget Office projects that the financial cost of the wars may reach \$1.7 trillion by 2017.²

The High Costs of War

The cost of the wars to American lives and blood (not to mention those of Iraqis and Afghans) has been similarly large. According to the U.S. Department of Defense’s running calculator, there had been 5,325 American casualties in Iraq and Afghanistan as of January 15, 2010.³ By many estimates, approximately 15 American soldiers have been wounded for every fatality in the current conflicts, putting the number of injured servicemembers at more than 75,000.⁴ Moreover, these figures likely leave out many who have suffered the three “invisible wounds”—posttraumatic stress disorder, major depression, and traumatic brain injury—of these wars.⁵

¹Amy Belasco, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Activities Since 9/11*, at 2 (2009), <http://bit.ly/aUkc1g>.

²National Priorities Project, *Cost of War* (n.d.), www.nationalpriorities.org/costofwar_home; *Estimated Costs of U.S. Operations in Iraq and Afghanistan and of Other Activities Related to the War on Terrorism: Hearing Before the H. Comm. on the Budget, 110th Cong. (2007)* (statement of Peter R. Orszag, Director, Congressional Budget Office), <http://bit.ly/cOFH00>.

³Operation Iraqi Freedom (OIF) U.S. Casualty Status (n.d.), www.defense.gov/NEWS/casualty.pdf.

⁴Associated Press, *True Cost of War—Staggering Number of Wounded Vets*, EDITOR AND PUBLISHER, March 8, 2008, <http://bit.ly/bb6kDj>.

⁵See generally RAND CENTER FOR MILITARY HEALTH POLICY RESEARCH, *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* (Terri Tanielan & Lisa H. Jaycox eds., 2008), <http://bit.ly/cKyCgq>.

A number of unique features of the current conflicts have made these invisible wounds more prevalent among servicemembers returning from Iraq and Afghanistan. First, individual servicemembers have been subjected to more frequent and longer deployments to the front than in previous conflicts.⁶ 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.⁷ 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.⁸ 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.⁹

These features have combined to cause returning servicemembers to exhibit the invisible wounds at high rates. A recent study by the Rand Corporation projected that nearly one in three servicemembers returning from Iraq and Afghanistan would suffer from at least one of the three invisible wounds.¹⁰ Given that nearly two million servicemembers have been deployed, more than a half million servicemembers will return suffering from one of the invisible wounds.¹¹ This number is particularly problematic because these invisible wounds all correlate with other adverse health consequences, family and relationship issues, and problems in employment.¹² These maladies also cor-

relate with increased involvement in the criminal justice system.¹³

The case of Marty Gonzalez is instructive.¹⁴ Gonzalez joined the Marines at 19. He guarded nuclear weapons sites before being deployed to Iraq. He “ultimately earned a Navy/Marine Corps Achievement Medal, three Purple Hearts, and two Bronze Stars.”¹⁵ He was on the ground during the worst combat in Fallujah, Iraq, in late 2004. He suffered a concussion and other brain injuries as a result of a grenade explosion when he went into a building to retrieve the body of a fallen comrade. (He successfully retrieved the body.) The next day he was shot in the arm, an injury which ultimately required nine or ten surgeries to heal.

In a familiar refrain, Gonzalez’s family members commented that “he was not the same person” when he returned from Iraq as he was before he left. He was angry, distracted, and withdrawn. His marriage fell apart, and he had difficulty maintaining employment. Although Gonzalez was suffering from posttraumatic stress disorder, he eluded the military’s screening measures for the disease and was not diagnosed or treated. He abused painkillers as a form of self-medication and was eventually arrested for and charged with driving under the influence of painkillers and endangering the life of a child, as his 2-year-old son was in the car at the time. Gonzalez faced a felony conviction requiring two to ten years in prison.

The Texas criminal justice system, as in most other states, was ill-equipped to handle Gonzalez’s situation. Incarcer-

⁶*Id.* at 5.

⁷*Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1062 (N.D. Cal. 2008).

⁸RAND CENTER FOR MILITARY HEALTH POLICY RESEARCH, *supra* note 5, at 6.

⁹*Id.* at 25.

¹⁰*Id.* at 96.

¹¹The figure was 1.9 million as of September 2009 (see Sydney J. Freedberg Jr., *The Army’s Growing Pains: Troop Strength Is Rising, But Can the Army Grow Faster than Iraq and Afghanistan Are Wearing It Out?*, NATIONAL JOURNAL, Sept. 19, 2009, at 1).

¹²RAND CENTER FOR MILITARY HEALTH POLICY RESEARCH, *supra* note 5, at 125–28, 137–40, 148.

¹³See, e.g., Claudia Baker & Cessie Alfonso, PTSD and Criminal Behavior: A National Center for PTSD Fact Sheet (n.d.), <http://bit.ly/a20spp>.

¹⁴Mimi Swartz, *Home Front Lines: Will Iraq and Afghanistan Be the Wars that Teach Us How to Take Better Care of Our Returning Warriors?*, TEXAS MONTHLY, January 2010, <http://bit.ly/cKr0a9>.

¹⁵*Id.*

ating Gonzalez for conduct related to ailments caused by his military service would fail to recognize the sacrifices he made in service to his country, and incarceration without treatment for his underlying illness would leave him at high risk of recidivism upon his release from prison. Gonzalez was fortunate to draw a sympathetic trial judge, a veteran himself, who took the time to look into Gonzalez's situation and had Gonzalez enter a treatment program rather than face a felony conviction and incarceration.

The First Veterans Courts

Around the country numerous courts that have seen large numbers of veterans and returning servicemembers with situations similar to Gonzalez's have sought systemic solutions that would allow the court a greater range of tools to help struggling veterans than the traditional criminal justice alternatives of conviction and incarceration. One result has been a number of veterans courts springing up. The first small-scale effort at starting a veterans court took place in Anchorage, Alaska, in 2004, but most commentators locate the beginning of the current movement toward specialty courts for veterans in Buffalo, New York.¹⁶

In January 2008 Erie County Court Judge Robert Russell presided over the first session of the Buffalo Veterans Treatment Court.¹⁷ Veterans charged with misdemeanor or felony nonviolent crimes are screened for participation in

a voluntary program designed to substitute a "treatment problem solving model for traditional court processing."¹⁸ If the veteran is diagnosed with a substance abuse or mental health issue or both and agrees to participate in the program, a team of court staff, veterans health care professionals, and a volunteer mentor is set up to guide the veteran through the twelve-to-sixteen-month recovery program.¹⁹ The veteran may receive, along with mental and physical health support, emergency financial assistance, employment and skills training assistance, temporary housing, and advocacy services.²⁰ Veterans who complete the program may have the charges against them dismissed or at least may avoid jail time for their offenses.

Though too soon to have comprehensive data on the success or failure of these efforts, the initial results seem promising. Judge Russell stated that, of more than 100 veterans who participated in the Buffalo program, only 2 were returned to the traditional criminal court system.²¹ Jack Smith, a judge with the Anchorage Veterans Court, stated that, of the 34 veterans who went through the court during its first two years, only 2 were rearrested.²² As a result of these perceived successes, by November 2009 twenty-two jurisdictions had opened specialty veterans courts, notably in California's Orange and Santa Clara counties, Chicago, Pittsburgh, and Tulsa.²³ Thirty-nine are planned to open in 2010.²⁴

¹⁶Amanda Ruggeri, *New Courts Give Troubled Veterans a Second Chance: The System Can Better Take Account of a Veteran's Physical and Emotional Condition*, U.S. NEWS & WORLD REPORT, April 3, 2009, <http://bit.ly/d4Eaum>.

¹⁷*Id.*; Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENGLAND JOURNAL ON CRIMINAL AND CIVIL CONFINEMENT 357, 364 (2009).

¹⁸Buffalo Veterans Court: Mentoring and Veterans Hospital Program Policy and Procedure Manual § 1.3 (n.d.) (in my files).

¹⁹*Id.*

²⁰*Id.*

²¹Nicholas Riccardi, *These Courts Give Wayward Veterans a Chance: The First Veterans Court Opened Last Year in Buffalo, N.Y.: Its Success Stories Have Led to More Across the Country*, LOS ANGELES TIMES, March 10, 2009, <http://bit.ly/UiRjR>.

²²Ruggeri, *supra* note 16.

²³Donna Leinwand, *Courts Work with VA, Bar to Help Vets with Legal Problems*, USA TODAY, Nov. 24, 2009, <http://bit.ly/da9ZcZ>; Riccardi, *supra* note 21.

²⁴Leinwand, *supra* note 23.

Criticisms and Responses

Despite these early indicia of success, some criticisms have been offered of the movement toward veterans courts. Some question whether veterans deserve “special treatment” from the courts.²⁵ In response, many veterans’ advocates would unhesitatingly answer “yes.” Veterans were willing to sacrifice life and limb in service to their country. At least in theory, the system of veterans benefits available through the U.S. Department of Veterans Affairs should be adequate to make veterans whole for any losses suffered during their terms of service. However, most are aware of serious shortcomings in that system.²⁶ To the extent that some veterans fall through the cracks in that safety net and end up in the criminal justice system, the latter should be willing to do what it can to connect these veterans to the help and support that should have been delivered previously.

Others might respond to the “special treatment” criticism by contending that 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. In this regard the movement toward veterans courts should be considered in the context of the broader movement toward “problem-solving” or “specialty” courts over the past two decades, when thousands of such courts opened around the country.²⁷ These courts deal specifically with domestic violence, homelessness,

and most frequently drug addiction and mental illness.²⁸ Although such courts are broad, each at some level deals with “the cycle of incarceration-release-recidivism” that occurs when violators of the law are punished but not treated for underlying mental health or addiction problems inextricably connected to their crimes.²⁹

Overall the movement toward problem-solving courts remains controversial. A broad consensus is that such courts do indeed reduce recidivism rates, yet there are many difficulties with the empirical research that has been done to date, and more research definitely needs to be done before problem-solving courts can be declared to be a success in all of the fields in which they operate.³⁰ Because problem-solving courts offer a much wider range of services than their traditional counterparts, they tend to be more expensive than traditional courts.³¹ However, the financial cost of problem-solving courts is still less than the financial costs of incarceration and recidivism.³² Critics of problem-solving courts also point out that such courts offer weakened versions of many of the core due process protections of our adversarial justice system. For example, rather than being a purely impartial arbiter, the judge in a problem-solving court is often very heavily involved in crafting and supervising the treatment plan and may become highly invested in its success or failure.³³ Similarly many problem-solving courts require defendants to waive their hallmark

²⁵Ruggeri, *supra* note 16.

²⁶See *Veterans for Common Sense*, 563 F. Supp. 2d at 1049.

²⁷John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER LAW JOURNAL 97, 98 (2007).

²⁸See, e.g., Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SOUTHERN METHODIST UNIVERSITY LAW REVIEW 1459 (2004); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK LAW REVIEW 1 (2006).

²⁹Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STANFORD LAW AND POLICY REVIEW 417, 417 (2009).

³⁰See Bozza, *supra* note 27, at 116. See also Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AMERICAN CRIMINAL LAW REVIEW 1501, 1505–6 (2003).

³¹See *Mental Health Courts and the Trend Toward a Rehabilitative Justice System*, 121 HARVARD LAW REVIEW 1168, 1172–73 (2008) (mental health courts).

³²*Id.*; Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts. Empirical Success: Will South Dakota Follow Suit?*, 52 SOUTH DAKOTA LAW REVIEW 288, 304 (2007).

³³Bozza, *supra* note 27, at 113–14; Casey, *supra* note 28, at 1500.

right to a trial by pleading guilty of the offense before being offered treatment and then facing sentencing in the event that the often ambiguous benchmarks of successful participation in treatment are not satisfied.³⁴

A detailed discussion of the pros and cons of the broader movement toward problem-solving courts goes beyond my scope here. However, for present purposes, I simply note that the proliferation of problem-solving courts demonstrates that the “special treatment” that critics accuse veterans courts of providing is not actually all that “special” any more.

Some veterans’ advocates contend that specialty courts for veterans perpetuate a stereotype that all veterans come back from the front with severe mental health problems, notwithstanding that a significant majority do not experience such problems, and an overwhelming majority manage to avoid involvement with the criminal justice system.³⁵ However, 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.

Considerations When Establishing a Veterans Court

Veterans’ advocates and court personnel thinking about pursuing a veterans court in their jurisdiction must consider three issues. The first is the categories of cases to be heard in veterans court. Many problem-solving courts restrict eligibility to those charged with misdemeanors, or at least to those charged with only nonviolent crimes, to the extent that felonies are considered, too.³⁶ This is the case with the Buffalo Veterans Treatment Court.³⁷ Perhaps the notion here is that

persons accused of more serious crimes warrant the more retributive response of the traditional criminal justice system. However, if we agree that in many cases veterans’ criminality is inextricably intertwined with invisible wounds incurred in military service, and that such circumstances call for treatment rather than punishment, excluding certain categories of crimes from eligibility for the problem-solving approach makes little sense. Indeed, some of the newer veterans courts do not restrict eligibility based upon the nature of the offense charged.³⁸

A second issue involves the manner in which cases are adjudicated. Should the court offer a postconviction process, or should the court operate as a true diversion program? In the former case, a conviction, usually by guilty plea, is required before treatment services are offered to the veteran.³⁹ In the latter case, adjudication of the criminal charge is deferred until after the treatment program is completed, with charges often dismissed upon successful completion of treatment. Advocates of the postconviction approach believe that the problem-solving court judge needs the threat of the immediate imposition of the sentence that was suspended following the conviction in order to coerce the defendant into participating enthusiastically in the treatment program. However, under the postconviction process, even the veteran who completes treatment is saddled with the burdens of a criminal conviction as the veteran competes in the job market and attempts to reintegrate into civilian society. In the case of a felony conviction, the impediment to certain types of employment may be disabling. If we are serious about giving struggling veterans the best opportunity to “make it” in civilian life, we should be willing to let them

³⁴Casey, *supra* note 28, at 1497–99; Meekins, *supra* note 28, at 16–17.

³⁵Ruggeri, *supra* note 16.

³⁶*Id.*; Casey, *supra* note 28, at 1481 (drug courts); Riccardi, *supra* note 21.

³⁷Russell, *supra* note 17, at 368.

³⁸Lynne Marek, *Courts for Veterans Spreading Across U.S.*, NATIONAL LAW JOURNAL, Dec. 22, 2008, <http://bit.ly/cIM2ID> (Orange County Veterans Court).

³⁹Casey, *supra* note 28, at 1481 (drug courts).

start with the clean slate of a true diversion program.

And, third, an issue arises as to what—along with the specific treatment for the mental health problem or substance abuse problem or both that drove the veteran’s criminal behavior—ancillary services to provide for the veteran. Clearly the specific treatment is much less likely to work without ancillary services to aid the veteran’s reintegration into civilian society. The Buffalo Veterans Treatment Court provides participants with services from a network of agencies outside the court’s personnel—the Veterans Administration Health Care Network, the Veterans Benefits Administration, job training and placement services, and a network of volunteer veterans’ mentors, among others.⁴⁰ Of all of the components of the multidisciplinary team, the volunteer veteran mentors seem particularly key to the struggling veteran’s completion of the program.⁴¹ Having assistance from one who has had similar experiences and encountered many of the same challenges as the struggling veteran has proven to be invaluable to the participating veteran’s success. An engaged judge who understands the veteran’s particular circum-

stances has also been cited as a critical element of the program’s success.

■ ■ ■

The unique nature of the current conflicts in Iraq and Afghanistan has resulted in unprecedented numbers of servicemembers suffering from the invisible injuries of posttraumatic stress disorder, major depression, and traumatic brain injury. Despite our best efforts to provide the necessary support and assistance for these struggling veterans, many fall through the cracks and are ending up involved in the criminal justice system. Newly created veterans courts offer an opportunity to hold struggling veterans accountable for their alleged offenses and at the same time provide the treatment for the invisible injuries that are often a major factor in the alleged criminality. Veterans courts thus break the cycle of conviction-incarceration-recidivism that occurs so often when the underlying causes of criminal behavior are ignored. The problem-solving approach and combination of treatment and supportive services available in veterans courts represent the least we can do for the struggling veterans who have sacrificed so much in service to our country.

⁴⁰Russell, *supra* note 17, at 368–69.

⁴¹*Id.* at 369–70.



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