

MILITARY SERVICE-RELATED PTSD AND THE CRIMINAL JUSTICE SYSTEM: TREATMENT AS AN ALTERNATIVE TO INCARCERATION

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I. INTRODUCTION

Jessie Bratcher, a veteran of Operation Iraqi Freedom, never fully returned from Iraq when he came home. On one occasion, his sister recalled seeing him gardening in his backyard with his AK-47 slung over his shoulder.¹ Bratcher's apparent psychiatric disorder led to an altercation with a man he believed had attacked his girlfriend.² The altercation culminated in Bratcher fatally shooting his victim six times while allegedly experiencing a flashback of watching a comrade die in Iraq.³ Bratcher argued that he "would have never shot anybody if it hadn't been from PTSD [Post-Traumatic Stress Disorder]."⁴ In 2009, an Oregon jury found Bratcher to be guilty of murder but legally insane.⁵ Thus, instead of serving a twenty-five year prison sentence, he is being treated for insanity at the Oregon State Hospital.⁶

Bratcher's story, a veteran who committed a crime and pleaded the insanity defense based on service-related PTSD, is a frequent news

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1. Chris Lawrence & Jennifer Rizzo, *Under Fire: Wartime Stress as a Defense for Murder*, CNN (May 11, 2012, 11:28 AM), <http://www.cnn.com/2012/05/05/justice/ptsd-murder-defense/index.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

headline as veterans return from deployments in Iraq and Afghanistan.⁷ The use of the insanity defense, however, has been sensationalized and exaggerated.⁸ Although PTSD diagnoses have been used to mitigate sentences of lesser crimes, Bratcher's case is the "first major criminal exoneration linked to PTSD since the Vietnam war."⁹

PTSD first entered the public sphere in the legacy of the Vietnam War.¹⁰ According to the United States Department of Veterans Affairs' National Center for PTSD, about 30% of Vietnam War veterans suffer from PTSD.¹¹ The center estimates that the diagnosis is shared by 11% to 20% of veterans of Operation Iraqi Freedom ("the Iraq War") and Operation Enduring Freedom ("the Afghanistan War").¹² The disorder became "legitimized" with the formal inclusion of PTSD in the third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") in 1980.¹³ Since its inclusion, a new class of veteran-defendants has emerged in criminal trials.

PTSD has been "put on trial" as a diagnosis in numerous cases including, but not limited to, as a means to acquit a defendant based on

7. See Kim Murphy, *Did the War Make Him Do It?*, L.A. TIMES (Nov. 28, 2009), <http://articles.latimes.com/2009/nov/28/nation/la-na-soldier28-2009nov28> (discussing Jessie Bratcher's case); Lawrence & Rizzo, *supra* note 1 (discussing Jessie Bratcher's case as well as several other cases of veterans claiming PTSD-based defenses for crimes committed upon their return from deployment); Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Is Taking the Stand*, N.Y. TIMES (Jan. 27, 2008), http://www.nytimes.com/2008/01/27/us/27vets.html?pagewanted=all&_r=0 (discussing other cases of veterans claiming PTSD-based defenses for crimes committed post-deployment, although not specifically that of Jessie Bratcher).

8. See CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISNER, *LAW AND THE MENTAL HEALTH SYSTEM, CIVIL AND CRIMINAL ASPECTS* 555–56 (5th ed. 2009) (noting that the public's view of the insanity defense as being used and abused often is grossly over exaggerated). The "average" resident of Wyoming believed the insanity defense was raised in 43% of criminal cases between 1970 and 1972 and was successful 38% of the time. *Id.* In reality, less than 0.5% of criminal defendants had raised the plea, and only one person from the 102 arrested was acquitted. *Id.*

9. Lawrence & Rizzo, *supra* note 1.

10. E.g., Sontag & Alvarez, *supra* note 7 ("It was in 1980, five years after the Vietnam War ended, that the psychiatric establishment first recognized post-traumatic stress disorder."); Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 99 (2010) ("The Vietnam War was arguably the first time that the United States military fully acknowledged the existence and impact of PTSD.").

11. *How Common is PTSD?*, NAT'L CTR. FOR PTSD, U.S. DEP'T VETERANS AFFAIRS (July 7, 2007), <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp>.

12. *Id.*

13. See Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 28–29 (2011).

insanity, mitigate charges, and prove that a mentally ill veteran should receive treatment as an alternative to incarceration.¹⁴ Since its initial acknowledgement in the DSM-III, the recognition of PTSD is often met with controversy. Skeptics have typically characterized PTSD as a social construct and not a true disorder,¹⁵ and critics who distrust PTSD as a legal defense highlight its potential for abuse.¹⁶ This Note responds to such skepticism by arguing that veterans who suffer from service-related PTSD are a unique class of defendants who deserve extra attention and access to treatment for mental illness. Traditional defenses based on a PTSD diagnosis are insufficient to reach this goal of treatment. Currently, alternative sentencing such as Veterans Treatment Courts (“VTCs”) and state legislation focused on service-related mental illness have been successful in expanding treatment options. However, an expansion of the eligibility requirement is still needed.

This Note develops this argument by first introducing the history, modern understanding, and treatment of PTSD in Part II. Part II also looks at why veterans with service-related PTSD are different from civilians with community trauma-based PTSD and therefore deserve special treatment. Part III then examines how PTSD has been traditionally utilized in the criminal justice system as a factor in (1) the insanity defense, (2) the diminished capacity defense, and (3) in mitigating sentencing, and comes to the conclusion that criminal defenses are limited in their applicability to the veteran-defendant. Part IV discusses inclusion of PTSD in the modern therapeutic justice model by looking at alternative sentencing, including VTCs and state sentencing statutes that mandate consideration of a defendant’s military and mental health status. Part V looks at the shortcomings of these criminal defenses and alternative sentencing and proposes the solution of extending eligibility requirements to make alternative sentencing a viable option for veteran-defendants.

14. See *infra* Parts III–IV.

15. See Smith *supra* note 13, at 60–65.

16. See Erin Gover, *Iraq as a Psychological Quagmire: The Implication of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 563, 581–84 (2008).

II. THE EMERGENCE OF PTSD

PTSD, virtually unrecognized before the Vietnam War, became emblematic of the damages of war.¹⁷ The conditions of the Vietnam War had an unprecedented psychological impact on soldiers, who found themselves in the midst of guerrilla warfare and were faced with omnipresent danger and combat.¹⁸ Unlike in previous wars, nowhere and no one was considered “safe.” Soldiers assumed a hyper-vigilant or “survivor mode” mindset to anticipate threats.¹⁹ Having sustained prolonged exposure to trauma while in this state of survivor mode, many soldiers continue to suffer from psychological problems upon returning from combat.²⁰ As will be addressed later in this Note, the typologies common of PTSD—such as dissociative reactions, sensation-seeking, and depression-suicide—may be experienced in criminal behaviors.²¹ A veteran suffering from PTSD may engage in criminal behavior in an attempt to escape the numbness of civilian life, or overreact to a perceived threat in a benign situation.²² The National Vietnam Veterans’ Readjustment Survey, conducted a decade after the end of the war, estimated that 480,000—or over 15%—of Vietnam veterans who participated in the survey have PTSD.²³ Of those diagnosed, about half have been arrested or jailed at least once, 34% more than once, and 11.5% have been convicted of a felony.²⁴ The experience of these Vietnam veterans spurred a national awareness of PTSD.²⁵

A. PTSD HISTORY

Although PTSD is a relatively new diagnosis, symptoms of PTSD have been recognized for centuries. The term “railway spine” was used in the 19th century to describe the physical and psychological trauma experienced by those subjected to violent railway accidents.²⁶ In the First

17. Hafemeister & Stockey, *supra* note 10, at 99.

18. *Id.*

19. *Id.* at 100–01.

20. *Id.* at 105.

21. *See infra* Part II.B.

22. *Id.*

23. Lawrence & Rizzo, *supra* note 1.

24. *Id.*

25. *See* Smith, *supra* note 13, at 24–25 (discussing the introduction of PTSD in the nationally regarded DSM in 1980); *infra* Part II.A.

26. *See* Smith, *supra* note 13, at 5–6.

World War, the British military used the term “shell shock” to describe war neuroses.²⁷ Until the Second World War, susceptibility to shell shock was attributed in large part to personal disposition.²⁸ The British and United States’ militaries, however, failed to prevent war neurosis by screening out those with preexisting psychiatric disorders.²⁹ This marked a shift in the understanding of these symptoms from “every man has his breaking point” to the recognition of a true psychological disorder.³⁰ Still, in the Second World War, psychiatric injuries were classified as “combat fatigue” and generally treated with no more than a brief rest before returning to the frontlines.³¹ Studies of the psychological injuries reflected in railway spine, shell shock, or combat fatigue did not gain momentum again until the end of the Vietnam War.³²

The evolution of PTSD to a recognized disorder is illustrated by its inclusion in the American Psychiatric Association’s DSM. The first DSM (“DSM-I”) was published in 1952 with the purpose of creating a uniform system of diagnoses to be used by clinicians.³³ DSM-I included a diagnosis of “gross stress reaction” as a short-term personality disorder.³⁴ The second version of the DSM (“DSM-II”) was published in 1968, at the peak of the Vietnam War.³⁵ DMS-II eliminated “gross stress reaction” as a diagnosis, but instead categorized the symptoms as “transient situational disturbances.”³⁶ This diagnosis included a subcategory of “adjustment reaction of adult life,” which encompassed “fear associated with military combat and manifested by trembling, running and hiding.”³⁷ During the Vietnam War, returning soldiers were faced with a dilemma as their symptoms—described as shell shock or war neurosis—did not fit a distinct diagnostic category and thus, they were denied benefits from the Veterans Administration (“VA”).³⁸ The similarity of symptoms to “character

27. *Id.* at 10–11.

28. *Id.* at 14.

29. *See id.*

30. *Id.*

31. *Id.* at 14–15.

32. *Id.* at 15.

33. *Id.* at 22.

34. *See id.*; Mary Tramontin, *Exit Wounds: Current Issues Pertaining to Combat-Related PTSD of Relevance to the Legal System*, 29 DEV. MENTAL HEALTH L. 23, 24 (2010).

35. Smith, *supra* note 13, at 23.

36. *Id.*; Tramontin, *supra* note 34, at 24.

37. Smith, *supra* note 13, at 23.

38. *Id.* at 23–24.

disorders” made it difficult for veterans to prove that they suffered from service-connected conditions that would qualify for VA benefits.³⁹ Recognizing this disconnect between the symptoms plaguing Vietnam veterans and their eligibility for VA benefits, veterans and their advocates lobbied for the inclusion of a “post-Vietnam” syndrome in the DSM.⁴⁰ Their efforts are reflected in the third DSM (“DSM-III”), published in 1980.⁴¹ DSM-III lists PTSD as an “anxiety disorder,” the “essential feature” of which is “the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience.”⁴²

B. A MODERN UNDERSTANDING OF PTSD

A more recent version of the DSM (“DSM-IV-TR”), published in 1994, includes the following as the diagnostic criteria for PTSD:

The diagnostic criteria requires a traumatic stressor (Criterion A) in which an individual both (1) “experiences, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of others; and (2) responds with “intense fear, helplessness, or horror.” The traumatic stressor must induce symptoms that are classified in three clusters: persistent reexperience of the event (Criterion B); persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C); and persistent symptoms of increased arousal (Criterion D). The duration of symptoms must be more than one month (Criterion E). The disturbance causes clinically significant distress or impairment in social, occupations, or other areas of functioning (Criterion F).⁴³

A total of seventeen symptoms are included in the three clusters of diagnostic criteria.⁴⁴ Not everyone diagnosed with PTSD will have all seventeen symptoms, but the diagnosis requires that the individual experience symptoms from each of the three clusters.⁴⁵

39. *Id.* at 24.

40. *Id.* at 24–25.

41. *Id.*

42. *Id.* at 26–28.

43. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467–68 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

44. *Id.*

45. *Id.*

The effects of PTSD may be observed as a change in the chemical processes of brain function. When faced with the traumatic stressor (Criterion A), the body undergoes a physiological stress response.⁴⁶ The stress response begins in the reticular activating system and then moves to the hypothalamus, which signals to the pituitary gland to secrete adrenocorticotrophic hormone.⁴⁷ This hormone generates adrenaline, resulting in rapid heartbeat, desensitization, and hyper-alertness.⁴⁸ This stress response is experienced as a natural reaction to a stressful or traumatic situation; however, in individuals with PTSD, this cycle may be repeated with every reminder of the original stressor.⁴⁹ In order to avoid this physiological stress, individuals with PTSD often avoid all situations that could potentially trigger the stress response.⁵⁰

The symptoms of PTSD can be categorized into three typologies: dissociative reactions, sensation-seeking syndrome, and depression-suicidal syndrome.⁵¹ Not all individuals with PTSD experience all three typologies.⁵² Dissociative reactions, despite being the most sensationalized, are actually rare.⁵³ A dissociative reaction includes altered states of consciousness or flashbacks, in which a veteran may regress into “survival mode” and commit an act “automatically” while reliving a past traumatic event.⁵⁴ Individuals who experience dissociative reactions act in an altered state of consciousness and those who commit crimes in this state are usually unaware of the wrongfulness of their actions.⁵⁵

Manifestations of the second typology, the sensation-seeking syndrome, include seeking out dangerous activities to recreate the

46. Hafemeister & Stockey, *supra* note 10, at 96.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Daniel Burgess, Nicole Stockey & Kara Coen, *Reviving the “Vietnam Defense”: Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 65–68 (2010).

52. PTSD symptoms are experienced on an individualized basis. As stated in the DSM-IV-TR diagnostic criteria, a total of seventeen symptoms are included in the three clusters of diagnostic criteria. Not everyone diagnosed with PTSD will have all seventeen symptoms, but the diagnosis requires that the individual experience symptoms from each cluster. DSM-IV-TR, *supra* note 43. The PTSD symptoms an individual presents depend on the traumatic event the individual experienced and the individual’s reaction to it. Burgess, Stockey & Coen, *supra* note 51, at 65.

53. Tramontin, *supra* note 34, at 38.

54. Burgess, Stockey & Coen, *supra* note 51, at 65–66; Tramontin, *supra* note 34, at 38–39.

55. Burgess, Stockey & Coen, *supra* note 51, at 65–66.

excitement of combat.⁵⁶ This may be interpreted as an attempt to feel alive again in civilian life or an attempt to relive and control the unconscious trauma experienced in combat.⁵⁷ Veterans experiencing PTSD symptoms in the sensation-seeking form may seek out legal activities, such as skydiving, or illegal activities, such as dealing drugs or robbing banks.⁵⁸

The third typology, the depression-suicide syndrome, includes intense feelings of guilt, hopelessness, betrayal, and deep depression.⁵⁹ Combat veterans often feel guilt from having survived or that they were unable to protect their comrades from harm.⁶⁰ They may feel hopeless or betrayed by the sudden lack of support from the government after they return from civilian life or by the public when returning from a controversial war.⁶¹ These individuals may commit suicide, subconsciously act out their anger through criminal acts, or commit criminal acts with the goal of “passive” suicide or “suicide by cop.”⁶² Army suicides have more than doubled since 2001,⁶³ and now outnumber combat deaths.⁶⁴ The three major typologies of PTSD have obvious connections to criminal behavior and thus, lead to a class of unique veteran-defendants in the criminal justice system.

C. CAN PTSD BE TREATED?

The fact that PTSD symptoms can be treated is essential to the argument that veteran-defendants suffering from PTSD should have the option of treatment as an alternative to incarceration. The United States Department of Veterans Affairs’ National Center for PTSD advocates that the most effective treatments are cognitive behavioral therapy (“CBT”), including cognitive processing therapy (“CPT”) and prolonged exposure

56. *Id.* at 66–67; Tramontin, *supra* note 34, at 39.

57. Burgess, Stockey & Coen, *supra* note 51, at 66–67.

58. *Id.* at 67.

59. *Id.* at 68.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *U.S. Military Suicides Exceed Combat Deaths*, CBS NEWS (Jan. 14, 2013, 2:12 PM), http://www.cbsnews.com/8301-201_162-57563857 (noting that in 2012, there were 349 suicides among active-duty troops, whereas 295 Americans died in Afghanistan). *See also* Tina Rosenberg, *For Veterans, a Surge of New Treatments for Trauma*, N.Y. TIMES OPINIONATOR (Sept. 26, 2012, 7:00 AM), <http://opinionator.blogs.nytimes.com/2012/09/26/for-veterans-a-surge-of-new-treatments-for-trauma> (noting that in July 2012, there were thirty-eight suicides among active duty and reserve soldiers, “the worst month since the Army began counting”).

(“PE”) therapy, eye movement desensitization and reprocessing (“EMDR”), and selective serotonin reuptake inhibitors (“SSRI”) as medication.⁶⁵ CPT, generally thought to be the most effective treatment, consists of working with a therapist to understand and make sense of the trauma.⁶⁶ The goal of CPT is to replace the negative thoughts with more accurate and less distressing thoughts.⁶⁷ PE involves discussing the trauma repeatedly with a therapist; this treatment operates under the premise that the subject will be able to control his thoughts and reactions to the trauma and be able to function without distress in situations that he may otherwise wish to avoid.⁶⁸ In EMDR, the subject focuses on hand movements, tapping, and sets of eye movements in order to help him relax and change reactions to memories of trauma.⁶⁹ These psychotherapy techniques work to help the subject understand, accept, and confront their memories of the trauma or situations that may trigger memories of the trauma.⁷⁰ SSRIs are a type of antidepressant medication that is effective in treating PTSD.⁷¹ Unlike medication, which has the potential to be used indefinitely, psychotherapy treatments (CBT and EMDR) are often needed for only three to six months.⁷²

The successes of treatment options are well established.⁷³ About 40% of veterans with PTSD are cured with behavioral cognitive therapy alone.⁷⁴ This number is lower than the treatment success rate of civilians with PTSD.⁷⁵ Factors that may explain the lower success rate include resistance

65. *Treatment of PTSD*, NAT’L CTR. FOR PTSD, U.S. DEP’T VETERANS AFFAIRS (Jan. 1, 2007), <http://www.ptsd.va.gov/public/pages/treatment-ptsd.asp>; *Understanding PTSD Treatment*, NAT’L CTR. FOR PTSD, U.S. DEP’T VETERANS AFFAIRS (2011), <http://www.ptsd.va.gov/public/pages/treatment-ptsd.asp>.

66. *Treatment of PTSD*, *supra* note 65; *Understanding PTSD Treatment*, *supra* note 65.

67. *Treatment of PTSD*, *supra* note 65; *Understanding PTSD Treatment*, *supra* note 65.

68. *Treatment of PTSD*, *supra* note 65; *Understanding PTSD Treatment*, *supra* note 65.

69. *Treatment of PTSD*, *supra* note 65; *Understanding PTSD Treatment*, *supra* note 65.

70. *See Treatment of PTSD*, *supra* note 65; *Understanding PTSD Treatment*, *supra* note 65.

71. *Treatment of PTSD*, *supra* note 65; *Understanding PTSD Treatment*, *supra* note 65.

72. *Treatment of PTSD*, *supra* note 65; *Understanding PTSD Treatment*, *supra* note 65. *See also* Hamblen, Schnurr, Rosenberg & Eftekhari, *Overview of Psychotherapy for PTSD*, NAT’L CTR. FOR PTSD, U.S. DEP’T VETERANS AFFAIRS (July 27, 2010), <http://www.ptsd.va.gov/professional/pages/overview-treatment-research.asp>.

73. Rosenberg, *supra* note 64. *See, e.g.*, Susan Solomon, Ellen Gerrity & Alyson Muff, *Efficacy of Treatments for Posttraumatic Stress Disorder: An Empirical Review*, 268 J. AM. MED. ASS’N 633, 633–38 (1992) (showing systematic desensitization of PTSD symptoms through cognitive behavioral therapy as an effective treatment for PTSD).

74. Rosenberg, *supra* note 64.

75. *Id.*

to seek help due to the stigma attached to mental health in the military and a military mental health system that lacks the resources to meet the demand of active members and veterans.⁷⁶ Treatment is a viable alternative to incarceration for veterans suffering from PTSD who are convicted of crimes.

D. DO VETERANS DESERVE SPECIAL TREATMENT?

Why should veterans' PTSD diagnoses be taken into account for culpability and sentencing? Discussion of the impact of service-related PTSD on criminal responsibility assumes that veterans are "different" and thus deserving of special consideration. This Note does not argue that a civilian-defendant's PTSD diagnosis should be disregarded in deciding criminal responsibility, but it argues that veterans are a special class that needs extra protection.

The National Center for PTSD, operated by the United States Department of Veterans Affairs, distinguishes between "community violence" trauma and "military trauma."⁷⁷ Community violence refers to a wide range of trauma including "riots, sniper attacks, gang wars, drive-by shootings, workplace assaults, terrorist attacks, torture, bombings, war, ethnic cleansing, and widespread sexual, physical, and emotional abuse."⁷⁸ The term is used to describe trauma experienced anywhere from domestic dangerous neighborhoods to foreign refugee camps.⁷⁹ Distinct from other types of trauma, community violence usually occurs without warning and comes as a sudden shock.⁸⁰ Community violence is an intentional act against others and, as such, survivors of community violence often feel an extreme sense of distrust and betrayal.⁸¹ Exposure to community violence is a cause of PTSD in civilian children, adolescents and adults.⁸² In fact, 7% to 8% of Americans will have PTSD at some point, and about 5.2

76. *Id.*

77. *Types of Trauma: Violence and Other Trauma*, NAT'L CTR. FOR PTSD, U.S. DEP'T. VETERANS AFFAIRS, <http://www.ptsd.va.gov/professional/pages/felist-other-trauma-types.asp> (last updated Dec. 21, 2012).

78. Jessica Hamblen & Carole Goguen, *Community Violence*, NAT'L CTR. FOR PTSD, U.S. DEP'T. VETERANS AFFAIRS (July 5, 2007), <http://www.ptsd.va.gov/professional/pages/community-violence.asp>.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

million adults have PTSD every year.⁸³ However, the particularities of combat make veterans especially vulnerable.

PTSD is an epidemic among combat veterans. The National Center for PTSD estimates that PTSD occurs in about 30% of Vietnam veterans, and in about 11% to 20% of Iraq and Afghanistan War veterans.⁸⁴ Of the Iraq and Afghanistan War veterans who had enrolled in veterans' healthcare systems between 2002 and 2008, 37% were diagnosed with mental health issues, 22% of which were for PTSD.⁸⁵ The unique causation element of the PTSD diagnosis makes it a service-connected illness.⁸⁶ The diagnosis requires a causation element ("Criterion A") that the person has been exposed to a traumatic event in which the person experienced, witnessed, or was confronted with events that threatened death, serious injury or the bodily integrity of that person or others, and that person responded with intense fear, helplessness or fear.⁸⁷ Modern warfare has taken a particularly traumatic form. The aspects of the Vietnam War that left soldiers especially vulnerable to trauma included guerilla warfare, omnipresent danger, a lack of defined war zones, and public animosity towards the war.⁸⁸ Advanced warfare technology and long and repeated deployments have intensified the trauma experienced by Iraq and Afghanistan War veterans.⁸⁹

Military training conditions soldiers to behave aggressively and violently; these traits, while necessary for survival in a warzone, can lead to criminal behavior at home.⁹⁰ Modern military training involves the breakdown of soldiers' psychological resistance to killing, desensitizing them to the act of killing, and conditioning them to reflexively take another's life when a certain set of circumstances exist.⁹¹ The goal is the automatic, unquestioned and, if necessary, lethal accomplishment of an objective.⁹² When a Vietnam veteran was asked whether he was aware of the wrongfulness of his actions when he murdered his brother-in-law while

83. *How Common is PTSD?*, *supra* note 11.

84. *Id.*

85. James Dao, *Vets' Mental Health Diagnoses Rising*, NY TIMES (July 17, 2009), http://www.nytimes.com/2009/07/17/health/views/17vets.html?_r=0.

86. *See* DSM-IV-TR, *supra* note 43.

87. *Id.*

88. *See* Hafemeister & Stockey, *supra* note 10, at 102, 105–06.

89. *Id.*

90. *See id.* at 103–05.

91. *Id.* at 104–05.

92. *See id.*

in a PTSD dissociative state, he responded: “Are you kidding? They gave us ice cream for that.”⁹³ This ingrained military training, coupled with the mental illness many soldiers develop in service, creates a class of defendants that deserve extra attention in the criminal justice system.

The United States military transformed these men and women into soldiers and placed them in especially traumatic situations. Consequently, the United States justice system must take responsibility and create paths to treatment for soldiers whose service-related PTSD lead them to commit crimes.

III. SUMMARY OF THE LAW: PTSD AND THE CRIMINAL JUSTICE SYSTEM

Unfortunately, many veterans who commit crimes as a result of their mental illness are not formally diagnosed with PTSD until they are in the criminal justice system.⁹⁴ There is a general resistance to seeking help due to the stigma attached to mental illness in military culture that, coupled with the insufficient resources of the VA mental health system, often delays treatment of a veteran until after a crime has been committed.⁹⁵ In a criminal trial, evidence of a veteran’s PTSD is likely to be considered in either the insanity defense, a diminished capacity defense, or as a mitigating factor in judicial sentencing after being found guilty.⁹⁶

93. SLOBOGIN, RAI & RESINER, *supra* note 8, at 560 (discussing an excerpt from the defense’s argument in *State v. Heads*, 370 So. 2d 564 (La. 1979)). See also discussion *infra* Part III.A.1.c.

94. See Kate Hoyt, *A Second Chance: Veterans Treatment Courts*, VANTAGE POINT (Mar. 30, 2011), <http://www.blogs.va.gov/VAntage/2018/a-second-chance-veterans-treatment-courts> (discussing obstacles to identifying veterans suffering from PTSD and qualifying for VA services in the Veterans Treatment Court context and stating that for some veterans, their first encounter with the VA services is through law enforcement); Jim McGuire & Sean Clark, *PTSD and the Law: An Update*, 22 PTSD RESEARCH QUARTERLY 1, 2–3 (2011), available at <http://www.ptsd.va.gov/professional/newsletters/research-quarterly/V22N1.pdf> (describing the Sequential Intercept Model, the standard framework for considering the interface between mental health and the criminal justice systems, and the various points along the continuum where PTSD may be identified and managed in an offender, including by law enforcement, in local jails, and in prison).

95. Adam Caine, *Fallen From Grace: Why Treatment Should be Considered for Convicted Combat Veterans Suffering From Post Traumatic Stress Disorder*, 78 UMKC L. REV. 215, 220–21 (2009). See also Tramontin, *supra* note 34, at 29 (quoting a Marine: “In the Marines, you might as well just lie down and cry for your mommy if you go for mental health services”).

96. A fourth instance in which a defendant’s PTSD may be considered is the guilty but mentally ill plea (“GBMI”). In the states that recognize the GBMI plea, a defendant pleads not guilty by reason of insanity, and the jury may find the defendant guilty, not guilty, insane, or in the alternative, guilty but mentally ill at the time of the offense. In the latter case, a GBMI defendant is sentenced to the appropriate term for the offense with the opportunity for treatment in a mental hospital in that term.

Jurisdictions treat these defenses differently, if they recognize the defenses at all, which results in a range of effects on defendants suffering from service-related PTSD.⁹⁷

A. TRADITIONAL PTSD-BASED DEFENSES AND MITIGATED SENTENCING

1. The Insanity Defense

The insanity defense is an affirmative defense to culpability, which gives a defendant the opportunity to prove that he is not criminally responsible for his actions as a result of his mental illness.⁹⁸ This defense assumes that people with mental disabilities are less blameworthy and less able to obey the law, diminishing the retributive and deterrence justifications of punishment.⁹⁹ Every state that allows the affirmative defense permits the immediate commitment of defendants found not guilty by reason of insanity.¹⁰⁰

a. *The M’Naghten Insanity Test*

The M’Naghten Test provides for a narrow range of mental capacity that can sustain an insanity defense.¹⁰¹ The original M’Naghten Test, as announced by the House of Lords in 1843, and now the accepted rule in England and the United States is as follows:

To establish a defense on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.¹⁰²

The M’Naghten Test includes a “cognitive” prong, whether the defendant knew “the nature and the quality of the act.”¹⁰³ It also includes a moral

SLOBOGIN, RAI & RESINER, *supra* note 8, at 632–33. This Note does not advocate for the GBMI plea as an appropriate means of protection for the veteran-defendant because of the consequences of being found guilty. For example, in *People v. Crews*, 522 N.E.2d 1167 (Ill. 1988), the Supreme Court of Illinois held that the death penalty is applicable to GBMI offenders. *Id.* at 636.

97. *See infra* Part III.A.

98. *See* SLOBOGIN, RAI & RESINER, *supra* note 8, at 545.

99. *See id.*

100. *Id.* at 868.

101. *See id.* at 546–47.

102. *Id.*

103. *Id.*

prong, the question being whether the defendant could recognize right from wrong at the time of the offense.¹⁰⁴ The M’Naghten Test provides a defense for those defendants with PTSD who committed crimes in a dissociative state, such as in an altered state of consciousness or a flashback, and thus could not appreciate the wrongness of their actions.¹⁰⁵

b. *The American Law Institute (ALI) Insanity Test*

A majority of states have adopted the American Law Institute’s (“ALI”) version of the insanity defense, which broadens the seemingly “all or nothing” cognitive articulation of the M’Naghten Test.¹⁰⁶ The ALI Test is as follows: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.”¹⁰⁷ The ALI Test requires that a defendant lack “substantial capacity” to recognize wrongfulness, as opposed to the M’Naghten Test’s stricter requirement that a defendant must “not know” the act was wrongful. The ALI Test includes a cognitive prong as well, embodied in whether a defendant could “appreciate the criminality of his conduct.”¹⁰⁸ However, fundamental to the ALI Test is the introduction of a volitional component that asks whether a defendant was capable of “conform[ing] his conduct to the requirements of the law.”¹⁰⁹ By including both cognitive and volitional prongs, the ALI Test provides a defense to those exhibiting dissociative reactions who could not appreciate the wrongness of their actions.¹¹⁰ It also provides a recourse for those suffering from sensation-seeking and depression-suicide syndromes who may have known the criminality of their actions but, because of their underlying PTSD, were unable to conform their conduct to meet the requirements of the law.¹¹¹

104. *Id.*

105. *See id.*

106. *Id.* at 549.

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.*

111. *See id.*

c. *The “Vietnam Defense” in State v. Heads*

The paradigmatic case involving the “Vietnam Defense” is *State v. Heads*.¹¹² In 1977, Charles Heads’s search for his wife and children, who had left him four days earlier, culminated in him shooting and killing his brother-in-law.¹¹³ Suspecting that his wife and children were with his sister-in-law, Heads kicked in the door of her house.¹¹⁴ His brother-in-law was armed with a pistol.¹¹⁵ Heads fired his pistol into the hallway and then retrieved a rifle from his truck, which he began firing until he killed his brother-in-law.¹¹⁶ When the police arrived, Heads surrendered, holding his rifle and the gun he retrieved from the body of his victim.¹¹⁷ In Heads’s subsequent criminal trial, the court applied a modified M’Naghten Test: “If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility.”¹¹⁸ In the first trial, Heads’s insanity defense failed because there was no recognized mental disorder on which to base the defense and he was convicted of first-degree murder.¹¹⁹ However, Heads’s conviction was reversed on unrelated grounds and set for retrial.¹²⁰

In 1980, before Heads’s second trial, the American Psychiatric Association formally recognized PTSD in DSM-III.¹²¹ In his second trial, Heads’s defense presented evidence that he had been suffering from symptoms of PTSD when he committed the crime.¹²² Earlier in his life, Heads’s father killed his mother.¹²³ He later experienced great trauma as a Reconner Patrolman in Vietnam, including an attack on his convoy in which he was shot in the stomach.¹²⁴ Heads argued that the stress of being

112. *State v. Heads*, 370 So. 2d 564 (La. 1979), *judgment vacated by Heads v. Louisiana*, 444 U.S. 1008 (1980), *on remand to State v. Heads*, 385 So. 2d 230 (La. 1980).

113. SLOBOGIN, RAI & REISNER, *supra* note 8, at 556; *Heads*, 370 So. 2d at 565–66.

114. SLOBOGIN, RAI & REISNER, *supra* note 8, at 557; *Heads*, 370 So. 2d at 565–66.

115. SLOBOGIN, RAI & REISNER, *supra* note 8, at 557; *Heads*, 370 So. 2d at 565–66.

116. SLOBOGIN, RAI & REISNER, *supra* note 8, at 557; *Heads*, 370 So. 2d at 565–66.

117. SLOBOGIN, RAI & REISNER, *supra* note 8, at 557.

118. *Id.* at 558.

119. *Id.* at 557. *See also Heads*, 385 So. 2d at 232.

120. SLOBOGIN, RAI & REISNER, *supra* note 8, at 557; *Heads*, 444 U.S. 1008.

121. SLOBOGIN, RAI & REISNER, *supra* note 8, at 557; Hafemeister & Stockey, *supra* note 10, at 121.

122. *Id.* at 556–61.

123. *Id.*

124. *Id.*

rejected by his family triggered him to revert into an “automatic” mode of completing a Reconner mission; essentially he “cleaned out a hooch” as he was trained to do to survive in Vietnam.¹²⁵ The defense recounted that his wife had left him once before; in that case, Heads had “vaulted onto the roof of his house with a rifle, assumed the assault position, and fired harmlessly for a few minutes into the tops of trees in the neighborhood.”¹²⁶ Despite the prosecution’s call to the jury to dismiss Heads’s PTSD defense as a “Vietnam fantasy idea,” Heads was acquitted by reason of insanity.¹²⁷ The *Heads* case is the definitive example of a veteran successfully pleading an insanity defense based on service-related PTSD.

2. The Diminished Capacity Defense

A second defense option for veteran-defendants suffering from PTSD is the diminished capacity defense. In jurisdictions that recognize the diminished capacity defense, a veteran’s PTSD may be admissible as relevant to negate the defendant’s *mens rea* for a crime.¹²⁸ A diminished capacity defense, unlike the insanity defense, allows the defendant to present testimony as to why he did not possess the requisite *mens rea* for the crime and should be prosecuted on lesser charges.¹²⁹ While some jurisdictions restrict clinical testimony of the defendant’s mental illness but allow observational testimony, the Model Penal Code allows all relevant testimony.¹³⁰ The Model Penal Code, section 4.02(1) states: “Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.”¹³¹ However, use of clinical testimony is also often limited to either charges of intentional homicide or crimes committed with specific intent (purpose or knowledge in MPC jurisdictions).¹³² If a defendant is found not to have possessed the requisite *mens rea* and is not charged with any lesser crime, then he may be acquitted.¹³³ On the other hand, if a defendant is acquitted through use of

125. *Id.* at 560.

126. *Id.* at 559.

127. *Id.* at 561.

128. *See id.* at 602.

129. *Id.* at 586–87.

130. *Id.* at 602.

131. *Id.*

132. *Id.* at 608.

133. *See id.* at 586–87.

the diminished capacity defense, then he is not committed unless the state then institutes civil commitment proceedings.¹³⁴

This defense has been accepted in the general PTSD context. For example, in a non-service-related PTSD situation, a Washington appellate court held that the lower court had abused its discretion by excluding the defense's expert testimony about the defendant's PTSD to mitigate the charge of first degree premeditated murder.¹³⁵ The court reiterated the psychiatric community's recognition of the link between PTSD and diminished capacity, as well as the importance of the expert testimony.¹³⁶ Here, the expert had testified that there was "medical certainty" that the defendant had PTSD, and that the defendant may have been experiencing a flashback when she struggled with her victim.¹³⁷ This testimony was relevant to determining whether the defendant was able to form the requisite intent to murder the victim.¹³⁸

3. PTSD as a Mitigating Factor in Sentencing

A third option for veterans with PTSD is mitigating their sentences. Once a defendant has been found guilty, some jurisdictions allow consideration of PTSD as a mitigating factor in sentencing.¹³⁹ At least six jurisdictions have recognized PTSD as a mitigating factor in case law.¹⁴⁰ In recent years, the tension between the retribution/deterrence model and the incapacitation/rehabilitation model of justification for punishment has turned in favor of the latter.¹⁴¹ There is a movement toward individualization of sentencing and judicial discretion.¹⁴² Although downward departures in sentencing premised on mental illness are the

134. *Id.* at 611.

135. *State v. Bottrell*, 14 P.3d 164, 165–66 (Wash. Ct. App. 2000).

136. *Id.* at 170.

137. *Id.*

138. *Id.*

139. *See, e.g.,* Gover, *supra* note 16, at 579–80 (discussing cases in which military service-related PTSD was considered as a mitigating factor in sentencing).

140. PTSD has been recognized as a mitigating factor in cases before the United States Supreme Court; Seventh, Ninth, and Eighth Circuit Courts; and Illinois and Washington state courts. *See* Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 70 (2012) (surveying cases in which military-related PTSD was recognized as a mitigating factor); *Brownfield Memorandum, infra* note 146 (Colorado District Court decision).

141. *See* SLOBOGIN, RAI & REISNER, *supra* note 8, at 669–74; *United States v. Booker*, 543 U.S. 220, 301, 304–05 (2005).

142. *See* SLOBOGIN, RAI & REISNER, *supra* note 8, at 669–74; *Booker*, 543 U.S. at 304–05.

exception, not the rule,¹⁴³ there is a trend toward taking into account that a defendant was suffering from PTSD as a result of military service as part of sentencing evidence.¹⁴⁴

Evidence of PTSD may be considered to change the type of sentence. In *Porter v. McCollum*, the Supreme Court ruled that attorneys representing clients facing the death penalty have an affirmative duty to present evidence of PTSD if applicable.¹⁴⁵ Furthermore, evidence of PTSD may be considered to reduce the length of a sentence. In *United States v. Brownfield*, a federal judge cited a defendant's possible PTSD diagnosis to explain a sentence that was lower than federal guidelines, as well as those recommended by both the prosecution and defense.¹⁴⁶ The judge sentenced military veteran John Brownfield to probation and a psychiatric evaluation for accepting a bribe as a public officer.¹⁴⁷ According to the judge, Brownfield "returned from war, but never really came home."¹⁴⁸

4. Concern About PTSD-Based Defenses: Validity and Malingering

Since its recognition after the Vietnam War and inclusion in the DSM-III in 1980, there has been skepticism of PTSD as a true disorder and questioning of its role in the criminal justice system. Concerns of validity and malingering challenge the legitimacy of criminal defenses based on service-related PTSD, but, as addressed below, this skepticism is often unfounded.

a. *Validity*

There is a general mistrust of PTSD as a true psychological disorder, and critics challenge the legitimacy of PTSD by describing the diagnosis as a social construct.¹⁴⁹ They doubt that the lobbying of Vietnam veterans groups for recognition in DSM-III resulted in the "discovery" of a new

143. See SLOBOGIN, RAI & REISNER, *supra* note 8, at 673.

144. See *id.* at 669–74.

145. Burgess, Stockey & Coen, *supra* note 51, at 77; *Porter v. McCollum*, 558 U.S. 30, 40 (2009).

146. Memorandum Opinion & Order on Sentencing, *United States v. Brownfield*, Criminal Case No. 08-cr-00452-JLK (D.C. Colo. 2009), available at <http://online.wsj.com/article/SB126221697769110969.html> [hereinafter *Brownfield* Memorandum].

147. Burgess, Stockey & Coen, *supra* note 51, at 78; *Brownfield* Memorandum, *supra* note 146.

148. Burgess, Stockey & Coen, *supra* note 51, at 78; *Brownfield* Memorandum, *supra* note 146.

149. Smith, *supra* note 13, at 1.

mental disease¹⁵⁰ and argue that psychiatry was not the right route for fixing what was inherently a VA compensation problem.¹⁵¹ Critics question the historical roots of PTSD and whether the evolution of the diagnosis from shell shock onwards is truly the same illness.¹⁵² There is no record of dissociations or flashbacks in World War I military pension files; most World War I soldiers who received compensation for war neurosis or shell shock would not meet the current PTSD diagnostic criteria.¹⁵³ As opposed to a medical discovery, critics see the evolution of PTSD as “the development of medical diagnoses generally reflect[ing] ‘negotiation,’ rather than discovery and the resulting classificat[ion] ‘serve[s] to rationalize, mediate, and legitimate relationships between individuals and institutions in a bureaucratic society.’”¹⁵⁴

Some critics characterize PTSD as “medicalizing liability”;¹⁵⁵ instead of a legitimate mental illness, PTSD is seen as medicalizing the fact that everyone has a breaking point.¹⁵⁶ Critics distrust the widespread inclusion of PTSD in criminal law and view it as a “mechanism to either acquire underserved compensation or to evade personal responsibility.”¹⁵⁷ Prosecutors have historically shared this belief, as the closing argument of the prosecution in *State v. Sturgeon* exemplified: “Ladies and gentlemen, we’ve got the Rambo defense going here. He assumed the ‘tactical defense position’—give me a break!”¹⁵⁸

Overall, the question of validity was more prevalent in the era immediately following the Vietnam War, when PTSD was first recognized in DSM-III.¹⁵⁹ The American Psychological Association (“APA”) has now recognized PTSD for more than thirty years.¹⁶⁰ Furthermore, PTSD has become part of the modern national discourse as the media focused on the effects of the September 11, 2001 attacks on survivors,¹⁶¹ and as more

150. *Id.* at 53.

151. *Id.* at 68.

152. *Id.* at 62.

153. *Id.*

154. *Id.* at 64.

155. *Id.* at 1.

156. See Burgess, Stockey & Coen, *supra* note 51, at 72.

157. Smith, *supra* note 13, at 65.

158. Burgess, Stockey & Coen, *supra* note 51, at 73.

159. *Id.* at 73.

160. *Id.* at 73–74. DSM-III, first recognizing PTSD as a psychological disorder, was published in 1980. See Part II.A.

161. Burgess, Stockey & Coen, *supra* note 51, at 73.

veterans returned from Iraq and Afghanistan exhibiting the mental illness.¹⁶²

b. *Malingering*

Malingering has also been a concern for abusing the defense since PTSD was first recognized in the Vietnam War era.¹⁶³ In 1983, in *People v. Lockett*, a Vietnam veteran, charged with eighteen counts of robbery, successfully proved an insanity defense based on his diagnosis of PTSD resulting from his service in the Air Force.¹⁶⁴ Lockett described in detail “ongoing stress, being under fire, witnessing fellow soldiers being impaled or blown apart by land mines,” feelings of guilt and anger, persistent nightmares of his Vietnam experience, and flashbacks triggered by the sound of jet engines at LaGuardia Airport.¹⁶⁵ The court found that he was unable to appreciate the wrongfulness of his actions due to his PTSD.¹⁶⁶ After the plea was entered, the prosecutor received a delayed subpoena of Lockett’s military record, showing that he had never been in Vietnam.¹⁶⁷ He was an accounting clerk and had never left Randolph Air Force Base in Texas.¹⁶⁸ On this evidence, the court vacated Lockett’s plea for fraud.¹⁶⁹

People v. Lockett is the predominant case cited by critics as to the susceptibility of veterans with PTSD to malingering.¹⁷⁰ As awareness of PTSD becomes widespread, so does an understanding of the related symptoms and how to effectively fake them.¹⁷¹ Critics are concerned that the prevalence of PTSD-based legal defenses will rapidly increase as soldiers return from Iraq and Afghanistan, not because there is greater incidence of mental illness, but because the soldiers will be able to strategically fake PTSD symptoms to manipulate the system.¹⁷²

162. Murphy, *supra* note 7 (reporting that the president of the National Veterans Federation warns that the criminal justice system is “getting ready to face an epidemic” of defendant veterans with PTSD).

163. Burgess, Stockey & Coen, *supra* note 51, at 73–74.

164. *Id.* at 73–74; *People v. Lockett*, 121 Misc. 2d 549, 549 (N.Y. Sup. Ct. 1983).

165. *Lockett*, 121 Misc. 2d at 550–53.

166. *Id.* at 550–54.

167. *Id.* at 553–54.

168. *Id.*

169. *Id.* at 554.

170. *See, e.g.*, Gover, *supra* note 16, at 582–84; Burgess, Stockey & Coen, *supra* note 51, at 73–74.

171. *See* Gover, *supra* note 16, at 563.

172. *See id.*

This skepticism is unfounded for various reasons. As PTSD awareness has increased, so has psychiatric understanding of the disorder. It is unlikely that a veteran would be able to fake symptoms with such ease, as was the case in the post-Vietnam *Lockett* case. At the time of the *Lockett* case, PTSD had only been introduced in the DSM-III three years prior.¹⁷³ Furthermore, a successful insanity defense does not let the defendant off free.¹⁷⁴ Although the effect of a successful insanity defense varies by jurisdiction, most states confine those acquitted by the insanity defense to mental institutions for as long as they remain mentally ill and dangerous.¹⁷⁵ The average duration of mental institution confinement for those acquitted via the insanity defense is about equal to the time they would have received if incarcerated.¹⁷⁶ A criminal defendant cannot make an *ex ante* prediction that a successful insanity defense would result in a shorter commitment than the time he would be incarcerated if convicted.¹⁷⁷ If a defendant is able to raise a successful partial defense of diminished capacity, then he may be acquitted if there is no lesser offense charged.¹⁷⁸ However, acquittal based on a finding of diminished capacity as a result of mental illness may lead the state to initiate civil commitment proceedings premised on the fact that the person is a danger to himself or others, or is gravely disabled.¹⁷⁹

Lastly, if malingering were as prevalent as predicted, there would be a proliferation of PTSD insanity defenses raised and acquittals from such defenses. In reality, however, the PTSD insanity defense is infrequently used and rarely successful.¹⁸⁰ Insanity pleas raised by those with diagnoses of PTSD (not limited to veterans with service-related PTSD) constitute only 0.3% of cases in which the insanity defense was raised.¹⁸¹ Insanity pleas based on PTSD are no more likely to succeed than pleas based on other psychiatric diagnoses.¹⁸² The insanity defense itself is raised infrequently and typically only in rare circumstances; for example, only half of 1% of those arrested in Wyoming over a period of time raised the

173. *People v. Lockett* was decided in 1983, three years after PTSD was first recognized in the DSM-III in 1980. See *Lockett*, 121 Misc. 2d at 549; Smith, *supra* note 13, at 24–25.

174. SLOBOGIN, RAI & REISNER, *supra* note 8, at 554, 868.

175. *Id.*

176. *See id.* at 556.

177. *See id.*

178. *See id.* at 586–87.

179. *Id.* at 610–11.

180. McGuire & Clark, *supra* note 94, at 1.

181. Hafemeister & Stockey, *supra* note 10, at 119.

182. *Id.*

defense, and only one person of the 102 defendants who raised the plea was acquitted.¹⁸³ As PTSD awareness grows and because an inundation of PTSD defenses in the criminal justice system has not materialized, categorical skepticism of PTSD is largely unfounded.

IV. ALTERNATIVE SENTENCING BASED ON PTSD

Alternative sentencing allows veterans with service-related PTSD to gain access to treatment instead of incarceration and includes VTCs as well as state treatment sentencing statutes.¹⁸⁴ The two are not mutually exclusive, as some states that have enacted treatment sentencing statutes have used that legislation as a vehicle for establishing VTCs.¹⁸⁵ Alternative sentencing statutes work collaboratively with the VA, and VA representatives are even physically present in VTC proceedings.¹⁸⁶ For many veterans, this may be their first exposure to the VA support system. Alternative sentencing also diminishes concerns about malingering as such programs require a determination of both the defendant's military status and mental health status in order to be eligible for treatment instead of incarceration.¹⁸⁷

A. VETERANS TREATMENT COURTS

VTCs operate under an understanding that combat veterans are generally not career criminals and deserve a therapeutic rather than retributive approach to criminal justice.¹⁸⁸ Since the first VTC came into existence in 2008, the system has expanded to 120 VTCs in thirty-five states, with one hundred more in the planning stages.¹⁸⁹ In January of 2011, President Barack Obama recognized the value of VTCs by noting that they addressed the "unique needs" of returning veterans and recommended expanding the VTC system.¹⁹⁰

183. SLOBOGIN, RAI & REISNER, *supra* note 8, at 555.

184. *See infra* Part IV.A and IV.B.

185. *See, e.g.*, FLA. STAT. § 948.08(7)(a) (2012) (authorizing creation of a "pretrial intervention" program modeled after a VTC).

186. *See infra* Part IV.B.3.

187. *See id.*

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

189. *Id.*

190. PRESIDENT BARACK H. OBAMA, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT ¶ 1.6.1, at 12 (Jan. 2011).

The original VTC began in Buffalo, New York in 2008 and was presided by Judge Robert T. Russell, Jr.¹⁹¹ The Buffalo VTC adopted as its “guiding principle” the founding principle of the Vietnam Veterans of America: “Never again will one generation of veterans abandon another.”¹⁹² While the VTC system is modeled after existing drug and mental health courts that offer a therapeutic alternative to incarceration, direct one-on-one mentoring is unique to the veteran model.¹⁹³ Judge Russell’s VTC answered the call for “tailored care” to address “veterans [as a] niche population with unique needs” with experiences not typically shared by non-military peers.¹⁹⁴ VTCs help guide veterans through PTSD, depression, substance abuse, anger issues, employment problems, and other issues that act as obstacles to reintegration into civilian life.¹⁹⁵ Potential candidates for the VTC program are identified early on by police arresting officers, as well as by VA workers,¹⁹⁶ and veterans may participate voluntarily after being advised about the court-supervised treatment program.¹⁹⁷ Programs are collaboratively tailored and designed with each individual veteran, giving the veteran control over his or her own treatment.¹⁹⁸ In the VTC, the veteran finds the structure, discipline, and camaraderie that is often lacking from civilian life.

The VTC system operates in conjunction with a team comprised of VA representatives, veterans groups, veteran mentors, and mental health providers.¹⁹⁹ Sessions include a VA social worker, with access to VA records through a secure laptop, who can provide veterans with “real time” access to VA programs.²⁰⁰ Participants in the VTC program are provided with medical and mental health treatment, training, and help finding jobs, housing, and transportation.²⁰¹ The Buffalo VTC allows for participation

191. Richard Currey, *Tailored Judicial Care, The Buffalo Veterans Treatment Court*, 40 VVA VETERAN 27, 27 (2010), available at <http://digitaledition.qwinc.com/publication/?i=42424&page=1>.

192. *Id.*

193. *Id.*

194. *Id.* at 28.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*; Caine, *supra* note 95, at 225.

200. Currey, *supra* note 191, at 28; *Keeping Veterans with PTSD out of the Justice System*, NAT’L CTR. FOR PTSD, U.S. DEP’T VETERANS AFFAIRS (Aug. 17, 2010), <http://www.ptsd.va.gov/public/pages/keeping-PTSD-vets-out-JS.asp>.

201. Currey, *supra* note 191, at 28–29.

before or after a conviction, allowing veterans to receive reduced charges and avoid a felony or serious misdemeanor charge.²⁰² Only veterans who have committed nonviolent crimes are accepted into the Buffalo VTC; the majority of such offenses include drug and alcohol offenses, disturbing the peace, disorderly conduct, petty mischief, and shoplifting.²⁰³ As of 2009, not a single veteran who had finished the court's two-year program had returned to the court.²⁰⁴ Participants may have the charges against them reduced or dismissed after completing the Buffalo VTC program.²⁰⁵ Although each individual VTC operates its own unique collaborative program depending on the court and specific judge, the original successful model in Buffalo is demonstrative of the potential of the VTC system as a whole.

B. STATE TREATMENT SENTENCING STATUTES

A second form of alternative sentencing is state sentencing statutes that direct treatment for veterans with PTSD. Although not as common as VTCs, some states have revised existing statutes or created new sentencing statutes with the purpose of identifying both a criminal defendant's military status and mental health status with the purpose of obtaining treatment for veterans rather than incarceration.

1. California Penal Code Section 1170.9

The first sentencing statute of this kind was enacted in California in 1982.²⁰⁶ It facilitated collaboration between the Department of Corrections and other government agencies to provide treatment to defendants.²⁰⁷ In 1984, California Penal Code section 1170.9 was revised to allow certain Vietnam combat veterans convicted of a felony to voluntarily elect treatment in a federal program as an alternative to state prison; the election was only available to veterans who had suffered from service-related substance abuse or psychological problems, and the treatment would last up to the term the defendant would have served in prison.²⁰⁸ Although the statute was symbolic in its recognition of PTSD, it was meaningless

202. Caine, *supra* note 95, at 234.

203. Currey, *supra* note 191, at 28.

204. *Id.*

205. *Keeping Veterans with PTSD out of the Justice System*, *supra* note 200.

206. CAL. PENAL CODE § 1170.9 (1982).

207. Caine, *supra* note 95, at 225–26.

208. *Id.*

without implementing federal legislation authorizing acceptance of state offenders in federal programs.²⁰⁹ Even if it had been effective, the 1984 version of section 1170.9 excluded a substantial amount of veterans by limiting eligibility only to Vietnam veterans who committed felony offenses.²¹⁰

The modern version of California Penal Code section 1170.9 was enacted in 2007 upon realization that the statute, expressly reserved for Vietnam veterans, could not reach veterans returning from Iraq and Afghanistan.²¹¹ The 2007 revision allows a defendant, who would otherwise be sentenced to county jail or state prison, to allege that he or she committed the offense “as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse or mental health problems stemming from service in the United States military.”²¹² This allegation then triggers a presentencing hearing in which the court makes a determination of both the defendant’s military status and mental health problems as a result of military service;²¹³ if a defendant’s military and mental health statuses are confirmed and the defendant is otherwise eligible for and placed on probation, the defendant may agree to participate in a “local, state, federal or private nonprofit treatment program.”²¹⁴ Assuming an appropriate treatment program exists, the term of the treatment program is no greater than what the defendant would have served in state prison or county jail.²¹⁵ In placing the defendant in a treatment program, preference is given to programs, including those operated by the United States Department of Defense and the VA, with a successful record of treating veterans with mental health problems.²¹⁶ The statute allows for collaboration between the treatment program and the VA to maximize benefits and services available to the defendant.²¹⁷ The main improvement in the 2007 version is the express procedures for implementation, which was the failing point of the 1984 version.²¹⁸

209. *Id.* at 226–27.

210. *Id.*

211. *Id.* at 227–28; CAL. PENAL CODE § 1170.9 (2007).

212. CAL. PENAL CODE § 1170.9(a).

213. *Id.*

214. *Id.* § 1170.9(b).

215. *Id.*

216. *Id.* § 1170.9(e).

217. *Id.* § 1170.9(g).

218. *Id.* § 1170.9(b). *See also* Caine, *supra* note 95, at 226–27, 229.

2. Minnesota Statute Section 609.115

Minnesota became the second state to enact legislation, taking into account a veteran's service-related mental illness in sentencing.²¹⁹ Based on California's 2007 revision to section 1170.9,²²⁰ Minnesota enacted a "Military Veterans" subdivision in 2008 as an addition to its existing presentence investigation statute.²²¹ Minnesota law allows for the court to order a presentence investigation for misdemeanor convictions and mandates a presentence investigation for felony convictions.²²² The investigation and accompanying written report made to the court include descriptions of the "defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense, and the harm caused by it to others and the community."²²³ Subdivision 10 "Military Veterans" was added to the statute in 2008.²²⁴ Subdivision 10 provides that:

(a) When a defendant appears in court and is convicted of a crime, the court shall inquire whether the defendant is currently serving in or is a veteran of the armed forces of the United States. (b) If the defendant is currently serving military or a veteran and has been diagnosed as having a mental illness. . .the court may: (1) order that the officer preparing the [presentence] report. . .consult with the United States Department of Veterans Affairs, Minnesota Department of Veterans Affairs, or another agency. . .for the purpose of providing the court with information regarding treatment options available for the defendant, including federal, state, and local programming; and (2) consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing sentence.²²⁵

In contrast to the California statute, the Minnesota statute requires the court to inquire as to the defendant's military and mental health status in the presentencing investigation of every felony and selected misdemeanor

219. The revised California statute was enacted in 2007 and the Minnesota statute was enacted in 2008. CAL. PENAL CODE § 1170.9 (2007); MINN. STAT. § 609.115 (2012); Caine, *supra* note 95, at 230.

220. Caine, *supra* note 95, at 230–32.

221. *Id.*; MINN. STAT. § 609.115.

222. MINN. STAT. § 609.115(1)(a).

223. *Id.*

224. *Id.* § 609.115(10) (discussing legislative history).

225. *Id.*

convictions.²²⁶ Furthermore, unlike the California statute, the Minnesota statute does not limit alternative sentencing to certain offenses.

3. Expansion of Alternative Sentencing Statutes

Although state treatment sentencing statutes have not replicated the expansive growth of the VTC system, several other states have enacted such legislation. In 2009, Nevada enacted a statute establishing treatment programs for veterans and military members suffering from mental illness, alcohol or drug abuse, or PTSD.²²⁷ In Nevada, such veteran-defendants, who tender a guilty plea or are found guilty of any offense eligible for probation, may consent to be placed on probation; the sentence of probation is conditioned upon the defendant's attendance and successful completion of an appropriate treatment program, but does not require entry of judgment of conviction.²²⁸ Upon completion, the court will discharge the defendant and dismiss the proceedings.²²⁹ Defendants are not eligible for alternative sentencing if the offense or any previous conviction involved the use or threat of violence.²³⁰

In Florida, a "pretrial intervention" program reflecting the VTC model was enacted in 2012.²³¹ Defendants identified as veterans or service members suffering from a military-related illness, traumatic brain injury, substance abuse disorder, or psychological problem, are eligible for voluntary admission into a pretrial veterans' treatment intervention program.²³² The program involves a "coordinated strategy developed by a veterans' treatment intervention team" modeled after therapeutic justice principles.²³³ At the end of the pretrial program, the court will take into consideration treatment recommendations in disposition of pending charges, including dismissal of the charges if the defendant has successfully completed the program.²³⁴ The statute excludes from eligibility certain violent and sex offenses.²³⁵ Furthermore, in 2012, the

226. *See id.* § 609.115(1)(a).

227. NEV. STAT. § 176A.280 (2009).

228. *Id.* §§ 176A.290(1), 176A.280.

229. *Id.* § 176A.290(4).

230. *Id.* § 176A.290(2).

231. FLA. STAT. § 948.08(7)(a) (2012).

232. *Id.*

233. *Id.* § 948.08(7)(b).

234. *Id.* § 948.08(7)(c).

235. *Id.* § 948.08(7)(a).

Florida Senate introduced a bill identical to California's Penal Code section 1170.9, the alternative sentencing statute.²³⁶

V. PROBLEMS WITH THE CURRENT LAW

A. TRADITIONAL PTSD-BASED CRIMINAL JUSTICE CONSIDERATIONS ARE INADEQUATE

The criminal justice system has traditionally recognized a veteran-defendant's PTSD as grounds for an insanity or diminished capacity defense, or has considered the diagnosis as a mitigating factor at sentencing; however, these three approaches are underinclusive and consequently inadequate. Depending on the jurisdiction and the nature of the defendant's specific PTSD symptoms, a veteran-defendant may not be able to take advantage of these defenses. Alternative sentencing is a solution to the ineffectiveness of using PTSD in the traditional criminal defense and mitigated sentencing contexts.

1. The Insanity Defense

c. *The M'Naghten Insanity Test*

The problem with the M'Naghten Test is that it excludes those who suffer from PTSD but do not experience dissociative states.²³⁷ Recall that the M'Naghten Test takes into account only a narrow range of mental capacity to establish an affirmative defense.²³⁸ The fundamental aspect of the M'Naghten Test is the "cognitive" prong, whether the defendant knew or did not know "the nature and the quality of the act."²³⁹ An insanity defense based upon the M'Naghten Test would only be successful for those defendants with PTSD who could not appreciate the wrongness of their actions, such as when the defendant committed the crime while in a PTSD dissociative state.²⁴⁰ The test is underinclusive because dissociative reactions are rare, making the M'Naghten Test of limited use to defendants suffering from less severe forms of PTSD.²⁴¹ Absent a dissociative reaction, the M'Naghten Test does not provide a defense to those who commit crimes while exhibiting symptoms of sensation-seeking or

236. S. 22, 114th Reg. Sess. (Fla. 2012).

237. See SLOBOGIN, RAI & REISNER, *supra* note 8, at 546–47.

238. See *supra* Part III.A.1.a.

239. See SLOBOGIN, RAI & REISNER, *supra* note 8, at 546–47.

240. See *id.*

241. Tramontin, *supra* note 34, at 38.

depression-suicide syndromes, even though these defendants may be unable to conform their actions to the law.²⁴²

d. *The ALI Insanity Test*

A majority of states have abandoned the M’Naghten Test and have adopted the ALI version of the insanity defense, which offers a more expansive definition of insanity.²⁴³ However, the ALI Test also fails to provide some veteran-defendants with grounds for an insanity defense because it is not available in every state and is rarely successful.²⁴⁴

Recall that the ALI Test includes both a cognitive prong that a defendant lacked “substantial” capacity to appreciate the criminality of his conduct, as well as a volitional prong that he could not “conform his conduct” to the law.²⁴⁵ Unlike the M’Naghten Test, which requires the stricter “did not know” the wrongfulness of his actions standard, the ALI Test provides a defense for defendants suffering from different forms of PTSD, both those who exhibit dissociative reactions and who could not appreciate the wrongness of their actions, as well as those suffering from sensation-seeking and depression-suicide syndromes.²⁴⁶

However, no matter which test a defendant uses to support his or her insanity defense, an insanity defense is rarely successful and insanity defenses based on PTSD are no more likely to succeed than those based on other mental illnesses.²⁴⁷ Although the ALI Test may allow more veterans to get past the “insanity defense velvet rope”²⁴⁸ and present their defense to the jury with its “substantial capacity” standard, it is still difficult to persuade a jury based on the insanity defense.²⁴⁹ Coupled with prosecutor and juror suspicion of the PTSD diagnosis, even the ALI Test does not

242. Those who suffer from sensation-seeking or depression-suicide syndromes but not from dissociative states fail the cognitive prong of the test because they may be able to appreciate the wrongfulness of their actions. *See supra* Part II.B.

243. SLOBOGIN, RAI & REISNER, *supra* note 8, at 549.

244. *See id.*

245. *Id.* *See also supra* Part III.A.1.a.

246. Compare SLOBOGIN, RAI & REISNER, *supra* note 8, at 549, with *id.* at 546–47. *See supra* Parts III.A.1.a–b.

247. McGuire & Clark, *supra* note 94; Hafemeister & Stockey, *supra* note 10, at 119.

248. *See* Gover, *supra* note 16, at 574–75.

249. McGuire & Clark, *supra* note 94.

provide sufficient protection to veteran-defendants with service-related PTSD.²⁵⁰

2. The Diminished Capacity Defense

If a veteran suffering from PTSD cannot raise an insanity defense as an affirmative defense to culpability, some jurisdictions recognize a diminished capacity defense whereby a veteran's PTSD may demonstrate that he or she lacked the required *mens rea* to be found guilty of the crime.²⁵¹ However, this defense is also limited because it may be applicable only to certain charges, it is not available in all jurisdictions, and has not been embraced by courts in the service-related PTSD context.²⁵² The principle limitations imposed on expert medical testimony about the defendant's *mens rea* include "a requirement that the testimony be due to a significant mental disorder; a requirement that the testimony only address whether the defendant had the capacity to formulate the requisite *mens rea*; and a prohibition on *mens rea* testimony for certain types of crimes."²⁵³ Use of clinical testimony is often limited to either charges of intentional homicide, or to crimes committed with specific intent.²⁵⁴

Although the diminished capacity defense has been accepted in the general PTSD context, it has not yet expanded to service-related PTSD.²⁵⁵ Furthermore, this defense is not available in all jurisdictions and has been abolished in jurisdictions that had previously adopted the defense.²⁵⁶ Unless there is no lesser charge, diminished capacity serves to downgrade the offense, rather than exonerate the defendant.²⁵⁷ For these reasons, diminished capacity is also inadequate because it only reaches some of the veterans excluded from using the insanity defense.²⁵⁸

250. *See id.*

251. SLOBOGIN, RAI & REISNER, *supra* note 8, at 586–87. *See also supra* Part III.A.2.

252. *See supra* Part II.A.2.

253. *Id.* at 604.

254. *Id.* at 608.

255. *See* State v. Korman, A-3454-08T4, 2010 WL 3932901, 9, 17–18 (N.J. Super. Ct. App. Div. Oct. 4, 2010) (showing a recognition of a veteran-defendant's PTSD, but disallowing the diminished capacity defense due to disconnect between service-related PTSD and the crime, by the New Jersey Court of Appeals); State v. Melendez, 30 A.3d 320 (N.J. Super. Ct. App. Div. 2011).

256. Gover, *supra* note 16, at 576.

257. SLOBOGIN, RAI & REISNER, *supra* note 8, at 586–87.

258. *See supra* Part V.A.2.

3. PTSD as a Mitigating Factor in Sentencing

Jurisdictional limits on insanity or diminished capacity defenses often make these defenses unsuccessful for veterans with PTSD.²⁵⁹ The trend towards individualized sentencing and judicial discretion allows judges to consider evidence that a defendant was suffering from PTSD as a result of military service.²⁶⁰ Recall that *Porter v. McCollum* held that attorneys representing clients facing the death penalty have an affirmative duty to present evidence of PTSD²⁶¹ and in *United States v. Brownfield* the judge cited a defendant's possible PTSD to reduce his sentence.²⁶² Although the particular cases of *Porter* and *Brownfield* illustrate the potential for a PTSD diagnosis to justify a mitigated sentence, downward departures in sentencing due to the defendant's mental illness are the exception, not the rule.²⁶³ Even though federal sentencing guidelines are technically voluntary, there is a general reluctance to deviate from the guidelines.²⁶⁴

B. ALTERNATIVE SENTENCING AS AN INCOMPLETE SOLUTION TO THE PROBLEMS WITH TRADITIONAL PTSD-BASED CRIMINAL DEFENSES AND MITIGATED SENTENCING

Many veterans suffering from PTSD are unable to get treatment in lieu of incarceration for various reasons including that their illnesses do not fit within the M'Naghten or ALI Tests for making an insanity defense, the jurisdictional limits of the diminished capacity defense, or that judges are reluctant to depart from sentencing guidelines.²⁶⁵ Coupled with skepticism towards PTSD and its place in the legal system, these post-Vietnam strategies are not adequate alternatives for veterans. Modern alternative sentencing, in the form of VTCs and state sentencing providing for treatment, are a safety net for veterans suffering from PTSD. However, even modern alternative sentencing is inadequate. Eligibility for VTCs and state sentencing statutes tends to be limited to less serious offenses, which

259. See *supra* Parts V.A.1–2.

260. See SLOBOGIN, RAI & REISNER, *supra* note 8, at 669–74; *Brownfield* Memorandum, *supra* note 146; *supra* Part III.A.3.

261. Burgess, Stockey & Coen, *supra* note 51, at 77; *Porter v. McCollum*, 558 U.S. 30, 40 (2009).

262. *Brownfield* Memorandum, *supra* note 146.

263. See SLOBOGIN, RAI & REISNER, *supra* note 8, at 673.

264. See *id.*

265. See *supra* Part V.A.

excludes from eligibility many of the veterans with service-related PTSD who need the protection of alternative sentencing the most.

1. Veterans Treatment Courts

Recall that VTCs are collaborative courts that operate under an understanding that combat veterans are generally not career criminals and are better served by a therapeutic rather than retributive approach.²⁶⁶ VTCs differ on eligibility requirements. The original VTC in Buffalo, New York only accepts veterans who committed nonviolent crimes, a course followed by newer courts.²⁶⁷ Generally, a veteran defendant must plead guilty to the charges against him in exchange for participation.²⁶⁸ Requiring a guilty plea is concerning; in pleading guilty, a veteran waives his right to a jury trial, to cross-examine witnesses against him, to call his own witnesses in his defense, and to testify in exchange for participation in the treatment court.²⁶⁹ Although some courts clear the participants' criminal charges on completion of the program, not all programs do.²⁷⁰

Courts also differ on whether offenses may include violent crimes.²⁷¹ A categorical restriction on the level of offense, often limiting eligibility to defendants charged with misdemeanors and nonviolent felonies,²⁷² excludes offenders of more serious crimes, facing more greater penalties, who need the support of a VTC the most. The VTC system of mentoring and treating veterans should not be limited to offenders of less serious crimes. If the VTC system is built on a therapeutic, rather than retributive, approach, the system should also include veterans who committed serious crimes as an isolated incident brought on by service-related PTSD. However, when a veteran commits premeditated murder or is a multiple

266. Smith, *supra* note 188. See also *supra* Part IV.A.

267. Smith, *supra* note 188.

268. Judge Eileen Moore, *Veterans Court, California Style*, THE STATE BAR OF CALIFORNIA 84TH ANNUAL MEETING, PROGRAM 112, HELPING VETERANS: PENAL CODE 1170.9 27 (Sept. 17, 2011), available at <http://html.documation.com/cds/SBC2011/HTML%20Files/PDFs/112.pdf>.

269. *Id.* at 35.

270. *Id.*

271. See *id.* (discussing that the Orange County, CA, VTC requires participants to have been in combat and includes participants who plead guilty to violent felonies, whereas the San Bernardino County, CA, VTC does not require combat service, but requires participants to be honorably discharged in order to be eligible and excludes most violent offenses); Currey, *supra* note 191, at 28 (discussing that the Buffalo, NY, VTC only allows non-violent offenses although more than half of veterans are charged with felonies).

272. See *supra* Part V.B.1.

offender, the goals of retribution, deterrence, and incapacitation may trump the goal of therapeutic justice. Whether a veteran's crime is so serious as to exempt him or her from therapeutic treatment should be determined on a case-by-case basis and not a bright line rule.

2. State Treatment Sentencing Statutes

Also recall that some states have revised existing statutes or have created new sentencing statutes with the purpose of identifying criminal defendants' veteran and mental health statuses in order to provide treatment in lieu of incarceration.²⁷³ However, similar to the VTC system, the procedures and eligibility requirements differ between jurisdictions and generally exclude veterans convicted of more serious crimes.²⁷⁴

a. *California Penal Code Section 1170.9 (2007)*

Although the revised California Penal Code section 1170.9 is an improvement to the 1984 version, which had no procedures for implementation, the revised statute is not perfect.²⁷⁵ While the presentencing hearing provides an important opportunity for the defendant to describe his personal history and symptoms of PTSD and allows the judge to make an individualized decision as to whether and what treatment program is appropriate,²⁷⁶ the burden is on the defendant to prove his or her military status and service-related mental health problems.²⁷⁷ Proof of military status can be obtained through the court's collaboration with the VA,²⁷⁸ however, a defendant may have difficulty providing evidence of PTSD without a formal recorded diagnosis prior to the presentencing hearing.

Furthermore, although it eliminates the 1984 requirement of a felony conviction, the 2007 version requires that the defendant be eligible to be placed on probation, thereby limiting the number of veterans who can utilize the sentencing statute.²⁷⁹ In the same way that many VTCs limit eligibility to nonviolent offenses, section 1170.9 places a restriction on the

273. *See supra* Part IV.B.

274. *See id.*

275. *See supra* Part IV.B.1.

276. Caine, *supra* note 95, at 228–29.

277. *Id.*

278. *See* CAL. PENAL CODE § 1170.9(b) (2007).

279. *See id.*

level of offense that will prevent many veterans from receiving needed treatment.²⁸⁰

b. *Minnesota Statute Section 609.115*

The Minnesota statute is an improvement on the California statute and reaches many veterans that would have been excluded under the California version. Recall that the “Military Veterans” presentence investigation subdivision enacted in 2008 allows a court to order a presentence investigation for misdemeanor convictions, but the law mandates an investigation and report for felony convictions.²⁸¹ As part of the presentencing investigation and report the court is to determine a defendant’s military status and whether the defendant has a mental illness.²⁸²

The Minnesota statute provides greater protection for veterans than the revised California sentencing statute. In California, a defendant must be aware of the alternative sentencing statute and allege eligibility to trigger a presentence hearing, allowing some veteran-defendants to slip through the cracks.²⁸³ In contrast, in Minnesota the court must inquire as to the defendant’s military and mental health status in every presentencing investigation.²⁸⁴ Furthermore, the Minnesota statute does not limit alternative sentencing to certain offenses but in fact requires a presentence investigation for felony convictions;²⁸⁵ while the California statute expressly applies only to defendants eligible for and placed on probation.²⁸⁶ The Minnesota statute allows the court to use its discretion in determining appropriate sentencing, using the presentence investigation as well as the recommendations of the VA and mental health professionals.²⁸⁷

c. *Nevada and Florida Alternative Sentencing Statutes*

The Nevada and Florida statutes reflect the California alternative sentencing statute and provide less protection for veterans than the

280. *Id.*

281. MINN. STAT. § 609.115(1)(a) (2012). *See also supra* Part IV.B.2.

282. *Id.* § 609.115(10).

283. *See Caine, supra* note 95, at 231–32.

284. MINN. STAT. § 609.115(10).

285. *Id.*

286. *See* CAL. PENAL CODE § 1170.9(b) (2007).

287. *Caine, supra* note 95, at 231–32. *See also* MINN. STAT. § 609.115(10).

Minnesota statute.²⁸⁸ The Nevada statute, enacted in 2009, requires that a defendant tender a guilty plea and be eligible for probation.²⁸⁹ The statute also states that defendants are not eligible for alternative sentencing if the offense or any previous conviction involved the use or threat of violence.²⁹⁰ The Florida “pretrial intervention” program enacted in 2012 also excludes from eligibility certain violent and sex offenses.²⁹¹ The 2012 Florida bill introduced by the Senate is identical to the California alternative sentencing statute section 1170.9, and thus excludes from eligibility those veterans not eligible for probation or who committed violent crimes.²⁹²

Both the Nevada and Florida statutes reflect the more rigid alternative sentencing procedure found in California. In contrast to the flexible wording of the Minnesota statute, which allows for treatment recommendations for a range of offenses, both the Nevada and Florida statutes restrict eligibility to those defendants who are eligible for probation and who have committed certain nonviolent offenses.²⁹³ These statutes categorically exclude from eligibility veterans who committed more serious crimes.

C. PROPOSED SOLUTION TO ALTERNATIVE SENTENCING

As previously discussed in the VTC and state treatment sentencing statute contexts, alternative sentencing almost universally restricts eligibility to either nonviolent offenders or to those who qualify for and receive probation.²⁹⁴ Alternative sentencing, like PTSD-based criminal defenses, is unavailable for many veteran-defendants committing certain offenses;²⁹⁵ one reason of which may be attributed to concern that collaborative treatment programs will release violent offenders into the community with minimal supervision, coupled with doubt that participants will actually adhere to the ordered program.²⁹⁶ However, treatment can be administered through the community-based VTC model or in a hospital or

288. *See supra* Part IV.B.

289. *See* NEV. REV. STAT. §§ 176A.290(1), 176A.280 (2009).

290. *Id.* § 176A.290(2).

291. FLA. STAT. § 948.08(7)(a) (2012).

292. S. 138, 2012 Leg., 114th Reg. Sess. (Fla. 2012).

293. *Compare* MINN. STAT. § 609.115(1)(a) (2012), *with* NEV. REV. STAT. § 176A.290(2) *and* FLA. STAT. § 948.087(7)(a).

294. *Supra* Part V.B.

295. *Id.*

296. *See* Caine, *supra* note 95, at 234 (expressing doubt that the VTC system of mentorship and treatment removed from the judicial system would work to rehabilitate violent offenders).

residential center and does not necessarily mean that an offender will be released into the community. Current forms of alternative sentencing exclude from eligibility an entire class of veteran-defendants who committed serious crimes because of their mental illness and have the greatest need for timely intervention and treatment.²⁹⁷

To solve this problem, rather than categorically excluding certain offenses, presentencing hearings, investigations, and referrals to VTCs should thoroughly assess whether treatment is a viable alternative to incarceration for each individual veteran-defendant. Based on the understanding that veterans who commit crimes because of their PTSD are not career criminals, alternative sentencing should include all levels of first-time offenses up to the point of premeditated murder or other premeditated crimes. Multiple offenses, premeditated offenses, or the commission of crimes while enrolled in an alternative treatment program indicates a heightened level of criminal responsibility not addressed by therapeutic justice. However, a categorical rule against eligibility for serious crimes is not necessary. Veteran-defendants, regardless of whether they commit misdemeanors or felonies, are eligible for probation, or are facing lengthy sentences, should be eligible for treatment as an alternative to incarceration.

VI. CONCLUSION

As the understanding of PTSD grows, Iraq and Afghanistan war veterans who commit crimes as a result of mental illness now have resources in the criminal justice system that their Vietnam-era counterparts did not have. Despite great strides, a number of veterans suffering from PTSD are excluded from alternatives to incarceration. Such veterans include those whose particular symptoms are not severe enough to satisfy the insanity defense, who do not have access to a diminished capacity defense, or who may be faced with a suspicious court unwilling to mitigate sentences for their “breakdown.” Accepting therapeutic justice as a necessary goal of sentencing has paved the way for countless veterans to receive needed treatment; however, even alternative sentencing is not enough. Veterans may not be eligible for alternative sentencing simply because they did not know a statute existed or because they were charged

²⁹⁷ See, e.g., Moore, *supra* note 268, at 35; NEV. REV. STAT. § 176A.290(2); FLA. STAT. § 948.087(7)(a).

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with a violent offense. The solution to the problem is alternative sentencing systems, both VTCs and treatment statutes, which extend eligibility to first time offenders of even the most serious crimes. Only this formulation furthers the purpose of therapeutic justice and the understanding that most of these veteran-defendants are not career criminals. Although the criminal justice system has evolved and there are now routes to get veterans with PTSD treatment instead of incarceration, too many veterans remain excluded from this benefit.²⁹⁸

298. *New Diagnostic Criteria for PTSD to Be Released: DSM-5*, NAT'L CTR. FOR PTSD, U.S. DEP'T VETERANS AFFAIRS (Dec. 6, 2012), http://www.ptsd.va.gov/professional/pages/diagnostic_criteria_dsm-5.asp. The more recent revision of the DSM, DSM-V, was released in May 2013. *Id.* Changes to the PTSD diagnostic criteria will affect those suffering from PTSD and the relationship of PTSD to the criminal justice system. Since the 2000 revision, the PTSD criteria have been revised to reflect greater understanding of the disorder. Based on the proposed revised criteria, the prevalence of PTSD and symptoms will not change significantly. The diagnosis is proposed to move from the anxiety disorders to a new class of "trauma and stressor-related disorders." *Id.* The most drastic change will be the elimination of the Criterion A2 (that the person's response involved intense fear, helplessness, or horror). *Id.*

