“They carried all they could bear, and then some, including a silent awe for the terrible power of the things they carried.”

I. Overview

More than 2.6 million Americans have now served in Iraq or Afghanistan. Only about half of these troops, it found, had reported or sought help for their condition. Untreated, many of these psychologically injured veterans are acting out in reckless, self-destructive and, sometimes, violent ways that bring them into contact with the criminal justice system. History tells us that as the wars in Iraq and Afghanistan wind down, the numbers of troubled veterans flooding into our criminal courts will swell. Our criminal justice system must be better prepared than previous generations.

A. PTSD’s Emerging History

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

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

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1 These CLE/CEU materials provide a brief overview of the unique problems facing criminally-involved veterans with service-related disorders and how the mental health and criminal justice systems can more effectively deal with them. For a much more thorough treatment of these issues, see the ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT (Brockton D. Hunter ed., 2013).

been used as the opportunity for intervention before more serious offenses or destruction occur, using probationary sentences to ensure compliance with treatment.

**B. Today's Military Under Strain**

After eight years of war in Iraq and Afghanistan, our military is now under enormous strain. Unlike any other extended conflict in American history, we have not resorted to a draft to ensure a large pool of combatants. Instead, we are fighting this conflict with a relatively small volunteer military force that we are recycling back into combat over and over. Most active duty troops have now served at least two tours. Many, especially our ground combat troops, have served more. Some are now on their sixth, seventh, even eighth combat tours. Our National Guard and Reserves have also been tapped to an unprecedented level with some now deploying for their second and even third tours. Compare this with Vietnam, in which the vast majority of draftees served only one 12-month tour. We have no modern precedent with which to compare our current situation. One thing is certain: the levels of combat trauma in our armed forces will continue to rise. A recent Army study found that, not surprisingly, the incidence of PTSD among troops rises significantly with each additional combat tour. This will inevitably lead to more veterans in the criminal justice system,

...PTSD is commonly associated with substance abuse, unregulated anger, aggressive behavior, and hazardous use of alcohol, all of which are themselves associated with legal problems and incarceration.

**II. Historical Perspective of PTSD**

The term “Post-Traumatic Stress Disorder” was first coined and formally recognized in the context of treating traumatized Vietnam veterans. This relatively recent formal recognition of the condition has led some to believe Vietnam was the first war to produce

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psychological casualties. In fact, PTSD has been a constant side effect of war for as long as soldiers have been sent into combat.

A. Combat Trauma in the Greek Classics, Modern Literature, and Cinema

Some of the first known chronicles of the psychological costs of war are found in Greek literary classics. Written approximately 3,000 years ago, Homer’s *Iliad* and *Odyssey* richly detail the effects of war on soldiers’ psyches and souls. Two recent books, *Achilles in Vietnam* and *Odysseus in America*, by Dr. Jonathan Shay, M.D., draw insightful parallels between the trauma suffered by Homers’ characters and that of modern day combat veterans.5

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

The *Odyssey* picks up at the end of the Trojan War and follows the often-criminal adventures of another traumatized Trojan War veteran, Odysseus (aka “Ulysses”) as he makes his way home to Greece. Along the way, notes Dr. Shay, Odysseus and his men raid and then drunkenly pillage the city of Ismarus, battle drug addiction in “Lotus Land,” and rob the Cyclops, among other misadventures. Once he reaches home, Odysseus commits a massive act of domestic violence, slaying dozens of suitors who had been courting his wife during his absence and then killing his wife’s maidservants.

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

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

**B. PTSD’s Many Names**

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

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

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7 Id.

Many veterans have taken issue with the term, Post-Traumatic Stress Disorder. One modern veteran is quoted as saying "PTSD is a name drained of both poetry and blame." That veteran prefers "soldier's heart," because it is "a disorder of warriors, not men and women who were weak or cowardly but . . . who followed orders and who, at a young age, put their feelings aside and performed unimaginable tasks."10

C. Psychiatric Casualties in 20th Century Wars

According to Lieutenant Colonel David Grossman, a West Point professor and recognized expert on the psychological effects of combat, “[c]ombat, and the killing that lies at the heart of combat, is an extraordinarily traumatic and psychologically costly endeavor that profoundly impacts all who participate in it . . . Psychiatric breakdown remains one of the most costly items of war when expressed in human terms.11 Indeed, for the combatants in every major war fought in this century, there has been a greater probability of becoming a psychiatric casualty than of being killed by enemy fire.12

World War I was a watershed period when the effects of “combat stresses” began to be recognized.13 It was only in World War I that armies began to experience months of 24-hour combat, leading to vast numbers of psychiatric casualties.14

During World War II, 504,000 men were lost from America’s combat forces due to psychiatric collapse—enough to man 50 divisions.15 At one point in World War II, psychiatric casualties were being discharged from the U.S. Army faster than new recruits were being drafted in.16 A World War II study of U.S. Army combatants on the beaches of Normandy found that after 60 days of continuous combat, 98% of the surviving soldiers had become psychiatric casualties.17

The Vietnam War, with its unpredictable “guerrilla” nature and lack of public support is believed to have generated even higher rates of psychological injuries. Though

9 Tick, supra note 6, at 99 (quoting George Hill, a disabled Marine).
10 Id.
12 Id.
14 Grossman & Siddle, supra note 11.
15 Id.
16 Id.
17 Id.
experts debate the numbers, among the 3.5 million Americans who served in Vietnam, estimates of psychiatric casualties range from 1,000,000 to 1,500,000 cases.\textsuperscript{18}

Twentieth century democracies have been better than most at admitting and dealing with their combat psychiatric casualties. Information from non-Western sources is extremely limited, but we now know that America’s experience is representative of a universal cost of modern, protracted warfare.\textsuperscript{19} Nations around the world have experienced similar mass psychiatric casualties, but many have simply driven these casualties into battle at bayonet point, shooting those who refused or were unable to continue.\textsuperscript{20}

\textbf{D. PTSD Today}

PTSD was not formally recognized by the psychiatric community and, more importantly, the Veterans Administration, until 1980, too late for many psychologically injured Vietnam veterans. Their lives and their trust in the system were often shattered by that time and many refused treatment when and if it was eventually offered. Ultimately, 31 percent of male Vietnam veterans and 27 percent of female Vietnam veterans have had PTSD in their lifetime.\textsuperscript{21}

\textbf{1. PTSD’s Stigma}

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

\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
into peace. Only when the warrior was ready to reunite with the tribe, and the tribe with the warrior, did the reunion occur.\textsuperscript{22}

Industrialized nations and their militaries have historically taken a tougher approach with the psychologically injured. Soldiers suffering psychological injuries have often been stigmatized and even punished. During WWII, General George Patton famously struck at least two psychologically injured soldiers he came across in Army hospitals, calling them cowards and malingerers. The press picked up on the story, causing a swell of anger among the American people and Patton was nearly relieved of his command.\textsuperscript{23}

Some psychologically injured troops received the ultimate punishment. The British government recently issued posthumous pardons to 306 of its soldiers from World War I who were executed without trial at the battlefront for cowardice or desertion, recognizing today that they likely suffered from PTSD.\textsuperscript{24}

Not only were psychological injured soldiers killed during WWI, they were also tortured. Dr. Lewis Yealland working at a French hospital was taking over treatment of a 24 year old private who had received nine months worth of the following types of treatment for war-related mental illness: “he had been strapped in a chair for 20 minutes at a time while strong electricity was applied to his neck and throat; lighted cigarettes had been applied to the top of this tongue and hot plates had been placed at the back of his mouth.”\textsuperscript{25} The goal of such treatment was “necessary to supply the disciplinary element which must be invoked if the patient is one of those who prefer not to recover.”\textsuperscript{26} Dr. Yealland apparently believed that the failures of this young private’s treatment were only the result of too little electro-shock therapy. Speaking of his own treatment of the private, he said “after a few more hours of electricity the patient could say ah, then whisper, then stammer. But just when it seemed to be working, the patient developed a tremor in his left

\textsuperscript{22} GROSSMAN \& SIDDELE, supra note 11, at 210–16.
\textsuperscript{24} Richard Norton-Taylor, Executed WWI Soldiers to be Given Pardons, GUARDIAN, Aug. 16, 2006, at 1.
\textsuperscript{26} Id. at 76–77.
arm. This too was attacked by electricity, but before it disappeared it had to be chased from the right arm, left leg, and finally the right leg with each part similarly treated.”

In the aftermath of WWII, the United States’ VA was guilty of similar treatment of our veterans. The VA had 102,000 hospital beds full and 20,700 patients in waiting, 60 percent of which were in need of psychiatric care. Maintaining these patients could cost as much as $35,000 per year, but George Washington University professor Walter Freeman created the ice pick lobotomy to be able to treat certain psychoses. Doctors would use “a hammer to tap a modified ice pick through the patient’s eye socket and into the prefrontal lobe, which was then severed from the rest of the brain.”

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

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

Though the military is making progress in removing the stigma, it still has a long way to go. The military is under unprecedented strain as it struggles to meet the demands of two extended conflicts. Military leaders are often caught between a rock and a hard place. Though they are now trained to recognize and encourage treatment of mental health disorders, they are also under pressure to field combat-effective units. Sometimes they relegate mental health treatment to a secondary priority. A series of 2007 media reports

27 _Id._ at 78 (emphasis added).
29 _Id._ at 54–55.
30 _Id._ at 54.
found systemic failures in mental health treatment of psychologically injured troops at Ft. Carson, Colorado.\textsuperscript{31} The reports found a pattern by leadership of denying their troops’ requests for treatment, stigmatizing those who were getting help and even kicking some out of the military. The reports spurred investigations by Congress and the Department of Defense, which confirmed remaining flaws in the military mental health system.\textsuperscript{32}

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

This “warrior” mindset becomes deeply ingrained and many psychologically injured warriors deny they have a problem, even to themselves. The RAND Corporation study, cited above, found that, of the one third of Iraq and Afghan vets who admitted PTSD or TBI-related issues, less than half had sought help. According to RAND, those veterans who declined help did so out of fear that they will lose the respect of their comrades, jeopardize their security clearance, or harm their chances of promotion.\textsuperscript{33} Many veterans carry this value system with them even after they leave the military and come home.

\section{2. Iraq and Afghan Veterans}

More than 1.8 million Americans have now served in Iraq or Afghanistan. A recent RAND Corporation study found that over 300,000 of those troops report symptoms of PTSD, 300,000 more suffer from TBI.\textsuperscript{34} Less than half of these troops had reported or sought help for their condition.\textsuperscript{35}

The vast majority of Vietnam veterans served a single 12-month tour in-country while many veterans of Iraq/Afghanistan will have served two, three, four or more tours.

\textsuperscript{33}\textit{INVISIBLE WOUNDS OF WAR}, supra note 2.
\textsuperscript{34}\textit{Id.}
\textsuperscript{35}\textit{Id.}

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"People aren’t designed to be exposed to the horrors of combat repeatedly. And it wears on them,” General George Casey, then-Army Chief of Staff, stated in a 2008 press conference. General Casey was announcing the results of a recent Army study, which found that levels of PTSD climb significantly with repeated combat deployments.

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

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

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

Unfortunately, the Veterans’ Administration (VA) was not initially provided sufficient additional funding to handle the large influx of Iraq and Afghan vets seeking PTSD treatment. Several highly publicized scandals, one of which involved a Minnesota Marine who killed himself after reportedly being turned away from a VA hospital, have forced the government to significantly increase resources toward necessary psychological care. Today, care for our psychologically injured veterans is improving.

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37 Id. (citing Mental Health Advisory Team (MHAT) V, supra note 3).
38 Charles W. Hoge et al., Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care, 351 NEW ENG. J. MED. 13, 18 (2004).
III. Links Between Combat Trauma and Criminal Behavior

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

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

Following the American Revolutionary War, one author noted a marked increase in crime that caused many states to institute new laws and penalties in response.40 A Revolutionary veteran, describing conditions in South Carolina after the war, wrote, “highway robbery was a common occurrence, and horse-stealing so frequent that the Legislature made it a crime punishable with death.”41

Studies conducted after the Civil War, World War I and World War II found a disproportionate number of veterans in the criminal justice system. Following the Civil War a great wave in crime and disorder was documented.42 One prison in Pennsylvania reported a large influx of prisoners in the last three months of 1865, “most in poor physical condition, and nine-tenths incapacitated and demoralized by the war.”43 In 1866 they reported an unprecedented influx, three-fourths of whom had fought in the war and were “shattered” by their experiences.44 Nationwide, in 1866 two-thirds of all commitments to state prisons in northern states were men who had seen service in the war.45

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

41 Id. (citing JOSEPH JOHNSON, TRADITIONS AND REMINISCENCES 400 (1851)).
42 Edith Abbott, Crime and the War, 9 J. AM. INST. CRIM. L & CRIMINOLOGY 41 (1918).
43 Id. at 43.
44 Id.
The war has destroyed with a hand more desolating than the Black Death or the most terrible plagues of history. But its consequences do not end with destruction. The people who have taken serious part in it are not the same people as those who went into it. . . . They are changed peoples. They have passed through an experience which has altered habits, temper, outlook, in five years, more than fifty years of ordinary life would have altered them. Some of the consequences of that experience are obviously bad. The epidemic of crimes of violence is the natural sequel of war, for men learn in that school to think little of life. The same increase of crime of this kind followed the Napoleonic Wars both here and in France.\textsuperscript{46}

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

Last year saw the ending of the War. From England to France, and in our own country, statistics have been gathered which show that serious crime, which had been on the decrease during the period of the War was again stalking in the foreground. . . . The newspapers are filled with accounts of crimes of such daring and boldness as to make the average citizen stand aghast at the manner in which the security of life and rights of property are ruthlessly disregarded and imperiled."\textsuperscript{47}

A study entitled \textit{Military Service and Criminality},\textsuperscript{48} published in 1952, a few years after WWII, tallied the number of men committed to 11 prisons in the upper-Midwest during 1947, 1948 and 1949 and found that fully one third of them were veterans. Similarly, a study of Vietnam veterans receiving care for PTSD in the VA system during the mid-1980's found that almost half of all Vietnam veterans suffering from PTSD had been arrested or in jail at least once, 34.2 percent more than once, and 11.5 percent reported being convicted of a felony.\textsuperscript{49}

In the case of the Vietnam generation, involvement in the criminal justice system has lingered for decades. A 1998 Department of Justice study found that more than 20


\textsuperscript{47} Betty Rosenbaum, \textit{The Relationship Between War and Crime in the United States}, 30 J. CRIM. L. & CRIMINOLOGY, 730 (1940) (citing Hugo Pam, Annual Address of the President of the Institute of Criminology, 10 J. OF AM. INST. OF CRIM. L. & CRIMINOLOGY 327 (1919)).


years after the war, approximately a quarter million veterans, a large portion from the Vietnam era, were still housed in our nation’s prisons.50

Those who attempt to deny the link between war trauma and crime often cite this same 1998 Department of Justice study cited above, pointing out that veterans are imprisoned in smaller percentages than the civilian population. What they overlook, however, is that since WWI, the military has aggressively screened out those it deems psychologically or morally unfit. During the call-up for World War II, for instance, 1,681,000 men were rejected and excluded from the draft for emotional, mental, or educational disorders or deficiencies.51 Another 500,000 were subsequently separated from the Army during training on psychiatric or behavioral grounds.52 This recruit screening continued through Vietnam and into our current conflicts. Thus, any direct comparison of incarceration rates between veterans and the civilian population is flawed. Given the military’s screening, the fact that veterans are incarcerated at even close to the same rates as the civilian population is alarming and is prima facie evidence that military service, itself, played a role.

The most recent and definitive tie between combat trauma and criminal behavior comes from the military, itself. In 2009, following a highly-publicized wave of homicides and other violent crimes committed by recently-returning combat soldiers on and around Fort Carson, Colorado, the Army commissioned a study called the Epidemiological Consultation, or EPICON, for short.53

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

51 Marlowe, supra note 13, at 48.
52 Id.
The EPICON team, first, found that violent crime among the soldiers at Ft. Carson was well outside normal levels of crime in civilian society. The murder rate for Ft. Carson had doubled since the start of the Iraq war. Rape arrests had tripled and stood at nearly twice the rate of other Army posts.54

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

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

The EPICON study also concluded that the crimes reported on and around Ft. Carson were just the tip of the iceberg. Of the Ft. Carson soldiers surveyed, 40% reported choking, beating, kicking, or pointing a gun at someone—in other words they had committed some kind of felony assault.55

In the end, the EPICON team found two major factors contributed to post-deployment violent behavior: (1) repeated deployments and (2) the intensity of combat in those deployments. The study concluded with a carefully worded assertion that “[s]urvey data from this investigation suggest a possible association between increasing levels of combat exposure and risk for negative behavioral outcomes.”56 In other words, the military finally confirmed what civilian sociologists had long believed: combat contributes to crime. Soldiers come home different. By sending young men and women to war, a country is unintentionally bringing violence back on itself.

Closely linked to the criminal justice system is the homeless population. A 2006 study found that fully 24% of Minnesota’s male homeless population are veterans. More than

54 Id. at 10–11.
55 Id. at 12–13.
56 Id. at 18.
half of those homeless veterans were deemed to have a “serious mental illness.”

Nationally,

An estimated 136,334 veterans spent at least one night in an emergency shelter or transitional housing program between October 1, 2008 and September 30, 2009. This accounts for 1 of every 168 veterans in the U.S. or 1 out of every 10 veterans living in poverty.

This statistic illustrates just how difficult it can be for veterans to make the transition from military to civilian life.

**B. Military Total Institution and Combat Psychological Conditioning**

In addition to the psychological toll of warfare, the training and conditioning used to prepare our veterans for combat may also be relevant to criminal behavior,

In order to fully understand the complexities associated with a veteran’s risk for chronic mental health problems (e.g., PTSD) it is necessary to consider the role and function of military training and the total institution (an area that has enjoyed research immunity in the area of PTSD), contributing static variables, and the more opaque dynamic variables, which include the psychological “software” installation and manipulation procedures employed during the training processes in the military total institution.

In order to ensure success and survival on the battlefield, the US military has a culture and training program that encourages immediate and violent reactions to threats. Nowhere is this clearer than the military’s attitude toward killing, “Killing another human being, for example, is considered an unnatural act in the civilian environment. In the military, killing is viewed differently – killing becomes a more natural act that enhances the likelihood of survival and advances the probability that the military will succeed in its mission.”

To overcome the human aversion to killing and ensure performance under the stress of combat, the armed forces must condition the service members to follow orders even in the most tragic situations. To this end, the military has grown to be what the sociologist Erving Goffman coined as a “total institution,” which is a place of work and

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60 Id. at 18.
residence where a great number of similarly situated people, cut off from the wider community for a considerable time, together lead an enclosed, formally administered round of life. As experienced by service members,

The United States military system meets many of the criteria set forth in Goffman’s *total institution* model. The individual’s entire being is devoured and controlled in a total institution environment. This environment undercuts the person’s individuality, disregards the individual’s dignity, and results in a regimentation of life that typically disregards his or her desires or inclinations. Short of going AWOL (Absent Without Leave) or desertion, the total institution significantly restricts the options for military personnel until their contractual agreement expires (discharge) – or until she or he is dead.61

Given this military total institution, the training and conditioning the military puts the service member through has powerful and lasting effects. This training often is expertly designed to overcome the service members’ reluctance to commit violent or aggressive acts in order to ensure they will kill the enemy or take other aggressive action when the need arises. This is good for the service member because it helps ensure survival in combat. But, since veterans are not deprogrammed as they leave the military, this will, of course, lead some veterans to rely on these violent and aggressive instincts even after they have left the military, causing terrible problems in their civilian lives. The power of these effects are so significant that, through thorough sociological research, Dr. William Brown found that there is very little dissimilarity between criminally-involved veterans and veterans with no criminal offenses in terms of alcohol use, attitudes about killing, relational problems, and illegal behavior.62

C. How Combat Trauma Sometimes Manifests in Criminal Behavior

Combat trauma can be linked to criminal behavior in two primary ways. First, symptoms of PTSD can incidentally lead to criminal behavior. Second, offenses can be directly connected to the specific trauma that an individual experienced.63 Many symptoms

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61 *Id.* at 18-19 (citing, ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961)).
of PTSD can lead to behaviors likely to result in criminal behavior and/or sudden outbursts of violence. Individuals with PTSD are often plagued by memories of the trauma, chronically anxious, and unable to sleep without terrifying nightmares. They often self-medicate with drugs and alcohol in an attempt to calm their nerves and sleep. The emotional numbness many trauma survivors experience can lead the survivor to engage in sensation-seeking behavior in an attempt to experience some type of emotion. Some combat veterans also may seek to recreate the adrenaline rush experienced during combat. “Hypervigilance,” feeling the need to be always “on guard” can cause veterans to misinterpret benign situations as threatening and cause them to respond with self-protective behavior. Increased baseline physiological arousal results in violent behavior that is out of proportion to the perceived threat. It is common for trauma survivors to feel guilt and to resort to self-destructive behaviors, which can sometimes lead them to commit crimes that will likely result in their apprehension, punishment, serious injury, or death.\textsuperscript{64}

A particular traumatic stressor can lead an individual suffering combat trauma to commit a specific crime in three primary ways. First, crimes at times literally or symbolically recreate important aspects of a trauma. The second way that traumatic stressors can be linked to specific crimes is that environmental conditions similar to those existing at the time of the trauma can induce behavior similar to that exhibited during the trauma, in particular, violent responses. The final way that traumatic stressors can be linked to specific crimes is that life events immediately preceding the offense can realistically or symbolically force the individual to face unresolved conflicts related to the trauma. This creates a disturbed psychological state in which otherwise unlikely behaviors emerge.\textsuperscript{65}

\textsuperscript{64} Id.
\textsuperscript{65} Id.
IV. Special Problems in Dealing with Combat Veterans in Criminal Court

A. Failure to Recognize Invisible Injuries

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

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

B. Superman Syndrome

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

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

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

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

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

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

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

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

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

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

V. Minnesota’s Approach

A. Veterans Sentencing Legislation

In 2007 and 2008, this writer and a small group of other veterans drafted and passed legislation that addresses deficiencies in the way the Minnesota’s criminal courts deal with psychologically-injured veterans.66 The new law is designed to ensure that a mental health diagnosis and available treatment options are taken into account in sentencing a veteran whose combat trauma played a role in his or her criminal offense. The law does not force a judge to do anything in a particular case, rather, it gives the judge

66 Minn. Stat § 609.115 Subd 10.
the tools to make an informed decision, recognizing that treatment and probation is often preferable to a single stint of incarceration in getting to the root of the problem and ensuring long term public safety. This is not a “get out of jail free card” for veterans. Completion of treatment is a condition of probation and failure to follow through can result in jail.

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

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

The language of the new Minnesota law reads as follows:
(a) When a defendant appears in court and is convicted of a crime, the court shall inquire whether the defendant is currently serving in or is a veteran of the armed forces of the United States.
(b) If the defendant is currently serving in the military or is a veteran and has been diagnosed as having a mental illness by a qualified psychiatrist or clinical psychologist or physician, the court may:
   (1) order that the officer preparing the report under subdivision 1 consult with the United States Department of Veterans Affairs, Minnesota Department of Veterans Affairs, or another agency or person with suitable knowledge or experience, for the purpose of providing the court with information regarding treatment options available to the defendant,
including federal, state, and local programming; and

(2) consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing sentence.67

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

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

California veterans and criminal justice advocates led a similar initiative that resulted in passage of a similar law during California’s 2007 legislative session. The California law provides judges with a basis to depart from presumptive prison sentences in case involving veterans with PTSD. Veterans are professionally screened for PTSD and, if suitable, are ordered to treatment in lieu of prison or jail.68

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

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

**B. Veterans Treatment Court Established in Minneapolis**

Minnesota took its next major step in its new approach to veterans in the justice system when it launched the Hennepin County Veterans Court in July, 2010. This new specialty court brings an unprecedented level of expertise and resources to bear to assist troubled veterans in getting back on their feet, recognizing that treatment and probation is often preferable to a single stint of incarceration in getting to the root of the veteran’s problem and ensuring long term public safety.

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

With help, many troubled veterans can get back on their feet and stay there, putting their life experiences to work and becoming assets to their communities. Untreated, many will continue to act out for the rest of their lives, destroying their families, presenting an ongoing threat to public safety and a financial burden to their communities. The choice is ours.
Brockton Hunter is a Minneapolis-based attorney. Prior to becoming an attorney, Brock served in the U.S. Army as a Recon Scout and now represents many veterans who find themselves charged with criminal offenses. In 2008, Brock drafted and led passage of Minnesota’s Veterans Sentencing Legislation. He has since been recognized nationally for his work on behalf of veterans in the criminal courts, helping to brief the Obama Presidential Transition Team, speaking before leadership of the Department of Defense and Department of Veterans Affairs, and training thousands of judges, prosecutors, defense attorneys and law enforcement officers. Brock is also the lead editor and co-author of the forthcoming book, The Attorney’s Guide to Defending Veterans in Criminal Court – www.veteransdefensebook.com.