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RECLAIMING THE REHABILITATIVE ETHIC IN MILITARY JUSTICE: THE SUSPENDED PUNITIVE DISCHARGE AS A METHOD TO TREAT MILITARY OFFENDERS WITH PTSD AND TBI AND REDUCE RECIDIVISM

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Preface

After ten years of sustained combat operations, a legal system has emerged in response to the special needs of servicemembers who have sustained Posttraumatic Stress Disorder (PTSD) and other unseen injuries in combat. Recognizing that these wounded warriors experience symptoms that often manifest in criminal conduct, this justice system incorporates advanced “problem-solving” strategies in its sentencing practices. It provides offenders with a second chance to escape the disabilities of a conviction by dismissing or expunging their charges upon successful completion of a demanding treatment program. In contrast to the problem-solving approach, an alternative justice system adjudicates cases for combat veterans with the same mental conditions. However, it considers treatment as collateral to the sentencing task. In this second system, the prosecutor diminishes the wounded warrior’s injuries and experiences in efforts to downplay the bases for mitigation and extenuation. While one would expect courts-martial to foster the

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problem-solving approach based on the active duty origin of these mental conditions, the initial legal approach resides exclusively in the domain of civilian Veterans Treatment Courts (VTCs).

As it relates to offenders with these unseen injuries, the military justice system is at odds with more than VTCs; it is at odds with itself—in the way it undermines the stated sentencing philosophy of rehabilitation of the offender, the way it erodes the professional ethic by denying core values, and the way it defies the moral obligation to advance the interests of both the veteran and the society he will rejoin. By perpetuating the belief that treatment has no place in military sentencing, the military justice system also undermines Major General (MG) Enoch Crowder's very basis for instituting the suspended court-martial sentence at the time of its origin in the early 1900s. In contrast to problem-solving courts, which target the illness underlying criminal conduct, courts-martial function as problem-*generating* courts when they result in punitive discharges that preclude mentally ill offenders from obtaining Veterans Affairs (VA) treatment. Such practices create a class of individuals whose untreated conditions endanger public safety and the veteran as they grow worse over time.

This article proposes convening authority clemency as a method to implement treatment-based suspended punitive discharges for combat-traumatized offenders. Without re-writing the law, military justice practitioners can make slight modifications to their practices that promote intelligent sentencing consistent with the historical notion of the "second chance." Recognizing that panels, military judges, and convening authorities have consistently attempted to implement treatment-based sentences, this article proposes a comprehensive framework to embody the innate rehabilitative ethic in military justice. Carefully drafted pretrial agreement terms indicate how offenders can enroll in existing VTCs within the convening authority's jurisdiction. A modified Sentence Worksheet provides an additional section alerting panel members to their right to recommend treatment-based suspended sentences. Specially tailored panel instructions expand on this system by addressing treatment considerations. At a time when both The Commander-in-Chief and a Chairman of the Joint Chiefs of Staff have endorsed VTCs, military justice practitioners should consider the ways in which these programs promote individualized sentencing, protect society, and honor the sacrifices of wounded warriors with unseen injuries.

I. Introduction: Divergent Approaches in the Sentencing of Similarly Situated Offenders with PTSD

*The following hypothetical account mirrors actual events now unfolding across the United States.*¹

Sergeant Bradley Davis greets his mentor on the stairs of the Merle County Court Building, a relatively simple structure that looks identical to the other tall, nondescript buildings at the intersection of East 23rd and Vineland. This is the second time Davis has met Mr. Paul Phillips, a retired Air Force Lieutenant Colonel, who volunteers to provide support, encouragement, and counseling to veterans who have been charged with criminal offenses.² “After you check in with the Veterans Affairs representative, you’ll sit with the other veterans who are on the docket. You can clap for them when they are praised by the judge; they’ll do it for you—that’s the way it works here.”³ In twenty minutes, Sergeant

¹ While the depicted locations—a county Veterans Treatment Court (VTC) and a military courtroom located thirty miles apart—are purely fictional, they easily reflect El Paso County, Colorado’s VTC, located only 7.82 miles from Fort Carson’s courtroom, WWW.MAPQUEST.COM (calculating the distance between the El Paso County’s Veterans Treatment Court, 270 South Tejon, Colorado Springs, Colo. 80901, and Fort Carson’s Courtroom, 1633 Mekong Avenue, Fort Carson, Colo. 80913); El Paso, Texas’s VTC, located only 6.03 miles from Fort Bliss’s courtroom, WWW.MAPQUEST.COM (calculating the distance between the El Paso County’s Court, 500 E. San Antonio, El Paso, Tex. 79901, and Fort Bliss, Tex. 79906); Orange County, California’s VTC, located 58.76 miles from Camp Pendleton Marine Base, WWW.MAPQUEST.COM (calculating the distance between the Orange County Court, 700 Civic Center Drive West, Santa Ana, Cal. 92701, and Camp Pendleton Marine Base, Cal. 92055); and Tucson, Arizona’s VTC, located only 7.51 miles from Davis-Monthan Air Force Base’s courtroom, WWW.MAPQUEST.COM (calculating the distance between the Tucson City Court, 103 E. Alameda Street, Tucson, Ariz. 85701, and Davis-Monthan Air Force Base, Ariz. 85707). These are only a few representative examples of numerous civilian VTCs operating in states with active duty installations from one or more of the Armed Forces. See generally Nat’l Ass’n of Drug Court Prof’ls, *Justice for Vets: The National Clearinghouse for Veterans Treatment Courts*, WWW.NADCP.ORG, <http://www.ndacp.org/JusticeForVets> (last visited Sept. 7, 2011) (listing established VTCs throughout the Nation). For a graphic depiction of VTCs in the United States, see *infra* app. A.

² Peer mentorship is an essential component in every VTC. See, e.g., Hon. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 565 (2010) (observing the undeniable value of “shared experience” and noting that some VTCs may “restrict participation to military veterans who have served in or near areas of active combat”).

³ This description summarizes the common experience of participants in most VTCs, who are praised and encouraged in a number of ways. In Judge Wendy Lindley’s Orange County chambers, for example, members of the veterans docket rise for applause and encouragement as their names are called. Observers remark, “There’s a lot of clapping in

Davis observes the practice with his own eyes. Judge David Shaw is a district judge who presided over a substance abuse treatment court before adopting a docket solely devoted to veterans.⁴ Judge Shaw welcomes Sergeant Davis and thirty other veterans to the day's session of the Merle County VTC, an innovative court program, modeled after at least 88 similar programs in 27 states.⁵ After Sergeant Davis rises to the call of

Lindley's veterans court." Megan McCloskey, *Veterans Court Takes a Chance on Violent Offenders*, STARS & STRIPES, Sept. 14, 2010, WWW.STRIPES.COM, <http://www.stripes.com/veterans-court-takes-a-chance-on-violent-offenders-1.118182>. In Judge Mike Snipes's Dallas, Texas, VTC, he provides praise to Air Force veteran Carlos Melendez, who remained clean on drug tests and has held gainful employment since his entry, "You're probably our No. 1 success story." Sam Merten, *Running on "Bubble Gum and Duct Tape," A New Court Aims to Keep Damaged Vets Out of Jail*, DALLAS OBSERVER (Tex.), Oct. 7, 2010, WWW.DALLASOBSERVER.COM, <http://www.dallasobserver.com/2010-10-07/news/running-on-bubble-gum-and-duct-tape-a-new-court-aims-to-keep-damaged-vets-out-of-jail/>. Yet, VTC judges also impose sanctions for noncompliance with individual treatment plans, like "jail therapy"—brief incarceration without the right to appeal—which is another hallmark of Veterans Treatment Courts. *Id.* (citing Judge Snipes). As Judge Wendy Lindley explained to a noncompliant veteran in her court,

[D]on't give me any garbage about how you were in the room and someone else was smoking marijuana, because that doesn't cut it. I really need you to examine yourself as to why you thought it was a better option to lie than to just own up to it and deal with it. You are going to get an overnight, you'll get out tomorrow at 6:00 a.m.

The Situation Room (CNN television broadcast Oct. 28, 2010).

⁴ While some state statutes do not require VTC judges to have particular prior experience, many of the presiding judges have already maintained mental health or drug court dockets. *See, e.g.*, Hawkins, *supra* note 2, at 564 (recognizing that many VTCs are either "springing out of or even part of existing drug treatment courts").

⁵ R. Norman Moody, *Veterans Court Focuses on a Trend of Treatment: Center Seeks Behavioral Help for Vets Who End Up on Wrong Side of Law*, FloridaToday.com (Jan. 10, 2012 9:02 AM), <http://www.floridatoday.com/article/20120111/NEWS01/301110012/Veterans-court-focuses-trend-treatment> (observing that "88 [VTCs] have been established nationwide in the past four years"). *See also* Telephone Interview with Major (Ret.) Brian Clubb, Veterans Treatment Court Project Dir. for the Nat'l Ass'n of Drug Court Prof'ls (Sept. 6, 2011) (further estimating that there will be 100 VTCs in operation at the start of 2012 based on current trends). United States Circuit Judge Michael Daly Hawkins, of the 9th Circuit Court of Appeals, observes how VTCs, which are continually growing in number, are "becoming a fixture of many state criminal justice systems." Hawkins, *supra* note 2, at 571. Although there are now over 2400 drug treatment courts in operation nationally, General (Ret.) Barry McCaffrey, who has been influential in supporting VTCs, observes that "Veterans Treatment Courts are growing at three times the rate Drug Courts grew twenty years ago." JUSTICE FOR VETS, SITREP 005-10 (Nov. 11, 2010) [hereinafter Justice SITREP], available at NADCP.ORG, http://www.nadcp.org/sites/default/files/nadcp/SITREP%20005-10%20FINAL_2.pdf. Buffalo's program and other states' VTCs have also paved the way for congressional

his name and assumes the customary position of parade rest like the other program participants,⁶ Judge Shaw introduces the program. “Here,” he explains, “we will work with you to get you the treatment that you need. All we ask is that you give your treatment plan a chance to work. The district attorney, social workers, and your mentor are here with me to help you get through your treatment and gain the skills to use for the rest of your life.”⁷ Sergeant Davis is relieved and grateful to be a part of the program, especially because he expected an entirely different experience.

Sergeant Davis, who served three combat tours in the last nine years, including a 2008 rotation in Bagram, Afghanistan, is in court for driving while intoxicated, child endangerment, and resisting an officer—offenses stemming from an incident in which Davis grabbed his son and drove from the house in an alcoholic stupor while haunted by memories of a

legislation to fund the establishment of additional courts across the Nation. Notably, the Services Education & Rehabilitation for Veterans (SERV) Act, S. 3379, 110th Cong. § 11 (2008), reintroduced as S. 902, 111th Cong. § 11 (2009), would provide \$25 million in annual grant funding for the development of local veterans treatment programs, limited to participants who are not charged with crimes of violence and who were separated from the service under conditions above dishonorable. *See also* Services, Education, and Rehabilitation for Veterans Act, H.R. 2138, 111th Cong. (2009) (proposing parallel legislation in the House).

⁶ Along with the respectful comments “Yes sir,” or “Yes ma’am,” observers of VTCs instantly recognize the ingrained customs and courtesies of defendants like Sergeant Davis as factors that make them distinguishable from offenders in different programs. *See, e.g.*, Neil Steinberg, *Veterans Court Assists Vets the Rest of Us Forget*, CHI. SUN-TIMES, Nov. 10, 2010, at 20 (relating the observations of Cook County, Ill., VTC Judge John P. Kirby, that program participants’ “service to the country implies that—at least at one point—they had more on the ball than the average street criminal”). To many, this practice is a refreshing reminder that veterans bring a different perspective to court treatment programs. Based on military service eligibility criteria, most veterans are far more educated and experienced than the repeat offenders who normally occupy criminal courts. LYNN K. HALL, COUNSELING MILITARY FAMILIES: WHAT MENTAL HEALTH PROFESSIONALS NEED TO KNOW 28 (2008) (“[T]he ranks are filled with the upwardly mobile working class, 96% of whom graduated from high school, compared to only 84% of the rest of Americans.”). Many, in fact, have had no prior criminal arrests or convictions before returning from their deployments. *See, e.g.*, Lewis Griswold, *Move for Veterans Courts Increasing: Program Bypasses a Jail Sentence in Favor of Mental Health Treatment*, MODESTO BEE (Cal.), June 27, 2010, at B7 (describing prosecutors’ recent observations of “an upsurge in [2010] in veterans being arrested for vandalism, drug use, and domestic violence, yet their backgrounds showed no history of wrongdoing before going to war”).

⁷ For a real VTC judge’s introductory statements, see, e.g., Jack Leonard, *Plan Aims to Help Veterans Avoid Jail*, L.A. TIMES, Sept. 14, 2010, at AA1 (reporting comments of Superior Court Judge Michael A. Tynan, “This is not a get-out-of-jail-free card. Your issues may or may not be your fault, but your recovery is totally your responsibility.”).

deadly ambush in which his squad suffered several casualties.⁸ After his civilian arrest within the county lines, the public defender recognized that these sorts of charges were common among returning veterans and believed he would be a prime candidate for the VTC.⁹ Like some federal

⁸ In a similar series of events, former Marine Marty Gonzalez, a recipient of three purple hearts and two bronze stars with valor for actions in Iraq, faced felony charges for abusing pain pills during marital difficulty and driving his truck into a house while his three-year-old son was a passenger. His case formed the impetus for Houston, Tex., Judge Marc Carter to develop a VTC there. See “Uniform Justice,” *Need to Know* (PBS television broadcast July 9, 2010), available at www.pbs.org/wnet/need-to-know/culture/uniform-justice/2135/. Servicemembers suffering from Posttraumatic Stress Disorder (PTSD) commonly become excitable in response to recurring traumatic memories. Triggering events include being cut-off by a vehicle on the road, perceiving that someone is staring-down the veteran, or even seeing a Middle-Eastern person. THE GROUND TRUTH (Focus Features 2006) (featuring firsthand accounts of veterans with PTSD who explained the situations that caused them to become physically violent). Other triggers commonly include the anniversary dates of traumatic events or news of other servicemembers killed in action. KEITH ARMSTRONG ET AL., COURAGE AFTER FIRE: COPING STRATEGIES FOR TROOPS RETURNING FROM IRAQ AND AFGHANISTAN AND THEIR FAMILIES 17–18 (2006). They often turn to alcohol in an effort to blunt the emotional effects of such reminders or simply to sleep. See, e.g., THE GROUND TRUTH (Focus Features 2006). Criminal conduct often stems from incidents that occur while veterans with PTSD are in these excitable states or subject to bouts of alcoholic rage. In response to this widespread and growing phenomenon, law enforcement officers have adopted specialized programs to divert persons with conditions like PTSD to mental health centers rather than jails. See *infra* discussion accompanying note 70.

⁹ Although VTCs have different eligibility criteria, aggravated assault is an offense that commonly leads to enrollment in such programs. See, e.g., McCloskey, *supra* note 3 (describing how the Orange County, Cal., VTC accepted cases “involving a veteran who had been shot in Iraq and was charged with domestic violence for dragging his wife out of the house by her ankles” and in which a former Marine struck a man repeatedly in the face, leaving him with \$14,000 in medical bills); Vezner, *supra* note 2 (describing VTC participation by a veteran who was arrested for drunk driving and had “clipped a police officer’s arm with one of his truck’s side mirrors,” all “while driving the wrong way on a Minneapolis street at night”); Merten, *supra* note 3 (describing VTC participation by a “22-year-old charged with stealing a car from a 77-year-old man after putting him in a headlock and demanding the keys . . .”). See also Justin Holbrook & Sara Anderson, *Veterans Courts: Early Outcomes and Key Indicators for Success* 26 (Widener Law Sch. Legal Studies Research Paper Series No. 11-25), available at <http://ssrn.com/abstract=1912655> (observing how “eligible offenses [in 14 surveyed VTCs] included DUI, fleeing from police, terroristic threats, and misdemeanor and felony domestic assaults”). In Orange County and some other VTCs, violent cases are not precluded from diversion because “combat veterans’ PTSD issues often manifest in aggressive behavior.” McCloskey, *supra* note 3.

Some have gone further to suggest that precluding violent offenders in VTCs is like having “a Veterans Court without veterans.” John Baker, *We Need Veterans Courts in Minnesota. Here’s Why*, ST. PAUL PIONEER PRESS (Minn.), Aug. 28, 2010 (further observing that “domestic-abuse . . . , bar fights, assault and battery, hit and run cases that result in injury, and DWI cases that result in injury” are largely “the types of cases that

civilian courts have begun to do in recent times,¹⁰ Davis's attorney transferred the case to Judge Shaw's Court with the support of the court's treatment team.¹¹

Sergeant Davis's cautious expectations were based on the experiences of fellow soldiers stationed only thirty miles away at Fort Ligget-Jordan, the home of the 128th Division. On this same day in Ligget-Jordan, Staff

bring veterans into the criminal justice system in the first place"). *See also* Jillian M. Cavanaugh, Note, *Helping Those who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 *NEW ENG. L. REV.* 463, 466 (2011) (observing how violent veteran offenders "are the ones most in need of rehabilitation"); Tiffany Cartwright, "To Care for Him who Shall Have Borne the Battle": *The Recent Development of Veterans Treatment Courts in America*, 22 *STAN. L. & POL'Y REV.* 295, 309 (2011) ("[T]he common limitation to non-violent crimes might fence out many of the veterans whose crimes are most tied to their combat trauma."). When VTCs do enroll violent offenders, many programs can, and do, require victim input prior to the admittance decision. *See* Holbrook & Anderson, *supra*, at 26 (observing how, "[o]f the ten courts [in a sample of 14 VTC respondents] that heard violent offenses, seven courts (70%) required prior victim consent").

¹⁰ *See infra* Part VIII.B (describing the program established by the U.S. Attorney's Office in the Western District of New York to send offenders to the Buffalo VTC, even if they committed exclusively federal offenses).

¹¹ All VTCs use team approaches in which the judge and members of various professional disciplines collaborate in the participant's course of treatment. *See, e.g.*, Katherine Mikkelson, *Veterans Courts Offer Hope and Treatment*, *PUB. LAW.*, Winter 2010, at 2, 3 (describing the "unique" team format "consisting of the veteran and his or her family, the defense attorney and prosecutor, court staff, mental and physical health care professionals, VA staff, peer mentors, and, of course, the judge who orchestrates the entire ensemble"). A journalist recently epitomized the synergy of the treatment team environment:

The real work of Veterans Court does not take place when Circuit Court Judge John P. Kirby enters his courtroom and all rise; rather, the heavy lifting of helping these vets get back on track goes on an hour beforehand, at a pre-court meeting, in a room so crowded with staff—I count 19 people—there isn't room for them to sit around the table. Representatives from the states attorney, public defender and sheriff's offices are here, along with those from the U.S., Illinois and Chicago offices of veterans affairs, plus probation offices, drug counselors, homeless coordinators, legal clinics.

Steinberg, *supra* note 6, at 20. Judge Kirby, like many VTC and therapeutic court judges, explains how the court's job is more one of streamlined coordination: "Every program here was in existence. We just put everybody in the same room and said, 'How can we work with veterans the best that we know how?'" *Id.* For statistics regarding the participation of various "stakeholders" in the supervision and coordination of individual VTC cases, see Holbrook & Anderson, *supra* note 9, at 28–29 (reporting on survey results from fourteen VTCs).

Sergeant Brent Keedens, an active duty noncommissioned officer (NCO) appears for his General Court-Martial facing charges of aggravated assault on a military police officer in the performance of his duties, driving while intoxicated, and willfully damaging government property in excess of \$500, offenses that occurred within the limits of Fort Liggett-Jordan's exclusive jurisdiction.¹² Like Sergeant Davis, Sergeant Keedens has undergone a psychiatric evaluation which has diagnosed him with PTSD,¹³ though not at a level that would render him incompetent to stand trial.¹⁴ After his plea, Sergeant Keedens's Trial Defense Counsel

¹² Since the U.S. Supreme Court's 1987 *Solorio* opinion, military commanders have retained the ability to prosecute servicemembers for state or federal offenses of a nonmilitary nature without the assistance of the U.S. Attorney or District Attorney or the involvement of civilian courts. *Solorio v. United States*, 483 U.S. 435 (1987) (permitting the military courts to exercise jurisdiction over a servicemember based solely on the accused's status as a member of the Armed Forces, rather than the nature of the offense).

¹³ Posttraumatic Stress Disorder is currently diagnosed based on seventeen diagnostic criteria in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, which require the person to have experienced an overwhelming event, such as a threat to one's life, and to re-experience that event with multiple distressing side effects for a period of at least one month. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467-68 (text rev., 4th ed. 2000). Although the list appears like a cookbook, the reality is that "[n]o single psychiatric diagnosis characterizes the service member's response to war," which may explain why the criteria are currently under revision. Colonel Stephen J. Cozza et al., *Topics Specific to the Psychiatric Treatment of Military Personnel*, in NAT'L CTR. FOR POST-TRAUMATIC STRESS DISORDER, IRAQ WAR CLINICIAN GUIDE 4, 12 (2d ed. 2004). As lived by servicemembers, PTSD is "a day-to-day experience of living with memories [sufferers] want to forget, staying constantly alert to dangers others don't pay any attention to, enduring sleepless nights, and reacting to things at home as if still in the warzone." COLONEL (RET.) CHARLES W. HOGE, *Introduction to ONCE A WARRIOR ALWAYS A WARRIOR: NAVIGATING THE TRANSITION FROM COMBAT TO HOME INCLUDING COMBAT STRESS, PTSD, AND MTBI* 3 (2010).

¹⁴ See, e.g., Vanessa Baehr-Jones, A "Catch-22" for Mentally-Ill Military Defendants: Plea-Bargaining Away Mental Health Benefits, 204 MIL. L. REV. 51, 55 (2010) ("Even where the accused is shown to suffer from PTSD symptoms, a sanity board is unlikely to find that the condition deprived the accused of mental capacity at the time of the charged offenses."). The diagnosis of PTSD likewise rarely equates to a finding of insanity at trial. See, e.g., Major Jeff Bovarnick & Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, ARMY LAW, June 2002, at 13, 13 n.4 (describing the low frequency of verdicts in which an accused was judged not guilty only by reason of lack of mental responsibility); Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 191 MIL. L. REV. 67, 104 (2007) (recognizing the accused's "slim" chances of prevailing on a PTSD defense at courts-martial); Daniel Burgess et al., *Reviving the "Vietnam Defense"?: Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 79 (2010) (observing the difficulty of prevailing on a defense of PTSD involving evidence of a dissociative state based on the difficulty of establishing a "necessary causal link between the disorder and the crime" in civilian courts).

addresses the court, providing details of his PTSD symptoms and the traumatic experiences he suffered as a member of Sergeant Davis's squad. Like Sergeant Davis, Sergeant Keedens has problems sleeping—often waking with night sweats, self-medicates with alcohol in an attempt to “numb” himself to the vivid realities of these haunting memories, and has withdrawn from his family, who recently left him after observing his transformation into an entirely “different person” since his return from Afghanistan.¹⁵

Rather than applauding Sergeant Keedens's recognition of the need for major life change, as the Assistant District Attorney had done during Sergeant Davis's appearance,¹⁶ the military prosecutor (Trial Counsel) responds in an entirely different manner. In a well rehearsed summation—refined during years of practice in similar PTSD-related cases—the prosecutor argues:

Your honor, over 15,000 128th Division soldiers deployed to Afghanistan in the last nine years, most more than twice.¹⁷ Many of these soldiers witnessed horrible events; they saw friends die; they lost limbs and faces; they went without sleep or food for days at a time.¹⁸ They have dealt with the same demons as the

¹⁵ For a survey of these and other unwanted common symptoms of PTSD, see, e.g., Laura Savitsky et al., *Civilian Social Work: Serving the Military and Veteran Populations*, 54 SOCIAL WORK 327, 333 (2009) (exploring the dangers of untreated PTSD symptoms as they relate to “divorce, substance abuse, family violence,” and other familial and societal calamities).

¹⁶ See, e.g., McCloskey, *supra* note 3 (describing how “[e]ven the prosecutor joins in to give encouragement” as each participant is greeted with applause at the commencement of the veterans' docket). Prosecutors who participate in VTCs explain that their new role requires “a paradigm shift from trying to get the appropriate sentence which generally is how much jail time, how much prison time to more of a rehabilitation [paradigm].” *The Situation Room* (CNN television broadcast Oct. 28, 2010) (relating comments of Orange County, Cal., Deputy District Attorney Wendy Brough).

¹⁷ Actual statistics for the U.S. Army indicate that “most of the active-duty soldiers in the Army (67 percent) have deployed to OIF or OEF—and most of those soldiers have deployed for a second or third year.” TIMOTHY BONDS ET AL., RAND ARROYO CENTER DOCUMENTED BRIEFING: ARMY DEPLOYMENTS TO OIF AND OEF, at x (2010), available at http://www.rand.org/pubs/documented_briefings/2010/RAND_DB587.sum.pdf. Significantly, “[o]ver 121,000 have deployed for their first year, 173,000 for their second year, and 79,000 for their third year or longer. Of this last group, over 9,000 are deploying for their fourth year.” *Id.*

¹⁸ Colonel Hoge describes common experiences, in which brigade and regimental combat teams in the Marines and Army had been ambushed (89 and 95 percent, respectively), handled or uncovered human remains (50 and 57 percent), knew “someone seriously

accused, and yet they have resisted alcohol and drugs. The accused is asking you to hold him to a different standard. Send a message to the others who have suffered. Give them a reason to stay the course and resist the temptation. Don't let Sergeant Keedens use PTSD as an excuse to violate the law and put others at risk. This time, he damaged a wall. Next time, who knows? The Government asks for a Dishonorable Discharge and three years confinement, because justice demands as much.¹⁹

On this same day, two soldiers began a journey through the criminal justice system. One will undergo intensive treatment through the VA, with the potential to have his criminal charges dismissed based on adherence to a mental health treatment plan.²⁰ The other will enter confinement at a military facility, where he will be able to see a counselor regarding emergency care and handle some aspects of anxiety,²¹ but where he has little incentive to undergo mental health treatment,²² and where military courts have questioned limitations on

injured or killed" (86 and 87 percent), or saw "dead or seriously injured Americans" (65 and 75 percent). HOGE, *supra* note 13, at 18 tbl.1 (providing statistics from the initial ground invasion of Iraq). Contemporary nonfiction books have begun to explore the ways these experiences have translated to later criminal offenses. Author David Philipps ends the eighth chapter, "Heart of Darkness," in his book *Lethal Warriors*, which describes many of the deployed experiences of later felons, this poignant way: "Five hundred shops reopened in the Dora market and a handful of the neighborhood Christians returned to rebuild their church. But in the grim process of peacemaking a number of soldiers lost their minds." DAVID PHILIPPS, *LETHAL WARRIORS: WHEN THE NEW BAND OF BROTHERS CAME HOME* 150 (2010). See also JIM FREDERICK, *BLACKHEARTS: ONE PLATOON'S DESCENT INTO MADNESS IN IRAQ'S TRIANGLE OF DEATH*, at viii (2010) (investigating conditions within a platoon, especially psychological tolls, that contributed to "one of the most nefarious war crimes known to be perpetrated by U.S. soldiers in any era").

¹⁹ Although this argument is hypothetical, see *infra* Part IV.C for similar arguments in the actual case of *United States v. Miller*. Trial Transcript, *United States v. Miller* 70–74 (10th Mountain Div., Fort Drum, Apr. 23, 2010) [hereinafter Trial Transcript] (on file with author).

²⁰ For an overview of the operation and key components of VTCs and other treatment courts, see *infra* Part II & app. A.

²¹ The Army regulation on corrections sets minimum standards for the nature of treatment available at corrections facilities, but explains that "no right is afforded by this regulation to any prisoner regarding participation in any particular counseling or treatment program." U.S. DEP'T OF ARMY, REG. 190-47, *THE ARMY CORRECTIONS SYSTEM* ¶ 5-5, at 9 (15 June 2006) [hereinafter AR 190-47].

²² *Infra* discussion accompanying notes 86–88.

comprehensive mental health treatment at military prisons.²³ The thirty miles that separate these two NCOs might as well be light years apart.

A. Convening Authority Clemency as the Method to Incorporate PTSD Treatment for Active Duty Military Offenders

After ten years of sustained combat operations and repeated combat deployments, the civilian justice system has developed VTCs as a “problem-solving” approach, which targets the mental condition underlying the veteran’s criminal conduct through an interdisciplinary treatment team.²⁴ In January of 2011, President Barack Obama recommended expansion of VTCs because of their tremendous value in addressing the “unique needs” of returning veterans with PTSD and Traumatic Brain Injury (TBI).²⁵ In February, Admiral Michael Mullen, then-Chairman of the Joint Chiefs of Staff, observed that VTCs “are having a significant impact across the country.”²⁶ He further noted, “I have seen these courts make a real difference, giving our veterans a second chance, and significantly improving their quality of life.”²⁷ The key concern is whether courts-martial can implement similar treatment-based approaches for active duty offenders. Because PTSD and other mental health conditions originate from active duty service,²⁸ this article argues that many courts-martial are *problem-generating*—rather than *problem-solving*—courts when they preclude treatment considerations as tangential matters, lack a coherent framework for evaluating the benefit of treatment vice incarceration, and result in punitive discharges that preclude offenders from future VA treatment.²⁹

This article proposes that the military can immediately use convening authority clemency to implement a treatment-based approach for

²³ See, e.g., *United States v. Best*, 61 M.J. 376, 381 n.6 (C.A.A.F. 2005) (“[T]he military does not have adequate facilities to provide long-term inpatient psychiatric treatment for its prisoners . . .”).

²⁴ *Infra* Part II.

²⁵ PRESIDENT BARACK H. OBAMA, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA’S COMMITMENT ¶ 1.6.1, at 12 (Jan. 2011).

²⁶ Letter from Admiral Michael G. Mullen, Chairman of the U.S. Joint Chiefs of Staff, to Hon. Eric K. Shinseki, Sec’y of the Dep’t of Veterans Affairs 1 (Feb. 15, 2011) [hereinafter Admiral Mullen Letter].

²⁷ *Id.*

²⁸ See *supra* notes 13 and 18 (describing diagnostic criteria for PTSD and common experiences of active duty personnel that can lead to a diagnosis).

²⁹ *Infra* Part I.C.

offenders with PTSD, TBI, or other service-related mental conditions. Specifically, a commander can condition the remission of a suspended sentence of discharge and confinement on successful completion of a functioning civilian VTC program or a military program developed along similar lines. Because treatment for service-connected mental health disorders can often continue throughout a veteran's life,³⁰ the main objective is to enable future health care from the VA. While it would be valuable for the military to retain an offender with experience and training, mental illness poses special considerations. Chiefly, the return to combat could compound existing mental injuries or create new ones, essentially reversing the beneficial effects of a course of completed treatment.³¹

Military justice practice provides many avenues to convening authority clemency. From the inception of criminal charges through the review of a court-martial sentence, the commanding officer (court-martial convening authority) exercises decisional authority in a system of "command control."³² Under this system, military judges and panels may

³⁰ Psychiatrist and retired COL Charles Hoge, who has studied PTSD and combat-related trauma throughout his military career, explains that "there's no clear definition of what the normal 'transition/readjustment' period is" for a veteran suffering from PTSD, and further that it may take up to decades after the return from combat and the trauma for readjustment to occur. HOGE, *supra* note 13, at xv–xvi.

³¹ Judge Wendy Lindley, who has presided over Orange County, California's VTC since 2008, is concerned with a "philosophical dilemma" for active duty servicemembers like those now in her court:

If it is true, as some studies have shown, that some individuals are more susceptible to PTSD than others then why would my team and I spend 18 months (the length of our program) restoring the individual to the person he or she was before they served, only to have them re-deployed once again to face the trauma that statistically might result in PTSD all over again. Would it not be better for them to separate from the military and pursue a civilian career, as difficult as that may be?

E-mail from Hon. Wendy Lindley, Veterans Treatment Court, Orange Cnty., Cal., to Captain Evan R. Seamone, Student, 59th Graduate Course (Sept. 20, 2010, 17:50 EST) (on file with author).

³² This term connotes the commander's "unique" direction over the military justice process from the time of initial "investigation into alleged misconduct," through all essential stages until the "action on the finding and sentence of courts-martial," such involvement offering necessary "flexibility" to meet military objectives. Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief?*, 54 NAVAL L. REV. 169, 172–73 (2007).

only recommend suspended sentences or other forms of clemency.³³ Accordingly, a military treatment court program could be implemented through recommendations of panel members or military judges, in pre- or post-trial agreements, through the support of staff judge advocates (SJAs) and chiefs of military justice—all ultimately vesting in the decision of the convening authority. While some could criticize the convening authority's broad and unfettered powers in the area of clemency, these very abilities make treatment programs possible prior to appellate review, *before* the servicemember is indelibly marked with a conviction or punitive discharge.³⁴

Appendix G offers a template containing treatment-based pretrial agreement terms. Appendix D offers a modified Sentence Worksheet which, through only a slight modification, can transform the very nature of panel sentencing by alerting the panel members that they have the right to recommend different forms of clemency contemporaneously with the adjudged sentence. Appendixes E and F provide accompanying instructions to empower the members with insight on evaluating mental conditions for the purpose of recommending treatment-based clemency. Together, the elements of this normative framework, which complies with existing law, will enable the military to achieve as much as or more than the innovative VTCs discussed in the introduction.

Realistically, a method to improve sentencing of mentally ill offenders will remain useless if there is no justification or desire to implement it in practice. The challenge is more difficult because the suspended discharge, though permitted by the *Manual for Courts-*

³³ For specific examples of court-martial clemency recommendations involving suspensions, see *infra* Part IV.A. Based on command control over the court-martial process, “[d]espite the agony that a panel or military judge may endure in determining an appropriate sentence for an accused, a court-martial’s sentence is simply a ‘recommendation’ to the convening authority.” Major Tyesha E. Lowery, *One “Get out of Jail Free” Card: Should Probation Be an Authorized Courts-Martial Punishment?*, 198 MIL. L. REV. 165, 190 (2008).

³⁴ “Repeatedly,” the military’s highest court has “noted that the accused’s best chance of relief rests with the convening authority’s power to grant clemency.” Marinello, *supra* note 32, at 169. This is likely because the court-martial convening authority possesses “unfettered discretion” beyond that of even a military court of review, and can eradicate a conviction or sentence for any reason, including no reason. See, e.g., *United States v. Catalani*, 46 M.J. 325, 329 (C.A.A.F. 1997) (“The convening authority has virtually unfettered power to modify a sentence in an accused’s favor, including disapproval of a punitive discharge, on the basis of clemency or any other reason.”); UCMJ art. 60(c)(2) (2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(1) (2008) [hereinafter MCM].

Martial, is seen by many as no more than a fossil in petrified wood, preserved only as an artifact after generations of nonuse.³⁵ History reveals the misleading nature of this limited view. Notably, the Armed Forces developed suspended sentences and discharge remission programs for reasons that have not changed since the early 1900s. Far from a thing of the past, suspended punitive discharges represent a form of compassion and clemency that is engrained in the very DNA of the military justice system—most evident in those many cases, both reported and unreported, where panel members have attempted to effect such sentences without having received any instructions on their abilities to do so. Exploring the contours of this innate military justice ethic is as vital to commanders and military justice practitioners as senior leaders' efforts to identify and “own” the Army's ethic; the two are simply indivisible.³⁶

To explore the gulf that exists between court-martial and treatment court sentencing, Part II explores key attributes of specialized courts and reports on the effectiveness of these court programs. Part II also distinguishes VTCs and mental health treatment courts (MHCs) from other specialized courts. Despite various differences between such programs, often dictated by the individual personalities of judges and treatment team members, this Part identifies the ten “essential elements” and “key components” to which all problem-solving courts basically adhere.

While recent cases provide significant insights into the optimal structure and format of a treatment-based approach, the Armed Forces' historical experiences with formal restoration-to-duty programs offer many lessons that are valuable today. Part III charts restoration-to-duty

³⁵ On first glance, some statistics may seem to support this position. *See, e.g.*, Marinello, *supra* note 32, at 169–70, 195 (describing how the exercise of convening authority clemency is rare and calculating a rate of only “4 percent” for Navy and Marine Corps cases between 1999 and 2004); Major John A. Hamner, *The Rise and Fall of Post-Trial—Is It Time for the Legislature to Give Us All Some Clemency?*, ARMY LAW., Dec. 2007, at 1, 16 (observing how, for all Army cases in which the accused contested charges between 2001 and 2006, “clemency was given at a rate of 1.7%”). Yet, these statistics do not tell the complete story. *See infra* Part III.A (discussing the distorting influence of the “history effect” on interpretations of past military clemency programs); *infra* discussion accompanying note 485 (describing how recent statistics do not capture successfully remitted punitive discharges).

³⁶ *See* Major Chris Case et al., *Owning Our Army Ethic*, MIL. REV.: THE ARMY ETHIC 2010, at 3, 10 (describing how Army's then-Chief of Staff, General George Casey, Jr., “charged the Army to . . . better articulate a framework for the Army Ethic and a strategy of how we inculcate and regulate it in our Army professionals”).

programs from the early 1800s, exploring the underlying philosophies for investing time and energy into the rehabilitation of punitively discharged servicemembers, including those with service-connected mental health disorders. This Part also identifies the legal lessons learned from appellate review of these military programs over generations, all of which provide crucial touchstones for the implementation of any modern discharge remission program, regardless of its format. These forgotten lessons provide guidance on the nature of testimony an accused may offer at sentencing, the content of panel instructions regarding how members might recommend enrollment in such a program, and the manner in which a convening authority should view an offender's participation in such programs. Part IV then considers how judges and panel members have implemented the same rehabilitative ethic in their own sentencing practices.

Part V applies the historical lessons to the contemporary military plea-bargaining and sentencing framework. While, in some cases, commanders may want to implement pretrial diversion programs contemplating treatment, this article recommends post-conviction discharge suspensions as the preferable therapeutic model. At this stage, military offenders have the best incentive to comply with their treatment plans and better measures to ensure due process if the servicemember is later terminated from a treatment program for noncompliance. Drawing on recent military decisions, this Part first explores the issue of treatment-based clemency recommendations by panel members in contested cases. After proposing modifications of the standard Sentence Worksheet and accompanying instructions concerning permissible clemency considerations, Part VI addresses plea terms relating to treatment program participation. This Part concludes with a model template containing legally permissible pretrial (and post-trial) agreement terms for participation in a state VTC.

With these new components of an enlightened sentencing process in military justice, Part VII discusses functional considerations for its implementation at the defense counsel, SJA, military judge, and convening authority levels. If the convening authority decides to grant clemency in the form of a suspended sentence, the major question is whether to use the resources of an existing civilian treatment court or to incorporate aspects of the problem-solving court model through purely military settings. Although a military, installation-based program would not operate exactly like a civilian treatment court with its designated treatment team and regular meetings before a judge empowered to grant

probation, these alternative methods could successfully incorporate the essential and effective attributes of problem-solving courts.

Part VIII concludes by recognizing the authority that permits state VTCs to respond to conduct that occurred within the exclusive federal jurisdiction of the military. Here, treatment court participation does not necessarily amount to a transfer of jurisdiction to the state. On a view adopted by the U.S. Department of Justice, treatment court participation can rightfully be seen as one of many conditions in an agreement with the convening authority, reducing participation to a matter of contract rather than constitutional interpretation. Alternatively, even on the view that the state exercises its jurisdiction through a VTC, such participation is still constitutionally permissible under the principle of “noninterference” first articulated by the Supreme Court in *Howard v. Commissioners of the Sinking Fund of the City of Louisville*, which permits state involvement in such matters as long as there is no conflict between the objectives of the two entities.³⁷

The tools in the appendices provide a treatment-based alternative to incarceration and discharge that permits SJAs, convening authorities, and military judges to serve the interests of both the servicemember and society at large. By accessing the servicemember at his or her greatest time of need and treating the underlying condition that led to the charged offense(s), the military can meaningfully reduce recidivism and restore veterans to a status where they can contribute to society, even if they are unable to continue their military service. As a preliminary matter, however, the sections immediately below describe the risk that accompanies abandonment of the suspended punitive discharge as a clemency tool.

B. Military Justice Myopia: The Reason for Concern

While VTCs operate in a galaxy of programs that divert mentally ill offenders into clinical treatment programs rather than confinement, military justice operates within a far smaller constellation dominated by the concept of “good order and discipline.”³⁸ At first blush, the two

³⁷ 344 U.S. 624, 627 (1953).

³⁸ In a recent edition of *The Reporter*, an Air Force publication for military legal practitioners, the Air Force Judge Advocate General described the crucial role of “*discipline*,” often referred to as ‘military discipline’ or, more expansively as ‘good order

systems might appear entirely incompatible. Most military judges face logistical challenges revisiting cases because they often commute to different installations, lacking a single fixed place of duty as do sitting civilian judges.³⁹ Furthermore, unlike civilian judges, military judges and court-martial panels are prohibited from adjudging suspended sentences.⁴⁰ Yet, civilian VTCs exist to address the identical issues underlying many active duty offenders' trials by court-martial.⁴¹ The divergence in sentencing methodology poses a number of concerns, most of which are completely hidden to military justice practitioners.

The military justice system, which has long been built on the notion of individualized sentencing,⁴² encounters a problem in cases that concern service-connected mental health disorders. Although standard

and discipline””: “The best people, training and equipment will fail without discipline to mold these elements into an effective fighting force. Without discipline, a fighting force is little more than a dangerous mob.” Lieutenant General Richard C. Harding, *A Revival in Military Justice*, REP., Summer 2010, at 4, 5 (emphasis in original). This concept has not changed since the inception of the U.S. Armed Forces, mainly because military justice must be mobile enough for administration wherever and whenever servicemembers are needed to fight. See, e.g., Marinello, *supra* note 32, at 172–74 (describing the historical necessity of discipline in military operations).

³⁹ See, e.g., Major Steve D. Berlin, *Clearing the High Hurdle of Judicial Recusal: Reforming RCM 902(a)*, 204 MIL. L. REV. 223, 254–55 (2010) (describing logistical difficulties unique to the military judiciary); Captain Charles A. Zimmerman, *Pretrial Diversion from the Criminal Process: A Proposed Model Regulation 32–33* (Apr. 1975) (unpublished thesis, The Judge Advocate Gen.'s Sch., U.S. Army, Charlottesville, Va.) (addressing identical considerations that would limit judicial supervision of pretrial diversion plans).

⁴⁰ See, e.g., Lowery, *supra* note 33, at 166–67.

⁴¹ Whether in the VTCs' mission statements or the text of their enabling legislation, it is quite clear that these state programs exist to address issues related exclusively to the offender's active duty military service. See, e.g., CAL. PEN. CODE § 1170.9 (2011) (directing treatment programs as diversionary alternatives offenses committed “as a result of post-traumatic stress disorder, substance abuse or psychological problems stemming from service in a combat theatre in the United States military”). See also Sean Clark et al., *Development of Veterans Treatment Courts: Local and Legislative Initiatives*, 7 DRUG CT. REV. 171, 189–92 tbl.2 (2010) (describing similar statutes in Virginia, Minnesota, Nevada, Texas, Connecticut, and Colorado, all conditioning state programs on active duty federal service or injuries).

⁴² See, e.g., *United States v. Mamaluy*, 27 C.M.R. 176, 180 (C.M.A. 1959) (“[A]ccused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment.”); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (“Generally sentence appropriateness should be judged by ‘individualized consideration’ of the particular accused ‘on the basis of the nature and seriousness of the offense and the character of the offender.’”) (internal citations omitted).

instructions tell panel members to consider mental illness,⁴³ they do not indicate precisely how to weigh and balance these concerns.⁴⁴ Based on the adversarial nature of court-martial sentencing, largely considered to be a “trial within a trial,” the process leaves little opportunity for agreement on the nature of a mental illness or its connection to the charged offense(s).⁴⁵ Evident in Sergeant Keedens’s case, military

⁴³ U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK instr. 2-5-23, at 71 (1 Jan. 2010) [hereinafter DA PAM. 27-9] (noting, among other factors to be considered at sentencing, “[t]he accused’s (mental condition) (mental impairment) (behavior disorder) (personality disorder)”).

⁴⁴ Air Force Colonel (Col) James A. Young III, who spent time as a Staff Judge Advocate [SJA] and a military trial judge, observes:

The military judge instructs the members on, among other things, the goals of sentencing, the maximum sentence they may adjudge, and the requirement to consider all factors in aggravation, extenuation, and mitigation. But no one tells the members how these factors are to be evaluated or what to apply them to.

Colonel James A. Young III, *Revising The Court Member Selection Process*, 163 MIL. L. REV. 91, 111 (2000). Based on his own experiences, “court members readily admit that they are uncomfortable with the sentencing function”:

While serving as the staff judge advocate at Laughlin Air Force Base, Texas . . . several officers who sat on courts-martial complained that military judges did not provide them realistic guidance on how to determine an appropriate sentence. While sitting as a trial judge, on at least two occasions, I was approached, after trial, by court members who voiced similar complaints. The president of one court-martial, in which the possible sentence was well over 50 years, asked, on the record, if I could provide the court with a ball-park figure of what an appropriate period of confinement would be for the offenses of which the accused was convicted, to which the court members could then apply the aggravating and mitigating factors to reach an appropriate sentence.

Id. at 111 n.112. See also Major Russell W.G. Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, ARMY LAW., July 1988, at 26, 27–33 (describing various reasons why panel sentencing presents the “risk of a ‘hipshot’ sentence by an uninformed court”). These general observations of sentencing do not even specifically touch upon the unique problem of mental illnesses like PTSD, which can stupefy even trained clinicians. For a representative example, see, e.g., ALLAN YOUNG, *THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS DISORDER* 145–75 (1995) (revealing divergence of clinician diagnoses of PTSD in cases based on slight variations in the facts of hypothetical scenarios that involve criminal behavior).

⁴⁵ In conflict with federal sentencing procedures and recommendations of the American Bar Association, military sentencing has consistently remained an adversarial process. See Captain Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the*

prosecutors who refute PTSD as the cause of an offense have an incentive to belittle a soldier for raising such conditions in extenuation or mitigation.⁴⁶

Additionally, the military justice system—like its concept of rehabilitation in general—largely focuses on the past, rather than the future. During court-martial sentencing, the defense may ask witnesses whether, based on the conduct of the accused, they would want to serve with him again; the prosecution might call a senior leader to evaluate rehabilitative potential based on the accused's past performance in the unit.⁴⁷ To avoid the appearance of eliciting prohibited euphemisms for punitive discharge and related appellate issues, military judges have suggested a scripted colloquy that elicits little more than a response that the accused either has or does not have rehabilitative potential in society, as to keep all the members “on the same sheet of music.”⁴⁸ These formulaic scripts provide little room for testimony regarding the suitability of the accused for specific treatment programs—how he might benefit from a specific type of therapy, medication, or lifestyle

Military Justice System, 114 MIL. L. REV. 87, 135 n.253 (1986) (“The concept that the sentencing hearing should take on the characteristics of a mini-trial, to include full confrontation and cross-examination rights is rejected in the introduction to the ABA Sentencing Standards. The federal procedure certainly cannot be characterized as a separate trial on the issue of punishment, contrary to the military practice.”).

⁴⁶ For a telling example of this incentive, see the trial counsel's arguments in *United States v. Miller*, reproduced in Part IV.C. The same influence exists in the civilian courts. In a 2011 federal case in Spokane, Wash., the prosecutor claimed that the defendant was faking PTSD and, alternatively, “if he did have PTSD it was not a result of combat.” William B. Brown, *From War Zones to Jail: Veteran Reintegration Problems*, 8 JUST. POL'Y J. 1, 30 n.27 (2011). After VA psychologists confirmed the veteran's diagnosis originated from combat and the defense provided documentation to confirm the award of the Combat Infantryman's Badge, the prosecutor then “proceeded to raise the concern that the award was perhaps fraudulently issued.” *Id.*

⁴⁷ See, e.g., *United States v. Eslinger*, 69 M.J. 522, 531–34 & 534 n.12 (A. Ct. Crim. App. 2010); Edward J. O'Brien, *Rehabilitative Potential Evidence: Theory and Practice*, ARMY LAW., Aug. 2011, at 5, 5–8 (discussing “basic” considerations for the prosecution and the defense). In laying the necessary foundation for opinions of rehabilitative potential counsel need only “establish that the witness knows the accused more thoroughly than as just a face in formation.” Colonel Mike Hargis, *A View from the Bench: Findings, Sentencing, and the “Good Soldier,”* ARMY LAW., Mar. 2010, at 91, 92–93.

⁴⁸ Hargis, *supra* note 47, at 93, 93 n.18. For example, Judge Hargis recommends, “Do you recall reading the definition of rehabilitative potential in the *Manual for Courts-Martial (MCM)*? Applying that definition to all you know about the accused, what is your opinion of the accused's rehabilitative potential?” *Id.*

modifications.⁴⁹ These scripts make it easy to assume that corrections facilities will provide all necessary and “appropriate” care without the slightest attention to individual needs, even during a sentencing proceeding that is supposed to be tailored to the individual.⁵⁰

Mental health conditions require far more than script-based sentencing for two reasons. First, even though an accused who has been cleared by a sanity board may appreciate the wrongfulness of his acts, this does not alleviate the concern that his mental condition contributed in some palpable way to the offense or that the offense would not have occurred in the absence of the service-connected psychological influence.⁵¹ Second, service-connected mental illness should make

⁴⁹ Official publications and treatises on military law have adopted a limited view of sentencing evidence on rehabilitative potential, confining discussions to prosecution evidence and omitting discussion of clinical treatment. *See, e.g.*, U.S. DEP’T OF ARMY, JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, *THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS*, at C-7-8 to C-7-10 (2008); DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 16-5 (7th ed. 2008); Guy B. Roberts & Brian D. Robertson, *Defense of Servicemembers*, in 3 *CRIMINAL DEFENSE TECHNIQUES* § 61.17 (Robert M. Cipes et al. eds., 2010 rev. ed.). In fact, many defense counsel would rather not call a mental health professional at sentencing to avoid their exposure to cross-examination on matters discussed with the accused during interviews. Baehr-Jones, *supra* note 14, at 58 (discussing factors which “discourage defense counsel from calling a psychiatrist to testify to the accused’s mental state”).

⁵⁰ In *United States v. Duncan*, for example, over the defense objection, the military judge instructed the members as follows in response to their request for information about treatment programs available to the accused if confined:

Now, I’m turning to your second question, which is: Will rehabilitation/therapy be required if PFC Duncan is incarcerated? Members of the court, you are advised that there are appropriate alcohol and sex offense rehabilitation programs available to the accused should he be confined as a result of the sentence in this case. The accused is not required to participate in any program of rehabilitation and treatment, but there are strong and usually effective incentives for him to do so while confined.

53 M.J. 494, 499 (C.A.A.F. 2000) (citing the trial record). Despite the fact that this response failed to provide a single criterion for appropriateness of programs, the Court of Appeals for the Armed Forces upheld the instruction on the basis that the military judge permissibly drew upon “a body of information that is reasonably available and which rationally relates to . . . sentencing considerations.” *Id.* at 500.

⁵¹ At its core, the nationwide VTC movement has emerged “in response to the realization that veterans[’] . . . military experiences may be contributing factors for why they are in court.” Mark Brunswick, *Veterans Get Hearing in Court of Their Own*, STAR TRIB. (Minneapolis, Minn.), Sept. 28, 2010, at 1A. Even if the connection is not direct, veterans’ collective experience has revealed that “PTSD symptoms can indirectly lead to

commanders, military judges, and panels more concerned about the future than the past because it strongly suggests that offenders will continue to find themselves in the same circumstances that led to the offense if they fail to obtain necessary cognitive tools.⁵² When there is an indication that the accused has experienced problems maintaining self-control, the focus on punishment of the crime in the court-martial system too often bypasses the issue of *how* the accused or society can prevent the same influences from leading to future crimes.

Posttraumatic Stress Disorder, a “signature disorder”⁵³ of Iraq and Afghanistan service, affects between ten⁵⁴ and thirty-five percent of veterans,⁵⁵ making these servicemembers more likely to commit criminal offenses.⁵⁶ Studies reveal that this diagnosis is

related to perpetrating more types of violence (e.g., physical fights, property damage, using weapons, and/or threats) . . . as well as higher incidence of owning more handguns and “combat” type knives, aiming guns at family members, considering suicide with firearms,

[various forms] of criminal behavior.” Bradley Schaffer, *A Problem of Magnitude: Pennsylvania Veterans and the Criminal Justice System*, PA. LAW., Jan.–Feb. 2011, at 16, 17.

⁵² See, e.g., David Loveland & Michael Boyle, *Inclusive Case Management as a Jail Diversion Program for People with a Serious Mental Illness: A Review of the Literature*, 51 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 130, 132 (2007) (“[I]nvolvement in the criminal justice system is a strong predictor of future arrests and incarceration for people with a psychiatric disability.”).

⁵³ Hillary S. Burke et al., *A New Disability for Rehabilitation Counselors: Iraq War Veterans with Traumatic Brain Injury and Post-Traumatic Stress Disorder*, 75 J. REHABILITATION 1, 1 (2009) (“[Traumatic Brain Injury] and PTSD are commonly referred to as the ‘signature injuries’ of military personnel serving in the Iraq war.”).

⁵⁴ See, e.g., Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42, 46 (observing ranges of studies indicating PTSD rates from 10 to 29 percent, and concluding that the rate “hover[s] around 20 percent”).

⁵⁵ 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, 89 (2010) (explaining why estimates for the current conflicts are significantly higher than data from prior conflicts).

⁵⁶ While statistics on the occurrence of PTSD are debatable, the connection between PTSD symptoms and criminal behavior is far clearer. See, e.g., Clark et al., *supra* note 41, at 174 (“[A] significant proportion of [servicemembers] returning from current wars either as a result of mental health problems or as a result of their military training are at a high risk for contact with the criminal justice system.”).

loading guns with the purpose of suicide in mind, and patrolling their property with loaded weapons.⁵⁷

Recently, a cohort study of 13,944 non-war-deployed and 77,881 war-deployed Marines who served from 2001 to 2007 revealed that “[c]ombat deployed Marines with a PTSD diagnosis were 11 times more likely to engage in the most serious forms of misconduct than were combat deployed Marines without a psychiatric diagnosis.”⁵⁸ Reflecting awareness of these trends, in a February 15, 2011 letter to the Secretary of Veterans Affairs, Admiral Mullen recognized that “[m]any of our returning veterans and Service members experience life-changing events, some of which may cause them to react in adverse ways and get into trouble with the law.”⁵⁹

The connection between combat service and future criminality is the same as it has been in most major wars. In its 2009 *Porter v. McCollum* opinion, the unanimous Supreme Court bridged across time, citing early studies of this crime connection in support of the Nation’s “long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines.”⁶⁰ Even while lacking

⁵⁷ Eric B. Elbogen et al., *Improving Risk Assessment of Violence Among Military Veterans: An Evidence-Based Approach for Clinical Decision-Making*, 30 CLINICAL PSYCHOL. REV. 595, 599 (2010). Based on this research, psychologists have even created matrices to predict the likelihood that combat veterans with PTSD might resort to a violent act, especially when their condition is untreated. *Id.* at 602 tbl.2 (“Prototype of Checklist for Assessing Violence Risk Among Veterans”).

⁵⁸ Robyn M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishments for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC PSYCHIATRY 1, 6 (2010), <http://www.biomedcentral.com/1471-244x/10/88>. See also Stephanie Booth et al., *Psychosocial Predictors of Military Misconduct*, 198 J. NERVOUS & MENTAL DISEASE 91, 97 (2010) (describing the connection between combat PTSD and criminal behaviors in a similar study).

⁵⁹ Admiral Mullen Letter, *supra* note 26, at 1.

⁶⁰ 130 S. Ct. 447, 455 n.8 (2009). Public concern for Service-connected criminal offenses dates back centuries. Writing in the sixteenth century, Sir Thomas More observed the natural consequences of warfare on criminal behavior of veterans in his book *Utopia*:

[W]hen they had no war, peace nothing better than war, by reason that their people in war had so inured themselves to corrupt and wicked manners, that then had taken a delight and pleasure in robbing and stealing; that through manslaughter they had gathered boldness to mischief; that their laws were had in contempt, and nothing set by or regarded.

refined diagnostic criteria for PTSD in the 1940s, corrections professionals observed the “crime wave”⁶¹ perpetrated by returning “problem veterans,” who suffered trauma during the course of a war that rapidly degenerated their mental abilities.⁶² Similar concerns sounded during Vietnam, most clearly in the public’s fears that it would be terrorized by returning “troubled” veterans who had become “walking time bomb[s]” in civilian society.⁶³ Little has changed for veterans or society at large.

Today, however, faced with recurring broadcasts of severe veteran meltdowns⁶⁴ and exploding rates of veteran suicide,⁶⁵ government

SIR THOMAS MORE, UTOPIA (2d rev. ed., Ralph Robinson trans., 1556), *reprinted in* UTOPIA; NEW ATLANTIS; THE ISLE OF PINES 1, 36 (Susan Bruce ed., 1999). Later, Voltaire cited an Italian proverb in concluding that “[w]ar is but too great a corrupter of morals”: “War makes thieves,” it began, “and peace finds them gibbets.” 6 THE COLLECTED WORKS OF VOLTAIRE: A CONTEMPORARY VERSION 216 (William F. Flemington trans., 1901). For additional examination of continued historical recognition through the centuries, see, e.g., Justin G. Holbrook, *Veterans’ Courts and Criminal Responsibility: A Problem-Solving History & Approach to the Liminality of Combat Trauma*, in TREATING YOUNG VETERANS: PROMOTING RESILIENCE THROUGH PRACTICE AND ADVOCACY 259, 268–69 (Diann E. Cameron-Kelly et al. eds., 2011); Holbrook & Anderson, *supra* note 9, at 7–9 (reviewing additional historical sources).

⁶¹ See, e.g., Symposium, *Must There Be a Postwar Crime Wave?*, PRISON WORLD, Nov.–Dec. 1944, at 13–14 (exploring perceptions of increased crimes committed by veterans during the Second World War).

⁶² Doctor Harold S. Hulbert, a psychiatrist, developed a rough calculus to approximate the tolls of combat on young veterans, in which a “day of battle ages a man several months,” a “campaign ages a man ten or more years,” and a “retreat ages a man half way to seventy years.” Harold S. Hulbert, *The War-Modified Combat Veteran and the Law*, in SOCIAL CORRECTIVES FOR DELINQUENCY: 1945 NATIONAL PROBATION ASSOCIATION YEARBOOK 30, 34–35 (Marjorie Bell ed., 1946).

⁶³ BARRY LEVIN & DAVID O. FERRIER, DEFENDING THE VIETNAM COMBAT VETERAN: RECOGNITION AND REPRESENTATION OF THE MILITARY HISTORY AND BACKGROUND OF THE COMBAT VETERAN LEGAL CLIENT 40–41 (Susan Caney-Peterson ed., 1989) (exploring various “commonly held public concepts” regarding returned Vietnam veterans).

⁶⁴ A prominent example is the *New York Times* website “War Torn,” hailed as an “interactive” “series of articles and multimedia about veterans of the wars in Iraq and Afghanistan who have committed killings, or been charged with them after coming home.” Deborah Sontag & Lizette Alvarez, *War Torn*, WWW.NYTIMES.COM, http://topics.nytimes.com/topics/news/us/series/war_torn/index.html (last visited Nov. 7, 2010). Lately, Fort Carson, Colo., has been a location of interest, since “the arrest rate for troops in the city tripled, compared to peacetime levels.” PHILIPPS, *supra* note 18, at 6. Ultimately, “[o]n any given day approximately 9.4 percent, or 223,000, of the inmates in the country’s prisons and jails are veterans.” U.S. DEP’T OF HEALTH & HUM. SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NAT’L GAINS CTR., RESPONDING TO THE NEEDS OF JUSTICE-INVOLVED COMBAT VETERANS WITH SERVICE-RELATED TRAUMA AND MENTAL HEALTH CONDITIONS 6 (2008), *available at*

agencies responsible for public protection have recognized heightened risks to safety. The Department of Homeland Security, for example, recently cited the national security threat posed by veterans with untreated mental illness, noting that homegrown terrorist groups are targeting these emotionally vulnerable veterans “in order to exploit their skills and knowledge derived from military training and combat.”⁶⁶ While concerning, the more acute problem rests in the fact that it may only take a random reminder of combat to unleash the bottled fury that accounted for the veteran’s very survival while deployed in harm’s way. Disaster psychologist George Everly, Jr., has also envisioned the consequences of PTSD in terms of homeland security, analogizing its symptoms as a “psychological pathogen” that, without proper treatment, “might cripple, or even lead to a loss of life through suicide, substance abuse, and domestic violence.”⁶⁷

http://www.gainscenter.samhsa.gov/pdfs/veterans/CVTJS_Report.pdf (citing studies). In a ninety-day period, between September and November 2008, for example, law enforcement officers in Travis County, Tex., arrested and booked 458 veterans. TRAVIS CNTY. ADULT PROB. DEP’T ET AL., REPORT OF VETERANS ARRESTED AND BOOKED INTO THE TRAVIS COUNTY JAIL 4 (2009). Reporters have likewise taken interest in the community surrounding Joint Base Lewis-McChord in Washington. See Kim Murpy, *A ‘Base on the Brink,’ As Is the Community: Lewis-McChord’s Washington State Neighbors are Feeling the Psychic Toll of War*, L.A. TIMES, Dec. 26, 2011, at 1, 1 (suggesting “a local crime wave [that] became apparent as early as 2004” and citing incidents including combat veterans’ violent offenses against their children, such as “waterboarding” and other forms of “torture” in response to trivial matters).

⁶⁵ According to the Department of Veterans Affairs’ own estimates, eighteen veterans under the VA’s care complete suicide each day while another 1000 attempt suicide each month. Bob Egelko, *Federal Court Hears Vets’ Appeal on Mental Health*, S.F. CHRON., Aug. 13, 2009, at A7. Active duty suicide rates have also steadily increased in recent years among the Army and the Marine Corps. See, e.g., Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 MIL. L. REV. 144, 150–51 (2009) (discussing various statistical trends).

⁶⁶ U.S. DEP’T OF HOMELAND SEC., OFFICE OF INTELLIGENCE AND ANALYSIS, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 7 (Apr. 7, 2009) (addressing the problem of “disgruntled military veterans” who are “suffering from the psychological effects of war”).

⁶⁷ George S. Everly, Jr. & Cherie Castellano, *Fostering Resilience in the Military: The Search for Psychological Body Armor*, J. OF COUNTERTERRORISM & HOMELAND SECURITY INT’L, Winter 2009, at 12, 13.

First-responders to emergencies are not waiting on definitive statistics on the nature of these links to tell them what they already know: Awareness of untreated veteran mental health conditions and de-escalation of their symptoms can save not only the veteran in crisis, but the lives of police officers and innocent bystanders as well. For these reasons, large police departments are currently dispatching combat veteran volunteers on emergency calls to provide immediate consolation through camaraderie from someone who has walked in their shoes.⁶⁸ The state of Georgia has gone even further, giving veterans the option of indicating diagnosed PTSD on their drivers' licenses to avoid potential confrontations with officers during traffic stops.⁶⁹ And, many veterans who would otherwise have been arrested and confined are being diverted by police to mental health centers in lieu of arrest.⁷⁰

⁶⁸ See, e.g., Penny Coleman, *Why Are We Locking Up Traumatized Veterans for Their Addictions Instead of Offering Them Treatment?*, WWW.ALTERNET.ORG (Nov. 11, 2009), http://www.alternet.org/world/143867/why_are_we_locking_up_traumatized_veterans_for_their_addictions_instead_of_offering_them_treatment (describing programs in Chicago and Los Angeles involving "veterans who are specifically trained to ride along with police when they get disturbance calls").

⁶⁹ See GA. CODE ANN. § 40-5-38 (2011). The statutory revision to the Motor Vehicle Code, titled, "Notation of post traumatic stress disorder," indicates, in part, that "[m]embers of the armed services and veterans who have been diagnosed with post traumatic stress disorder may request to have a notation of such diagnosis placed on his or her driver's license," so long as they provide sworn verification from a clinician. *Id.* at §40-5-38(a). Despite objection from various veterans organizations, Georgia Governor Sonny Perdue signed the senate bill in June of 2010 after it "passed the state House and Senate with overwhelming approval," making Georgia the first state in the Nation "with a driver's license that denotes a specific health problem other than poor eyesight." Lily Gordon, *Gov. Sonny Perdue Signs PTSD License Bill*, COLUMBUS LEDGER-ENQUIRER, Jun. 10, 2010, www.ledger-enquirer.com. One of the law's co-sponsors, State Senator Ed Harbison explained its intent to "protect both law enforcement officers and veterans from potentially volatile situations." *Id.* Another senator, John Douglass, himself an Army veteran, explained the dynamic of "a safer encounter": "The police officer would know that a sudden move [by the motorist] wasn't necessarily an offensive move." Nancy Badertscher, *Disorder Could Be Listed on License; Post-traumatic Stress Option Would Be Only for the Military*, ATLANTA J.-CONST., May 12, 2010, at 1B. In addition to Georgia, since July 1, 2011, Utah has permitted drivers to indicate veteran status on their licenses and identification cards. See UTAH CODE ANN. § 53-3-805(1)(a)(vii) (West 2011) (limiting the privilege to honorably discharged veterans upon verification of their status). Utah's legislation similarly seeks to enable law enforcement officers "to potentially diffuse the tension" by providing "a little bit of background on what [a driver may be] dealing with" at an emotional level. Jared Page, *Driver's License Honoring Vets Could Diffuse Tense Situations*, DESERET NEWS (Utah), Jul. 7, 2011 (4:22 MDT), www.deseretnews.com.

⁷⁰ See, e.g., Guy Gambill, *Justice-Involved Veterans: A Mounting Social Crisis*, L.A. DAILY J., May 5, 2010, at 6 (describing the establishment of "six state veterans' jail diversion pilots" and "12 federally-funded jail diversion efforts" since 2008); DRUG

C. The Societal Cost of Military Indifference

Society suffers when the punishment of military misconduct trumps the demonstrated need for mental health treatment. In the Army, soldiers who are flagged for misconduct are barred from participating in a Warrior Transition Unit, even if they would otherwise qualify for comprehensive care based on the severity of their mental health disorder.⁷¹ The Navy is similar.⁷² Once pending court-martial, even for accused servicemembers with suspected or confirmed mental conditions, most sanity boards focus only on whether the accused is fit to stand trial, with little concern for treatment recommendations—this despite the fact that sanity board members are eminently qualified to make treatment recommendations.⁷³ The lack of concern for treatment is troublesome

POLICY ALLIANCE, HEALING A BROKEN SYSTEM: VETERANS BATTLING ADDICTION AND INCARCERATION 9 (Nov. 4, 2009) (exploring how “a number of law enforcement agencies have become involved in designing pre-booking diversions that are veteran-specific”). These frameworks build on methods established to address the problems of mentally ill offenders in general. *See* Loveland & Boyle, *supra* note 52, at 132–33 (describing “prebooking, police-based programs that provide mental health treatment in lieu of arrests” as one of five contemporary criminal justice diversion programs).

Even for veterans who are sentenced to confinement, the Florida Department of Corrections has begun a new trend of assigning veterans to be housed together to enhance the prospect of successful treatment and recovery. *See* Barbara Liston, *Florida Debuts New Prison Dorms for U.S. Veterans*, WWW.REUTERS.COM (Nov. 9, 2011), <http://www.reuters.com/article/2011/11/10/us-florida-prisons-veterans-idUSTRE7A90H-A20111110> (describing the institution of five veterans dormitories, including one devoted to female veterans, with maximum capacity of 400 veterans located throughout the state). Administrators have learned that, “[g]rouping veterans allows prisons to tailor pre-release services to their specific needs, such as [PTSD] counseling, and to formalize inmates with military benefits and supports available to them on the outside . . .” *Id.*

⁷¹ Citing to various provisions in a collection of consolidated guidance, LTC Christopher G. Jarvis, Battalion Commander of the Warrior Transition Unit at Fort Campbell, Ky., explains how many commanders attempt to evade these prohibitions by removing the electronic notifications regarding soldier misconduct and transferring them for a treatment program with purged physical files. Interview with LTC Christopher G. Jarvis, Battalion Commander, in Charlottesville, Va. (Oct. 22, 2010) (notes on file with author). To prevent violation of admission requirements, he routinely conducts independent investigations of soldiers’ criminal status prior to admitting new participants. *Id.*

⁷² Telephone Interview with Captain Key Watkins, U.S. Navy, Commander, U.S. Navy Safe Harbor Program (Oct. 21, 2010) [hereinafter Watkins Interview] (discussing the extreme difficulty he faced in repeated efforts to enroll a sailor with serious combat trauma in the Navy’s rehabilitative program after the sailor admitted to using cocaine).

⁷³ *See, e.g.*, Baehr-Jones, *supra* note 14, at 62–63 (describing the current limited practice of responding solely to the four backward-looking questions in Rule for Court-Martial (RCM) 706(c)(2), and contrasting the ease with which sanity boards could permissibly contemplate “a broader set of questions in evaluating the accused, to include recommended treatment,” which is now an exceptional practice, if and when it happens at

because of its inherent assumption that *somebody else*, outside of the military, will someday be responsible for dealing with aggravated psychological problems. Too often, this assumption is undermined by an undeniable truth of which panels are reminded at every court-martial: A punitive discharge “deprives one of substantially all benefits administered by the Department of Veterans Affairs and the [military] establishment.”⁷⁴

In its philosophy and practice, the military justice system is masking a major consequence of its sentencing procedures, which civilian courts have learned over the last two decades: Incarceration without adequate mental treatment leads to repeat offenses at a rate so alarming and harmful to society that it has created a “national public health crisis” of “epidemic” proportion.⁷⁵ Civilian judges call this phenomenon the “revolving door syndrome” because many offenders with mental illness return to prison shortly after their release.⁷⁶ After civilian courts continually observed this familiar pattern of repeat incarceration, judges responded by developing sentencing alternatives to divert the mentally ill

all). The premium on quickly replacing a “problem soldier” can easily downplay his or her legitimate mental health concerns or needs for treatment. *See, e.g.*, Bill Murphy, Jr., *Critics: Fort Carson Policy Targeted Troubled Wounded Soldiers*, STARS & STRIPES, Nov. 15, 2011, <http://www.stripes.com/critics-fort-carson-policy-targeted-troubled-wounded-soldiers-1.160871> (citing e-mail communications to suggest that commanders and judge advocates used the court-martial process to “get wounded, troubled soldiers out of the Army fast”).

⁷⁴ DA PAM. 27-9, *supra* note 43, instr. 2-5-22, at 70 (“Types of Punishment”). The case will be different if the servicemember has been in the military long enough to have obtained an honorable discharge for a term of service prior to the one in which he has received a punitive discharge. *Id.*

⁷⁵ Jacques Baillargeon et al., *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103, 103 (2009). As a noteworthy statistic, in “June 2007, there were at least 360,000 persons with major psychiatric disorders, and perhaps as many as half a million, in [U.S.] jails and prisons.” H. Richard Lamb, *Reversing Criminalization*, 166 AM. J. PSYCHIATRY 8, 8 (2009).

⁷⁶ The “revolving door” defines a sentencing approach which, through its emphasis on incarceration and obliviousness to treatment, transforms jails and prisons into “surrogate mental hospitals.” *See, e.g.*, LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 225, 258 (2001). Before the establishment of mental health courts, judges noted how, as a result of the revolving door syndrome, defendants were “doing life in prison,” only “thirty days at a time.” GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 15 (2005) (citing Judge Alex Calabrese).

into treatment programs.⁷⁷ Whether labeled as “treatment courts,”⁷⁸ “therapeutic courts,”⁷⁹ or “problem-solving courts,”⁸⁰ these new programs all exist to “merge intensive treatment with the power of a court.”⁸¹ Through these treatment programs, judges have also learned something important that separates veteran offenders from other participants. While failure to treat mentally ill offenders may very well amount to a crisis in public health, the failure to treat mentally ill combat veteran offenders amounts to far more; by virtue of military training and experience that depends on the sustained direction and outlet of rage and emotion,⁸² it constitutes a threat to public safety.⁸³

⁷⁷ See, e.g., Kondo, *supra* note 76, at 260 (describing “the establishment of mental health courts . . . as a partial solution to the perplexing societal problem that relegates mentally ill offenders to a ‘revolving door’ existence, in and out of prisons and jails”).

⁷⁸ See, e.g., GOV’T ACCOUNTABILITY OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS 22 (July 1997), <http://www.gao.gov/archive/1997/gg97106.pdf> (defining a treatment court as a program that “increase[s] the offender’s] likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services”) (emphasis added).

⁷⁹ See, e.g., Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1517 n.10 (2003) (defining a therapeutic court as “a court that handles cases which traditionally would have been adjudicated in criminal court, but in which ‘helping’ rather than punitive outcomes are contemplated. The term ‘therapeutic’ has a medical tone to it, and for the most part the rhetoric of recovery is applicable to court operations, particularly with drug courts and mental health courts.”).

⁸⁰ Judith Kaye, the Chief Judge of the State of New York, explained the concept this way:

What these courts have in common is an idea we call problem-solving justice. The underlying premise is that courts should do more than just process cases—really people—who we know from experience will be back before us again and again with the very same problem, like drug offenders. Adjudicating these cases is not the same thing as resolving them. In the end, the business of courts is not only getting through a day’s calendar, but also dispensing effective justice. That is what problem-solving courts are about.

Hon. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL’Y REV. 125, 128 (2004).

⁸¹ Hon. William P. Keesley, *Drug Courts*, S.C. LAW., July/Aug. 1998, at 32, 34.

⁸² As various VTC program administrators have learned, “veterans, unlike the general population, were taught directly to be violent.” Editorial, *New Court Set to Serve Vets*, DAILY NEWS (L.A.), Sept. 13, 2010, at A1 (relating comments of California veterans center team leader Jason Young). Vietnam veteran Ray Essenmacher, President of the Bay County Veterans Council, puts it this way: “If you come up behind [some combat veterans] and tap them on the shoulder, they’re liable to come around swinging. They’re

Although commanders and courts-martial sentencing authorities may be blind to the revolving door syndrome and its results,⁸⁴ these actors play a definite part in the syndrome. While discharged servicemembers may be gone and forgotten to their units, the military justice system sometimes promotes future civilian offenses. Senior U.S. District Judge John L. Kane, who has confronted the problem of sentencing veterans with untreated mental conditions, commented that “[w]e dump all kinds of money to get soldiers over there and train them to kill, but we don’t do anything to reintegrate them into our society.”⁸⁵ The punitive discharge

hyper-alert, always trying to keep up with everything going on around them and always ready to go into combat at a moment’s notice. We were trained to do one thing, and some of us were trained rather well. It takes a lot to ‘untrain’ someone.” Lania Coleman, *Idea Floated to Create Court for Special Needs of Returning Veterans*, BAY CITY TIMES (Mich.), July 9, 2010, at A1. Marine Lieutenant General Chesty Puller put it best when he said, “Take me to the brig. I want to see the real Marines,” meaning “that a certain amount of aggression and acting out, such as drinking and fighting, must be tolerated (despite official sanctions against such behavior) because it is an unfortunate side effect of maintaining a proper level of aggression.” Don Catherall, *Systemic Therapy with Families of U.S. Marines*, in FAMILIES UNDER FIRE 99, 103 (R. Blaine Everson & Charles R. Figley eds., 2011). For additional exploration of the effect of lethal training on military members, see generally LIEUTENANT COLONEL DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1996).

⁸³ See, e.g., Steinberg, *supra* note 6, at 20 (observing the conclusions of Cook County, Ill., VTC Judge John P. Kirby, that, “[n]ot only is Veterans Court the right thing to do, but it works as a crime-fighting tool”); Editorial, *The Public and Veterans Benefit from Special Court*, SPOKESMAN REV. (Spokane, Wash.), Sept. 21, 2010, at A9 (relating the comments of Spokane County VTC Judge Vance Peterson, “[w]e have the ability to take people who might be felons and pre-empt them”). The converse is also true. Judge Wendy Lindley poses this question, “Are we safer as a community if we simply process these human beings through the system and send them off to prison and have them come back into our community? Because they will come back to our community, and if they come back and their PTSD has not been treated, what is the likelihood that they’re going to have another violent act in our community?” *The Situation Room* (CNN television broadcast Oct. 28, 2010). See also Holbrook & Anderson, *supra* note 9, at 21 (observing that the methodology of VTCs implicitly recognizes that “the risk factors for criminal behavior exhibited by some veterans—including alcohol and substance use, homelessness, broken relationships, unemployment, and mental health [conditions]—would, if left unaddressed, likely result in future involvement with the criminal justice system”).

⁸⁴ The primary reason for this result is the fact that, “[u]nlike the civilian world, the Army can maintain communal stability even though it fails to reform the criminal offender.” Major Thomas Q. Robbins & Captain Harry St. G. T. Carmichael III, *Sentencing Handbook* 36 (Mar. 1971) (unpublished thesis, The Judge Advocate Gen.’s Sch., U.S. Army, Charlottesville, Va.).

⁸⁵ Amir Efrati, *Judges Consider New Factor at Sentencing: Military Service*, WALL ST. J., Dec. 31, 2009, [www.WSJ.COM](http://online.wsj.com/article/SB12622169110969.html), <http://online.wsj.com/article/SB12622169110969.html> (citing Judge Kane).

builds on this quagmire in two ways. First, confinement tends to aggravate mental illness,⁸⁶ and PTSD becomes more difficult to manage when effective treatment is delayed.⁸⁷ Although an inmate with PTSD may be able to see a therapist when confined in a military facility, such treatment is not optimal.⁸⁸

The second problem is the likelihood that the punitively discharged offender will not be able to obtain quality care from the VA upon release from confinement after the aggravation of his symptoms based on his incarceration. Although military courts have noted the fact that the VA can provide care to certain convicts despite punitive discharges,⁸⁹ there is

⁸⁶ Not only is “being sent to prison” considered a traumatic event, the magnitude of this trauma is comparable to “rape,” “acts of terrorism,” and “being held hostage.” DIANA SULLIVAN EVERSTINE & LOUIS EVERSTINE, *STRATEGIC INTERVENTIONS FOR PEOPLE IN CRISIS, TRAUMA, AND DISASTER*, at xiv (2006 rev. ed.). *See also* Lamb, *supra* note 75, at 8 (observing that “[i]ncarceration poses a number of important problems and obstacles to treatment and rehabilitation” for the mentally ill).

⁸⁷ *See, e.g.*, Joseph I. Ruzek et al., *Treatment of the Returning War Veteran*, in NAT’L CTR. FOR POST-TRAUMATIC STRESS DISORDER, *IRAQ WAR CLINICIAN GUIDE* 33, 39 (2d ed. 2004), http://www.ptsd.va.gov/professional/manuals/manual-pdf/iwcg/iraq_clinician_guide_v2.pdf (describing the importance of early intervention in addressing and preventing PTSD).

⁸⁸ Generally, “[e]ven when quality psychiatric care is provided, the inmate/patient still has been doubly stigmatized—as both a mentally ill person and a criminal.” Lamb, *supra* note 75, at 8. Major Paul A. White, who works as a clinical psychologist at the U.S. Disciplinary Barracks, explains some of the additional considerations facing inmates with service-connected disorders like PTSD. First, for effective therapeutic treatment, the inmate must be willing to participate in therapy voluntarily. One disincentive is the inmate’s concern about the disclosure of incriminating information related to the combat trauma. Notably, Major White has had patients who desired to clear issues with their attorneys before raising them in therapy, refused to write as part of an exercise that required written journaling, and ultimately left the program. Separately, inmates receive consideration for clemency based on a series of standard training blocks, none of which provide credit for participation in treatment of disorders like PTSD. Third, the very nature of confinement, with constant monitoring, often limits the degree of openness between a therapist and an inmate with a mental disorder. Interview with Major Paul A. White, Clinical Psychologist, U.S. Disciplinary Barracks, in Fort Leavenworth, Kan. (Oct. 6, 2010).

⁸⁹ Older convicts with a prior honorable discharge in their service record may be eligible for VA care, despite a punitive discharge on a later term. *See, e.g.*, *United States v. Goodwin*, 33 M.J. 18, 18 (C.M.A. 1991). Additionally, the courts have also noted exceptions to statutory bars on benefit eligibility, especially for inmates who received Bad-Conduct Discharges (BCDs) at Special Courts-Martial. *See, e.g.*, *Waller v. Swift*, 30 M.J. 139, 144 (C.M.A. 1990) (“Both a dishonorable and a bad-conduct discharge adjudged by a general court-martial automatically preclude receipt of veterans’ benefits, based on the terms of service from which the accused is discharged, *see* 38 USC § 3103;

great danger in assuming that *all* inmates can avail themselves of these limited exceptions.⁹⁰ The success of new programs for veterans who are involved in the civilian justice system and the rapid establishment and funding of VTCs rest entirely on the presumption that incarcerated veterans are still eligible for VA benefits and that they received discharges under honorable conditions.⁹¹ Veterans Affairs representatives encounter substantial problems when the case is different, conceding that the Other Than Honorable conditions discharge, the Dishonorable Discharge (DD), and the Bad-Conduct Discharge (BCD) are largely disqualifiers.⁹² Thus, while it is theoretically possible for a punitively discharged combat veteran to appeal a denial of VA benefits or request an exception, it may take years of litigation before such servicemembers could obtain the right to seek treatment.⁹³ Civilian programs without VA

but the effect on a veteran's benefits of a bad-conduct discharge adjudged by a special court-martial must be determined on a case-by-case basis.").

⁹⁰ Studies of PTSD reveal that younger servicemembers are far more susceptible to the disorder and far more likely to engage in violent behavior when so afflicted. *See, e.g.*, Elbogen et al., *supra* note 57, at 599. Those who have successfully completed prior enlistment periods under honorable conditions, thus entitled to VA benefits, are likely to be older noncommissioned officers.

⁹¹ State VTCs have tremendous financial incentive to condition enrollment on the possession of a discharge under honorable conditions due to participants' automatic eligibility for VA treatment at a time when states lack independent funding for PTSD treatment. *See, e.g.*, Merten, *supra* note 3 (describing these as Judge Snipes's reasons for mandating an honorable discharge for participation in Dallas's VTC "which is not required by the legislation").

⁹² Letter from Michael J. Kussman, Veterans Affairs Undersec'y for Health: Information and Recommendations for Services Provided by VHA [Veterans Health Administration] Facilities to Veterans in the Criminal Justice System ¶ 3.a, at 2 (Apr. 30, 2009) (explaining how eighteen percent of incarcerated veterans in the civilian system are ineligible for care from the Veterans Administration based on the nature of their discharge). In a recent study, for example, of 645 offenders referred to VTCs, discharge characterizations precluded 200 of them from receiving VA services as part of the program. Schaffer, *supra* note 51, at 16, 19. *But see* Holbrook & Anderson, *supra* note 9, at 25–26 (noting that ten of the 14 VTCs in their sample population "did not require program participants to be eligible for VA benefits," but acknowledging that "VA involvement [still] remained critical" in such cases).

⁹³ *See, e.g.*, Major Tiffany M. Chapman, *Leave No Solider Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1, 26–33 (2010) (reviewing various cases in which the VA denied servicemembers benefits for PTSD treatment based on the nature of their discharges and interpretation of statutory bars following years of litigation).

funding may not prioritize treatment for veterans and are rarely able to provide the same quality of care.⁹⁴

Thus, by expecting that treatment will be available from some unknown entity at an equally uncertain date, the military is oblivious to the possibility it has created a double wound, first by placing the servicemember in a situation that caused the mental illness, and, second, by preventing necessary treatment in the future.⁹⁵ This is as much a wound to society; rather than closing the revolving door, the court-martial is responsible for the first revolution of the door, sending the discharged veteran into the streets, and locking the treatment door behind him. The position adopted in the military—to ensure that the accused gets his “just deserts”—is ultimately undermining America’s public safety because mentally ill offenders who have difficulty controlling their behavior are in greatest need of treatment. Such treatment is not just a concern to protect the veteran, but, moreover, for the well-being of the Nation that all active duty military members are sworn to protect and defend.⁹⁶

Because there is ample room in military justice to develop solutions without changing military law, military justice practitioners should consider recent developments in civilian treatment courts over a decade of innovation that has rightly been characterized as nothing less than a

⁹⁴ See, e.g., Brunswick, *supra* note 51, at 1A (observing the need for the VA to supplement state VTCs as “state court funding becomes more sparse and federal funding remains flush”).

⁹⁵ Preclusion from benefits is often “arbitrary” when commanders, separation boards, and courts-martial panels remain oblivious to future treatment needs in individual cases:

For example, if a veteran had PTSD that led to infractions while he was still in the military, he might receive a less-than-honorable discharge and thus be ineligible for treatment in a veterans court. However, if the same soldier received a medical discharge for his PTSD, or if he did not start showing negative behavioral symptoms until he had been discharged, he would remain eligible.

Cartwright, *supra* note 9, at 309.

⁹⁶ See Stephanie Simmons, Note, *When Restoration to Duty and Full Rehabilitation is Not a Concern: An Evaluation of the United States Armed Forces*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 105, 128 (2008) (describing a blurred distinction in which the untreated soldier, discharged from the Service, who “suffers from PTSD and commits crimes outside the military scope . . . again finds himself indirectly serving time under the U.S. government for criminal activity that was a result of his service in the United States government” when he is later convicted through the civilian court system).

legal “revolution.”⁹⁷ Likewise, civilian court administrators and judges should consider how partnerships with active duty and reserve installations might advance their goals. This sharing would reflect the military’s longstanding practice of turning to civilian courts and corrections professionals to model its own rehabilitative programs.⁹⁸ Such a symbiotic relationship springs from shared concerns for the future of the military inmate after he rejoins the civilian community. Today, there should be even greater concern over punitively discharged inmates with mental health disorders because, here, the military’s interest and society’s interest are indistinguishable.⁹⁹

II. The Common Aims of the Treatment Court Movement

Scholars fear that the rehabilitative ideal has given way to retributive theories of justice.¹⁰⁰ Regular reporting on wardens who aim to make prison as painful and humiliating an experience as possible and candidates who run for office on a “tough on crime” platform may cast a bleak view of modern corrections and its aims.¹⁰¹ However, even if retribution is a common denominator, the widespread adoption of treatment courts throughout the Nation has proved an important exception.

The rapid expansion of specialized treatment courts is noteworthy. As of 2012, there are over 3648 problem-solving courts in the United

⁹⁷ BERMAN & FEINBLATT, *supra* note 76, at 3 (characterizing the phenomenon of therapeutic courts as a “quiet revolution among American criminal courts”).

⁹⁸ See *infra* Part III (describing civilian influences on the development of active duty rehabilitative programs).

⁹⁹ See *supra* note 41 (describing indivisible interests for criminally involved servicemembers with mental conditions).

¹⁰⁰ See, e.g., Jonathan Harris & Lothlórien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 CRIM. L. BRIEF 2, 7 (2007) (“[R]ehabilitation has been widely discarded as a goal of the penal system. In its place, a retributive theory of justice—of ‘just deserts’—where the measure of the punishment should be a function of the seriousness of the crime and the culpability of the offender, has largely taken over.”).

¹⁰¹ See, e.g., Tracy Idell Hamilton, *Bexar County Tent Jail Idea “Get Tough” or Gimmick?*, SAN ANTONIO EXPRESS-NEWS (Tex.), Oct. 30, 2006, at 1A (discussing the notoriety of “controversial Sheriff [Joe Arpaio, who] forces jail inmates to wear pink underwear, eat 15-cent meals, work on chain gangs and live in un-air-conditioned, Korean war-era tents that can heat up past 120 degrees in the summer”).

States¹⁰²—an increase of more than 500 since 2009¹⁰³—including at least 2459 drug treatment courts,¹⁰⁴ 250 MHCs,¹⁰⁵ and 88 VTCs.¹⁰⁶ In Dallas, Texas, alone, the inauguration of its first VTC marked the 14th type of treatment court, among the ranks of specialized programs for prostitutes and perpetrators of domestic violence, to name a few.¹⁰⁷ Recognizing the success of drug court approaches, the Conference of Chief Justices and the Conference of State Court Administrators endorsed the development of problem-solving courts in all jurisdictions.¹⁰⁸ The American Bar Association further encouraged “the development of Veterans Treatment Courts, including but not limited to specialized court calendars or the expansion of available resources within existing civil and criminal court models focused on treatment-oriented proceedings.”¹⁰⁹ As a noteworthy break from traditional adversarial court relationships, the National District Attorney’s Association also endorsed VTC programs in its 2010 Resolution 26B.¹¹⁰

¹⁰² WEST HUDDLESTON & DOUGLAS B. MARLOWE, *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* 37 (July 2011).

¹⁰³ JOANN MILLER & DONALD C. JOHNSON, *PROBLEM-SOLVING COURTS: NEW APPROACHES TO CRIMINAL JUSTICE* 53 (2009).

¹⁰⁴ HUDDLESTON & MARLOWE, *supra* note 102, at 19.

¹⁰⁵ See, e.g., Henry J. Steadman, *Effect of Mental Health Courts on Arrests and Jail Days: A Multisite Study*, *ARCHIVES GEN. PSYCHIATRY*, Oct. 4, 2010, at 1, <http://archpsyc.ama-assn.org/cgi/content/abstract/archgenpsychiatry.2010.134v1>.

¹⁰⁶ *Supra* note 5 (discussing the rapid development of VTCs).

¹⁰⁷ Merten, *supra* note 3 (describing “13 other specialty courts,” in addition to VTCs). See also HUDDLESTON & MARLOWE, *supra* note 102, at 43–47 (defining the attributes of different types of problem-solving courts, including VTCs). Additional programs are now in the developmental stages, such as a specialized court to address the unique problem of animal abuse under similar principles. See generally Debra L. Muller-Harris, *Animal Violence Court: A Therapeutic Jurisprudence-Based Problem-Solving Court for the Adjudication of Animal Cruelty Cases Involving Juvenile Offenders and Animal Hoarders*, 17 *ANIMAL L.* 313 (2011).

¹⁰⁸ Conference of Chief Justices & Conference of State Court Adm’rs, CCJ Resolution 22/COSCA Resolution 4, In Support of Problem-Solving Courts (Aug. 2000), *available at* <http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/resolutionproblemsolvingcts.html>.

¹⁰⁹ Am. Bar Ass’n, ABA Resolution 105A (2010).

¹¹⁰ Nat’l Dist. Attorneys Ass’n, National District Attorney’s Association Resolution 26b (2010), *available at* http://www.nadcp.org/sites/default/files/nadcp/NDAA%20Endorsement_0.pdf (endorsing the development of VTCs and recognizing, “[f]or soldiers, mental trauma and debilitating stress are part of the job description. When veterans go astray, they deserve every reasonable effort to get them back where they began: clean, sober and on the right side of the law”).

To aid in identifying common features of the treatment court “movement,” Appendix B reprints Ninth Circuit Appellate Judge Michael Daly Hawkins’s visual depiction of the operation of Anchorage, Alaska’s VTC.¹¹¹ The diagram reveals characteristics that help to distinguish why a court-martial is not simply a de facto “veterans court” based on the military status of participants tried in the setting: Problem-solving courts involve much more than suspended sentences with treatment requirements and routine contact with probation officers. In the therapeutic court setting, the judge assumes the monitoring role that would normally fall on the shoulders of the probation officer, but with enforcement powers several times greater.¹¹²

Any attempt to describe all problem-solving courts comprehensively would be necessarily incomplete because much of their structure is based on individual personalities of presiding judges and treatment teams. They have flourished over the years, mainly at the state level,¹¹³ because they have operated outside the *Federal Sentencing Guidelines*, which limited the federal courts’ ability to develop innovative rehabilitative alternatives prior to the Supreme Court’s 2005 *Booker* opinion¹¹⁴ and very recent *Guidelines* amendments by the U.S. Sentencing Commission.¹¹⁵ However, amid the great variance, all treatment courts adhere to certain

¹¹¹ Hawkins, *supra* note 2, at 573.

¹¹² See *infra* note 124 (describing the heightened requirements of judicial oversight in VTCs).

¹¹³ Although nearly all VTCs are state-operated programs, Federal Magistrate Judge Paul Warner operates at least one federal VTC program in the District of Utah. See Dennis Romboy, *Veterans Court Deals with ‘Root of Problem,’* DESERET NEWS (Utah), Jan. 2, 2011 (12:26 MST), <http://www.deseretnews.com> (describing the judge’s “monthly veterans calendar,” which is similar to many state programs and recognized as “the only one of its kind on a federal level in the nation”).

¹¹⁴ See, e.g., David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, in REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 20, 28 (David B. Wexler ed., 2008) (observing how treatment-based and problem-solving sentencing options exist mainly “in state and local courts, where there is typically greater flexibility than under the federal guidelines”). The Supreme Court’s holding in *United States v. Booker*, 543 U.S. 220, 245 (2005), finding the *Federal Sentencing Guidelines* advisory rather than mandatory in nature, has led the U.S. Sentencing Commission to consider alternative sentencing programs, including drug treatment courts as options in federal sentencing practice. Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209 (2009).

¹¹⁵ See Cartwright, *supra* note 9, at 314 (noting amendments to the *Federal Sentencing Guidelines* that would permit judges to assign greater significance to military service and psychological conditions and enable alternatives to incarceration in certain “unusual” cases).

unifying principles, normally fashioned as “Key Components”¹¹⁶ or “Essential Elements.”¹¹⁷ With slight variations, the principles remain constant through different program types; all feature “ongoing judicial interaction with each [participant],”¹¹⁸ use interdisciplinary teams to respond to the offender’s individual needs,¹¹⁹ hold the offender accountable for lack of adherence to specifically-designed treatment plans,¹²⁰ and require both the willingness to innovate in treatment approaches and to incorporate lessons learned.¹²¹ A list of the Ten Key Components of Veterans Treatment Courts appears in Appendix C for further illumination.¹²² In comparison with existing military and civilian treatment programs, these problem-solving, treatment-based courts reflect an entirely novel approach, which differs mainly in the number of interactions the offender has with a judicial officer¹²³ and the demanding responsibilities required for the offender to remain in the program.¹²⁴

¹¹⁶ U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997) (providing ten key components of drug courts).

¹¹⁷ *See, e.g.*, MICHAEL THOMPSON ET AL., *IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESS: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT 1* (2007) (providing detailed discussion of ten essential elements of mental health courts, but noting how the ten key components of drug courts “provided the foundation in format and content” for the mental health elements).

¹¹⁸ Hon. Robert T. Russell, Jr., *Veterans Treatment Court: A Proactive Approach*, 35 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 357, 366, Key Component 7 (2009).

¹¹⁹ *See id.*, Key Component 6 (“A coordinated strategy governs Veterans Treatment Court responses to participants’ compliance.”).

¹²⁰ THOMPSON ET AL., *supra* note 117, at 9, Essential Element 9 (“Criminal justice and mental health staff collaboratively monitor participants’ adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants’ recovery.”).

¹²¹ Russell, *supra* note 118, at 367, Key Component 8 (“Monitoring and evaluation measures the achievement of program goals and gauges effectiveness.”); THOMPSON ET AL., *supra* note 117, at 10, Essential Element 10 (“Data are collected and analyzed to demonstrate the impact of the mental health court, its performance is assessed periodically (and procedures are modified accordingly), court processes are institutionalized, and support for the court in the community is cultivated and expanded.”).

¹²² *Infra* app. C.

¹²³ *See, e.g.*, Allison D. Redlich et al., *The Use of Mental Health Court Appearances in Supervision*, 33 *INT’L J. L. & PSYCHIATRY* 272, 272 (2010) (noting mental health treatment courts’ requirements to appear at court, sometimes “four times a week”).

¹²⁴ James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 *AM. CRIM. L. REV.* 1541, 1555 (2003) (describing how “noncompliance” with treatment plans “may result in more serious sanctions than would be experienced in a traditional court”).

Within the broad parameters of basic treatment court principles, common attributes of these programs have led to program success.¹²⁵ Studies reveal that drug courts reduce recidivism and save more costs than traditional probation or prison.¹²⁶ As applied to the treatment of mental illness, where detection of program effectiveness is not as easy as obtaining urinalysis results, there are strong indicators that the basic drug court principles work equally well.¹²⁷ Even at their current infantile stages, VTCs too show promising results.¹²⁸ While these general gains do

¹²⁵ Numerous studies address the essential role of the treatment court judge, whose frequent contact with the offender and the treatment team produce specific positive results. *See, e.g.*, Heathcote W. Wales, *Procedural Justice and the Mental Health Court Judge's Role in Reducing Recidivism*, 33 INT'L J. L. & PSYCHIATRY 265, 265 (2010):

(1) the judge provides a quality of interpersonal treatment of participants that accords them dignity, respect and voice, builds trust by showing a concern for their best interests, and repeatedly emphasizes their control over their choice to participate; (2) the judge holds participants, attorneys and service providers alike accountable for their respective roles in participants' rehabilitation and resolution of their legal problems; and (3) the judge provides transparency, carefully explaining the reasons for all decisions.

¹²⁶ *See, e.g.*, Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts: Empirical Success. Will South Dakota Follow Suit?*, 52 S.D. L. REV. 288, 303-04 (2007) (noting studies of recidivism and cost savings and how "most studies have found that drug court clients who participated in treatment were considerably less likely to recidivate than both untreated drug court clients and control subjects"); Clark et al., *supra* note 41, at 177 (observing how "[f]our meta-analyses indicated that drug courts reduced crime by an average of 17 to 14 percentage points").

¹²⁷ Redlich et al., *supra* note 123, at 272 ("Several studies on individual MHCs [mental health courts] have demonstrated that the courts can be effective in reducing the rate of new arrests either in comparison to a control group or in comparison to participants' rates pre-MHC involvement.").

¹²⁸ *See, e.g.*, William H. McMichael, *The Battle on the Home Front: Special Courts Turn Vets to Help Other Vets*, ABAJOURNAL.COM (Nov. 1, 2011 4:10 AM CST), http://www.abajournal.com/magazine/article/the_battle_on_the_home_front_special_courts_turn_to_vets_to_help_other_vets/ (reporting general statistics for all VTCs that "70 percent of defendants finish the program and 75 percent are not rearrested for at least two years after"); Cartwright, *supra* note 9, at 315 ("The Anchorage [Veterans Treatment C]ourt had only one re-arrest out of thirty-four graduates in two years."); Holbrook, *supra* note 60, at 259, 279 (concluding that the results of Buffalo's VTC are "promising," with "only 2 of more than 100 veterans who had participated in the program . . . return[ing] to regular criminal court" and explaining that no participants had been rearrested since the first graduation in May 2010); William H. McMichael, *Finding a New Normal: Special Courts Help Vets Regain Discipline, Camaraderie by Turning to Mentors Who've Served*, ARMY TIMES, Feb. 21, 2011, at 10, 11 ("None of the 41 graduates to date has been rearrested. And only 25 of the 181 total veterans admitted to the program have dropped out before graduation."). In a more recent attempt to overcome

not guarantee the success of any program for a given offender, they suggest that local problem-solving courts can be a tremendous resource to commanders and military justice practitioners. These courts not only have unmatched experience in the evaluation of offenders' rehabilitative potential, but have developed best practices in the management of mental illness and substance dependence.¹²⁹ Given the high level of community involvement in these courts, which draw on both public and private organizations to aid in offenders' recovery, local problem-solving courts can provide access to many more treatment alternatives than standard probationary programs.

Part III, below, reveals that the military has historically employed a problem-solving approach in its own disciplinary system that makes it well suited to incorporate veterans, mental health, or drug courts—and their major lessons—in the current practice of military justice.

the “lack of evaluative data” on the effectiveness of VTCs, Professor Justin Holbrook and his Widener Law School colleague Sara Anderson examined participation records in 14 VTCs, concluding not only that “veterans court outcomes are at least as favorable as those of other specialized treatment courts,” but also that, “[o]f the 59 reported graduates among all responding courts, only one had re-offended following graduation, a recidivism rate under 2 percent.” Holbrook & Anderson, *supra* note 9, at 4, 39, 30.

¹²⁹ For example, the administrators of these programs often participate in, and at least have awareness of trends in, the effective supervision of probationers with mental health disorders and can potentially share these lessons with military personnel responsible for supervising offenders with suspended discharges. *See, e.g.*, Jennifer Eno Loudon et al., *Supervising Probationers with Mental Disorder: How Do Agencies Respond to Violations?*, 35 CRIM. JUST. & BEHAV. 832, 843–45 (2008) (describing attributes of specialized supervision techniques, as opposed to traditional ones). Within VTCs, specifically, scholars have also very recently identified “‘best practices’ essential to veterans courts’ success,” some of which include:

- “An integrated stakeholder team committed to veterans’ rehabilitative interests”;
- “a willingness to maximize the offenses available to be heard in veterans court, provided the interests of the state and any victim are appropriately served”;
- “a reliable network to identify potential program participants early in the criminal justice process”;
- and, “treatment plans and disposition decision that are both tailored and flexible.”

Holbrook & Anderson, *supra* note 9, at 41.

III. Precedents from Military Discharge Remission Programs

A. The Value of a Historical Perspective on Military Clemency and Offenders with Combat Trauma

The following sections of Part III trace military discharge remission programs from their genesis with special attention to clemency accorded on the basis of combat-generated mental health conditions. Although combat trauma has been a staple of military service since the earliest battles,¹³⁰ and its link to crime has been known throughout the military and society since at least the Civil War,¹³¹ military law practitioners and the courts have missed many crucial lessons from earlier periods.¹³² Instead, like many students of history in general, they are captives of a “history effect,” which sometimes causes them to adopt narrow and faulty interpretations of historical facts and causal relationships.¹³³ This effect permeates studies of battles and the evolution of theories and represents the failure to consider alternative explanations for outcomes.¹³⁴ Andrew S. Effron, the former Chief Judge of the military’s highest court, has described the dangers of the history effect in legal interpretation:

¹³⁰ See, e.g., WILLIAM SCHRODER & RONALD DAWE, *SOLDIER’S HEART: CLOSE-UP TODAY WITH PTSD IN VIETNAM VETERANS* 175 (2007) (“As early as 1900 B.C., Egyptian physicians depicted hysterical psychological reactions in soldiers exposed to traumatic events in battle.”).

¹³¹ Holbrook, *supra* note 60, at 259, 268. Arguably, much earlier, Homer explored this link in *The Odyssey*. JONATHAN SHAY, *ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING* 26 (2002) (“A career that war exactly prepares veterans for upon return to civilian life is a *criminal career*, symbolized . . . by Odysseus’ pirate raid on Ismarus.”). If not the Civil War, Vietnam certainly resurrected earlier concerns. See, e.g., BEN SHEPARD, *A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY* 365 (2000) (“Ever since the early 1970s there had been press stories about the problems of Vietnam veterans—their drug addiction, high crime rate, homelessness, propensity to violence and suicide.”).

¹³² *Infra* Part III.B.

¹³³ ROBERT F. BERKHOFFER JR., *FASHIONING HISTORY: CURRENT PRACTICES AND PRINCIPLES* 215 (2008) (defining the “history effect” as “rhetoric [that] asserts definite, preferably definitive, statements about the past whether simple fact or speculative generalization”). See also JOHN TOSH & SEÁN LANG, *THE PURSUIT OF HISTORY: AIMS, METHODS AND NEW DIRECTIONS IN THE STUDY OF MODERN HISTORY* 180 (4th ed. 2006) (“Most of what pass for the ‘facts’ of history actually depend on inference.”).

¹³⁴ See, e.g., JEREMY BLACK, *RETHINKING MILITARY HISTORY* 30 (2004) (discussing how “[e]ven frequently recounted battles benefit from re-examination”); Phillip S. Meilinger, *The Historiography of Airpower: Theory and Doctrine*, 64 *J. MIL. HIST.* 467, 467 (2000) (“Theory and doctrine deal with the realm of ideas, not operations [T]racing the history of ideas has proven to be a fairly barren field.”).

The most important cases require a deep appreciation of military justice in its larger context—the conduct of military policy, the war powers, the separation of powers, and the role of military justice in projecting military power. When such matters are addressed through buzz words, rather than critical scholarship, the courts are deprived of an important source of analysis.¹³⁵

Further, “when military justice issues are debated by policy makers in the executive or legislative branches without the benefit of historical perspective and past example, these deficiencies cannot be overcome by a thousand buzz words.”¹³⁶

Mindful of the history effect, in approaching offenders with mental illness, the military justice practitioner should have an open mind and be ready to eschew core historical narratives and oversimplifications of what commanders have or have not done in the past.¹³⁷ Despite writers’

¹³⁵ Hon. Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, *ARMY LAW.*, June 2000, at 1, 7.

¹³⁶ *Id.*

¹³⁷ See, e.g., Jon Tetsuro Sumida & David Alan Rosenberg, *Machines, Men, Manufacturing, Management, and Money: The Study of Navies as Complex Organizations and the Transformation of Twentieth Century Naval History*, in *DOING NAVAL HISTORY: ESSAYS TOWARD IMPROVEMENT* 25, 26, 29 (John B. Hattendorf ed., 1995) (describing how core historical narratives, as repeated, are normally incomplete and reflect unsophisticated analysis “so vast as to preclude careful measurement by a single scholar”).

The history of military clemency is even harder to interpret because the field of military corrections is value-laden and can change based on the background of the researcher. Richard L. Henshel, *Military Correctional Objectives: Social Theory, Official Policy, and Practice*, in *THE MILITARY PRISON: THEORY, RESEARCH, AND PRACTICE* 28, 28–32 (Stanley L. Brodsky & Norman E. Eggleston eds., 1970) (describing how military correctional programs have “often produced a ‘hodge-podge’ of policy . . . created largely by compromises between conflicting external pressures,” in which representatives from different branches, including judge advocates and military police, “see the problem in a somewhat different light” and, therefore, generate poor decisions based on unexplored clashing objectives and the pressure to achieve some sort of compromise) (emphasis added). In 1952, following major clemency lessons of the Second World War, an official publication by the Adjutant General sought to prevent such distortion by capturing several recent lessons. U.S. DEP’T OF ARMY, *THE ARMY CORRECTIONAL SYSTEM*, at i (2 Jan. 1952) [hereinafter U.S. DEP’T OF ARMY, *CORRECTIONAL SYSTEM*] (forecasting how the publication’s “general statement of the history, development, progress, practices, and beliefs which comprise the Army Correctional System, will be of valuable assistance to those whose duties are connected in any way with custodial problems”). See also COLONEL JAMES J. SMITH, *MILITARY CLEMENCY AND PAROLE: DOES IT WORK?* 3 (1993),

lack of attention to historical precedents, the civilian criminal and military justice systems both adopted problem-solving approaches to address the unique situations facing combat-traumatized veterans in generations prior to operations Enduring and Iraqi Freedom.¹³⁸ For example, in the civilian realm, since the late nineteenth century, the Veterans Homes established in the wake of the Civil War developed their own disciplinary system and structure as an alternative to conviction through the civilian courts in efforts to rehabilitate veterans.¹³⁹ Likewise, in the aftermath of WWII, much like contemporary VTCs, the state of Indiana developed a “special” sentencing program that provided intensive rehabilitation and mentorship in lieu of lengthy incarceration for convicted veterans.¹⁴⁰ Yet, the current discourse on contemporary problem-solving courts entirely omits such examples.¹⁴¹

available at WWW.DTIC.MIL, <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA276635>:

We learn lessons from the past. The more things change, the more they remain the same. Because [military] clemency and parole is a human topic, rather than a scientific study, history is even more likely to lead us in the right direction. We look at how our predecessors used clemency and parole, so we can learn from their experiences and avoid mistakes.

¹³⁸ For in-depth explorations of military programs, see *infra* Part III.B.

¹³⁹ See, e.g., Judith Gladys Cetina, *A History of Veterans' Homes in the United States 1811–1930*, at 166, 411–14 (1977) (unpublished Ph.D. dissertation on file at Case Western Reserve University) (describing disciplinary approaches at Veterans Homes).

¹⁴⁰ Albert Evigil & Harry L. Hawkins, *The Short-Term Institution and the Delinquent Veteran*, *PRISON WORLD*, May–June 1946, at 16, 28 (recognizing how the veteran offender “seems to be a ‘special’ person who requires a ‘special’ type of treatment and appeal” and describing a specialized program built on individualized treatment plans, involvement of VA representatives, the use of veterans mentors, and community partnerships with methods for monitoring the participant’s adjustment).

¹⁴¹ Although aspects of the Veterans Homes and Indiana’s program largely resemble contemporary VTCs, commentators normally link the VTC movement to the programs at Anchorage, Alaska, in 2004, Buffalo, N.Y., in 2008, or Rochester, N.Y., in 2006. See, e.g., Hawkins, *supra* note 2, at 565–66 (describing origins in Anchorage or Buffalo); Timothy S. Eckley, *Veterans Court Session in Buffalo*, 92 *JUDICATURE* 43, 43 (2008) (“The concept of the Veterans Court grew from proceedings in the Rochester, New York City Court of Judge John Schwartz, who began [in 2006] to involve Veterans Affairs staff in his drug court.”). Cf. Telephone Interview with Darlene Richardson, Historian, U.S. Dep’t of Veterans Affairs (Jan. 5, 2011) (observing how the lessons from the Veterans Homes, while relevant to modern practice, remain largely undiscovered and unexplored).

Contemporary views of military discharge remission are similarly infected by a virus of oversimplification. They are reminiscent of the entirely fictional account of WWII clemency in E.M. Nathanson's critically-acclaimed book and film adaptations of *The Dirty Dozen*,¹⁴² in which the Army selects twelve dishonorably discharged prisoners convicted at a general court-martial, trains them, and unleashes them behind enemy lines to conduct clandestine "suicide missions."¹⁴³ In every rendition of the storyline, a general officer exercises his broad clemency power by suspending prisoners' court-martial sentences and affording them a chance to be considered for restoration to active duty upon mission success; if the prisoners fail, they will face summary execution of their sentences.¹⁴⁴ In their adoption of this fable, some scholars reason that clemency has always been a rarity, that discharges were suspended only in limited situations involving special skills, and that such suspensions are obsolete artifacts of past wars.¹⁴⁵

¹⁴² E.M. NATHANSON, *THE DIRTY DOZEN* (Random House Book Club ed. 1965); *THE DIRTY DOZEN* (MGM 1967). Unabashedly, Nathanson explained that the whole story was an entirely fictional account. NATHANSON, *supra*, at 1 ("This story is fiction. I have heard a legend that there might have been men like them, but nowhere in the archives of the United States Government, or in its military history did I find it recorded.") (appearing on an unmarked page after the author's dedication).

¹⁴³ The theatrical trailer for the original film dramatically summarizes, "Train them. Excite them. Arm them. And, turn them loose on the Nazi high command." THEATRICAL TRAILER FOR *THE DIRTY DOZEN* (MGM 1967).

¹⁴⁴ As the precursor to a 2012 re-make, made-for-television movies, and a 1988 television series, the recurring plot grows entirely from the concept of a suspended probationary sentence and continues to introduce court-martial clemency to audiences in mainstream America and the world. See Joseph Adalain & Michael Fleming, *WB Gets Down and "Dirty,"* VARIETY.COM, <http://www.variety.com/article/VR1117939603.html?Categoryid=13&cs=1> (Mar. 12, 2006 9:00 PM PT); *THE DIRTY DOZEN: NEXT MISSION* (1985); *THE DIRTY DOZEN: THE DEADLY MISSION* (1987); *THE DIRTY DOZEN: THE FATAL MISSION* (1988); *DIRTY DOZEN: THE SERIES* (1988). A representative example of the television series is the ninth episode of the season, titled *Don Danko*, in which, the Dozen, while stationed in Lisbon, Portugal in 1943, "must pose as mafia mobsters and use their inside knowledge of forgery, in order to stop a counterfeit money operation which is funding the Nazis." *Dirty Dozen: The Series*, IMDB.COM, <http://www.imdb.com/title/tt0094451/episodes#year-1988>.

¹⁴⁵ One commentator distinguishes how modern warfare is different from WWII, "where perhaps one man . . . could make [an individual] difference in the outcome of the war" because of special training. Hamner, *supra* note 35, at 1, 18 (citing an individual "integrally involved in the creation of the atomic bomb" as an example of one who might have been restored to duty from a dishonorable discharge in the past and speculating that, today, no soldier "is so crucial that it demands the commander to exercise his prerogative to keep that [s]oldier for the war effort").

Military courts have not only adopted this clemency fiction, but attributed it to eminent figures like General Dwight Eisenhower.¹⁴⁶ The line of cases cites Mr. Felix Larkin's summary of General Eisenhower's testimony:

The classic case that I think General Eisenhower stated in his testimony before your subcommittee last year was that even though you might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such a unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say "Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission."¹⁴⁷

The account reflects a simplified history of military justice during the Second World War with sentences so oppressive that they necessitated the establishment of a Uniform Code to prevent widespread abuses by commanders.¹⁴⁸ Closer examination, however, reveals an entirely different philosophy toward clemency.

¹⁴⁶ See *United States v. Cansdale*, 7 M.J. 143, 146–47 (C.M.A. 1979); *United States v. Morrison*, 3 M.J. 408, 412 n.13 (C.M.A. 1977); *United States v. Prince*, 36 C.M.R. 470, 472 (C.M.A. 1966); *United States v. Kirsch*, 35 C.M.R. 56, 64 (C.M.A. 1958); *United States v. Fields*, 25 C.M.R. 332, 337 (C.M.A. 1958); *United States v. Nassey*, 18 C.M.R. 138, 144 (C.M.A. 1955); *United States v. Schmidt*, 13 M.J. 934, 938–39 (A.F.C.M.R. 1982).

¹⁴⁷ *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1184 (1949) [hereinafter *House Hearing on H.R. 2498*] (comments of Felix E. Larkin, a member of the drafting committee for the *Uniform Code of Military Justice* during floor congressional debates).

¹⁴⁸ The contemporary historical account of military justice in WWII perpetuates a limited core narrative that neglects the use of rehabilitation, probationary sentences, and related lessons. It paints a picture of 2,000,000 courts-martial—sometimes related in daily rates for effect—which ultimately resulted in over 80,000 punitive discharges. See e.g., WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 14 (1973) ("There were about eighty thousand general court-martial convictions during the war, an average of nearly sixty convictions by the highest form of military court, somewhere every day of the war."); Hon. Walter Cox III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 11 (1987) (noting "more than sixty convictions by general courts-martial for every day the war was fought"). Problematically, the narrative omits the prominent fact that the Army remitted more than half of these discharges and honorably restored the same offenders to military service. See *infra* Part III.B.3.

In 1947, General Eisenhower was then Army Chief of Staff. He testified during a full session of the House Committee on Armed Services regarding a proposal to empower the Judge Advocate General to mitigate a court-martial sentence independent of the convening authority and the Secretary of War. General Eisenhower related his own experience as Commander of U.S. Forces in the German front to underscore the importance of line commanders' involvement in the clemency process. The actual account clearly distinguishes between clemency fact and clemency fiction by highlighting, in Eisenhower's own words, a far more "delicate" calculus, completely omitted by Mr. Larkin and modern commentators.

As General Eisenhower visited troops, the tentacles of a complex black market syndicate had reached from France to Germany, targeting U.S. equipment. Soldiers often made inquiries: "Every time I visited the front and walked along the front, all I heard was, 'General, what are you doing about that business? These people are stealing our gasoline so we can get no place, and stealing our cigarettes.'"¹⁴⁹ Eventually, the American soldiers involved in these activities were court-martialed, receiving severe sentences, including terms of seventy-five years. General Eisenhower purposely "kept out of the thing because it was not my primary responsibility to try these men."¹⁵⁰ Thus, he waited until the sentences were fixed and word of their severity spread throughout the German front.¹⁵¹ All the while, General Eisenhower had been poised along with his Deputy Commander to address the group of convicts:

As quickly as those sentences were given, after the files were concluded . . . I offered every one of them this: Complete opportunity to exonerate himself if he would volunteer for the front line. I made that offer to every single one of them, including men who had been given 75 years on this thing.¹⁵²

¹⁴⁹ *Full Committee Hearings on H.R. 2964, 3417, 3735, 1544, 2993, 2575, Before the H. Comm. on Armed Services, 80th Cong. 4413 (1947) [hereinafter Full Committee Hearings].*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* ("We took great care to punish those so that the boys in the front line knew about it.")

¹⁵² *Id.*

His offer was based on the notion that discipline has more than one dimension: “I am trying to show you that there is a very delicate thing, but a very, very powerful thing always involved in this business and that is the morale of the whole fighting force,” he remarked to the committee.¹⁵³

Notably, there was no mention of a “suicide mission” to complete. These convicts would be called to perform the same duties as peers who had committed no crimes. Nor was there any mention that the members of this criminal syndicate had any unique skills. Rather, they were soldiers, plain and simple. The system functioned and resulted in a sentence that provided other soldiers with a sense of satisfaction and legitimacy of the military justice system. The additional component that made it a “very delicate” situation was a common factor in clemency recognized by Brigadier General John S. Cooke in his observation that “discipline” does not mean “fear of punishment for doing something wrong,” but rather “faith in the value of doing something right.”¹⁵⁴ Rejecting an end state in which servicemembers are constantly “cringing in fear of the lash,” valuable discipline is an orientation that “flows from within,” and which is fundamentally rooted in the perception of fair treatment.¹⁵⁵ Seizing on the observations of General George Marshall, General Cooke highlights the danger that the ideal war-fighting perspective in combat operations “will quickly die if soldiers come to believe themselves the victims of indifference or injustice.”¹⁵⁶ Not

¹⁵³ *Id.* Fourteen of the men “who had fifteen years or less refused to volunteer for the front line,” to his amazement. *Id.*

¹⁵⁴ Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 6 (1998).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (citing General Marshall in BARTLETT’S FAMILIAR QUOTATIONS 771 (1980)). Echoing the observations of Generals Cooke and Marshall, Professor Linda Ross Meyer, who has studied different forms of military clemency, characterizes one distinct form as “allegiance” between superior and subordinate. Linda Ross Meyer, *The Merciful State, in FORGIVENESS, MERCY, AND CLEMENCY* 64, 69–71 (Austin Sarat & Nasser Hussain eds., 2007) [hereinafter Meyer, *Merciful State*]. This variation of military mercy “stems from an authority . . . who can forgive and resettle a preexisting relationship for the future” and is uniquely relevant in the military setting because it serves the mutual trust between a commander and a subordinate that is necessary to accomplish disciplined military missions. *Id.* at 70. She describes one vivid example involving a soldier deployed to Forward Operating Base (FOB) Cropper, Iraq, in 2004. This soldier apparently “had had his fill of death” and, toward the end of his tour, repeatedly refused to chamber rounds when leaving the FOB on military missions. Linda Ross Meyer, *Military Mercy* 54 (Quinnipiac Law Sch. Working Paper Grp., Paper No. 955207) [hereinafter Meyer, *Military Mercy*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=

surprisingly, this same balance of interests has endured in more recent clemency decisions involving offenders with mental conditions.¹⁵⁷ To Eisenhower, this symbiosis of interests in a second chance was a way in which the “court-martial system affects the Army as a whole.”¹⁵⁸

955207. Although the commander could have pursued court-martial, he, instead, assigned the soldier to “duties within the perimeter for the short remainder of his tour.” Meyer, *Merciful State, supra*, at 64, 69.

The clemency came in recognition of the soldier’s several months of steadfast duty before experiencing this aversion to combat. Had the misconduct occurred in the beginning of the deployment, the commander estimates he would have had little choice but to resort to court-martial. *Id.* (noting that, during the beginning of the tour, “other members of the company would have taken it as favoritism, weakness, and it would have destroyed discipline”). What transformed the situation, observes Meyer, is the fact that members of the company had observed the soldier’s prior faithful service to the commander and his peers. *Id.* (observing the sentiments of many members in the company who “understood that the soldier had been responsible to the commander, and now the commander was being responsible for the soldier”). Transcending buzz words like “deterrence” or “discipline,” there existed between the commander and the subordinate a relationship in which one’s success would depend on the other in either the granting or withholding of clemency. Ultimately, the commander’s clemency decision was “essential to maintaining the interdependence and trust within the command structure that is essential to teamwork.” Meyer, *Military Mercy, supra*, at 43.

¹⁵⁷ See *infra* Part IV.B (citing more recent examples involving the recommendations of panels and military judges and the adoption of those recommendations by convening authorities in cases involving combat trauma).

¹⁵⁸ Full Committee Hearings, *supra* note 149, at 4423. The notion that commanders were uniformly inflexible regarding clemency might better characterize their judge advocates. During the course of his testimony, General Eisenhower explained that “my judge advocate all during the war was always against me when I wanted to reduce and mitigate sentences.” *Id.* at 4426. In his opinion, the involvement of the legal advisors contributed to the “tremendously stiff sentences” that had been criticized in the legislature, while line commanders were much more inclined toward mercy. *Id.* For an example of another commander’s equally lenient clemency philosophy, see House Hearing on H.R. 2498, *supra* note 147, at 1185:

I well remember General Collins’ testimony . . . when he talked about his authority, as of that time, to empty the whole guardhouse if he wanted to. He had a bunch of people out there who had been convicted. They were getting ready to go to combat and he wanted to give them a chance to work themselves out from under a serious conviction. He suspended their sentences and let them all go back to combat. If they made good he remitted the entire sentence. Now this permits the convening authority to do the very same thing. That is the intent.

(citing Robert Smart, Counsel for the Comm. on Armed Servs.).

Because many have settled for caricatures of historical events rather than the genuine articles, military justice practitioners must resist the temptation to duplicate the same misleading core history in approaching contemporary problems. Otherwise, we may mistakenly believe that there is no basis for re-appraisal of existing clemency policies. To correct for the distortion of the history effect, historians have employed an approach that is cognizant of broader lessons, which they have collectively labeled the “new military history.”¹⁵⁹ This view encompasses additional perspectives, such as ones from international relations and economics.¹⁶⁰ The enlightened view equally demands a conscious effort to consider the historical experience of servicemembers in dealing with the “psychological experiences in battle” and their “postwar effects.”¹⁶¹ Lawyers and courts must similarly look to historical accounts from military corrections specialists and mental health professionals as they relate to offenders with mental conditions.¹⁶²

The sections below explore these obscured lessons, confirming that, many decades ago, the military justice system enjoyed a problem-solving approach that resembled contemporary treatment courts. The disciplinary companies at the U.S. Disciplinary Barracks of WWI, Service Command Rehabilitation Centers during WWII, and discharge remission programs

¹⁵⁹ See, e.g., Peter Paret, *The New Military History*, PARAMETERS, Autumn 1991, at 10, 11–14 (describing how this approach “represent[s] a . . . change in emphasis in research and writing” that counters the traditional “narrowness” of historical analyses by “increas[ing] interdisciplinary approaches and topics”).

¹⁶⁰ See, e.g., John B. Hattendorf, *Introduction to DOING NAVAL HISTORY: ESSAYS TOWARD IMPROVEMENT* 1, 5 (John B. Hattendorf ed., 1995) (describing a range of disciplines that increase accurate interpretation of historical events, including science, industry, politics, and even migration of persons across the globe).

¹⁶¹ Don Higginbotham, *The New Military History: Its Practitioners and Their Practices*, in MILITARY HISTORY AND THE MILITARY PROFESSION 131, 136, 139 (David A. Charters et al. eds., 1992). Ben Shephard’s book *A War of Nerves*, has been cited as an example of the new military history applied to psychology. *Id.* at 139; see generally SHEPHARD, *supra* note 131.

¹⁶² Aside from official regulations, specialized texts that address the evolution of programs for military offenders include articles in the *American Journal of Sociology*, *Diseases of the Nervous System*, *Psychological Bulletin*, *American Journal of Psychiatry*, *Federal Probation*, *Prison World*, *U.S. Armed Forces Medical Journal*, *Military Medicine*, *Journal of Criminal Law and Criminology*, and the Medical Department’s multi-volume set *Neuropsychiatry in World War II*. See *infra* Part III.B (referring to various publications—many from bygone eras). Even philosophy is valuable to consider, as it helps to place types of clemency in a proper context. See generally FORGIVENESS, MERCY, AND CLEMENCY (Austin Sarat & Nasser Hussain eds., 2007); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1989); Meyer, *Military Mercy*, *supra* note 156.

in the Army and Air Force during Vietnam equally reveal how a robust clemency machinery functioned, apart from the inflexible and oftentimes harsh sentencing regimes that dominate the stock military justice histories.¹⁶³ The military, in fact, fostered restorative justice by suspending discharges with the dual purpose of treating combat-traumatized offenders while protecting society in the long-term.¹⁶⁴ When properly considered, the recognition that these concepts are not foreign to the profession of arms should encourage a revival of innovation within the court-martial system and collaboration with civilian agencies currently operating at the tip of the spear in treatment court programs.

B. Historical Discharge Remission Programs

Military diversionary programs that have suspended and remitted punitive discharges shed necessary light on the suitability of problem-solving programs for military members with service-connected mental illness. Although active duty programs have never overtly targeted offenses committed by mentally ill servicemembers, they all have inescapably been forced to contend with these offenders. While the power to suspend a punitive discharge has been a staple of command authority over courts-martial from the inception of the Articles of War in 1775,¹⁶⁵ the first national-level discharge remission programs emerged in

¹⁶³ See *infra* part III.B.

¹⁶⁴ See MICHAEL BRASWELL ET AL., CORRECTIONS, PEACEMAKING, AND RESTORATIVE JUSTICE: TRANSFORMING INDIVIDUALS AND INSTITUTIONS 141 (2001) (describing how the concept of restorative justice “has a broader mandate than the traditional criminal justice system” in the way it prioritizes “maintaining order and social and moral balance in the community,” far beyond “the limited institutional goals of clearing a court docket or ensuring that the offender is punished”).

¹⁶⁵ American Articles of War Art. LXVII (June 30, 1775), reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953, 959 (2d. ed. 1920) (1896):

That the general, or commander in chief for the time being, shall have full power of pardoning, or mitigating any of the punishments ordered to be inflicted for any of the offenses mentioned in the foregoing articles; and every offender convicted as aforesaid by regimental court-martial, may be pardoned, or have his punishment mitigated by the colonel or officer commanding the regiment.

According to Winthrop, commanders routinely imposed “conditional remissions” of discharges based on the satisfaction of various types of events, either prior to or after the sentence went into effect. WINTHROP, *supra*, at 469 (noting especially that, “[d]uring the period especially of the late war, pardons on express conditions, granted in Orders, both by the President and by army commanders, were not unfrequently in military cases”).

relation to desertion offenses, in the form of executive orders. Building on President Thomas Jefferson's initial pardon of deserters in 1807,¹⁶⁶ President Andrew Jackson developed a program to return incarcerated convicts to duty in General Orders 29 of June 12, 1830.¹⁶⁷ In 1864, President Abraham Lincoln instituted a similar program, allowing commanding generals to "restore to duty deserters under sentence, when in their judgment the service will be thereby benefitted."¹⁶⁸ Lincoln's order was the last attempt to restore military offenders convicted by courts-martial prior to 1873 when the Congress permitted the Secretary of War to "remit, in part, the sentences of . . . convicts [at the Military Prison at Fort Leavenworth] and to give them an honorable restoration to duty in case the same is merited."¹⁶⁹ However, by 1893, another congressional act effectively muted all restoration provisions by preventing the re-enlistment of any servicemember whose prior period of enlistment had not been "honest and faithful."¹⁷⁰

1. Major General Enoch Crowder's Guiding Vision

When MG Enoch H. Crowder assumed duties on February 11, 1911, as the Army's Thirteenth Judge Advocate General, he brought a fresh perspective on military justice and penology. After transferring from the cavalry to the Judge Advocate General's Corps, Crowder spent time

These conditions ranged from "reenlist[ment]" following return to duty to payment of fines, "the company fund in his hands," "the expenses incurred in his apprehension . . .," or further service equivalent to "the time lost by his absence." *Id.*

¹⁶⁶ U.S. PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT 357 (1975) (observing that "Thomas Jefferson was the first American President to grant a pardon to military deserters").

¹⁶⁷ While the order directed, "[a]ll who are under arrest for this offense at the different posts and garrisons will be forthwith liberated, and return to their duty," it simultaneously precluded restoration for other classes of offenders; "Such as are roaming at large and those who are under sentence of death are discharged, and are not again to be permitted to enter the Army, nor at any time hereafter to be enlisted in the service of this country." Headquarters, War Dep't, Gen. Orders 29 (12 June 1830), available at THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/ajack02.asp.

¹⁶⁸ Headquarters, War Dep't, Gen. Orders 76 (26 Feb. 1864), available at THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=70008>.

¹⁶⁹ An Act to Provide for the Establishment of a Military Prison, and for its Government, 17 Stat. 582, 583 (1873).

¹⁷⁰ An Act to Regulate Enlistments in the Army of the United States, 28 Stat. 215, 216 (1893).

inspecting military confinement facilities throughout the United States.¹⁷¹ In Cuba, he addressed policy issues regarding “crime and punishment” while serving as chairman of the Advisory Law Commission and Supervisor of the Department of State and Justice.¹⁷² Not only had he studied the difficulties of military justice and penology in the aftermath of the Civil War,¹⁷³ just prior to his appointment in 1910, General Crowder conducted “firsthand study of the military penal systems of England and France” and the theories of international penologists.¹⁷⁴ This combination of experience and interest revived in General Crowder the desire to reform the *Articles of War*, as he had attempted to do since he was a line officer.¹⁷⁵

General Crowder’s insights came at a crucial time. In 1909, at the behest of Adjutant General F. C. Ainsworth, the Army began a nationwide effort to reverse a trend in which, “for many years[,] the War Department and the Army made no systematic or energetic efforts to apprehend deserters.”¹⁷⁶ The new measures represented “a policy of pursuing all deserters vigorously and bringing them to punishment if possible.”¹⁷⁷ As part of the effort, executive orders removed court-martial provisions on leniency for youthful offenders,¹⁷⁸ resulting in so many

¹⁷¹ DAVID A. LOCKMILLER, ENOCH H. CROWDER, SOLDIER, LAWYER AND STATESMAN 135 (1955).

¹⁷² *Id.*

¹⁷³ See, e.g., David R. Henderson, *From “Porous” to “Ruthless” Conscription, 1776–1917*, 14 INDEP. REV. 587 (2010) (discussing General Crowder’s study of an 1866 report regarding the Civil War draft in 1899 when Crowder was “a young cavalry officer”).

¹⁷⁴ LOCKMILLER, *supra* note 171, at 135 (recognizing the influence of theorists, including F.H. Wines, E.S. Whitlin, C.R. Henderson, and the reports of the International Prison Congress).

¹⁷⁵ General Crowder detailed his attempts to urge General Lieber and the Secretary of War to reform the *Articles* in a personal campaign that began “[i]n 1888, while still a lieutenant in the Cavalry.” Letter from Major General Enoch H. Crowder to Secretary of War Newton D. Baker (Mar. 10, 1919), in WAR DEP’T, MILITARY JUSTICE DURING THE WAR: A LETTER FROM THE JUDGE ADVOCATE GENERAL OF THE ARMY TO THE SECRETARY OF WAR IN REPLY TO A REQUEST FOR INFORMATION 5–6 (1919) [hereinafter 1919 Crowder Letter].

¹⁷⁶ Annual Report of the Adjutant General, 1910, in 1 WAR DEPARTMENT ANNUAL REPORTS, 1910, at 176 (1910) [hereinafter 1910 Adjutant General’s Report].

¹⁷⁷ *Id.*

¹⁷⁸ Annual Report of the Judge Advocate General, 1910, in 1 WAR DEPARTMENT ANNUAL REPORTS, 1910, at 237–38 (1910) [hereinafter 1910 Judge Advocate General’s Report]:

Formerly the executive orders prescribing the maximum limits of punishment provided for a much lighter sentence in the case of an inexperienced soldier, particularly if surrendering himself promptly

discharges that it appeared most courts-martial awarded dishonorable discharges automatically, even though they had the option of retention.¹⁷⁹ Despite a significant decrease in the number of desertions, tension between the Adjutant General and the Judge Advocate General was apparent in their 1910 reports to the Secretary of War, just prior to General Crowder's assumption of duties.¹⁸⁰

he showed a disposition to atone for the offense. It was expected that in deserving cases courts would not award dishonorable discharge, but would impose a term of confinement with forfeiture as a corrective punishment, giving the soldier an opportunity to return to duty with the colors and redeem himself, to the end that the Government should not be deprived of the services of one who, as a result of such corrective punishment, would probably become a good soldier. Recently, the executive order has been amended so as to prescribe one limit of three years with dishonorable discharge and forfeiture of pay and allowances for all cases of desertion

¹⁷⁹ *Id.* at 168 ("It has been found . . . that there has been a tendency to impose dishonorable discharge in nearly all cases of desertion, regardless of any mitigating circumstances.").

¹⁸⁰ On the one hand, Adjutant General Ainsworth attributed the thirty percent decrease in desertion to the effectiveness of the program, urging the Secretary of War to preclude any convicts from return to the ranks.

It is not contended here that clemency should never be extended to a deserter, but it is contended that it should not be extended to him at the expense of keeping him in or restoring him to a status of honor in the Army, and thereby giving widespread encouragement to other men to yield to the temptation to desert. The Army is not a reformatory for its own criminals or for criminals from civil life, and it cannot be made one without doing great damage to the service.

1910 Adjutant General's Report, *supra* note 176, at 177. On the other hand, Judge Advocate General George B. Davis urged the Secretary of War to consider the danger of overly harsh discipline:

This tendency to mete out the extreme and degrading punishment of dishonorable discharge, even to young and inexperienced soldiers who, it is quite certain, have failed to grasp the enormity of their offense in deserting, will, if unchecked, draw the discipline of the army further and further away from the trend, not only of modern criminology, but also, it is believed, of the modern trend of military discipline toward correction, rather than merely punitive measures.

1910 Judge Advocate General's Report, *supra* note 178, at 238. The Judge Advocate General, therefore, recommended the adoption of some method to alert department commanders to the "view of corrective punishments without dishonorable discharge." *Id.*

Shortly after his appointment, General Crowder toured the confinement facilities as he had in years past, but now with an eye toward using his new influence to promote reform.¹⁸¹ He, like others, saw that most dishonorably discharged inmates were approximately twenty-three years-old and was concerned that these men were wasting away in cells with eroded skills and little to offer.¹⁸² General Crowder took a far more active role in penology than prior judge advocates general, justifying his expanded involvement on the fact that confinement conditions were an outgrowth of military justice programs.¹⁸³ From his examinations, General Crowder concluded that “discipline must be maintained, but . . . the military system of justice could be utilized as a reforming agency and that many men, heretofore lost through dishonorable discharge, could be saved for the service.”¹⁸⁴

¹⁸¹ James Barclay Smith, *What of the Court-Martial System?: A Comparison with Civil Criminal Procedure*, 30 MINN. L. REV. 78, 100, 102 n.25 (1946) (describing General Crowder’s personal inspection of “the main branch of . . . military prisons” in October 1911 and later in 1913).

¹⁸² *Id.* at 100 n.25 (“General Crowder expressed surprise at the youth of the prisoners in the military prison, their average age being twenty-three years.”). *See also* Annual Report of the Secretary of War, 1911, in 1 WAR DEPARTMENT ANNUAL REPORTS, 1911, at 26 (1912) (“Over three-fourths of [inmates] are men who have been convicted of a military offense only, by far the largest proportion of which is desertion. Seven-eighths of these are men under 24 years of age.”) [hereinafter 1911 War Secretary Report]. Chief of Staff, Major General Leonard Wood, raised similar concerns as General Crowder. Annual Report of the Chief of Staff, 1911, in 1 WAR DEPARTMENT ANNUAL REPORTS, 1911, at 161 (1912):

Under present conditions, a man found guilty of desertion has no chance to make good and to earn by conduct, a chance to serve honorably as a soldier. All hope of doing so by excellent and long-continued good conduct is removed. No matter how much he may desire to clear his name he cannot do so. Most of the offenders are mere boys. The practical effect of our present military prison system and the legislation governing it is to crush out of these young men all hope of atoning for an offense, the gravity of which most of them failed to appreciate, to brand them as convicts, and to deprive them of . . . hope for the future.

¹⁸³ Smith, *supra* note 181, at 100 n.25 (observing the basis of General Crowder’s increased involvement in confinement and restoration regimes as their “*relation . . . to the administration of military justice*”) (italics in original).

¹⁸⁴ LOCKMILLER, *supra* note 171, at 135.

General Crowder consulted with President Taft and others to share ideas for a new military corrections framework.¹⁸⁵ He also observed as the U.S. Navy established its first disciplinary barracks at Port Royal, South Carolina, on September 1, 1911.¹⁸⁶ From these collaborations grew the revolutionary concept of “honorable restoration to duty”—a “reform school” approach¹⁸⁷—that entered the national agenda after Crowder presented it to the Military Affairs Committee of the House of Representatives in 1912.¹⁸⁸ Modeled on the British system, which had provided the very impetus to create a Military Prison in the late 1800s,¹⁸⁹

¹⁸⁵ Some of these great minds included George Ives, author of *History of Modern Penal Methods*, and his friend Northwestern University Law Professor John H. Wigmore. *Id.* at 136.

¹⁸⁶ Annual Report of the Judge Advocate General, 1912, in *Annual Reports of the Navy Department for the Fiscal Year 1912*, H.R. Doc. No. 62-932, at 98-99 (1913) (describing the impetus for the inaugural disciplinary barracks as a method to distinguish between naval offenders who committed purely military offenses and “the criminal in civil life convicted of offenses which brand him as a menace to organized society,” which clearly he was not) [hereinafter 1912 Navy Judge Advocate General’s Report]. As time passed, the Secretary of War not only cited, but included, the very same studies of naval board members regarding their inspection of British prisons as the impetus for Army modifications. See 1911 War Secretary Report, *supra* note 182, app. B, at 70-71.

¹⁸⁷ General Crowder, himself, expressed so much in a letter to the Secretary of War. 1919 Crowder Letter, *supra* note 175, at 19 (“Our disciplinary barracks should indeed be thought of as a reform school, rather than as a prison; it corresponds to the term ‘industrial school’ as used in some states.”). See also Annual Report of the Secretary of the Navy, 1912, in *Annual Reports of the Navy Department for the Fiscal Year 1912*, H.R. Doc. No. 62-932, at 61 (1913) (calling the Navy’s disciplinary barracks system a “correctional school”).

¹⁸⁸ See *Revision of the Articles of War: Hearings on H.R. 23628 Before the H. Comm. on Military Affairs*, 62d Cong. 15, 51 (1912) (statement of Major General Enoch H. Crowder):

Subdivision *b* is new and grants the reviewing authority the power to change the sequence in which a sentence as adjudged by the court may require the execution of the punishment of dishonorable discharge and confinement. Under the present practice a soldier sentenced to be dishonorably discharged and to confinement is sentenced to be dishonorably discharged first and serves his confinement in the status of a civilian. It is sometimes the case that the reviewing authority is convinced that the prisoner might mend his conduct under discipline. By giving him the power to defer dishonorable discharge he could in a meritorious case remit the discharge and restore the man to duty with the colors.

See also Smith, *supra* note 181, at 102 n.25 (describing other aspects of General Crowder’s presentation before the House’s military committee).

¹⁸⁹ See, e.g., SMITH, *supra* note 137, at 5 (observing how “[t]he goal of the British military prison was to restore a soldier to duty,” primarily to “return[] them to society as

the plan featured six components, all tailored toward the inmate's eventual restoration to duty.¹⁹⁰ Cementing a patchwork of executive orders with legislation, Congress gradually implemented Crowder's Army restoration scheme, allowing reenlistment of peacetime deserters in 1912,¹⁹¹ permitting suspended sentences for dishonorable discharges in 1914,¹⁹² and, on March 4, 1915, christening a U.S. "Disciplinary

productive citizens"); Captain Diane E. Sapp, "Our Mission, Your Future": The United States Disciplinary Barracks, Fort Leavenworth, Kansas: An Overview 1-14 (Aug. 1981) (unpublished M.A. thesis, University of Minnesota) (on file with The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.) (describing how, after observing harsh conditions in civilian prisons that housed military inmates, "the Secretary of War ordered . . . a board of officers to visit the British military prisons in Canada to obtain ideas for improvement of our own disciplinary system," which culminated in the creation of the U.S. Military Prison).

¹⁹⁰ General Crowder's six objectives were

- (1) Conversion of the United States Military Prison into the United States Military Disciplinary Barracks, (2) use of indeterminate sentences, and suspended sentences of dishonorable discharge, (3) military and industrial training in disciplinary companies to stimulate soldiers' self-respect, (4) the use of parole to test a man's fitness for restoration to duty, (5) removal of loss of citizenship previously attached to peace time deserters and authority in the Secretary of War to permit discharged offenders to reenlist, and (6) honorable restoration to duty with the colors.

LOCKMILLER, *supra* note 171, at 136. The Navy's new system operated with nearly identical objectives, using a probationary system that made "it possible for any detentioner at the disciplinary barracks whose sentence includes a dishonorable discharge to save himself from such a discharge." 1912 Navy Judge Advocate General's Report, *supra* note 186, at 99. In all of the services, the concept was so completely revolutionary that Navy Secretary Josephus Daniels remarked in 1914 how the disciplinary system represented "a view to abandoning the methods which all navies had deemed essential in maintaining a full enlistment and enforcing discipline." Annual Report of the Secretary of the Navy, 1914, in *Annual Reports of the Navy Department for the Fiscal Year 1914*, H.R. Doc. No. 63-1484, at 40 (1915) [hereinafter 1914 Navy Secretary Report].

¹⁹¹ Act of Aug. 22, 1912, 37 Stat. 356 (1912) (limiting prior legislation and permitting "the reenlistment or muster into the Army of any person who has deserted, or may hereafter desert, from the military service of the United States in time of peace, or of any soldier whose service during his last preceding term of enlistment has not been honest and faithful . . ."). Such provisions allowed the Navy to place deserters in its disciplinary barracks on the same date. 1912 Navy Judge Advocate General's Report, *supra* note 186, at 101.

¹⁹² Act of Apr. 27, 1914, 38 Stat. 354 (1914):

The reviewing authority may suspend the execution of a sentence of dishonorable discharge until the soldier's release from confinement; but the order of suspension may be vacated at any time and the

Barracks” (USDB or DB) with “legislative authority for employment and training of offenders with a view to their honorable restoration to duty or reenlistment.”¹⁹³ The War Department provided guidance to court-martial reviewing authorities not more than two months after Congress’s endorsement of the suspended dishonorable discharge, directing suspension “whenever there was a probability of saving a soldier for honorable service.”¹⁹⁴

Significantly, what began as a proposal to address the crime of desertion in no time grew to encompass all military-related offenses,¹⁹⁵ with immediate transfer of murderers and career criminals into different facilities than those designated for restoration.¹⁹⁶ The new restoration program functioned chiefly through the “indeterminate (or probationary)” court-martial sentence, in which, “having no minimum,

execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command in which the soldier is held, or by the Secretary of War.

Later, in 1918, Congress gave convening authorities themselves the right to suspend sentences, apart from reviewing authorities. Act of July 9, 1918, 40 Stat. 882 (1918) (“The authority competent to order the execution of a sentence of a court-martial, may, at the time of approval of such sentence, suspend the execution in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension.”).

¹⁹³ LOCKMILLER, *supra* note 171, at 137. See also An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June Thirteenth, Nineteen Hundred and Sixteen, 38 Stat. 1085–86 (1913) (directing the Secretary of War to place offenders deemed worthy of restoration to duty in “a course of military training” carried out by “disciplinary companies” and authorizing “the Secretary of War [to] remit the unexecuted portions of the sentences of offenders . . . [to] grant those who have not been discharged from the Army an honorable restoration to duty, [and to] authorize the reenlistment of those who have been discharged”). This enactment was recognized as “the final execution of Crowder’s plan.” LOCKMILLER, *supra* note 171, at 137.

¹⁹⁴ LOCKMILLER, *supra* note 171, at 137.

¹⁹⁵ Legislative authorization to reenlist prisoners whose prior service had not been honorable and faithful reached far beyond desertion to the majority of youthful offenders who had been incarcerated for purely military offenses. The “nine principal military offenses” also included “absence without leave, sleeping on post, assaulting an officer or noncommissioned officer, disobeying an officer or noncommissioned officer, mutiny, and disobeying general order or regulation,” all of which received special recognition as offenses for which leniency could be accorded following behavioral modification. 1919 Crowder Letter, *supra* note 175, at 35.

¹⁹⁶ Alcatraz Island, recognized as the Pacific Branch of the United States Disciplinary Barracks (USDB), became a home for offenders not considered for restoration to duty, as did segregated portions of the facility at Fort Leavenworth over time. Smith, *supra* note 181, at 102 n.25.

only a maximum, the confinement may be terminated at any time, and the offender . . . may be restored to duty” upon the satisfaction of program criteria.¹⁹⁷

In October of 1913, under the authority of General Orders 56, the Military Prison at Fort Leavenworth established the first restoration program in the form of a disciplinary battalion, consisting of four disciplinary companies.¹⁹⁸ In these units, participants were treated differently from prisoners:

[M]embers of the disciplinary organizations were to be taken out of prison garb, and put into uniform. They were to be known by name and not by number separated from other prisoners, permitted to render and receive the military salute, and to be armed, equipped, and trained as infantry—all for the purpose of developing their self-respect, and fitting them for restoration to duty.¹⁹⁹

¹⁹⁷ 1919 Crowder Letter, *supra* note 175, at 18. In a 1914 report, the Commandant of the Disciplinary Barracks described the objective: “A soldier dishonorably discharged from the service can be honorably restored to the service only by putting him back honorably in the enlistment period which he cut short by his dishonor.” *Reports of Military Prisons, Fort Leavenworth, Kans., and Alcatraz Island, Cal.*, H.R. Doc. No. 63-1418, at 31 (1914) [hereinafter 1914 Military Prison Report]. He further explained, “[t]he reinstatement or restoration of the soldier works a revivication of the enlistment period.” *Id.* In this way, he “picks up the ‘broken thread,’ continues in the military services, and completes his enlistment.” *Id.* at 26.

¹⁹⁸ Headquarters, War Dep’t, Gen. Orders 56 (17 Sept. 1913). *See generally* 1914 Military Prison Report, *supra* note 197, at 26 (noting that the order “directed the organization of a disciplinary battalion—four companies—at the military prison [with each company, at its maximum strength, . . . to consist of 86 prisoners, with a proper complement of officers and noncommissioned officers of the line of the Army acting as instructors”). The order also established one disciplinary company along similar lines at Castle Williams Prison at Governor’s Island, N.Y.

¹⁹⁹ Smith, *supra* note 181, at 103 n.25. The Navy treated its inmates similarly: “Detentioners wear the regular naval uniform and instead of being required to perform hard labor are given a thorough course of drills and instruction with a view to better fitting them for the duties of their ratings should they earn their restoration to duty.” Annual Report of the Judge Advocate General, 1914, in *Annual Reports of the Navy Department for the Fiscal Year 1914*, H.R. Doc. No. 63-1484, at 114 (1915).

These Army inmates, known as “disciplinarians,” further had free movement throughout their company areas, and operated on an “honor system,” in which peers were expected to enforce rules of discipline.²⁰⁰

Importantly, as this Army program developed from its seedlings of innovation planted by General Crowder, mental evaluation played a significant role as early as 1914, with the establishment of the DB’s Department of Psychiatry.²⁰¹ Under a “confidential” review, medical examiners conducted a comprehensive evaluation of each prisoner’s family and social background by corresponding with police departments, family members, and others, and evaluating these facts along with the circumstances surrounding the offense for which he was convicted.²⁰² After evaluation, it was ultimately the medical examiner that assessed future capacity for restoration:

If the medical examiner considers the man a good risk for restoration to the colors, he recommends suspension of dishonorable discharge in case one be adjudged, or in certain cases, if the man be unsuited for further service, and if discipline will not suffer thereby, he may recommend that any confinement awarded be remitted, this latter action being frequently taken in the case of married national guardsmen whose records indicated that they had properly supported their families before being called into federal service.²⁰³

Offenders who committed purely military offenses, it was thought, had entered the military without efficient systems to deal with its exacting requirements. Unless inmates suffered from calamities that made them nonresponsive to further direction, they remained good candidates for

²⁰⁰ 1914 Military Prison Report, *supra* note 197, at 27. The honor system was modeled off of existing civilian penal institutions under the recommendations of their wardens. As a form of “self-government” committees of elected representatives “handle[d] the discipline of the battalion while in quarters, looks after minor infractions of the rules, etc., and . . . caused each man in the battalion to feel his responsibility not only to the battalion but to himself.” *Id.* at 35. In one representative example, twenty-one unsupervised members of the disciplinary battalion participated in the apprehension of escaped inmates after obtaining authorization from the Commandant. *Id.*

²⁰¹ Major George V. Strong, *The Administration of Military Justice at the United States Disciplinary Barracks, Fort Leavenworth, Kansas*, 8 J. AM. INST. CRIM. L. & CRIMINOLOGY 420, 421 (1917).

²⁰² *Id.* at 421–22.

²⁰³ *Id.* at 424.

restoration-to-duty. The two key criteria for participation in the restoration program were an “average mentality” and “no serious blots in his past” prior to military service.²⁰⁴

Within only a short time after its inception, by August of 1914, 51 Army inmates had been restored to duty.²⁰⁵ In the same year, the Navy had restored 396 sailors and 95 Marines at Port Royal and 135 sailors and 22 Marines at Puget Sound.²⁰⁶ Later, in the Army, “[o]ne hundred and seven out of 128 men restored up to March 4, 1915, were serving satisfactorily on that date.”²⁰⁷ By 1917, for the purpose of uniformity and monetary savings, the USDB became a separate general court-martial jurisdiction for all Army desertion cases involving servicemembers projected to receive dishonorable discharges if convicted.²⁰⁸ Of 349 cases tried at Fort Leavenworth, the DB’s SJA observed that “the reviewing authority suspended the execution of dishonorable discharge until the soldier’s release from confinement in 134 cases,” the purpose of such suspension to “give the man a certain period of time in which by positive action he can evidence his reformation and be restored to the service without the stigma of a dishonorable discharge appearing upon his record.”²⁰⁹ Like the Navy, in the great majority of these cases—“over 80%”—the Army program worked, with many restores “later being discharged as non-commissioned officers with a character ‘Excellent.’”²¹⁰

2. WWI Restoration

As American participation in WWI was about to commence, Professor John Wigmore, serving on active duty as a lieutenant colonel, outlined plans for the implementation of a widespread Army restoration-

²⁰⁴ *Id.* at 426.

²⁰⁵ Annual Report of the Judge Advocate General, 1914, in 1 WAR DEPARTMENT ANNUAL REPORTS, 1914, at 213 (1914) [hereinafter 1914 Judge Advocate General Report].

²⁰⁶ Annual Report of the Judge Advocate General, 1914, in *Annual Reports of the Navy Department for the Fiscal Year 1914*, H.R. Doc. No. 63-1484, at 113 (1915). More importantly, the Navy had, until that date, cumulatively restored 696 naval personnel at Port Royal and 157 more at Puget Sound with over eighty percent success rates among both groups. 1914 Navy Secretary Report, *supra* note 190, at 40.

²⁰⁷ Annual Report of the Judge Advocate General, 1915, in 1 WAR DEPARTMENT ANNUAL REPORTS, 1915, at 240 (1916).

²⁰⁸ Strong, *supra* note 201, at 420.

²⁰⁹ *Id.* at 424.

²¹⁰ *Id.*

to-duty program to address an anticipated explosion in wartime courts-martial.²¹¹ Building on General Crowder's initial concept, which reflected "a modernized penal system to the extent of placing reformation on a plane of equality with punishment," Wigmore proposed the following systems outline:

The path of the offender will be:

1. Commits offense.
2. Confined for trial.
3. Examined mentally and physically.
4. Reported mentally and physically fit, or unfit.
5. If unfit, action according to circumstances, but separated from service in any case.
6. If fit, tried, and sentenced, if found guilty.
7. After sentence, placed in disciplinary battalion (unless guilty of major crime).
8. After three months' training, restoration, either to regular organization or one of the special units.²¹²

Colonel Wigmore recommended that inmates should be placed in disciplinary companies within two weeks after commencing the service of their sentences and restored to duty within three months' time.²¹³ Under the plan, "[b]y not executing the dishonorable discharges imposed by courts, it will be a simple matter to [restore participants to] duty at the proper time."²¹⁴

As times changed, the restoration programs that grew entirely from peacetime considerations persisted during times of war, when purely military offenses had far greater impacts. Significantly, during WWI, an estimated twenty percent of all dishonorably discharged prisoners were restored to active service under terms similar to those outlined by Wigmore.²¹⁵ Although the Navy sent fewer offenders to disciplinary

²¹¹ See generally Lieutenant Colonel John H. Wigmore, *Modern Penal Methods in Our Army*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 163 (1918).

²¹² *Id.* at 165.

²¹³ *Id.*

²¹⁴ *Id.* at 168–69.

²¹⁵ SMITH, *supra* note 137, at 6 (relating restoration statistics from Fort Leavenworth).

programs, its Judge Advocate General also still recognized the enduring value of the restoration program in time of war.²¹⁶

Following WWI, restoration-to-duty remained the objective of the military justice system, and programs continued at the USDB and other military confinement facilities. Ultimately, the Army's and Navy's experience with restoration to duty in the inaugural period of 1911–1917 teaches two significant lessons. First, these programs began during a time of peace, not war. Although re-filling the depleted ranks with restored soldiers, sailors, and Marines was, no doubt, a valuable goal during the War, the programs were hardly established with this single goal in mind. The “principal object” of the restoration programs, as observed by the Judge Advocate General of the Navy who established the first programs, was to avoid “turning [a military offender] adrift without the credentials generally necessary to secure honest employment in civil life.”²¹⁷ The second, equally important, point exists in the fact that the entire impetus for restoration grew when the military operated on an all-volunteer status. Both of these lessons weigh against the notion that the military's restoration theories are not applicable to contemporary times because circumstances have drastically changed. Evident immediately below, this message echoes most clearly in the following World War.

3. WWII Rehabilitation Centers

Before the mobilization for WWII, responsibility for restoration-to-duty of military offenders was split between local stockades and the USDB,²¹⁸ whose restoration programs grew more stringent and selective over the years. The major difference between the post-WWI program and General Crowder's brainchild was transformed expectations about the number of inmates that the DB should return to duty. Since the original

²¹⁶ Annual Report of the Judge Advocate General, 1917, in *Annual Reports of the Navy Department for the Fiscal Year 1917*, H.R. Doc. No. 65-618, at 125 (1918) [hereinafter 1917 Navy Judge Advocate General's Report] (“It is held to be proper and right that some prisoners should have another chance to gain and maintain honorable status in the naval service, thus wiping out the effect of early misconduct for which a substantial punishment has been suffered. . . .”). However, new provisions eliminated automatic participation based on the age of the offender and encouraged commanders of naval prisons to be judicious in recommending program participants. *Id.*

²¹⁷ 1912 Navy Judge Advocate General's Report, *supra* note 186, at 99.

²¹⁸ Brigadier General Raymond R. Ramsey, *Military Offenders and the Army Correctional Program*, in *CRIME IN AMERICA: CONTROVERSIAL ISSUES IN TWENTIETH CENTURY CRIMINOLOGY* 117, 120 (Herbert A. Bloch ed., 1961).

program had, to some extent, been exported to local installations, corrections specialists expected that soldiers worthy of the opportunity for restoration already had their opportunity prior to arrival at the DB.²¹⁹ Consequently, corrections specialists expected that only 10 out of 200 general prisoners at the DB would ultimately be restored:

180, being unqualified for service, complete their sentences and receive dishonorable discharges;
10, being qualified for service but unwilling to work for restoration and honorable discharge, complete their sentences and receive dishonorable discharges;
9 who are restored to duty make good;
1 who is restored to duty, deserts or otherwise fails to make good.²²⁰

Significantly, even though only 9 of 200—4.5%—would maintain their honorable status, the DB program's overseer remarked that those nine, "who have made one big mistake, but who are fighting their way back to honor and self-respect . . . deserve favorable assistance and favorable consideration wherever they go."²²¹

The dramatic increase of personnel during the Second World War required new plans for confining and rehabilitating inmates. While it is not the aim of this article to provide the definitive history of restoration programs in the 1940s, it explores the period in some detail, to the extent that identifiable lessons exist regarding combat-connected mental health disorders and rehabilitative programs. Although there are notable differences between the war tactics and machines used in different generations, many of the psychiatric issues from that early era are similar to, if not indistinguishable from, the dilemmas we face today.²²² During

²¹⁹ Robert C. Davis, TAG, Information Paper, *Honorable Restoration to Duty of General Prisoners at the United States Disciplinary Barracks: For Leavenworth, Kansas and its Branches at Fort Jay, New York, and Alcatraz, Calif.* ¶ 1, at 1 (n.d.), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.).

²²⁰ *Id.* ¶ 9, at 1.

²²¹ *Id.* at ¶ 10, at 2.

²²² While some may describe certain features of Iraq and Afghanistan as unique causes of combat stress, it is vital to recognize the reasons why the trauma of WWII was considered to be even "tougher" than that of the trench warfare of WWI. WILLIAM C. MENNINGER, *PSYCHIATRY IN A TROUBLED WORLD: YESTERDAY'S WAR AND TODAY'S CHALLENGE* 132 (1948). Doctor Menninger describes how the Second World War

the Second World War, society became acutely aware of the problems related to veteran readjustment.²²³ Figure 1, below, drawn from a representative book on readjustment strategies,²²⁴ pictorially depicts the daunting challenges encountered by WWII veterans who had problems acclimating to civilian society after enduring harsh battle conditions.

was nearly three times as long; it was fought on a rapidly moving and shifting basis instead of on fixed lines; it required many amphibious landings; it was fought in every extreme of climate; the lethal devices were far more devastating and nerve-racking than ever before; and more men were kept away from home for longer periods.

Id. In attempting to deal with the unique problems of these veterans in WWII Mental-Hygiene Units (MHUs) or other rehabilitative settings, mental health professionals had to understand the dynamics of particular types of trauma. See Major Harry L. Freedman, *The Mental-Hygiene-Unit Approach to Reconditioning Neuropsychiatric Casualties*, 29 MENTAL HYGIENE 269, 276–77 (1945) (describing the necessity of adopting approaches tailored to specific types of trauma). For example, the Marine who suffered from a condition that became known as “Guadalcanal Nerves,” based on a combination of constant combat operations in tropic environs, posed different challenges from a soldier who nearly drowned during the sinking of an amphibious vessel. Albert Deutsch, *Military Psychiatry: World War II 1941–1943*, in ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 419, 437, 440–41 (J.K. Hall et al. eds., 1944) (describing, among other things, unique symptoms facing victims of torpedoed ships); see also Freedman, *supra*, at 288 (exploring complications of trauma suffered from sea combat, including the problems of a soldier who felt responsible for shipmates who perished because he required assistance during rescue due to his lack of skill in swimming). With the tremendous number of servicemembers who experienced combat trauma, mental health professionals came to learn of delayed onset of symptoms, survivor’s guilt, and identical situations that often manifest in criminal conduct. See, e.g., G.M. Gilbert, *A Preview of Adjustment Problems*, 40 J. ABNORMAL & SOCIAL PSYCHOL. 287, 296 (1945) (“We can anticipate that many war neuroses will precipitate into activity many years later in civilian life when the stress of the environment rekindles these old feelings of helplessness.”).

²²³ As General Omar Bradley remarked during an August 1946 radio address, “The shooting war may be over but the suffering isn’t.” MENNINGER, *supra* note 222, at 363.

²²⁴ For examples, see, e.g., WILLARD WALLER, *VETERAN COMES BACK* (1944); MORTON THOMPSON, *HOW TO BE A CIVILIAN* (1946); HERBERT I. KUPPER, *BACK TO LIFE: THE EMOTIONAL READJUSTMENT OF OUR VETERANS* (1945); DIXON WECTER, *WHEN JOHNNY COMES MARCHING HOME* (1944); CHARLES G. BOLTE *THE NEW VETERAN: CITIZENS FIRST, VETERANS SECOND* (1945). For an overview of these sources and other mainstream media depictions of the ’40s reflecting PTSD specifically, see generally Christina Jarvis, “*If He Comes Home Nervous*”: *U.S. World War II Neuropsychiatric Casualties and Postwar Masculinities*, 17 J. MEN’S STUD. 97 (2009).



Fig. 1. Depiction of WWII Veteran Readjustment Problems.²²⁵

The civilian community's experiences with returning veterans and their problems underscored the necessity of developing innovative programs to address their crimes.²²⁶ As the military was the very origin of many combat neuroses, the Armed Forces had an even more pressing need to become efficient in both the practice of psychiatry and the practice of military justice in relation to psychiatric conditions. The Service Command Rehabilitation Center (SCRC) was the first real bridge between these distinct areas.

In 1940, the Nation began a massive mobilization for WWII. The War Department, concerned for the preservation of manpower and expecting a tremendous increase in the number of courts-martial, contemplated major changes to its correctional system. Aided by several of the leading civilian penologists, the Army soon devised a program for the operation of "rehabilitation centers" within each of its nine service commands.²²⁷

²²⁵ THOMPSON, *supra* note 224, at 17 (illustration by Charles Pearson). Although this book was originally published in 1946 by Doubleday & Co., a corporation whose titles are now affiliated with Random House Inc., the copyright in Thompson's work is registered to Mr. Hilliard L. Bernstein, Esq., who is now deceased. According to his survivor, Mrs. Kathleen Bernstein-Lipkins, she is not now enforcing this copyright and she knows of no entity that is enforcing this copyright.

²²⁶ See *supra* notes 61–62 (describing concerns over the post-WWII veteran crime wave); *supra* note 140 (describing Indiana's implementation of a specialized criminal court program for WWII veteran offenders).

²²⁷ The civilian penologists were complemented by distinguished experts who adorned the uniform during the war, including Richard A. Chappell and Victor Evjen, who were formerly employed as the Chief and Assistant Chief of Federal Probation, and who used their skills within the Navy's Correctional Services Division and the Army's Correctional Division of the Office of the Adjutant General, respectively. Miguel Oviedo, *Federal Probation During the Second World War—Part One*, 67 FED. PROBATION 3, 6 (2003).

At a decisive time when the Army had little more than 1551 inmates in custody,²²⁸ it assembled five-person teams, including psychiatrists, from each of the nine service commands at the Command and General Staff College and the USDB to translate penal theory into practice.²²⁹ Although modeled off of the DB's restoration program—with similar inmate classification procedures, gradually increasing privileges, intensive military training, and participation in honor companies as a condition precedent to restoration—rehabilitation centers were designed to restore a far greater number of general prisoners.²³⁰ The October 1942 memorandum establishing the centers, in fact, reminded the service commands that “[c]onsideration and action under existing regulations which permit suspension of sentences, reclassification, and restoration of general prisoners to duty will be liberalized.”²³¹

The concept of the rehabilitation center was considered to be an “innovation in Army practice.” Austin MacCormick & Victor H. Evjen, *The Army's Postwar Program for Military Prisoners*, PRISON WORLD, May–June 1947, at 3, 5. See also Major Isodore I. Weiss, *Rehabilitation of Military Offenders at the Ninth Service Command and Rehabilitation Center*, 103 AM. J. PSYCHIATRY 172, 172 (1946) (referring to the rehabilitation center experience as “a brilliant chapter in the history of the war”). In 1943, when the Navy adopted a similar restoration program, it too was considered “a new departure from traditional Navy confinement activity.” Colonel Emmett W. Skinner, *The Navy's Correctional Program*, PRISON WORLD, Jan.–Feb. 1945, at 8, 8. While none of these personnel referenced the effort of General Crowder or the service secretaries in instituting the first real restoration programs in the early 1900s, or COL Wigmore for recommending a similar idea during WWI, this may have been due to the monumental scale on which correctional planners conceptualized WWII programs.

²²⁸ Colonel Marion Rushton, *The Army's New Correction Division: Its Purposes, Functions and Organization*, PRISON WORLD, Nov.–Dec. 1944, at 4, 4 (providing statistics from January 1942).

²²⁹ Weiss, *supra* note 227, at 172; Major Perry V. Wagley, *The Army Rehabilitates Military Offenders*, 8 FED. PROBATION 14, 15 (1944).

²³⁰ As the Turlock Rehabilitation Center's first commander, COL Kindervater, explained to his cadre and staff, the program would not be “exactly the same as [the DB because] we were to instill a better sense of responsibility and patriotism among our prisoners with a view towards restoring them to duty instead of merely keeping them in confinement.” CARLING I. MALOUF, REHABILITATION AT TURLOCK: LIFE IN AN AMERICAN PRISON CAMP DURING WORLD WAR II, at 6 (n.d.) (unpublished manuscript), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (citing the commander).

²³¹ Carling I. Malouf, *Notes from a War Department Letter Regarding the Establishment of Detention and Rehabilitation Centers* 3 (n.d.), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (citing War Department Letter from S.O.S., Oct. 28, 1942, AG 383.06 (10-17-42) OB-I-SP-M). The memorandum likewise admonished commanders that “[c]ourts-martial will be held at an absolute minimum, using other authorized disciplinary means and measures” and that “[g]eneral courts-martial should be resorted to only in most flagrant cases.” *Id.* at 3–4. In developing the concept of rehabilitation centers, the War Department weighed these

By the end of 1942, nine Army rehabilitation centers commenced operation across the United States.²³² Over time, so would eleven overseas counterparts known as “disciplinary training centers” or “detention rehabilitation centers.”²³³ With differences in population size and operational standards, each center was quite unique.²³⁴ Although the service command commanders had had the final say in determining who would be returned to duty under War Department standards, theater commanders had more discretion to change the format of their training programs²³⁵—and often did. A primary concern was ensuring that inmates did not view rehabilitation centers as safe “haven[s]” from combat.²³⁶ The *Trainee Handbook* for the inmates at the North African

considerations in order of precedence: (1) The best interests of the prisoners; (2) those of other soldiers; (3) those of the Army; and (4) those of society. U.S. DEP’T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 6.

²³² The locations of the nine service command rehabilitation centers (SCRCs) were Fort Devens, Mass. (First Service Command (S.C.)); Camp Upton, N.Y. (Second S.C.); Camp Pickett, Va. (Third S.C.); Fort Jackson, S.C. (Fourth S.C.); Fort Knox, Ky. (Fifth S.C.); Camp Custer, Mich. (Sixth S.C.); Camp Phillips, Kan. (Seventh S.C.); Camp Bowie, Tex. (Eighth S.C.); and Turlock, Cal. (Ninth S.C.). U.S. DEP’T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 5. By 1944 these commands were consolidated from nine to six, eliminating the First, Third, and Sixth, with the shifting of the Seventh S.C. from Kansas to Jefferson Barracks, Mo. Rushton, *supra* note 228, at 4, 6. The Navy established its retraining commands for each coast, with the east coast’s command located at the Naval Base at Norfolk, Va., and the west coast’s command located at Mare Island Naval Shipyard in Vallejo, Cal. Captain J. Maginnis, *The Navy’s Postwar Correctional Program*, PRISON WORLD, Mar.–Apr. 1947, at 3, 25.

²³³ Austin H. MacCormick & Captain Victor H. Evjen, *The Army’s Rehabilitation Program for Military Prisoners*, in SOCIAL CORRECTIVES FOR DELINQUENCY: 1945 NATIONAL PROBATION ASSOCIATION YEARBOOK 1, 8 (Marjorie Bell ed., 1946) (noting rehabilitation units for dishonorably discharged soldiers in “Pisa, Italy; Paris, Loire, and Seine, France; Casablanca and Oran, North Africa; Shepton Mallet, England; Chungking, China; Saipan; Calcutta and Karechi, India; Round Mountain, Australia; Oro Bay, New Guinea, Oahu, T.H.; and Luzon, P.I.”).

²³⁴ MALOUF, *supra* note 230, at 10 (“Not all Rehabilitation[] Centers were alike in their policies of operation. Some . . . were just being sent prisoners with less serious cases behind them . . .”).

²³⁵ MacCormick & Evjen, *supra* note 233, at 1, 8.

²³⁶ Sergeant George M. Hakim, *GIs Gone Wrong Get Straightened Out at Progressive Prison in Africa*, YANK: THE ARMY WKLY., Mar. 24, 1944, at 6, 6 (observing that “[g]enerally a prisoner works and trains 12 [to 14] hours a day, seven days a week—and they’re probably the toughest days he ever put in,” that prisoners eat standing up, miss meals for “gigs” during inspections, repeat infantry training even if they completed basic training prior to their offense, and that “if the training were easy and routine, the center might become a haven for those outside who want to escape work or danger”). Sergeant Norbert Hofman, *GI Reform School: The Toughest Detail in the Army is Dished Out to Court-Martialed GIs at the Disciplinary Training Center Near Pisa*, YANK: THE ARMY WKLY., Nov. 9, 1945, at 16, 16 (observing that the re-training regimen was “planned to

Theater of Operations (NATOUSA) clearly expressed this position upon their admittance:

*A man confined in the Disciplinary Training Center is a man enlisted in the service of our enemies. More than that, he represents two men in the Axis army. This is true because of the large numbers of officers and men retained here to operate this institution—to train and care for you—and also because your presence here has deprived the army of a soldier whose services had been counted upon. You have deprived the Army of two men. To even the score you will do the work of two men while you are confined.*²³⁷

Although indisputably tough on inmates, many prisoners in the program had opportunities to serve in leadership positions²³⁸ and “alert squads”—armed with Thompson machine guns for special duty.²³⁹ At overseas

be tougher than combat, and when the Army tries to make things rugged it does a good job”); MALOUF, *supra* note 230, at 23 (“Army regulations . . . specified that [rehabilitation center] programs be more strenuous than those required in the Army itself.”). In the words of War Secretary Robert Patterson,

A military prison is safer than the battlefield, but it should not be made into a soft berth, and certainly no soldier who commits a serious offense should be sent back to civilian life ahead of the steady soldier who does do his duty. We owe it to our fighting men who maintain clear records to deal *effectively* with those few who commit offenses.

Hon. Robert P. Patterson, *Military Justice*, PA. BAR ASS’N Q., Oct. 1945, at 30, 32 (emphasis added).

²³⁷ WAR DEP’T, HQS., NORTH AFR. THEATER OF OPERATIONS, NATOUSA DISCIPLINARY TRAINING CENTER (A.B.S.) TRAINEE HANDBOOK 5–6 (1943) [hereinafter WAR DEP’T, NATOUSA HANDBOOK] (on file at the U.S. Dep’t of Army Military Police History Office, Fort Leonard Wood, Mo.) (emphasis in original).

²³⁸ War Dep’t, HQs NATOUSA Disciplinary Training Center, *Organizational History from Activation to 19 June, 1944* (Jun. 19, 1944) (on file at the U.S. Dep’t of Army Military Police History Office, Fort Leonard Wood, Mo.) (describing how trainees could potentially rise to trainee non-commissioned officer).

²³⁹ WAR DEP’T, NATOUSA HANDBOOK, *supra* note 237, ¶¶ 3–4, at 29 (“The squad is armed with Thompson sub-machine guns, and is specifically trained in the use of that weapon, in guard duty . . . special patrol work . . . [or] any emergency which might arise . . . such as an air raid, fire, riot or an emergency action”). It was said that some soldiers in otherwise uneventful positions purposely committed offenses with hopes that their assignment to a rehabilitation center would result in quicker assignment to a different unit. See MALOUF, *supra* note 230, at 126.

centers, the reality of combat lingered at all times,²⁴⁰ especially when, in 1944, the NATOUSA program moved its location from Morocco to just twelve miles from the front line, near Pisa, Italy.²⁴¹ Not surprisingly, these “rehabilitation” experiences were far different from inmates in domestic centers, many of whom were incarcerated for absenting themselves from duty at induction stations, before they even received their initial issue of gear or attended military training.²⁴²

a. The Basic Structure of Restoration Programs

All rehabilitation centers and disciplinary training centers had basic programmatic elements. The blueprint contained a multi-phase program, which began with a period of screening and classification. Following assignment to a training unit, staff and cadre intensely observed participants’ performance as their responsibilities and concomitant privileges gradually increased.²⁴³ Initial stages of participation employed the philosophy of “re-training,” the assumption that the participants’

²⁴⁰ See, e.g., WAR DEP’T, NATOUSA HANDBOOK, *supra* note 237, at 9 (“All production is planned to aid those who are at this moment fighting the battles which you and I should be participating in, were it not for *your* failure to understand the meaning of discipline.”) (emphasis in original). Some overseas centers used such work with therapeutic, rather than punitive aims, however. See, e.g., Captain Edward N. Usnick, Commander, Round Mountain Detention and Rehabilitation Ctr., Australia Base Section, USAOS, *Foreword to SUPPLEMENT TO THE HISTORY OF ROUND MOUNTAIN DETENTION AND REHABILITATION CENTER* (n.d.) (on file at the U.S. Dep’t of Army Military Police History Office, Fort Leonard Wood, Mo.):

It is believed by those of us who hold the present and immediate future destinies of the Trainees in our hands, that in order to start re-training, a man’s mind must first be eased as to his burden on the government, this we have accomplished by our employment of the labor in the furtherance of the war effort by our extensive production policy. After showing a Trainee that the time spent here is not completely lost we are able to emphasize the need for retraining both along military and technical lines.

²⁴¹ Hofman, *supra* note 236, at 16, 16. The Pisa DTC confined the poet Ezra Pound while he awaited charges for treason. See, e.g., EZRA AND DOROTHY POUND: LETTERS IN CAPTIVITY, 1945–46, at 84 (Omar Pound & Robert Spoo eds., 1999) (citing a letter written by the DTC Commander to his mother reflecting on Ezra Pound’s activities translating various writings by a Chinese philosopher while confined at the DTC).

²⁴² MALOUF, *supra* note 230, at 22.

²⁴³ See, e.g., MacCormick & Evjen, *supra* note 233, at 1, 12 (describing how pre-honor company trainees were under guard, whereas honor company trainees lived in a separate area with freedoms that were very similar to those they would enjoy as normal soldiers).

criminal behavior resulted from unsuccessful adaptation to military ways of life and a failure to apply standards of military discipline.²⁴⁴ The “correctional treatment” at rehabilitation centers largely operated under the “medical model” of corrections, in which “the prisoner was viewed as ‘sick,’ the prison became a ‘hospital,’ and the corrections personnel were the ‘medical staff’ who would ‘cure’ the patient of his illness through scientific treatment.”²⁴⁵ Under this approach, endless iterations of drill and ceremonies, physical training, and other common soldier tasks were the antidote for improved performance, and intensive observation during the performance of these tasks would permit cadre to correct contaminated beliefs on-the-spot by modeling acceptable

²⁴⁴ See, e.g., Major Herman B. Snow, *Psychiatric Procedure in the Rehabilitation Center, Second Service Command Rehabilitation Center*, 25 MIL. NEUROPSYCHIATRY 258, 258 (1946) (noting that “reorientation in the military service is of primary import” and that “[e]verything that is done at these Centers, whether it be in the form of privileges, instruction, discipline, dress or attitude, all emanate from one consideration, all converge toward one goal—the performance of proper military service upon release from the Center”). Some trainee handbooks reprinted the definition of military discipline in their first pages. See, e.g., WAR DEP’T, NATOUSA HANDBOOK, *supra* note 237, at 3:

Military Discipline is that mental attitude and state of training which render obedience and proper conduct instinctive under all conditions . . . It is generally indicated in an individual or unit by smartness of appearance and action; by cleanliness and neatness of dress, equipment, or quarters; by respect for seniors and by the prompt and cheerful execution by subordinates of both the letter and the spirit of the legal orders of their lawful superiors.

Army Regulation 600-10.

The NATOUSA *Trainee Handbook* went on to explain,

It is known that most offenses arise from the soldier’s lack of understanding of discipline and inadequate training. The War Department established this Disciplinary Training Center to train and work you in such a way that you will thoroughly appreciate the meaning and vital importance of discipline in the Army, with the entire day from *before dawn until late at night* filled with a schedule to fit you for active service in a combat unit.

Id. at 7–8 (emphasis in original).

²⁴⁵ ROGER G. MILLER, CRIME, CORRECTIONS, AND QUALITY FORCE: A HISTORY OF THE 3320TH CORRECTION AND REHABILITATION SQUADRON 1951–1985, at 61 (1987). See also Lieutenant Colonel Lawrence J. Morris, *Our Mission, No Future: The Case for Closing the United States Army Disciplinary Barracks*, 6 KAN. J. L. & PUB. POL’Y 77, 85 (1997) (noting, from a “review of official reports and other records” at the DB, the “persistent belief” that rehabilitative measures could address “criminal behavior as if it were an illness for which there was a ‘cure’”).

behavior.²⁴⁶ Although psychologists, psychiatrists, and other mental health professionals screened participants and composed reports, most of these programs could not facilitate the “treatment” of all participants in any meaningful way.²⁴⁷ While there was an opportunity for individual “therapy” in exceptional cases, the standard correctional treatment did not contemplate it.²⁴⁸

If trainees successfully performed in successive phases, their daily conditions, with a few exceptions, eventually resembled those commonly encountered in normal military service.²⁴⁹ Servicemembers in their final stages could often go anywhere on the military post under curfew²⁵⁰ and draw pay to attend movies and other recreational events.²⁵¹ In all cases, graduates were never returned to the units where they had been court-martialed, and only their commanders were supposed to know

²⁴⁶ MALOUF, *supra* note 230, at 23 (“A military training was regarded as adequate therapy for most of the prisoners.”).

²⁴⁷ See, e.g., Major Ivan C. Berlien, *Rehabilitation Center: Psychiatry and Group Therapy*, 36 J. CRIM. L. & CRIMINOLOGY 249, 254 (1945). At the Ninth SCRC, the psychiatrist, for example, then-First Lieutenant Isodore Weiss, explained, that “everyone goes through precisely the same procedure no matter what their problems are or how long they will be confined,” and, even for the neurotic, “once he is diagnosed . . . I promptly proceed to forget about him because there is nothing I can do—not even see him again. The scope of the work is so great that I see a man only for the purpose of preserving his papers.” Letter from First Lieutenant Isodore I. Weiss, Psychiatrist, Headquarters Rehabilitation Ctr., Ninth Serv. Command, Turlock, Cal., to Major Perry V. Wagley, Dep’t of Psychiatry & Sociology, Sixth Serv. Rehabilitation Ctr., Fort Custer, Mich. 1 (May 1, 1943), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) [hereinafter Weiss Letter]. Importantly, there was an exception to this general rule. See *infra* Part III.B.3.b.i & ii (describing group therapy and intensive treatment at some SCRCs).

²⁴⁸ See, e.g., MALOUF, *supra* note 230, at 22 (“There was no effort to provide training or therapy required of individual cases. The psychiatrist had to devote most of his time to evaluating prisoners rather than giving them treatment, although he did try to find some time to try group therapy.”).

²⁴⁹ See, e.g., Major Joseph L. Knapp & Fredrick Weitzen, *A Total Psychotherapeutic Push Method as Practiced in the Fifth Service Command Rehabilitation Center, Fort Knox, Kentucky*, 102 AM. J. PSYCHIATRY 362, 365 (1945) (comparing honor company status to “institutional parole,” in which restorers could “associate on an equal basis with other soldiers on a duty status”).

²⁵⁰ See, e.g., MacCormick & Evjen, *supra* note 233, at 1, 12.

²⁵¹ This was true even at the USDB. Austin MacCormick, *Some Basic Considerations in the Discipline of Military Prisoners*, 9 FED. PROBATION 7, 11 (1945) (“At Fort Leavenworth, members of the disciplinary company after the first four weeks in the company have the freedom of the post at Fort Leavenworth on Saturday and Sunday afternoons, and may draw a limited amount of funds for expenditures.”).

they had been assigned from rehabilitation programs.²⁵² In both the Army and the Navy, however, graduates still remained on a term of probation for several months prior to the remission of their sentence, after returning to active duty.²⁵³ While commanders' attitudes toward restorees ranged from high praise²⁵⁴ to the belief that they generally constituted "inferior material,"²⁵⁵ overall assessments in the Army suggest that restorees generally performed well and commanders were generally satisfied with their performance.²⁵⁶ The ultimate philosophy of all 1940s rehabilitation centers and retraining commands is best summarized in the conclusion of the Ninth Service Command's *Prisoner's Handbook*: "Remember the slogan, 'Put out and you will get out.'"²⁵⁷

²⁵² See, e.g., Don Wharton, *The Army Saves its Black Sheep*, READER'S DIG., Nov. 1943, at 77, 77 (describing the policy that "[o]nly his company commander knows that he came from a rehabilitation center").

²⁵³ See, e.g., McCormick & Evjen, *supra* note 233, at 1, 12 ("On restoration to duty the unserved portion of his sentence to confinement is suspended. This procedure in a sense is comparable to being placed on probation."); Hakim, *supra* note 236, at 6, 6 (noting how, in the Army, the probationary period following restoration lasted six months); Maginnis, *supra* note 232, at 3, 3 (describing the Navy's institution of a probationary period of six to twelve months). In fact, the War Department stressed this point to all restorees as a way to exert legal leverage over their future conduct. U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 18 ("Emphasis was placed upon the fact that in the event of subsequent misconduct the suspension could be vacated and the entire sentence, including dishonorable discharge, total forfeitures, and confinement, ordered executed.").

²⁵⁴ See, e.g., Rushton, *supra* note 228, at 4, 5 (observing that some "commanders are anxious to find [trainees] and, whenever possible, to restore them to the field").

²⁵⁵ Editorial, *Rehabilitated Soldiers Can Make Good*, WHAT THE SOLDIER THINKS, May 25, 1944, at 5, 5.

²⁵⁶ McCormick & Evjen, *supra* note 233, at 1, 17 (observing reports that, after six months of active duty following restoration, 89% of restorees were rated "average or above average in performance of duties" and 87% "average or above average in personal conduct").

²⁵⁷ WAR DEP'T, HQS. REHABILITATION CENTER, NINTH SERVICE COMMAND, INTERNAL SECURITY ORDERS NO. 2: PRISONER'S HANDBOOK 24 (10 Aug. 1943), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.). The Camp Sociologist described how the same slogan was prominently displayed at the inprocessing section of the center, until a trainee who had not been restored argued that he met his side of the bargain by putting out; following this, cadre modified the banner to read, "Put out and you *may* get out." MALOUF, *supra* note 230, at 13 (emphasis added). At Turlock, which housed approximately 10,000 trainees during its tenure, the motto held true in approximately ninety percent of the cases, with the rejects serving the remainder of their—in some cases twenty-year—sentences at the DB or federal prisons. *Id.* at 24. Not all centers were as generous, however. See, e.g., Snow, *supra* note 244, at 270 (describing nearly half the numbers of restored trainees at his SCRC).

i. The Flexible Concept of Correctional Treatment

Although, initially, the Army mandated that trainees should be restored in the quickest time possible,²⁵⁸ actual experience led the War Department to make the programs indefinite in length to address each trainee's underlying problems.²⁵⁹ This policy foreshadowed the future experiences of the Army and Air Force rehabilitation programs in the 1950s and beyond.²⁶⁰ At the largest Army rehabilitation center, for example, while most participants graduated within nine to ten months, some remained for one year, and others even eighteen months.²⁶¹ The elastic nature of program duration also permitted innovation in these earliest centers and, as a necessary component of such innovation, the opportunity to incorporate both civilian correctional theories²⁶² and psychotherapeutic approaches.²⁶³

²⁵⁸ See, e.g., Weiss Letter, *supra* note 247, at 6:

[T]his is a place for "mass production" and the guiding theme is to get them back into the service just as soon as possible. I feel that the mission of the station is compromised by the singleness of purpose which blinds everyone to the shortcomings of many of these people who will never be good soldiers.

It is noteworthy that Weiss wrote the above excerpt during the infancy of the center. The author's opinion changed by 1945, when operations permitted more time for psychotherapy. Weiss, *supra* note 227, at 176.

²⁵⁹ See, e.g., MacCormick & Evjen, *supra* note 233, at 1, 12 ("Proper preparation for restoration rather than speed is emphasized at all times.").

²⁶⁰ See *infra* Parts III.B.4 & 5.

²⁶¹ Weiss, *supra* note 227, at 173. The overall average for all rehabilitation centers was thirty-two weeks. U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 22.

²⁶² The War Department, on October 11, 1944, assembled a thirteen-person board of civilian penology "consultants" for the purpose of reviewing rehabilitation centers and developing standards and guidelines for their operation, to include matters of restoration. U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 8. See also Memorandum from First Lieutenant Robert D. Moran, Office of The Judge Advocate Gen. to the JAGO Files, subject: Background of Present System for the Administration of Clemency 10 (28 May 1954) (JAGA 54/5169) [hereinafter Moran Memo]. More specifically,

the board was made up of the country's leading prison administrators and penologists, and included among its members the Director of the Federal Bureau of Prisons, the General Secretary of the American Prison Association, a member of the New York State Board of Parole, three State Commissioners of Correction, four Federal and two State Institution Wardens, and a former Commissioner of Correction for New York City.

ii. Philosophies of Rehabilitation at WWII Centers

Built into the concept of the “second chance” was the realization that, in a time of war, there would be little time to accurately determine the potential of an inmate at court-martial.²⁶⁴ Recognizing the harshness of the punitive discharge, the rehabilitation center began to function as a laboratory in which to evaluate the inmate’s potential objectively, after careful observation. Court-martial panels often advised inmates about the expectation that they would in fact prove themselves, and return to honorable duty in six months, while simultaneously adjudging twenty-year sentences to the very same offenders.²⁶⁵ In all cases, the major

U.S. DEP’T OF ARMY, CORRECTIONAL SYSTEM, *supra*, at 8.

This cooperative spirit was not just limited to the Army; noting how the rehabilitative program was necessarily “flexible and experimental,” the Psychiatrist for the Naval Retraining Command at Mare Island, Cal., described other collaborative policies: “Close liaison with various other correctional institutions in California is maintained, with field trips and open exchange of information and ideas. Every effort is made to integrate and correlate the work of the several departments toward the ultimate objective of more effective retraining.” Commander John M. Murphy, *The Role of Psychiatry in Naval Retraining*, 3 U.S. ARMED FORCES MED. J. 631, 632 (1952). In fact, by July 1945, the classification system for all Army retrainees was adopted from “the Federal Bureau of Prisons and more progressive state prisons, reformatories, and correctional institutions.” MacCormick & Evjen, *supra* note 233, at 1, 11.

²⁶³ Berlien, *supra* note 247, at 254–55 (challenging psychiatrists at rehabilitation centers to innovate new therapeutic approaches to address trainees’ underlying developmental problems—not simply their responsiveness to disciplinary measures); Knapp & Weitzen, *supra* note 249, at 362 (describing how the Fifth SCRC instituted a program of individual therapy, despite significant challenges); Weiss, *supra* note 227, at 176 (describing how expansion of staff responsibilities permitted the Ninth SCRC’s psychiatrist to institute various group therapy initiatives).

²⁶⁴ See, e.g., *infra* discussion accompanying notes 311 to 319 (suggesting how more specific information about the offender’s history and the circumstances surrounding the offense would have likely altered the findings and sentences of many courts).

²⁶⁵ A 1943 *Saturday Evening Post* article related the court-martial president’s additional comments when announcing his sentence of twenty years’ confinement to seven soldiers who had been convicted for desertion from a unit in French Morocco:

I must explain to you that Army justice is tempered with mercy. What happens to you now depends entirely upon yourselves. You will begin serving your sentence in the disciplinary training center near Casablanca. [A]nd your conduct there will determine your future. At the end of six months, like all other offenders, you are entitled to apply for restoration as soldiers in good standing. If your records indicate that you have learned what discipline means, the commanding officer in this area is empowered to approve your application.

vehicle through which to accomplish these tasks was the suspended sentence accompanied by the assignment to a rehabilitation center, rather than the DB.²⁶⁶ With some important differences, the Navy too established a very similar system when operating its own retraining commands throughout the United States.²⁶⁷

iii. One Commander's Perspective on Restoration and Rehabilitation Centers

The historical records for the Ninth SCRC at Turlock, California, provide unique insight into the Commander's philosophy on restoration. Occupying fairgrounds formerly used as a holding area for Japanese-American internees, Turlock was the first and largest rehabilitation center in the United States.²⁶⁸ In an effort to ensure consistency in court-martial and restoration practice throughout the command, MG Kenyon Joyce met with "officers involved with courts-martial procedures" to highlight his expectations.²⁶⁹ His illuminating speech, which offers important insight into how the program operated—aside from amounting to what is now unlawful command influence—first established that he largely viewed cases of absence without leave and desertion as a failure

Demaree Bess, *When Soldiers Go to Jail*, SATURDAY EVENING POST, Dec. 11, 1943, at 20, 20–21. See also Knapp & Weitzen, *supra* note 249, at 362 (observing courts-martial in which "[a]t the time the sentence is passed the court makes a recommendation as to whether the soldier has any possibility of being rehabilitated and restored to duty").

²⁶⁶ See, e.g., Weiss, *supra* note 227, at 173 (describing the necessity of suspended sentences and noting how, even where the center desired to restore a trainee with an unsuspended discharge, the "obstacles to restoration were . . . virtually insurmountable").

²⁶⁷ With time to observe the Army's experiment, the Navy began to institute its retraining programs in 1943. Commander John M. Murphy, *The Role of Psychiatry in Naval Retraining*, 3 U.S. ARMED FORCES MED. J. 631, 631 (1952). See generally Commander Richard A. Chappell & Ensign F. Emerson Logee, *Training Wayward Sailor Men for Return to Duty*, in SOCIAL CORRECTIVES FOR DELINQUENCY: 1945 NATIONAL PROBATION ASSOCIATION YEARBOOK 20, 20–27 (Marjorie Bell ed., 1946) (describing how, by 1944, a fixed program had been established in which prisoners were enrolled in retraining commands for an eight- to ten-week training program, but only after they had served a good portion of their adjudged sentence).

²⁶⁸ MALOUF, *supra* note 230, at i, 4, 5. The center housed inmates from the Pacific Theater, Alaska, and eight western states. *Id.* at 2, 28. At times, the Ninth SCRC had a greater number of participants than inmates at the USDB. *Id.* at 28.

²⁶⁹ Carling I. Malouf, Command Policies Regarding Court-Martial 1–5 (n.d.), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.).

in leadership on the part of the offender's commanding officer.²⁷⁰ Consequently, as a matter of course, in all desertion cases, even if soldiers received decades of confinement, General Joyce would reduce confinement to between two and five years, depending on the aggravation present.²⁷¹ He pledged further to suspend each of the sentences, thereby offering the possibility of restoration and early release from the already substantially reduced sentence.²⁷²

General Joyce had a similarly accommodating view of crimes that occurred in the backdrop of alcohol consumption. He explained that the soldier who "commits some act of violence . . . may get drunk, take a swing at somebody and be all wrong about it as a matter of military procedure but still be all right basically,"²⁷³ thus providing insight into special considerations for what some would term "situational offenders."²⁷⁴ Contrastingly, for crimes of moral turpitude—especially larceny of other soldiers' property—General Joyce explained his

²⁷⁰ According to Major General Joyce, "[t]he inordinate number of men who have gone absent without leave or who have deserted is a direct reflection on the discipline that has been instilled in these men by unit commanders, and in that source lies the greatest possibility for correction of the existing situation." *Id.* at 1. For further exploration of this concept, see generally, Rear Admiral Chester Ward, *Leadership as Related to the Application of Military Law*, JAG. J., Dec. 1957–Jan. 1958, 13, 16 ("The achievement of justice is leadership in action."). In his speech, General Joyce further acknowledged, "[i]n this command every effort has been made to handle cases of the sort with a minimum resort to courts[-]martial." Malouf, *supra*, note 269, at 1.

²⁷¹ Malouf, *supra* note 269, at 1–2.

²⁷² *Id.* ("In all such cases [including "ordinary wartime desertion and aggravated desertion"] the dishonorable discharge has been suspended."). General Joyce's allowance reflected the general policy that "a long sentence to confinement was not taken as an indication that successful preparation of the inmate for restoration to duty could not be accomplished by the rehabilitation center." U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 17. See also Hofman, *supra* note 236, at 16 (describing sentence ranges of trainees between "five years to life," all with dishonorable discharges).

²⁷³ Malouf, *supra* note 269, at 2 (noting, additionally, "[i]f they are basically good soldiers, we should save them to the service. In 95 out of a hundred cases they can be safely restored to duty even though the sentence includes a dishonorable discharge").

²⁷⁴ Berlien, *supra* note 247, at 252 (defining situational or accidental crimes, which "are brought about when the anti-social impulses gain supremacy in the individual under impelling [or unconscious] circumstances" and distinguishing these types of "acute criminal[s]" who commit crimes "under special circumstances," from more chronic offenders). Lieutenant Malouf, who served as the Camp Sociologist for more than a year, explained how "the Army itself stimulated a desire for alcohol within its ranks" at the time and that "a large number of the offenders at Turlock attributed their downfall to intoxication." MALOUF, *supra* note 230, at 155–56.

presumption of nonrestorability.²⁷⁵ This presumption of restoration for deserters prevailed, despite the fact that, in the words of one audience member, the deserter “deprived or ‘robbed’ the Army and his fellow soldiers of months of useful service.”²⁷⁶

General Joyce’s philosophies of punishment, to a large extent, mirrored the War Department’s prohibitions on the participation of servicemembers convicted for nonmilitary offenses.²⁷⁷ Although the rehabilitation centers *did* come to restore all types of offenders—including ones convicted of homicide, aggravated violence, narcotics, and sex offenses²⁷⁸—the presumption of nonrestorability for nonmilitary

²⁷⁵ Malouf, *supra* note 269, at 2 (“[A]ny time that restoration is asked for a man who has been convicted of robbery, larceny or thievery of any kind, the case must be an extraordinary one to warrant [sic] favorable consideration. I don’t believe in restoring them and it is not going to be done unless there is rehabilitation beyond a reasonable doubt.”); *id.* at 3–4:

[For] crimes which indicate distinct moral turpitude or depravity or a mental slant which goes to violence . . . rape, sodomy, robbery. All of those offenses, of course, will receive penitentiary confinement as far as our recommendations are concerned. And in those cases, of course, the action here will always be to execute the dishonorable discharge.

²⁷⁶ MALOUF, *supra* note 230, at 8–9 (noting that “[a] man who stole an inexpensive fountain pen was often regarded to be more evil and disturbing to a unit than a deserter”).

²⁷⁷ Carling I. Malouf, *Extracts from Section VI-W.D. Circular 6, and Section VI-W.D. Circular 63, Which Are Still In Effect—Governing Places of Confinement for General Prisoners* 1 (n.d.), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (generally designating the following types of offenders for confinement in Federal penitentiaries: “All prisoners . . . convicted of treason, murder, rape, kidnapping, arson, sodomy, pandering, any illegal trafficking in narcotics or other habit forming drugs in violation of Federal law . . .”; and the following offenders at the USDB: officers, drug offenders, “sodomists or other sexual perverts,” those with unsuspended discharges, and “[e]stablished incorrigibles and soldiers convicted of crimes involving aggravated violence . . .”). For the violent offenders and incorrigibles, these directives further explained that “dishonorable discharge is usually executed and not suspended.” *Id.* The directives did, however, permit the commanders of rehabilitation centers to take alternative action when warranted by “special circums[t]ances.” *Id.* These were some of the same concerns that General Crowder voiced about young deserters and crimes of a military nature. *See supra* Part III.B.1.

²⁷⁸ *See, e.g.,* MALOUF, *supra* note 230, at 26–27 (describing how, as a result of the “indiscriminate” selection of inmates transferred to Turlock, the rehabilitation center “absorbed many individuals, by regulation who should have been sent elsewhere for a full term of confinement”); *id.* at 125–26 (noting how twenty-three percent of trainees at the center were confined for criminal offenses punishable for civilians and twenty-one percent more were confined for “a combination of military and civilian type criminal

crimes carried throughout the services, far beyond the territorial limits of the Ninth SCRC. Major General Henry B. Luis, during a speech to corrections professionals in 1948, explained the reason why, despite demonstrated transformations in attitude and discipline, many offenders were not restored at rehabilitation centers:

It is seldom that the Secretary of the Army will find circumstances in a case are sufficiently unusual to warrant the restoration to duty of a thief, a robber, or a sex offender. While it is granted that the offender might be completely reformed, the youth of so many of our enlisted men provides a compelling reason to avoid requiring any of them to eat and sleep beside men who have been convicted of felonious crimes. I am sure you understand how parents of young soldiers would feel about that. Military service must be maintained on a high plane, and the Army must be very careful to protect the reputation as well as the character of all those in its service.²⁷⁹

offenses, such as where a soldier stole a car, and used it to go into desertion”); Hofman, *supra* note 236, at 16, 16 (noting that seven percent of the trainees at the Pisa Disciplinary Training Center were convicted of “misbehavior before the enemy, murder, rape, larceny, and other felonies”). In a telling example, a “trainee with a life sentence had shot and killed a fellow soldier while drunk; he proved to be such an efficient trainee that he rose in a few months to [trainee] sergeant major.” Bess, *supra* note 265, at 99.

²⁷⁹ U.S. DEP’T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, app. II, at 98 (reprinting an address to 78th Annual Congress of Correction, held at Boston, Mass., Sept. 2, 1948). The reasoning for this policy remains in even today’s regulations on restoration in the Army. *See* AR 190-47, *supra* note 21, ¶ 8-3b, at 19:

In the absence of exceptional circumstances, conviction of a crime generally recognized as a felony or serious offense in civil law, or a serious crime perpetrated under circumstances showing disregard for the rights or feelings of others that is willfully malicious, brutal, heedless, and lacking in serious provocation will ordinarily disqualify that prisoner for restoration to duty or reenlistment. Desertion or absence without leave with intent to avoid hazardous or important service or, regardless of offense of which convicted, a history of repeated drunkenness, narcotic addiction, or continued difficulty in adjusting to military life may also disqualify a prisoner for restoration to duty or reenlistment.

Such nonmilitary type offenders, of course, still could be restored to duty at the USDB, and even from the Federal prisons, however at a far smaller rate.²⁸⁰

On the final analysis, between 1940 and 1946—largely during the lifespan of the rehabilitation centers and retraining units (December of 1942 to May of 1946)—the Army restored to honorable service 42,373 of 84,245 punitively discharged soldiers, in what amounted to the full strength of “three full infantry divisions.”²⁸¹ Among these restorees, only twelve percent—“the strength of approximately one and two-thirds infantry regiments”—became general prisoners once again.²⁸² At the same time, the Navy and the Marine Corps restored an additional seventy-five percent of their punitively discharged offenders to honorable service—from among 16,000 total offenders confined at their 1945 operational peak.²⁸³ For all of these men, their discharges had been “wiped clean,” and many officials within the military recognized that the net effects of these efforts helped not only the military, but ultimately the families and communities who depended on their future employability and good name.²⁸⁴ Contrastingly, during the same timeframe that

²⁸⁰ Rushton, *supra* note 228, at 4, 6 (noting how “[t]he Disciplinary Barracks also have honor companies and they, too, restore prisoners to duty though by no means in such numbers or proportion as do the Rehabilitation Centers,” and that, “[e]ven when Federal institutions receive a military prisoner, the door of hope is not closed against him”). From January 1943 to September 1944, for example, while rehabilitation centers restored 7644 inmates, the DB restored only 1098. *Id.* at 6. In total, as of June 30, 1945, the Army’s seven disciplinary barracks had restored 2299 of 18,921 general prisoners (12.15%). MacCormick & Evjen, *supra* note 233, at 1, 7. Between 1944 and 1945, Federal prisons restored an additional 326. *Id.*

²⁸¹ MacCormick & Evjen, *supra* note 227, at 3, 5, 6. Reflecting on how the rate of 500 restorations per week during the war amounted to the strength of “two full companies,” one reporter explained, “You might call them ‘lost battalions’ that are being found.” Wharton, *supra* note 252, at 77, 77.

²⁸² See, e.g., Major General Edward F. Witsell, *The Quality of Mercy* (1947), in U.S. DEP’T OF ARMY, THE ARMY CORRECTIONAL SYSTEM app. I, at 90 (2 Jan. 1952).

²⁸³ Maginnis, *supra* note 232, at 3, 3 (“[A]pproximately 75 per cent of all general court-martial prisoners confined during and immediately following hostilities were restored to active duty.”). At the conclusion of 1945, one Navy penologist estimated that “more than 90 percent of those in confinement will one day be restored to duty, as he addressed the new retraining commands, which had moved to Camp Peary, near Williamsburg, Va., and Farragut, Idaho. Lieutenant Commander Richard A. Chappell, *Naval Offenders and Their Treatment*, 9 FED. PROBATION 3, 5 (1945).

²⁸⁴ See, e.g., MacCormick & Evjen, *supra* note 227, at 3, 5 (“Throughout the war the major emphasis was on restoring as many men as possible to duty, not only to provide needed manpower *but also give them a second chance to earn an honorable discharge.*” (emphasis added)); Skinner, *supra* note 227, at 8, 27 (observing how the Navy’s

rehabilitation centers restored roughly half of discharged convicts, the USDB only restored 12.15% of its confines,²⁸⁵ which—while surely surpassing its own pre-war five percent (10/200) standard—fell dramatically short of the massive gains outside its gray “castle” walls.

b. Treatment of Offenders with Mental Illness and Combat Trauma

The Army’s initial appropriation of the name “rehabilitation centers” for its new correctional program ultimately forced the medical service departments to name their own programs “recovery centers.”²⁸⁶ In an ironic way, the medical connotation of the name underscored the reality that these corrections programs would inevitably face many offenders

restoration program existed “to assure both the naval service and society in general that the released naval prisoner will be an asset rather than a detriment”); Weiss, *supra* note 227, at 178 (“[A] few thousand young men were remolded into better soldiers and citizens [at the Ninth SCRC]; and since their families as well as communities will continue to profit thereby, society at large has also benefitted”); Chappell, *supra* note 283, at 3, 5:

It is the objective of the naval correction program to treat its offenders in such a manner that they will be restored to duty benefitted, rather than damaged, by the period of confinement. The Navy considers this to be not only in its own best interests but also the interests of society as a whole.

See also Morton M. Goldfine, *Current Penology Methods and the Military Offender*, 14 B. BULL. 207, 209 (1943), describing the benefits of the First SCRC’s program at Fort Devens, Mass.:

Civilian authorities owe the Army a certain debt of gratitude for the rehabilitation work, in the sense that the awakening in many of these men will be reflected in their approach to civic responsibilities and subsequent adjustments to community life, after the War has finally been won. The rehabilitative work is of permanent value to the community at large

²⁸⁵ Compare MacCormick & Evjen, *supra* note 233, at 1, 7, with MacCormick & Evjen, *supra* note 227, at 3, 5.

²⁸⁶ MALOUF, *supra* note 230, at 21. *See also* Snow, *supra* note 244, at 258 (“Rehabilitation has been applied to physical . . . and mental rehabilitation in . . . hospitals, but, when applied specifically to these Centers, it has a somewhat different connotation. Actually, it is a military rehabilitation, an effort to change the habits and thought processes of the individual by reformation and redirection.”).

with mental illness.²⁸⁷ Although, by regulation, mental illness disqualified inmates from participating in rehabilitation programs,²⁸⁸ this prohibition was not enforceable from a practical standpoint. Initial detention centers had become so flooded with court-martial convicts that their staff routinely sent all prisoners to rehabilitation centers, hoping for more meaningful psychiatric screening at some later date.²⁸⁹ For many servicemembers with mental illness, this was not the first time their conditions had been overlooked. Psychiatrists at induction centers often conducted cursory examinations²⁹⁰ and members of some draft boards, who were opposed to the War, purposely sent the lowest quality draftees for induction.²⁹¹

As a result of the unavoidable participation of mentally ill trainees, the Army's SCRCs and the Navy's retraining commands provide a rare window to enduring lessons about necessary modifications to the standard penal approach. Importantly, this very brief experiment, which lasted only two and one-half years, came at a time when psychiatry was forced by both circumstances²⁹²—and President Roosevelt²⁹³—to rapidly

²⁸⁷ U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 69 (“It is a recognized fact that a large percentage of prisoners become prisoners because of some mental, or a combination of mental and physical maladjustments.”).

²⁸⁸ *See, e.g.*, Snow, *supra* note 244, at 259–60 (providing a representative list of prohibited psychiatric conditions).

²⁸⁹ *See, e.g.*, MALOUF, *supra* note 230, at 26–27 (describing how inmates who clearly did not meet eligibility criteria were sent to the Turlock Rehabilitation Center on an “indiscriminate” basis).

²⁹⁰ *See, e.g.*, Deutsch, *supra* note 222, at 419, 423, 425–26 (explaining that psychiatrists were reduced to “decide-at-a-glance shotgun decisions” based on “the two-minute average psychiatric interview unaided by social histories, [which] proved little more than a farce”).

²⁹¹ Colonel Franklin G. Ebaugh, *Survey of Neuropsychiatric Casualties at Station Hospitals and Military Camps—1941–1943*, in *MANUAL OF MILITARY NEUROPSYCHIATRY* 106, 107 (Harry C. Solomon & Paul I. Yakovlev eds., 1945) (describing how “[m]any local draft boards, some of which were not too enthusiastic about the military effort, sent to the Army men who were the least needed in the community”). One psychiatrist who worked at the New York induction center during the Second World War recalls how draft boards went against his recommendations in many of the cases he wished to eliminate for psychiatric reasons. Commander (Ret.) James L. McCartney & Sergeant Frederick J. Cusick, *Classification of Prisoners in American Civil and Military Correctional Institutions*, 124 *MIL MED.* 447, 452 (1959) (estimating that “at least 30 percent of the young draftees would be unable to adjust to the Navy, but the center rejected only 10 percent . . .”).

²⁹² *See, e.g.*, Albert Deutsch, *The History of Mental Hygiene*, in *ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY* 325, 365 (J.K. Hall et al. eds., 1944) (observing how “psychiatry and mental hygiene were slow to accept the challenge presented to them by the war emergency” and how “[t]he profound lessons of World War I regarding the significance

“evolve” its treatment capabilities.²⁹⁴ To this end, the illustration below, supplied from a popular veteran re-adjustment guide from 1946, conveys

of mental hygiene in wartime were for the most part forgotten”); Deutsch, *supra* note 222, at 419, 425 (discussing the national shortage of psychiatrists to meet wartime demands in both the civilian and military sectors). William Menninger, who served as the Chief Consultant in Neuropsychiatry to the Army Surgeon General from 1943 to 1946, described, “It is an enigma that despite the terrific loss from psychiatric causes which was suffered in World War I, the Army was essentially unaware of psychiatry at the beginning of World War II.” MENNINGER, *supra*, note 222, at 535. The resulting lack of insight seriously limited the Army’s ability to respond to increasing psychiatric casualties, 380,000 who would eventually be discharged for neuropsychiatric reasons. *Id.* at 152. Not only had the Army failed to create a separate division for psychiatrists until February of 1942, Deutsch, *supra* note 222, at 429, in 1941, it removed psychiatrists from each of the divisions—for the purpose of economic savings. MENNINGER, *supra*, at 11. Menninger also observed how several WWI psychiatric lessons, which would have surely aided the Army in its prewar planning, sat on dusty shelves at the Medical Department. *Id.* at 7, 10 (noting additionally how “[t]he rich knowledge gained from the experience of World War I had either been forgotten or neglected”). That crucial volume was 10 THE MEDICAL DEPARTMENT IN THE WORLD WAR (1929) (covering neuropsychiatry practice in the United States and the American Expeditionary Forces); “paradoxically,” while the British used it to aid in their war-planning efforts, the War Department did not. MENNINGER, *supra*, at 10.

²⁹³ On December 4, 1944, President Franklin Delano Roosevelt dispatched a letter to the Secretary of War, which read:

My dear Mr. Secretary:

I am deeply concerned over the physical and emotional condition of disabled men returning from the war. I feel, as I know you do, that the ultimate ought to be done for them to return them as useful citizens—useful not only to themselves but the community.

I wish you would issue instructions to the effect that it should be the responsibility of the military authorities to insure that no overseas casualty is discharged from the armed forces until he has received the maximum benefits of hospitalization and convalescent facilities which must include physical and psychological rehabilitation, vocational guidance, prevocational training, and resocialization.

Very sincerely yours,
FRANKLIN DELANO ROOSEVELT

MENNINGER, *supra* note 222, at 296 (reprinting the letter).

²⁹⁴ *Id.* at 293 (“The psychiatric treatment program had to be evolved during the war.”). For example, at the Mediterranean Theater of Operations Disciplinary Training Center, “[t]he task of providing comprehensive case reports accurately and quickly for 4,000

both the prevalence of psychiatric analysis in the Army and the stigma that accompanied it:



Fig. 2. Depiction of the Effects of Rapid Psychiatric Growth.²⁹⁵

While the general practice of psychiatry in the military was stunted by a number of factors, the greatest gains occurred in corrections settings—rehabilitation centers, specifically—because the task called for *treatment*, not just diagnosis or the standard dose of military discipline administered to all prisoners deemed salvageable.²⁹⁶ Although psychiatric treatment

prisoners *forced* the development of new technologies, instruments, and procedures.” Captain Morse P. Manson & Captain Harry M. Grayson, *The Psychological Clinic at the MTOUSA Disciplinary Training Center*, 1 AM. PSYCHOLOGIST 91, 91 (1946) (emphasis added).

²⁹⁵ THOMPSON, *supra* note 224, at 153 (illustration by Charles Pearson). Although this book was originally published in 1946 by Doubleday & Co., a corporation whose titles are now affiliated with Random House Inc., the copyright in Thompson’s work is registered to Mr. Hilliard L. Bernstein, Esq., who is now deceased. According to his survivor, Mrs. Kathleen Bernstein-Lipkins, she is not now enforcing this copyright and she knows of no entity that is enforcing this copyright.

²⁹⁶ Without question, rigorous drill enforced the need for unquestioning obedience to authority. Knapp & Weitzen, *supra* note 249, at 3 (“[T]hese activities are extremely valuable in promoting group action (teamwork) and the automatic, unquestioning acceptance of authority, which is essential in the training of any good soldier.”). Above this, however, psychiatrists at rehabilitative centers recognized that therapeutic intervention, in concert with discipline and training, was required to return the emotionally disturbed soldier to duty as a productive military member. *See* Berlien, *supra* note 247, at 254 (“We must not alone train men to drill, wear gas masks, read maps, and fire guns. We must strive to continue or reinstitute normal development where it left off in our offenders.”).

was not technically condoned until 1945 in major Army commands,²⁹⁷ and the general attitude of the military toward psychiatry was “a mixture of fatalism and disinterest,”²⁹⁸ the military corrections system both solicited and accepted advice from psychiatrists and provided them the room to develop creative approaches to the rehabilitative task.²⁹⁹ These innovations would forever alter the military’s corrections and justice systems.³⁰⁰

Importantly, the role of the military psychiatrist and other mental health professionals at the rehabilitation centers was not limited to the determination of competency to stand trial, which was often their exclusive function in the military justice system prior to trial.³⁰¹ Here, they had a different, broader function to “infer” an offender’s “capacity for responding to rehabilitation,” and the concomitant responsibility to tailor individualized plans for this purpose.³⁰² The rehabilitative task required not only extensive study of the offender’s background and personal circumstances,³⁰³ but close and continued observation of the

²⁹⁷ MENNINGER, *supra* note 222, at 295 (“Technically, treatment was not officially approved until a directive of March, 1945 . . .”).

²⁹⁸ *Id.* (observing the prevalence of these sentiments until approximately the spring of 1944).

²⁹⁹ *See, e.g., id.* at 200 (“The recommendations of psychiatry for rehabilitation efforts were welcomed and seriously accepted.”); Lieutenant Commander Robert J. Lewinski & Lieutenant Edward J. Galway, *Psychological Services at a Naval Retraining Command*, 42 PSYCHOLOGICAL BULL. 297, 297 (1945) (addressing how “psychological opinion [was] frequently solicited” in the Naval Retraining Command, making the Neuropsychiatric Clinic an “integral part of the retraining program”); Lloyd J. Thompson, *Other Neuropsychiatric Services*, in 2 MEDICAL DEPARTMENT, UNITED STATES ARMY, NEUROPSYCHIATRY IN WORLD WAR II: OVERSEAS THEATERS 399, 411 (Colonel William S. Mullins & Colonel (Ret.) Albert J. Glass eds., 1973) (discussing how psychiatrists assigned to the Disciplinary Training Centers developed specialized expertise and broadened the scope of corrections operations “by using much initiative and imagination”).

³⁰⁰ *See infra* Part III.B.4–5.

³⁰¹ *See, e.g.,* Colonel William C. Porter, *Military Forensic Neuropsychiatry*, in MANUAL OF MILITARY NEUROPSYCHIATRY 122, 125–26 (Harry C. Solomon & Paul I. Yakovlev eds., 1945) (describing the psychiatrist’s limited role in the court-martial competency determination and how the accused was normally found competent to stand trial).

³⁰² Lewinski & Galway, *supra* note 299, at 299.

³⁰³ For a general description of the contents of a psychiatric history workup, see, e.g., Staff Sergeant Max Deutscher, *The Clinical Psychologist in an AAF Mental Hygiene Unit*, 41 PSYCHOLOGICAL BULL. 543, 544 (1944). Importantly, the clemency board at rehabilitation centers “generally ha[d] before it much more about the offender than was available to the members of the court martial who handed down the original sentence.” Benjamin B. Ferencz, *Rehabilitation of Army Offenders*, 34 J. CRIM. L. & CRIMINOLOGY 245, 246 (1943). As one source for important historical background, the personnel at

offender's performance and attitude while in the program.³⁰⁴ These interactions provided ample opportunity to develop innovative treatment plans and therapeutic interventions.

i. Psychotherapy and Alternative Disposition for Trainees with Mental Illness

Rehabilitation centers had to develop methods to sustain all program participants, even though some inmates would not benefit from disciplinary training and were not supposed to be at SCRCs in the first place. Both the center commanders and the War Department responded in different ways. Initially, the programs experienced failures and growing pains. In most cases, mentally ill offenders who were physically fit, capable of carrying on conversations, and had awareness of their daily activities completed training and returned to duty like offenders without such conditions.³⁰⁵ This resulted mainly from the intense

rehabilitation centers relied on home chapters of the American Red Cross. Major Joseph L. Knapp & Frederick Weitzen, *A Total Psychotherapeutic Push Method as Practiced in the Fifth Service Command Rehabilitation Center, Fort Knox, Kentucky*, 102 AM. J. PSYCHIATRY 362, 363 (1945). In at least 17,000 other cases, they went beyond the standard reports and records of trial, working in concert with civilian Federal Probation officers to obtain additional information in the same format as standard presentencing reports used in Federal courts at the time. Oviedo, *supra* note 227, at 3, 6 (addressing the period between 1942 and 1945).

It is axiomatic that these work-ups were precisely the documents that most induction centers lacked in evaluating the suitability of recruits who should have never been inducted. *See, e.g.*, Deutsch, *supra* note 222, at 419, 425, 427–28 (describing how induction boards conducted cursory psychiatric examinations “unaided by social histories,” and how, due to the cost of procuring records of convictions and school delinquency, induction boards largely “ignored” directives to investigate such matters). These comprehensive studies also provided the exact type of information that would benefit commanders *prior* to the charging decision. *See infra* discussion accompanying notes 311 to 319 (addressing numerous recommendations to incorporate these reviews *prior* to court-martial and *prior* to sentencing).

³⁰⁴ *See, e.g.*, Lewinski & Galway, *supra* note 299, at 299 (describing the practice of routinely annotating “progress notes,” which included “observations on the man’s attitude toward the program and the service in general, his physical well-being, his immediate problems, his adjustment to the routine of the command,” and the professional’s own recommendations for improvement); Captain Joseph Abrahams & Lieutenant Lloyd W. McCorkle, *Group Psychotherapy at An Army Rehabilitation Center*, 7 DISEASES OF THE NERVOUS SYSTEM 50, 58 (1947) (“At daily staff conferences, group and individual progress is discussed and, if indicated, rehabilitees are shifted from one group to another.”).

³⁰⁵ *See, e.g.*, Weiss Letter, *supra* note 247, at 2:

pressure of rehabilitation center commanders to appear efficient by rehabilitating as many prisoners, as quickly as possible.³⁰⁶ This emphasis also led to inconsistent standards for psychiatric evaluation, with some psychiatrists foregoing any type of diagnosis unless and until an inmate was visibly and seriously debilitated.³⁰⁷

Continued concerns over restorees with mental problems, however, led the War Department to require more comprehensive testing and screening of inmates by psychiatrists.³⁰⁸ With the additional staff assigned to meet this mandate, psychiatrists who had formerly felt as though their treatment and diagnosis skills were horribly underutilized now perceived an opportunity to make a significant impact.³⁰⁹ Group therapy became a hallmark of all programs in their later phases.³¹⁰ In

As for the treatment of the psychopaths in confinement . . . he receives no special consideration of any kind, goes through exactly the same routine as other prisoners, and disposition of his case is made exactly the same as the others. I have found that the psychopath is restored to duty as readily as the so-called average or normal individual

³⁰⁶ MALOUF, *supra* note 230, at 8 (describing the Ninth SCRC Commander's direction to the board "to make as many favorable recommendations for restoration to duty as possible"—"The more restorations we have," he explained, "the better we will be judged in our records of rehabilitating prisoners."). *See also* Weiss letter, *supra* note 247, at 2, 6 (noting the "mass production" nature of the Turlock Rehabilitation Center and the "pressure" to move cases).

³⁰⁷ Weiss Letter, *supra* note 247, at 2 ("In outstanding cases I record the diagnosis, but I am gradually getting away from the practice and merely giving a short summary of the psychiatric evaluation of the prisoner before me. Higher authority merely wants an opinion as to what type of soldier this man can be.").

³⁰⁸ *See, e.g.*, Memorandum from Major M.F. Mochau, Adjutant Gen., Army Serv. Forces, Ninth Serv. Command, to Commanding Officers, subject: Medical Reports to Accompany Records of Trial by General Court-Martial 1 (9 Dec. 1943), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.).

³⁰⁹ *Contra* Letter from Isodore Weiss to Carling I. Malouf 1 (Apr. 16, 1945), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (noting a "very wholesome change" in the rehabilitative program at the Ninth SCRC by April 1945, which was "really rehabilitation," as opposed to his prior sentiments in May 1943), with Weiss Letter, *supra* note 247.

³¹⁰ *See, e.g.*, MENNINGER, *supra* note 222, at 201, 513–14 (observing how group therapy was implemented at some level in all rehabilitation centers and that it "was adjudged by some of the commanding officers, nonmedical individuals, as being one of the most potent factors in the entire rehabilitation process"); MacCormick & Evjen, *supra* note 233, at 1, 11 (explaining attributes of group therapy, in which "[s]ome centers supplement the lecture method by dramatization and other devices," addressing a range of topics from "emotional development" to "social orientation").

conducting psychiatric evaluations for the purpose of transfer to a confined setting, it also became routine practice to consider and report on whether confinement would have a negative effect on the inmate's condition.³¹¹

As mental distinctions between trainees became clearer, another standard emerged to medically discharge mentally ill inmates so they could obtain civilian treatment, rather than putting them through the new brand of "disciplinary" treatment.³¹² For example, shortly after the opening of the Sixth SCRC, the commander, MG Henry S. Aurand, voiced the following concerns:

Many [soldiers] *while mentally responsible* for their actions, are inapt and do not possess the required degree of adaptability for the military service or give evidence

³¹¹ See, e.g., Commander John R. Cavanaugh, *The Effect of Confinement on Psychiatric Patients*, 2 U.S. ARMED FORCES MED. J. 1479, 1479 (1951):

The Manual of the Medical Department of the United States Navy (Paragraph 3326) requires a Board of Medical Survey insert the following sentence in all its reports on patients in whom disciplinary action is pending: "It is the opinion of the Board * * * that disciplinary action is (not) likely to have a deleterious effect on his mental or physical health."

Cf. also MALOUF, *supra* note 230, at 166, 170–72 (describing incidences of "prison psychosis," which would materialize only after the trainee was in a confined setting); Weiss, *supra* note 227, at 175 (noting trainee breakdowns that were "incidental to confinement").

³¹² See, e.g., Memorandum from Colonel Chas. C. Quigley, Adjutant Gen., Headquarters Ninth Serv. Command, Office of the Commanding Gen., to Commanding Officer, Ninth Serv. Command Rehabilitation Ctr., subject: Procedure for Discharge of General Prisoners Requiring Intermittent [or] Continuing Medical Treatment and of No Value as Soldier Material ¶ 5, at 2 (18 June 1943), in 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (directing in cases where psychiatric examination reveals a psychoneurotic condition, absent malingering, which renders a trainee unfit for limited duty or further service, "the report should be submitted to this headquarters with the recommendation that the sentence of the prisoner be remitted" with the expectation that the discharge certificate will be "blue" rather than dishonorable); Weiss, *supra* note 227, at 176 (discussing cases in which "sentences were mitigated, and the prisoners restored to duty and medically discharged for care and treatment in a non-military hospital"). This policy held true even in the Mediterranean Theater near the front lines in Italy. Manson & Grayson, *supra* note 294, at 93 (noting cases of "mental deficiency," "constitutional psychopathy," and "chronic alcoholism" in which offenders were either sent for treatment in the Zone of the Interior with a suspended punitive discharge or assigned to limited duty).

of habits or traits of character which serve to render their retention in the service undesirable. . . . It is obvious that prisoners who are mentally or physically disqualified for service should not be sent to the Rehabilitation Center for the purpose of retraining them for further military service. Many of these prisoners should have been discharged *and not brought to trial*.³¹³

With reference to this group of offenders, a consensus emerged among military psychiatrists that medical discharge was optimal over a term of confinement that would only increase the risk to society by aggravating the inmate's symptoms.³¹⁴

In a very real way, the rehabilitation center evolved into the first military organization that was capable of routinely conducting detailed analyses of offenders' mental condition with an eye toward rehabilitative measures, and not only competency evaluations.³¹⁵ Although such analyses were conducted here in the reverse—following the sentence—

³¹³ Wagley, *supra* note 229, at 18 (citing letter dated Sept. 13, 1943) (emphasis added).

³¹⁴ See Ivan C. Berlien, *Psychiatry in the Army Correctional System*, in 1 MEDICAL DEPARTMENT, UNITED STATES ARMY, NEUROPSYCHIATRY IN WORLD WAR II: ZONE OF THE INTERIOR 491, 512–13 (Colonel William S. Mullins & Colonel (Ret.) Albert J. Glass eds., 1973):

Prisoners who did not meet eligibility for military service constituted the major difficulty to clemency, for many had mental or physical defects In such cases, the psychiatrist was often tempted, as were his line officer confreeres, to recommend clemency on the grounds that continued confinement would avail nothing of value either to the man or the service and might even aggravate the existing condition and make necessary transfer to a hospital.

By 1944, COL Marion Rushton, a judge advocate, and Major Ivan Berlien, a psychiatrist in the Neuropsychiatry Consultant's Division, jointly developed a discharge policy for offenders with mental illness that had the aim of providing clemency for offenders incapable of being restored to duty so long as they did not "pose a menace to the community to which the men returned." William C. Menninger et al., *The Consultant System*, in 1 MEDICAL DEPARTMENT, UNITED STATES ARMY, NEUROPSYCHIATRY IN WORLD WAR II: ZONE OF THE INTERIOR 67, 99 (Colonel William S. Mullins & Colonel (Ret.) Albert J. Glass eds., 1973).

³¹⁵ See *supra* note 303 and accompanying discussion (describing extensive background studies and reports obtained by Federal Probation officers in the same format as presentencing investigations).

the net effect was greater concern for the offender's mental stability.³¹⁶ Based on the value of these new practices, many psychiatrists recommended implementing identical comprehensive investigations, *prior to the charging decision*, as the most prudent course of action in military justice.³¹⁷ Although this never became an official requirement, some officers serving as defense counsel volunteered their clients for psychiatric evaluation at rehabilitation centers *prior to trial* for the benefit of negotiating alternative dispositions for their clients.³¹⁸ Moreover, even after the War, some commands continued to use these intensive treatment-based investigations to improve decision-making in all cases that could result in a general court-martial.³¹⁹

ii. Enduring Lessons from the Fifth Service Command Rehabilitation Center and Major Harry Freedman

During its abbreviated lifespan, the rehabilitation center system provided two significant mental health treatment guideposts for future generations of military justice practitioners. The first was the "total therapeutic push" method as practiced at the Fifth SCRC at Fort Knox,

³¹⁶ See, e.g., Wagley, *supra* note 229, at 18. Years later, the logic still holds. See, e.g., Lowery, *supra* note 33, at 200–01 (describing the benefits of an extensive and detailed presentencing investigation prior to court-martial sentencing).

³¹⁷ See, e.g., Manson & Grayson, *supra* note 294, at 94 ("It is strongly recommended that psychological neuropsychiatric evaluations precede all general courts-martial trials. Such evaluations should be made routinely and introduced as expert testimony where necessary. Cases of mental deficiency often should be administratively discharged rather than court-martialed and sentenced."); Wagley, *supra* note 229, at 18–19 (proposing use of, and sustained communication with, rehabilitation centers prior to court-martial sentencing and the appointment of a "social investigator" to carry-out such investigations in the Army).

³¹⁸ Manson & Grayson, *supra* note 294, at 94:

One S-3 officer, in his capacity as defense counsel of the DTC Special Court-Martial, adopted the standard operating procedure of having every accused soldier examined by the clinic prior to trial. He used the report, where indicated, either as testimony or as a basis for recommending withdrawal of the charges. In several cases administrative discharge proceedings were initiated as a result of the psychological-psychiatric findings.

³¹⁹ MENNINGER, *supra* note 222, at 506 ("In certain of the Service Commands a psychiatric examination was prescribed for each offender to be tried at a general-court-martial. Serious consideration was given to making this procedure a uniform rule throughout the Army.").

Kentucky. It remains the most comprehensive treatment program at any rehabilitation center during the 1940s, and singularly marks the culmination of various techniques, which are advanced—even by today’s standards.³²⁰ The second achievement comes from the theory and practice of psychiatrist Major (MAJ) Harry Freedman, who set the groundwork for a court-martial system fully adaptable to the treatment concerns of criminal offenders with combat trauma.

(a) *The Fifth Service Command Rehabilitation Center*

Rehabilitation centers like Turlock were limited by practical considerations, even when the War Department encouraged further psychiatric treatment. As one psychiatrist, who was himself a proponent of intensive treatment, conceded, “[i]f we are to remain realistic we must acknowledge the fact that psychiatrists in our rehabilitation centers have far too little time to devote to the treatment of trainees.”³²¹ The centers were further hampered by the youth of the programs, which all literally grew from scratch. Yet, while minimal group therapy became a staple in all centers, advances at the Fifth SCRC made it possible to implement a new technique called the “total therapeutic push” as the first incorporation of that mental health concept in the correctional setting.³²² Far exceeding the expectation of minimal group discussions, and while still incorporating intensive military training, the Fifth SCRC maximized the therapeutic value of every interaction and activity occurring during the re-training period: each trainee began his time with a personal orientation from the commandant,³²³ cadre and staff used the term “rehabilitée” to remove the stigma of prisoner status,³²⁴ the trainees were managed by a diverse and accessible treatment team,³²⁵ the program

³²⁰ See *supra* Parts I & II (discussing the objectives of modern problem-solving courts).

³²¹ Berlien, *supra* note 247, at 254.

³²² Knapp & Weitzen, *supra* note 249, at 364.

³²³ *Id.* at 362 (recognizing the “tremendous benefit” of the personalized approach).

³²⁴ *Id.* (“This is of itself of psychological benefit as it lessens a feeling of rejection developed during his court-martial and confinement in the guard house.”).

³²⁵ Among the members of the treatment team were (1) a Red Cross Worker “to assist with . . . personal family and financial problems, utilizing Red Cross Home Chapters and their contacts with all the public, private, social and relief agencies,” (2) a chaplain, (3) a custodial officer who supervises prisoners, (4) a medical officer “who makes every effort to assume the role of family physician and counselor,” and (5) a psychotherapist. *Id.* at 363.

instituted a merit system to award participants additional privileges for improvements,³²⁶ and, upon graduation, the clemency board—and separately the commandant—personally congratulated the trainee, sharing comments of optimism for the future.³²⁷

Within the structure of the Fifth SCRC, psychiatrists transcended the prevailing classification system in which “the man was diagnosed correctly and put in the appropriate ‘pigeon hole’ and promptly forgotten.”³²⁸ Recognizing the limitations of diagnostic criteria at the time,³²⁹ mental health professionals there focused therapy on the nature of the trainee’s underlying problem: “Selection for the groups is made on the basis of reaction to group life rather than on categories such as psychopathic, psychoneurotic, etc.”³³⁰ In this way, group therapy became the primary “weapon” in the battle “for retaining and reintegrating the personality of our offenders in a normal pattern of development.”³³¹ The Fifth SCRC’s tripartite approach to large group,³³² small group,³³³ and individual therapy³³⁴—combined with a treatment team approach—

³²⁶ *Id.* at 365.

³²⁷ *Id.*

The board takes the opportunity of commending the man for his success and expressing their confidence in his ability to become a good soldier; they assure him that he will be recommended for restoration. The effect on his morale is further augmented by a final personal contact with the commandant.

³²⁸ Weiss letter, *supra* note 247, at 2.

³²⁹ See, e.g., MENNINGER, *supra* note 222, at 127, 198–99 (describing the “inaccuracy” of diagnoses of psychoneurosis); MALOUF, *supra* note 230, at 162 (observing “some interesting variations in the differences between psychiatrists” regarding trainees labeled “psychopaths” and that “[s]ince psychiatrists themselves often disagree on the diagnosis of individuals as being psychopathic, most statistical information . . . would be questionable”).

³³⁰ Joseph Abrahams & Lloyd W. McCorkle, *Group Psychotherapy of Military Offenders*, 51 AM. J. SOC. 455, 456 (1946) (explaining, for example, that it was possible for “excessive drinking and A.W.O.L. [to be] handled similarly”).

³³¹ Berlien, *supra* note 247, at 255.

³³² Large therapy groups at the Fifth SCRC had 125 to 175 members and occurred in a “converted barn that serve[d] as the center’s chapel.” Abrahams & McCorkle, *supra* note 330, at 455.

³³³ Small groups, which consisted of fifteen to thirty-five members, would meet in “two specially equipped barracks.” *Id.* Some such groups were devoted to behavior that revealed “aggress[ion],” while others were geared toward “depress[ion] and withdraw[al],” regardless of the trainee’s diagnosis on paper. *Id.*

³³⁴ The Fifth SCRC stood in contrast to the many rehabilitation centers that were unable or unwilling to conduct individual therapy. In every case, trainees had “a minimum of

provided maximum flexibility. It is significant that, within this specialized correctional setting, trainees actually received more therapy time than psychiatric battlefield casualties received during their rehabilitation period in mental hygiene units.³³⁵ Importantly, the process did not sacrifice the core requirement for discipline; as a pragmatic psychiatrist explained, “[w]e cannot hope in a military environment to greet the incoming deserter, thief, or forger with love and kisses.”³³⁶

Some observers noted that the novel methods employed by the Fifth SCRC created an environment in which trainees essentially had the opportunity to work through their problems in a “24-hours-a-day” therapy setting.³³⁷ Among various accounts, the trainee labeled *S* was a soldier whose misconduct culminated in a dishonorable discharge for theft of a jeep.³³⁸ *S* also had a history of mental disturbance that culminated when he “refused an interview with a psychiatrist[,] struck a medical officer, and slashed his wrists.”³³⁹ In a detailed examination, Captain Joseph Abrahams and Lieutenant Lloyd W. McCorkle tracked *S*’s participation in the center’s group setting, the methods used to address his particular problems, and his experiences upon return to duty.³⁴⁰ *S*’s case study, in particular, demonstrates the flexibility of the rehabilitation centers to address the unique problems of discharge remission for military offenders with mental illness. The work of the Fifth SCRC, and the combined lessons of other rehabilitation centers,

three sessions, totaling approximately 4 hours” followed by “a variable amount,” based on their needs and whether they engaged in “aggressive” or “marked antisocial behavior.” Knapp & Weitzen, *supra* note 249, at 363.

³³⁵ For patients suffering from combat trauma, group therapy lasted approximately four-and-a-half hours per week. Freedman, *supra* note 222, at 281. At the Fifth SCRC, group therapy was one-and-one-half hours longer per week. Knapp & Weitzen, *supra* note 249, at 364. Also, whereas the therapy program at MHUs was only six weeks in duration, Freedman, *supra*, at 275, the Fifth SCRC’s therapy program lasted four times as long. Abrahams & McCorkle, *supra* note 330, at 456 (describing the twenty-four week program).

³³⁶ Berlien, *supra* note 247, at 253.

³³⁷ Lloyd W. McCorkle, *Group Therapy in Correctional Institutions*, 13 FED. PROBATION 34, 34–35 (1949) (summarizing the 5th SCRC’s operations).

³³⁸ Abrahams & McCorkle, *supra* note 330, at 460–61. Although the initial “*S*” is not italicized in the text of the publication, this article italicizes the initial to reflect the patient’s protected identity and shortened true name.

³³⁹ *Id.* at 461.

³⁴⁰ *Id.* at 460–63 (providing treatment note excerpts from the months of April to November and reprinting a letter from *S* “two and a half months after restoration”). The various excerpts not only describe the therapist’s different treatment strategies, but the way he enlisted other group members to help *S* obtain greater insight.

reveals that the Army contemplated a therapeutic approach to military justice for decades. Moreover, for just as long, the Army employed treatment plans and interdisciplinary teams in contingent sentencing arrangements for general prisoners.

At its base, the total therapeutic push practiced at the Fifth SCRC embodies the modern philosophy of “therapeutic jurisprudence,” which seeks to maximize the therapeutic value of all phases of criminal justice for the ultimate betterment of both society and the offender.³⁴¹ It is no coincidence that contemporary treatment courts also operate on this very principle.³⁴² That Army corrections in the 1940s and modern treatment courts arose from a *common nexus* is vitally important—especially considering that the military employed these principles during the exigencies of a nation at war, when discipline was of paramount importance.³⁴³ Because the goals of therapeutic jurisprudence were attained in the demanding environment of the 1940s, they can surely be attained within the present military justice system.

(b) *Major Harry Freedman’s Contributions*

Major Harry L. Freedman practiced psychiatry in the Army at the time when the rise in combat neuroses transformed the Medical

³⁴¹ See, e.g., Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 25 (1997) (describing how therapeutic jurisprudence is “sensitive to the therapeutic and antitherapeutic consequences that sometimes flow from legal rules, legal procedures, and the roles of legal actors”); David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.U. L. SCH. J. HUM. RTS. 759, 761–62 (1993) (describing how therapeutic jurisprudence “proposes we explore ways in which, consistent with principles of justice, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law [as applied]”).

³⁴² See, e.g., Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 Touro L. REV. 479, 481 (2002) (describing how drug treatment courts constitute “a therapeutic jurisprudence approach to the processing of drug cases” and how “[s]pecialized treatment courts—including drug treatment courts—are related to therapeutic jurisprudence”); David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, NAT’L INST. JUST. J., July 1999, at 13 (evaluating various practical applications of therapeutic jurisprudence).

³⁴³ Witsell, *supra* note 282, at 90 (“[I]n many cases confronted with a different type of offender, the Army was faced with much the same problems as civilian institutions, but with the increased complication of being engaged in *the greatest war in history*, with all its attendant social problems.”) (emphasis added).

Department's approach. Operating within a network of professionals at both mental hygiene units (MHUs) and rehabilitation centers, he was instrumental in combining the lessons learned in both settings. His publications reveal that he was involved in the initial development of MHUs throughout the military when they existed largely for the purpose of preventing psychiatric casualties in the pre-deployment phases of training.³⁴⁴ At this level, he came to address justice-related mental health issues in the context of disobedience and absence without leave.³⁴⁵ The approaches that evolved from the initial MHUs provided the basic framework for addressing treatment and matters of discharge characterization.

Over time, MHUs—which departed from the Army's exclusively diagnostic posture—adapted to address the symptoms of combat trauma.³⁴⁶ The MHUs treated both officers and enlisted men who were self-destructive or nonproductive at their units after returning from combat.³⁴⁷ The MHU's six-week intensive therapy programs determined whether these servicemembers would be returned to duty, reclassified, or discharged.³⁴⁸ Through this experience, clinicians recognized that SCRCs housed many war-traumatized offenders who were different from other classes of sociopaths or chronic offenders. Major Freedman pointed to the representative case in which, “[b]y reason of his participation in combat and the minute to minute existence which he had been living, [the soldier's] values were distorted and in his illness there can be seen the motivating forces which might easily bring him in conflict with the law.”³⁴⁹

³⁴⁴ See generally Major Harry L. Freedman, *Mental-Hygiene First Aid for Precombat Casualties*, 28 MENTAL HYGIENE 24 (1944).

³⁴⁵ See, e.g., MENNINGER, *supra* note 222, at 195 (observing situations in which absence without leave correlated with offenders' severe personality disorders).

³⁴⁶ Freedman, *supra* note 222, at 269–70 (describing how MHUs were modified to create a more “therapeutic setting” for war-traumatized soldiers).

³⁴⁷ See, e.g., *id.* at 286–87 (describing the case of a thirty-one-year-old lieutenant, who, after “having been blown out of a fox hole by dive bombers and also having experienced extreme conditions of strafing under fatiguing conditions” had slipped into “seven and a half months of invalidism and unproductivity”); Major Harry L. Freedman & Staff Sergeant Myron John Rockmore, *Mental Hygiene Frontiers in Probation and Parole Services*, in SOCIAL CORRECTIVES FOR DELINQUENCY: 1945 NATIONAL PROBATION ASSOCIATION YEARBOOK 44, 52 (Marjorie Bell ed., 1946) (describing a soldier who committed repeated offenses after combat).

³⁴⁸ Freedman, *supra* note 222, at 274.

³⁴⁹ Freedman & Rockmore, *supra* note 347, at 44, 53.

This special brand of combat-traumatized offenders needed “*understanding* more than sympathy,” because the war was a “principal causative factor” in their behavior.³⁵⁰ Accordingly, the military justice system had the responsibility to “differentiate between the cause and effect relationship” and to base treatment on “sound mental hygiene principles” and discharge decisions on more “careful study and analysis of the factors involved.”³⁵¹ Because such court-martial sentences needed to be especially “constructive,”³⁵² Major Freedman established a system in which MHCs liaised with SCRCs. He provides examples of combat-traumatized soldiers with serious and repeated misconduct who were ultimately treated as “soldier-patients,” rather than general prisoners.³⁵³ Through MAJ Freedman’s programs, the MHUs provided an alternative to address the unique challenges facing trainees at rehabilitation centers who were unsuitable for restoration to line units as a result of combat trauma.³⁵⁴

Major Freedman’s concluding advice to legal and corrections professionals is directly relevant to the instant article and its proposals. In contemplating alterations to military justice practice necessary to meet the unique problems posed by PTSD and other invisible wounds of war, MAJ Freedman highlighted the importance of building individualized mental health treatment into both the court-martial and the correctional

³⁵⁰ Gilbert, *supra* note 222, at 296.

³⁵¹ Freedman & Rockmore, *supra* note 347, at 44, 51, 56.

³⁵² Berlien, *supra* note 247, at 249 (explaining that, beyond the use of probation and conditional sentences, the military justice system must also make the sentence itself a “constructive experience” in order to attain treatment objectives).

³⁵³ One soldier suffered shrapnel wounds and lost several of his “closest buddies” in severe combat conditions in the North African Theater. He then lived in a state where, “I didn’t give a damn whether I lived or not.” Following a series of unauthorized absences, alcohol-induced rampages, and an occasion when he pleaded for the military police to shoot him, the Army adopted a treatment-based approach: “After a course of treatment this soldier was returned to duty of a limited nature within the continental limits of the United States.” Accordingly, “[t]he Army recognized [the relationship between his lack of treatment and his criminal behavior] and treated him as a soldier-patient. The reward was that a combat-experienced soldier continued to render effective service where otherwise a stockade prisoner might have been the only result.” Freedman & Rockmore, *supra* note 347, at 44, 52–53. *See also* Freedman, *supra* note 222, at 270 (“The status of soldier in this therapeutic company is somewhat of an anomaly. It is that of a soldier-patient.”).

³⁵⁴ While it is unclear how many victims of PTSD, despite their illnesses, were returned to combat units as a result of the pressures to restore as many prisoners as possible, *supra* note 306, Major Freedman’s initiatives demonstrate the existence of additional options in military justice, specially tailored to individuals who suffered from PTSD.

apparatus following the sentence: The objective of treatment for the war-traumatized offender, he explained,

can be done by including a mental hygiene division in the courts and in the departments of correction, parole and probation, with a definitive function which includes administrative responsibility. At that point discussion of treatment with a psychiatric orientation, for the individual who is in difficulty, be he a [combat] veteran or no, becomes more than academic.

Further, “[t]he justification of such a painstaking and costly undertaking is its translation into help for the individual, so that the community gains a better citizen instead of a social liability.”³⁵⁵

The Army’s disciplinary policy soon reflected MAJ Freedman’s “soldier-patient” concept in its 1951 publication of Army Regulation 600-332, which addressed the “restoration of military prisoners sentenced to confinement and discharge,” and officially recognized “combat exhaustion”³⁵⁶ as an exception that would permit restoration to duty, despite a conviction for desertion from a combat setting.³⁵⁷ In

³⁵⁵ Freedman & Rockmore, *supra* note 347, at 44, 57.

³⁵⁶ From the time of WWI, prior to the inception of the PTSD diagnosis in 1980, many clinicians used the terms “combat fatigue,” “battle or operational fatigue,” or “combat exhaustion” interchangeably with “war neurosis,” “shell shock,” and later “gross stress reaction,” all of which ostensibly included identical symptoms of combat trauma. SCHRODER & DAWE, *supra* note 130, at 177–79. In 1962, the Army’s *Social Work Handbook* synopsisized “combat exhaustion”:

This category includes those transient personality reactions which are due to stress of combat. When treated promptly and adequately, combat exhaustion may clear rapidly, but it may also progress into one of the neurotic reactions. It is justified as a diagnosis only in situations in which the individual has been exposed to severe physical demands or extreme emotional stress in combat.

RAYMOND MONSOUR SCURFIELD, *A VIETNAM TRILOGY: VETERANS AND POST TRAUMATIC STRESS*: 1968, 1989, 2000, at 13 n.14 (2004) (reprinting U.S. DEP’T OF ARMY, TECHNICAL MANUAL 8-246, ARMY SOCIAL WORK HANDBOOK ¶ 233, at 146 (Jan. 1962)).

³⁵⁷ Army Regulation 600-332, like successive policies, provided a list of offenses that would not normally lead to restoration absent “exceptional circumstances.” U.S. DEP’T OF ARMY, REG. 600-332, RESTORATION OF MILITARY PRISONERS SENTENCED TO CONFINEMENT AND DISCHARGE ¶ 1.c, at 1 (24 May 1951). However, a new provision now existed for an offense normally considered to be an aggravated form of desertion: “Desertion from units engaged in combat,” it began, “will ordinarily disqualify for

addition to this provision, the Army's 1952 publication, *The Army Correctional System*, addressed necessary considerations for restoration and discharge of offenders with mental illness:

General prisoners who are not eligible for restoration to duty because of mental or physical disabilities, and who but for such disabilities probably would have been restored to duty with an opportunity to earn an honorable discharge, may be restored as a matter of clemency, solely for the purpose of being furnished a discharge other than dishonorable.³⁵⁸

In no uncertain terms, MAJ Freedman advocated the treatment court approach in the military justice system for offenders with combat trauma, long before the VTCs in Anchorage or Buffalo had even been contemplated. Consequently, the therapeutic approach to military justice, at least for victims of PTSD, is a call that has gone unanswered for 60 years—hidden, in plain sight, in the history of military psychiatry and penology.

c. The Conclusion of the Rehabilitation Center "Experiment"

Just as the War Department appointed a commission of civilian experts to study the most efficient use of rehabilitation centers, and just as these programs began to evolve more meaningful standards based on lessons learned, the War ended. During the final phases of the programs, rather than conducting training in military subjects, the program directors trained participants in vocational tasks with the hope of preparing them for civilian employment in a post-war economy.³⁵⁹ These final days also marked an intensification of efforts to restore and honorably discharge program participants, rather than transferring them to continued

restoration to duty." *Id.* But it continued, "unless the offender was a victim of combat exhaustion following substantial combat service." *Id.* Significantly, this marked a first occasion when the Army officially recognized that a military offender, himself, could be considered a "victim" in relation to the perpetration of the charged offense. *Id.*

³⁵⁸ U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 53.

³⁵⁹ *Id.* at 21 ("Prior to VJ Day, the stress was upon military training. After that date and until inactivation of the last Center, primary emphasis was placed upon vocational and technical training.").

confinement.³⁶⁰ Importantly, as perhaps the clearest indication of the military's enduring rehabilitative ethic, the concept of restoration to honorable duty was still retained in the Army's and Navy's corrections programs, even though the manpower needs that justified the programs no longer existed.³⁶¹ After illustrating how "consideration of clemency is woven constantly through the procedure for military justice,"³⁶² War Secretary Robert Patterson further remarked on the Army's correctional concept at the end of the War:

It is the Army's purpose to restore as soon as possible all those convicted who give indication of their ability to again become soldiers. To accomplish this the Army utilizes the most approved and modern methods It will continue to do everything within its power to administer a fair and just system of military justice.³⁶³

³⁶⁰ See, e.g., *id.* at 10 ("While there was no general amnesty granted to military prisoners, the progressive penal philosophy had enabled many thousands of prisoners to be restored to honorable duty [immediately following the War]"). MacCormick & Evjen, *supra* note 227, at 3, 5 ("Emphasis on restoration to duty did not stop when hostilities ended. During the first 9 months following V-J Day the War Department was more liberal in its restoration policy than at any time during the war.").

³⁶¹ See, e.g., U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 11:

It was recognized, of course, that there were still general prisoners confined who, after participating in the rehabilitation program for an additional time, would be considered for restoration to duty. Because of the War Department's policy to permit every general prisoner who was physically, mentally, and morally qualified to earn honorable restoration to duty, restoration programs to a more limited extent were carried on at each of the disciplinary barracks.

Maginnis, *supra* note 232, at 3, 28:

The responsibilities of the Navy Department to men who voluntarily enlist in time of peace, and subsequently get themselves into difficulties, are somewhat different from those attached to men inducted into service. However, the Navy feels a keen and continuing sense of responsibility to the Nation for the young men under its jurisdiction. Accordingly, the rehabilitative and restoration aspects of the Navy's wartime correctional program are being retained and adapted to peacetime needs.

³⁶² Patterson, *supra* note 236, at 30, 41–42, 45 (describing how a deserter who received a dishonorable discharge and fifteen years' confinement would still be considered for restoration to duty).

³⁶³ *Id.* at 46.

The mention of “modern methods” paid reverence to the priceless input that the Army received from advisory boards that included the “Country’s most distinguished penologists.”³⁶⁴

The two most prominent lessons from the 1940s are (1) the use of therapeutic intervention and conditional sentencing to address offenders’ underlying problems; and (2) the need to expand and adapt court-martial procedure when addressing offenders with combat trauma. They both echo today, as all of the services contemplate the challenges of unseen injuries in the medical, correctional, and military justice arenas. Despite the passage of many years and countless social revolutions since the Second World War, these programs are all significant because suspended sentences and rehabilitation centers carried into the 1950s and stayed with the Armed Forces after the codification of the *Uniform Code of Military Justice (UCMJ)*.³⁶⁵ As observed by Lieutenant Colonel Thomas Cuthbert, who later served as the Chief of the Army’s Trial Judiciary,

Although a cynic might suggest that the restoration rate was related to the fact that there was a war in progress during this period, the tenor of the reports and a contemporary review of the program reflects a reformist zeal that cannot be explained in terms of military manpower economics. Clearly, restoration to duty was a fundamental precept of military prison philosophy.³⁶⁶

The courts’ continued reference to the clemency lessons of WWII in contemporary military jurisprudence further underscores the importance of this time period.³⁶⁷

4. *The Air Force’s Approach to Rehabilitation*

The Army’s rehabilitation center experiment, despite teaching many important lessons during its short tenure, ended abruptly at the close of the War, with all operations ceasing in May of 1946. Although

³⁶⁴ *Id.* at 43.

³⁶⁵ See *infra* Parts III.B.4 & 5.

³⁶⁶ Lieutenant Colonel Thomas R. Cuthbert, *Military Clemency: Extra-Judicial Clemency in the United States Army Prison System 5* (May 20, 1977) (unpublished manuscript) (on file with author).

³⁶⁷ See *supra* note 146 (describing the courts’ reliance on WWII commanders’ clemency philosophies, though many of their findings were distorted by the “history effect”).

restoration responsibilities returned to the DB and the stockades, the infant Air Force provided a chance to continue the Army's major correctional innovations.³⁶⁸ In 1951, some Air Force corrections professionals who had exposure to the Army's SCRCs developed the 3320th Corrections and Rehabilitation Squadron (3320th) with the goal of improving on the Army's correctional models.³⁶⁹ This program emphasized a therapeutic environment over rigorous training,³⁷⁰ and soon came to implement treatment teams and individualized treatment plans that provided the opportunity to address offenders with a wide variety of mental illness.³⁷¹

By the time of Vietnam, the 3320th played a definitive role in the treatment and disposition of offenders with PTSD. Not only was "combat exhaustion" a condition that weighed favorably in admission to the Air

³⁶⁸ The Air Force, in fact, continued the tradition of the most innovative SCRC in Fort Knox, Ky., where group treatment functioned on a continuing basis. *See supra* discussion accompanying notes 322–340.

³⁶⁹ MILLER, *supra* note 245, at 17 ("Air Force leaders were uninterested in developing systems that mirrored those of the Army; they sought to apply new methods to do the same jobs faster, cheaper, and better.").

³⁷⁰ *Id.* at 48, 62 (noting how "the new arrival wore a regular Air Force Uniform, and staff members spent time insuring that he knew he was a retrainee, not a prisoner" and how "[e]ducation and training were not the purpose of the 3320th [but, in fact,] only the vehicles for rehabilitation activities of the program"). Far from the "put out and you will get out" disciplinary philosophy that dominated the Army's 1940s rehabilitation centers, the 3320th, instead, focused on bolstering the participant's sense of personal worth. *Id.* at 62 (observing how "[e]ducation and training were not the purpose of the 3320th [but] were in fact only the vehicles for rehabilitation activities of the program").

A noteworthy account of the commander's orientation for newcomers to the 3320th captures its operational philosophy: When the Airman [Amn] first entered the room, he sat before Colonel Tackney, who greeted him in all seriousness. The colonel provided a yellow handbook, titled "Rules and Regulations," and sternly reminded the Amn: "[H]ere is our rule book and this is going to be your Bible while you are here. I expect you to abide by every word of it!" *Id.* at 49. The Amn took the book with quivering hand and began to thumb through its nine pages, only to find that it contained but a single sentence: "Use your common sense; it is usually the only thing needed to solve any problem." *Id.* Observers would watch the "dramatic change" as "surly frowns changed to smiles" and hope returned to follow the Airmen through their rehabilitative experience. The Air Force researcher who studied the 3320th and related this account notes how "with this technique, Colonel Tackney vividly established the practical, informal, nonpunitive nature of the 3320th's program." *Id.*

³⁷¹ *Id.* at 22–23, 60 (discussing Maxwell Jones's theory of the "therapeutic community," which envisions the patient as "an active participant in his own treatment," and Captain Lawrence A. Carpenter's translation of that theory to a model in which "[r]ehabilitation is not a treatment which can be administered like a dose of Penicillin").

Force's restoration program,³⁷² but the 3320th developed special expertise to address it. Mr. John Moye, who worked as a judge advocate for the 3320th between 1968 and 1972, describes how, in the early years, Air Force policy required convening authorities to transfer all courts-martial involving offenders with suspected "combat fatigue" to the 3320th for the purpose of trial.³⁷³ Although the transfer of witnesses and evidence to Colorado—sometimes from Vietnam—required great cost and energy, it was thought that the offender would experience less stress and turmoil in the therapeutic environment of the 3320th with the aid of an interdisciplinary treatment team.³⁷⁴

Although Mr. Moye could not recall specific statistics, he reports that there were "definitely" cases where offenders diagnosed with combat fatigue received suspended discharges in order to undergo comprehensive and individualized treatment.³⁷⁵ Alternatively, many of these offenders would be discharged administratively with a characterization that enabled them to obtain benefits from the VA.³⁷⁶ At this same juncture in history, the Army too addressed these unique considerations with its own offenders.

5. Vietnam and the Army's Retraining Brigade

Although the Army continued to operate rehabilitation centers during the Korean War at Camp Gordon, Georgia,³⁷⁷ and in Germany,³⁷⁸ it

³⁷² Captain Jeffrey W. Cook, *Clemency, Transfer, and Parole of Air Force Prisoners at the United States Disciplinary Barracks*, 18 A.F. L. REV. 101, 104 (1976) (citing U.S. DEP'T OF AIR FORCE, REG. 125-18, OPERATION OF AIR FORCE CORRECTION AND DETENTION FACILITIES ¶ 7-2(2) (16 Jan. 1975)).

³⁷³ Telephone Interview with John Moye, Senior Partner, Moye White LLP (Jan. 10, 2011) (notes on file with author).

³⁷⁴ *Id.*

³⁷⁵ *Id.* At the same time, however, Mr. Moye noted attempts by accused Airmen to falsely claim that they suffered from combat trauma in order to receive better treatment: "We were overwhelmed by people who said they suffered from acute combat fatigue, even though they had not been in combat. It's hard to argue that Montgomery, Alabama, was a combat zone, though." *Id.*

³⁷⁶ *Id.*

³⁷⁷ While it could easily go unnoticed in modern times—with only brief mention in the single reported appellate case of *United States v. Gordon*, 2 C.M.R. 322, 322 (A.B.R. 1952) (noting how, after the accused was convicted of willfully disobeying a superior officer and sentenced to a dishonorable discharge and one year confinement at hard labor, the convening authority suspended the discharge and directed his placement in the Pilot Center program pending appellate review or the accused's release from confinement)—

significantly intensified restoration efforts with the establishment of the U.S. Army Correctional Training Facility at Fort Riley, Kansas (later named the United States Army Retraining Brigade (USARB)). The program, launched in 1968, was expected to restore 7560 convicts in its first year and 9825 each following year.³⁷⁹ Similar to the 3320th, the program developed treatment teams and evolved to the point where social workers played a direct role in addressing the individual needs of trainees.³⁸⁰ Unlike the 3320th, however, the USARB mainly relied on the

the Camp Gordon Pilot Rehabilitation Training Center functioned in a manner that was virtually indistinguishable from a WWII rehabilitation or disciplinary training center. MILLER, *supra* note 245, at 26 (“The Army activated a rehabilitation center at camp Gordon, Georgia, similar to those it had operated during World War II.”).

Not only were inmates called “trainees” and sentenced to “terms” for therapeutic purposes, but, as in the case of WWII, a “merit system replace[d] guards, barbed wire and high walls.” Sterling Slappey, *Cure Adjusts ‘Bad’ Soldier Into Good GI: Normal Treatment Proves Success at Vast Military Jail*, SUN TIMES (Cumberland, Md.), Aug. 17, 1952, at 40. Trainees likewise adorned regular duty uniforms, rendered and received the salute despite punitive discharges, and earned the right to leave the post unescorted “simply because they give their word they will return.” *Id.* As in the WWII experience, “[t]rainees [we]re eligible for honorable discharge regardless of what their courts[-]martial involved.” *Id.* The three differences between the Pilot Center and prior iterations were apparently (1) the institution of a sixteen-week intensive military training program; (2) more liberal standards in admitting all classes of offenders; and (3) a high degree of selectivity among the persons ultimately admitted to the program. *Id.* (revealing how, as opposed to the centers of WWII, trainees “were a hand-picked—sifted to avoid those soldiers considered incorrigible”). While it is unclear whether restorations from the center were captured in the Korean War discharge remission statistics, over 1000 trainees attended the Center by August of 1952. *Id.* The program was apparently so successful that the Army once “hinted similar camps will be set up for possibly each of the five armies in the continental United States.” *Id.* The Pilot is most noteworthy because it reaffirms the most salient values of the World War II rehabilitation centers in a time period following the codification of the *Uniform Code of Military Justice (UCMJ)*.

³⁷⁸ See, e.g., Memorandum from Lieutenant Colonel W.F. La Farge, to Commanding Officer, The Provost Marshal Gen. Ctr., Camp Gordon, Ga., subject: Operating Procedures of Retraining Center (2 June 1953) (describing operating procedures for the 7727th U.S. Army Europe Retraining Center located in Kaufbeuren, Germany) (on file at the U.S. Dep’t of Army Mil. Police History Office, Fort Leonard Wood, Mo.).

³⁷⁹ Memorandum from General Ralph E. Haines, Jr., Acting Chief of Staff, U.S. Army, for Secretary of the Army, subject: Establishment of the Correctional Training Facility ¶ 2 (3 Jan. 1968), reprinted in Lawrence J. Fox, *A Chronological History of U.S. Army Correctional Programs at Ft. Riley Kansas: 1968–1992*, app. G, at 173 (June 1992) (unpublished manuscript on file at U.S. Army Ctr. of Military History, U.S. Cavalry Museum & 1st Infantry Div. Museum, Fort Riley, Kan.).

³⁸⁰ See, e.g., Mary C. Femmer, *A Second Chance: The Retraining Brigade*, ARMY MAG., Sept. 1980, at 25, 26 & Call-Out Box (“The Retraining of Sgt. McIntyre”) (describing an approach to Army rehabilitation that involved “daily [individualized] counseling sessions that lasted for hours [and] well into the night” and the involvement of social workers in several aspects of the rehabilitative program); Fox, *supra* note 379, at 39–40 (describing

concept of intense military training similar to basic infantry training and the physical fitness programs implemented at the rehabilitation centers in the 1940s.³⁸¹ Within the framework established at the USARB, like all restoration programs, staff used alternative methods to address offenders with PTSD, who were often medically discharged based on their mental illness.³⁸²

The end of the draft in 1973 and the concept of a “quality force” pushed servicewide restoration programs into sharp decline and eventual dormancy by the late ’70s.³⁸³ However, the Army’s Judge Advocate General and other officials still encouraged local commanders to continue their use of suspended punitive discharges.³⁸⁴ Despite the fact

the innovative involvement of social workers in the U.S. Army Retraining Brigade (USARB) retraining operations).

³⁸¹ Arranged in battalions and companies, under the supervision of Drill Instructors, program participants completed nine weeks of training, which included classroom instruction and field exercises with a focus on basic infantry soldier skills. Fox, *supra* note 379, at 3, 5 (describing organizational and training structures).

³⁸² Doctor James Smith, who served as a Social Work Officer in the USARB from 1978 to 1983, explains that the program did, in fact, take on offenders who had suffered from PTSD, and, in many cases, helped them earn a medical discharge rather than an approved punitive discharge. Telephone Interview with James Smith, Assoc. Professor, Washburn Univ. Sch. of Social Work (Oct. 8, 2010). Doctor Smith shared that the PTSD encountered at the USARB was not only related to combat in Vietnam, but also included trauma from sexual assault and other causes. *Id.* In line with Dr. Smith’s observation, some of the company commanders within the USARB structure innovated treatment plans that were little different from one that a contemporary treatment court might develop today. For example, the “correctional planning conference” included “the Unit commander, the Unit Social Worker, the Battalion Chaplain, and, in some instances . . . an NCO from the trainee’s leadership team.” Fox, *supra* note 379, at 26. During these meetings, “[t]he team leader offered his evaluation of the trainee and the participants responded with criticisms and suggestions, perhaps modifying the treatment plan.” *Id.* Even after routine meetings, there existed the option to schedule subsequent conferences based on the trainee’s progress. *Id.*

³⁸³ See, e.g., Cuthbert, *supra* note 366, at 13 (observing how restoration programs came to “retain only historical significance” by 1977); Fox, *supra* note 379, at 124 (tracing how it came to be that the “retraining mission [has] remained . . . in name only”).

³⁸⁴ In May of 1975, Major General George S. Prugh, the Army Judge Advocate General, dispatched a memorandum to all SJAs, promoting the suspended sentence as a valuable tool available to convening authorities. Captain David A. Shaw, *Clemency: A Useful Rehabilitation Tool*, ARMY LAW., Aug. 1975, at 32, 32 (citing extensively from Memorandum DAJA-CL 1974/12056 (2 Jan. 1975)). Notably,

all staff judge advocates were urged to look for instances where clemency action would be appropriate in courts-martial cases. It was requested that staff judge advocates stress the value of suspended sentences to commanders at all levels. The memorandum stated the

that the Air Force is the only service with a functioning program,³⁸⁵ now called the “Return-to-Duty Program”—which has, at times, been populated by only one trainee—all of the restoration programs were extremely successful, with their disuse resulting from policy preferences, rather than legal mandates.³⁸⁶

In fact, based on existing statutory mandates to operate military restoration programs,³⁸⁷ scholars suggest that such programs have been “mothballed,” rather than terminated, so that they can be resurrected in times of national emergency when a significant number of servicemembers is again mobilized to defend the Nation.³⁸⁸ Without question, however, in addition to the 42,373 soldiers rehabilitated by the SCRCs and Disciplinary Training Centers, the USARB restored an additional 37,801 soldiers by 1992,³⁸⁹ and the Air Force an additional 8252 Airmen by 1985.³⁹⁰ The military courts’ experiences addressing these programs have clarified a number of enduring legal lessons that will be vital to any program that contemplates discharge remission based on successful treatment of mental illnesses.

suspension and/or remission of an individual’s discharge might provide an incentive for the individual, set an example for others in similar circumstances, encourage good behavior, and improve morale.

Id. The Air Force also stressed the importance of suspensions at the installation level. MILLER, *supra* note 245, at 147 (describing the Air Force’s encouragement “for wider application of suspended sentences in lieu of short term confinement” in the same time period).

³⁸⁵ Telephone Interview with Lieutenant Colonel (Ret.) Peter J. Grande, Chief of Staff, Military Correctional Complex, Fort Leavenworth, Kan. (Dec. 30, 2010) [hereinafter Grande Interview] (notes on file with author).

³⁸⁶ Morris, *supra* note 245, at 84 (“The regulations governing restoration to duty have become somewhat more restrictive over the years, though statistics will show it is their *interpretation*, as opposed to their *text*, that has tightened most markedly.”) (emphasis added).

³⁸⁷ See, e.g., *id.* (describing the continued validity of statutory requirements); 10 U.S.C. § 953 (2006) (requiring the establishment of restoration programs throughout the services); U.S. GEN. ACCOUNTING OFFICE, COMPTROLLER GEN., REPORT TO THE CONGRESS: UNIFORM TREATMENT OF PRISONERS UNDER THE MILITARY CORRECTIONAL FACILITIES ACT CURRENTLY NOT BEING ACHIEVED 40–41 (May 30, 1975) (strictly interpreting the statutory requirement).

³⁸⁸ MILLER, *supra* note 245, at 107–08 (“[S]hould the Air Force interest in rehabilitation increase at any time, the nucleus of a strong rehabilitation program still existed.”). Cuthbert, *supra* note 366, at 16 (observing that the Army’s secretarial restoration program exists on paper “probably as a safety valve . . .”).

³⁸⁹ Fox, *supra* note 379, at 163.

³⁹⁰ MILLER, *supra* note 245, app. X, at 251.

C. Legal Lessons Learned from Military Restoration Programs

As discharge remission programs evolved over the years, military courts recognized their success³⁹¹ and resolved a number of important issues that could one day be important if such programs emerge from the mothballs. The sections below briefly review the most enduring legal precedents.

1. Cases Regarding the Nature and Objectives of Restoration Programs

Since the *Wise* opinion in 1955, military courts have recognized the convening authority's responsibility to review each case, on its individual merits, for the possibility of suspending a punitive discharge:

A casting aside of the sentence review by a sweeping proclamation that all accused who receive a punitive discharge are to be discharged from the service, regardless of any showing made on their behalf, is not in keeping with [the] rationale [of clemency]. That view smacks too much of the principle that all military offenders must inflexibly and arbitrarily be tarred with the same brush of dishonorable service.³⁹²

Instead, suspension of a punitive discharge that accords the possibility of remission is the sole vehicle through which to accomplish rehabilitation as conceptualized by the *UCMJ*.³⁹³ Hence, the *opportunity* to participate

³⁹¹ See, e.g., *United States v. Andreason*, 48 C.M.R. 399, 401 (C.M.A. 1974) (observing that the 3320th's "degree of success is . . . extraordinary in comparison to correctional programs in the civilian community" and relying on this fact in its ruling).

³⁹² *United States v. Wise*, 20 C.M.R. 188, 192 (C.M.A. 1955).

³⁹³ *Id.*

[I]t seems axiomatic to state that if a convening authority can group all cases in one category and by a policy fiat decide in advance not to suspend any punitive discharge, the painstaking efforts of Congress and the framers of the Manual to prescribe an enlightened way of dealing with restoration to duty and rehabilitation of military offenders would go for naught.

in a program that could result in remission of the discharge has a distinct clemency value, separate from one's ultimate graduation from the program or return to duty³⁹⁴—even if the individual ultimately fails to complete the program.³⁹⁵ The Army Court of Military Review recognized this special value in its 1981 *Krenn* decision:

We assume that the convening authority knew that prisoners assigned to the Retraining Brigade have more of an opportunity to ameliorate the confinement and forfeiture portions of their sentence than prisoners confined in the Disciplinary Barracks and that he took that matter into account when he designated the Retraining Brigade as the place the appellant was to be confined. To that extent the erroneous failure to transfer the appellant to the Retraining Brigade resulted in a more severe sentence than deemed appropriate by the convening authority.³⁹⁶

While appellate courts have acknowledged a presumption of regularity in the review of convening authority clemency determinations, they have nevertheless mandated that convening authorities must individually weigh the merits of suspending a punitive discharge in each case.³⁹⁷

See also United States v. Schmit, 13 M.J. 934, 939 (A.F.C.M.R. 1982) (“[T]he possibility of . . . rehabilitation is the *sole* justification for suspension of a punitive discharge.”) (emphasis added).

³⁹⁴ *See, e.g., Schmit*, 13 M.J. at 940 (observing that the convening authority’s allowance for an accused to participate in a rehabilitation program constitutes an exercise of clemency and “sentence amelioration,” even if the convening authority does not do anything beyond permitting the accused to participate in the program); United States v. Thompson, 25 M.J. 662, 665 (A.F.C.M.R. 1987) (recognizing the vital question in cases involving participation in the 3320th as “whether [the accused] would be offered the *opportunity* for rehabilitation,” rather than where he would be assigned or whether he would matriculate) (emphasis in original).

³⁹⁵ *Thompson*, 25 M.J. at 655 (“Being sent to the 3320th CRS does not, of course guarantee a member will successfully complete the retraining program and be retained in the service.”).

³⁹⁶ United States v. Krenn, 12 M.J. 594, 597 (A.C.M.R.), *petition denied*, 12 M.J. 64 (C.M.A. 1981) (addressing a case in which the convening authority suspended the sentence in order to permit the accused’s participation in the USARB). *See also* United States v. DeHart, 18 M.J. 693, 694 (A.F.C.M.R. 1984) (finding error in the Government’s failure to transfer the accused to the 3320th based on his loss of the second chance to prove his value to the Air Force).

³⁹⁷ *Wise*, 20 C.M.R. at 193 (finding “the refu[sal] to listen” as grounds to review such cases on appeal, despite the dual presumptions that the convening authority considered favorable matters and “conscientiously reached the conclusion that the particular accused

Convening authorities cannot, therefore, preemptively remove the suspended punitive discharge from their clemency practices or philosophies.³⁹⁸

With as much zeal as they have confirmed the necessity for convening authorities to evaluate the suitability of an accused for a suspended discharge, the appellate courts have upheld convening authorities' refusal to grant the opportunity after *meaningful* consideration. Courts have found no freestanding right to participate in a rehabilitative program, even if the accused so requests,³⁹⁹ even if he otherwise meets the enrollment criteria for a specific program,⁴⁰⁰ and even if an experienced military judge "strongly recommend[s]" a suspended discharge to permit participation in a rehabilitative program.⁴⁰¹ However, when the military judge or the panel has, on the record, issued a contemporaneous recommendation for suspension of an adjudged discharge or participation in a restoration program, courts have stringently applied the requirement for SJAs to alert the convening authority.⁴⁰²

was not entitled to that form of relief"); *United States v. Johnson*, 45 C.M.R. 44, 45 (C.M.A. 1972) (discussing the presumption of regularity).

³⁹⁸ See, e.g., *United States v. Davis*, 58 M.J. 100, 104 (C.A.A.F. 2003) (commenting on *Wise's* vitality and relevance in current times).

³⁹⁹ In fact, an SJA is not even required to single out the accused's request during the review of clemency matters. See, e.g., *United States v. Taylor*, 67 M.J. 578, 580 (A.F. Ct. Crim. App. 2008) ("[N]either statutory law nor case law obliged [the SJA] to specifically advise the convening authority of the appellant's RTDP request."); *United States v. Black*, 16 M.J. 507, 514 (A.F.C.M.R. 1983) (Snyder, J., concurring and dissenting) ("Informing the convening authority that one is a volunteer for the CRS is not on the same level as appraising him of a petition for clemency . . . [and] realistically, not a threshold action.").

⁴⁰⁰ See, e.g., *United States v. Turbeville*, 32 C.M.R. 745, 749 (C.G.B.R. 1962) (rejecting the claim that the accused "lost the chance to undergo rehabilitation training [and] did not have proper opportunity to demonstrate restorability" as a result of the location where he was ultimately confined).

⁴⁰¹ *Johnson*, 45 C.M.R. at 45; *United States v. Gardner*, 1991 WL 229961, at *1 (A.F.C.M.R., Oct. 31, 1991) (unpublished); *United States v. Hommel*, 45 C.M.R. 51, 52 (C.M.A. 1972) (upholding refusal to place the accused in a rehabilitation program even though the military judge and the trial counsel recommended suspension of the punitive discharge based on his "excellent history of conduct, proficiency" and "other traits").

⁴⁰² The requirement to inform the convening authority of the recommendation for a suspended sentence under this circumstance derives from RCM 1106(d)(3)(B), which mandates that all announcements of clemency "made in conjunction with the announced sentence" must be summarized in the staff judge advocate's recommendation (SJAR). Courts have stringently applied this rule. For example, in *United States v. Boyken*, 2004 WL 944030 (A.F. Ct. Crim. App., Apr. 2, 2004) (unpublished), *review denied*, 2005 CAAF LEXIS 218 (C.A.A.F., Feb. 23, 2005), the court found error in the SJA's failure to bring matters to the convening authority's attention when,

It is sometimes the case that the aims of courts-martial or convening authorities clash with servicewide restoration program eligibility criteria. On these occasions, the courts weigh in favor of the secretarial standards, invalidating inconsistent provisions. In *United States v. Cadenhead*, the Air Force Board of Review nullified that portion of the convening authority's clemency which curtailed the length of participation in the 3320th prescribed by the Secretary of the Air Force.⁴⁰³ Recognizing how "[t]he Secretary's view is that suspension of a punitive discharge with provision for automatic remission removes much of the incentive of the prisoners to work toward restoration,"⁴⁰⁴ the Board thus eliminated the "self-contradictory" clemency terms (six months' participation time limit) that had originally been recommended in the panel's contingent sentence.⁴⁰⁵ Other cases similarly nullified inconsistent provisions of judicial clemency recommendations,⁴⁰⁶ with all suggesting that military justice practitioners should independently evaluate the recommended terms of suspended sentences before incorporating them into the convening authority's action. Importantly, a convening authority's comparison of a recommended contingent sentence with servicewide restoration programs is necessary only to the extent that the court-martial invokes a specific preexisting servicewide restoration program; regulations governing programs at the secretarial level do not, and should

[a]fter announcing the sentence, the military judge stated that if the appellant elected to volunteer for the Air Force Return to Duty Program, she would "recommend that the convening authority seriously consider that [she] be given that opportunity." She added, however, that if the appellant did not volunteer for the program, her "sentence would not change one bit." She said that, "This recommendation should not be misconstrued as a recommendation for any other type of clemency, and it does not impeach the bad conduct discharge I have adjudged, nor any other element of this sentence."

Id. at *1.

⁴⁰³ 33 C.M.R. 742 (A.F.B.R.), *aff'd*, 34 C.M.R. 51 (C.M.A. 1963).

⁴⁰⁴ *Id.* at 745.

⁴⁰⁵ *Id.* ("We think the real concern of the court members in submitting their recommendation was that [the] accused be given an opportunity to earn restoration to duty.").

⁴⁰⁶ *See, e.g.*, *United States v. Merriweather*, 44 C.M.R. 544, 544-46 (A.F.C.M.R. 1971) (finding serious problems with the military judge's clemency recommendation concerning the actions that the commander of the 3320th was expected to take, especially regarding restoration of the accused's reduced rank).

not, control participation in treatment programs that operate locally through civilian or military channels.⁴⁰⁷

Additional court decisions counsel toward use of post-conviction agreements in all cases that involve treatment plans, so as not to create clemency conditions that deny an accused the opportunity to participate in a rehabilitative program for which he would have otherwise been eligible. So suggested *United States v. Rogan* by finding impermissible the convening authority's denial of participation in the 3320th on the basis that he refused to accept responsibility for the charged offenses; at the time, the Air Force did not require acceptance of responsibility for enrollment.⁴⁰⁸ However, it would be a far different case if the accused—having knowledge of program requirements—agreed to participate in a treatment program that required acknowledgement of guilt, as most veterans and other treatment court programs require.⁴⁰⁹ *Rogan*, as

⁴⁰⁷ The military courts have emphasized the need for creativity and flexibility in developing specialized programs to meet the individual needs of servicemembers and supported such terms. *See, e.g.*, Major Mary M. Foreman, *Let's Make a Deal!: The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53, 116 (2001) (reviewing various cases and concluding that “the CAAF has paved the way for much broader discretion on the part of convening authorities for entering into pretrial agreements with innovative terms”). Individualized treatment plans offer far greater opportunities to meet the accused's particular needs compared with programs operated by the Service secretaries because they eliminate the inevitable clash of competing objectives that occurs by virtue of different interest groups in the corrections field. *See generally* Henshel, *supra* note 137, at 28.

⁴⁰⁸ 19 M.J. 646 (A.F.C.M.R. 1984). In *Rogan*, the accused was convicted of rape, sodomy, and other offenses, all contrary to his pleas. Even after his conviction, he did not desire to accept responsibility for his offenses, leading the SJA to recommend against his participation in the 3320th, in part because “[u]ntil he admits his wrongs, there is no possibility of any successful rehabilitation taking place.” *Id.* at 650. The court recognized that such a requirement exceeded the eligibility criteria for participation in the 3320th under then-existing Air Force regulations, and ruled that “a servicemember's refusal to admit guilt, before or after trial, should not exclude him from the opportunity for rehabilitation.” *Id.* Because the clemency recommendation relates to a restoration program operated by the Service secretary, *Rogan* falls in line with *United States v. Tate*, which more recently held that “[t]he terms and conditions [of a pretrial agreement] that would deprive Appellant of parole and clemency consideration under generally applicable procedures are unenforceable,” largely because they “usurp” the discretion of a Service secretary and the President in promulgating such rules. 64 M.J. 269, 272 (C.A.A.F. 2007) (citing cases).

⁴⁰⁹ Interview with Major (Ret.) Brian Clubb, Veterans Treatment Court Project Dir. for the Nat'l Ass'n of Drug Court Prof'ls, in Santa Clara, Cal. (Aug. 6, 2010) [hereinafter Clubb Interview] (notes on file with author) (describing how the majority of VTCs are post-plea programs that require admission of guilt). *See also* Holbrook & Anderson, *supra* note 9, at 27 (concluding that a majority (57%) of a sample of 14 VTCs “enrolled

informed by rehabilitation programs since the early 1900s, provides additional insight by underscoring the value of clemency terms specially tailored to meet specific, quantifiable goals, rather than ones that depend on merely the passage of time without incident. Suspensions should create a genuine opportunity for participants to benefit from the program by specifying the maximum program length (usually up to 24 months) or the attainment of specific goals within estimated timeframes.⁴¹⁰

Voluntary participation in all aspects of the rehabilitative program is another factor raised by the cases. In *Black*, the Air Force court explained that the convening authority was not permitted to compel the accused's participation in a rehabilitative program: "[I]f a prisoner is not a volunteer, the convening authority is precluded from entering him into the program."⁴¹¹ Judge Snyder's concurrence emphasized how this limitation acted as a "restraint on convening authorities," "specifically, to deter [them] from wasting limited space by attempting to rehabilitate those who have no desire to be rehabilitated."⁴¹² Related cases have highlighted the special problems that arise when an accused does not desire to participate in a restoration program—even when recommended by a military judge,⁴¹³ when the accused changes his mind regarding intentions to participate prior to the convening authority's action,⁴¹⁴ or

veterans solely at the post-plea stage of criminal proceedings"). Military treatment programs often require more than mere acknowledgement of culpability. *See, e.g.*, *United States v. Cockrell*, 60 M.J. 501, 505 (C.G. Ct. Crim. App. 2004) (discussing the terms of a sex offender treatment program requiring submission to polygraph examinations and discussions of one's sexual history).

⁴¹⁰ *See infra* Part VI & app. G (discussing pretrial agreement terms for program duration based on existing requirements).

⁴¹¹ *United States v. Black*, 16 M.J. 507, 510 n.1 (A.F.C.M.R. 1983).

⁴¹² *Id.* at 514 (Snyder, J., concurring).

⁴¹³ In *United States v. Clear*, the judge remarked, on the record,

in view of the previous superb record, Sergeant Clear, the recommendations of supervisors and other NCOs, it's the recommendation of this court that the 3320th Corrections and Rehabilitation Squadron at Lowry Air Force Base, Colorado, be designated as the place of confinement and that Sergeant Clear be afforded an opportunity to earn conditional suspension of the discharge.

34 M.J. 129, 130 (C.M.A. 1992). Despite this, the accused expressed that he did not desire the clemency recommended by the judge and would rather be punitively discharged with a shorter term of confinement so that he could meet financial needs of his family more quickly. *Id.* at 131.

⁴¹⁴ *Black*, 16 M.J. at 511.

when an accused desires to un-volunteer himself from a restoration program after enrollment (based on its demanding requirements).⁴¹⁵ Together, such cases reveal how a comprehensive post-conviction agreement would cure many of these potential problems.⁴¹⁶

2. *The Accused's Right to Request Restoration Program Participation and to Present Evidence Concerning Rehabilitative Program Attributes*

The suspended sentence is cognized only in the form of clemency, which a court may recommend, but may not itself adjudge. Military courts have, therefore, recognized the inherent value of both the opportunity to participate in discharge remission programs⁴¹⁷ and a court-martial's recommendation of a suspended sentence to effectuate them.⁴¹⁸

⁴¹⁵ See *United States v. Smith*, 1995 WL 229143, at *3 (A.F. Ct. Crim. App., Apr. 5, 1995) (unpublished), *review denied*, 43 M.J. 474 (C.A.A.F. 1996) (addressing a situation in which, despite a pretrial agreement "requirement for designation of the 3320th Correctional and Rehabilitation Squadron as the place at which any confinement will be served," the accused changed his mind while in the program and sought to modify the terms to allow him to leave).

⁴¹⁶ For a recommended format, see *infra* app. G.

⁴¹⁷ See, e.g., *United States v. Roberts*, 46 C.M.R. 953, 955 (A.F.C.M.R. 1972) (internal citations omitted):

Assignment to the retraining group "offers Air Force prisoners the opportunity to receive specialized treatment and training to return them to duty improved in attitude, conduct and efficiency and with the ability to perform productively in the Air Force." To deny such assignment deprives the accused of the opportunity "to obtain an additional chance to prove his worth to his service and his country."

⁴¹⁸ *United States v. Weatherspoon*, 44 M.J. 211, 213 (C.A.A.F. 1996), recognized that a clemency recommendation for suspension of a sentence "is a practice which must be encouraged in light of the court-martial's legal inability itself, to suspend any or all of a sentence." The *Weatherspoon* court further explained, "for over 4 decades, the President has provided for, and this Court has recognized the power of a court-martial to recommend clemency to the convening authority *contemporaneously with announcement of the sentence.*" *Id.* (italics added). Refusing to limit "when and where" clemency recommendations are made, the Army Court of Criminal Appeals later found plain error in the judge's prohibition on announcing clemency at sentencing, further identifying "various reasons" for contemporaneous announcement of the recommendation with the sentence. *United States v. Hurtado*, 2008 WL 8086426, at *2 (A. Ct. Crim. App., June 30, 2008) (unpublished). *Hurtado* highlighted the fact that "[t]he accused's best hope for sentencing relief is most likely to result from recommendations made by the panel

Even if the convening authority is not inclined to grant the request for participation in a restoration program, knowledge of the court-martial's clemency request can lead the convening authority to mitigate the sentence in some other way besides the one requested.⁴¹⁹ Civilian jurisdictions that permit juries to recommend sentences of probation like the military does have recognized this same "gravitational influence"⁴²⁰ principle: "The right to be considered for probation is valuable, *even if probation is not given*," remarked the Texas Court of Criminal Appeals, "because the jury instruction concerning probation forcefully directs the jury's attention to the lowest punishment allowed by law."⁴²¹ This very phenomenon occurred in the case of *United States v. Parsons*, where the convening authority confined the accused at a facility where the accused could potentially participate in the 3320th, even without a suspended sentence, "in partial recognition of the military judge's recommendation."⁴²² Because of the undeniable value of clemency recommendations in court-martial practice, the accused can use the presentencing stages of court-martial proceedings to request a suspended punitive discharge that would enable participation in a rehabilitation program.

members determined by the convening authority, himself as 'best qualified' to sit on this court martial and decide the appropriate sentence." *Id.* at *3.

⁴¹⁹ See, e.g., *United States v. Clear*, 34 M.J. 129, 132 (C.M.A. 1992) (evaluating a recommendation for enrollment into the 3320th: "The decision of an 'experienced' military judge to recommend clemency of one kind is a circumstance that may also predispose a convening authority towards granting clemency of some other type."); *United States v. Olson*, 41 C.M.R. 652, 653 (A.C.M.R. 1969) (recognizing that, with knowledge of a judicial clemency recommendation to reconsider the sentence if the accused demonstrates rehabilitative potential by the time of appellate review, the convening authority "might . . . have approved a lesser period of confinement or, alternatively, expressly provided in his action for the remission of the unexecuted sentence of confinement for upon the completion of appellate review").

⁴²⁰ *Ex parte Cash*, 178 S.W.2d 816, 822 (Tex. Crim. App. 2005) (Holcomb, J., dissenting) (characterizing the phenomenon).

⁴²¹ *Snow v. State*, 697 S.W.2d 633, 665 (Tex. Crim. App. 1985) (emphasis added).

⁴²² 1990 WL 8404, at *1 (A.F.C.M.R., Jan. 13, 1990) (unpublished) (further explaining his decision to pencil-in Lowry Air Force Base over Fort Lewis for confinement because "he understood that various authorities could then direct rehabilitation at a further time, should they believe it appropriate").

In the backdrop of an Air Force program that was still producing annual restoration rates in the triple digits,⁴²³ *United States v. McBride*⁴²⁴ articulated a rule for the propriety of a contingent sentence based on treatment, rather than fines or more familiar conditions. Airman (Amn) McBride asked his panel not to adjudge a BCD but “instead to confine [him] for ‘two or three months or so and let him go to the rehabilitation center at Lowry . . . where experts and people who are familiar with [the accused’s kind of problems] know what the situation is, have been through it, and who would work with him.’”⁴²⁵ The panel, after considering the unique factors in the case, attempted to adopt the suggestion by adjudging a BCD, but simultaneously providing for remission of the discharge contingent upon his future improvement in the program. On the Sentence Worksheet, the panel president wrote:

To be discharged from the service with a bad conduct discharge; to be confined at hard labor for 6 months; to be reduced to the grade of airman basic. The court recommends that confinement be at the 3320th and that the B.C.D. be reduced to an administrative discharge dependent upon performance in the 3320 R.G.⁴²⁶

The military judge, noticing the apparent “inconsisten[cy]” between a BCD and an administrative discharge, which the panel could not lawfully adjudge,⁴²⁷ did not permit the sentence to be announced as written.⁴²⁸ The president thus attempted to explain the panel’s rationale:

We felt that the situation as it exists now warrants the sentence as we wrote it, however we do feel that there is some incentive provided in our recommendation for improved performance on the individual’s behalf, and

⁴²³ MILLER, *supra* note 245, app. II.

⁴²⁴ 50 C.M.R. 126 (A.F.C.M.R. 1975).

⁴²⁵ *Id.* at 130–31.

⁴²⁶ *Id.* at 131.

⁴²⁷ For example, in the case of *United States v. Sears*, 2004 WL 637951 (A.F. Ct. Crim. App., Mar. 24, 2004) (unpublished), the court remarked on the concerns raised when a panel attempts to adjudge an administrative separation and a punitive discharge, without conditioning the recommendation on a specific future event: “[T]he case raises the real possibility that the members adjudged a sentence that they believed excessive based upon the hope that the convening authority would substitute an administrative discharge for the bad-conduct discharge.” *Id.* at *3. This approach to hedge one’s bets can easily backfire if the accused’s goal is “to avoid the bad-conduct discharge.” *Id.*

⁴²⁸ *McBride*, 50 C.M.R. at 126.

that our recommendation for a lighter discharge follows his performance. In other words, if his performance does not warrant a less severe discharge, then that should be the case; however, if his performance at Lowry does show that he intends to improve and he does in fact improve, in their judgment, then he is not worthy of that degree of discharge.⁴²⁹

The Air Force Court of Military Review held that, under these facts, the judge erred in disallowing the sentence and recommendation as it had been written. The defense's request for a clemency recommendation was permissible—as was the panel's adoption of it.⁴³⁰

To the appellate court, it was vital that the panel understood the limitations of its powers. To this end, the members clearly evidenced their knowledge that they *did not* have the power to adjudge a suspended sentence or its intended result—an administrative discharge. The recommendation was therefore consistent with the panel's power and did not impeach their sentence.⁴³¹ *McBride's* enduring relevance today is its general rule permitting contemporaneous clemency recommendations for participation in specific rehabilitative programs so long as (1) the panel “underst[ands] the relationship of the recommendation to the sentence adjudged . . . ,”⁴³² and (2) the recommendation is in some way based on observation and “evaluation” of the “accused's conduct between trial and discharge.”⁴³³ *McBride's* continued validity is evident in cases upholding various types of “contingent sentences” on the grounds that remission is

⁴²⁹ *Id.* at 131.

⁴³⁰ *Id.* at 132–33. *See also* United States v. McLaurin, 9 M.J. 855, 859 (A.F.C.M.R.), *petition denied*, 10 M.J. 113 (C.M.A. 1980) (“When a contemporaneous recommendation is for a form of clemency not within the power of the sentencing authority to implement . . . the recommendation will not impeach the adjudged sentence.”).

⁴³¹ *See, e.g.*, United States v. Grumbley, 1985 CMR LEXIS 3257, at *3–4 (A.F.C.M.R., Sept. 13, 1985) (unpublished):

A Court, after having imposed a sentence it believes to be appropriate, may seek to temper justice with mercy, by recommending a form of clemency it has no authority to grant itself. In the context of our military justice system, it appears clear that we should not, in any way, discourage such clemency considerations.

⁴³² *Id.* at 143 (internal citation omitted).

⁴³³ *Id.* at 132–33. *See also* United States v. McLaurin, 9 M.J. 855, 858 n.5 (A.F.C.M.R. 1980) (“[A] contemporaneous recommendation [for clemency] would be permissible if contingent upon evaluation of the accused's post-trial conduct.”).

conditioned on a future event.⁴³⁴

That an accused may request a clemency recommendation does not automatically render admissible all evidence regarding such programs. However, since the inception of the service rehabilitation programs, the military courts' evaluation of evidence pertaining to these programs has reflected a tension between two opposing theories of admissibility. At one pole are concerns of speculation: All secretarial restoration programs have, by their nature, required an accused to participate in a course of training that subjects him to constant observation and rating; the failure to demonstrate sufficient proficiency in military tasks and personal attitude is a basis for dismissal from all programs. These prominent features would ordinarily place an accused's ultimate restoration in the area of conjecture because it is contingent on many unknown factors. Courts have accordingly found certain information about restoration programs to be collateral to the court-martial's decision-making task. Adopting key language from *United States v. Quesinberry*, the cases usually exclude evidence on the basis that "an unending catalogue of administrative information" would only "mudd[y]" the "waters of the military sentencing process."⁴³⁵

At the other pole, because rehabilitation is undoubtedly one of five permissible rationales for punishment in the military,⁴³⁶ military judges

⁴³⁴ *McLaurin*, 9 M.J. at 859 nn.6-7 (identifying permissible contingencies of "good post-trial conduct," "cooperation with law enforcement," and "restitution"). See also Captain Daniel R. Remily, *Instructions: Failure to Disclose to the Court Members Their Right to Recommend Clemency*, 27 JAG. J. 523, 530-31 (1973) (noting additional historical examples from the *Military Judge's Guide*, including "health," and "attitude of or by an accused after trial").

⁴³⁵ 31 C.M.R. 195, 198 (C.M.A. 1962). *Quesinberry* did, in fact, deal with an endless chain of information. The panel in that case repeatedly asked for information regarding the effects of a BCD. Even after the trial counsel provided a copy of a chart documenting eligibility for various benefits, the president requested a more recent one since his version was three years-old. The court's instruction to the members on the general consequences of a punitive discharge were upheld on the foregoing grounds.

⁴³⁶ DA PAM. 27-9, *supra* note 43, instr. 2-6-9, at 92; MCM, *supra* note 34, R.C.M. 1001(b)(5) (defining evidence on rehabilitative potential as "the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society"); see also *id.* R.C.M. 1001(c) (concerning rehabilitative evidence in mitigation, specifically). See generally Major Charles E. Wiedie, Jr., *Rehab Potential 101: A Primer on the Use of Rehabilitative Potential Evidence in Sentencing*, 62 A.F. L. REV. 43 (2008) (discussing general evidentiary requirements); Major Jan Aldykiewicz, *Recent Developments in Sentencing: A Sentencing Potpourri from Pretrial Agreement Terms Affecting Sentencing to Sentence Rehearings*, ARMY LAW., July 2004, at 110, 112-113 (describing different views

cannot exclude *all* evidence concerning restoration programs. In the 1991 case of *United States v. Rosato*, the military's highest court admonished others that there was no "per se rule of inadmissibil[ity]" regarding sentencing "evidence of service-rehabilitation programs"; such evidence, instead, required consideration on a case-by-case basis.⁴³⁷ An increasing number of opinions regarding rehabilitative potential evidence has since removed many issues from *Quesinberry's* exclusionary domain.⁴³⁸ Although Rule 1001(b)(5) does not limit the defense the way it limits the Government,⁴³⁹ it is a good point of reference for the defense because military law accords the defense even greater latitude to introduce mitigation evidence related to rehabilitative potential.⁴⁴⁰ Rule 1001(b)(5) now provides a wide berth for experts to offer opinion evidence on future dangerousness, which contemplates many of the same evidentiary issues as treatment programs, including features that would make the accused more amendable to reformed behavior.⁴⁴¹ Because defense evidence on rehabilitation is even broader, *Quesinberry's* prohibition now mainly applies to the narrow issue of optimal program completion times,

regarding the extent to which Rule 1001(b)(5)—known by some to be a "Government" Rule only—still relates to the presentation of defense evidence on rehabilitative potential).

⁴³⁷ *United States v. Rosato*, 32 M.J. 93, 95 (C.M.A. 1991).

⁴³⁸ See generally *United States v. Ellis*, 68 M.J. 341, 345 (C.A.A.F. 2010) (tracing the development of cases regarding admissibility of expert testimony on rehabilitative potential). See also *United States v. George*, 52 M.J. 259, 263 (C.A.A.F. 2000) (Crawford, C.J., concurring in the result) (describing how the 1994 amendments to RCM 1001(b)(5) "greatly modified" its provisions on rehabilitative potential opinions).

⁴³⁹ *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) ("R.C.M. 1001(b)(5)(D) does not apply to defense evidence offered in mitigation under R.C.M. 1001(c).").

⁴⁴⁰ *United States v. Hill*, 62 M.J. 271, 272 (C.A.A.F. 2006) (observing the defense's "broad latitude" to present its own evidence on rehabilitative potential under Rule 1001(c), which pertains to mitigation). See also O'Brien, *supra* note 47, at 5, 5 & n.1 (explaining how, for these reasons, "[t]he sentencing rules in courts-martial dramatically favor the defense" and contrasting the "restrictive nature" of the prosecution rule with the "broad nature" of the defense rule).

⁴⁴¹ *Ellis*, 68 M.J. at 345 (explaining that "there can be no hard and fast rules as to what constitutes 'sufficient information and knowledge about the accused' necessary for an expert's opinion as to the accused's rehabilitation" and, ultimately, permitting testimony from an expert who did not interview the accused, did not read his medical files or mental health reports, and essentially based his opinion on the nature and number of charges). Since other cases have also permitted testimony regarding estimates of likelihood for success in drug treatment programs based on a review of the accused's "efforts at rehabilitation," "determination to be rehabilitated," and "other information relevant to becoming drug-free," the defense's more liberal standards would surely permit evidence regarding the nature of service restoration programs or VTCs without violating the dated rationales that once precluded such evidence under *Quesinberry*. *United States v. Gunter*, 29 M.J. 140, 142-43 (C.M.A. 1989).

rendering some of this evidence irrelevant on the basis that it is collateral.⁴⁴²

Although an accused has no right to participate in a specific discharge remission program independent of a grant of clemency, military appellate opinions clarify that an accused has the right to present certain evidence about rehabilitation programs including matters of eligibility, his desire to participate, and his understanding of the program's requirements. The legal opinions touching on these issues are vital because they distinguish between relevant and collateral aspects of any program that contemplates discharge remission contingent on program participation or successful completion of treatment. To this end, *Rosato* is ideal.

In 1991, a year when participation in the Air Force Return-to-Duty program had plummeted, a drug offender desired to use his unsworn statement as a means to inform the panel of his desire to participate in the 3320th.⁴⁴³ Under *Quesinberry*, the trial judge excluded a letter by the Air Force Judge Advocate General which promoted the program, as well as a newspaper article describing it, as collateral to the sentencing considerations.⁴⁴⁴ After hearing the accused's proposed unsworn statement, the judge, on the same theory, excluded "whatever he has to say about what other people told him about the 3320th" and any information beyond the accused's "desire to go into the 3320th."⁴⁴⁵ In pertinent part, the accused would have stated,

⁴⁴² See, e.g., *United States v. Murphy*, 26 M.J. 454, 457 (C.M.A. 1988) (upholding the exclusion of an "extract" explaining eligibility requirements for the 3320th when offered for the purpose of showing the accused's ineligibility to participate if he was sentenced to a certain confinement time range); *United States v. McNutt*, 62 M.J. 16, 20 (C.A.A.F. 2005) (finding error in the trial judge's consideration of "good-time" credit during sentencing).

⁴⁴³ *Rosato*, 32 M.J. 93. An unsworn statement is a method by which the accused may address members of the panel at sentencing without being subject to cross-examination by the Government. See generally MCM, *supra* note 34, R.C.M. 1001(c)(2)(C). The Government is, however, permitted to rebut statements of fact following the accused's statement. *Id.* Because defense counsel have long recognized the unsworn statement as a method to generate a sort of living presentencing report, ideally suited for clemency requests, it is reasonable to expect most of this evidence to be presented in the form of the unsworn statement. Captain Charles R. Marvin, Jr. & Captain Russel S. Jokinen, *The Pre-Sentence Report: Preparing for the Second Half of the Case*, ARMY LAW., Feb. 1989, at 53, 54.

⁴⁴⁴ To the court, this "evidence of the details of a particular service program was an irrelevant collateral consequence of a prison sentence." *Rosato*, 32 M.J. at 94.

⁴⁴⁵ *Id.* at 95.

I have been seeing a counselor at the rehabilitative squadron of the 3320th for once a week for about two months. . . . I have come to realize that drugs are 95 percent of my problem. He mentioned the rehabilitative program to me. . . . I would like to do this program. I have talked with prisoners who came from the rehabilitative program and were unable to complete it. Only about two or three people out of 12 people who were in the program last year completed it. The prisoners I talked to who have been in the program said it was very difficult and a good program. The prisoners who have not been in the program constantly say it is a waste of time and a waste of eight months of your life and then you'll just get discharged. I do not agree with them. I think the program will be tough, but I know I can do it and I will be better off for it. I ask you to consider my attitude about rehabilitation training in determining my rehabilitative potential as a factor in your sentencing me.⁴⁴⁶

The appellate court in *Rosato* found that the proposed statement was not so extensive or convoluted as to “muddy[] the sentencing waters,”⁴⁴⁷ and that any potential confusion could have easily been remedied with a standard instruction on the limited nature of an unsworn statement.⁴⁴⁸ Invoking the enduring concept of “soldier[ing] . . . back” from a conviction, the appellate court further recognized that the excluded portions of the accused’s unsworn statement were necessary to show the “depth of his commitment to a rehabilitative program” and his understanding of its exacting requirements.⁴⁴⁹ *Rosato*’s holding also reflects the longstanding rule that an accused has a “broad right during allocution” to “attempt to demonstrate . . . readiness for rehabilitation.”⁴⁵⁰

⁴⁴⁶ *Id.* at 94–95 (emphasis omitted).

⁴⁴⁷ *Id.* at 96.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *United States v. Green*, 64 M.J. 289, 293 (C.A.A.F. 2007) (relying on the same principle to conclude that an accused can offer evidence of his “religious practices and beliefs” as proof of readiness for rehabilitation).

3. *The Convening Authority's Requirement to Ignore Secretarial Norms*

A final line of cases places *Rosato* and *McBride* in their proper context, cementing the legal requirement for convening authorities to adopt precisely the *opposite* positions as the clemency policies that permeate the Service secretaries' restoration programs. Expanding on *Wise's* requirement for the convening authority to approach suspensions with an open mind, *United States v. Plummer* addressed the "appal[ling]" situation where a convening authority denied an accused consideration for a suspended dishonorable discharge simply because he was a convicted "barracks thief."⁴⁵¹ There, the SJA recommended denial of clemency based on the military's need for "trust" and loyalty to peers, while acknowledging that civilian courts "would probably suspend the entire sentence" for the same offense.⁴⁵² By adopting a policy little different from the Service secretaries' presumption against discharge remission for crimes of moral turpitude,⁴⁵³ the convening authority's lack of "conscious discretion" on review amounted to prejudicial error.⁴⁵⁴

United States v. Prince directly emphasized the difference between the Army's regulatory policies and the convening authority's responsibility during clemency review. While the court certainly acknowledged "the services' traditional policy against retention of those convicted of thievery and similar crimes," the court also distinguished it:

Undoubtedly, such personnel may frequently prove untrustworthy or, indeed, in most cases, be eminently suitable candidates for separation. At the same time, there is nothing so inherently wrong with these offenders that justifies branding them as unsuitable for restoration to duty as a matter of law. It was to a convicted thief that Jesus remarked, "Truly, I say unto you, today you will be with me in Paradise." . . . Surely, others may grant a lesser degree of mercy without justifying their clement attitude. In any event, as Congress has provided, it is the convening authority who must make the determination, unbound by any strictures as to his

⁴⁵¹ 23 C.M.R. 94, 95 (C.M.A. 1957).

⁴⁵² *Id.* at 95–96.

⁴⁵³ *Id.* at 96.

⁴⁵⁴ *Id.* at 97.

reaching the conclusion a particular offender is worthy of another opportunity to serve.⁴⁵⁵

*United States v. Johnson*⁴⁵⁶ revived the *Wise* rule in a case involving a military judge's "very strong[]" clemency recommendation for a suspended BCD and "with provision for automatic remission."⁴⁵⁷ In reviewing the convening authority's denial, *Johnson* emphasized how, despite the convening authority's unfettered discretion, any "firm policy against suspension" means that he "ha[s] not consciously reflected on all the evidence affecting the sentence and ha[s] thereby denied the accused his right to an individualized sentence."⁴⁵⁸

Through the years, courts have applied the same rationales as *Plummer*, *Prince*, and *Johnson* to clemency recommendations involving participation restoration programs. The decisions have invalidated denials of clemency when the evidence suggested that the court denied clemency solely based on the award of a short term of confinement.⁴⁵⁹ The cases have likewise targeted decisions in which the convening authority appeared unaware of the power to commute a punitive discharge to a longer term of confinement which, if granted, would make the accused eligible for participation in a restoration program.⁴⁶⁰

Ultimately, while the trial counsel may incite passion when he argues that the military "is not a rehabilitation center,"⁴⁶¹ convening authorities cannot adopt this position in their determinations regarding the opportunity to obtain mental health treatment under a conditional sentence. It is illegal in the military justice system to foreclose this form of clemency *at the convening authority level*, simply because the USDB has not done it in a decade's time or because military regulations

⁴⁵⁵ 36 C.M.R. 470, 473–74 (C.M.A. 1966) (biblical citation omitted).

⁴⁵⁶ 45 C.M.R. 44 (C.M.A. 1972).

⁴⁵⁷ *Id.* at 45.

⁴⁵⁸ *Id.* at 46.

⁴⁵⁹ *See, e.g.*, *United States v. Lynch*, 1990 WL 79318 (A.F.C.M.R., May 29, 1990) (unpublished), *review denied*, 33 M.J. 160 (C.M.A. 1991).

⁴⁶⁰ *See, e.g.*, *United States v. Bennett*, 39 C.M.R. 96, 99 (C.M.A. 1969) (finding prejudicial error in the SJA's failure to "call attention to [the] alternative" of a commuted punitive discharge that would enable the accused to participate in the 3320th); *United States v. Roberts*, 46 C.M.R. 953, 955, 956 (C.M.A. 1972) (finding error in the SJA's "failure to advise the supervisory authority of the only method by which the [accused's] transfer to the retraining group . . . could have been effected"—"by commutation").

⁴⁶¹ *United States v. Metz*, 36 C.M.R. 296, 297 n.1 (C.M.A. 1966) (relating the trial counsel's representative argument).

involving secretarial programs cite a presumption against restoration of certain types of offenders. In no uncertain terms, the military courts' jurisprudence prohibits general policies against punitive discharge remission by convening authorities.

IV. Court-Martial Practices as Windows to the Rehabilitative Ethic

A. Panel Member Sentencing Practices Reveal the Viability of the Contingent Sentence

Aside from the Service secretaries' discharge remission programs, the actual practices of military judges and panel members in contingent sentencing are more reliable indicators of the rehabilitative ethic in military justice. Although considered as a special or "unusual" occasion,⁴⁶² military judges have crafted detailed clemency recommendations in an effort to surpass the default limitations of court-martial sentencing. Judges not only suggest clemency alternatives involving restoration programs,⁴⁶³ but they also create their own restoration-to-duty programs with clemency recommendations that the accused's punitive discharge be suspended until after he has deployed to a combat zone with his unit.⁴⁶⁴ Panels also attempt to construct

⁴⁶² *United States v. Brown*, 1993 WL 180100, at *1 (A.F.C.M.R., May 7, 1993) (unpublished) (addressing judicial clemency recommendation for participation in the 3320th).

⁴⁶³ *See, e.g., United States v. Schrock*, 11 M.J. 797, 799–800 (A.F.C.M.R. 1980) (Miller, J., dissenting):

I therefore recommend to the convening authority to designate the 3320th Corrections and Rehabilitation Squadron at Lowry as the place of confinement in order to allow you the opportunity to rehabilitate yourself. In the event that the convening authority should not see to do that, or by some reason be prevented from doing so, I would further recommend that he give serious consideration to a conditional suspension of the imposition of the bad conduct discharge which I have adjudged as a portion of this sentence.

⁴⁶⁴ In *United States v. Guernsey*, 2008 WL 8087974, at *1 (A. Ct. Crim. App., Jan. 22, 2008) (unpublished), the military judge made the following recommendation after announcing the sentence: "The court recommends that the bad-conduct discharge be suspended for a period of one year so the accused can deploy to Iraq." *Guernsey* teaches an important lesson about judicial surrogates for restoration-to-duty programs. Even without an operational Army restoration program in place, military judges (and panels) still have the ability to create a similar system through a deployment contingency. Implicit in *Guernsey*, if the command withholds discharge and the accused performs well

contingent sentences, often without the benefit of instructions from the court or even knowledge of their right to recommend clemency.⁴⁶⁵ The rehabilitative ethic has, in essence, enabled them to rise above the artificial limitations imposed by the Sentence Worksheet and to construct more meaningful sentencing alternatives.⁴⁶⁶

United States v. King is a simple case that represents both the limitations of conventional sentencing practice and the promise of the rehabilitative ethic. There, the panel members announced the following sentence after consulting “a chart for reduced VA benefits associated with a bad conduct discharge”:

Your honor, it’s the feeling of this court in sentencing Airman King that we have two duties to perform; first to see that Airman King is punished for the offenses of which the court has found him guilty; secondly, but to see that this 22-year old does not carry the brand of his misconduct in the past for the rest of his life—for this reason the court would recommend that upon the

in combat, his service generates new data upon which to determine whether discharge is appropriate; in the literal sense, the servicemember receives a chance to “soldier-back,” in an environment where battlefield gains are real, rather than hypothetical.

⁴⁶⁵ See, e.g., *United States v. Samuels*, 27 C.M.R. 280, 285 (C.M.A. 1959) (sentencing the accused, among other things, “to be discharged from the naval service with a bad conduct discharge to be suspended for a period of three (3) years during good behavior. At that time, unless the sentence is vacated, the suspended portion should be remitted without further action.”). In *United States v. Wanhainen*, a Navy case in which the panel sentenced the accused to “a Bad Conduct [d]ischarge, suspended for six months,” the court contemplated their reasoning: “[T]he court-martial was faced with the task of sentencing an eighteen-year-old first offender with only nine months’ service and no prior record of misconduct. Undoubtedly, it may have thought, as did the convening authority, that ‘by suspending the Bad Conduct discharge, the Navy might restore a potentially good naval seaman.’” 36 C.M.R. 299, 300 (C.M.A. 1966).

⁴⁶⁶ See, e.g., *United States v. Thompson*, 2010 WL 2265444, at *6 (A.F. Ct. Crim. App., May 6, 2010) (unpublished) (revealing a situation in which “the members asked if a general discharge was allowed”); *United States v. Perkinson*, 16 M.J. 400, 401 (C.M.A. 1983) (“The president has handed me Appellate Exhibit V, the sentence worksheet, and next to number eight, which is to be discharged from the naval service with a bad conduct discharge, the words ‘bad conduct discharge’ have been struck out and the words ‘general discharge as unsuitable for military service’ have been inserted.”); *United States v. Briggs*, 69 M.J. 648, 649 (A.F. Ct. Crim. App.), *review denied*, 69 M.J. 117 (C.A.A.F. 2010) (“[T]he members asked the military judge if there was an option for recommending a discharge other than a bad-conduct discharge.”); *United States v. Keith*, 46 C.M.R. 59, 60 (C.M.A. 1972) (“The question that has been asked is: Is there any other type of discharge available in this case?”).

completion of his confinement sentence the bad conduct discharge be reduced to an administrative discharge in the hopes that when Airman King is released from the Navy he can start a second life.⁴⁶⁷

The court reluctantly affirmed this sentence because the members were aware of the limits of their recommendation, but cautioned that “military judges would do well to steer clear of th[e] judicial shoalwater” that results from discussions of administrative options.⁴⁶⁸ *King* thus signals a reason why judges have often been reluctant instruct on clemency.⁴⁶⁹ Beyond this limitation, however, the panel’s underlying rationale in *King* suggests that, when provided with useful evidence about sentencing alternatives and a proper framework for contingent sentencing, courts-martial are ideally positioned to incorporate a therapeutic perspective in military justice.

The next section will explore judges’ and panels’ rationales for these persistent and recurring contingent sentences for three primary reasons. First, the continuing trend emphasizes that members of the military who are discharging their duties in the criminal justice system have long supported the same diversionary principles underlying civilian treatment courts’ approach to veterans. In so doing, panels and military judges have even embraced MAJ Freedman’s concept of the “soldier-patient”; they too recognize a moral obligation to make the sentence constructive—even where return to duty is not contemplated due to mental and medical conditions.⁴⁷⁰ Second, and closely related, the

⁴⁶⁷ 1 M.J. 657, 660 (N.M.C.C.M.R. 1975).

⁴⁶⁸ *Id.* at 661.

⁴⁶⁹ Many opinions reveal an apparent threshold in which judges must first be convinced that a panel intends to recommend clemency before instructing members on their right to do so or the proper considerations. In *United States v. Perkinson*, for example, even though the members lined through the punitive discharge option and replaced it with an administrative one, this did not warrant a clemency instruction as “[t]he mere attempt to award a general discharge, standing alone, was insufficient to signal an intention on the part of the members to recommend clemency.” 16 M.J. 400, 401 (C.M.A. 1983). *See also Thompson*, 2010 WL 2265444, at *6 (“During sentencing deliberations, the members asked if a general discharge was allowed. The military judge responded, ‘The short answer to that question is no. Again in adjudging a sentence you are restricted to the kinds of punishment which I listed during my original instructions or you may adjudge no punishment.’”); *United States v. Keith*, 46 C.M.R. 59, 60 (C.M.A. 1972) (“You may adjudge only a bad conduct discharge. You may not adjudge any administrative discharge under general, unfitness, or unsuitability. You may not adjudge any discharge other than a bad conduct discharge in this case, if you elect to adjudge a discharge at all.”).

⁴⁷⁰ *See supra* Part III.B.3.b.ii (describing Major Freedman’s theories).

persistent endorsement of the same “constructive” sentencing philosophy—especially despite the lack of judicial instructions spelling out its dimensions—demonstrates an underlying rehabilitative ethic at work within the military. Echoing Justice Owen Roberts’s observations in the 1940s, these cases show us that clemency is, in fact, engrained in the DNA of the Armed Forces.⁴⁷¹ Third, and perhaps most concerning, panel members’ continuing attempts to adjudge contingent sentences suggest that there are, lurking below the surface of many adjudged punitive discharges, hidden contingent sentencing recommendations—suppressed by the judges’ omission of instructions, or suffocated by the forced choices appearing on the Sentence Worksheet.

B. The Soldier-Patient in Court-Martial Clemency Recommendations

Within the appellate cases addressing these recommendations, panels and judges have invoked their own concept of the soldier-patient, not so different from MAJ Freedman’s. Under this view, when the accused is attempting to obtain treatment for a condition over which he has little control, these facts introduce a new perceptual frame. Considerations here far exceed the standard sentencing analysis, as court-martial members have often voiced additional concerns for the accused.⁴⁷²

In *McBride*, the panel members explained the unique calculus that resulted in their recommendation for the convening authority to allow the accused to participate in the 3320th so he could ultimately obtain an administrative discharge, instead of the punitive discharge they had adjudged. The panel president described how the accused had been stable and productive prior to his experiences in Southeast Asia.⁴⁷³ Lacking any

⁴⁷¹ When Supreme Court Justice Owen J. Roberts was chair of the Advisory Board on Clemency in 1945, he underscored the fact that “clemency is and has always been the capstone of the whole system of military justice.” Moran Memo, *supra* note 262, at 10 (citing 1945 interim report).

⁴⁷² For a basic example, see, e.g., *United States v. Sears*, 2004 WL 637951, at *1–2 (A.F. Ct. Crim. App., Mar. 24, 2004) (unpublished) (attempting to sentence the accused to “[a] bad conduct discharge, with recommendation for clemency for a general discharge under honorable conditions,” owing to the fact that the offense, which involved “suddenly” striking a crying infant on the head, was “an isolated incident” and the accused had a “recent diagnosis of bipolar disorder,” which was likely aggravated by the “tragic death” of his father).

⁴⁷³ *United States v. McBride*, 50 C.M.R. 126, app. A, at 134 (A.F.C.M.R. 1975) (reprinting the 26 July 1974 clemency petition of Major Lawrence A. Day) (“Throughout the deliberations of the court, I questioned the factors that brought about in [Amn]

criminal past, it was clear to the president and other members of the panel that the military environment had contributed in a significant way to his present mental condition, and his offenses. Because the military contributed to the accused's need for "immediate and intensive psychological treatment,"⁴⁷⁴ the military incurred a special obligation to treat it, even though Amn McBride engaged in criminal behavior: "I felt strongly, and still do, that the military environment in South East Asia brought about [Amn] McBride's change of attitude, and that the Air Force was therefore at least partially obligated to provide him medical or psychiatric treatment."⁴⁷⁵ On these facts, the court's recognition of the panel's right to recommend a reduced sentence contingent upon future progress in treatment highlights the unique sentencing considerations in cases that involve mental health issues.⁴⁷⁶ The court evidently agreed that the standard Sentence Worksheet and instructions were not adaptable to the panel's demanding obligations and decision-making process in their application of the law.⁴⁷⁷

The 2010 *Knight* opinion is also valuable for the purposes of this article. There, even though the accused had not been diagnosed with a

McBride an apparent psychological reversal in his attitudes. Prior to his tour of duty in Thailand, this young man had an outstanding school record and performed highly satisfactory as an aircraft crew chief.").

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 132–33.

⁴⁷⁷ *Id.* app. A, at 134:

From the choice of sentences available, which I felt were insufficient, I envisioned the capability for [Amn] McBride to reduce the type of discharge by demonstrating a willingness to attend and be rehabilitated by the Lowry Rehabilitation Center. I do not feel that a bad conduct discharge is appropriate in this case; the court awarded a [BCD] as the lowest available discharge.

See also id. app. B, at 134 (reprinting the 26 November 1974 clemency petition of Second Lieutenant Richard W. Joyce):

As I am sure can be seen from the record of trial, the court was not satisfied with the options we had and I thought that an administrative discharge was appropriate; or, at least, [Amn] McBride should be given a chance. I think that the judge should have recognized our initial recommendation [T]he way the judge's recommendations were phrased left us really no choice. I adjudged a BCD because it was the only option I thought we had.

psychiatric disorder, the military judge—much like federal judge John Kane had in the Colorado *Brownfield* case⁴⁷⁸—suspected that the accused suffered from PTSD based on his combat experiences in Iraq.⁴⁷⁹ In *Knight*, the accused had wrongfully taken various pieces of military equipment, which were later recovered when he was apprehended by local authorities for impersonating a law enforcement officer in Texas.⁴⁸⁰ Upon sentencing the accused to a BCD and ten months confinement, the judge recommended:

If [the appellant] has been diagnosed with Post Traumatic Stress Disorder resulting from his combat service in Iraq, then I recommend that the Convening Authority, at the time he takes action on the record of trial, approve only so much of the adjudged confinement as will have been served by that date.⁴⁸¹

Adoption of the clemency recommendation would have reduced the accused's confinement by several months.⁴⁸² In the SJA's post-trial recommendation, he argued against the clemency on a number of grounds. Even if the accused did suffer from PTSD, the SJA explained, there was no proof that the condition had been "caused" by the combat deployment. The SJA also pointed out that the accused's pretrial agreement governed the terms of the deal and that the accused already benefitted greatly from that deal. The convening authority thus rejected the clemency recommendation.⁴⁸³

Knight is an important opinion because it demonstrates that some military judges—not only panels—believe that psychiatric conditions, including those connected to combat, are valid reasons to suspend significant portions of adjudged sentences.⁴⁸⁴ The case also suggests that

⁴⁷⁸ See Memorandum Opinion and Order on Sentencing at 15–23 *United States v. Brownfield*, No. 08-cr-00452-JLK (D. Colo. Dec. 18, 2009), available at <http://graphics8.nytimes.com/packages/pdf/us/20100303brownfield-opinion-order.pdf> (describing the court's approach to medical diagnosis and treatment for suspected PTSD).

⁴⁷⁹ *United States v. Knight*, 2010 WL 4068918, at *1 (A.F. Ct. Crim. App., June 28, 2010) (unpublished).

⁴⁸⁰ *Id.* at *3–4.

⁴⁸¹ *Id.* at *4.

⁴⁸² The current standard for processing a court-martial is 120 days. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

⁴⁸³ *Knight*, 2010 WL 4068918, at *1.

⁴⁸⁴ In *United States v. Mack*, 56 M.J. 786 (A. Ct. Crim. App. 2002), for example, the accused was a COL in the Chaplain's Corps, who perpetrated an elaborate fraud scheme

suspended sentences hold less weight with convening authorities if they are based on nothing more than a diagnosis of PTSD. Without establishing benchmarks for demonstrated rehabilitation, diagnosis-dependent conditions are susceptible to the same brand of skepticism that leads military members to believe that PTSD is a trial tactic and nothing more. Had the defense counsel obtained the PTSD diagnosis first or proposed treatment standards in *Knight*, there may have been an entirely different outcome. Consequently, *Knight* signals that it is easier to reject the proposal for a suspended discharge in the absence of a clear results-oriented framework.

C. Convening Authorities *Do* Grant Treatment-Based Clemency

It is particularly difficult to obtain statistics on cases in which punitive discharges were remitted based on successful completion of treatment.⁴⁸⁵ However, contrary to the impression left by reported appellate cases concerning clemency denials, unreported cases reveal the vitality of the practice today, and decades ago. In years past, upon granting a suspended punitive discharge, it was not uncommon for the convening authority to appoint a probation officer from a line unit to routinely monitor the progress of the offender and report back to the command on violations of

to support a pathological gambling addiction, going so far as enlisting his sister to play the role of a religious book saleswoman to field official inquiries into the fictional “Covenant House” business he created. *Id.* at 788. Based on evidence that he had “been diagnosed as suffering from PTSD due to his combat experiences and his sexual abuse as a child [and that] his gambling addition [was] connected to his [PTSD],” the convening authority initially “deferred confinement for forty days to enable the appellant to obtain medical treatment.” *Id.* at 787. The military judge, after hearing the case, sentenced the accused to various punishments, including dismissal from the service, but then added, “[b]ased upon the entire record I recommend that the sentence be suspended.” *Id.* at 787 n.2. *See also* United States v. Clear, 34 M.J. 129, 130 (C.M.A. 1992) (recommending enrollment in the 3320th to provide the accused with “an opportunity to earn conditional suspension of the discharge,” in part, because “the accused had been exposed to direct sniper fire; that he was working long stressful hours; and that he was going through a bad divorce”). *Cf.* United States v. Ledbetter, 2008 WL 2698677, at *3 (N-M. Ct. Crim. App., July 10, 2008) (unpublished), *review denied*, 2009 CAAF LEXIS 307 (C.A.A.F., Mar. 31, 2009) (recommending a suspended punitive discharge based, in part, on “some evidence indicating that he had an alcohol problem, and that his command would not refer him for treatment due to manpower concerns . . .”).

⁴⁸⁵ Telephone Interview with Colonel (Ret.) Malcolm Squires, Jr., Clerk of Court, U.S. Army Court of Criminal Appeals (Jan. 3, 2011) (explaining how there is no method to track how many cases had discharges remitted after a period of suspension based on the Army’s record-keeping system, but confirming, anecdotally, that the practice *does* occur).

probationary terms.⁴⁸⁶ Seeing that most of these line officers did not have specialized mental health training, some commanders tailored conditions in which a psychiatrist served as a probation officer for an offender with significant emotional difficulties to ensure that the offender would benefit from a course of mental health treatment.

In a 1960 *U.S. Armed Forces Medical Journal* article, a Navy psychiatrist recounted the case of a nineteen-year-old sailor who stole items from another sailor's barracks locker in order to fund the costs of his mother's urgent operation. The sailor was raised by his mother, who suffered from repeated heart problems after his father died when he was six. He joined the Navy primarily to support his mother and often experienced "hallucinatory episodes" in which he believed his father was telling him to support his mother.⁴⁸⁷ After a sanity board found the sailor competent to stand trial, the court-martial accepted his plea and sentenced him to thirty days confinement at hard labor and a BCD.⁴⁸⁸ The convening authority in the case suspended the sentence for six months because the sailor suffered from "acute situational turmoil" and because "the offender's difficulties were largely neurotic."⁴⁸⁹

The convening authority then appointed a psychiatrist as the military probation officer "on the theory that assisting persons in regaining confidence and self-respect, evaluating tensions and attitudes, and suggesting constructive courses of action are functions of a psychiatrist."⁴⁹⁰ The convening authority also reasoned that,

particularly during the probationary period, the parolee would need help, because the threat of a [BCD] might

⁴⁸⁶ Lieutenant John C. Kramer & Lieutenant Commander John L. Young, *The Psychiatrist as Probation Officer*, 11 U.S. ARMED FORCES MED. J. 454, 455 (1960) (noting how, in the normal course of events, "[t]he position of probation officer, as with other similar special functions ordinarily performed in civilian life by experienced professional personnel, must be occupied in the armed services by officers with little or no preparation"). Later, the *Figueroa* court addressed, upheld, and applauded the assignment of a Marine Corps officer to monitor the accused's probation compliance during meetings "at least once per week" for a ten-month term, though recognizing that there was no obligation for the convening authority to do so. *United States v. Figueroa*, 47 C.M.R. 212, 213-14 (N.M.C.M.R. 1973). *See also* Lowery, *supra* note 33, at 200-01 (discussing the modern-day application of *Figueroa*).

⁴⁸⁷ Kramer & Young, *supra* note 486, at 455.

⁴⁸⁸ *Id.* at 455-56.

⁴⁸⁹ *Id.* at 455-57.

⁴⁹⁰ *Id.* at 456.

not be enough to overcome the bitterness and antagonism toward authority engendered by the probable scorn and rejection, real or imagined, of his associates and superiors. It was felt that he might develop a “What’s-the-use” attitude leading to compensatory misconduct if thoughtless and uncomprehending persons caused him to feel unwanted.⁴⁹¹

The terms of mental health probation included “regular weekly interviews” involving “a pattern of supportive psychotherapy,” in which the sailor therapeutically addressed issues ranging from “guilt over his mother’s surgery,” conflicts with his father, and unresolved issues regarding “his relationship with a 17-year-old woman.”⁴⁹²

The practice, while raising the potential for ethical conflicts in light of the psychiatrist’s requirement to report the client’s probation violations under the dual role,⁴⁹³ appears to be an early variant of the contemporary mental health probation officer now assigned to various MHCs.⁴⁹⁴ Embodying the notion of interdisciplinary treatment teams, the military psychiatrists concluded that such a program of probation “has a definite place within the military forces,” if it can be instituted “by the commanding officer with the assistance of social workers, psychiatrists, chaplain, and legal officer,” and if the psychologist can maintain loyalties by serving on the team, *in addition to* a regularly appointed probation officer from the line.⁴⁹⁵ Although it would be extremely difficult to determine how many probationary terms like this have been implemented throughout the services, it is crucial that the military precedent has existed for over forty years, at a time after the implementation of the *UCMJ*, and within its statutory limitations. Also important is the fact that the local commander instituted a mental health treatment program using installation resources rather than requiring entry

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.* at 457.

⁴⁹⁴ For a discussion of the recent trend of assigning specially-trained probation officers to cases involving offenders with mental illness, see, e.g., Nancy Wolff et al., *Mental Health Probation Officers: Stopping Justice-Involvement Before Incarceration*, CTR. FOR BEHAV. HEALTH SERVS. & CRIM. JUST. RES., Oct. 2010, at 1, 2, http://www.cbhs-cjr.rutgers.edu/pdfs/Policy_Brief_Oct_2010.pdf (describing “[s]pecialized [t]raining of Mental Health Probation Officers” in “psychopathology” and “co-occurring disorders,” interviewing and stress-reduction techniques, coupled with a smaller case load to allow for more sustained and individualized attention).

⁴⁹⁵ Kramer & Young, *supra* note 486, at 454, 457.

into a formalized restoration program; standard restoration-to-duty statistics hardly reflect these innovative clemency practices.

In contrast with *Knight*, the 2010 case of *United States v. Miller* reflects a more comprehensive treatment-based approach to clemency for a servicemember with PTSD. The case is not reported because the convening authority remitted the accused's punitive discharge after he successfully completed treatment for PTSD under the terms of a suspended sentence.⁴⁹⁶ According to the trial transcript, Staff Sergeant Ryan Miller first deployed to Afghanistan in 2003–2004 as a cavalry scout. During that deployment, he was confronted with a divorce, the death of his father, and his mother's cancer diagnosis. His second deployment to Iraq, from 2005–2006, brought greater turmoil; aside from the re-emergence of his mother's cancer and a break-up with his girlfriend, Sergeant Miller suffered the loss of his best friend as a result of an improvised explosive device. The impact of the death was so great that he was immobilized, "just laying in bed crying and thinking about the very last moment[s]."⁴⁹⁷ When he received word that the unit had detained the insurgent suspected of the killing, Sergeant Miller immediately traveled to the holding facility, "and stood there watching, waiting, hoping he would do anything that would allow me to kill him."⁴⁹⁸

Sergeant Miller experienced increasing symptoms of PTSD through the rest of the deployment, and thereafter.⁴⁹⁹ He was near the expiration of his term of service (ETS), and set the goal of surviving until the day in 2007 when he would be able to return to civilian life. Recognizing the impact of his PTSD symptoms, Sergeant Miller purposely avoided treatment, "in fear that I would be labeled a 'nut' and no longer be respected by my peers or subordinates."⁵⁰⁰ One-and-a-half months before his ETS date, Sergeant Miller received news that the Army had "Stop-Loss'd" him, essentially requiring him to stay at his unit and participate in a third deployment—this time to Iraq.⁵⁰¹ Sergeant Miller experienced

⁴⁹⁶ Interview with Major Jeremy Larchick, Chief of Military Justice, Fort Drum & 10th Mountain Div., at Charlottesville, Va. (Nov. 3, 2010).

⁴⁹⁷ Trial Transcript, *supra* note 19, at 68.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* at 69 ("I have anger issues and did not sleep most nights.")

⁵⁰⁰ *Id.*

⁵⁰¹ "Stop-Loss" describes the procedure by which the military requires service beyond a servicemember's original contractual term. See generally Evan M. Wooten, Note, *Banging on the Backdoor Draft: The Constitutional Validity of Stop-Loss in the Military*,

the feeling that he had done his “time” and “combat deployments” and simply “couldn’t take it anymore.”⁵⁰² Sergeant Miller absented himself without leave for a period of just over two months, until one of his friends talked him into returning. Upon his return, perceiving that he could no longer bear “reliving the past and reopening old wounds,”⁵⁰³ Sergeant Miller left a second time, for seventeen months, until he was detained by police on a seat belt violation.

Unlike the accused in *Knight*, Sergeant Miller was diagnosed with PTSD prior to trial, with a mental health prognosis that his condition was “treatable” by “medication and therapy.”⁵⁰⁴ During sentencing, the prosecution, in recognition of Sergeant Miller’s “previous deployments and service,” asked the court for a sentence of seven months confinement and a BCD, in pertinent part, arguing that “Staff Sergeant Miller was the anchor for the team . . . he let them down when he went AWOL and his unit deployed to Iraq without him,” and further that the “difficult events in his life . . . [were] no excuse to let your squad[,] command and the Army down.”⁵⁰⁵ Recognizing that “extremely unfortunate events [often happen] in a war, on multiple fronts,” the trial counsel explained,

Staff Sergeant Miller is not the only one who has gone through events like this. There are thousands of [s]oldiers who have died in Iraq and countless more who have witnessed it, all of whom dealt with similar tragedies. Staff Sergeant Miller was the only one from his unit to go AWOL. The other [s]oldiers, the same [s]oldiers who lost friends, did what a [s]oldier in the U.S. Army does, they [s]oldiered on. . . .

If we allow Staff Sergeant Miller to get off easy, what kind of message will that send? We cannot do that. It

47 WM. & MARY L. REV. 1061 (2005) (discussing various policies that emerged from the President’s declaration of a state of emergency following the attacks of September 11, 2001, all of which suspended the laws pertaining to the separation of servicemembers from the Armed Forces). Some researchers have observed that the distress associated with the Stop-Loss process contributes to or aggravates PTSD. See William B. Brown, *Another Emerging “Storm”: Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System*, 5 JUST. POL’Y J. 1, 11 (2008).

⁵⁰² Trial Transcript, *supra* note 19, at 20.

⁵⁰³ *Id.* at 70.

⁵⁰⁴ *Id.* at 75.

⁵⁰⁵ *Id.* at 70, 72.

would tell all those [s]oldiers, lower [s]oldiers it is okay to go AWOL, which it is not.⁵⁰⁶

Sergeant Miller's defense counsel asked for no confinement. He first explained,

[t]his is not a [s]oldier who failed to perform his duty; this is a [s]oldier who did do his duty, in fact, to his own detriment. He deployed twice, once to Iraq and once to Afghanistan. He lost a best friend on that last deployment just 3 months short of coming home. The impact of that loss is with him, and he experiences it every day.⁵⁰⁷

Addressing the report by Sergeant Miller's therapist—indicating that the condition was treatable—defense counsel argued that “medication and therapy” were preferable to confinement.⁵⁰⁸ He then cited a major lesson learned during Operation Iraqi Freedom:

He is a senior NCO. But not too long ago, Your Honor, Defense Secretary Rumsfeld, returning to Iraq, said, “We broke it, we bought it,” meaning it's our obligation to fix it. Now, he's talking about the enemy, but if we have an obligation to fix the enemy, do we have no less of an obligation to our own?⁵⁰⁹

Before announcing his sentence, the military judge recognized the link between the accused's untreated symptoms and his charged offenses:

The accused said in his unsworn statement that he did not seek assistance with dealing with his situation because he did not want to be seen as weak. It is a far too common but outmoded belief that seeking help for a mental health issue is a sign of weakness. The proper view is that seeking such assistance should be seen as a sign of strength. This case is a painful example of the

⁵⁰⁶ *Id.* at 73, 74.

⁵⁰⁷ *Id.* at 74.

⁵⁰⁸ *Id.* at 75.

⁵⁰⁹ *Id.* at 77.

negative effects that flow from the adherence to this common but outmoded belief.

Accused and Counsel, please rise.⁵¹⁰

After sentencing the accused to seven months confinement, reduction to the lowest enlisted grade, and to be discharged from the service with a BCD, the judge recommended clemency: “I recommend that the entire sentence, with the exception of reduction to the grade of E4, be suspended upon conditions including successful participation in and completion of treatment and counseling, as recommended by military mental health professionals.”⁵¹¹ Unlike *Knight*, the convening authority, MG James Terry, adopted the judge’s recommendation; Miller successfully completed his treatment without incident.

Together, *McBride*, *Knight*, *Miller*, and the 1960 Navy case reflect more than a generation of attempts—albeit with varying degrees of success—to incorporate mental health treatment in the form of contingent sentences. Within the parameters of these opinions, it is evident that such efforts require greater tools than those provided by the standard court-martial sentencing framework. Collectively, these cases speak to the need for a more flexible sentencing process. Rather than changing the Rules for Courts-Martial or instigating other congressional action, one need only consider the comments of panel members who have wrestled with these issues. Because *McBride* and other cases demonstrate problems with the force-choice format of the Sentence Worksheet and the lack of clarity in panel instructions, the following Part proposes simple, nonlegislative alterations that will assist panel members in properly devising contingent sentences and recommendations for treatment.

V. Comprehensive Tools for Treatment-Based Contingent Court-Martial Sentences

Although a court-martial panel is entitled to hear evidence regarding the nature of rehabilitation programs and can use this information to make a clemency recommendation, panel members are not trained in penology and have little understanding of how probationary terms

⁵¹⁰ *Id.* at 78.

⁵¹¹ *Id.* at 79.

operate.⁵¹² The task of determining whether to recommend clemency for mental health treatment necessarily requires consideration of both the accused's mental condition and the capabilities of a given program to respond to it.⁵¹³ In addressing these two considerations, sentencing tools should allow the panel to estimate the accused's potential for successful completion of a program. This naturally includes inquiries about modes of treatment—medication, phases, and the nature of counseling.⁵¹⁴ But, it also includes the capacity of the treatment program to monitor the accused's progress and adapt to his needs. To determine the feasibility of a "second chance" for treatment, panels also need assurances that the accused will be accountable during his treatment and that the program will prevent abuses.⁵¹⁵

Providing a useful sentencing framework to address the possibility of treatment is a complex undertaking; it is simply unrealistic to ask panel members to stand in the place of an interdisciplinary team of professionals and to dictate specific treatment terms, given their limited expertise in penology and mental health. If a panel is expected to recommend a series of treatment conditions, the task would consume substantial time; it could, ironically, persuade the convening authority to deny the recommendation, simply based on its complexity. However, it is just as prudent to educate the panel about aspects of treatment programs and suspended sentences that would not otherwise be obvious to them and which would enhance the quality of their deliberations. In

⁵¹² See, e.g., Colonel Herbert Green, *Trial Judiciary Note: Annual Review of Developments in Instructions*, ARMY LAW., Apr. 1990, at 47, 56 (observing that "[c]ourt members ordinarily are not privy" to the same information about offender treatment programs as are military judges); Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39, 44 (2009) (criticizing panel members' "lack of sufficient experience with the criminal justice system" to determine appropriate sentences); Robbins & Carmichael, *supra* note 84, at 26 (criticizing panel members' lack of training and experience on sentencing considerations and explaining how "court members normally will have less information about the accused than the judge, and be completely unaware of the available alternatives for his treatment").

⁵¹³ Civilian courts speak of information necessary for a jury to "tailor" its recommendation for probation to the individual needs of the defendant. See, e.g., *Najar v. State*, 74 S.W.3d 82, 88 (Tex. Crim. App. 2002).

⁵¹⁴ See, e.g., *United States v. Gunter*, 29 M.J. 140, 142–43 (C.M.A. 1989) (permitting the panel to hear estimations of the accused's likelihood of succeeding in drug treatment at sentencing); Green, *supra* note 512, at 47, 56 (describing how instructions that "place the treatment programs and their availability to the accused in proper focus" can "lead to more intelligent sentencing").

⁵¹⁵ See *supra* Parts I & II (describing how judges developed problem-solving treatment courts to assure such accountability because it was lacking in traditional programs).

striking the appropriate balance, the following subsections consider existing panel instructions on mental health evidence and recommend improvements that will avoid inundating panel members with needless and distracting information.

A. Existing Sentencing Instructions on Mental Health

Students of panel sentencing in the military justice system have criticized standard instructions for failing to define important concepts.⁵¹⁶ This concern is manifest in the area of mental health, where instructions in the *Military Judges' Benchbook* describe unclear, and often inconsistent, mental health concepts. Depending upon the nature of a case and the instructions raised by the facts, panels could potentially hear about “mental inability,” “mental capacity,” “mental development,” “mental infirmity,” “mental disease or defect,” “mental handicap,” “mental alertness,” “mental impairment,” “mental faculty,” “mental maturity,” “mental conditions,” “mental coercion,” “mental distress,” “mental deficiency,” “unconsciousness,” and “character or behavior disorders,” during the course of a trial without any standards to distinguish between different gradations of impairment or cognitive interference.⁵¹⁷ The range of terms raises a litany of concerning questions: For example, can a panel evaluate the impact of an accused’s mental condition on his functioning by applying the standard used to evaluate the substantial incapacitation of a sexual assault victim? Should the panel accord different weight at sentencing to the accused’s mental status if the members believe it is a “condition,” as opposed to a “deficiency,” a “defect,” or an “impairment?” There are nearly infinite possibilities for such cross-over.⁵¹⁸

At sentencing, panel members are charged to consider “rehabilitation of the wrongdoer” as one of the “five principal reasons for the sentence of those who violate the law.”⁵¹⁹ They are normally instructed to consider

⁵¹⁶ See, e.g., Colonel R. Peter Masterton, *Trial Judiciary Note, Instructions: A Primer for Counsel*, ARMY LAW., Oct. 2007, at 85, 85 (describing various occasions when inadequate *Benchbook* instructions require counsel to tailor their own panel instructions on topics, including definitions).

⁵¹⁷ See generally DA PAM. 27-9, *supra* note 43 (addressing mental health concepts in various sections on sexual assault, alcohol offenses, and defenses).

⁵¹⁸ *Id. passim*.

⁵¹⁹ *Id.* instr. 2-6-9, at 92. The other four rationales are “punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the

various additional matters for the purpose of “extenuation and mitigation” of the sentence, such as “lack of previous convictions or Article 15 punishment,” “financial” or “domestic” difficulties, and the accused’s desire to remain in the Service or not to be punitively discharged from it.⁵²⁰ Presumably, instructions that touch upon service-related mental conditions might include mandates to consider “[t]he combat record of the accused,” “[t]he accused’s (mental condition) (mental impairment) (behavior disorder) (personality disorder),” and any “(physical disorder) (physical impairment) (addiction).”⁵²¹ In weighing all of these matters, including the concept of rehabilitation, the panel is ultimately directed to “select a sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society.”⁵²²

While government evidence of future dangerousness is routinely admitted under a principle of rehabilitation,⁵²³ only two of the *Benchbook*’s instructions are remotely useful for addressing treatment considerations. The instruction titled “Presentencing Factors,” which is designed to put evidence of mental conditions in a proper context for sentencing purposes, provides a very basic foundation for considering mental illness in relation to clemency:

Although you have found the accused guilty of the offense(s) charged, and, therefore, mentally responsible (you should consider as a mitigating circumstance evidence tending to show that the accused was suffering from a mental condition) (you should consider a condition classified as a (personality) (character or behavior) disorder as a (mitigating) factor tending to explain the accused’s conduct.) (I refer specifically to matters including, but not limited to (here the military judge may specify significant evidentiary factors bearing

military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses.” *Id.*

⁵²⁰ *Id.* instr. 2-5-23, at 71–72 (items 6, 7, 16, 20 & 21).

⁵²¹ *Id.* instr. 2-5-23, at 72 (items 8 & 9). In a capital case, the panel must consider evidence of a “nervous disorder,” in addition to the listed types of impairments, with the addition of a blank space, suggesting that any possible condition should be listed even if not enumerated in the instruction. *See id.* instr. 8-13-40, at 1076 (item 8).

⁵²² *Id.* instr. 2-5-24, at 76.

⁵²³ *See generally* United States v. Ellis, 68 M.J. 341, 345 (C.A.A.F. 2010).

on the issue and indicate the respective contentions of counsel for both sides).⁵²⁴

Instruction 6-6 provides additional cues to assist in the evaluation of treatment programs for mental conditions, including treatment courts. Though intended to accompany evidence on the lack of mental responsibility or partial mental responsibility defenses, Instruction 6-6 offers these applicable considerations:⁵²⁵

- (1) Panels may consider evidence regarding a mental condition “before and after the alleged offense(s),” as well as on the date of the offense(s);
- (2) panel members are not “bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect”;
- (3) simply based on the purpose of an expert’s inquiry—whether the analysis is done to consider treatment or criminal responsibility—psychologists’ and psychiatrists’ opinions on the nature and severity of a mental condition may change;
- (4) panel members are free to consider lay testimony regarding “observations of the accused’s appearance, behavior, speech, and actions” to evaluate his mental condition;
- (5) they should likewise consider testimony regarding presence or lack of “extraordinary or bizarre acts performed by the accused”;
- (6) they should not “arbitrarily or capriciously reject the testimony of a lay or expert witness” regarding mental health;
- (7) and, finally, they “should bear in mind that an untrained person may not be readily able to detect a mental [issue] and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.”

Aside from signaling the difference between mental health evaluations for the purpose of “treatment” and those used to determine “criminal

⁵²⁴ DA PAM. 27-9, *supra* note 43, instr. 6-9, at 952.

⁵²⁵ *Id.* instr. 6-6, at 942–43.

responsibility,” all *Benchbook* instructions are otherwise silent on considerations of treatment. These are seemingly the only guidelines that have been available to the members in the many cases where military courts have allowed sentencing evidence regarding the accused’s likelihood of success in drug treatment, the nature of programs available in different confinement facilities, and indicators of future dangerousness—most of which has been offered by the Government in aggravation under Rule for Court-Martial (RCM) 1001(b)(5).

B. Existing Instructions on Clemency

Like instructions on expert testimony and sentence mitigation, the clemency instructions are merely additional floorboards in the sentencing framework for treatment programs—hardly a wall, and certainly no ceiling. Here, Instructions 8-3-34 (addressing the recommendation for a suspended sentence) and 2-7-17 (addressing “additional” clemency instructions), merely trace the contours of the contingent sentence. The first instruction states:

Although you have no authority to suspend either a portion of or the entire sentence that you impose, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority. Therefore, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted, even if the convening or higher authority refuses to adopt your recommendation for suspension.⁵²⁶

After directing that selected members’ names be listed on the Sentence Worksheet if less than all of them support a suspended sentence, the instruction permits the president to read the recommendation contemporaneously with the sentence, and explains that the decision of “[w]hether to make any recommendation for suspension of a portion of or the sentence in its entirety is solely a matter within the discretion of the court.”⁵²⁷

⁵²⁶ *Id.* instr. 8-3-34, at 1071.

⁵²⁷ *Id.*

Instruction 2-7-17 provides additional guidance on the operation of the suspended sentence. After reiterating the limitations of the court-martial's recommendation, this instruction briefly explains the mechanics of a permissible contingent sentence:

A recommendation by the court for an administrative discharge or disapproval of a punitive discharge, if based upon the same matters as the sentence, is inconsistent with a sentence to a punitive discharge as a matter of law. You may make the court's recommendation expressly dependent upon such mitigating factors as (the (attitude) (conduct) of) (or) (the restitution by) the accused after the trial and before the convening authority's action.⁵²⁸

Although unlike earlier versions of the *Military Judge's Guide*, which explicitly provided for improvement in "health" as a contingency for remission,⁵²⁹ the current language is still broad enough to include improvement in mental health conditions, as evident in *Miller, Knight*, and *McBride*. However, the foregoing instructions—even if pieced-together by counsel from their disparate locations in the *Benchbook*—offer little guidance for panels considering treatment-based contingent sentences. The following section therefore considers how civilian courts have approached such instructions in the two states that allow juries to recommend probation during criminal sentencing.

C. Precedents from Arkansas and Texas

Among six states that authorize juries to sentence defendants in criminal cases,⁵³⁰ both Arkansas⁵³¹ and Texas⁵³² further permit juries to

⁵²⁸ *Id.* instr. 2-7-17, at 134.

⁵²⁹ Remily, *supra* note 434, at 530–31.

⁵³⁰ Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004) (noting that, "in [the following] six states, felons convicted by juries are routinely sentenced by juries": Virginia, Kentucky, Montana, Arkansas, Texas, and Oklahoma). Seeing how "[r]oughly 4000 juries deliver felony sentences every year" in these states, appellate opinions on these cases provide valuable insights on the nature of jury sentencing instructions. *Id.* at 887.

⁵³¹ See ARK. CODE ANN. § 16-97-101(4) (2011) (permitting the jury to consider a defense request for an alternative probationary sentence); *id.* § 16-93-201 (describing various types of community punishment that can be requested by the jury as part of its recommendation for an alternative sentence).

recommend probationary terms to enable participation in rehabilitative programs.⁵³³ In Texas, while a jury has the discretion to reject the defendant's request, the *Code of Criminal Procedure* requires a judge to order probation when recommended if the defendant otherwise lacks a prior felony conviction.⁵³⁴ Arkansas is most similar to the military in the way its code vests the presiding judge with the discretion to accept or reject the jury's recommendation for probation.⁵³⁵ The legal opinions and, more importantly, jury instructions from both jurisdictions provide additional guidance.

Arkansas courts have implemented a system in which the jury, "[c]ompletes two forms, one imposing an alternative sentence and the other imposing imprisonment, a fine, or both. If the court declines to follow the alternative sentence recommendation of the jury, there will be a basis, *viz.*, the other completed verdict form for a sentence."⁵³⁶ The model instruction for alternative sentencing provides: "_____ (*Defendant*) may also contend that he should receive [an alternative sentence] [the alternative sentence of _____]. You may recommend that he receive [an] [this] alternative sentence, but you are advised that your recommendation will not be binding on the court."⁵³⁷ Defense attorneys, in practice, may fashion additional verdict and instruction forms based on any of the alternative sentences provided for in Arkansas's Community Punishment Act,⁵³⁸ some of which include

⁵³² TEX. CODE CRIM. PROC. §§ 37.07(f), 42.12(4) (2011) ("In cases in which the matter of punishment is referred to a jury, either party may offer into evidence the availability of community corrections facilities serving the jurisdiction in which the offense was committed.").

⁵³³ This is not true of all states. In Missouri, for example, an appellate court did not allow a jury to recommend probation because, under the state's law, "[i]t was not the task of the jury to determine whether appellant should receive leniency or probation." *State v. Dungan*, 772 S.W.2d 844, 861 (Mo. Ct. App. 1989). Because the military already permits such recommendations, cases from Missouri and other jurisdictions that do not allow such recommendations offer little useful guidance.

⁵³⁴ TEX. CODE CRIM. PROC. art. 42.12 § 4(d).

⁵³⁵ ARK. CODE ANN. § 16-97-101(4) (stating that the jury's recommendation for an alternative sentence "shall not be binding on the court").

⁵³⁶ ARK. MODEL JURY INSTRUCTIONS-CRIMINAL ¶ 2-91 (2d ed. 2010).

⁵³⁷ *Id.* at AMCI 2d 9111 (closing instruction).

⁵³⁸ *See, e.g., State v. Hill*, 887 S.W.2d 275, 279–80 (Ark. 1994) (upholding use of the form instruction, which included options of probation or a suspended sentence, and noting the defense counsel's corresponding "discuss[ion] of alternative sentencing and the restrictions which would accompany probation or a suspended sentence").

straight probation,⁵³⁹ more complex conditions,⁵⁴⁰ or involvement in community corrections facilities where a defendant can obtain mental health treatment.⁵⁴¹ The “mental health treatment services” involve “both inpatient and outpatient mental health, family, and psychological counseling and treatment provided by qualified community correction service provider programs for correctional clients.”⁵⁴² Accordingly, Arkansas juries may recommend an individually tailored sentencing alternative based on general knowledge of how probationary programs function.

The Texas courts, which have upheld testimony regarding various features of treatment programs under the state’s jury sentencing provisions,⁵⁴³ have likewise provided an instructional framework contemplating probation. For example, in the instruction used by Judge Carol Davies in a 2003 jury sentencing trial, she described the nature of community supervision and a list of fifteen possible community supervision conditions including “counseling sessions,” “electronic monitoring,” and “a period of confinement in a county jail for no more than 180 days,” and then further described how revocation proceedings would occur.⁵⁴⁴

⁵³⁹ ARK CODE ANN § 16-93-1202(2)(A) (2011) (defining the term as a “criminal sanction permitting varying levels of supervision of eligible offenders in the community”).

⁵⁴⁰ These other conditions include economic sanctions programs (defined as “an active organized collection of fees, fines, restitution, day fines, day reporting centers, and penalties attached for nonpayment of fines”); home detention programs (“curfew programs [or] house arrest with and without electronic monitoring”); community service programs (“both supervised and unsupervised work assignments and projects such that offenders provide substantial labor benefit to the community”); work-release programs (“residential and nonresidential forms of labor, with salary, in the community”); and restitution programs (“an organized collection and dissemination of restitution by a designated entity within the community punishment range of services, including, when necessary, the use of restorations centers such that the offender is held accountable to the victim and the victim receives restitution ordered by the court in a timely fashion”). *Id.* at § 16-93-1202(2)(A)–(F).

⁵⁴¹ Community corrections facilities are “multipurpose facilities encompassing security, punishment, and services such that offenders can be housed therein when necessary but can also be assigned to or access correction programs which are housed there.” *Id.* § 16-93-1202(2)(A). They can include “boot camps,” drug treatment programs, and educational programs. *Id.*

⁵⁴² *Id.* at § 16-93-1202(2)(M).

⁵⁴³ *See, e.g.,* *Najar v. State*, 74 S.W.3d 82, 87–88 (Tex. Crim. App. 2002).

⁵⁴⁴ HON. ELIZABETH BERRY & HON. GEORGE GALLAGHER, TEXAS CRIMINAL JURY CHARGES § 4:420 (2009).

Although Texas does not allow jurors to recommend specific conditions of probation, the above instruction highlights the value of making jurors aware of the nature and mechanics of a suspended sentence. Quintessentially, where probation exists as a means to attain mental health treatment, not as an end in itself, the need for more detail about programs is most evident. Texas courts have consequently reasoned that jurors can be overcome by emotional “impulse[s]” without proper information on which to base their probation recommendations.⁵⁴⁵

D. Proposed Modified Sentence Worksheet

The proposed model instructions and Modified Sentence Worksheet draw three important points from the Texas and Arkansas instructions. First, panel members should know the limits of their role in recommending clemency, which includes, foremost, the fact that they cannot participate in future vacation proceedings if probation is granted. Second, the panel should have a general understanding of how a contingent sentence operates. The military clemency instruction’s current references to contingencies of “conduct” or “attitude” provide so little guidance that panel members might perceive these terms as nothing more than absence of misconduct—the very notion of automatic remission that the *Cadenhead* court used to invalidate the convening authority’s grant of clemency; there, the Air Force Return-to-Duty program required the servicemember to *transform* according to varied and measurable program

⁵⁴⁵ See *Najar*, 74 S.W.3d at 88 (noting that “community supervision, which by its nature offers a defendant a ‘second chance’ and an opportunity for rehabilitation without having to serve time in prison” can easily trigger “impulse[s]” that make jurors feel “compel[led]” to simplify their evaluation of evidence unless they have access to details on nature and mechanics of the rehabilitation program). Other Texas instructions provide additional guidance to aid deliberations, such as:

If you recommend that the Defendant be placed upon community supervision, the Court shall determine the conditions of community supervision and may, at any time, during the period of community supervision alter or modify the conditions. The Court may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate or reform the Defendant. You may NOT recommend that part of the period of confinement be served by incarceration and part by community supervision.

objectives, not just to sustain.⁵⁴⁶ Third, panel members should have an idea of the types of additional conditions that the convening authority could impose upon adoption of the panel’s recommendation. Knowledge, for example, that their accepted recommendation would lead to a more detailed agreement with the convening authority—possibly including “therapeutic incarceration” as a sanction during the course of the accused’s treatment—might provide the members with a better understanding of the ways that clemency could meet the accused’s individual treatment needs.

The Modified Sentence Worksheet therefore adopts a hybrid of Texas’s and Arkansas’s frameworks, permitting panel members to suggest ideal program attributes, but limited to a menu of brief descriptions. The pertinent part of the Modified Sentence Worksheet appears below in Figure 3, while the whole document is located at Appendix D.

<p>PUNITIVE DISCHARGE</p> <p>10. To be discharged from the service with a bad-conduct discharge.</p> <p>11. To be dishonorably discharged from the service.</p> <p>12. To be dismissed from the service.</p> <p style="text-align: center;">NON-BINDING CLEMENCY RECOMMENDATION</p> <p>13. To suspend and then [remit the [entire adjudged sentence] [the adjudged punitive discharge] [the adjudged confinement]] [commute the adjudged punitive discharge to an administrative discharge] upon the occurrence of the following future event(s):</p> <p>Restitution in the amount of _____ paid to _____ no later than _____.</p> <p>Crime-free conduct for a period of _____.</p> <p>Successful completion of a treatment program requiring [demonstration of measurable progress according to [psychiatric] [medical] [_____] professionals]] [an <u>intensive</u> treatment program with regularly scheduled appearances and other measures to monitor and encourage compliance].</p> <p>Other: _____</p> <p>_____.</p>

Fig. 3. Excerpt from Modified Sentence Worksheet, App. D.

⁵⁴⁶ United States v. Cadenhead, 33 C.M.R. 742, 745 (A.F.B.R.), *aff'd*, 34 C.M.R. 51 (C.M.A. 1963).

The Modified Sentence Worksheet adds just one heading and a few lines to a single page that has changed little from its predecessors dating back to the 1940s.⁵⁴⁷ However, these provisions have the power to make the sentencing process far more constructive, providing convening authorities with vital insights on the panel's estimations of future improvement.

By unmasking the hidden vehicle for considering and indicating clemency recommendations, the new section on the Worksheet prevents a decisional impairment known by psychologists as "acting from a single perspective."⁵⁴⁸ A simple experiment highlights the problem with the standard force-choice form. There, an actor played the part of an injured person poised feet away from a drugstore. After the actor told passers-by that she had sprained her knee and needed help, she explained that she needed an Ace Bandage™ to treat the injury. The coached clerk at the drugstore informed all bystanders that he had sold the last of the Ace Bandages. With a limited concept of only one fix for the problem, all twenty-five subjects in the study accepted failure, even though they had at their disposal several other means of assistance for addressing the sprain.⁵⁴⁹ The situation is practically no different from cases where panel members would have recommended contingent sentences, but refrained owing to force-choice sentence worksheets and judicial silence.

As important as the form on which to recommend clemency is a lawful and meaningful instruction to guide the members in their deliberations. The instruction accompanying the Modified Sentence Worksheet appears at Appendix E and draws upon existing legal principles to ensure that deliberations on treatment neither interfere with the task of determining an appropriate *sentence* nor devolve into debates over tangential matters. Beyond the mechanics of contingent sentences, the following section considers more complicated methods to analyze mental health conditions for the purpose of recommending treatment.

⁵⁴⁷ Compare COLONEL F. GRANVILLE MUNSON & MAJOR WALTER H.E. JAEGER, *MILITARY LAW AND COURT-MARTIAL PROCEDURE*: "ARMY OFFICER'S BLUE BOOK" app., at 113 (1941) (providing similarly limited binary choices), with DA PAM. 27-9, *supra* note 43, app. C3, at 1099-1100 (providing the current Sentence Worksheet for a noncapital court-martial empowered to adjudge up to a Dishonorable Discharge).

⁵⁴⁸ ELLEN J. LANGER, *MINDFULNESS* 16 (1989).

⁵⁴⁹ *Id.* at 16-17 (explaining how "[p]eople left the drugstore empty-handed to the 'victim' and told her the news" due to the recurring cognitive phenomenon).

E. Instructions Regarding Treatment for Mental Health Conditions

Because the current instructions are largely silent on treatment considerations, the proposed instruction offers new provisions to guide the members in their evaluation of testimony on individualized treatment plans, untreated mental health conditions, and connections between symptoms and military service. While the panel members retain the right to determine the existence, impact, and mitigation value of any alleged mental condition, as emphasized by Instruction 6-6, this additional guidance is still necessary to prevent confusion and interference with the deliberative process. Despite patent differences between civilian and military systems, the civilian frameworks explored below are useful to the extent that they provide tools to consider the impact of PTSD and other mental conditions on an offender.

1. Service-Connected Mental Health Disorders

The first valuable principle from civilian sentencing practice concerns the “service connection” issue, which, depending on the case, could either involve the connection between the accused’s military service and the mental condition, or, additionally, the further link between the mental condition and the charged offense. The SJA’s concern in *Knight*, which prompted him to deny clemency on the basis that the accused’s “combat service ‘has not been identified as the cause of the PTSD,’”⁵⁵⁰ may be shared by panel members during their sentencing deliberations. Civilian cases rectify these matters by revealing the importance of context. Often, such standards of proof are necessarily heightened to urge the adoption of a “narrow” categorical exclusion.⁵⁵¹ Likewise, the circuit-splits among federal courts regarding how they will interpret the rules on downward

⁵⁵⁰ United States v. Knight, 2010 WL 4068918, at *1 (A.F. Ct. Crim. App., June 28, 2010) (unpublished).

⁵⁵¹ Marine Major Anthony Giardino, for example, provides criteria for exempting all PTSD-afflicted combat veterans from the death penalty. He argues, in part, first, that “one meets the criteria for being a combat veteran only if he or she has taken fire from or fired at an enemy force while serving in the armed forces”; second, that “a combat veteran be suffering from a diagnosis of PTSD or Traumatic Brain Injury (TBI) at the time of his or her offense;” and third, that, “for a diagnosis of PTSD or TBI to be considered service-related, some aspect of military service must be the primary cause of the injury in the opinion of a medical expert.” Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2988–89 (2009) (suggesting use of the VA’s criteria for service-related injuries).

departures for diminished capacity are similarly limited by the strict requirements of Federal Sentencing Guideline 5K2.13, which does not apply to the military.⁵⁵²

Contrastingly, in *Johnson v. Singletary*, a concurring justice of Florida's Supreme Court described how TBI sustained during a training accident could easily constitute a service-related mental condition for sentence mitigation purposes. The soldier there "descended into madness" after incurring "a freak head injury on military maneuvers" when he "was struck directly in the head by a [four or five pound] smoke grenade canister hurled in his direction."⁵⁵³ Justice Kogan found that the injury "contributed to [an] inability to cope," which existed at the time of the offense, despite the absence of a combat-connection.⁵⁵⁴ The logic would be little different in evaluating the mental condition of a female offender suffering from PTSD as the result of a sexual assault occurring during her military service.⁵⁵⁵ In both instances, "[a] peacetime veteran could incur PTSD or TBI through any variety of noncombat, service-related causes ranging from training exercise accidents to incidents occurring while performing day-to-day military duties."⁵⁵⁶

⁵⁵² See, e.g., Robert R. Miller, Comment, *Diminished Capacity—Expanded Discretion: Section 5K2.13 of the Federal Sentencing Guidelines and the Demise of the 'Non-Violent Offense,'* 46 VILL. L. REV. 679 (2001) (discussing aspects of U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (1997)).

⁵⁵³ *Johnson v. Singletary*, 612 So. 2d 575, 578, 578 n.4 (Fla. 1993) (Kogan, J., concurring specially).

⁵⁵⁴ *Id.* at 580.

⁵⁵⁵ To this end, Representative Jane Harman shared statistics indicating that "[w]omen in the U.S. military are more likely to be raped by a fellow soldier than killed by enemy fire" Hon. Jane Harman, *Rapists in the Ranks: Sexual Assaults are Frequent, and Frequently Ignored, in the Armed Services*, L.A. TIMES, Mar. 31, 2008, at 15. For a general discussion of military sexual trauma, see, e.g., Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma*, 16 WM. & MARY J. WOMEN & L. 155 (2009). Cf. also Chris R. Brewin et al., *Meta-Analysis of Risk Factors for Posttraumatic Stress Disorder in Trauma-Exposed Adults*, 68 J. CONSULTING & CLINICAL PSYCHOL. 748, 752–53 (2000) (discussing gender as a risk factor in the development of PTSD, and situations in which traumatized women would be more likely to develop the condition, including combat, and even mixed traumas). In VTCs, some women offenders have suffered such trauma, requiring a different approach to their treatment and rehabilitation. See Clubb Interview, *supra* note 409.

⁵⁵⁶ Giardino, *supra* note 551, at 2965 n.61.

The proposed model instruction helps to ensure that panel members do not deny clemency consideration based on an unnecessary, self-imposed requirement for a direct combat connection:

As long as the accused was performing duties faithfully and honorably at the time trauma was sustained, you may consider this as a positive factor in recommending treatment. There is no requirement for trauma to have been inflicted by an enemy during combat operations for the accused to receive the benefit of your clemency consideration. You may consider trauma to be service-connected if it was sustained during a training exercise, as the result of a sexual assault, or any other execution of faithful service to the Government.⁵⁵⁷

This instruction, which follows Justice Kogan's distinction, is also consistent with the *Benchbook's* current guidance on the consideration of symptoms suffered at times other than the date of the charged offense, which could reasonably include behavior in response to a full range of trauma.⁵⁵⁸ The proposed instruction highlights honorable service to avoid the situation where offenders might benefit from clemency premised upon adverse reactions resulting from their own criminal conduct, such as PTSD resulting from observing the aftermath of a detainee they had assaulted, tortured, or killed.⁵⁵⁹

2. *Co-occurring Substance Abuse*

The issue of service connection may arise in regard to "self-medication"—the accused's use of narcotics or other controlled substances to minimize the symptoms of PTSD. The term, which has been overused in different contexts, often obscures the significance of one's resort to controlled substances rather than conventional methods of treatment. Here, one uses a controlled substance, not to get "high," but

⁵⁵⁷ *Infra* app. F.

⁵⁵⁸ DA PAM. 27-9, *supra* note 43, instr. 6-6, at 942.

⁵⁵⁹ *Cf.* Bell v. Cone, 535 U.S. 685, 712 (2002) (Stevens, J., dissenting) (describing how honorable military service should reasonably result in mitigation value). The perpetrator of a heinous crime often suffers traumatic stress as the result of his participation. *See, e.g.,* J. Vincent Aprille II, *PTSD: When the Crime Punishes the Perpetrator*, 23 CRIM. JUST. 39 (2009) (exploring the reality of this common phenomenon).

rather to get “normal.”⁵⁶⁰ There is mitigation value when an accused resorts to controlled substances in an effort to “slow down, calm down and experience the world as most everyone else does.”⁵⁶¹ Self-medication may reveal how PTSD contributed to offenses involving distribution or use of controlled substances, as described in *Perry*:

There is certainly a clear and interdependent “causal” relationship between (a) the disorder which caused the nightmares and associated symptoms of the disease; (b) Perry’s efforts to avoid sleep in order to avoid the nightmares; (c) Perry’s impaired judgment as a result of his efforts to avoid sleep and the nightmares which followed; (d) Perry’s use of over-the-counter medication followed by cocaine to cause exhaustion so as to prevent sleep which permitted avoidance of the nightmares; and (e) distribution of cocaine to fund the purchase of cocaine so as to be able to continue to self-medicate.⁵⁶²

Along the same lines, the purposeful failure to obtain treatment, as underscored by the military judge in *United States v. Miller*,⁵⁶³ has mitigation value because it also signals abnormality. As noted by *Perry*, not only was self-medication consistent with the *Diagnostic and Statistical Manual*’s criterion discussing “avoidance” behavior, but the “refusal to seek help likewise tends to confirm that Perry’s judgment was impaired, as he was willing to suffer through a life haunted by uncontrollable compulsion to vividly relive truly horrific experiences.”⁵⁶⁴ The proposed model instruction, therefore, addresses self-medication by permitting members to consider the “[u]se of controlled substances to limit unwanted effects of the mental condition.” It goes on,

⁵⁶⁰ Elliot L. Atkins, *Preparing for Sentencing in the Federal Courts: Use of Mental Health Consultation in the Development of Departure Strategies*, THE CHAMPION, Mar. 1995, at 38, 40.

⁵⁶¹ *Id.* In a Supreme Court case involving counsel’s failure to present evidence of PTSD during the sentencing phase, Justice Stevens recognized “the possible mitigating effect of drug addiction incurred as a result of honorable service in the military.” *Bell*, 535 U.S. at 712–13 (Stevens, J., dissenting).

⁵⁶² *United States v. Perry*, 1995 WL 137294, at *8 (D. Neb., Mar. 27, 1995) (unpublished).

⁵⁶³ Trial Transcript, *supra* note 19, at 78 (noting a “common but outmoded belief” to abstain from assistance to avert perceived weakness).

⁵⁶⁴ *Perry*, 1995 WL 137294 at *10.

[i]f an accused has used controlled substances not to get “high” but, instead, in an attempt to be “normal,” such as in an attempt to eliminate problems falling asleep because of recurring nightmares or intrusive thoughts, this may present evidence of the nature of an accused’s mental condition and the value of treatment.⁵⁶⁵

The proposed instruction also addresses the failure to seek treatment in a number of ways, including guidance on factors that may have prevented rehabilitative efforts, such as superiors who would not permit the accused to obtain treatment or otherwise interfered with the ability to be treated.⁵⁶⁶

3. *The Physical and Behavioral Manifestation of Unseen Injuries*

A final contribution from the civilian cases concerns the analytical framework for evaluating symptoms. While Instruction 6-6 emphasizes the fact that labels alone should not dictate whether a panel accords weight to evidence of a mental condition, little is said regarding a more useful alternative.⁵⁶⁷ Its admonishments to consider “appearance, behavior, speech, and actions” still fall short of meaningful guidance based on the near-endless reach of these terms.⁵⁶⁸ Federal cases like *United States v. Cantu* assist to this end by identifying “distort[ion] of reasoning” and “interference with [the] ability to make considered decisions” as the influences of concern, regardless of the condition’s label.⁵⁶⁹ In this respect, “nightmares,” “flashbacks to scenes of combat,” “intrusive thoughts [and images],” “rage,” “paranoi[a],” and

⁵⁶⁵ *Infra* app. F.

⁵⁶⁶ *Id.* In *Johnson*, for example, it was significant to the court that the defendant’s condition worsened because he was “abandoned without the medical intervention he obviously needed after being injured while on his nation’s business.” *Johnson v. Singletary*, 612 So. 2d 575, 580 (Fla. 1993) (Kogan, J., specially concurring). For a recent study of other common obstacles to successful treatment of PTSD, see generally Paul Y. Kim et al., *Stigma, Barriers to Care, and Use of Mental Health Services Among Active Duty and National Guard Soldiers After Combat*, 61 PSYCHIATRIC SERVS. 582, 585 tbl.3 (2010).

⁵⁶⁷ See DA PAM. 27-9, *supra* note 43, instr. 6-6, at 942.

⁵⁶⁸ *Id.*

⁵⁶⁹ 12 F.3d 1506, 1513 (9th Cir. 1993). See also *id.* at 1512 (also identifying “a failure to be able to quickly or fully to grasp ordinary concepts” as a functional description that cuts across definitions or labels).

“explosive[ness],” all have value when considered for their “effect on [one’s] mental process.”⁵⁷⁰

Clinical studies have categorized the nature of mental impairments like PTSD in a helpful way. Mitigation expert Deana Dorman Logan divides behaviors under the main headings of “reality confusion”; “speech and language”; “memory and attention”; “medical complaints”; “emotional tone”; “personal insight and problem solving”; “physical activity”; and “interactions with others.”⁵⁷¹ Others have identified specific executive functions that are commonly linked to criminal offenders with mental illnesses.⁵⁷² The proposed model instruction applies these concepts first by defining a “mental condition” in terms of its effects: “As referenced here, the term ‘mental condition’ means impairment to the accused’s ability to reason and make considered decisions.”⁵⁷³ It then provides specific categories in the notes to help the members consider specific behaviors that are evidence of a mental condition as defined.⁵⁷⁴

While evaluation of PTSD and other service-connected disorders will grow increasingly complex with the advancement of psychotropic medications and the promulgation of new diagnostic criteria, the proposed instructions are purposefully adaptable to accommodate such developments. Although expert testimony and advocacy may often provide the panel with enough information to evaluate evidence for the purpose of clemency, the complex, individualized nature of unseen injuries requires additional precautions to ensure that uneducated assumptions do not deprive an accused of the benefit of fair consideration or activate impulses that cause the panel to abandon a reasoned approach.⁵⁷⁵

⁵⁷⁰ *Id.*

⁵⁷¹ Deana Dorman Logan, *Learning to Observe Signs of Mental Impairment*, in KY. DEP’T OF PUB. ADVOCACY, MENTAL HEALTH AND EXPERTS MANUAL figs.1–8 (6th ed. 2002), <http://www.dpa.state.ky.us/library/manuals/mental/Ch17.html>.

⁵⁷² See *infra* app. F (citing Russell Stetler, *Mental Disabilities and Mitigation*, THE CHAMPION, Apr. 1999, at 49, 51).

⁵⁷³ *Id.* (providing additional commentary).

⁵⁷⁴ *Id.* at n.

⁵⁷⁵ See, e.g., Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42, 49 (observing the operation of a “certain stigma” jurors commonly attach to PTSD as a result of their lack of knowledge about the disorder or what they have learned in the media).

F. Succinct Descriptions of Individualized Treatment Programs, Including Treatment Courts

The proposed instructions provide a concise description of the general attributes of an “intensified” treatment program, as opposed to the standard probationary term accorded by a suspended sentence with no treatment requirement or provisions that merely require treatment without the possibility of sanctions. In pertinent part, the proposed instruction advises,

[Y]ou may recommend a more intensive form of probation that uses sanctions to encourage compliance with treatment plans. Examples of possible sanctions include: being subject to unannounced searches of person and property, random drug testing, imposition of curfews, electronic monitoring, and intermittent confinement. You should not speculate on the specific terms that would be imposed during the suspension, but should recommend a basic form of clemency best suited to the accused’s individual needs or circumstances.⁵⁷⁶

Despite the brief description, the Modified Sentence Worksheet and corresponding instructions provide tremendous incentive for defense counsel to recommend programs that are well suited to meet the accused’s particular needs.⁵⁷⁷

Should the defense offer evidence concerning a specific treatment program, the instructions provide additional guidance, advising the members that they may consider the accused’s “desire and willingness to participate,” his “personal understanding of the program’s requirements,” “plans the accused may have developed” to maximize the benefits of treatment, “[t]he availability of a specific type of treatment to address the accused’s present symptoms,” effects of confinement on the accused’s mental condition, and the impact of treatment on the accused’s family.⁵⁷⁸ In addressing preadmission to a specific program, the instruction also explains that, while the panel is free to consider such evidence, it “should

⁵⁷⁶ *Infra* app. F.

⁵⁷⁷ The election of a less stringent program may provide the convening authority with insight necessary to fully evaluate a clemency request because it signals greater trust in the accused’s ability to rebound from mental illness.

⁵⁷⁸ *Infra* app. F.

not assume that the absence of evidence about a specific program would disqualify the accused from participating in one.”⁵⁷⁹

Although the instructions on intensive treatment are minimal for the purpose of considering clemency recommendations, provisions concerning the same program attributes are necessarily detailed in the context of plea agreements. Despite this incongruity, the standards governing pretrial plea agreements are still valuable in all contested panel cases that result in clemency recommendations; due to the requirements for voluntary participation in a treatment program, convening authorities can use the same standards applicable to pretrial agreements to achieve meaningful post-trial agreements.⁵⁸⁰ The next Part, therefore, explores multiple aspects of treatment-based pretrial provisions.

VI. Pretrial and Post-Trial Agreements Contemplating Suspension of Sentences for Treatment of Mental Conditions

Rather than judge-alone and panel courts-martial involving *sua sponte* recommendations for the suspension of punitive discharges, the best source of guidance on the establishment of effective treatment options appears in the decades of precedents addressing such terms in pretrial agreements (PTAs). In their promotion of discharge remission at the installation level, the military courts have highlighted special considerations pertaining to treatment. As military law has evolved, the courts have become increasingly willing to enforce PTAs with innovative provisions for soldiering-back from punitive discharges.⁵⁸¹ In fact, by 1999, some commentators recognized that the Court of Appeals for the Armed Forces (CAAF) had reached the most liberal period in its

⁵⁷⁹ *Id.*

⁵⁸⁰ *Cf.* Foreman, *supra* note 407, at 106 (citing various cases for the proposition that the courts “allow a great deal of flexibility in [post-trial] negotiations between the accused and the convening authority”).

⁵⁸¹ *Id.* at 116 (“[T]he CAAF has paved the way for much broader discretion on the part of convening authorities for entering into pretrial agreements with innovative terms.”). *See also id.* at 115 (recognizing a “trend” of an “increasingly hands-off approach when reviewing pretrial agreements”).

history in construing such terms.⁵⁸² The position apparently remained unchanged in 2010.⁵⁸³

This trend is mirrored in PTAs that include terms permitting offenders to benefit from state and local treatment programs unavailable in the military.⁵⁸⁴ Like many medical rehabilitation programs for wounded warriors, they recognize that some civilian programs are highly coordinated and are often better suited to facilitate civilian employment and life routines following military service.⁵⁸⁵ Military law upholding such PTA terms permits military offenders to benefit from all existing problem-solving courts, including VTCs. This section describes the rulings of military courts on some of the most important provisions.

A. Particular Lessons for Treatment Programs

Within the significant corpus of law on pretrial agreements related to treatment programs there are many lessons. The first set deals with the reality that the convening authority must necessarily rely on the expertise of mental health personnel to carry out a rehabilitation program in accordance with professional standards that are likely unfamiliar to the command. Despite this reliance on others, the convening authority may not delegate clemency discretion to these professionals to determine the

⁵⁸² *Id.* at 116 (“The playing field has never before been so broad, affording both the accused and the convening authority unlimited opportunities to bargain with each other within the confines of fair play.”).

⁵⁸³ Major Stefan R. Wolfe, *Pretrial Agreements: Going Beyond the Guilty Plea*, ARMY LAW., Oct. 2010, at 27, 29 (“The appellate courts have . . . abandoned their past paternalism and now have an expansive and permissible attitude towards pretrial agreements.”).

⁵⁸⁴ *See, e.g.*, *Spriggs v. United States*, 40 M.J. 158, 163 (C.M.A. 1994) (recognizing that the parties’ objective to involve a state agency in providing treatment was commendable, especially because they attempted to “creatively and effectively address the best interests of the individual accused and of society in a meaningful way . . .”).

⁵⁸⁵ *Compare* U.S. Naval Inst. & Military Officers Ass’n of Am. War Veterans Reintegration Panel (CSPAN television broadcast Sept. 10, 2010) [hereinafter Watkins Presentation], available at <http://www.c-spanvideo.org/oakleywatkins> (comments of Captain Oakley Key Watkins, Commander, U.S. Navy Safe Harbor Program) (explaining how the Navy’s rehabilitative program largely depends on civilian community agencies for programs such as job placement and residential treatment that the Navy is unable to provide), *with* Marvin & Jokinen, *supra* note 443, at 53, 57 (observing that “[t]he sentence recommendation of counsel need not be limited to the options contained in the Rules for Court-Martial” and that, “[i]n appropriate cases, a sentence recommendation can blend normal sentence components with participation in community or military rehabilitative programs”).

attainment or violation of material terms in the PTA. Thus, a military court disapproved of a PTA term in which the commander of a medical treatment facility was empowered to determine whether the accused “successfully” completed treatment by that commander’s own subjective standards prior to remission of the conditional court-martial sentence.⁵⁸⁶ As applied to VTCs or MHCs, this same rule would prohibit the convening authority from conditioning punitive discharge remission merely on the treatment court judge’s subjective determination that the accused “successfully” completed the program.⁵⁸⁷

Importantly, while the convening authority cannot delegate the individual discretion accorded to her by Article 71(d) of the *UCMJ* and RCM 1108(b),⁵⁸⁸ she also cannot delimit this discretion to the point where remission is conditioned on whatever subjective, unarticulated factors she might deem sufficient at a future date. To the contrary, military appellate courts have interpreted the plea provisions of RCM 910(f) to require the accused to manifest understanding of not simply all material PTA terms, but also the corresponding consequences of violating them.⁵⁸⁹ The section below explores these two complementary requirements in turn.

1. Successful Explanation of Treatment Plan Requirements

Over the years, military courts have struggled to define the threshold

⁵⁸⁶ *United States v. Wendlandt*, 39 M.J. 810, 812–13 (A.C.M.R. 1994).

⁵⁸⁷ Alone, the word “successful” implies a subjective determination. A person can complete a job (e.g., building a bookcase), but the user may not deem the work successful (e.g., if the shelves are crooked, or not spaced to accommodate large books.)” *Id.* at 813.

⁵⁸⁸ *UCMJ* art. 71(d) (2008) (“The convening authority . . . may suspend the execution of any sentence or part thereof, except a death sentence.”); *MCM*, *supra* note 34, R.C.M. 1108(b) (“The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a court-martial, except for a sentence of death.”).

⁵⁸⁹ Rule 910(f) governs the plea agreement inquiry. *MCM*, *supra* note 34, R.C.M. 910(f). This Rule also incorporates by reference the additional requirements of RCM 705, which covers, among other things, both prohibited and permissible plea terms. Notably, RCM 705(c)(2)(D) authorizes the accused’s “promise to conform [his or her] conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence” Subsection (3) requires “disclosure of the entire agreement before the plea is accepted,” and subsection (4) requires inquiry into the agreement to ensure the accused’s understanding. *Id.* R.C.M. 910(f)(3) & (4). Additionally, the requirement of RCM 1108(c)(1) mandates that all conditions of suspended sentences must be further specified in writing.

for sufficient explanation of treatment program participation requirements. While a literal interpretation of Rule 910 would require the PTA to repeat verbatim every component—to include terms in all waivers and forms that the accused would have to sign as part of the program, or an accounting of the content, frequency, or duration of every required therapy session⁵⁹⁰—these minute details far exceed the convening authority's legal requirements.⁵⁹¹ Although courts have pointed to the validity of a standard condition that the accused refrain from violating any provisions of the *UCMJ* for the duration of the suspension—despite its lack of explanation for each of the *UCMJ*'s punitive articles⁵⁹²—PTAs concerning treatment programs require a bit more illumination.⁵⁹³

Convening authorities are best served by designating an existing program that has all of its major requirements expressed in a prospectus, like most treatment courts already provide by virtue of their rigorous program evaluation requirements.⁵⁹⁴ Moreover, due to the legal context surrounding programs administered by treatment *courts*, many of these programs use *legally vetted*, written participation agreements.⁵⁹⁵ During a

⁵⁹⁰ For a case in which the appellant raised these issues, see *United States v. Coker*, 67 M.J. 571, 576, 576 n.8 (C.G. Ct. Crim. App. 2008), addressing the claim that he lacked knowledge of “what rights he is required to waive, in order to participate in the sex offender program” and the absence of information on the number of sessions in “three treatment series that are prerequisite to [additional required] sex offender treatment [meetings].”

⁵⁹¹ *Id.* at 576.

⁵⁹² See, e.g., *United States v. Myrick*, 24 M.J. 792, 796 (A.C.M.R. 1987) (“In our opinion, to require appellant to participate in and successfully continue a prescribed counseling program is a condition of suspension that is as specific as the well-recognized one that the probationer not violate any punitive article of the code.”). Note, however, that this contemplates pre-existing treatment conditions, hence prior knowledge of its terms.

⁵⁹³ This is likely because military members are routinely trained in the requirements of the *UCMJ* and have attained some familiarity with them during prior military service, whereas treatment requirements are likely unfamiliar to the accused.

⁵⁹⁴ For example, in accordance with the eighth Key Component of Drug Courts, which applies to all VTCs, the Santa Clara County VTC has pledged to “draw upon our experience in evaluating and monitoring our other treatment court collaborative efforts to replicate our prior efforts in this new program because we recognize that if we do not have specific goals and measures of success or lack of success, the program will fail.” SANTA CLARA CNTY. VETERAN’S TREATMENT COURT: POLICY AND PROCEDURE MANUAL 4 (Apr. 2010) (on file with the Nat’l Ass’n of Drug Court Prof’ls, Justice for Vets, Alexandria, Va.).

⁵⁹⁵ See, e.g., Oklahoma County Mental Health Court Participant Performance Contract, reprinted in COUNCIL OF STATE GOV’TS, BUREAU OF JUSTICE ASSISTANCE, A GUIDE TO

providence inquiry, it is insufficient merely for the accused to silently read the treatment program description and associated requirements and then to acknowledge his understanding of the terms he read.⁵⁹⁶ Although each of the program's requirements need not be reproduced verbatim, and can be summarized in writing,⁵⁹⁷ the military judge is required to discuss each of the accused's material obligations under the treatment plan on the record. In the Coast Guard appellate case of *United States v. Coker*, for example, the court found error in the trial judge's failure to verbally explore the program's particular requirements to "admit some responsibility and be willing to discuss his behavior in detail" and "agree to follow program guidelines specified in a Program Agreement," even though the accused acknowledged reading about them in a general sense.⁵⁹⁸

Because relapse and dishonesty are not only possible but *expected* as part of the recovery process in any treatment program,⁵⁹⁹ an accused must understand the consequences of noncompliance and the interrelationship of nonmaterial and material PTA terms. In *United States v. Cockrell*, the PTA required the accused to pay for the costs of his participation in a sex offender program that mandated voluntary submission to polygraph examinations and the discussion of his past sexual behaviors.⁶⁰⁰ The court addressed significant "gaps" between PTA's terms and consequences for noncompliance that rendered those terms unenforceable; specifically, "[w]ithout amplification in the pretrial agreement or mutual understanding on the record, noncompliance could mean anything from the Appellant's voluntary disenrollment from the program to the Convening Authority's subjective evaluation that Appellant was not making progress."⁶⁰¹ The court explained that the

MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION 91–92 (2005) (providing a detailed representative example).

⁵⁹⁶ *United States v. Coker*, 67 M.J. 571, 576 (C.G. Ct. Crim. App. 2008) ("The military judge ascertained that Appellant had read [the program description] but did not discuss with Appellant the obligations it sets forth for an individual seeking to enroll in the sex offender treatment program.").

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.*

⁵⁹⁹ See, e.g., Heather E. Williams, *Social Justice and Comprehensive Law Practices: Three Washington State Examples*, 5 SEATTLE J. SOC. JUST. 411, 433 (2006) (describing how, in the King County Family Drug Court, which represents other problem-solving courts in Washington, "[b]ecause of the nature of addiction and recovery, the court expects that relapses will happen").

⁶⁰⁰ 60 M.J. 501, 505 (C.G. Ct. Crim. App. 2004).

⁶⁰¹ *Id.*

unarticulated bases for vacating the suspension might include “Appellant having insufficient funds for continued treatment, a refusal by him to submit to a specific polygraph examination, or having submitted to a polygraph examination, an assessment by the polygraph examiner of deception by Appellant.”⁶⁰² In *Cockrell*, because the accused was provided with no idea of the standards that would ultimately be applied to potential infractions, the PTA’s requirement for treatment program “compliance” was unenforceable.⁶⁰³

Fortunately, other cases provide necessary illumination of how these fatal “gaps” can be bridged in the PTA. In the subsequent opinion of *United States v. Coker*, the same appellate court found terms sufficient which identified basic program requirements and then “provide[d] that failure of compliance by Appellant allows the Convening Authority to vacate the suspension after following the hearing procedures set forth in R.C.M. 1109.”⁶⁰⁴ The connection between specific terms and “specific consequences” eliminated the problem of “unlimited and undefined discretion on the part of the Convening Authority.”⁶⁰⁵

2. Completion Times

Like the early military rehabilitative programs, treatment courts have learned through experience that individualized treatment plans may exceed ideal timeframes for program completion. Many VTC programs last longer than the twelve-month period recommended for drug courts, with most VTCs approaching twenty-four months due to mental health

⁶⁰² *Id.*

⁶⁰³ *Id.* at 506–07 (finding “insufficient information to meet the terms of Article 72, UCMJ, and RCM 1109 . . . ,” both of which govern proceedings to vacate suspended sentences).

⁶⁰⁴ 67 M.J. 571, 576–77 (C.G. Ct. Crim. App. 2008). For a practical explanation of the Rule’s multiple requirements, see generally DAVID A. SCHLUETER ET AL., MILITARY CRIMINAL PROCEDURE FORMS §11-11(a)–(d) (3d ed. 2009) (providing a discussion of key principles and scripts for vacation proceedings). At the most basic level, the procedures of RCM 1109 are intended to meet the due process requirements articulated by the Supreme Court in its *Gagnon*, *Morrissey*, and *Black* decisions. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Black v. Romano*, 471 U.S. 606 (1985).

⁶⁰⁵ *Coker*, 67 M.J. at 577. *Coker*, however, was still not a perfect case because the military judge failed to explore the essential terms on the record. *Id.* at 576.

treatment requirements.⁶⁰⁶ In recommending an ideal duration of a suspended court-martial sentence, Army Regulation 27-10 specifies the period of one year for a BCD adjudged by a Special Court-Martial,⁶⁰⁷ or two years for any punitive discharge (BCD or DD) adjudged at a General Court-Martial.⁶⁰⁸ However, these periods are conservative compared with RCM 1108(d)'s requirement that the timeframe for a suspension not be "unreasonably long," in all instances.⁶⁰⁹

In the case of *Spriggs v. United States*, the Court of Military Appeals concluded that five years' completion time approached the "outer limits" of suspension of a punitive discharge for sex offender treatment permitted by Rule 1108.⁶¹⁰ Accordingly, a program's terms were indefinite and impermissible when they required treatment for up to five years, followed by up to ten years of supervision.⁶¹¹ Despite the insufficiency of the treatment terms in *Spriggs*, the court otherwise encouraged and "commend[ed]" treatment plans with civilian agencies.⁶¹² Because automatic remission of a probationary sentence not tied to treatment progress or the participant's performance provides disincentives to attain program objectives,⁶¹³ the proposed pretrial agreement conditions remission on the maximal time contemplated for graduation from the program.⁶¹⁴ In any event, the PTA must specify a date certain for remission of the suspended portions of the sentence.

⁶⁰⁶ Clubb Interview, *supra* note 409 (observing a range for VTCs between nine and twenty-four months). See also Holbrook & Anderson, *supra* note 9, at 29 (observing program lengths ranging from "an initial 12 month probation with three phases followed by a six month post-graduation phase" to two years among 14 surveyed VTCs). At least one VTC requires a commitment of more than thirty months. See SUPERIOR COURT OF CAL., CNTY. OF ORANGE, VETERANS COURT PARTICIPANT'S HANDBOOK 3 (rev. ed. Oct. 2009) (on file at Nat'l Ass'n of Drug Court Prof'ls, Justice for Vets, Alexandria, Va.) (describing how participation in the VTC is accomplished in conjunction with a "formal [term of] probation for a period of three years").

⁶⁰⁷ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ¶ 5-35a(2), at 40 (3 Oct. 2011).

⁶⁰⁸ More specifically, "[t]wo years or the period of any unexecuted portion of confinement (that portion of approved confinement unserved as of the date of action), whichever is longer for a GCM." *Id.* ¶ 5-35a(3), at 40.

⁶⁰⁹ MCM, *supra* note 34, R.C.M. 1108(d) ("Suspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long.").

⁶¹⁰ 40 M.J. 158, 163 (C.M.A. 1994).

⁶¹¹ *Id.* at 160, 162.

⁶¹² *Id.* at 163.

⁶¹³ *United States v. Cadenhead*, 33 C.M.R. 742, 745 (A.F.B.R.), *aff'd*, 34 C.M.R. 51 (C.M.A. 1963).

⁶¹⁴ See *infra* app. G (providing a model pretrial agreement for modification).

3. Pay Status

The *Spriggs* opinion separately addressed issues related to the pay status of a military member while completing a probationary sentence that foreseeably removes him from the productive service of the Armed Forces. Under the terms of Senior Amn Spriggs's PTA and a subsequent agreement, the convening authority required him to begin unpaid appellate leave pursuant to Article 76a, *UCMJ*; to pay victim restitution on a schedule; to engage in an alcohol rehabilitation program if suggested after consultation; and to complete a designated civilian sex offender treatment program, or suitable alternative, provided that the funding was "without use of Air Force Funds."⁶¹⁵ The practical effect of these requirements left Amn Spriggs with serious hardships that affected his family. They constituted impermissible terms because Article 76 only permits appellate leave for discharged servicemembers with *unsuspended* punitive discharges.⁶¹⁶

That probationary servicemembers cannot be placed on unpaid appellate leave while pursuing treatment is but one lesson from *Spriggs*. Another is that the conditions of probation for treatment should not be so onerous that a servicemember still on active duty is forced by those conditions between a "proverbial rock and a hard place" to hunt for civilian jobs without having a discharge that would enable meaningful employment.⁶¹⁷ While *Spriggs* does not foreclose alternative arrangements that might take funds out of an accused servicemember's control,⁶¹⁸ the opinion suggests that it becomes the Government's obligation to assist the accused in meeting pretrial terms on which he expends a good faith effort if financial hardship is the only factor lending

⁶¹⁵ *Spriggs*, 40 M.J. at 159.

⁶¹⁶ UCMJ art. 76a (2008) (observing that "an accused who has been sentenced by a court-martial may be required to take leave pending completion of the action . . . if the sentence, as approved . . . includes an unsuspended dishonorable or bad conduct discharge").

⁶¹⁷ *Spriggs*, 40 M.J. at 160: "The rock: The action obligated him to pay from his own pocket for the cost of his rehabilitation program The hard place: For the duration of that suspension . . . Spriggs would not receive any active duty pay . . . and would be handicapped in his effort to seek civilian employment by the fact that he had no discharge at all from his military service." In this instance, despite searching for a civilian job for five months, and eventually accepting a \$4.00-per-hour pizza delivery job, Spriggs and his family lost their home, were evicted from their apartment, and suffered "continuingly deteriorating financial and related living conditions" that culminated in their stay at a church which provided them with donated food. *Id.* at 161.

⁶¹⁸ *Id.* at 163.

to noncompliance, despite those efforts.⁶¹⁹ So as not to provide the accused with a financial windfall during the course of treatment, the PTA could require the accused to make automatic allotments to fund administrative costs of a treatment program for amounts in excess of living requirements.⁶²⁰

4. Therapeutic Incarceration

While incarceration represents the ultimate deprivation of personal liberty, aside from death, brief periods of incarceration remain a hallmark of treatment court programs as the ultimate sanction for program noncompliance on a graduated scale.⁶²¹ The difference between therapeutic incarceration and outright incarceration, however, is the relationship of the brief custodial period to an unwanted behavior occurring in the context of individualized therapy. The possibility of therapeutic incarceration looming as a potential consequence of treatment noncompliance can, in itself, provide necessary legal leverage to encourage treatment progress. However, the mere fact of therapeutic incarceration during the course of program participation should not automatically trigger vacation proceedings as breach of a material term in the PTA or count as vacation of a deferred or suspended term of confinement in the original sentence. Although the distinction is a fine one, the proposed model PTA contains a provision to enable the effective use of therapeutic incarceration.

⁶¹⁹ Judge Cox, in addressing the requirements for vacating a suspended sentence under RCM 1113(d)(3), considered the good faith efforts of the accused and thought that the financial circumstances “require[d] some effort by both the appellant and *the Government* to resolve the problem.” *Id.* at 164 (Cox, J., concurring) (emphasis in original).

⁶²⁰ Military courts have upheld provisions of restitution that are functionally little different, and the standard practice of requiring proof of financial allotments from pay is routinely required prior to granting requests for deferments to provide money for dependents. *See, e.g.*, United States v. Mitchell, 51 M.J. 490 (C.A.A.F. 1999) (discussing the validity of restitution conditions in pretrial agreements); Lieutenant Colonel Timothy C. MacDonnell, *Tending the Garden: A Post-Trial Primer for Chiefs of Criminal Law*, ARMY LAW., Oct. 2007, at 1, 13 (specifying terms of deferred forfeitures themselves “contingent on the accused’s establishing and maintaining an allotment for the benefit of [his] dependents”).

⁶²¹ *See supra* Parts I & II (discussing the concept of legal leverage and its value in treatment court settings).

In pertinent part, the model provision resembles the Texas legislature's approach to the issue in its community supervision statute. Article 42.12 of Texas's *Code of Criminal Procedure* provides that a court may require, as a condition of community supervision, the probationer to serve up to 30 days confinement for a misdemeanor or up to 180 days confinement for a felony "at any time during the supervision period," and "in increments smaller than" those maximum terms.⁶²² Adopting similar terms in the PTA permits an interdisciplinary team to effectuate its treatment objectives without unnecessarily consuming the convening authority's time when activating intermittent incarceration. If, in advance, an accused understands and agrees to a minimal number of days of incarceration that may be distributed intermittently during the period of the suspension as a part of his treatment, this would not amount to improper delegation of the convening authority's discretionary function.⁶²³ It also represents a PTA term far more favorable to the accused than standard terms requiring several months of incarceration prior to the implementation of a suspended sentence for the purpose of treatment.⁶²⁴ Furthermore, the accused's knowledge of the relationship and interplay between therapeutic incarceration and material terms that *do* require vacation proceedings would eliminate potential ambiguity in his understanding.⁶²⁵

5. *Deferral of Confinement to Effectuate Treatment Objectives*

A major limitation of the court-martial process is the immediate imposition of confinement following a sentence including confinement, even despite the possibility that a convening authority may suspend or remit that very confinement during a later review of the case. Under current practice, the first time a convening authority is able to modify the confinement provisions occurs weeks or months after the verdict when the trial transcript has been authenticated and the case is ready for

⁶²² TEX. CODE CRIM. PROC. art. 42.12, § 12(a) & (c) (2011).

⁶²³ See *supra* discussion accompanying notes 586–87 (discussing *Wendlandt's* prohibitions on delegation of the convening authority's functions).

⁶²⁴ See, e.g., *United States v. Cockrell*, 60 M.J. 501, 502, 503 (C.G. Ct. Crim. App. 2004) (suspending the accused's sentence in order to participate in sex offender treatment outside a confined setting, however, only after his release from confinement for ten months).

⁶²⁵ See, e.g., *United States v. Martin*, 2006 CCA LEXIS 330, at * 4 (C.G. Ct. Crim. App., Dec. 6, 2006) (unpublished) (voiding two pretrial agreement provisions which could possibly have led to a conflicting or ambiguous interpretation without discussion of the "interaction of the [] provisions" during the providence inquiry).

action.⁶²⁶ In some cases, where the accused suffers from an untreated condition like PTSD, time in confinement can aggravate his symptoms and make him less likely to benefit from treatment at a later period following release.⁶²⁷ This phenomenon was witnessed in the Air Force after prisoners were transferred from the USDB to the 3320th's rehabilitation program. According to Air Force clinicians and facilitators, these prisoners were less amenable to rehabilitative treatment because they had already been conditioned: "They learned to play their confinement center's game, and this increased their difficulty with rehabilitation."⁶²⁸

The courts have been clear that automatic confinement is only a default standard, which is not mandatory.⁶²⁹ Convening authorities are therefore free to begin a period of suspension prior to their "action," if this is specified in writing prior to the adjudged sentence. Like the convening authority in *Mack*, convening authorities in cases involving untreated mental conditions like PTSD can defer confinement for a period that would permit immediate entry into a treatment program.⁶³⁰ Although the military courts have identified situations where certain post-trial arrangements would violate public policy, the treatment-based suspended sentence resembles a longstanding and permissible clemency tradition.⁶³¹ Even where the case is fully contested, a preliminary

⁶²⁶ See, e.g., *United States v. Koppen*, 39 M.J. 897, 900 n.7 (A.C.M.R. 1994) ("The suspension will begin on the date when the convening authority takes action, which in our view is the best time for a suspension to begin.").

⁶²⁷ *Supra* Part I.

⁶²⁸ MILLER, *supra* note 245, at 179.

⁶²⁹ *Koppen*, 39 M.J. at 900 n.7 ("[T]he agreement may state the date or event when any period of suspension or confinement will begin.").

⁶³⁰ *United States v. Mack*, 56 M.J. 786, 787 (A. Ct. Crim. App. 2002) (deferring confinement for over a month to enable treatment of a medical condition).

⁶³¹ First, *United States v. Lundy* reveals that convening authorities may not suspend rank reduction if an unsuspended punitive discharge would statutorily require automatic rank reduction to the lowest enlisted grade. 60 M.J. 52, 55 (C.A.A.F. 2004) (invalidating the pretrial agreement on the basis that the convening authority promised more than the law would permit). Second, it would violate public policy for a convening authority to develop a sliding scale in which the accused would benefit from a suspended punitive discharge only if the accused first received a fixed amount of confinement from the court-martial. *United States v. Cassity*, 36 M.J. 759, 765 (N.M.C.M.R. 1992) (rejecting the arrangement because it essentially "distort[ed] the sentencing process" by undermining sentencing rationales). Third, the convening authority cannot create a plea provision that would limit the accused from exercising the right to apply for post-trial clemency and parole from a service secretary. *United States v. Tate*, 64 M.J. 269, 272 (C.A.A.F. 2007).

Under the instant proposal, the convening authority would suspend the entire sentence to permit the accused to enjoy the benefits of treatment prior to incarceration. Unlike

agreement for deferral of confinement to permit mental health treatment until action, *if a suspended sentence is recommended by the panel*, would be particularly useful in promoting a successful result.

B. Model Pretrial Agreement Contemplating Veterans Treatment Court Participation

The proposed pretrial agreement, included in Appendix G, contains a number of provisions modeled on common features of existing VTC programs. It provides detailed descriptions of program obligations and rules and distinguishes the relationship between material terms of the agreement with the convening authority and requirements of civilian programs that could lead to termination or expulsion from the program. Ideally, the convening authority's obligations will be limited, permitting maximum participation in the civilian program, with ample room for program administrators to impose rewards and sanctions that are responsive to individual performance and treatment needs. For this reason, therapeutic incarceration, alone, will not be the basis for vacating suspension of the sentence. Instead, the deal-breakers include violations of the *UCMJ* and civilian criminal laws, failure to pay for administrative costs of the civilian program (consistent with the accused's ability to pay), and termination from the treatment court program. On this last point, it is assumed that termination from a program reflects the interdisciplinary treatment team's position that the accused is no longer able to benefit from the program and not suited for its rehabilitative goals.

Although some civilian cases have addressed a defendant's due process rights under state and federal law before his original sentence can be reinstated following termination from a treatment court program,⁶³² such law would not apply to a military accused. As long as it

Lundy, the provisions for a suspended discharge would not require reduction to the lowest enlisted pay grade. Dissimilar to *Cassity*, the treatment-based suspended sentence would not require any period of confinement prior to enrollment. Finally, the arrangement would not offend the rights discussed in *Tate*. Here, the convening authority would maintain continuing jurisdiction over the accused through the duration of the suspension. The accused would remain free to apply for secretarial clemency upon vacation of the suspension.

⁶³² See, e.g., *Torres v. Berbary*, 340 F.3d 63, 72 (2d. Cir. 2003) (vacating a sentence imposed under a conditional release to a drug treatment facility based on the defendant's lack of a revocation hearing when the judge reinstated a felony sentence after taking the

is clear that participation in a state treatment program is merely a condition of an agreement with the convening authority, the proper forum for exercise of the accused's due process rights is within the limits of the *UCMJ* (Articles 71 and 72) and Rules for Courts-Martial (1108 and 1109), which are consistent with the Supreme Court's requirements for revocation of probation. The Department of Justice, through its U.S. Attorney's Office in the Western District of New York, has adopted a similar approach to deferred adjudication of purely federal offenders, in which it has permitted participation in the Buffalo VTC as a condition of the pretrial agreement.⁶³³ Even without a willing or able VTC, the provisions of Appendix G's model pretrial agreement can be adapted to a treatment program administered through a board of interdisciplinary officers, rather than a treatment court.⁶³⁴

VII. Functional Considerations Across the Military Justice Spectrum

On paper, the Modified Sentence Worksheet, panel instructions, and model pretrial agreement all provide instant methods to incorporate the proposal for enlightened sentencing within the limits of existing law and regulation. However, military justice depends as much on the commitment of its stakeholders as it does on the law. As an example, although clemency interviews with the accused were widely practiced throughout all of the services until 1977, the *Hill* case's requirement for representation during such interviews marked the functional "demise" of the practice.⁶³⁵ Because complexities of time, money, discipline, and the military mission all impact matters of military justice, this Part provides insight on the way these tools can be used most effectively. The sections below address functional considerations at each level of military justice practice from the defense counsel to the convening authority.

word of the program administrators that there was a valid basis for terminating his participation).

⁶³³ See *infra* Part VIII.B (describing the Department of Justice's cross-jurisdictional arrangement).

⁶³⁴ See *infra* Part VII.D (describing alternatives to VTCs).

⁶³⁵ Vowell, *supra* note 45, at 149 (citing *United States v. Hill*, 4 M.J. 33, 34 (C.M.A. 1977)).

A. Defense Counsel

Because all treatment courts operate on the basis of the offender's voluntary decision to participate,⁶³⁶ the accused should be the one to propose a treatment-based sentencing alternative to the convening authority or present such evidence at a court-martial.⁶³⁷ Even though the nature of mental illness creates additional challenges for defense counsel in contested cases,⁶³⁸ the court-martial sentencing format is of great benefit. Despite longstanding recommendations to eliminate panel sentencing,⁶³⁹ or, at least substitute a traditional presentence report for the adversarial penalty phase,⁶⁴⁰ the existing sentencing format withstands these challenges for a simple reason: The opportunity to observe the demeanor of the accused and probe further into competing positions will always be superior to a paper presentation, which can neither be questioned nor interpreted independently from the shaded perceptual lenses of its author.⁶⁴¹ In a necessarily limited environment where SJAs can satisfy their statutory responsibility with mere formulaic statements indicating disagreements with summarized positions,⁶⁴² and

⁶³⁶ Cartwright, *supra* note 9, at 306 (“In accordance with due process, all courts require that the defendant voluntarily agree to participate in the treatment court program.”).

⁶³⁷ Military courts require voluntary participation in rehabilitative programs. *See supra* discussion accompanying notes 411–15. Further, there may be strategic reasons to withhold this option from a decision-maker, such as the concern that panels or military judges would be more likely to adjudge punitive discharges in order to create greater incentives for successful treatment program completion.

⁶³⁸ *See, e.g.,* Seamone, *supra* note 65, at 161 (describing how the nature of mental illness largely requires defense attorneys to know more about its symptoms and treatment to be effective advocates).

⁶³⁹ *See, e.g.,* Major James Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1, 4 (1994) (noting consistent criticisms of panel sentencing dating back to the period just after WWI).

⁶⁴⁰ *See, e.g.,* Major General George S. Prugh, *Evolving Military Law: Sentences and Sentencing*, ARMY LAW., Dec. 1974, at 1, 5 (discussing the value of a formalized presentence report); Lowery, *supra* note 33, at 201 (“The factfinder should have a presentence report to aid in deciding what punishment to impose.”).

⁶⁴¹ *See, e.g.,* Michael I. Spack & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481, 536 (1999) (observing how “a presentencing report [is not] a significant improvement over the current sentencing procedure that allows the accused to introduce matters in extenuation and mitigation with relaxed rules of evidence”).

⁶⁴² *See, e.g.,* Major Andrew D. Flor, “I’ve Got to Admit It’s Getting Better”: *New Developments in Post-Trial*, ARMY LAW., Feb. 2010, at 10, 21 (describing recommendations for SJAs to respond to allegations of legal error with minimal statements, such as, “I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error. In my opinion, no corrective action is necessary.”) (citing *United States v. McKinley*, 48 M.J. 280, 281 (C.A.A.F. 1998)).

where a busy commander might have five or ten minutes, at best, to review binders of material, the commander is better served relying on the evaluations of those panel members who have, by virtue of their service, come to know the accused, the crime, and the victim on a far more intimate level.⁶⁴³

Within the sentencing forum, a unique series of rules related to rehabilitative evidence permits an approach unavailable to prosecutors who are more limited in the presentation of evidence in aggravation. Initiative, time, and creativity invested by the defense counsel determine whether these possibilities are ever realized, however.⁶⁴⁴ While it is beyond the scope of this study to outline the approach in detail, defense counsel have the benefit of a detailed scholarly article, which recommends a live presentencing report for the panel conveyed in the form of an unsworn statement by the accused and built around a request for a clemency recommendation from the panel regarding a suitable rehabilitation program.⁶⁴⁵ If defense counsel recognize their potential during the sentencing proceedings, not only will SJAs be required to brief clemency recommendations to the convening authority in addition to the standard boilerplate,⁶⁴⁶ but the evidentiary basis will exist to support clemency recommendations, limiting the chance that the military judge would construe the clemency recommendation as impeachment of the adjudged lawful sentence.

⁶⁴³ See, e.g., *United States v. Hurtado*, 2008 WL 8086426, at * 2 (A. Ct. Crim. App., June 30, 2008) (unpublished) (describing the value of clemency recommendations by panel members based on their criteria for selection); Major Robert D. Byers, *The Court-Martial as a Sentencing Agency: Milestone or Millstone?*, 41 MIL. L. REV. 81, 100 (1968):

Logically, the most intelligent decision concerning the feasibility of suspending all or a portion of a sentence can be made by the agency who, through the advantages of trial presence and an exhaustive inquiry into the background of the accused, is responsible for tailoring a sentence to meet the needs of the accused and society.

⁶⁴⁴ While “most defense counsel still rely on the same [limited sentencing] methodology as the prosecution,” they are still “in the best position to present the information that the court needs to tailor the sentence” when they exceed such limits. Marvin & Jokinen, *supra* note 443, at 53, 53.

⁶⁴⁵ See *id.* at 53, 54 (recommending a “defense presentence report format”).

⁶⁴⁶ MCM, *supra* note 34, R.C.M. 1106(d)(3)(B) (requiring “concise information” on such recommendations in the SJAR).

B. Staff Judge Advocates

The SJA holds a special place in the clemency process by virtue of his or her military justice role in the organizational structure of most Offices of the Staff Judge Advocate.⁶⁴⁷ Effective clemency policy depends as much on leadership and setting the right example for subordinate prosecutors as it depends on getting the legal decisions right. Without considering matters of fairness and the best interests of the accused and society—in addition to the military—SJAs have every incentive to recommend against discharge remission; not only did their offices invest the time and money to secure a conviction that would withstand appellate review, but the SJA logically would not have recommended referral of the case to a court-martial in which a punitive discharge could be adjudged without providing advice that a punitive discharge was deserved and obtainable in that very case.⁶⁴⁸ However, the SJA's role is far more comprehensive.

The existence of plea agreements containing suspended discharges and alternative dispositions based on the nature of a sentence—sometimes with provisions commuting punitive discharges to a term of additional months or years if adjudged—tells a far different story. Rather than acting only as a frugal manager with the predominant objective of deterrence, these practices align with the concept of the SJA as a problem-solver—a community prosecutor—with responsibilities to the commander, the military community, society, and the accused.⁶⁴⁹ In

⁶⁴⁷ See, e.g., *United States v. Hill*, 4 M.J. 33, 39 n.26 (C.M.A. 1977) (observing “that the staff judge advocate is the ‘chief counsel for the given command among whose various functions include the responsibilities of being the chief prosecutor’”) (internal citation omitted).

⁶⁴⁸ Byers, *supra* note 643, at 100 (discussing the SJA's incentive not to recommend suspension of the adjudged sentence).

⁶⁴⁹ The concept of the community prosecutor evolved in the 1990s, embodying the ideal that “prosecutors [should] respond to community concerns with procedures that depart from the traditional focus on prosecuting criminal cases.” Kelley Bowden Gray, Comment, *Community Prosecution: After Two Decades*, 32 J. LEGAL PROF. 199, 200 (2008). Under the theory, also hailed as the “new prosecution,” “policymakers and district attorneys seek to encourage local prosecutors to expand their professional outcomes beyond conviction and sentencing of defendants to prioritize the reduction of crime as a principal goal.” Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1128–29 (2005). Notably, this includes participation in problem-solving courts. *Id.* at 1128. By 2004, more than half of 879 local prosecutors' offices employed the community prosecution model. ANTHONY C. THOMPSON & ROBERT V. WOLF, TEACHERS GUIDE, THE PROSECUTOR AS PROBLEM-SOLVER: AN OVERVIEW OF COMMUNITY PROSECUTION 5 (2004).

keeping with this ideal and obligation, the panel's ability to provide the convening authority with the highest quality of information should be viewed as an opportunity rather than as a threat.⁶⁵⁰

C. Military Judges

The proposed alterations to court-martial sentencing practice require two judicial initiatives. The first is the willingness to inform panel members of their rights to recommend clemency and to provide guidance on evaluating treatment options for mental health conditions. To this end, while cases over time have revealed reluctance on the part of some judges to instruct members about their right to recommend clemency in any form, appellate courts, including the CAAF, have more recently encouraged clemency instructions.⁶⁵¹ Although some panels have clearly misunderstood their purpose in considering clemency, the proposed instructions provide suggestions on how to avoid these distractions. If judges do not prefer those recommendations, they might draw from the existing *Benchbook* instructions, or other specially tailored examples. Because of the unique issues raised by cases involving untreated mental conditions, these are the instances where the panel's special consideration of treatment options will have the most value to the convening authority during post-trial review.

The second initiative is further involvement in the management of cases. While unlikely in every case involving the prospect of mental health treatment, some cases could require further testing, evaluation, or preliminary participation in a treatment program to permit the court-martial to evaluate rehabilitative potential or the suitability of a suspended sentence. Although, traditionally, judicial oversight has been limited in the court-martial system, military judges retain authority to dictate conditions during the course of delays in the proceedings.⁶⁵²

⁶⁵⁰ See, e.g., *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999) (noting the responsibilities that SJAs have as commissioned officers, not only lawyers, and observing that their advice on clemency "is much more than a ministerial action or mechanical recitation of facts concerning the trial") (internal citation omitted).

⁶⁵¹ *United States v. Weatherspoon*, 44 M.J. 211, 213 (C.A.A.F. 1996) (observing that the practice "must be encouraged") (internal citation omitted).

⁶⁵² Zimmerman, *supra* note 39, at xi n.77 ("It is not unreasonable to assume that the military judge's powers . . . to grant continuances could be used as the method of granting [a] probationary period."). See also UCMJ art. 40 (2008) (discussing the court's power to grant a continuance "for reasonable cause"); MCM, *supra* note 34, R.C.M.

Despite the fact that military judges often prefer quick cases that move directly to sentencing after the findings,⁶⁵³ more complicated cases can require delays for a period of weeks.⁶⁵⁴ In recognition of this inherent flexibility, especially where the defense favors a delay, military judges can facilitate more “intelligent sentencing” in the complex area of mental health.⁶⁵⁵

On a final note, the military judge has the ability to replicate the most crucial aspect of problem-solving courts at the installation level where participation in a civilian treatment court—with a civilian judge—is not possible. While, in pretrial diversion programs, there are viable concerns

906(b)(1) (discussion) (describing the discretionary nature of determinations to grant continuances).

⁶⁵³ See, e.g., Lieutenant Colonel David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Court-Martial 1003(b)*, 52 NAVAL L. REV. 1, 40 n.185 (2005) (describing how the interval between court-martial conviction and sentencing is “almost immediate” or “usually no more than a few days”); *United States v. Stafford*, 15 M.J. 866, 869 (A.C.M.R. 1983) (“[T]here is usually no temporal break between findings and sentence in courts-martial . . .”).

⁶⁵⁴ Grove, *supra* note 44, at 26, 33 (“[C]ontested cases with high maximum permissible punishments are often recessed for a week or more after guilty findings to allow counsel to prepare the presentence case.”).

⁶⁵⁵ In *United States v. Flowers*, Senior District Judge Jack B. Weinstein described the genesis of federal and state court delays “intended to allow the defendant further time to demonstrate rehabilitation prior to imposition of sentence.” 983 F. Supp. 159, 160, 161–67 (E.D.N.Y. 1997). Recognizing the societal interests served by such presentencing adjournments, the court held,

Under appropriate circumstances, adequate steps should be taken to allow a defendant facing sentencing an opportunity to rehabilitate herself and change her circumstances. Such steps may include, in appropriate circumstances and with adequate controls, granting a request for deferred sentencing, similar to the sort of adjournment granted under structured diversion programs, so that a defendant may restore herself, on her own, to her greatest potential.

Id. at 167. Federal appellate courts have commented on the types of factors to consider in evaluating such periods of deferment. See, e.g., *United States v. Maier*, 975 F.2d 944, 948–49 (2d. Cir. 1992) (noting “the nature of the defendant’s addiction, the characteristics of the program she has entered, the progress she is making, the objective indications of her determination to rehabilitate herself, and her therapist’s assessment of her progress toward rehabilitation and the interrupting of that progress”). See generally Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION 245, 267–71 (Dennis P. Stolle et al. eds., 2000) (exploring the value of presentence deferments).

over participation of military judges who risk later disqualification from cases involving an accused who violates the terms of such agreements,⁶⁵⁶ this article promotes a post-trial, post-plea diversion program in recognition of the unparalleled value of legal leverage in promoting compliance with individualized treatment plans. Under the proposed system, the military judge retains the ability to play a role unmatched by any other member of an interdisciplinary treatment team. Concerns of recusal would arise only in cases where subsequent misconduct is so egregious as to warrant another court-martial. In all other cases, it would be the Special Court-Martial Convening Authority conducting the revocation proceedings—and not the military judge—who ultimately makes the recommendation on whether to vacate the suspension. In this expanded role, military judges can easily attend training provided for civilian problem-solving court judges and build on their existing expertise to produce similar results in a military setting.

D. Convening Authorities

It is suggested that “[c]onfinement is the single element of the ‘Military Justice System’ which commanders see least and know less.”⁶⁵⁷ Although true in some—or, even, most—cases, convening authorities’ continuing development of innovative alternatives to incarceration, such as MG James Terry’s suspension of Staff Sergeant Ryan Miller’s sentence at Fort Drum, suggests that far more is underway. While, to some critics, it might seem inefficient and counterproductive to convene a court-martial and then abandon its adjudged punitive discharge after the investment of significant time and resources, this simplistic position ignores several benefits of contingent sentences based on treatment.

First, courts-martial involving guilty pleas require far less time to prosecute than contested cases and far fewer resources.⁶⁵⁸ Second, the

⁶⁵⁶ See Zimmerman, *supra* note 39, at 33 (discussing the prospect of recusal arising from judges’ knowledge of, and response to, misconduct unrelated to the initial charges).

⁶⁵⁷ COLONEL PATRICK R. LOWREY, *MILITARY CONFINEMENT: NEEDLESS LUXURY OR VIABLE NECESSITY?: AN INDIVIDUAL RESEARCH REPORT 1–2* (1974).

⁶⁵⁸ As the *Benchbook* currently instructs, “[t]ime, effort, and expense to the government (have been) (usually are) saved by a plea of guilty.” DA PAM. 27-9, *supra* note 43, instr. 2-6-11, at 103. See also Major Michael E. Klein, *United States v. Weasler and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?*, ARMY LAW., Feb. 1998, at 3, 7 (“[S]ince the military first started using pretrial agreements, savings in the time it takes to try an accused have been a significant benefit to the government.”).

legal leverage provided by the conditional suspended sentence is often the determinative factor that enables meaningful treatment and lasting rehabilitation, which remains a sentencing rationale in all courts-martial. Third, the ability to vacate a suspension for failure to meet the terms of a suspended sentence preserves the option of executing the adjudged punishment.

Even in contested cases where a treatment-based contingent sentence arises from a military judge's or panel's clemency recommendation, expended time and other resources are not necessarily lost if the convening authority adopts the recommendation. In addition to the ease of remission, addressed above, military justice values optimal information and careful analysis in the convening authority's exercise of disciplinary authority. Foremost is the Article 32 pretrial investigation, which often involves production of experts and other witnesses.⁶⁵⁹ Commanders regularly direct pretrial investigations that *never* result in the convening of courts-martial, despite the investment of substantial resources.⁶⁶⁰ When this occurs, SJAs and commanders do not normally conclude that such efforts were *wasted* if they led to the production of helpful information.⁶⁶¹ While treatment-based contingent sentences will surely have similar value, they offer more in the sense that they can empower the accused to deal with potentially lifelong consequences of mental illness, thereby promoting the safety of society.

Importantly, in the absence of civilian treatment court programs, convening authorities can establish standing boards of interdisciplinary professionals to implement the same types of treatment team interventions that have allowed VTCs and MHCs to flourish. Not only are traditional courts—like courts-martial—capable of incorporating successful attributes of treatment courts, even when full transformation is not possible,⁶⁶² but Judge Robert Russell, Jr., the innovator of the Buffalo

⁶⁵⁹ See generally MCM, *supra* note 34, R.C.M. 405 (describing various attributes). For other nuances of pretrial investigations, see also DAVID A. SCHLUETER, MILITARY JUSTICE PRACTICE AND PROCEDURE § 702 (7th ed. 2008); Major Larry A. Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 MIL. L. REV. 49 (1986).

⁶⁶⁰ See, e.g., Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15, 18 (suggesting that commanders should “reassess the case after the Article 32 investigation is complete [and military justice c]hiefs should be liberal in recommending that charges be dropped after the Article 32 before referral”).

⁶⁶¹ *Id.*

⁶⁶² See, e.g., JOANN MILLER & DONALD C. JOHNSON, PROBLEM-SOLVING COURTS: NEW APPROACHES TO CRIMINAL JUSTICE 197 (2009) (explaining that “the practices of the

VTC, also believes that a standing military board can attain similar goals as VTCs like his own.⁶⁶³

To this end, many boards that have either been planned or established in the military setting are well suited for this problem-solving purpose. The post-appellate review clemency board established at the 101st Airborne Division in the late '70s signals the types of members who could be included and their distinct functions,⁶⁶⁴ as does Captain Charles Zimmerman's further suggestions for an organization to set the conditions of pretrial diversion.⁶⁶⁵ Other useful lessons exist in the

[problem-solving court] should be transferred to the conventional courtroom to settle . . . everyday disputes," such as "mandate[d] drug-abuse treatment within the sentencing order").

⁶⁶³ Interview with Hon. Robert T. Russell, Jr., Presiding Judge, Buffalo Veterans Treatment Court, in S.F., Cal. (Aug. 6, 2010). As support, Judge Russell observes that the military structure of communication, supervision, and accountability provides many more opportunities for oversight of the participant's behaviors and progress in settings outside of the courtroom. *Id.*

⁶⁶⁴ The informal clemency board developed at Fort Campbell by Major General John A. Wickham included "the Deputy SJA (to provide legal expertise in reviewing records and recommending specific clemency actions), the Post/Division Command Sergeant Major (to provide expertise in assessing character)," and a member of the Provost Marshal's Office (to assess rehabilitative and "correctional" options). Major Jack F. Lane, Jr., *Discharge Clemency After Appellate Review*, *ARMY LAW.*, Dec. 1978, at 5, 5. In the activities of the board, where "[t]he provisions of AR 15-6 will not apply," General Wickham directed the board to

review the soldier's performance . . . through interviews with his supervisors and commanders, review of records and interviews with the individual concerned. . . . [T]heir function is advisory and . . . they are to perform this function informally, and . . . the individual concerned will be allowed to know and rebut any adverse comments by his supervisors and commanders.

Id. at 6. By 1978, nine of fourteen soldiers, whose crimes included assault, larceny, and drug sales, were restored to duty by the board following an adjudged punitive discharge. *Id.* at 7.

⁶⁶⁵ Captain Charles Zimmerman, in his 1975 thesis, proposed an installation-level "diversion committee" to oversee a pretrial program in which court-martial charges would be held in abeyance pending the soldier's successful participation in and completion of a structured course of rehabilitation:

The diversion committee shall be composed of the trial counsel, the defense counsel, the unit commander of the offender, and any other persons the diversion authority requests to participate. It shall be the function of the committee to advise the diversion authority

Family Advocacy Program's Case Review Committees, which already operate on all major Army installations to develop plans for dealing with domestic violence allegations.⁶⁶⁶

To attain oversight of military probationers in the civilian community, options range from the assignment of military probation officers to the innovative use of drilling or volunteer reservists, which has largely proven successful for current medical rehabilitation programs in the Navy.⁶⁶⁷ The Mandatory Supervised Release Program, which has

concerning the propriety of diversion and the type of individual diversion program to be utilized.

Zimmerman, *supra* note 39, at 42. Modeled off of civilian treatment teams, the committee could foreseeably include various experts, depending on the nature of the accused's problems: "[I]f the offender has a drug problem . . . the head of the local drug abuse program would be an ideal addition to the committee. If a contributing factor to the offense is the soldier's language difficulty, the director of the local education center would be . . . appropriate . . ." *Id.* at 43. Surely, a mental health professional and chaplain would add necessary perspectives to a pre- or post-conviction diversionary team. In the military landscape, Unit Ministry Teams and their chaplain leaders have been specially equipped to work alongside medical professionals in addressing a condition like PTSD. *See* Chaplain (Major) Stephen M. Tolander, *The Relationship of PTSD Issues to the Pastoral Care of Soldiers with Battle Fatigue*, MIL. CHAPLAINS' REV., Fall 1990, at 47, 52–56 (describing how military chaplains can combine tenets of healing with their ministry activities to aid PTSD-afflicted military members).

⁶⁶⁶ The Case Review Committee is established to "determine the type and extent of treatment and prevention training that will be required" in substantiated cases of domestic violence. Major Toby N. Curto, *The Case Review Committee: Purpose, Players, and Pitfalls*, ARMY LAW., Sept. 2010, at 45, 52. By definition, it is a "multidisciplinary team appointed on orders by the installation commander." U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM ¶ 2-3a(1), at 11 (30 Oct. 2007). Its diverse membership includes a doctor, lawyer, military police officer, social worker, and a physician. *Id.* ¶ 2-3a(3). Juvenile Review Boards also use diverse teams to address offenses committed by juveniles on the installation. *See, e.g.*, U.S. DEP'T OF ARMY, INTELLIGENCE CTR. & FT. HUACHUCA, REG. 27-3, YOUTH COUNCIL ¶ 5a(1)–(13), at 3–4 (25 Oct. 2006) (specifying members from various organizations on the Youth Council, including county government entities as well as military ones).

⁶⁶⁷ Navy Captain Oakley Key Watkins, who recently commanded the Navy's Safe Harbor Program, explained the components of the "Near Pier Anchor Program," in which sailors undergoing rehabilitation for PTSD and other medical conditions are paired with reservists who volunteer to mentor the active duty sailor-patients. Watkins Interview, *supra* note 72. While there is a handbook and orientation for the Anchor Program, there are no formal courses; "What we ask is not more than good old fashioned leadership," remarked Captain Watkins. *Id.* After considering the prospect of using reservists to monitor the progress of military members with suspended punitive discharges, Captain Watkins believed that the same sort of approach could work with modifications, such as drawing reservists from military police or medical branches and pairing offenders with mentors of a much higher rank, such as an E7 or E8. *Id.* Although this use of reservists

recently been implemented to maintain accountability over military offenders released from confinement early, also provides a useful framework to maintain oversight over military members receiving PTSD treatment in the community.⁶⁶⁸ The salient point from the combined examples is that existing frameworks can easily be modified without the burden of initially establishing a system. Similar to the lessons learned by treatment court judges and medical rehabilitation programs, the key issue involves “coordination” of functioning programs and existing resources, rather than the creation of any programs from scratch.⁶⁶⁹

VIII. Intergovernmental and Cross-Jurisdictional Cooperation

In considering the relationship between state courts and military offenders, courts and commentators have largely interpreted exclusive federal jurisdiction over the offender as a prohibition on the exercise of state authority.⁶⁷⁰ While active duty servicemembers currently participate

would be akin to “an AA [Alcoholics Anonymous] sponsor to verify that the participant would not fall off the wagon,” Captain Watkins estimated that the Anchor Program would be a useful model to develop a probationary system for servicemembers with suspended discharges. *Id.*

⁶⁶⁸ In 2001, the Mandatory Supervised Release Program was established by the Department of Defense as an alternative to parole, in which offenders could be released into the community with several requirements to conform their conduct to the law. *See generally* United States v. Pena, 64 M.J. 259, 262, 263 (C.A.A.F. 2007) (describing the genesis of the program and reviewing sixteen representative conditions placed on a sex offender who was enrolled in the program). During the course of participation in this program, released offenders are still accountable to the military and tracked for administrative purposes as if they were still participating in units. The methods used to account for these participants could lend important examples in the development of programs for offenders participating in treatment under suspended punitive discharges. *See* Grande Interview, *supra* note 385 (describing attributes of administrative processing for members under Mandatory Supervised Release).

⁶⁶⁹ *See, e.g.*, Watkins Presentation, *supra* note 585 (describing how the Safe Harbor Program operates on the basis of coordination, and how the program achieves its objectives by linking existing resources, including those in the community, rather than using any of its own); Hon. Steven V. Manley, Presiding Judge, Veterans and Mental Health Treatment Court, Santa Clara Superior Court, Presentation at the 2010 ABA Annual Meeting (Aug. 6, 2010) (describing how, without coordinating existing resources within the community, it would not be possible for his Veterans Treatment Court to function); Steinberg, *supra* note 6, at 20 (relating the comments of Illinois VTC Judge Kirby that his primary function is to coordinate existing programs).

⁶⁷⁰ *See generally* John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 283–84 (2000) (describing why this rule concretized by the 1990s). The view is largely supported by the Supreme Court’s 1987 *Solorio* opinion, which recognized that commanders had jurisdiction to try active duty

in state treatment court programs as a consequence of state law violations,⁶⁷¹ the same cannot be said regarding purely military offenses or offenses committed within federal lands.⁶⁷² Contrary to this position, the following vital considerations reveal a far more permissive posture for cooperation between the military justice system and civilian treatment courts.

A. *Howard's* Concept of Noninterference

While the military retains criminal jurisdiction over offenders and offenses committed within federal enclaves and the state retains exclusive criminal jurisdiction over offenses committed within state property,⁶⁷³ these rules do not apply so broadly to administrative matters involving protection of the public or an individual at risk.⁶⁷⁴ A number of state cases involving child protection and domestic issues has paved the way for a permissive rule that has been characterized as the “presumption of noninterference.”⁶⁷⁵ Under this rule, which trended in the 1990s,⁶⁷⁶ the courts essentially find that “all state laws are valid within federal enclaves unless they interfere with the jurisdiction asserted by the federal government.”⁶⁷⁷ Their major anchor has been the 1953 Supreme Court opinion of *Howard v. Commissioners of the Sinking*

offenders based on their military status, rather than the nature of the offense. *See supra* note 12 (discussing the impact of *Solorio v. United States*, 483 U.S. 435 (1997)).

⁶⁷¹ *See, e.g.*, Lindley, *supra* note 31 (describing how two active duty members were participating in her Combat Veterans Treatment Court program as a result of state offenses); Telephone Interview with Hon. Brent Carr, Presiding Judge, Tarrant Cnty., Tex., Veterans Treatment and Mental Health Court (Oct. 15, 2010) (confirming that active duty Army soldiers have participated in his MHC for state offenses).

⁶⁷² Clubb Interview, *supra* note 409 (confirming no known cases of active duty offenders charged with purely military offenses).

⁶⁷³ Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 126 (1997) (“[T]he federal government obtains sole criminal jurisdiction over areas where it has *exclusive* legislative jurisdiction . . . [and] a state’s jurisdiction extends only over state property.”) (emphasis in original).

⁶⁷⁴ *Id.* at 130.

⁶⁷⁵ Michael J. Malinowski, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189, 203 (1991).

⁶⁷⁶ *See, e.g.*, Castlen & Block, *supra* note 673, at 116 n.10 (observing how, in 1997, “recent developments are changing th[e] courts’ traditional view”); Malinowski, *supra* note 675, at 203 (explaining how “[c]ourts have begun to nudge the law . . . by adopting the doctrine of noninterference’s presumption in favor of applying state law”).

⁶⁷⁷ Malinowski, *supra* note 675, at 203.

Fund of the City of Louisville,⁶⁷⁸ which explained occasions when the state can enforce a local law on residents of military enclaves. The Court first debunked the prevailing idea that military bases were “states within states.”⁶⁷⁹ Rather than adopting this “fiction,” the Court identified “friction” as the basis for its intervention to exclude state interests.⁶⁸⁰ Hence, it would not violate the Constitution for the state to assert its interest where the military commander approved of the state’s involvement and where there was no apparent conflict between the state’s enabling legislation and federal legislation. In such cases, “[t]he sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim.”⁶⁸¹ Importantly, *Howard* has been used to justify a variety of state involvements including the provision of welfare benefits,⁶⁸² the revocation of drivers’ licenses,⁶⁸³ the removal of children from abusive military homes,⁶⁸⁴ and the institutionalization of the mentally ill.⁶⁸⁵

B. State Treatment Court Participation as a Plea Condition, Rather Than Transfer of Jurisdiction

Even though the *Howard* noninterference exception permits participation of active duty servicemembers in state VTCs, such participation would never amount to a transfer of jurisdiction by the military, especially when implemented in accordance with a convening authority’s suspended sentence; a view of transferred jurisdiction unnecessarily complicates matters. It must always be remembered that VTCs exist to *prevent* the exercise of—rather than to exercise—the state’s criminal jurisdiction and power to punish offenders.⁶⁸⁶ For this

⁶⁷⁸ 344 U.S. 624 (1953).

⁶⁷⁹ *Id.* at 627.

⁶⁸⁰ *Id.* (“It is friction, not fiction to which we must heed.”).

⁶⁸¹ *Id.*

⁶⁸² Castlen & Block, *supra* note 673, at 123.

⁶⁸³ *Williams v. Dep’t of Licensing*, 932 P.2d 665 (Wash. Ct. App. 1997).

⁶⁸⁴ *In re Terry Y.*, 101 Cal. App. 3d 178 (Cal. Ct. App. 1980).

⁶⁸⁵ *Bd. of Chosen Freeholders of Burlington Co. v. McCorkle*, 237 A.2d 640, 645 (N.J. Super. Ct. 1968) (finding propriety in the application of civil commitment laws and no interference with “the function of the Federal Government” on the basis that “state laws passed for the public welfare should be applied to federal enclaves within the state, for the state is best fitted to know the requirements of its particular locality and to deal with them”).

⁶⁸⁶ As reflected in the discussion of VTCs, *supra* Parts I & II, these programs are diversions from traditional sentencing and alternatives to confinement. If termination

reason, active duty participation in state VTCs is a matter of contract and cooperation with civilian entities to treat a mental health disorder in an innovative and effective way—hardly a transfer in jurisdiction. This is precisely the approach adopted by the U.S. Attorney’s Office in the Western District of New York, which has instituted an agreement with the Buffalo VTC to enroll federal offenders (charged with exclusively federal crimes) in that state program *as a condition of pretrial diversion*.

The New York agreement was initiated with the case of *United States v. Walker*, in which Britten M. Walker, a combat veteran with multiple deployments as a sniper in Iraq and Afghanistan, had been charged with purely federal offenses for assaulting and threatening to kill employees of the VA while on federal property.⁶⁸⁷ Although some have referred to Walker’s case as “the first federal criminal case in the nation ever to be transferred to a [state] veterans court,”⁶⁸⁸ the government prosecutor, Assistant U.S. Attorney Edward H. White, clarified the nature of the agreement during an interview. While the Buffalo Court has a presiding judge and functions within a state courtroom, it operates as a treatment program; far from a “transfer of federal jurisdiction,” explains White, “the Veterans Treatment Court is one of many conditions included as a term of the agreement for deferred prosecution.”⁶⁸⁹ White’s office permitted participation in Buffalo’s program because it offered more effective and comprehensive services than confinement and recognized the relationship between Walker’s combat-related mental condition and his offense.⁶⁹⁰ Under the agreement, Walker will remain subject to

from the program results in assignment back to a normal court docket, it cannot be said that a VTC holds the same status as a state criminal court.

⁶⁸⁷ Dan Herbeck, *Veteran Gets 2nd Chance From a Court with a Heart*, BUFFALONEWS.COM, Sept. 14, 2010, <http://www.buffalonews.com/city/communities/buffalonews.com/city/communities/buffalo/article189920.ece>.

⁶⁸⁸ *Id.* (citing comments of Walker’s Federal Public Defender Tracy Hayes).

⁶⁸⁹ Telephone Interview with Assistant U.S. Attorney Edward H. White, U.S. Dep’t of Justice, W. Dist. of N.Y. (Oct. 15, 2010) [hereinafter White Interview].

⁶⁹⁰ *Id.* See also Letter from Hon. Kathleen M. Mehlretter, U.S. Attorney, W. Dist. of N.Y., to Hon. William M. Skretny, Chief Judge, U.S. Dist. Court 1 (Feb. 8, 2010) (on file with author):

[T]he federal criminal justice system, with seeming increasing regularity, finds itself coming into contact with individuals who are military veterans . . . [and] some cases involve . . . situations in which veterans find themselves in contact with the federal criminal justice system largely as the result of mental health and/or drug and alcohol dependency issues related to their military service . . . [T]he Magistrate Judges often, together with prosecutors and defense

federal prosecution and continued federal supervision until he has successfully completed treatment.⁶⁹¹

Viewed along the same lines as the U.S. Department of Justice, the participation of active servicemembers in VTCs hardly raises concerns of Federal Supremacy or related constitutional conundrums. Instead, the participation contemplated by this article takes on qualities of cooperation that have long characterized the military's use of state resources. While current innovations in cooperative medical rehabilitation of active duty members are the most vivid example of this tradition, others can be found in the area of military corrections. Most notably, the Army uses county jails for confinement of active military members awaiting court-martial and for offenders sentenced to minimal terms of confinement.⁶⁹² These arrangements are hardly seen as violations of the Constitution.

Just as the active duty military now relies on civilian entities to meet its corrections objectives, this has also been the case historically. Although largely forgotten, for over thirty years, following 1915, the War Department depended on civilian volunteers from the community to serve as probation officers for military offenders released from confinement early on parole.⁶⁹³ It was not until an agreement between the Department of the Army and the Administrative Office of the United

counsel alike, find themselves struggling with how to deal with these offenders. Frankly, experience has shown, that often our criminal justice system is ill-equipped to deal with these individuals. In response, this Office has, working with the United States Probation Office, sought to develop a plan that allows certain veterans, who are qualified, lower-level offenders, another option.

The arrangement also represented community prosecution in the way the U.S. Attorney's Office preferred pretrial diversion over a post-plea arrangement to facilitate Walker's continued progress in treatment. White Interview, *supra* note 689.

⁶⁹¹ White Interview, *supra* note 689.

⁶⁹² See COLONEL THOMAS P. EVANS, SHOULD THE DEPARTMENT OF DEFENSE ESTABLISH A JOINT CORRECTIONS COMMAND 3-4 (2008) ("The U.S. Army does not operate a level one facility but uses other service facilities or contracts with local jails for confinement of pretrial inmates and post-trial sentences of less than 30 days."). This policy is most evident in reports of pretrial confinement for major cases. See, e.g., Jeremy Schwartz, *Hasan Hearing to Stay Open*, AUSTIN AM.-STATESMAN (Tex.), Sept. 17, 2010, at B1 (reporting how Fort Hood shooter Major Nidal Hasan "has been held at the Bell County Jail since April . . .").

⁶⁹³ Colonel Lloyd R. Garrison, *The Military Parolee and the Federal Probation Officer*, 14 FED. PROBATION 65, 65-68 (1950).

States Courts in 1946⁶⁹⁴ that Federal Probation replaced these thousands of “first friends”⁶⁹⁵—with some still retaining their roles in cases where parolees lived in remote areas.⁶⁹⁶ Considering President Obama’s recent endorsement of VTCs as a means to “make court systems more responsive to the unique needs of veterans and their families,” these programs are ripe for cooperative arrangements enabling participation by active duty servicemembers with identical “unique needs.”⁶⁹⁷

C. The Benefits of Federal Veterans Affairs Participation in State Veterans Treatment Courts

Another important consideration is the dependence of state VTCs on the VA—a federal agency—to achieve their treatment objectives. Veterans Treatment Courts largely require participants to be eligible for VA benefits in order to use their programs because federal benefits reduce the state’s financial burdens while ensuring the highest quality of care.⁶⁹⁸ Active duty offenders with suspended discharges are ideally suited to use these existing VA resources because their discharges have been held in abeyance. Because the VA is capable of rendering services to active duty personnel, and has recently pledged to increase these efforts in the VHA’s 28 November 2010 Directive 2010-051,⁶⁹⁹ these

⁶⁹⁴ *Id.* at 66.

⁶⁹⁵ These volunteers were defined as “reputable individuals in the prisoner’s community who accepted the responsibility to aid the parolee in making satisfactory adjustment in the community.” *Id.* at 65.

⁶⁹⁶ Herman L. Goldberg & Frederick A.C. Hoefler, *The Army Parole System*, 40 J. CRIM. L. & CRIMINOLOGY 158, 167 (1950):

In some instances, especially where a parolee lives a great distance from the nearest U.S. Probation Office, the probation officer appoints a volunteer to assist him with the supervision of the parolee. Such a volunteer is called “first friend” or “counselor” of the parolee and is directly responsible to the probation officer.

⁶⁹⁷ OBAMA, *supra* note 25, ¶ 1.6.1, at 12 (further recognizing such needs as ones related to “PTSD, TBI, and substance abuse programs”).

⁶⁹⁸ *Supra* Part I.

⁶⁹⁹ U.S. DEP’T VETERANS AFFAIRS, VHA DIR. 2010-051, TREATMENT OF ACTIVE DUTY AND RESERVE COMPONENT SERVICEMEMBERS IN VA HEALTHCARE FACILITIES ¶¶ 2b, 3, at 2, 3 (28 Nov. 2010) (observing that “[i]t is VHA policy to provide health care services to eligible active duty and [reserve component] Servicemembers presenting for care at a VA health care facility,” largely based on the fact that “DOD may not have adequate healthcare resources to care for military personnel wounded in combat and other active duty personnel”).

factors remove many obstacles in active duty offenders' successful participation in state VTCs. Past VA programs have also recognized the same sorts of capabilities.⁷⁰⁰

D. Funding Considerations

This proposal for treatment-based suspended sentences requires recurring evaluation of a participant's progress over the term of suspension. Because military courts do not currently have a mechanism to provide such intensive post-trial oversight, the ideal arrangement relies on the existing administrative machinery within functioning problem-solving courts. These services surely have associated fees to provide for all aspects of court administration, from placing a participant on the docket to assigning a case manager to review his progress.⁷⁰¹ However, such costs are independent from, and amount to far less than, the value of therapeutic and medicinal services provided by treatment entities.

While money will, no doubt, change hands under any view of the instant proposal, the military's reliance on treatment courts as an alternative to incarceration is particularly appealing at a time when funding is scarce and considerations of cost largely dictate the survival of military corrections programs.⁷⁰² Undeniably, the Department of Defense must now pay the daily costs of confining a servicemember, even after a discharge. This fact alone, when coupled with the possibility of effectively treating an aggravated mental condition, supports the suspended sentence. Though monetary figures for the USDB are not

⁷⁰⁰ MILLER, *supra* note 245, at 142, 194 (discussing Air Force proposals "that serious drug abusers should be handled by the Veterans Administration"). On a reimbursable basis, the VA still coordinates for residential drug treatment of active duty offenders, who are usually pending administrative administration. E-mail from John C. Froppenbacher, LCSW, Veterans Justice Outreach Coordinator, Hawaii Department of Veterans Affairs (Sept. 22, 2010 13:11 PST) (describing an agreement in Hawaii whereby the DoD would reimburse the VA for residential treatment of active duty servicemembers).

⁷⁰¹ See *supra* Parts I & II (discussing the coordination performed by treatment court judges and support teams). Within VTCs, different agencies have overcome funding obstacles though "in-kind contributions," including "ancillary services," where budgetary limitations would otherwise prevent the operation of such programs. Holbrook & Anderson, *supra* note 9, at 36.

⁷⁰² See, e.g., EVANS, *supra* note 692, at 14, 17–18 (describing how the military is necessarily "looking for ways to cut . . . cost" in its confinement operations and has increasingly turned to consolidation and realignment of its services as a method to survive economic turmoil).

readily available, the daily cost of federal incarceration within a Federal Bureau of Prisons facility is likely comparable at \$77.49,⁷⁰³ which also falls within the same general range as the average daily cost of housing inmates in state facilities.⁷⁰⁴ While the instant proposal for a suspended sentence would permit the accused to receive a salary⁷⁰⁵—assuming minor deviations from federal and state incarceration fees—it would still cost the military approximately the base pay for an E-5 (Sergeant) with over three years' service—simply to cover the annual cost of confinement.⁷⁰⁶ In fact, total costs may be greater if the servicemember receives deferments or waivers of forfeitures or is sentenced by a Special Court-Martial authorized to adjudge a maximum forfeiture of only two-thirds of the accused's pay.

All forms of community supervision cost significantly less than confinement in any scenario.⁷⁰⁷ Among these, VTCs notably generate significant monetary benefits, with programs like Buffalo's program costing only \$2,700 per participant annually.⁷⁰⁸ Although costs will vary based on the attributes of a specific program, the military would recognize significant savings in at least three different scenarios, each of which may now be implemented:

⁷⁰³ Press Release, U.S. Courts, Newly Available: Costs of Incarceration and Supervision in FY 2010 (June 23, 2010), *available at* <http://www.uscourts.gov> (noting an annual cost of \$28,284.16).

⁷⁰⁴ The rates vary based on a number of factors. *See, e.g.*, HOWARD ABADINSKY, PROBATION AND PAROLE: THEORY AND PRACTICE 18 (3d ed. 2009) (“[T]he annual operating cost of housing a state prison inmate is \$25,000–\$30,000, although in some states, such as Massachusetts, Minnesota, New York, and Oregon, the cost is closer to \$40,000.”).

⁷⁰⁵ *Supra* Part VI.A.3.

⁷⁰⁶ *See* 2012 BASIC ENLISTED PAY CHART (2012), *available at* <http://www.navycom/2012-military-pay-chart.html> (revealing a monthly pay rate (\$2,375) that translates to an annual salary of \$28,500).

⁷⁰⁷ *See, e.g.*, ABADINSKY, *supra* note 704, at 18 (observing that “[i]ncarceration costs 10 to 20 times as much as probation and parole supervision”). JOHN SCHMITT ET AL., THE HIGH BUDGETARY COSTS OF INCARCERATION 11 (June 2010) (“[F]or each . . . offender shifted from prison or jail . . . to probation or parole . . . , government corrections systems would save \$23,000 to \$25,000 per inmate per year.”).

⁷⁰⁸ Cavanaugh, *supra* note 9, at 478 n.108. “While it may seem more costly for veterans to go through treatment programs under the direction of the Buffalo Court, it actually costs less than ten percent of the total amount spent on incarcerating an individual.” *Id.* at 478.

- The command bears the cost of court administration fees while requiring the accused to use military, instead of civilian, treatment services;
- the accused bears the cost of civilian treatment services or court administration fees as part of a pre- or post-trial agreement;⁷⁰⁹ or
- either the accused (through agreement) or the command bears the cost of the court's administration fees, but the VA covers the costs of its treatment services pursuant to existing arrangements for active duty personnel.⁷¹⁰

Defense counsel and convening authorities should consider each of these possibilities in a flexible manner since program availability may change based upon the location of any given military installation.

IX. Conclusion: Reclaiming the Rehabilitative Ethic in Military Justice

Medical professionals who work in the field of veteran rehabilitation describe the daunting challenges of unseen injuries.⁷¹¹ For the criminal justice system, the air of skepticism surrounding unseen conditions has led to dismissive sentiments and labels like “designer disorder,” “diagnosis of choice,” and “post-dramatic stress.”⁷¹² Yet, for every forensic psychiatrist who touts the subjective nature of diagnosis, the ease of exaggeration or malingering, or likely financial motives for obtaining a disability rating, clinical psychologists who treat PTSD and TBI victims can describe the tremendous needs of legitimate patients,

⁷⁰⁹ See *supra* Part VI.A.3 (discussing the validity of plea provisions that enable the accused to fund his own treatment during a term of suspension).

⁷¹⁰ See *supra* Part VII.C (discussing recent provisions within the VA).

⁷¹¹ See, e.g., U.S. Naval Inst. & Mil. Officers Ass'n of Am., War Veterans Reintegration Panel (CSPAN Broadcast, Sept. 10, 2010), available at <http://www.c-spanvideo.org/michaeldabbs> (Comments of Dr. Mike Dabbs, President, Brain Injury Ass'n of Am.) (describing how mental health professionals are largely still learning about the challenges of unseen injuries); Ira R. Katz & Bradley Karlin, *A Veterans' Guide to Mental Health Services in the VA*, in HIDDEN BATTLES ON UNSEEN FRONTS: STORIES OF AMERICAN SOLDIERS WITH TRAUMATIC BRAIN INJURY AND PTSD 119, 122 (Patricia P. Driscoll & Celia Straus eds., 2009) (describing how, even with types of treatments, “it can frequently require first one treatment, and then another, and maybe even another before patients are doing as well as they can”).

⁷¹² Ralph Slovenko, *The Watering Down of PTSD in Criminal Law*, 32 J. PSYCHIATRY & L. 411, 420, 432 & 423 n.8 (2004).

who might require trials of medications with devastating side effects before a treatment works.⁷¹³ This article has attempted to strike a balance between these polar extremes and to adopt a reasoned approach.

Today, at a time when soldiers and officers have been challenged to “own” the Army’s professional ethic,⁷¹⁴ there is a growing recognition that effective leaders are obligated to know about the effects of combat trauma on their subordinates, to take active steps in obtaining treatment for them, and to avoid—at all costs—situations that aggravate their symptoms in the long-term.⁷¹⁵ While it is easy to address PTSD symptoms as purely disciplinary problems, the historical lessons of the Second World War⁷¹⁶ and Vietnam⁷¹⁷ on this issue are now repeating at

⁷¹³ See generally HOGUE, *supra* note 13 (discussing the realities of potentially lifelong treatment requirements). For further discussion of the inevitable tension between “the role of the therapeutic clinician as a care provider and the role of the forensic evaluator as expert to the court,” see generally Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PROF’L PSYCHOL: RES. & PRAC. 50, 50 (1997).

⁷¹⁴ Case et al., *supra* note 36, at 3, 3.

⁷¹⁵ See Lieutenant Colonel Mary E. Card-Mina, *Leadership and Post Traumatic Stress Symptoms*, MIL. REV., Jan.–Feb. 2011, at 47, 48 (“By understanding and recognizing PTSD and its symptoms, leaders in every military branch can help those suffering from Post Traumatic Stress by motivating and guiding those persons to seek resources and treatment”); *id.* at 50 (“A true leader has the ability to give meaning to a crisis event and turn it into an opportunity for growth.”); *id.* at 51 (“Symptoms that are ignored, left unchecked, or minimized only lead to greater difficulties in the long term.”). Inescapably, this mandate for empathetic leaders includes intervention to prevent the permanent solution. See, e.g., Robert M. Hill, *Complexity Leadership: New Conceptions for Dealing with Soldier Suicides*, MIL. REV., Jan.–Feb. 2011, at 36, 36 (“While the Army cannot prevent every suicide, the aim must be to reduce the number dramatically, and new visions of leadership are essential to the task.”).

⁷¹⁶ Despite popular accounts of WWII veterans who proudly returned to their families from combat concealing their emotional scars, the soldier-patient philosophy grew largely in an effort to prevent the reintegration problems of many veterans who did not fare as well as their mythical counterparts. See *supra* text accompanying notes 61–62, 140, and 224–25.

⁷¹⁷ Notwithstanding the success of the Retraining Brigade and other restoration programs in treating PTSD, many thousands of other servicemembers with combat trauma were denied the opportunity to participate in these programs. In the more common set of circumstances, commanders treated “almost all soldiers with emotional and psychiatric symptoms to be behavioral problems.” SCURFIELD, *supra* note 356, at 34. The situation seems to be little different today. See Card-Mina, *supra* note 715, at 47, 48 (“Across the military, service members returning from deployments may be branded malcontents or malingerers when, in fact, they are afflicted with [Post Traumatic Stress Symptoms] or PTSD.”). The major result of reliance on the disciplinary process over the medical one was a group of veterans whose PTSD symptoms made them more likely to engage in criminal behavior. See, e.g., Tolander, *supra* note 665, at 47, 52 (discussing the results of

courts-martial and separation boards of the modern era⁷¹⁸ and highlighting significant societal costs.

In these tried and tested situations, the professional ethic, indeed, translates to military justice, where its practitioners must re-orient themselves to dormant statutory provisions which survive on the books for a reason. As revealed in the foregoing historical study, the military justice rehabilitative ethic embraces an interdisciplinary approach to rehabilitation, adoption of the newest theories and methodologies, and a spirit of cooperation that contemplates indivisible interests between society and the military—especially when an offender is not designated for return to the ranks. The military justice system needs only to promote innovation and creativity to reclaim its past glory in addressing the crippling effects of unseen injury.

Rather than dismissing attempts to achieve meaningful results on the blind assumption that rehabilitation *cannot* be done by the military, *has not* been attempted, or, worse yet, that the military is not a “rehabilitation

studies in which 73% of veteran patients with PTSD had “been arrested for criminal behavior); SHAY, *supra* note 131, at 26–27 (expanding on such studies and his own clinical experience treating criminally-involved veterans). As persuasively argued by Sociologist William Brown:

[Exacerbating] the problems confronting young veterans today is the absence of a comprehensive understanding of the impact of war on those who have served in war zones. This lack of understanding seems to exist throughout much of America—even though we have volumes of research and personal accountings in the aftermath of the Vietnam War. This is particularly true in the case of the American criminal justice system. American history seems to be positioning itself for a replication of the imprudent responses to veterans’ experiences and needs practiced for at least the past several decades.

Brown, *supra* note 501, at 11.

⁷¹⁸ Aside from the many veterans with PTSD who are ineligible for participation in VTCs due to the earlier award of less than honorable discharges, discussed *supra* note 92, this phenomenon also includes soldiers who now progress through increasingly severe forums—such as the graduation from non-judicial punishment to summary court-martial, to involuntary administrative separation or court-martial—who are prevented all-the-while from obtaining quality mental health treatment by virtue of their misconduct-related status. *See, e.g.,* Cartwright, *supra* note 9, at 309–10 (describing situations in which early treatment and intervention on active duty would have prevented a chain of continuing drug, alcohol, and “minor violent offenses” from culminating in more serious violent offenses like murder).

center,”⁷¹⁹ as commissioned officers, and officers of the court, we should instead acknowledge that many of these innovative problem-solving methods were *originated* in the military long before the civilian world embraced them.⁷²⁰ Ultimately, it is in the very DNA of the military justice system to innovate solutions to the most complex correctional problems based on the special nature of military service. Through their collective efforts, military commanders, SJAs, defense counsel, military judges, corrections specialists, and civilian agencies, such as the VA and treatment courts, can revive the rehabilitative ideal to the mutual benefit of all.

The ability to remit both a conviction and a discharge are unique to the military, making it a place where a conviction can be “wiped clean” and where there is truly an indeterminate sentence. The special clemency powers of convening authorities allow them—today—to help needy offenders who suffer from contemporary mental illnesses perhaps more than many VTCs and other problem-solving courts can. Many civilian courts lack the ability to remove a conviction and its consequences; further, the ability to expunge records may fall short of full restoration of rights.⁷²¹ These limits on the clemency power of civilian courts can make the convening authority’s powers of remission even more powerful a tool when a military offender successfully completes the program of treatment. Because these powers have been preserved through the centuries, the active component is well suited to use existing problem-solving courts or to replicate their components in the military environment.⁷²² Revitalized standards for treatment-based suspended sentences can, over time, contribute to the effective and widespread use of analogous provisions in service regulations that allow for the remission of administrative discharges under less than honorable conditions.⁷²³

⁷¹⁹ *United States v. Metz*, 36 C.M.R. 296, 297 n.1 (C.M.A. 1966).

⁷²⁰ See, particularly, *supra* Part III.B.3.b.ii (discussing Major Freedman’s conception of the soldier-patient and the precursor to the veterans treatment court in the 1940s).

⁷²¹ Clark et al., *supra* note 41, at 195 n.3.

⁷²² MacCormick & Evjen, *supra* note 227, at 3, 6 (noting the uniqueness of the military justice system in that “civil prisoners sentenced to penal and correctional institutions can never completely clear themselves of the stigma of conviction and imprisonment, even in those comparatively few cases where a full pardon is later granted”).

⁷²³ See, e.g., U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 1-18a(1), at 7 (6 June 2005) (with 27 Apr. 2010 Rapid Action Review) (discussing the allowance for a one-year suspended separation in most instances).

“Success”—if it can be defined in a correctional setting where every offender’s experience is necessarily unique—must be linked to realistic expectations. To this end, MAJ Ivan C. Berlien’s 1945 proposal for psychologists to employ group psychotherapy at rehabilitation centers—against the prevailing wisdom, which would limit such techniques only to medical settings—is equally as valuable today regarding the treatment court approach: “We must disregard the prejudice and proceed on the basis that ‘nothing ventured nothing gained’ and with vigor and determination bring this weapon into play in our battle of rehabilitation, especially with the acute and neurotic criminal.”⁷²⁴ He continued, “[o]ur purpose is to determine a method of attack in the struggle for regaining and reintegrating the personality of our offenders in a normal pattern of development.” Above all, however,

We must, as all good soldiers do, cultivate the virtue of patience. The method must not be damned if it does not in the space of a few weeks undo and correct the results of years of maldevelopment. Neither must we expect 100 per cent results. . . . If we successfully treat a good percentage, it will have been successful and worth our efforts.⁷²⁵

Rather than group therapy, which contributed to the restoration of tens of thousands to honorable service, the military now has the problem-solving court as its prime weapon in the battle against PTSD and TBI. In this regard, it is helpful to consider the reminiscences of Thomas J. Lunney, a World War I veteran, who served as a Veterans Counselor in Rikers Island Prison following WWII:

We who work close to the veteran in the environment of prison may be less forgetful that he is essentially the same fellow who, but a few years ago, was applauded and heralded in our grandest manner. He was the grandest star in the most savage drama of all history. But the play has been recast. We find our star playing a walk-on-part in a villainous role to be hissed at. His lead has been taken over by the audience. Let them not forget this bit player because of his new costume. Material to rebuild his citizenship is ever too little to ask for in

⁷²⁴ Berlien, *supra* note 247, at 255.

⁷²⁵ *Id.*

remembrance that without him the new show would be a command performance of storm troupers.⁷²⁶

Treatment-based suspended sentences are the means to provide the vital “material” of which Mr. Lunney eloquently speaks.

In the final analysis, the military justice system, like the civilian justice system referenced by Mr. Lunney, must accept its own casting function and the societal consequences of observing PTSD and TBI-afflicted offenders solely through a “just deserts” lens. Through the intelligent exercise of clemency and use of the same types of VTC programs now available to veterans like Sergeant Bradley Davis, active duty soldiers like Staff Sergeant Brent Keedens can take the lead in their own recovery with the ability to obtain future care.⁷²⁷ Otherwise, they can continue playing the role of the villains—civilian offenders in a caste system that reduces them to little more than societal parasites.⁷²⁸

⁷²⁶ Thomas J. Lunney, *A Veterans' Counselor Goes to Prison*, PRISON WORLD, Mar.–Apr., 1949, at 14, 28.

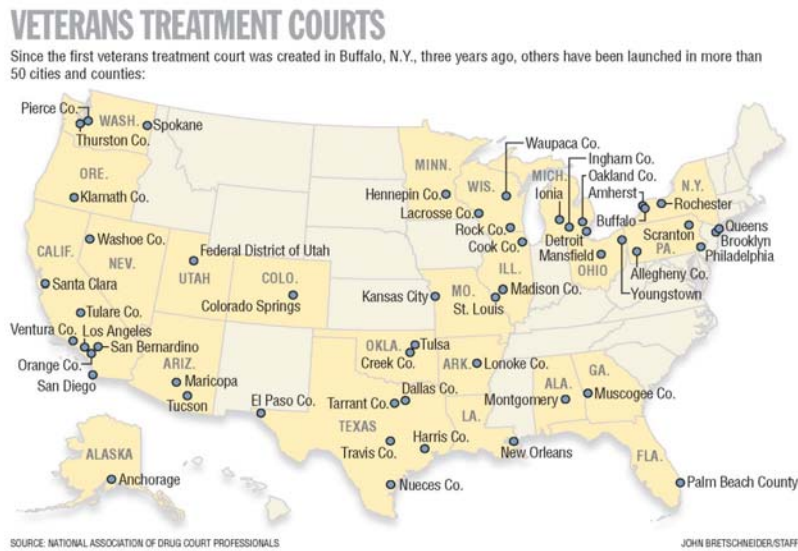
⁷²⁷ See *supra* Part I (introducing the similarly situated but differently treated offenders, Sergeants Keedens and Davis, at the outset of this article).

⁷²⁸ See *supra* Part I.C (describing the public safety threats of indifference in the military justice system).

Appendix A

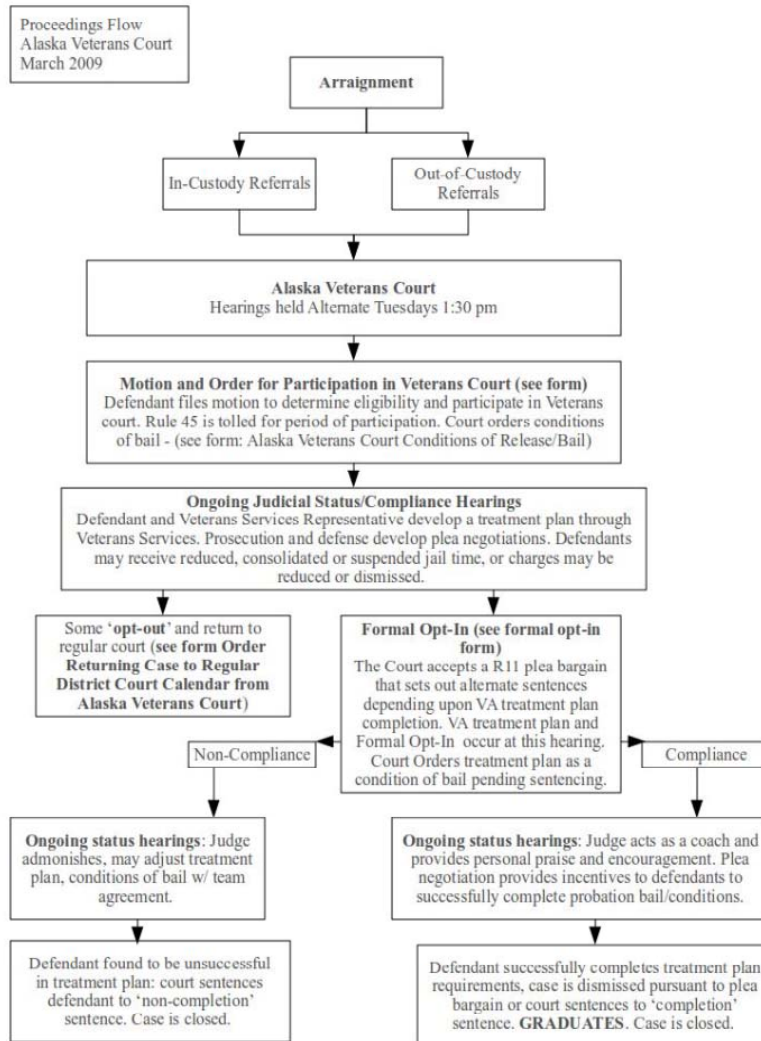
Graphic Dispersion of Veterans Treatment Courts

Note: The graphic immediately below appeared in the February 21, 2011 edition of the *Army Times* and is reproduced with the permission of Gannett Government Media.



Appendix B

Example of Alaska's Veteran's Treatment Court Structure



Reprinted with permission. Hon. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 573 (2010).

Appendix C

Ten Key Components of Veterans Treatment Courts⁷²⁹

1. Veterans Treatment Court integrates alcohol, drug treatment, and mental health services with justice system case processing.
2. Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and promptly placed in the Veterans Treatment Court program.
4. The Veterans Treatment Court provides access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs Veterans Treatment Court responses to participants' compliance.
7. Ongoing judicial interaction with each veteran is essential.
8. Monitoring and evaluation measures the achievement of program goals and gauges effectiveness.
9. Continuing interdisciplinary education promotes effective Veterans Treatment Court planning, implementation, and operation.
10. Forging partnerships among the Veterans Treatment Court, the VA, public agencies, and community-based organizations generates local support and enhances Veterans Treatment Courts' effectiveness.

⁷²⁹ Russell, *supra* note 118, at 365–67 (also cited in Holbrook, *supra* note 60, at 259. 278–79).

Appendix D

Proposed Modified Sentence Worksheet

United States)	
)	
v.)	
)	
SPC James D. Jones)	SENTENCE WORKSHEET
123-45-6789)	
A Co 1/504 PIR)	
82d Airborne Division)	

[NOTE: After the court members have reached their sentence, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The president will not read the language in bold print.]

Specialist James D. Jones, this court-martial sentences you:

NO PUNISHMENT

1. To no punishment.

REPRIMAND

2. To be reprimanded.

REDUCTION

3. To be reduced to the grade of _____.

FINE AND FOREFITURES

4. To pay the United States a fine of \$ _____ (and to serve (additional) confinement of ____ [day(s)] [month(s)] [year(s)] if the fine is not paid).

5. To forfeit \$ _____ pay per month for ____ month(s).

6. To forfeit all pay and allowances.

RESTRAINT AND HARD LABOR

7. To be restricted for ____ day(s) to the limits of: _____.

8. To perform hard labor with confinement for ____ day(s).

9. To be confined for ____ [day(s)] [month(s)] [year(s)] [life with [without] eligibility for parole].

PUNITIVE DISCHARGE

10. To be discharged from the service with a bad-conduct discharge.

11. To be dishonorably discharged from the service.

12. To be dismissed from the service.

NON-BINDING CLEMENCY RECOMMENDATION

13. To suspend and then [remit the [entire adjudged sentence] [the adjudged punitive discharge] [the adjudged confinement]] [commute the adjudged punitive discharge to an administrative discharge] upon the occurrence of the following future event(s):

Restitution in the amount of _____ paid to _____ no later than _____.

Crime-free conduct for a period of _____.

Successful completion of a treatment program requiring [demonstration of measurable progress according to [psychiatric] [medical] [_____] professionals]] [an intensive treatment program with regularly scheduled appearances and other measures to monitor and encourage compliance]]

[Other: _____].

Signature of President _____

Appendix E

Model Instruction for Sentence Worksheet

2-7-17A CLEMENCY (INSTRUCTIONS FOR MODEL SENTENCE WORKSHEET CONTEMPLATING TREATMENT)

NOTE: Where not indicated in the accompanying notes, the below instructions were merged from Benchbook Instructions 2-7-17 and 8-3-34.

MJ: I now direct your attention to number 13, which addresses the clemency recommendation. It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. As evident in the Sentence Worksheet, you are limited in the type of punishment you may adjudge. The Convening Authority has separate powers of clemency. The term “clemency” means bestowing mercy or treating an accused with less rigor than (her) (his) crime(s) or conviction deserves.⁷³⁰ It can include reduction, suspension, or remission of all or part of the legal punishment.⁷³¹ You are not authorized to grant clemency to the accused and you are not required to recommend clemency for the accused. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. You must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority.

Your responsibility is to adjudge a sentence that you believe is fair and just at the time it is imposed and not a sentence that will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation. The Sentence Worksheet provides you with a format for recommending clemency to the Convening Authority, but you are not limited to it; you can make your own separate recommendation following this court-martial in another form, such as a letter. A recommendation by the court for an administrative discharge or disapproval of a punitive discharge, if based upon the same matters as the sentence, is inconsistent with the sentence to a punitive discharge as a matter of law.

⁷³⁰ United States v. Healey, 26 M.J. 394, 395 (C.M.A. 1988); United States v. Lansford, 20 C.M.R. 87, 94 (C.M.A. 1955).

⁷³¹ Commander Raymond W. Glasgow, *Clemency*, JAG. J., June 1952, at 7, 7.

The types of clemency listed on the Sentence Worksheet are general suggestions to the Convening Authority. You can expect that, if the Convening Authority adopts your recommendation, (she) (he) may add special conditions beyond the basic ones covered here. You may make the court's recommendation expressly dependent upon different mitigating factors after the trial and before the Convening Authority's action. For example, one type of clemency is a suspended sentence requiring the accused to pay restitution or to remain crime-free and perform military duties for a specific period of time. This can be a term of months, or years, or until the accused has returned from a combat deployment.⁷³² A suspended sentence furthers the goal of rehabilitation by providing a "second chance" for the accused to "soldier-back" from the offenses with knowledge of the possibility that your adjudged sentence can be reinstated if (she) (he) does not meet the condition(s).⁷³³

Aside from the condition of good conduct, restitution, or a change in attitude, you can recommend a suspended sentence with more specific conditions, such as successful participation in and completion of treatment and counseling, as recommended by mental health or medical professionals.⁷³⁴

Alternatively, you may recommend a more intensive form of probation that uses sanctions to encourage compliance with treatment plans. Examples of possible sanctions include: being subject to unannounced searches of person and property, random drug testing, imposition of curfews, electronic monitoring, and intermittent confinement. You should not speculate on the specific terms that would be imposed during the suspension, but should recommend a basic form of clemency best suited to the accused's individual needs or circumstances.

The Sentence Worksheet provides you with the option of suggesting how much of the adjudged sentence to suspend, such as the discharge, rank reduction, and confinement, and the duration of the suspension. If you

⁷³² United States v. Guernsey, 2008 WL 8087974 (A. Ct. Crim. App., Jan. 22, 2008) (unpublished).

⁷³³ For the notion that "the possibility of . . . rehabilitation is the sole justification for suspension of a punitive discharge," see United States v. Schmit, 13 M.J. 934, 939 (A.F.C.M.R. 1982).

⁷³⁴ The above wording appeared in the *Miller* Trial Transcript, *supra* note 19, at 79, in which the military judge recommended a suspended punitive discharge for treatment of diagnosed PTSD.

adjudge confinement, a term of suspension can last as long as the confinement period, but should not exceed five years.⁷³⁵ You should only consider eligibility requirements for specific rehabilitative programs or ideal times to participate in such programs if this information has been presented in court. Otherwise, you should assume that these matters will be determined independent of your recommendation.

If the accused violates a term of the suspension after it is granted, (she) (he) is subject to imposition of your entire adjudged sentence. The Uniform Code of Military Justice provides for a revocation hearing in which an investigating officer will consider the allegation that the accused violated a term of the suspension and the accused will have the opportunity to respond to the allegation with the assistance of a defense attorney. Your services will not be required for any future revocation proceedings, and, aside from knowing that the procedure exists, you should not consider the likelihood of revocation proceedings or other matters related to revocation of a suspended sentence.

If fewer than all members of the court wish to recommend suspension of a portion of or the entire sentence, then the names of those making such a recommendation should be listed at the bottom of the Sentence Worksheet.

Where such a recommendation is made, then the President, after announcing the sentence, may announce the recommendation and the number of members joining in that recommendation. Whether to make any recommendation for suspension of a portion of the sentence, or suspension of the sentence in its entirety, is solely a matter within the discretion of the Court.

⁷³⁵ For mental health treatment, the “outermost period of suspension” of a DD is five years. *Spriggs v. United States*, 40 M.J. 158, 163 (C.M.A. 1994).

Appendix F

Model Instruction for Mental Health Treatment Considerations

2-7-17B CLEMENCY (EVIDENCE REGARDING MENTAL HEALTH TREATMENT)

NOTE: Where not indicated in the accompanying notes, the below instructions were merged from Benchbook Instruction 6-6.

You have heard evidence regarding the possibility of future mental health treatment. Only the Court can decide whether the accused has a mental condition or would benefit from mental health treatment. As referenced here, the term “mental condition” means impairment to the accused’s ability to reason and make considered decisions;⁷³⁶ which can include regulating emotions, maintaining self- or social awareness, organizing and remembering information and events, or distinguishing between past and present.⁷³⁷

***NOTE: Nature of Mental Condition.** In an effort to better explain the nature of a mental condition, rather than using labels and concepts lacking definition, Military Judges may highlight behavioral factors that have been linked to “criminality and violence,” which include: “Sustaining attention and concentration”; “[u]nderstanding, processing, and communicating information”; “[p]lanning, organizing, and initiating thoughts and behavior”; “[u]nderstanding others’ reactions”; “[a]bstracting and reasoning”; “[c]ontrolling impulses/stopping behavior/emotional regulation”; “[i]nhibiting, unsuccessfully, inappropriate or impulsive behaviors”; “[u]sing knowledge to regulate behavior”; “[b]ehavioral flexibility to changing contingencies”; “[m]odulating behavior in light of expected consequences”; “[d]istracted from . . . appropriate behavior”; “[l]acking appreciation of impact of behavior onto others”; and “[m]anipulation*

⁷³⁶ United States v. Cantu, 12 F.3d 1506, 1513 (9th Cir. 1993).

⁷³⁷ Atkins, *supra* note 560, at 38.

of learned and stored information when making decisions.”⁷³⁸

It can also be helpful to express mental conditions in terms of four areas of functioning: “cognition (how we understand ideas, intellectual capacity); social functioning (how we understand and respond appropriately to our environment, quality of thought and judgment); emotional functioning (mood control: depression, mania, anger); and behavior (impulsivity, substance abuse, etc.).”⁷³⁹

Although witnesses may have used terms such as [Posttraumatic Stress Disorder] [Depression] [Addiction] [Schizophrenia] [Adjustment Disorder] [_____], you are not bound by labels, definitions, diagnostic criteria, or any other conclusions as to what is or is not a mental condition, or whether the accused suffers from one. You are also not bound to any witness’s prognosis for the type or extent of treatment necessary to address the accused’s mental condition. A mental condition as defined by a mental health professional for clinical purposes, where their concern is treatment, may or may not be the same as the definition of a mental condition for the purpose of determining criminal responsibility.

As reflected in the Sentence Worksheet, you are permitted to recommend successful completion of a treatment program as a future condition upon which to remit the sentence you have adjudged. But, even if such evidence is presented, and even if you believe that the accused suffers from a mental condition, you are not required to make a recommendation concerning treatment. In determining whether to recommend mental health treatment, you may consider the same evidence of a mental condition that you are required to consider for purposes of mitigation in adjudging the accused’s sentence.

You may consider the following information about the nature of the accused’s mental condition:

⁷³⁸ John Matthew Fabian, *Forensic and Neuropsychological Assessment and Death Penalty Litigation*, THE CHAMPION, Apr. 2009, at 24, 27–28.

⁷³⁹ Stetler, *supra* note 572, at 49, 51. Logan, *supra* note 571 (providing additional guidance for describing behaviors that indicate mental conditions).

1. The accused's mental condition before and after the alleged offense(s), as well as on the date(s) of the offense(s). For example, if the accused experienced a traumatic event and (her) (his) behavior changed after the event, this may help reveal the severity of the condition and the value of treatment.

2. The absence of treatment, or the absence of effective treatment, prior to the offense(s) of which the accused was convicted. If, for example, the accused was not diagnosed with a condition until after the commission of the charged offense(s), this could indicate the decreased likelihood of similar offenses in the future with appropriate treatment. It may also be valuable to consider whether the accused was on medication, the effects of the medication, and whether the accused was compliant with prescriptions.⁷⁴⁰

3. The accused's attempts to rehabilitate (herself) (himself). Here, if the accused attempted to obtain treatment but was stopped in some way, such as by orders of superiors, this may suggest that the accused is motivated to conform (her) (his) conduct to the requirements of the law.

4. The manner in which the accused's mental condition affected (her) (his) subjective "beliefs and state of mind."⁷⁴¹ This can occur in a number of ways, such as where an accused becomes highly paranoid and believes that "everyone is out to get" (her) (him).⁷⁴² While this symptom may not have *caused* the offense, it may have been a "contributing factor"⁷⁴³ in the sense that it explains "how the [offender's] conduct would have been less harmful under the circumstances that the [accused] believed them to be" or how the accused "was more susceptible to being influenced and motivated to undertake the charged activity."⁷⁴⁴

5. Abnormal behavior, including extraordinary or bizarre acts. Such acts might include "self-destructive" acts, such as "fighting, single-car accidents," and other "life-threatening situations"; "sporadic and unpredictable explosions of aggressive behavior"; or "dissociative states

⁷⁴⁰ Richard G. Dudley Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigations as the Foundation for Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 984, 985 (2008).

⁷⁴¹ Atkins, *supra* note 560, at 38, 40.

⁷⁴² LEVIN & FERRIER, *supra* note 63, at 83.

⁷⁴³ United States v. Perry, 1995 WL 137294, at *8 (D. Neb., Mar. 27, 1995) (unpublished).

⁷⁴⁴ Atkins, *supra* note 560, at 38, 40.

. . . during which components of [a past] event are relived and the individual behaves as though experiencing the event at the moment.”⁷⁴⁵ This behavior may signal the nature of an accused’s mental condition and the value of treatment.

6. Use of controlled substances to limit unwanted effects of the mental condition. If an accused has used controlled substances not to “get high” but, instead, in an attempt to be “normal,”⁷⁴⁶ such as in an attempt to eliminate problems falling asleep because of recurring nightmares or intrusive thoughts, this may present evidence of the nature of an accused’s mental condition and value of treatment.

7. The absence of malingering.

(For suspected Posttraumatic Stress Disorder:

8. The nature, magnitude, and frequency of traumatic event(s) to which the accused was exposed. For example, if the accused suffered from symptoms related to trauma during one deployment, and then experienced additional trauma during a later deployment that aggravated existing symptoms, this may signal the nature of the mental condition and the value of treatment. It may, therefore, be important to consider differences in personality and behavior—who the accused is now—versus who (she) (he) was prior to the trauma; how the accused responded to the trauma when it occurred, and any “family history of psychiatric vulnerability.”⁷⁴⁷

NOTE: Identifying the Effect of Trauma. *One attempt for determining the event of a mental condition over time includes comparisons between: “(a) the time period preceding the traumatic event; (b) the traumatic event itself; and (c) the time period following the traumatic event in which behavioral changes can be observed.”*⁷⁴⁸

⁷⁴⁵ LEVIN & FERRIER, *supra* note 63, at 77, 83.

⁷⁴⁶ Atkins, *supra* note 560, at 38, 39–40.

⁷⁴⁷ Kathleen Wayland, *The Importance of Recognizing Trauma Through Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 936 (2008).

⁷⁴⁸ C. Peter Erlinder, *Vietnam on Trial: Developing a Conceptual Framework and Explaining PTSD in a Forensic Setting*, 42 GUILD PRAC. 65, 73 (1985).

9. “The nature and extent of support [the accused] received following the traumatic experience(s).”⁷⁴⁹

10. As long as the accused was performing duties faithfully and honorably at the time trauma was sustained, you may consider this as a positive factor in recommending treatment.⁷⁵⁰ There is no requirement for trauma to have been inflicted by an enemy or during combat operations for the accused to receive the benefit of your clemency consideration. You may consider trauma to be service-connected if it was sustained during a training exercise, as the result of a sexual assault, or any other execution of faithful service to the Government.⁷⁵¹

(Additional Information: Within reason, you are free to ask the court for additional information that will help you in your evaluation of mental health treatment programs. For example, you may wish to request a neutral expert witness to pose questions regarding treatment options if you believe that further inquiry is necessary beyond the testimony of a witness for either party to this case.⁷⁵² You may further request that the Military Judge defer sentencing for a provisional period that would allow the accused to demonstrate willingness to participate in and complete treatment prior to sentencing.)

Aside from evidence of any mental condition, you are also free to consider information concerning the nature of a treatment program. This includes:

1. The accused’s desire and willingness to participate in a treatment program;⁷⁵³
2. The accused’s personal understanding of the program’s requirements;⁷⁵⁴
3. Any plans the accused may have developed in order to avail (herself) (himself) of the benefits of treatment;

⁷⁴⁹ *Id.*

⁷⁵⁰ *Bell v. Cone*, 535 U.S. 685, 712 (2002) (Stevens, J., dissenting).

⁷⁵¹ *Johnson v. Singletary*, 612 So. 2d 575, 578 n.4 (Fla. 1993).

⁷⁵² MCM, *supra* note 34, MIL. R. EVID. 614.

⁷⁵³ *United States v. McBride*, 50 C.M.R. 126, 132–33 (A.F.C.M.R. 1975).

⁷⁵⁴ *United States v. Rosato*, 32 M.J. 93, 96 (C.M.A. 1991).

4. The ability of a specific type of treatment to address the accused's present symptoms;
5. Any evidence revealing that the accused has been provisionally accepted to a specific type of program. However, you should not assume that the absence of evidence about a specific program would disqualify the accused from participating in one. You may recommend a treatment program type even if you do not have evidence regarding its eligibility standards or whether the accused currently meets them.
6. The manner in which confinement would influence the accused's mental condition, to include the nature of treatment available in confinement versus elsewhere.⁷⁵⁵
7. The potential impact of treatment on the accused's family or significant other(s).

You are not bound by the opinions of either expert or lay witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.

You may also consider the testimony of witnesses who observed the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such witnesses, you may consider the circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to (her) (his) observations and knowledge, the basis for the witnesses' opinions and conclusions, and the time of their observations in relation to the time of the offense charged.

You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the nature and

⁷⁵⁵ United States v. Flynn, 28 M.J. 218 (C.M.A. 1989).

length of time of the witness's contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental condition and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.

Appendix G

Model Pretrial Agreement for Mental Health Treatment Programs⁷⁵⁶

United States)	
)	
v.)	
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	OFFER TO PLEAD GUILTY
82d Airborne Division)	
)	
)	

I, Specialist James D. Jones, U.S. Army, the accused in the General Court-Martial now pending, having had an opportunity to examine the charges preferred against me and all statements and documents attached thereto, and in exchange for good consideration, and after consulting with my defense counsel, [_____], offer to plead as follows.

To Specification 1 of the Charge: Guilty.

To Specification 2 of the Charge: Guilty.

To The Charge: Guilty.

2. I offer to plead as indicated above, provided that the Convening Authority agrees to the following:

a. To take the action specified in the Quantum; and

⁷⁵⁶ This template may omit certain standard pretrial agreement provisions. It can be modified to accommodate post-conviction agreements and should be used only as a starting point.

b. There are no other promises, conditions, or understandings regarding my proposed pleas of guilty that are not contained in this offer and the Quantum portion.

3. I further offer to do the following:

a. I understand that I have a right to be tried by a court consisting of at least five officer members, or by a court consisting of at least one-third enlisted members. None of the members would come from my company. I further understand that I have a right to request trial by military judge alone, and, if approved, there would be no court members and the judge alone would decide whether I am guilty or not guilty. If found guilty, the judge alone would determine my sentence. Knowing all of the above, I agree to be tried by judge alone.

b. Enter into a written stipulation with the trial counsel of the facts and circumstances directly relating to or resulting from the offense and further agree that this stipulation may be used to inform the members of the court or the military judge, if tried by (her) (him) alone, of matters pertinent to an appropriate finding and sentence.

c. I fully understand that if I engage in misconduct after signing this pretrial agreement, I may forfeit the benefits of this agreement. Misconduct means any act or failure to act that violates a punitive article of the Uniform Code of Military Justice (UCMJ) or federal or state criminal law that applies to me at the time and place of the violation. If I engage in misconduct at any time, between when I sign this pretrial agreement and the time that I complete the sentence approved by the Convening Authority, including any period of probation or period in which a sentence component is suspended, the Convening Authority will be able to act on this agreement based on that misconduct. The action the Convening Authority may take on this agreement depends on when the Convening Authority acts, if (she) (he) chooses to act, not on when the misconduct occurs, so long as the misconduct occurs within the timeframe governed by this provision. There are three periods of time during which the Convening Authority may act on this agreement based on my misconduct: (1) from the time the Convening Authority and I sign this pretrial agreement until the time the military judge accepts my plea(s); (2) from the time the military judge accepts my plea(s) until the Convening Authority takes (her) (his) R.C.M. 1107 action; and (3) from the time the Convening Authority takes (her) (his) R.C.M. 1107 action until I have completed serving my entire sentence (including any period

of suspension or probation, if applicable) as finally approved and executed;

d. I understand that if, based on my misconduct, the Convening Authority acts on this agreement after (she) (he) and I sign this pretrial agreement but before the military judge accepts my plea(s), the Convening Authority may use such misconduct as grounds to unilaterally withdraw from this plea agreement. Should the Convening Authority do so, I understand that the pretrial agreement would thereby become null and void, and both I and the Convening Authority would be relieved of all obligations and responsibilities that either of us would have been required to meet by the terms of this pretrial agreement;

e. I further understand that, if based on my misconduct, the Convening Authority acts on this agreement after the time the military judge accepts my plea(s) but before the Convening Authority takes (her) (his) R.C.M. 1107 action, such misconduct may be the basis for setting aside the sentencing provisions of the pretrial agreement. Before setting aside the sentencing provisions of this agreement, however, the Convening Authority shall afford me a hearing, substantially similar to the hearing required by Article 72, UCMJ, and the procedures based on the level of adjudged punishment set forth in R.C.M. 1109(d), (e), (f), or (g), to determine whether misconduct occurred and whether I committed the misconduct; and

f. I further understand that if, based on my misconduct, the Convening Authority acts on this agreement after the time the Convening Authority takes (her) (his) R.C.M. 1107 action, but before I have completed serving the entire sentence (including any period of suspension or probation, if applicable) as finally approved and executed, the Convening Authority may, after compliance with the hearing procedures set forth in R.C.M. 1109, vacate any periods of suspension agreed upon in this pretrial agreement or as otherwise approved by the Convening Authority.⁷⁵⁷

⁷⁵⁷ See *United States v. Coker*, 67 M.J. 571, 576–77 (C.G. Ct. Crim. App. 2008) (requiring a description of the process under which vacation proceedings will occur).

Treatment Court Participation and Completion

g. As further consideration of this agreement, I agree to voluntarily enroll into the [_____] County Veterans Treatment Court (VTC), located at [_____]. I agree to undergo all testing and evaluation required for my initial entry into and continued participation in the VTC program. If it is determined that I meet criteria established by the court to pay for treatment, which may include participation in a residential facility, I shall bear the cost for payment of this evaluation and treatment through a monetary allotment administered by the Defense Finance and Accounting Office, and present proof of that allotment to the Convening Authority's Staff Judge Advocate. I will participate in the program until I have obtained a certificate of graduation, or until I have been terminated, whichever comes sooner, understanding that the program will not exceed twenty-four (24) months.⁷⁵⁸ Graduation must be certified by the VTC Judge and I will provide a duly certified report of completion to the Convening Authority's Staff Judge Advocate.

Program Description for Veterans Treatment Court

h. I understand that the VTC is a special intensive treatment program for criminal offenders who have served in the military. It is a voluntary program that requires all participants to have regular court appearances, scheduled and random drug tests, individual and group counseling sessions, active participation in residential, transitional, sober-living environments, or an outpatient program, and regular attendance at meetings.

⁷⁵⁸ See *Spriggs v. United States*, 40 M.J. 158, 163 (C.M.A. 1994) (requiring a clear understanding of treatment program duration).

Rules and Obligations⁷⁵⁹

i. I further understand that, as a participant in the VTC, I will be subject to the following rules:⁷⁶⁰ refrain from violating state and local laws, in addition to the UCMJ, which include traffic offenses and driving without a valid license; attend all VTC-required court appearances and other appointments, such as intake, office visits, home visits, and phone calls; be on time for scheduled appointments; reschedule any missed appointments; refrain from violence or threats toward other participants, staff, or court personnel; refrain from possessing drugs, alcohol, or weapons or bringing these items to court or other treatment facilities; refrain from tampering with my own or anyone else's urine or drug-testing devices; do not argue with the Judge or other team members; dress appropriately for scheduled appointments and do not wear clothing bearing drug or alcohol-related themes or advertising alcohol or drug use; be respectful by following directions of team members, court personnel, and deputies regarding behavior, cell phones, and talking while in court. I agree to abide by these rules.

j. I understand that I will also be subject to the following obligations:⁷⁶¹ making weekly or bi-weekly "court" appearances as determined by the VTC Judge; unannounced searches of my property or person; being present for home visits and phone calls; at least one group therapy session per week; drug testing at least three times per week (drug test patch and immediate-result drug tests may be used at the treatment team's discretion, if appropriate); taking medications as directed by medical and/or mental health professionals; attending at least five self-help meetings per week (if applicable); reporting to a social worker and probation officer at least once per week; completing additional case management services as determined by the treatment team (detoxification, employment search, psychiatric and/or psychological evaluation); making consistent financial payments to probation, and other agencies as determined by the treatment team; curfew as indicated by the treatment team or facility; searching for and obtaining

⁷⁵⁹ These basic rules and obligations, which are applicable in almost all VTCs are provided as an adaptable template to meet the requirements articulated in *Coker*, 67 M.J. at 576.

⁷⁶⁰ These rules are modeled off of THE TULSA CNTY. DIST. COURT VETERANS TREATMENT COURT PROGRAM PARTICIPANT HANDBOOK (Dec. 10, 2009) (on file with the Nat'l Ass'n of Drug Court Prof'ls, Justice for Vets, Alexandria, Va.).

⁷⁶¹ These obligations are modeled off of the *Orange County Veterans Court Participant's Handbook*. SUPERIOR COURT OF CAL., *supra* note 606.

employment, developing a treatment plan, participating in educational programs, which includes parenting classes; undergoing detoxification; and, participating in residential programs. Aside from reporting to a probation officer associated with the VTC, I may also be required to meet with a military probation officer. I agree to comply with these obligations.

k. I understand that I may not advance in the program, or I may be terminated from it, if I have positive drug tests (including missed or tampered tests); unexcused absences from scheduled services; if I miss taking medications or fail to take medications as directed; if I fail to acknowledge the extent of any substance abuse problem and fail to commit to living an alcohol- and drug-free lifestyle; if I fail to submit required reports or plans; if I fail to participate in community service; if I fail to become a mentor to a new VTC participant as approved by my treatment team; or if I fail to maintain full-time employment or make progress toward it or an educational goal.

Sanctions

l. I understand that the treatment team may impose any of the following sanctions on me: Admonishment from the court; increased drug testing; writing an essay, which must be read aloud, as instructed; increased participation in self-help meetings; increased participation in individual and/or group counseling sessions; increased frequency of VTC appearances; community service hours in addition to those required by the program; demotion to an earlier program phase; commitment to community residential treatment; incarceration; finding of a formal probation violation; termination from the program.⁷⁶²

⁷⁶² Even though a VTC treatment team might change the requirements for effective treatment over time, this would not invalidate the plea agreement. For example, a military appellate court upheld pretrial agreement terms that required the accused to pay child support, even if the state court modified the terms of that obligation. 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE* § 12-25.19(b), at 12-18 (3d ed. 2006) (discussing *United States v. Smith*, No. 83 4182 (N.M.C.M.R., Feb. 16, 1984)).

Intermittent Confinement

m. I fully understand that, if permitted to participate in a VTC, I agree to serve a term of up to sixty (60) days intermittent confinement in a confinement facility chosen by the VTC Judge. This intermittent confinement may be imposed on me as a sanction related to my treatment plan based on the determination of my treatment team. It may be imposed on me in increments of up to ten (10) days. Intermittent confinement does not constitute pretrial confinement under R.C.M. 305. While a violation of the UCMJ or other misconduct, as defined in this agreement, may be a basis for vacating suspension of a suspended sentence, intermittent confinement, alone, is not a basis for vacating any suspension. In the event that my adjudged confinement is reinstated, I will be credited with any intermitted confinement served during VTC participation.

Relationship Between Veterans Treatment Court Rules and Conditions of Suspension⁷⁶³

n. I understand that violation of the VTC rules and obligations will normally be addressed by the treatment team assigned to my case, and could lead to termination from the VTC program. If violations of the VTC rules and obligations constitute misconduct, as defined in this agreement, or if I am terminated from the VTC for any reason, this conduct may serve as the basis for the convening authority to withdraw from this agreement, rendering it null and void, or may serve as the basis for the Convening Authority to vacate any or all previously suspended portions of my sentence, causing me to have to serve the previously suspended sentence.

Requirement to Extend Enlistment Beyond ETS to Permit Treatment Court Participation

o. I understand that I am expected to participate in the VTC program, continuously, for a period of [_____] months. The current Expiration of

⁷⁶³ This provision exists to address concerns related in *United States v. Cockrell*, 60 M.J. 501, 506 (C.G. Ct. Crim. App. 2004) (requiring an understanding of what constitutes a material term in the plea agreement when various other conditions may represent violations of treatment program rules); *United States v. Martin*, 2006 CCA LEXIS 330, at *4 (C.G. Ct. Crim. App., Dec. 6, 2006) (unpublished) (requiring an understanding of the interaction between provisions).

my Term of Service (ETS) occurs on [_____], which is a date that will not currently afford me the full benefit of treatment. Under the terms of this agreement, I am aware that I am required to extend my enlistment so that I can benefit from the VTC program and the Convening Authority can determine the disposition of my sentence. I also understand that by extending my enlistment, I will be subject to the sentence adjudged by the Court-Martial if I have been found in violation of the terms of this agreement, even though my current ETS will be expired and I will have a new ETS date.

p. I am initially required to request an extension of my enlistment [_____] months prior to my ETS. I will submit my request no later than [_____], which is one month prior to the suspense date. If I fail to meet this suspense, I may be found in violation of a material term of this agreement. Furthermore, after an initial extension, I am required to request further extensions of my enlistment every [_____] days. To ensure that I am compliant with these rules, I will submit each of my periodic requests [___] days before the deadline. If I fail to timely submit any of these required requests, this is also grounds for vacation of any suspension.⁷⁶⁴

⁷⁶⁴ This paragraph should be drafted in accordance with Service regulations that govern extensions of enlistment. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM ¶ 4-8.a, at 20 (31 Jan. 2006) (providing for extensions of ETS dates not longer than 23 months); *id.* ¶ 4-8.i & l(6) (permitting extensions for soldiers in substance abuse programs as well as those who are “pending [military] legal action . . . until final outcome of action”). Noting how, “[e]ven though a Marine does not have sufficient time remaining on an enlistment to serve [a] period of suspension,” the Marine Corps permits extensions of expiration of terms of service for the purpose of restoration to duty, “provided the Marine consents in writing to an extension of enlistment for the required suspension period” in the following manner:

With full knowledge that the unexecuted portion of my sentence may be suspended for the purpose of allowing me to serve on active duty during the period of suspension, I hereby agree to be retained on active duty for the period of suspension, such period not to exceed 1 year. I further understand that the suspension may be vacated in accordance with R.C.M. 1109 . . . in which event the unexecuted portion of my sentence shall be executed.

U.S. MARINE CORPS, ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (LEGADMINMAN) ¶ 1008(1)–(2) (31 Aug. 1999) (citing from the paragraph titled “Agreement to Extend Enlistment for the Purpose of Serving a Period of Suspension”).

q. I understand that my conviction may be disapproved at the Convening Authority's discretion.⁷⁶⁵ The Convening Authority will have the option of separating me with an administrative discharge upon disapproval of the findings or remission of my sentence, or (she) (he) may offer me the opportunity to continue active service if I am deemed of further benefit to the military. However, I will not be required to serve the remainder of any remaining time on an existing ETS date, including an ETS extension that was provided to enable my completion of a VTC program, unless the Convening Authority offers me this opportunity and I affirmatively elect to continue service. I further understand that successful completion of the terms of this agreement does not guarantee me the opportunity to continue my military service.

r. To the extent, if any, the Secretary of the Army has, through the provisions of AR 635-200, provided me a right to a hearing before an administrative discharge board, I agree to waive my right to a hearing before an administrative discharge board, doing so with full understanding of the consequences of waiving such a board, as explained by defense counsel. I understand that any administrative discharge will be characterized in accordance with Service regulations, and may be general under honorable or under other than honorable conditions. I will submit a written waiver to the Convening Authority, upon request.⁷⁶⁶

s. I agree to make restitution in the amount of \$ [____], to the economic victim of my misconduct, [Name of Victim], on the date of trial and the remaining balance \$ [____] by [date]. I expressly represent that I will have the economic means to make full restitution by [date]. Through my defense counsel, I will provide the trial counsel with a cashier's check or money order made payable to [Name of Victim]. I fully understand that failure on my part to meet this obligation may serve as the basis for the Convening Authority to withdraw from this

⁷⁶⁵ If it is contemplated that the convening authority would disapprove the findings of the court-martial following proof of the accused's successful rehabilitation in a treatment court, counsel should explore an agreement term which permits the convening authority to hold the action in abeyance to enable such evaluation since the convening authority only has one opportunity to disapprove the findings.

⁷⁶⁶ For guidance concerning this provision, see, e.g., *United States v. Tate*, 64 M.J. 269, 271 (C.A.A.F. 2007) (“[A]s part of a pretrial agreement an accused may agree to waive an administrative discharge board hearing, as provided in applicable administrative regulations.”); *United States v. Gansemer*, 38 M.J. 340, 340 (C.M.A. 1993) (upholding a pretrial agreement that contemplated processing for administrative discharge and waiver of a board “even if part or all of the sentence, including a punitive discharge, is suspended or disapproved pursuant to the agreement”).

agreement, rendering it null and void, or may serve as the basis for the Convening Authority to vacate any or all previously suspended portions of my sentence, causing me to have to serve the previously suspended sentence.⁷⁶⁷ I further understand that the duty to pay restitution, as outlined in this agreement, exists independently of, and regardless of, the Convening Authority's approval or disapproval of any deferments or waivers of forfeitures, and independently of, and regardless of, the Convening Authority's approval or disapproval of any fines.

4. In offering the above agreement, I state that:

a. I am satisfied with the defense counsel who has been detailed to defend me, and I believe that (her) (his) advice is in my best interest.

b. This offer to plead guilty originated with me and no persons have made any attempt to force or coerce me into making this offer to plead guilty.

c. My defense counsel has advised me of the meaning and effect of my guilty plea and I understand the meaning and effect thereof. I understand that by pleading guilty I am giving up three important rights: the right against self incrimination (the right to say nothing at all); the right to a trial of the facts by the court (the right to have the court decide whether or not I am guilty based upon evidence the prosecution would present and any evidence I may present); and the right to be confronted by and to cross-examine any witness called against me.

d. I understand that I may request withdrawal of this plea at any time before sentence is announced and that the military judge may, as a matter of discretion, permit me to do so.

e. I request that the Convening Authority defer all adjudged confinement prior to action.

⁷⁶⁷ See *United States v. Olson*, 25 M.J. 293, 297 n.5 (C.M.A. 1987) ("If the pretrial agreement calls for restitution, the judge should determine what is the amount which the accused must pay or how that amount is to be ascertained.").

5. I further understand that this agreement may be cancelled upon the happening of any of the following events.

a. Failure to agree with the trial counsel on the contents of the stipulation of fact;

b. The withdrawal by either party from the agreement prior to trial;

c. The changing of my plea by anyone during the trial from guilty to not guilty; or,

d. The refusal of the military judge to accept my plea of guilty.

Defense Counsel

JAMES D. JONES
SPC, USA
Accused

The foregoing Offer to Plead Guilty is (accepted) (not accepted).

(Date)

Major General
Commanding

United States)	
)	
)	
SPC James D. Jones)	
123-45-6789)	
A Co 1/504 PIR)	QUANTUM
82d Airborne Division)	
)	
)	

In consideration for the promises made by the accused, Specialist James D. Jones, in his Offer to Plead Guilty, the Convening Authority agrees to do the following:

a. The request for deferment of all confinement is granted. The period of deferment will run from the date the confinement is adjudged until the date the Convening Authority acts on the sentence.

b. The execution of all confinement and punitive discharge will be suspended. The period of suspension will end in twenty-four (24) months from the date of the sentence, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

c. Forfeitures or fines may be approved as adjudged. Automatic forfeitures may be implemented in accordance with applicable law.

d. Any other lawful punishments may be approved as adjudged.

Defense Counsel

JAMES D. JONES
SPC, USA
Accused

The foregoing is (accepted) (not accepted).

(Date)

Major General
Commanding