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## Veterans Treatment Courts: Broadening Eligibility for Veterans Convicted of Violent Offenses

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### Cover Page Footnote

J.D. Candidate, May 2024, The Catholic University of America, Columbus School of Law. The author previously served in the United States Marine Corps as an Infantry Officer. The author thanks the staff and editors of the Catholic University Law Review for their hard work. The author also thanks Pia Miller for her guidance. Lastly, the author thanks his wife, Cate, for her unwavering support. This comment is dedicated to those who have served and are currently serving in the United States Armed Forces.

# VETERANS TREATMENT COURTS: BROADENING ELIGIBILITY FOR VETERANS CONVICTED OF VIOLENT OFFENSES

*Mark Dela Peña<sup>+</sup>*

Veterans treatment courts (VTCs) have been gaining widespread popularity as a tool to divert justice-involved veterans from the criminal justice system. While a step in the right direction, most of these courts categorically exclude violent offenders for eligibility. Many jurisdictions conflate violent offenses with serious offenses, even when many violent offenses lack any physical harm. Additionally, prosecutors wield almost unbridled discretion in determining whether or not someone is charged with an offense considered to be violent, determining VTC eligibility even before a case reaches a sentencing hearing.

This comment argues for admitting veterans convicted of violent offenses into VTCs. This comment compares VTCs that exclude violent offenses with those that include them and argues that a standard-based approach serves public safety and the needs of a justice-involved veteran better than a rule-based approach that categorically excludes violent offenses.

While the criminal justice system as a whole would benefit from diverting violent offenders, the veteran community has a particular need for such broadened eligibility. Most veterans incarcerated in state systems have been convicted of violent offenses, yet only a modest amount of VTC admissions represent veterans convicted of violent offenses. Additionally, even though the largest ground combat operations of the Global War on Terror have come to an end, there will continue to be justice-involved veterans who will benefit from broader eligibility for VTCs.

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<sup>+</sup> J.D. Candidate, May 2024, The Catholic University of America, Columbus School of Law. The author previously served in the United States Marine Corps as an Infantry Officer. The author thanks the staff and editors of the *Catholic University Law Review* for their hard work. The author also thanks Pia Miller for her guidance. Lastly, the author thanks his wife, Cate, for her unwavering support. This comment is dedicated to those who have served and are currently serving in the United States Armed Forces.

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As veterans return home from their military service, many are finding the transition to civilian life difficult: a Bureau of Justice Statistics (BJS) survey in 2016 found that approximately 107,400 veterans were incarcerated in either federal or state prison systems.<sup>1</sup> About one third of the veteran population reported being arrested and booked into jail, while only fewer than one fifth of civilians reported the same.<sup>2</sup> Veterans account for nearly eight percent of incarcerated individuals in state prison systems and five percent in federal prison systems.<sup>3</sup> Moreover, 69.3% of veterans serving sentences in state prison systems in 2016 were convicted of violent offenses, versus 24.7% in federal prison systems.<sup>4</sup>

As states started seeing the rise of incarceration rates for veterans and the rise of their admissions into drug and mental health treatment courts,<sup>5</sup> jurisdictions across America created veterans treatment courts (VTCs) in response.<sup>6</sup> VTCs stand out from other treatment courts because they instill into the program the structure and camaraderie that veterans associate with their time in service; while also serving as a “one-stop shop” to take care of other underlying issues, such as working with the VA to get proper disability benefits.<sup>7</sup> While VTCs are

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1. Laura M. Maruschak et al., *Veterans in Prison: Survey of Prison Inmates, 2016*, BUREAU JUST. STAT. 1 (Mar. 2021), <https://bjs.ojp.gov/library/publications/veterans-prison-survey-prison-inmates-2016>.

2. *From Service through Reentry: A Preliminary Assessment of Veterans in the Criminal Justice System*, COUNCIL ON CRIM. JUST. (Council on Crim. Just. Veterans Just. Comm’n, Washington, D.C.) Aug. 2022, at 3.

3. *Id.*

4. Maruschak et al., *supra* note 1, at 5. The breakdown of other offenses in state systems are as follows: 9.2% (property); 8.6% (drug); and 12.9% (public order). *Id.* At the federal level: 12.7% (property); 29.6% (drug); 33.0% (public order). *Id.*

5. See Honorable Robert T. Russell, Problem-Solving Court: *Veterans Treatment Courts*, 31 TUORO L. REV. 385, 386–87 (2015) (“The first Veterans Treatment Court in Buffalo, N.Y., evolved from our experience with veterans who participated in either the Buffalo Drug Treatment Court or the Mental Health Treatment Court or both. We realized over time that veterans needed a different kind of supervision and support.”).

6. *What Is A Veterans Treatment Court?*, JUST. FOR VETS, <https://justiceforvets.org/what-is-a-veterans-treatment-court/> (last visited Nov. 9, 2022).

7. *Id.* At a typical VTC hearing, a Veterans Justice Outreach (VJO) Specialist is present to access pertinent medical records, schedule appointments, and communicate other information on behalf of the veteran to the court. *Id.* Specifically, VJO Specialists represent the VA in these hearings and “assess Veteran defendants’ treatment needs, link Veterans with appropriate VA treatment services, and (with the Veterans’ permission) provide regular updates to the court on their progress in treatment.” *Veterans Treatment Courts and Other Veteran-Focused Courts Served by VA Veterans Justice Outreach Specialists*, U.S. DEP’T. OF VETERANS AFF. (Mar. 2022), <https://www.va.gov/HOMELESS/docs/VJO/Veterans-Treatment-Court-Inventory-Update-Fact-Sheet-March-2022-508.pdf>.

The mission of the VJO program “is to avoid unnecessary criminalization of mental illness and extended incarceration among Veterans by ensuring that eligible Veterans in contact with the criminal justice system have access to Veterans Health Administration (VHA) mental health and substance services.” *Veterans Justice Outreach Program*, U.S. DEP’T. OF VETERANS AFF., [https://www.va.gov/files/2021-04/CAVHS\\_VJO\\_Brochure.pdf](https://www.va.gov/files/2021-04/CAVHS_VJO_Brochure.pdf) (last visited Nov. 18, 2022).

a step in the right direction, eligibility standards across jurisdictions differ, with about only 62% accepting veterans convicted of violent offenses.<sup>8</sup> Overall, only 21.5% of VTC admissions are from veterans convicted of violent offenses.<sup>9</sup>

This comment supports a broadening of VTC eligibility standards for the admission of veterans who committed violent offenses. It begins with an orientation of the criminal justice system as a whole, and ends with a solution to mitigate mass incarcerations in the veteran community. Part I provides a framework for the problem of mass incarceration, specifically through the lens of prosecutorial power and violent crimes. Part II discusses the formation of specialty treatment courts as a response to tackle mass incarceration in the United States and details the evolution of VTCs, starting with the creation of the first one in Buffalo, NY, and ending with the modern template of a VTC. Parts III and IV analyzes the varying approaches of VTCs and provides solutions to increase admission of veterans convicted of violent offenses into VTCs. Lastly, this comment concludes that due to the substantial benefits to be gained from broadening eligibility for VTCs and the unique needs of the veterans community, veterans convicted of violent offenses should be eligible for VTCs.

#### I. THE RISE OF MASS INCARCERATION IN AMERICA

America has the largest incarceration rate in the world, with 655 out of 100,000 Americans serving time in prisons and jails.<sup>10</sup> The current state of our incarceration system places a heavy economic burden on the government: the estimated total of U.S. government expenditures to run correctional facilities is 81 billion dollars, with some studies even suggesting that the number is closer to 182 billion dollars.<sup>11</sup> Moreover, high incarceration rates have imposed economic strains on incarcerated individuals and their families: the average daily

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8. Jack Tsai et al., *A National Study of Veterans Treatment Court Participants: Who Benefits and Who Recidivates*, 45 ADM POL'Y MENT. HEALTH 236, 237 (2018) ("18% of courts will not consider violent charges other than domestic violence, and 4% of courts will consider violent offenses at the exclusion of domestic violence. The remaining 16% of courts do not accept violent offenses"). *Id.*

9. *Id.* at 239.

10. *Trends in U.S. Corrections*, SENT'G PROJECT, at 1, <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf> (last visited Oct. 21, 2022); see also *Changing Patterns of Imprisonment*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/ten-country-prisons-project/changing-patterns-imprisonment> (last visited Oct. 21, 2022) ("The United States' prison population is the largest in the world at over 2 million. This equates to a prison population rate—prisoners per 100,000 of the national population—of 639.").

11. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>. In this study, the Prison Policy Initiative notes other financial costs imposed by the criminal justice system, such as policing, prosecution, indigent defense, commissaries, and telephone calls. *Id.*

wage of incarcerated workers is \$0.86 while the average loss of earnings of incarcerated individuals over a lifetime is estimated at \$500,000.<sup>12</sup>

The high number of Americans incarcerated today is mostly a product of sentencing and punishment policies rather than an actual increase in criminal activity.<sup>13</sup> Many criminal justice reformers point to the “War on Drugs”<sup>14</sup> and the private prison industry system as the largest drivers of incarceration in America.<sup>15</sup> While the “War on Drugs” and the private prison industry system have both done their fair share in increasing prison and jail populations, incarceration leading from those two causes only account for a small percentage.<sup>16</sup> Though drug offenses account for a large portion of arrests and prison and jail populations, “4 out of 5 people in prison or jail are locked up for

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12. *Economics of Incarceration: The Economic Drivers and Consequences of Mass Incarceration*, PRISON POL’Y INITIATIVE, [https://www.prisonpolicy.org/research/economics\\_of\\_incarceration/](https://www.prisonpolicy.org/research/economics_of_incarceration/) (last visited Dec. 29, 2022). About 27% of formerly incarcerated individuals are unemployed.

13. *Trends in U.S. Corrections*, *supra* note 10, at 2. Changes in punishment policies have led to a 500% increase in the nation’s incarceration rate over the last forty years.

14. The “War on Drugs,” or the policy of heavily enforcing drug offenses and imposing harsh punishment, was first announced by President Nixon in 1971 and gained momentum during President Reagan’s presidency. *1960–1980: Nixon Signed the Controlled Substances Act*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Dec. 29, 2022). In fact, the number of incarcerated non-violent drug offenders increased from 50,000 in 1980 to around 400,000 in 1997. *Id.* *1980–2000: Attitudes Towards Drugs Reverted to Punishment*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Dec. 29, 2022). The political hysteria associated with the “War on Drugs” led to an increase from only 2–6% of Americans who saw drug abuse as the nation’s “big problem” in 1985 to 64% in 1989. *Id.* While the impact of these drug enforcement policies falls disproportionately on communities of color, comments by a Nixon administration aide, John Erlichman, suggests that this was the intended effect: “[w]e knew we couldn’t make it illegal to be . . . black, but by getting the public to associate . . . blacks with heroin, and then criminalizing [heroin] heavily, we could disrupt [black] communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news.” *Drug War Confessional*, VERA INST. OF JUST., <https://www.vera.org/reimagining-prison-webumentary/the-past-is-never-dead/drug-war-confessional> (last visited Oct. 10, 2023).

15. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press 2011). In *THE NEW JIM CROW*, Michelle Alexander discusses the “War on Drugs” and how it disproportionately targeted black individuals, leading to restraints on the black community which had similar effects to that of the Jim Crow laws enacted in the Reconstruction South. *Id.* Published around the time of President Obama’s election, the book took center stage in the discussion on criminal justice reform. David Remnick, *Ten Years After “The New Jim Crow,”* THE NEW YORKER INTERVIEW (Jan. 17, 2020), <https://www.newyorker.com/news/the-new-yorker-interview/ten-years-after-the-new-jim-crow> (“Sometimes a book comes along and, after it is absorbed into the culture, we cannot see ourselves again in quite the same way.”). PFAFF, *infra* note 19, at 81–84.

16. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>. Overall, 1.9 million individuals are incarcerated in the United States. *Id.* The number of individuals who are incarcerated while waiting disposition of a drug offense is 113,000, while the number of those who have already been convicted of a drug offense is 24,000. *Id.*

something other than a drug offense — either a more serious offense or an even *less* serious one.”<sup>17</sup> Additionally, while many criminal justice reformers focus on the profit seeking behavior of the private prison industry system as a driver of mass incarceration, that focus is unwarranted: private prisons only account for 8% of the American incarcerated population.<sup>18</sup>

The nation needs to shift its focus away from non-violent drug offenses and the private prison complex system.<sup>19</sup> Academics who adopt an alternative view, such as Professor John Pfaff, argue that to make lasting changes in the criminal justice system, we need “to take on the far more difficult, but far more important, issues of prosecutorial power . . . and the punishment of violent crimes.”<sup>20</sup>

#### A. *Prosecutorial Power*

As Justice Robert H. Jackson famously stated, “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.”<sup>21</sup> Nonetheless, prosecutors have been largely ignored by criminal justice reforms, creating a “blind spot” in efforts to target mass incarceration.<sup>22</sup> Prosecutors wield wide authority in crafting sentences: 9 out of 10 cases in America are typically resolved before trial by a plea bargain.<sup>23</sup> While judges make the final determination as to what the sentence will be, the current system provides little bargaining power for the defendant during plea negotiations, shifting virtually all the bargaining power to the prosecutor.<sup>24</sup> This effect is largely due to the creation of severe criminal penalties, such as mandatory minimums, which provide prosecutors with a marked advantage in negotiating sentences and influences defendants to accept a guilty plea, even when they may in fact be innocent.<sup>25</sup> Additionally, unlike the sentencing guidelines that federal judges, and most state judges, are required to consider

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17. *Id.*

18. *Id.* Another factor that warrants more attention are “holds” stemming from parole or probation violations. *Id.* Parole or probation officers have the power to file “detainers” or “holds” to deny individuals release on bail. *Id.* Recent studies estimate that about one in five people in state jail and prison systems are being held under detainers for parole or probation violations. *Id.*

19. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 13 (Basic Books 2017).

20. *Id.* at 18.

21. Robert H. Jackson, Att’y Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940) (delivering this speech while serving as the Attorney General of the United States).

22. PFAFF, *supra* note 19, at 127–28.

23. *The Power of Prosecutors*, ACLU,

<https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors> (last visited Jan. 8, 2023).

24. *Id.*

25. *Id.*; PFAFF, *supra* note 19, at 135 (“Strike laws, other repeat offender laws, mandatory minimums, gun enhancements, long maximum sentences: all these make the prosecutor’s threat to go to trial riskier for the defendant.”).



when crafting a sentence,<sup>26</sup> there are no equivalent “prosecutorial guidelines” to reign in the discretion of prosecutors.<sup>27</sup>

### B. Violent Crimes

While most criminal justice reform efforts target low level drug offenses, the numbers suggest the focus should be on violent offenses: in a 2019 BJS study, 58.2% of prisoners sentenced under state correctional authorities were convicted of violent offenses, while those convicted of drug offenses only accounted for 14%.<sup>28</sup> In capturing statistics of violent offenses across the nation, the FBI’s Uniform Crime Reporting (UCR) Program collects data on “murder and non-negligent manslaughter, rape, robbery, and aggravated assault.”<sup>29</sup> While these numbers reflect patterns of the most serious offenses, they fail to capture the trend of “non-index” crimes (offenses unreported in the UCR Program), which account for at least 80% of arrests in most states.<sup>30</sup>

Moreover, the distinction between “violent” and “non-violent” is often blurred, and comprise a broad category of offenses, with many of the violent crimes lacking any infliction of physical harm.<sup>31</sup> For example, some states label purse snatching, possession of marijuana, manufacturing methamphetamines, embezzlement, and dealing drugs near a school as violent offenses.<sup>32</sup> Similarly, some states categorize violent offenses differently: an assault in Maryland can include “kissing without consent, touching or tapping, jostling, and throwing

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26. PFAFF, *supra* note 19, at 197.

27. See *id.* at 147 (internal citation omitted). Professor Pfaff notes that New Jersey was the only state at the time he wrote *Locked In* to mandate any sort of prosecutor’s guidebook: in finding that the state legislature provided prosecutors too much discretion in crafting sentences, the New Jersey Supreme Court “ordered the state attorney general to develop guidelines for prosecutors that defined acceptable plea bargains for certain parts of the drug code; trial judges could then review pleas for compliance.” *Id.* (internal citation omitted).

28. E. Ann Carson, *Prisoners in 2020 – Statistical Tables*, BUREAU OF JUST. STAT. 28 (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

29. *Violent Crime*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/violent-crime> (last visited Mar. 3, 2023).

30. *Action Item 1: Examine Crime, Arrest, and Victimization Data*, 50-STATE REP. ON PUB. SAFETY, <https://50statespublicsafety.us/part-1/strategy-1/action-item-1/> (last visited Mar. 3, 2023). Index crimes are incidents reported to the FBI by local law enforcement that represent “the most serious property and violent crime trends in a state.” *Id.* Specifically, they are “homicide and non-negligent manslaughter, forcible rape, robbery, and aggravated assault” for violent offenses and “burglary, larceny-theft, motor vehicle theft, and arson” for property-related offenses. *Id.* Non-index crimes are those that fall outside the categories of those eight offenses. *Id.*

31. Sawyer & Wagner, *supra*, note 16.

32. Eli Hager, *When “Violent Offenders” Commit Nonviolent Crimes*, MARSHALL PROJECT (Apr. 3, 2019), <https://www.themarshallproject.org/2019/04/03/when-violent-offenders-commit-nonviolent-crimes>.

water upon another,”<sup>33</sup> and burglary—an offense that seldom results in actual injury—is classified by most states as a violent offense.<sup>34</sup>

The undue emphasis on low level drug offenses is caused by the focus of most criminal justice reform on the broader federal system.<sup>35</sup> While the “federal government holds only about 12 percent of the nation’s prisoners, its criminal justice system receives almost all of the national media and scholarly attention.”<sup>36</sup> Because of this undue focus, national media and academia tend to anchor on the larger representation of drug offenses in the federal prison system, while ignoring the modest representation of drug convictions in state prison systems.<sup>37</sup>

The criminal justice system relies on the punishment theories of incapacitation and deterrence in crafting sentences for violent crimes.<sup>38</sup> These theories rest on

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33. *Defining Violence: Reducing Incarceration by Rethinking America’s Approach to Violence*, JUST. POL’Y INST. 9 (Aug. 2016),

[https://justicepolicy.org/wpcontent/uploads/2022/02/jpi\\_definingviolence\\_final\\_report\\_9.7.2016.pdf](https://justicepolicy.org/wpcontent/uploads/2022/02/jpi_definingviolence_final_report_9.7.2016.pdf) (quoting *Epps v. State*, 333 Md. 121, 127, 634 A.2d 20 (1993)). Similarly, in encounters with police officers in Washington D.C., an individual can be charged with Assaulting a Police Officer for slight behaviors that include “wiggling in handcuffs, yelling at a police officer, or removing an officer’s hand from one’s person when they are not being arrested.” *Id.* at 10.

34. *Id.* at 12.

35. PFAFF, *supra* note 19, at 189.

36. *Id.*

37. *Id.* Another factor leading to the lack of change in the punishment of violent offenses is what Professor Pfaff refers to as the “man bites dog” problem when “the media never reports when a dog bites a man — or when a bank robber with a gun gets five years, or a murderer ten or fifteen,” they prefer to report on the extreme circumstances, or when the “man bites dog”:

They want to cover the . . . the shockingly short or long sentences, not the regular ones. So we see dozens of articles about the “influenza” teen who was sentenced to probation after killing four people in a drunk driving accident . . . [o]r we see the extensive coverage of a first-time drug dealer convicted of selling only a small amount but given life without parole. The reality, however, is much different, and these cases make the news *because* they are the exceptions, not the rules.

*Id.* (internal citations omitted) (emphasis original). See also Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM & MARY L. REV. 397 (2006). Professor Beale asserts that the media does not accurately reflect true societal conditions, but “[r]ather, media content is shaped by economic and marketing considerations that frequently override traditional journalistic criteria for newsworthiness.” *Id.* at 397–98. Moreover, Professor Beale notes how media manipulated footage increases the salience of stories that have a “persistent effect on viewers” and “primes audiences to believe that [certain] issues warrant more political attention.” *Id.* at 443. Ultimately, Professor Beale concludes that despite the decrease in crime from the 1990s onward, the media’s emphasis on violent crimes led Americans to “remain[] ignorant of the reduction in crime” while a “large majority continued to rate crime as one of the nation’s most serious problems and support even harsher measures.” *Id.* at 476.

38. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 200 (2013). There are also retributive purposes to punish, “which [are] imposed retrospectively with a view to guilt,” but have no aim “to provide any future benefit, and for this reason it was understood by the early architects of modern penology as irrational and cruel, and thus unjust.” Arthur Shuster, *Kant on the Role of the Retributive Outlook in Moral and Political Life*, 73 UNIV. NOTRE DAME

the assumption that justice-involved individuals who committed violent offenses should be branded as “[v]iolent offenders.”<sup>39</sup> In other words, “[i]t presupposes that past offenders are uniquely dangerous individuals who are destined to offend and re-offend regardless of social context.”<sup>40</sup>

However, these assumptions are unwarranted: modern evidence suggests that the absolute rate of recidivism for individuals who committed violent crimes, even homicide, is substantially low.<sup>41</sup> In fact, individuals convicted of violent offenses who are released are less likely to be arrested than individuals convicted of other types of offenses, such as property and drug offenses.<sup>42</sup> Additionally, traditional notions of incapacitation fail to capture that “people age into and out of the risk of engaging in criminal or antisocial behavior.”<sup>43</sup> A BJS study of re-arrest rates for prisoners after release yielded the following results: “[e]ighty-one percent of prisoners age 24 or younger at release in 2012 were arrested within 5 years of release, compared to 74% of those ages 25 to 39 and 61% of those age 40 or older.”<sup>44</sup> These numbers tend to support the general “life course” pattern criminality takes in most individuals, in that “criminality and violence rise in the late teen years through the twenties or thirties; and thereafter, both criminality and violence subside.”<sup>45</sup> Lastly, modern evidence suggests that there is little effect of severe punishment on the deterrence of crimes: famed criminologist and statistician Professor Daniel Nagin asserts that it is the certainty of punishment, not the length or severity of the punishment imposed,

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REV. POL. 425, 425 (2011). Kant is credited with being “the first [] modern thinker to react against” the idea that retributive punishment serves no purpose and is thus “an act of ‘cruelty.’” *Id.* at 426 (internal citations omitted). Whatever metaphysical grounding Kant and other thinkers used to support their retributive theories, “[t]here’s no data or evidence, however, that can shape these sorts of philosophical and moral decisions,” PFAFF, *supra* note 19, at 190 n. 7, 287, and therefore will not be addressed in this comment. However, a rehabilitative perspective towards punishment is the thrust of alternative sentencing courts and is detailed below.

39. PFAFF, *supra* note 19, at 190.

40. Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 3 (2017).

41. J.J. Prescott, et al., *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1697 (2020). Professors Prescott, Pyle, and Starr survey previous studies regarding violent offense recidivism and tap into data from the National Corrections Reporting Program (NCRP) to provide empirical statistics “to address the fear that [individuals convicted of violent crimes] will almost certainly reoffend violently.” *Id.* at 1643, 1645.

42. Matthew R. Durose & Leonardo Antenangeli, *Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012–2017)*, BUREAU JUST. STAT. 6, 3 (July 2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf>.

43. PFAFF, *supra* note 19, at 191.

44. Durose & Antenangeli, *supra* note 42, at 1.

45. PFAFF, *supra* note 19, at 191 (internal citations omitted). Professor Pfaff notes that this evidence is so widely accepted that the Supreme Court has held “the death penalty, life without parole for non-capital crimes, and mandatory life without parole for murder all unconstitutional when applied to juveniles.” *Id.* at 191 n.13, 288 (citing *Roper v. Simmons*, 543 U.S. 551 (2005); citing *Graham v. Florida*, 560 U.S. 48 (2010); citing *Miller v. Alabama*, 567 U.S. 460 (2012)).

that leads to the deterrent effects of laws and that resources may better be shifted towards policing rather than corrections.<sup>46</sup>

## II. VTCs

Specialty treatment courts seek to treat justice-involved individuals through a rehabilitative lens by treating the root causes of the criminal behavior.<sup>47</sup> One of the first specialty treatment courts to be established in the United States was the Miami-Dade County, Florida, drug treatment court.<sup>48</sup> This court strayed from the typical “adversarial approach” by treating “the offender’s chronic and underlying problems . . . [t]hrough mandatory drug testing, frequent appearances before the judge, and ongoing community supervision,” all while keeping incarceration time low or preventing incarceration of the offender completely.<sup>49</sup> After the success of the Miami-Dade drug court, states across the nation soon followed, resulting in the establishment of 3,848 drug courts by the end of 2020.<sup>50</sup>

The very first VTC was established in Buffalo, NY by Judge Robert Russell in January 2008.<sup>51</sup> It stemmed from his work with veterans who participated in the Buffalo Drug Treatment and Mental Health Treatment courts.<sup>52</sup> Noting the unique needs of justice-involved veterans with service related issues, Judge Russell consolidated veterans’ cases into a “centralized, singular calendar of all eligible veterans” that “increased collaboration with law enforcement and the Veterans Administration.”<sup>53</sup> In building a framework for the program, he adopted the drug and mental health court models.<sup>54</sup> Judge Russell combined the best of both programs, emphasizing the abstinence and sanctions based approach

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46. Daniel S. Nagin, *supra* note 38, at 199. Professor Nagin asserts that modern research on deterrence suggests that “evidence . . . of the certainty of punishment is far more convincing and consistent than for the severity of punishment.” *Id.* at 201. Additionally, Professor Nagin defines certainty of punishment through mathematical probabilities: “the probability of apprehension given commission of a crime, the probability of prosecution given apprehension, the probability of conviction given prosecution, and the probability of sanction given conviction.” *Id.* While analyzing evidence through this lens, Professor Nagin concludes that current deterrence research “also suggest[s] that crime control effectiveness would be improved by shifting resources from corrections to policing methods that enhance the effectiveness of police in their official guardian role.” *Id.* at 253.

47. James P. Kennedy, Jr., *Specialty Courts: Expanding Possibilities for Prosecutors*, 63 U.S. ATT’YS’ BULL. 52, 53 (Jan. 2015).

48. *Id.*

49. *Id.*

50. *Treatment Courts Across the United States (2020)*, NAT’L DRUG CT. RES. CTR., [https://ndcrc.org/wpcontent/uploads/2021/08/2020\\_NDCRC\\_TreatmentCourt\\_Count\\_Table\\_v8.pdf](https://ndcrc.org/wpcontent/uploads/2021/08/2020_NDCRC_TreatmentCourt_Count_Table_v8.pdf) (last visited Oct. 27, 2022).

51. Russell, *supra* note 5, at 385.

52. *Id.* at 386–87.

53. *Id.* at 387.

54. *Id.*

of drug courts, and the flexible individualized approach of mental health courts.<sup>55</sup>

As of 2017, VTCs have become “one of the fastest growing specialty courts types in the U.S. with over 461 VTCs currently existing nationally.”<sup>56</sup> This is largely due to the success of the Buffalo court.<sup>57</sup> Following the Buffalo Court’s lead, modern VTCs adhere to core components that are substantially similar to those of drug treatment courts.<sup>58</sup> Moreover, today’s VTCs stand out from drug and mental health courts because the program includes volunteer veteran peer mentors, whose support to the justice-involved veteran “increases the likelihood that a veteran will remain in treatment and improves the chances for . . . law-abiding behavior.”<sup>59</sup> To harness the efficacy of VTCs at the national level, Congress passed The Veteran Treatment Court Coordination Act in 2019 to “provide grants and technical assistance to state [local and tribal government] court systems that [(1)] have adopted a veterans court program or [(2)] have filed [a notice of] intent to do so.”<sup>60</sup>

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55. *Id.* at 388, 390.

56. Tsai et al., *supra* note 8, at 236.

57. *Id.*

58. See, e.g., *The Ten Key Components of Veterans Treatment Courts*, JUST. FOR VETS, <https://justiceforvets.org/wp-content/uploads/2017/02/The-Ten-Key-Components-of-Veterans-Treatment-Courts.pdf> (last visited Oct. 27, 2022); Bernard Edelman et al., *Veterans Treatment Courts: A Second Chance for Vets who Have Lost Their Way*, NAT’L INST. CORRECTIONS 25 (May 2016), <https://info.nicic.gov/jiv/sites/info.nicic.gov/jiv/files/030018.pdf>; *Veterans Courts*, FLA. CTS., <https://www.flcourts.gov/Resources-Services/Office-of-Problem-Solving-Courts/Veterans-Courts> (last visited Nov. 20, 2023); *Veterans Treatment Court*, N.C. JUDICIAL BRANCH, <https://www.nccourts.gov/courts/recovery-courts/veterans-treatment-court> (last visited Nov. 20, 2023); *Veterans Treatment Court: Mentor Program Handbook*, N.Y. STATE UNIFIED CT. SYS. 8 (June 2020), [https://www.nycourts.gov/legacyPDFs/courts/problem\\_solving/FInal\\_VeteranMentor\\_Handbook\\_June2020.pdf](https://www.nycourts.gov/legacyPDFs/courts/problem_solving/FInal_VeteranMentor_Handbook_June2020.pdf) (last visited Nov. 20, 2023); and *Veterans Treatment Court Standards, Best Practices, and Promising Practices*, STATE CT. ADMIN. OFFICE 1 (Mar. 2021), <https://www.courts.michigan.gov/4a88a2/siteassets/court-administration/best-practices/psc/vtc-bpmanual.pdf>.

59. JUST. FOR VETS, *supra* note 58; Paul A. Lucas, *An Exploratory Study of Veterans Treatment Court Peer Mentors: Roles, Experiences, and Expectations*, DRUG CT. REV. VETERANS TREATMENT CT. ISSUE, Winter 2018, at 60 (“VTCs differ from drug courts through their use of peer mentors to assist the VTC participants during their time within the court. These peer mentors are veterans themselves and are central to the VTC model given the unique experiences shared by many veterans.”); Clyde J. Tate, *Mentor Roles and Boundaries: Setting the Conditions for Success*, JUST. FOR VETS DISPATCH FROM FRONT LINES (Jan. 2022),

<https://allrise.org/wp-content/uploads/2023/05/Mentor-Roles-and-Responsibilities-Dispatch-2022.pdf> (“Volunteer veteran mentors have been described as the ‘secret sauce’ of VTCs and, I humbly submit, rightly so.”).

60. THE VETERAN TREATMENT COURT COORDINATION ACT OF 2019 ACT, H.R. REP. NO. 116–259, (2019).

### A. Differing Eligibility Standards of VTCs

While most alternative treatment courts refuse to accept individuals convicted of violent crimes, VTCs vary from court to court: “[s]ome courts won’t hear such cases; others do, but with significant caveats and checks.”<sup>61</sup> A national study of VTCs determined that most VTCs exclude at least one violent felony charge from eligibility.<sup>62</sup> Even New York, the home state of the very first VTC and a state that now has thirty-four VTCs,<sup>63</sup> differs in its eligibility criteria across subordinate jurisdictions.<sup>64</sup>

#### 1. VTCs That Categorically Exclude Veterans Convicted of Violent Offenses

Many states, such as Illinois, establish rules that explicitly exclude violent offenses from eligibility for VTCs.<sup>65</sup> The Illinois law authorizing specialty veterans dockets requires that a veteran is to be “excluded from Veterans and Servicemembers Court program if . . . [t]he crime is a crime of violence . . . .”<sup>66</sup>

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61. William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Vets to Help Other Vets*, ABA J. (Nov. 1, 2011, 10:10 AM), [https://www.abajournal.com/magazine/article/the\\_battle\\_on\\_the\\_home\\_front\\_special\\_courts\\_turn\\_to\\_vets\\_to\\_help\\_other\\_vets](https://www.abajournal.com/magazine/article/the_battle_on_the_home_front_special_courts_turn_to_vets_to_help_other_vets).

62. COUNCIL ON CRIM. JUST., *supra* note 2, at 14.

63. Chelsia Rose Marcius, *Veterans Trickle Through a Special New York Court Known Only to a Few*, N.Y. TIMES (Jan. 1, 2023), <https://www.nytimes.com/2023/01/01/nyregion/new-york-veterans-court.html>.

64. For example, the Buffalo VTC created by Judge Russell typically will only take non-violent felonies or misdemeanors but allow violent offenses when “evaluated on a case-by-case basis with the District Attorney’s office.” Russell, *supra* note 5, at 395. Using domestic violence as an example, Judge Russell notes that in evaluating such defendants courts should “distinguish[] those whose behavior has changed related to their service, compared with those with a predisposition or domestic violence.” *Id.* (“Symptoms associated with injury from combat such as post-traumatic stress disorder or traumatic brain injury can manifest in outbursts of anger. This is wholly separate from those who commit domestic violence prior to entering the service and then continue after they leave.”) *Id.* Similarly, the Veterans Treatment Track of the Brooklyn Treatment Court excludes “[a]ny defendant with pending charges or prior convictions for a violent felony offense as that term is defined by Penal Law § 70.02 is ineligible, absent the consent of the District Attorney’s office.” *Brooklyn Treatment Court Policy & Procedures*, NYCOURTS at 5, <https://www.nycourts.gov/courts/2jd/brooklyntreatment/Policy-and-Procedures.pdf> (last visited Dec. 30, 2022). The Long Island counties of Nassau and Suffolk both categorically exclude violent offenses from eligibility for their VTCs. *Eligibility*, NASSAU CNTY. N.Y., <https://www.nassaucountyny.gov/4537/Eligibility> (last visited Dec. 30, 2022) (“U.S. military veterans charged with relatively minor non-violent offenses may qualify for reduced charges or penalties by participating in a court-supervised treatment program.”); Honorable John T. Toomey, *Suffolk County Veterans Court Policy and Procedure Manual*, N.Y. STATE UNIFIED CT. SYS., 3, <https://www.nycourts.gov/LegacyPDFS/courts/10jd/suffolk/VeteransCT/pdf/VETPoliciesAndProcedures.pdf> (last visited Dec. 30, 2022) (“The Suffolk County Veterans Court seeks to divert eligible veteran-defendants with substance dependency and/or mental illness that are typically charged with non-violent misdemeanor or felony criminal offenses . . . .”).

65. Veterans and Servicemembers Court Treatment Act, 730 ILL. COMP. STAT. 167 / § 20(b)(1) (2009).

66. *Id.*

It then specifies what classifies as a “crime of violence” by listing several offenses and even excludes veterans if they were previously convicted of a “crime of violence” within the past five years.<sup>67</sup> Accordingly, county VTC’s formed under this legislation follow the same categorical exclusion of crimes of violence.<sup>68</sup>

While some states do not make explicit categorical exclusions of violent offenses, “several veterans treatment dockets rely on the adult drug treatment court statute as a basis for their operations,” leading most VTCs, such as those in Virginia, to only include nonviolent offenses for eligibility.<sup>69</sup> The State of Virginia’s law authorizing VTCs provides no guidance for the eligibility standards, leading lower courts to adopt standards of drug treatment courts, which states: “adult offenders who have been convicted of a violent criminal offense within the preceding 10 years . . . shall not be eligible for participation in any drug treatment court . . . .”<sup>70</sup> Accordingly, most VTCs in Virginia adopt this drug treatment court standard and categorically exclude violent offenses for eligibility.<sup>71</sup>

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67. *Id.* § 20(b)(3) (2009). A “crime of violence” includes, but is not limited to: [F]irst degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, armed robbery, aggravated arson, arson, aggravated kidnapping and kidnapping, aggravated battery resulting in great bodily harm or permanent disability, stalking, aggravated criminal sexual abuse by a person in a position of trust or authority over a child, aggravated stalking, or any offense involving the discharge of a firearm or where occurred serious bodily injury or death to any person.

*Id.*

68. *Cook County Veterans Treatment Court*, ILL. CIR. CT. COOK CNTY., <https://www.cookcountycourt.org/ABOUT-THE-COURT/Problem-Solving-Courts/Veterans-Treatment-Court> (last visited Dec. 30, 2022) (“A defendant will be excluded from the Veterans Court Treatment Program if: The crime is of violence; . . . [t]he defendant has been convicted of a crime of violence within the past 10 years excluding incarceration.”); *Veterans Treatment Court*, MCLEAN CNTY. ILL. GOV’T, <https://www.mcleancountyil.gov/1391/Veterans-Treatment-Court> (last visited Dec. 30, 2022) (“Veterans Treatment Court is a Veteran Specialty Court designed for adult offenders who have been convicted of a *non-violent offense* who have been diagnosed with serious mental illness or substance abuse.”) (emphasis added).

69. OFF. EXEC. SEC’Y VA., VIRGINIA VETERANS TREATMENT COURT STATEWIDE STRATEGIC PLAN 5 (2019), [https://www.vacourts.gov/courtadmin/aoc/djs/programs/sds/programs/vtd/resources/vtd\\_strategic\\_plan.pdf](https://www.vacourts.gov/courtadmin/aoc/djs/programs/sds/programs/vtd/resources/vtd_strategic_plan.pdf). Because VTCs in Virginia are established in such a manner, most Virginia VTCs preclude for eligibility “adult offenders who have been convicted of a violent criminal offense within the preceding ten years.” *Id.* (citing VA. CODE § 18.2-254.1). Through this document, the state of Virginia asserts: “best practice indicates that if adequate treatment and supervision are available, there is no empirical justification for routinely excluding violent offenders from participation in drug courts. Furthermore, research shows that violence is one way that trauma manifests itself in the justice-involved veteran population.” *Id.* (internal citations omitted).

70. VA. CODE ANN. § 18.2–254.1(H) (2023).

71. *Veterans Treatment Docket*, FAIRFAX CNTY. VA., <https://www.fairfaxcounty.gov/general-district/veterans> (last visited Oct. 3, 2022); *Norfolk Adult Drug Treatment Veterans Track*,

While the efforts to build VTCs across the nation has primarily been a state affair, the federal government has acknowledged the need and success of VTCs by enacting The Veteran Treatment Court Coordination Act of 2019.<sup>72</sup> However, the Act also intends to categorically exclude violent offenses: “[i]t is the sense of Congress that veterans treatment courts are . . . aimed at helping veterans charged with *nonviolent crimes* receive the help and the benefits for which the veterans are entitled.”<sup>73</sup> Subsequently, VTCs that seek funding from the federal Act must exclude violent offenses for eligibility.<sup>74</sup>

## 2. VTCs That Draw No Distinction Between Nonviolent and Violent Offenses

While some VTCs abide by the rigid standards of their drug and mental health courts, other jurisdictions, such as some in California, allow individuals convicted of violent offenses into specialty treatment courts following a fact-based determination.<sup>75</sup> California’s statutory scheme that authorizes VTCs draws no distinction between violent and nonviolent offenses for eligibility, and only states certain serious crimes, sexual in nature, as precluded from admission.<sup>76</sup> In determining the eligibility of a veteran for VTCs, California

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NORFOLK CIR. CT., <https://www.norfolkcircuitcourt.us/wp-content/uploads/2021/12/Veterans-Track-of-the-Norfolk-Drug-Court-Brochure.pdf> (last visited Oct. 28, 2022).

72. The Veteran Treatment Court Coordination Act of 2019, Pub. L. No. 116-153, 134 Stat. 688.

73. *Id.* (emphasis added). While the Act claims that Congress only intends VTCs to support veterans convicted of nonviolent crimes, the statute that governs the funding scheme for adult and juvenile collaboration courts only excludes individuals charged with certain sex offenses and “murder or assault with intent to commit murder.” 34 U.S.C. § 10651(a)(9)(A)(iv)(II). Moreover, a justice-involved individual can be designated as a “preliminarily qualified offender” after the prosecutor or court considers:

- (i) whether the participation of the defendant in the program would pose a substantial risk of violence to the community;
- (ii) the criminal history of the defendant and the nature and severity of the offense for which the defendant is charged;
- (iii) the views of any relevant victims to the offense;
- (iv) the extent to which the defendant would benefit from participation in the program;
- (v) the extent to which the community would realize cost savings because of the defendant’s participation in the program; and
- (vi) whether the defendant satisfies the eligibility criteria for program participation unanimously established by the relevant prosecuting attorney, defense attorney, probation or corrections official, judge and mental health or substance abuse agency representative.

*Id.* § 10651(a)(9)(B).

74. Mark Bowes, *Chesterfield Creating the Region’s First Court Docket That Will Provide Support to Military Vets Who Run Afoul of the Law*, RICHMOND TIMES-DISPATCH (Feb 4., 2022), [https://richmond.com/news/local/crime-and-courts/chesterfield-creating-the-regions-first-court-docket-that-will-provide-support-to-military-vets-who/article\\_5daba94e-35c1-5667-8f60-0133bb74899f.html](https://richmond.com/news/local/crime-and-courts/chesterfield-creating-the-regions-first-court-docket-that-will-provide-support-to-military-vets-who/article_5daba94e-35c1-5667-8f60-0133bb74899f.html).

75. CAL. PENAL CODE § 1170.9(a).

76. *See id.*



requires that the underlying offense was committed “as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military,”<sup>77</sup> and that the defendant is eligible for probation, which requires the court to consider: “[t]he safety of the public . . . ; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant . . . .”<sup>78</sup> Accordingly, discretion is delegated down to local courts,<sup>79</sup> with some including and others excluding violent offenses.<sup>80</sup>

### III. ELIGIBILITY FOR VIOLENT CRIMES IN VTCs: ANALYSIS AND CRITIQUE

For VTCs to play a substantial role in mitigating mass incarceration, eligibility should be opened to veterans convicted of violent offenses. To determine the efficacy of such an approach, this section analyzes: (1) whether the veteran community has a unique need that would be better served with the inclusion of veterans convicted of violent offenses into VTCs and (2) whether a rule that categorically excludes violent offenses or a standard that on a case-by-case basis considers more than just the nature of the offense, better serves the needs of the community and justice-involved veterans.

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77. *Id.*

78. CAL. PENAL CODE § 1202.7.

79. A 2021 California case is illustrative of this discretion: in remanding a case to the trial court to consider eligibility for a veteran charged with aggravated assault, the Court of Appeal of California for the Fourth Appellate District held that CAL. PENAL CODE § 1170.9 required that the trial consider any service-related qualifying condition as a mitigating factor. *People v. Panozo*, 59 Cal. App. 5th 825 (Cal. Ct. App. 2021). Nowhere in the opinion does the court suggest that the defendant was ineligible because of the violent nature of his offense. *Id.* The court concluded that “[b]y their plain language, sections 1170.9 and 1170.91 unambiguously obligate a sentencing court to consider a defendant’s service-related PTSD, substance abuse, or other qualifying conditions in making discretionary sentencing choices.” *Id.* at 836.

80. *Veterans Treatment Court*, CALVET, <https://www.calvet.ca.gov/VetServices/Pages/Veterans-Treatment-Court.aspx> (last visited Dec. 30, 2022) (“Some courts don’t hear cases where veterans have been charged with violent crimes, others do, with stipulations.”); *Veterans Treatment Court*, CALIFORNIA COURTS THE JUDICIAL BRANCH OF CALIFORNIA, [https://www.courts.ca.gov/documents/BTB\\_XXII\\_IVJ\\_2.pdf](https://www.courts.ca.gov/documents/BTB_XXII_IVJ_2.pdf) (last visited Dec. 30, 2022) (listing the admission criteria of the Orange County VTC as “both misdemeanor and felony cases, where the treatment team believes admission will protect the public and assist the veteran”); *Veterans Court and Diversion*, L. OFF. KENNETH H. LEWIS, <https://www.losangeleslegaldefense.com/criminal-defense/veterans-court-and-diversion/> (last visited Dec. 30, 2022) (“Both misdemeanors and felonies can qualify. However, sex, gang and violent crimes are often disqualifying. This is always evaluated by and determined within the judge’s discretion to allow veterans having committed those types of serious crimes to enter into Veterans Court.”)

A. *Whether the Veterans Community has a Unique Need That Would be Better Served with Inclusion of Violent Offenses Into VTCs.*

Justice-involved veterans are the individuals treatment courts are intended to help: “[m]ore than half of justice-involved Veterans have either mental health problems—namely PTSD, depression, or high anxiety—or substance-abuse disorders, most notably alcohol or cocaine addiction.”<sup>81</sup> Trauma and its associated stressors can be linked to criminal behavior under the General Strain Theory (GST): stressors produce negative emotions and “create pressure for corrective action, and crime is one possible response . . . .”<sup>82</sup> GST seems to be a plausible explanation for the connection between service related mental illness and criminality: a study by the Veterans Affairs Mid-Atlantic Mental Illness Research, Education, and Clinical Center suggests that veterans with PTSD, specifically leading to high levels of anger and irritability, may be more likely to engage in violent criminal behavior and are at a higher risk for arrest.<sup>83</sup> However, empirical data from the same study demonstrates that factors generally found in the civilian population are more likely to be indicative of criminal behavior than the negative effects of PTSD: “[I]ike their civilian counterparts, veterans who are young and male, come from troubled family backgrounds . . . , abuse substances, or have criminal backgrounds appear at higher risk of breaking the law.”<sup>84</sup>

Similarly, findings from a British study on U.S. veterans who served in Iraq and Afghanistan demonstrate that veterans with PTSD are no more likely to engage in severe violent behavior than veterans without PTSD or alcohol abuse.<sup>85</sup> Moreover, a recent report by the Council on Criminal Justice found that while traditional theories regarding criminality among veterans assert that PTSD and combat related trauma are the root causes of criminal behavior with veterans, modern evidence suggests that rather it is a combination of risk factors, to include those pre-dating military service, that lead to criminal behavior.<sup>86</sup> In fact, the report found that other risk factors, such as adverse childhood

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81. Mike Richman, *Veterans and the Criminal Justice System*, U.S. DEPT. VETERANS AFFS. (Sep. 7, 2018), <https://www.research.va.gov/currents/0918-VA-researcher-examines-Vets-who-collide-with-criminal-justice-system.cfm>.

82. Robert Agnew, *Building on the Foundation of General Strain Theory: Specifying the Types of Strain Most Likely to Lead to Crime And Delinquency*, 38 J. RSCH. CRIME & DELINQUENCY 319 (2001).

83. Eric B. Elbogen et al., *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, 80 J. CONSULTING & CLINICAL PSYCH. 1097, 1100-01 (2012).

84. *Id.*

85. Eric B. Elbogen et al., *Violent Behaviour and Post-Traumatic Stress Disorder in US Iraq and Afghanistan Veterans*, 204 BRITISH J. PSYCH. 368, 372 (2014) [hereinafter *Violent Behaviour and Post-Traumatic Stress Disorder*]. While the study concluded that PTSD has some connection with violent behavior, more indicative of violent behavior is the “co-occurrence of PTSD and alcohol misuse that was particularly associated with dramatically increased odds of violent behaviour perpetrated by veterans.” *Id.* at 374.

86. COUNCIL ON CRIM. JUST., *supra* note 2, at 5.

experiences, military sexual trauma, homelessness and housing instability, the transition from military to civilian life, and “bad paper discharges” are key drivers in criminal behavior amongst the veteran community.<sup>87</sup>

While conventional thoughts on violent criminal behavior in the veteran community relied on the conclusion that PTSD and combat experience led to aggressive criminal behavior, the studies cited above demonstrate the issue is more nuanced.<sup>88</sup> If our notions on what leads to violent behavior simply rested on combat trauma, PTSD, or TBI, a rule-based approach of VTCs that categorically exclude veterans convicted of violent offenses would seem to be appropriate: we would only need to carve out an exception for that subset of veterans.<sup>89</sup> But, with the varying range of risk factors, justice would require that a judge consider and weigh all the factors, outside of just PTSD and TBI, that brought the veteran before them in court.

If risk factors associated with violent behavior in veterans are prevalent in the civilian community, why is there a special need for justice-involved veterans? Are VTCs just a “get out of jail free” card for veterans who misbehave?<sup>90</sup> Moreover, even if PTSD and TBI are unique risk factors that require special treatment, will the need for such treatment soon disappear with the end of combat operations in Iraq and Afghanistan?

To answer the first question, VTCs are by no means a free pass: they provide the veteran with mandatory treatment for their service related conditions, and they hold the veteran to stringent requirements.<sup>91</sup> Judge Russel provides an illustration for how difficult participation in a VTC could be:

It is a demanding and difficult program. One veteran in the program in Tulsa, Oklahoma, described the processes he is required to follow in the court as a very hard program. He undergoes counseling, works with a volunteer veteran mentor, auto-tests for sobriety three times a day, and regularly attends Alcoholics Anonymous meetings.<sup>92</sup>

Moreover, VTCs apply the reward and sanction method, so participants have the added incentive to perform well to avoid the risk of incarceration or potentially

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87. *Id.* at 5–10. The U.S. military discharges enlisted service members through five different classifications: honorable, general, other than honorable, bad conduct, and dishonorable. *Id.* Dishonorable, bad conduct, and other than honorable discharges are colloquially referred to as “bad paper” discharges, which negatively impact veterans when seeking VA benefits, employment, medical treatment, education, and housing. *The Fallout of a ‘Bad Paper’ Discharge*, VETERANS HEALTHCARE POL’Y INSTITUTE, <https://www.veteranspolicy.org/post/the-fallout-of-a-bad-paper-discharge> (last updated Jan. 12, 2021).

88. See Eric B. Elbogen et al., *supra* note 83; *Violent Behaviour and Post-Traumatic Stress Disorder*, *supra* note 85, at 368; COUNCIL ON CRIM. JUST., *supra* note 2, at 5–6.

89. WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 168, 164 (Univ. Chi. Press 2007).

90. Russell, *supra* note 5, at 398 (“There will always be those who argue that using a collaborative approach for veterans in the criminal justice system is a ‘get out of jail free’ card.”).

91. *Id.*

92. *Id.*

losing the opportunity for expungement of a conviction or imposition of a lesser offense.<sup>93</sup> While the freedom from incarceration and the potential for a conviction to be expunged provides the “carrot,” the risk of being incarcerated and having the conviction sustained provides the “stick.”<sup>94</sup>

Additionally, the treatment court model has proven to be just as effective for individuals convicted of violent offenses than those who are not: a Center for Court Innovation study that surveyed twenty-three drug courts from eight different states found that “drug court[s] produced a significantly larger reduction in criminal behavior among offenders with a history of violence ...” than populations of participants convicted of non-violent offenses.<sup>95</sup> Similarly, in a study funded by the National Institute on Drug Abuse, participants in drug court who had histories of committing violent offenses were found to recidivate after drug court treatment at the same rate as those who were only convicted of non-violent offenses.<sup>96</sup> Thus, “[i]t is possible that the greater levels of supervision and services characteristic of drug courts might afford greater community protection than traditional forms of community supervision for these individuals both during and after participating in drug court.”<sup>97</sup>

Additionally, even if combat operations in Iraq and Afghanistan have come to an end, there are still service members deployed around the world in support of other missions and are participating in combat and non-combat operations.<sup>98</sup>

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93. *Id.* at 389.

94. *Id.* at 396.

95. Michael Rempel et al., *The Impact of Adult Drug Courts on Crime and Incarceration: Findings From a Multi-site Quasi-experimental Design*, 8 J. EXPERIMENTAL CRIMINOLOGY 165, 185 (2012).

96. Christine A. Saum & Matthew L. Hiller, *Should Violent Offenders Be Excluded From Drug Court Participation? An Examination of the Recidivism of Violent and Nonviolent Drug Court Participants*, 33 CRIM. JUST. REV. 291, 303 (2008).

97. *Id.* at 303.

98. *Deployment of U.S. active-duty military & civilian personnel around the world in 2020, by selected regions*, STATISTA (June 2022), <https://www.statista.com/statistics/222920/deployment-of-us-troops-in-selected-world-regions/>. The following is the distribution, based on region, of U.S. active duty and civilian personnel deployed overseas as of June 2022: Europe (67,395), Former Soviet States (210), East Asia and Pacific (84,093), North Africa, Near East and South Asia (6,561); and Sub-Saharan Africa (1,035). *Id.* While troops have left Iraq and Afghanistan, even at its beginning, the Global War on Terror encompassed operations in areas such as Africa, the Philippines, and Colombia and included “a wide variety of combat and non-combat missions ranging from combating insurgents, to civil affairs and reconstruction operations, to training military forces of other nations in counternarcotics, counterterrorism, and counterinsurgency tactics.” *U.S. Military Operations in the Global War on Terrorism: Afghanistan, Africa, the Philippines, and Colombia*, CONG. RSCH. SERV. (Jan. 20, 2006), <https://crsreports.congress.gov/product/pdf/RL/RL32758/5>. Will this “war on terror” ever end? See Philip H. Gordon, *Can the War on Terror Be Won? How to Fight the Right War*, 86 FOREIGN AFFS. 53, 53–54 (2007) (“The traditional notion of winning a war is fairly clear: defeating an enemy on the battlefield and forcing it to accept political terms. But what does victory — or defeat — mean in a war on terror? Will this kind of war ever end? How long will it take? Would we see victory coming? Would we recognize it when it came?”).

Moreover, about two thirds of veterans currently incarcerated were released from military duty from 1974 to 2000, the period between the Vietnam War and the Global War on Terror.<sup>99</sup> Therefore, the data suggests that even though combat operations in Iraq and Afghanistan have come to an end, it is likely that the disproportionately high number of veterans entering the criminal justice system will be a continuing issue.<sup>100</sup>

*B. The Non-Violent Offense Rule Based Approach Compared with the Fact-Based Standard Approach.*

Generally viewed, courts that categorically exclude veterans convicted of violent offenses follow a rule-based approach, whether they exclude all violent offenses or some, while courts that include veterans convicted of violent offenses follow a standard based approach. Analyzing VTCs through the lens of rules versus standards<sup>101</sup> will help to illuminate the pros and cons of the varying approaches to VTCs. In *The Legal Analyst: A Toolkit for Thinking About the Law*, Professor Farnsworth asserts that the “classic trade-offs” in the debate between a rule and a standard are: (1) the potential for abuse; (2) precision and notice; (3) blame and accountability; (4) uncertainty and conflict; and (5) costs of creation and application.<sup>102</sup>

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99. Mike Richman, *Veterans and the Criminal Justice System*, U.S. DEPT. VETERANS AFFS. (Sep. 7, 2018), <https://www.research.va.gov/currents/0918-VA-researcher-examines-Vets-who-collide-with-criminal-justice-system.cfm>.

100. *See id.* Dr. Andrea Finlay with the Center for Innovation to Implementation at the VA Palo Alto Health Care System, asserts that the issue lies with the criminal justice system, not the nature of the veteran’s service: “I think those numbers [from 1974 to 2000] have more to do with how the criminal justice system has been structured, than with differences in military service.” *Id.*

101. *See* FARNSWORTH, *supra* note 89, at 164. *See also* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995). Professor Sunstein offers as a solution to the “disadvantages of rules and rule-bound justice” a casuistic approach, on which judgments are based not on a currently existing legal rule, but through comparison of the case at hand with another similar case that is “unambiguously within a generally accepted norm.” *Id.* at 958. Moreover, Professor Sunstein asserts that such an approach is consistent with “democratic foundations” because a casuistic approach “insist[s] that every litigant is entitled to urge that he is distinctive, that he deserves distinctive treatment, and that his claims to this effect warrant a public response.” *But see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1992). Justice Scalia argues that “perfection in judicial decisions should not be overrated,” and other competing factors, such as the “appearance of equal treatment” and predictability, are at times preferable to achieving the perfect solution on a case by case basis. *Id.* at 1178–80. However, Justice Scalia makes clear that he has “not said that legal determinations that do not reflect a general rule can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them.” *Id.* at 1186–87.

102. FARNSWORTH, *supra* note 89, at 165–68. Professor Farnsworth uses the law regarding custodial interrogations as an example: while the Fifth Amendment states that no defendant “shall be compelled in any criminal case to be a witness against himself,” the language is a broad and ambiguous standard that led the Supreme Court to adopt the rule espoused in *Miranda v. Arizona*. *Id.* at 163 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)). While the old standard approach asked, “whether there was coercion at the police station,” the rule-based approach after *Miranda* asks whether the defendant was read his rights or not. FARNSWORTH, *supra* note 89, at 163. Before

### 1. Potential for Abuse

Professor Farnsworth notes the dual nature of rules: “[they] can provide stronger protection than standards—or weaker.”<sup>103</sup> While rules can provide a precise bright-line threshold, standards place more discretion in judges “to apply the law to all the facts and make a judgment about whether the standard was satisfied.”<sup>104</sup> Additionally, while rules are generally designed to provide clear limits for parties to operate within, rules can also drive parties “to see what one can get away with by tiptoeing right up to the edge of what a rule allows.”<sup>105</sup>

The issue with VTCs is whether the vagueness of a fact-based standard for eligibility or the precision of a rule precluding violent offenses for eligibility poses a greater danger. Prosecutors wield vast bargaining power at every phase of the criminal justice process.<sup>106</sup> Conversely, defendants are essentially powerless when faced with the prosecutorial discretion of the government, which provides strong incentives for the defendant to refuse a trial and accept the deal presented by the prosecutor.<sup>107</sup> A prosecutor can choose which charges to bring forward, and if they secure the conviction of a violent offense, the defendant is automatically labeled as a violent offender.<sup>108</sup> Thus, adopting a categorical rule for VTC eligibility places the decision for a veteran’s inclusion entirely in the hands of the prosecutor who, according to former prosecutor and law professor Paul Butler, most likely does not consider “advancing the defendant’s interests as part of their job.”<sup>109</sup>

Adopting a standard-based approach would shift discretion to the judge to determine eligibility based on other factors such as danger to the community, the criminal history and characteristics of the defendant, the views of the victim, the benefit to the defendant, and the cost savings of alternatives to incarcerations.<sup>110</sup> Moreover, even if a judge could abuse the standard-based approach through their increased discretion, such abuse would be easily identified in public hearings—and challenged through the appeals process—as

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*Miranda*, a judge was “to apply the law to all the facts and make a judgement about whether the standard was satisfied.” *Id.* Now, all a court need determine is whether the defendant was read his *Miranda* rights or not, “and once that factual question is settled there usually isn’t any judgment to exercise.” *Id.* at 163-64.

103. *Id.* at 165.

104. *Id.* at 163-64.

105. *Id.* (citing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1773-74 (1976)).

106. See discussion *supra* Part I.A.

107. *Id.*

108. See discussion *supra* Part II.A.1.

109. *The Problem: A Deeper Dive*, ACCOUNTABILITY NY, <https://accountabilityny.org/the-problem/> (last visited Feb. 14, 2023).

110. See discussion *supra* Part II.A.2.; Brandon Garrett & John Monahan, *Assessing Risk: The Use of Risk Assessment in Sentencing*, 103 JUDICATURE 42, 43 (2019) (noting the increased use of risk assessment tools by judges that consider factors based on a defendant’s criminal history and personal characteristics).

opposed to plea bargaining, which happens behind closed doors and is out of view from the general public.<sup>111</sup> Thus, when it comes to determining which approach has a greater potential for abuse, a fact-based standard for eligibility poses a lower potential for abuse than a rule based approach.

## 2. Precision and Notice

While rules provide certainty, they can also be both “over-inclusive and under-inclusive” at the same time.<sup>112</sup> A standard reduces these risks because more discretion is placed in the hands of the parties to discuss and weigh different factors, providing a more “personalized administration of justice.”<sup>113</sup> Conversely, a rule may be preferred over a standard, because the certainty of the rule can provide notice to the parties to the case, making compliance with a law simpler and making it “easier to resolve disputes without help from a judge.”<sup>114</sup>

While a rule-based approach provides parties with certainty, it is over-inclusive: the classification of offenses as “violent” is ambiguous in many jurisdictions and includes offenses that involve no physical harm directed towards another human being.<sup>115</sup> Additionally, a justice-involved veteran has more unique factors to weigh than the average citizen, making it in the interest of justice for the trial judge to review the totality of the circumstances. Similarly, a rule-based approach may prove to be under-inclusive as well: since some programs only look to the immediate offense in question to determine eligibility, that offense may not provide a clear picture as to the offender’s criminal history.<sup>116</sup>

## 3. Blame and Accountability

While standards place more discretion in the hands of judges, this approach makes it difficult to hold the right party accountable for improper application of

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111. PFAFF, *supra* note 19, at 127–38. Professor Pfaff describes the prosecutors’ offices as a “black box[.]” of empirical data: “[d]espite the power of prosecutors, there is almost no data or research on what drives them.” *Id.* at 134. Additionally, while ninety-five percent of cases end with a guilty plea by the defendant, Americans still view the criminal justice system through the lens of a trial: “[f]or all the courtroom drama we see on *Law & Order*, nearly everyone in prison ended up there by signing a piece of paper in a dingy conference room in a county office building, or in a dingier room in a local jail.” *Id.* at 132. Additionally, the doctrine of “prosecutorial immunity,” which was developed to shield prosecutors from frivolous lawsuits, has had the perverse effect of “shield[ing] prosecutors from civil accountability,” making it “very difficult to successfully sue a prosecutor for misconduct.” *Prosecutorial Immunity*, INST. FOR JUST., <https://ij.org/immunity-for-prosecutorial-conduct/> (last visited Feb. 14, 2023).

112. FARNSWORTH, *supra* note 89, at 165.

113. *Id.*

114. *Id.*

115. See discussion *supra* Part I.B.

116. See Christine A. Saum et al., *Violent Offenders in Drug Court*, 31 J. DRUG ISSUES 107, 109 (2001).

a law.<sup>117</sup> Thus, rules tend to make assigning accountability easier.<sup>118</sup> Conversely, rules can “have the perverse effect of publishing discretion out of view and thus making its exercise *less* accountable.”<sup>119</sup>

A standard-based approach will spread accountability to all the parties involved in the veteran defendant’s case. If a veteran defendant convicted of a violent offense is eligible for a VTC, they will have the opportunity to argue for admission at sentencing. However, if the underlying offense is gravely serious—regardless of whether or not the offense is violent—the prosecutor has the opportunity to move the court to deny the veteran inclusion into the VTC. After hearing arguments from both sides, the decision for inclusion will fall solely in the hands of the judge. And ultimately, if the judge makes an erroneous decision, both sides have the opportunity to appeal. This contrasts with a rule-based approach, in which all the discretion falls on the prosecutor when they decide what offense to charge.

#### 4. *Uncertainty and Conflict*

While rules have the benefit of finality, standards are often more appropriate because “good judgments require the sort of information about the facts that a trial judge will have [] that is beyond the reach of rule makers further away from the action.”<sup>120</sup> Additionally, the case by case approach of standards is preferable when parties disagree on the “first principles” of legal theories, but can reasonably agree on an outcome.<sup>121</sup> Rules categorically excluding violent offenses provides jurisdictions with certainty and less conflict: all parties know that a veteran convicted of a violent offense is ineligible. Conversely, a standard-based approach towards VTCs could lead to uncertainty as applied to counties and districts, resulting in conflicting eligibility standards throughout a state, such as the wide variance in eligibility standards across VTCs in California.<sup>122</sup> Moreover, if states provide no rule at all as to whether or not violent offenses are eligible, the effect is that subordinate jurisdictions will look to other standards, such as drug and mental health court templates, to craft their VTCs which leads to conflicting eligibility standards in a state.<sup>123</sup>

#### 5. *Cost and Application*

Typically, standards are perceived to be more expensive solutions: while the time devoted to considering and weighing factors make standards more precise, they also drive up administrative costs through extended litigation.<sup>124</sup>

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117. FARNSWORTH, *supra* note 89, at 166.

118. *Id.*

119. *Id.* (emphasis original).

120. *Id.* at 166–67.

121. *Id.* at 167.

122. See discussion *supra* Part II.A.2.

123. See OFF. EXEC. SEC’Y VA., *supra* note 69, at 4–5.

124. FARNSWORTH, *supra* note 89, at 167.



Conversely, rules have associated administrative costs, such as the amount of time and deliberation required to come to a rule that has application to many situations.<sup>125</sup> Additionally, if such rules fail to have universal application, administrative costs will be incurred to rewrite rules.<sup>126</sup> Standards would allow practitioners on the “front lines” of the law, such as judges, to apply the standard with flexibility and provide bottom-up refinement, which may be the cheapest approach, depending on how often a law must be altered.<sup>127</sup>

A standard-based approach for VTC eligibility poses less administrative costs on society than incarceration. While costs are incurred to litigate factors at sentencing hearings in a standard-based approach, benefits of treatment courts have proven to have a substantial economic return on investment: a study of juvenile drug courts found that the net economic benefits to society from “reductions in costs to society associated with health problems, criminal activity, and missing school or work” amounted to \$84,569 for each juvenile participant.<sup>128</sup> Conversely, many economics centered studies that applied a cost benefit analysis on the criminal justice system have found that “the costs of incarceration and sentencing policy outweigh the benefits.”<sup>129</sup> In fact, some studies suggest that the investments in the criminal justice system that have been found to be the most cost effective in reducing crime were found in law enforcement training and high school education.<sup>130</sup> Thus, in applying a cost-benefit analysis to treatment courts and incarceration, it is evident that treatment courts lead to less administrative costs and greater benefits for society as a whole.

Applying a blanket, no violent offenses rule to VTC eligibility will lead to increases in incarceration rates. This places a heavier economic impact on society than if a defendant receives treatment for their underlying condition from the VA and maintains their freedom.<sup>131</sup> Like the juvenile courts in the study

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125. *Id.* at 168.

126. *Id.*

127. *Id.*

128. Kathryn McCollister et al., *Economic Evaluation of the Juvenile Drug Court/Reclaiming Futures (JDC/RF) Model*, 45 J BEHAV. HEALTH SERV. RSCH. 321, 335 (2018).

129. *Economic Perspectives on Incarceration and the Criminal Justice System*, Exec. Off of the President, 52 (April 2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf).

130. *Id.* Studies on investments in policing have been found to yield an eighty-three percent return on cost, while studies on investment in education have been found to yield a 100% return. *Id.*

131. See Russell, *supra* note 5, at 398–99 (“In addition to helping participants turn their lives around, Drug Courts are proven to save nearly \$27 for every dollar invested. Veterans Courts will likely see similar savings from reducing the amount of money spent to keep inmates locked up, as Drug Courts have done in spending an average of one-tenth as much on treatment compared with imprisonment.”). Another administrative cost to consider is while a veteran burdens local and state governments with treatment while incarcerated, participation in a VTC leverages treatment from the VA, thus shifting the costs to the federal government. *Id.* at 399.

mentioned above, investments in treating veterans for the underlying conditions that led to their contact with the criminal justice system, such as PTSD or substance abuse, would likely yield greater benefits to society through “reductions in costs to society associated with health problems, criminal activity, and missing school or work,”<sup>132</sup> as opposed to incurring costs associated with incarceration. Therefore, the administrative costs associated with adopting a rule—that leads to more incarceration and less treatment—substantially outweigh the costs associated with a standard based approach that ultimately leads to increased inclusion into VTCs.

#### IV. SOLUTIONS TO BROADEN ELIGIBILITY FOR VTCs

While a standard-based approach will broaden eligibility for VTCs, legislation must communicate to subordinate jurisdictions that violent offenses should be included for eligibility into VTCs. Thus, a hybrid approach in which there is a rule that explicitly provides for inclusion for violent offenses, but then uses a standard-based approach to ultimately determine eligibility, would be most appropriate.<sup>133</sup> For example, instead of the federal Veteran Treatment Court Coordination Act of 2020 stating that its scope is to “help[] veterans charged with *nonviolent crimes* receive the help and the benefits for which the veterans are entitled,”<sup>134</sup> it could be amended to state that the Act is intended to “help veterans charged with *nonviolent and violent crimes*.” Additionally, states that already follow a standard-based approach, but provide no guidance on how to treat violent offenses, can simply include a rule in their eligibility criteria. For example, California’s standard-based approach when determining eligibility for probation, for ultimate inclusion into VTCs,<sup>135</sup> could include a provision that explicitly mandates courts to consider violent offenses for inclusion.

Additionally, the broadening of eligibility criteria for VTCs must be coupled with a paradigm shift in how jurisdictions charge and prosecute crimes. Fair and Just Prosecution (FJP)—a non-profit dedicated to “promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility” by supporting reform minded prosecutors<sup>136</sup>—teamed with the Justice Collaborative and the Brennan Center for Justice to co-author *21 Principles for*

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132. McCollister et al., *supra* note 128, at 335.

133. FARNSWORTH, *supra* note 89, at 164–65 (“[W]e can have standards within rules; and we also can have rules within standards.”).

134. THE VETERAN TREATMENT COURT COORDINATION ACT OF 2019 ACT, H.R. REP. NO. 116-153 (2020).

135. See discussion *supra* Part II.B.2.

136. *About FJP / Our Work And Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/> (last visited Jan. 3, 2023). The vision of FJP is to create a network of newly elected prosecutors who are reform minded by providing “ongoing information sharing, research and resource materials, opportunities for on the ground learning, in-person convenings, technical assistance, and access to national experts.” *Id.* Ultimately, FJP assists prosecutors to “overcome barriers, address ongoing challenges, and share their successes so others can learn from them and propel broader changes in the field.” *Id.*

*the 21st Century Prosecutor*.<sup>137</sup> The first principle is to make diversion the rule.<sup>138</sup> Diversion programs can be thought of as “exit ramps” that provide individuals an alternative to entering the criminal justice system.<sup>139</sup> Programs intended to divert individuals from incarceration can “conserve resources, reduce reoffending, and diminish the collateral harms of criminal prosecution.”<sup>140</sup> Though diversion programs differ in approaches, they are all intended to reduce an individual’s involvement in the criminal justice system.<sup>141</sup> An example are pre-charge programs, also known as “prosecutor-led interventions,” that allow a prosecutor to divert an individual to receive treatment for their underlying issues, rather than charging them with a crime and forcing that individual to enter the criminal justice system.<sup>142</sup>

Many jurisdictions have successfully adopted diversion programs in juvenile courts, with some studies suggesting that diverted youths are “45% percent less likely to reoffend than comparable youth facing formal court processing.”<sup>143</sup> This is an approach that can be applied to veterans: prosecution offices could have diversion programs that screen justice-involved veterans before they are even charged, and, if warranted, send them immediately to a VTC for treatment.

However, some states, such as Virginia, have funding policies that provide prosecutorial offices disincentives for diversion by allocating funding based on the number of convictions they acquire: “The more people a prosecutor charges with a felony and the more sentences they secure, the more state money their office receives.”<sup>144</sup> Steve Descano, the Commonwealth’s Attorney of Fairfax County, Virginia, described the difficulty his office faces in implementing diversionary programs: “The problem with diversion programs is that they’re hard, they take time . . . I can use mandatory minimums, I can jam someone up, I can get a sentence, I can do that in an afternoon. And I get paid for that.”<sup>145</sup>

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137. *21 Principles for the 21st Century Prosecutor*, FAIR & JUST PROSECUTION, 26 [https://www.fairandjustprosecution.org/staging/wpcontent/uploads/2018/12/FJP\\_21Principles\\_Interractive-w-destinations.pdf](https://www.fairandjustprosecution.org/staging/wpcontent/uploads/2018/12/FJP_21Principles_Interractive-w-destinations.pdf) (last visited Jan. 3, 2023).

138. *Id.* at 4. Two other principles FJP proposes, which this article has already addressed in depth, is to encourage the treatment (not criminalization) of mental illness and drug addiction. *Id.* at 7–8.

139. Akhi Johnson & Mustafa Ali-Smith, *Diversion Programs, Explained*, VERA 1 (Apr. 28, 2022), <https://www.vera.org/inline-downloads/diversion-programs-explained.pdf>.

140. *21 Principles for the 21st Century Prosecutor*, *supra* note 137, at 4.

141. Akhi Johnson & Mustafa Ali-Smith, *supra* note 139, at 2.

142. *Id.*

143. *What is Diversion in Juvenile Justice?*, THE ANNIE E. CASEY FOUNDATION (Oct. 22, 2020), <https://www.aecf.org/blog/what-is-juvenile-diversion> (“In 2018, 41% of juvenile referrals nationwide were diverted, according to the federal Office of Juvenile Justice Delinquency and Prevention.”).

144. Sam McCann, *In Virginia, Money—Not Justice—Drives Prosecution*, VERA INST. (Jun. 14, 2022), <https://www.vera.org/news/in-virginia-money-not-justice-drives-prosecution>.

145. *Id.* Additionally, perverse economic incentives drive behavior for individual participation in diversion programs, leading to less inclusion of more financially burdened individuals. Blaise Mesa, *Court Alternatives that Spare a Criminal Record Cost You Hundreds and Put a Price on*

Accordingly, before states even consider implementing diversion programs, they must address the financial incentives that lead prosecutorial offices to seek convictions.

#### CONCLUSION

While the increased use of specialty treatment courts, particularly VTCs, are a step in the right direction, prosecutorial discretion and the exclusion of violent offenses from VTCs inhibit them from achieving their true potential. If VTCs are to have their greatest effect, jurisdictions must adopt a standard-based approach that considers the entirety of a justice-involved veteran's circumstances. Though all treatment courts should include violent offenses for eligibility, veterans have unique risk factors that places a greater need on their community than that of ordinary citizens. With VTCs gaining their momentum during the Global War on Terror, the necessity of treatment programs for veterans will continue even though our heaviest fighting in Iraq and Afghanistan has come to an end. It is our duty to care for our veterans, both during war and peace. And perhaps there is no better way to do so than by offering them a second chance when they have lost their way on the journey home.

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*Justice*, NPR IN KANSAS CITY (Oct. 17, 2022), <https://www.kcur.org/news/2022-10-17/court-alternatives-that-spare-a-criminal-record-cost-you-hundreds-and-put-a-price-on-justice>. Those systems place justice-involved individuals to a choice: take a crippling financial loss to participate in a treatment program or face incarceration and a mark on your criminal record barring you from future economic prosperity. *Id.*