

Way Off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts

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INTRODUCTION

Army Spc. Thomas Delgado served as a combat medic in Iraq and earned a Purple Heart when a bomb struck his vehicle.² He returned home in December of 2005.³ On September 24, 2008, several days after his fifth wedding anniversary, Delgado got into an argument with his wife Shayla while under the influence of alcohol and the anti-anxiety medication, Ativan, grabbed a gun and threatened to kill himself.⁴ Shayla attempted to wrestle the gun from him and Delgado pursued her, broke her nose and attempted to choke her.⁵ Police records indicate that she reported fear that he was “going to kill her or hurt her very badly.”⁶ Records also indicate that she got away from him and he pursued her again into the bedroom where he attempted to choke her a second time.⁷ Prosecutors charged Delgado with first-degree attempted murder, among other charges.⁸ Shayla later stated to reporters that Delgado did not intend to harm or kill her, but

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² Jim Spellman & Wayne Drash, *Soldier’s Invisible War: Iraq Vet Charged with Attempted Murder*, CNN, Aug. 6, 2009, http://articles.cnn.com/2009-08-06/justice/accused.soldier.ptsd_1_war-veterans-iraq-post-traumatic-stress-disorder?_s=PM:CRIME.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

that she was injured in the struggle over the weapon because her husband was in a suicidal crisis.⁹ Delgado's case was considered as one of the very first cases for the new veterans treatment court near Fort Carson, Colorado.¹⁰

The concept of problem-solving justice is a criminal justice approach that has developed over the past fifteen years to address the underlying issues and conditions that lead to criminal behavior.¹¹ Court models employing problem-solving theories vary according to the specific issue, but most include practices such as enhanced information collection, increased community involvement, increased collaboration and tailored access to community-based services and resources for the defendant.¹² Domestic violence¹³ has been a prominent issue in the

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., ROBERT V. WOLFE, CTR. FOR COURT INNOVATION, BUREAU OF JUSTICE ASSISTANCE, PRINCIPLES OF PROBLEM-SOLVING JUSTICE, available at <http://www.courtinnovation.org/sites/default/files/Principles.pdf>; CTR. FOR COURT INNOVATION, BUREAU OF JUSTICE ASSISTANCE, PROBLEM-SOLVING JUSTICE IN THE UNITED STATES: COMMON PRINCIPLES, available at http://www.courtinnovation.org/sites/default/files/Problem_Solving_Justice_in_the_US.pdf.

¹² *Id.*

¹³ For purposes of clarity, I am including a brief comment on my use of language. First, I use the term "domestic violence" to mean violence between intimate partners only, which does not encompass violence among other family members such as parents, children or siblings. The terms "intimate partner violence" and "domestic violence" are used interchangeably throughout the note. All intimate partner and dating relationships are included regardless of marital or co-parenting status. Same-sex relationships may or may not have different dynamics and issues and are beyond the scope of this note. Finally, I am very conscious of the controversy surrounding the use of gendered pronouns within discussions of domestic violence. See ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 11-12 (2d ed. 2008) (noting the use of female pronouns to refer to victims of intimate violence). While some research, such as that of Murray Straus and Richard Gelles, appears to support the assertion that women are as likely as men to perpetrate domestic violence, there are factors, such as the context and severity of the violence and the likelihood of serious injury, that are not adequately addressed in the research design of such studies. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 24 (2000); Evan Stark & Ann Flitcraft, *Violence Among Intimates: An Epidemiological Review*, in HANDBOOK OF FAMILY VIOLENCE 293-317 (Vincent B. Van Hasselt et al. eds., 1988); Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat? A Feminist Perspective on the Empirical Findings*, in FEMINIST PERSPECTIVES ON WIFE ABUSE (Kersti Yllö & Michele Bograd eds., 1988);

problem-solving justice arena.¹⁴ The U.S. Department of Justice Office on Violence Against Women has used various funding streams, particularly the Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program (GTEAP),¹⁵ and the Court Training and Improvements Program to support the development of Domestic Violence and Integrated Domestic Violence Courts with the overarching goals of increasing victim safety through access to victim advocacy, shelter, safety planning and other resources, and also increasing offender accountability through enhanced monitoring and compliance hearings.¹⁶

SCHNEIDER, *supra* note 13, at 24-27. As Evan Stark explains,

[a]bsent sexual inequality, the same acts have different meanings. . . . Men use controlling tactics much more often than women do, just as they use the severest forms of violence more frequently, and are somewhat more likely than women to be motivated by a desire to control a partner. But it is the social endowment men inherit from sexual inequality, not the motives or frequency of these acts, that allows them (but rarely women) to shape discrete acts into patterns of dominance that entrap partners and make them subordinate.

EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 199 (2007). While I acknowledge that men can be victims of intimate partner violence at the hands of their female partners, I, like many respected professionals in the field, use female pronouns when referring to victims and male pronouns when referring to perpetrators throughout this note in an effort to highlight the perpetuation of domestic violence as a form of social control and gender subordination. See JACKSON KATZ, *THE MACHO PARADOX: WHY SOME MEN HURT WOMEN AND HOW ALL MEN CAN HELP* 91-112 (2006) (discussing the importance of the use of gendered language in examining the issue of intimate partner violence).

¹⁴ See PAMELA M. CASEY & DAVID B. ROTTMAN, NATIONAL CENTER FOR STATE COURTS, *PROBLEM-SOLVING COURTS: MODELS AND TRENDS* 1 (2003) (describing domestic violence courts as one of “four prominent American problem-solving courts”); WOLFE, *supra* note 11; see also SAMANTHA MOORE, CTR. FOR COURT INNOVATION, BUREAU OF JUSTICE ASSISTANCE, *TWO DECADES OF SPECIALIZED DOMESTIC VIOLENCE COURTS: A REVIEW OF THE LITERATURE* (2009).

¹⁵ OFFICE ON VIOLENCE AGAINST WOMEN (“OVW”), U.S. DEP’T OF JUSTICE, OMB No. 1122-0020, *THE COMMUNITY-DEFINED SOLUTIONS TO VIOLENCE AGAINST WOMEN PROGRAM* (2010) [hereinafter *COMMUNITY-DEFINED SOLUTIONS*], available at <http://www.ovw.usdoj.gov/docs/fy2010-comm-defined-solutions.pdf>. In FY 2011, the program reverted back to the GTEAP title. *Grant Programs*, OVW, U.S. DEP’T OF JUSTICE, <http://www.ovw.usdoj.gov/ovwgrantprograms.htm> (last visited July 31, 2011).

¹⁶ See *COMMUNITY-DEFINED SOLUTIONS*, *supra* note 15, at 3; OVW, U.S. DEP’T OF JUSTICE, OMB No. 1122-0020, *COURT TRAINING AND IMPROVEMENTS PROGRAM* 3-4 (2010), available at <http://www.ovw.usdoj.gov/docs/fy2010-courts-prog-solicitation.pdf>.

Additionally, courts targeting veterans as criminal defendants are among the newer developments in the field of problem-solving justice. As a hybrid of drug treatment and mental health court models,¹⁷ veterans treatment courts¹⁸ seek to address the mental health and addiction issues that often stem from the trauma of active combat and that can lead to criminal activity.¹⁹ Rather than pursuing the normal course of a criminal case, the courts focus on providing access to community-based services and rehabilitation, such as substance abuse treatment, vocational training, education, and mentoring.²⁰

The intersection of these two issues, domestic violence and veterans affected by trauma, leads to serious safety and ethical concerns when intimate partner violence cases are heard in a veterans court model. Despite the U.S. Department of Justice's support and guidance on the establishment of veterans courts²¹ in conjunction with national technical assistance providers such as the National Association of Drug Court

¹⁷ See *infra* notes 86-94.

¹⁸ See discussion *infra* Part II.

¹⁹ Nat'l Ass'n of Drug Treatment Court Prof'ls (NADCP), *Veterans Treatment Courts: Giving Our Heroes at Home the Help They've Earned*, 2, <http://www.house.mi.gov/SessionDocs/2011-2012/Testimony/Committee16-3-15-2011-1.pdf>.

²⁰ See *id.*

²¹ *Id.* Although the Bureau of Justice Assistance does not provide any specific funding stream for the development or enhancement of veterans treatment courts, in 2009 the agency funded an enhancement of the Buffalo Veterans Treatment Court, which was the first specialized veterans court in the country and has served as a model for other developing programs. *Veterans Treatment Court Mentor Court Program*, NADCP, <http://www.nadcp.org/learn/veterans-treatment-courts/mentor-court-program> (last visited June 22, 2011). The Bureau of Justice Assistance continues to fund the development of veterans treatment courts throughout the country through its Drug Court Discretionary Grant Program. *BJA Programs*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, <http://www.ojp.usdoj.gov/BJA/grant/drugcourts.html> (last visited Aug. 13, 2011). In addition, the Bureau of Justice Assistance has partnered with the Department of Veterans Affairs, and the National Drug Court Institute to develop the Veterans Treatment Court Planning Initiative, which provides training and technical assistance to jurisdictions in the process of developing a veterans treatment court. OFFICE OF NAT'L DRUG CONTROL POLICY, FACT SHEET (2010), available at http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/veterans_treatment_courts_fact_sheet_12-13-10.pdf.

Professionals (NADCP),²² a clear protocol does not exist as to whether intimate partner violence cases should be eligible for entry into veterans courts.²³ This lack of a coherent policy leads to inconsistent treatment of these cases and potentially dangerous situations for domestic violence victims as well as problematic messages to the community about the nature of domestic violence and the proper criminal justice response.

This note argues that intimate partner violence cases are inappropriate for admission into veterans treatment courts for three reasons. First, the courts do not currently have access to professionals with sufficient expertise in both combat-related trauma and domestic violence dynamics to perform adequate

²² *About NADCP*, NADCP, <http://www.nadcp.org/learn/about-nadcp> (last visited July 31, 2011) (describing NADCP as a national non-profit organization formed in 1994 to expand the drug court model throughout the United States and provide training and resources to drug court staff and treatment professionals). The NADCP hosts the “National Clearinghouse for Veterans Treatment Courts” and has been at the forefront of the movement to assist jurisdictions throughout the country to develop veterans courts in their communities. *Justice for Vets*, NADCP, <http://www.VeteransTreatmentCourt.com> (last visited July 31, 2011).

²³ The Buffalo Veteran Treatment Court is the primary leading model for the development of veterans courts throughout the country. *See infra* notes 79-82. Many of the Buffalo Veterans Treatment Court policies and procedures documents are posted online through the *Justice for Vets*, NADCP website as resources for other developing and operating veterans treatment courts. *See Veterans Treatment Court Resources*, NADCP, <http://www.nadcp.org/node/439>. Included among these documents are the *Buffalo Veteran’s Court: Mentoring and Veterans Hospital Program Policy and Procedure Manual* and the *Buffalo Veterans Treatment Court Eligibility Questionnaire*. NADCP, BUFFALO VETERAN’S COURT: MENTORING AND VETERANS HOSPITAL PROGRAM POLICY AND PROCEDURE MANUAL, available at <http://www.nadcp.org/sites/default/files/nadcp/Buffalo%20policy%20and%20procedure%20manual.pdf>; *Buffalo Veterans Treatment Court Eligibility Questionnaire*, NADCP, available at <http://www.nadcp.org/sites/default/files/nadcp/Buffalo%20VTC%20Eligibility%20Questionnaire.pdf>. Although the *Policy and Procedure Manual* mentions domestic violence as a consideration under “Key Component #4: Veterans Treatment Court provide access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services,” it is not clear, however, what it means to “consider” domestic violence as “co-occurring problem” and what impact this should have on a veteran’s eligibility for the program. In addition, the *Eligibility Questionnaire* does not ask any questions pertaining to current or past domestic violence perpetration. The only additional guidance provided by the Bureau of Justice Assistance is the general exclusion of violent offenders from federally funded treatment court programs. *See infra* note 109.

assessments to determine the underlying causes of a veteran's violence against his partner.²⁴ Second, accepting an intimate partner violence case into a veterans court sends the victim and the community problematic messages about the dynamic of domestic violence and the role of the criminal justice system.²⁵ Finally, the majority of research has shown that substance abuse, mental health and batterers' intervention treatment has limited, if any, effectiveness on recidivism in intimate partner violence cases.²⁶

In many ways, the case involving Thomas and Shayla Delgado²⁷ is a common domestic violence scenario – a violent incident has occurred where a husband has seriously assaulted his wife, the wife's version of events has either gradually or abruptly changed from what she initially reported to law enforcement on the scene, and she is resistant to participating in her husband's prosecution.²⁸ The case also raises serious questions regarding

²⁴ Amy Fairweather et al., *Veterans in the Justice System: Treatment of Violent Offenders*, DAILY JOURNAL (L.A.), Aug. 17, 2010, at 7, available at http://www.bwjp.org/files/bwjp/files/veterans_in_the_justice_system.pdf.

²⁵ One of the primary tenants of the Battered Women's Movement has been to frame the perpetration of domestic violence as a deliberate and intentional pattern of behavior with the objective of gaining and maintaining power and control over an intimate partner and to recognize the gendered aspects of this dynamic. See discussion *infra* Part I.B. STARK, *supra* note 13, at 25, 36-38.

In 1984, after holding public hearings in each region that included prominent advocates, a U.S. attorney general's Task Force on Family Violence appointed by President Reagan stressed the need for a uniform policy of sanctions and concluded that domestic violence was a crime, not a conflict situation; that culpability should be assigned; and that police failure to take this approach could contribute to escalation of the violence.

Id. at 37.

²⁶ See discussion *infra* Part III.C.

²⁷ See Spellman & Drash, *supra* note 2.

²⁸ Attrition rates for domestic violence cases have historically been very high. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 181-85 (3d ed. 2003). "The fact is that in many cases, victims' attitude toward the crime and the offender alter over time. Memories of the crime and the perpetrated harm recede after an extended period." *Id.* at 184. Victims may blame themselves for the incident, experience financial hardships as a result of their abuser's prosecution, distrust the criminal justice system or be encouraged to drop charges by law enforcement. *Id.* at 181-85. See also Walter Komanski & Robert T. Magill, *Prosecuting Domestic Violence Cases*, in THE WAR AGAINST DOMESTIC VIOLENCE 193, 208 (Lee E. Ross ed. 2010).

admitting perpetrators of domestic violence into veterans treatment court programs. Was Thomas' assault a result of the trauma he experienced while serving in Iraq, or is there a history of abuse in his relationship with Shayla prior to his deployment? How is a court expected to be able to make such a determination in a pre-trial and pre-discovery assessment? What has caused Shayla to revise her perception of what occurred? What communication has taken place between Thomas and Shayla since the incident? Given the severity of the incident and of the charges against Thomas, it is alarming that the veterans treatment court near Colorado Springs, Colorado, a program in its infancy, would attempt to take jurisdiction of the case.²⁹ Fortunately, prosecutors successfully resisted the transfer and the case was handled in a traditional criminal court.³⁰ However, given the growing trend to expand the scope of veterans treatment court programs to violent offenses generally, and specifically to domestic violence offenses,³¹ it is possible that cases like Delgado's could find their way into an ill-equipped veterans treatment court, with potentially dangerous results.

The remainder of this note is organized as follows: Part I provides an overview of the dynamics of domestic violence, Part II provides an overview of the history and procedures of veterans treatment courts, and Part III describes the problems associated with accepting intimate partner violence cases into veterans treatment courts with respect to screening and assessment expertise, the strong risk of victim coercion, and the ineffectiveness of treatment. Part IV concludes by suggesting a policy of exclusion of intimate partner violence cases from veterans treatment courts and recommends, as an alternative, that defense attorneys increase their awareness of PTSD and explore the increased validity of PTSD as an insanity defense. This approach would provide a traditional accountability response

²⁹ Spellman & Drash, *supra* note 2.

³⁰ *Id.*

³¹ See discussion *infra* note 109.

to domestic violence as a serious crime while also providing opportunities for the offender to present mitigating evidence to avoid or reduce his criminal responsibility.

I. BACKGROUND OF DOMESTIC VIOLENCE

A. Prevalence of Domestic Violence in the Military

Domestic violence is a serious problem that pervades all branches of the U.S. military.³² Recent studies have shown that the rates of domestic violence in military families may be two to five times the rate in the general population.³³ Victims of domestic violence at the hands of military servicemembers may be at particular risk of injury or death due to the offender's access to firearms and his specialized training in combat and use of weapons. Numerous high profile cases of intimate partner homicides and violence involving military families have been making headlines over the past several years.³⁴ This heightened awareness has

³² Kathlene J. Somerville, *The Military Report Card Concerning Domestic Violence and Sexual Assault, Including Compliance with the Lautenberg Amendment*, 43 FAM. L.Q. 301, 301 (2009); *Death in the Ranks at Fort Bragg*, NEWSWEEK, Aug. 5, 2002, at 30, available at 2002 WLNR 8851759.

³³ Allen G. Breed, *Does Army Breed Domestic Violence?* DESERET NEWS, Sept. 3, 2002, at A7, available at 2002 WLNR 11257212 (finding that rates of domestic violence in military families may not be as disproportionately high when certain demographics, such as age, are controlled); cf. Fox Butterfield, *Wife Killings at Fort Reflect Growing Problem in Military*, N.Y. TIMES, July 29, 2002, at A9, available at 2002 WLNR 4028656 (noting that there is a debate concerning the higher rates of domestic violence in the military (versus civilian population) because the military counts only married couples in incidents of domestic violence, not former spouses or girlfriends); see also Jerri L. Fosnaught, *Domestic Violence in the Armed Forces: Using Restorative Mediation as a Method to Resolve Disputes Between Service Members and Their Significant Others*, 19 OHIO ST. J. ON DISP. RESOL. 1059, 1059 (2004) (noting that servicemembers are committing a high number of violent crimes and this rate may be growing).

³⁴ *Officials at Ft. Bragg, North Carolina, Investigate String of Killings of Army Wives* (CBS television broadcast transcript July 26, 2002); *The Military and Domestic Violence* (CBS television broadcast transcript Jan. 28, 2009); Miles Moffeit & Amy Herdy, *Betrayal in the Ranks*, DENVER POST, Nov. 17, 2003, at A18, available at 2003 WLNR 862622; see Lizette Alvarez & Deborah Sontag, *When Strains on Military Families Turn Deadly*, N.Y. TIMES, Feb. 15, 2008, at A1, available at 2002 WLNR 3057824; Stacy Davis, *Fort Bragg Soldiers Appear in Court on Murder Charges*, WRAL.COM (Oct. 6, 2008),

drawn attention to the military's handling of domestic violence and sexual assault by servicemembers.³⁵ Exact rates of intimate partner violence among military families, like general domestic violence rates overall, are difficult to determine.³⁶ Congress has generally granted wide discretion to military base commanders to address domestic violence in their ranks and as a result, the military has been largely unaffected by advocacy efforts to prevent and address the issue.³⁷ From 1998 to 2007, the Department of Defense Family Advocacy Program received more than 176,000 reports of spousal abuse, 102,754 of which were determined to be substantiated.³⁸ The data from 1998 through 2005 includes only reports involving married couples.³⁹ In 2006, the Department of Defense added the category of "intimate partner" to the data collection, which is defined as "a person of the opposite sex with whom the victim shares a child in common, or a person with whom the victim shares or has shared a common domicile."⁴⁰

<http://www.wral.com/news/local/story/3678679/>; Spellman & Drash, *supra* note 2; Larry Shaughnessy, *Army's Largest Base Reeling from Four Apparent Suicides in One Weekend*, CNN (Sept. 29, 2010), <http://www.cnn.com/2010/us/09/29/texas.fort.hood.deaths/index.html?iref=allsearch>; accord Lizette Alvarez, *Despite Assurances from Army, an Assault Case Founders*, N.Y. TIMES, Nov. 23, 2008, at A24, available at 2008 WLNR 22348554; Breed, *supra* note 33; Michael Moss & Ray Rivera, *At Fort Hood, Some Violence Is too Familiar*, N.Y. TIMES, Nov. 10, 2009, at A1, available at 2009 WLNR 23127504; Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, at 11, available at 2008 WLNR 1047345.

³⁵ Jennifer Heintz, *Safe at Home Base? A Look at the Military's New Approach To Dealing with Domestic Violence on Military Installations*, 48 ST. LOUIS U. L.J. 277, 283 (2003).

³⁶ See discussion *supra* notes 33-35.

³⁷ Heintz, *supra* note 35, at 281-82.

³⁸ DEP'T OF DEFENSE, FAMILY ADVOCACY PROGRAM, CHILD ABUSE AND DOMESTIC VIOLENCE DATA TRENDS FROM FY 1998 TO 2007, *Family Advocacy Program Domestic Abuse & Child Abuse Data Trends (1998-2007)* [hereinafter DoD], available at <http://cs.mhf.dod.mil/content/dav/mhf/QOL-Library/Project%20Documents/MilitaryHOMEFRONT/Homepage/CADA%20trends98-07%20no%20contact%20info.pdf>.

³⁹ *Id.*

⁴⁰ *Id.* In addition to serious issues with domestic violence, there have been longstanding problems with sexual assault and abuse of women in the military. See Moffeit & Herdy, *supra* note 34 (discussing the stories of military women who were victims of domestic abuse or sexually assaulted while in the military). In surveys conducted by the Department of Defense, approximately thirty-three percent of female service members reported experiences of sexual harassment – this figure is high when compared with the civilian rate of less than eighteen percent. KATHERINE T. BARTLETT & DEBORAH L. RHODE,

B. Theories of Domestic Violence

While a universally accepted definition does not exist, domestic violence is generally understood to be a pattern of conduct by an abuser to gain and maintain power and control over an intimate partner.⁴¹ Abuse can take many forms including, physical, psychological, emotional, sexual and financial abuse and often escalates in severity and frequency over time.⁴² It is difficult to accurately determine the frequency and pervasiveness of domestic violence due to varying definitions and methodologies of data collection.⁴³ Results can vary significantly depending

GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 421 (5th ed. 2010). Explanations for the high rates of sexual abuse against women include “a highly masculine culture that reinforces aggression; strict hierarchies and limited opportunities for subordinates to escape abusive circumstances; stresses caused by lack of privacy and dangerous or onerous living conditions; separation from spouses or partners; and traditions of hazing for new or ‘deviant’ recruits.” *Id.* The military’s response to sexual assault cases has been highly criticized with reports that victims are discouraged from filing complaints due to retaliation, intimidation, and/or punishment in addition to poor access to supportive services, faulty investigations, and routine leniency towards offenders. Moffeit & Herdy, *supra* note 34, at A18; see Elizabeth Becker, *Women in Military Say Silence on Harassment Protects Careers*, N.Y. TIMES, May 12, 2000, at A1, available at 2000 WLNR 3250879. Reforms in 2005 and 2006 have broadened the definition of rape, enhanced mechanisms for reporting, increased confidentiality and improved investigation protocols in order to better respond to the needs of victims. Helen Benedict, *The Scandal of Military Rape*, MS. MAGAZINE, Fall 2008, available at www.ms magazine.com/Fall2008/TheScandalOfMilitaryRape.asp. However, in 2008, Representative Jane Harman reported that “[w]omen serving in the U.S. military are more likely to be raped by a fellow soldier than killed by enemy fire in Iraq.” *Id.*

⁴¹ *Domestic Violence*, OVW, U.S. Dep’t of Justice, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited June 14, 2011); *Intimate Partner Violence: Definitions*, CTRS. FOR DISEASE CONTROL AND PREVENTION (CDC), <http://www.cdc.gov/ViolencePrevention/intimatepartnerviolence/definitions.html> (last visited June 14, 2011); *Intimate Partner Violence*, NAT’L INSTITUTE OF JUSTICE, U.S. DEP’T OF JUSTICE, <http://www.nij.gov/topics/crime/intimate-partner-violence/welcome.htm> (last visited June 14, 2011); *The Problem: What is Battering*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/learn/TheProblem.php> (last visited June 14, 2011); ABA Comm’n on Domestic Violence, *Tool for Attorneys to Screen for Domestic Violence* (2005), available at <http://www.abanet.org/domviol/screeningtoolcdv.pdf>.

⁴² See *id.*

⁴³ BUZAWA & BUZAWA, *supra* note 28, at 13-20 (discussing the difficulties associated with defining and measuring domestic violence). See *Intimate Partner Violence*, *supra* note 41 (noting why consistent definitions are important to examine rates of intimate partner

on the sources of information with criminal justice agencies capturing only domestic violence incidents that are reported to law enforcement and healthcare sources relaying information about physical assaults that led to medical attention.⁴⁴ Furthermore, domestic violence is severely underreported due to victims' fear, shame, distrust of law enforcement and reluctance to engage with the system.⁴⁵ The U.S. Department of Health and Human Services Centers for Disease Control and Prevention considers domestic violence to be a serious public health problem.⁴⁶ Women are the victims of approximately 4.8 million intimate partner physical and sexual assaults per year.⁴⁷ According to the National Institute of Justice's 2000 study on the prevalence of intimate partner violence, it is estimated that approximately one in four women will experience domestic violence in her lifetime.⁴⁸

violence over time); STARK, *supra* note 13, at 293-94 (discussing the complexity and significance of defining domestic violence).

⁴⁴ SCHNEIDER ET AL., *supra* note 13, at 11; BUZAWA & BUZAWA, *supra* note 28, at 13-14.

⁴⁵ SCHNEIDER ET AL., *supra* note 13, at 11.

⁴⁶ CDC, UNDERSTANDING INTIMATE PARTNER VIOLENCE FACT SHEET (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/IPV_factsheet-a.pdf.

⁴⁷ PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, PUB. NO. NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE iii (2000), *available at* <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

⁴⁸ *Id.* In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court relied on statistics from the American Medical Association (AMA) to support its conclusion that a provision of the Pennsylvania abortion statute that required pregnant women seeking an abortion to notify their husbands was unconstitutional:

The [AMA] has published a summary of the recent research in this field, which indicates that in an average 12-month period in this country, approximately two million women are victims of severe assaults by their male partners. In a 1985 survey, women reported that nearly one of every eight husbands had assaulted their wives during the past year. The AMA views these figures as "marked underestimates," because the nature of these incidents discourages women from reporting them, and because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions or hospitals when the survey is conducted. According to the AMA, "[r]esearchers on family violence agree that the true incidence of partner violence is probably *double* the above estimates; or four million severely assaulted women per year. Studies on prevalence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner

i. Power and Control/Coercion and Control

This note is focused on violent intimate relationships are characterized by the dynamic of power and control where an abuser employs a set of tactics designed to enforce his will upon the victim. While there are often misconceptions that victims of domestic violence experience constant physical violence at the hands of their abusers, the reality is that physical assaults are only one facet of the experience of being a battered woman.⁴⁹ Most often, the physical violence punctuates other methods of abuse such as restricted access to money and property, constant insults and humiliation, and threats of harm to children or other family members.⁵⁰ Additionally, victims of domestic violence experience extremely high rates of sexual assault, which is estimated at a range of thirty-three to sixty percent of battered women.⁵¹

Intimate partner violence is often characterized by abusers' assertion of control over the daily activities of their victims.⁵² Victims are often isolated from family and other support systems and abusers frequently prevent access to basic necessities such as food, money, health care, transportation, telephones and personal property.⁵³ Sometimes an abuser's rules are explicit and even result in written documents detailing specific conditions ranging from the direction of the vacuum marks on the carpets to specific sexual acts the victim must perform.⁵⁴ In other instances, the

during their lifetime." Thus on an average day in the United States, nearly 11,000 women are severely assaulted by their male partners.

Id. at 891 (alteration in original) (citation omitted).

⁴⁹ See Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2121 (1993) (discussing why emotional and sexual forms of abuse should be considered under the rubric of domestic violence).

⁵⁰ *Id.* at 2121-22.

⁵¹ *Id.* at 2123. See also OLA W. BARNETT & ALYCE D. LAVIOLETTE, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* 60 (1993).

⁵² Fischer et al., *supra* note 49, at 2126-27.

⁵³ EVAN STARK & ANNE FLITCRAFT, *WOMEN AT RISK: DOMESTIC VIOLENCE AND WOMEN'S HEALTH* 214 (1996); STARK, *supra* note 13, at 229.

⁵⁴ Fischer et al., *supra* note 49, at 2127.

batterer controls his partner with no formal expression of rules and victims become adept at understanding non-verbal cues from the abuser related to acceptable and unacceptable behavior.⁵⁵ In either case, physical violence is often the consequence for violating the rules.⁵⁶ In this way, physical violence is always a looming threat and the victim's fear of future attack allows the abuser to control her behavior.⁵⁷ Most importantly, "[i]t's vital to understand that battering is not a series of isolated blow-ups. It is a process of deliberate intimidation intended to coerce the victim to do the will of the victimizer."⁵⁸ Evan Stark describes this concept as "coercive control":

Coercion entails the use of force or threats to compel or dispel a particular response. In addition to causing immediate pain, injury, fear, or death, coercion can have long-term physical, behavioral, or psychological consequences. . . . Control is comprised of structural forms of deprivation, exploitation, and command that compel obedience indirectly by monopolizing vital resources, dictating preferred choices, microregulating a partner's behavior, limiting her options, and depriving her of supports needed to exercise independent judgment. . . . Control may be implemented through specific acts of prohibition or coercion, as when a victim is kept home from work, denied access to a car or phone, or forced to turn over her paycheck. . . . The result when coercion and control are combined is the condition . . . victims experience as *entrapment*.⁵⁹

⁵⁵ *Id.* at 2128.

⁵⁶ *Id.* at 2127.

⁵⁷ *Id.* at 2127-28; see BARNETT & LAVIOLETTE, *supra* note 51, at 52-68 (discussing the powerful emotion of fear and how it can change behavior).

⁵⁸ ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 88 (1994) (*italics omitted*).

⁵⁹ STARK, *supra* note 13, at 228-29 (alteration in original).

Abusers will also cut their victims off from friends and family, prevent them from working outside the home and become jealous of people and activities external to the relationship.⁶⁰

ii. Cycle of Violence

In 1979, Lenore Walker developed the “Cycle of Violence Theory” through her work and research with victims of intimate partner violence to explain a pattern of violence that “intensifies in degree and frequency over time and holds the people involved in an established pattern of behavior.”⁶¹ The cycle generally consists of three repeating phases: tension-building, acute battering, and honeymoon or loving contrition.⁶² Throughout the tension-building phase, the abuser may perpetrate less severe physical assaults including slapping, pushing, etc. as well as the destruction of property and verbal threats and insults.⁶³ Eventually an acute battering incident occurs and the victim is seriously and brutally assaulted, although she may not seek medical or police intervention for several days or weeks, if at all.⁶⁴ Immediately following a serious assault, an abuser’s behavior and attitude often change abruptly, as noted by Walker:

⁶⁰ ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 42-45 (1987).

⁶¹ BARNETT & LAVIOLETTE, *supra* note 51, at xxii.

⁶² *Id.*; LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 42 (1989). *But see* STARK, *supra* note 13, at 245-46 (explaining that the Cycle of Violence Theory may lead to inaccurate understandings of intimate partner violence such as the belief that the acute battering incident assaults are “neatly circumscribed,” that tension building is chronic rather than episodic, that the acute battering incidents follow a predictable pattern and that the apologies during the honeymoon phase represent “genuine contrition” or any universal set of emotions that abusers experience). While it can be argued that Walker’s theory is outdated and that current research has shown a more nuanced and complicated dynamic in domestic violence relationships, the overall concepts embodied in the Cycle of Violence Theory continue to provide the foundation for understanding the general dynamic common to many abusive relationships and to represent an accurate description of many battered women’s experiences, especially with respect to the periods following acute battering incidents.

⁶³ WALKER, *supra* note 62, at 42.

⁶⁴ *Id.* at 44.

When the acute battering incident ends, the final phase in the Cycle of Violence begins. In this phase, usually all tension and violence are gone This is a tranquil period, during which the batterer may exhibit warm, nurturing, loving behavior He knows he's been "bad," and tries to atone; he promises never to do it again; he begs for forgiveness. . . . During the third phase, the battered woman may join with the batterer in sustaining this illusion of bliss. She convinces herself, too, that it will never happen again; her lover can change, she tells herself. This "good" man, who is gentle and sensitive and nurturing towards her now, this is the "real" man, the man she married, the man she loves. Many battered women believe that they are the sole support of the batterer's emotional stability and sanity, the one link their men have to the normal world. Sensing the batterer's isolation and despair, they feel responsible for his well-being. . . . It is in this phase of loving contrition that the battered woman is most thoroughly victimized psychologically.⁶⁵

The honeymoon or loving contrition phase, as described by Walker, is arguably the most significant aspect of a battered woman's experience. "Here she receives discernable reinforcement of her identity as the good wife and her importance to her partner. . . . Here she remembers that abuse is not the only significant aspect of her relationship. . . . She cares about how he feels, his health, his survival if she leaves, his reputation, and so forth."⁶⁶ This ever-changing pattern of violence and non-violence has tangible psychological, cognitive, and behavioral consequences, which has been described as a form of "intermittent reinforcement."⁶⁷

⁶⁵ *Id.* at 44-45.

⁶⁶ BARNETT & LAVIOLETTE, *supra* note 51, at 16.

⁶⁷ *Id.*; see also WALKER, *supra* note 62, at 47 (discussing the social-learning theory of intermittent reinforcement).

“Behavioral psychologists have found that behavior that has been intermittently reinforced is the most difficult behavior to stop.”⁶⁸ Finally, the honeymoon phase also reinforces the victim’s belief and hope that the abuser will change, bolstered by his promises to stop the violence or to seek treatment, which is often cited as the most powerful reason abuse victims remain in the violent relationship.⁶⁹

II. OVERVIEW OF VETERANS TREATMENT COURTS

There are an estimated 23,067,000 veterans in the United States population as of July 2010.⁷⁰ A 2008 study by the RAND Corporation⁷¹ found that since October 2001 “approximately 1.64 million U.S. troops have been deployed for Operations Enduring Freedom and Iraqi Freedom (OEF/OIF) in Afghanistan and Iraq.”⁷² Preliminary data shows that veterans of these operations are showing higher rates of psychological injuries, particularly posttraumatic stress disorder (PTSD), depression, and traumatic brain injury (TBI) compared to physical combat casualties.⁷³ A key finding of the RAND study indicates that while most servicemembers will return from Iraq

⁶⁸ WALKER, *supra* note 62, at 47.

⁶⁹ BARNETT & LAVIOLETTE, *supra* note 51, at 16-17.

⁷⁰ NAT’L CTR. FOR VETERANS ANALYSIS AND STATISTICS, VA BENEFITS AND HEALTH CARE UTILIZATION (2010), *available at* http://www.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf.

⁷¹ RAND WORLDWIDE (“RAND”), <http://www.rand.org> (last visited Aug. 3, 2011). RAND is a nonprofit organization that conducts research on a variety of issues of public concern ranging from the arts, to national security, to energy and the environment in order to inform policy decisions on a national and international scale. *History and Mission*, RAND, <http://www.rand.org/about/history.html> (last visited Aug. 3, 2011).

⁷² RAND, CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY iii (Terri Tanielian & Lisa H. Jaycox eds., 2008), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf. A 2009 *Washington Post* article estimates that “more than 1.9 million service members have gone to Iraq and Afghanistan, the largest deployment since 3.4 million were sent to Southeast Asia in support of the Vietnam War.” P. Solomon Banda, *Troubled Veterans Get a Hand: VA Offers Legal Alternatives to Those Accused of Crimes*, WASH. POST, Aug. 7, 2009, at A19.

⁷³ RAND, *supra* note 72, at iii.

and Afghanistan unharmed, many will experience ongoing psychological problems that impact their ability to readjust to civilian life.⁷⁴

Assuming that the prevalence found in this study is representative, of the 1.64 million servicemembers who had been deployed for OEF/OIF as of October 2007, we estimate that approximately 300,000 individuals currently suffer from PTSD or major depression and that 320,000 individuals experienced a probable TBI during deployment. About one-third of those previously deployed have at least one of these three conditions, and about 5 percent report symptoms of all three. Some specific groups, previously understudied – including the Reserve Components and those who have left military service – may be at higher risk of suffering from these conditions.⁷⁵

A. History of the Model

Many returning veterans are struggling with substance abuse, unemployment, mental health issues, and violent conduct that lands them in the criminal justice system.⁷⁶ Addressing the

⁷⁴ *Id.* at xix-xx.

⁷⁵ *Id.* at xxi.

⁷⁶ Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 357, 360-61 (2009); see also Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 564 (2010) (examining the trend of creating specialty court systems to deal with the problems of returning veterans); Dahlia Lithwick, *A Separate Peace: Why Veterans Deserve Special Courts*, NEWSWEEK, Feb. 22, 2010, at 20, available at 2010 WLNR 3243428; accord Lizette Alvarez & Dan Frosch, *A Focus on Violence by Returning G.I.'s*, N.Y. TIMES, Jan. 2, 2009, at A1; Erica Goode, *Suicide's Rising Toll: After Combat, Victims of an Inner War*, N.Y. TIMES, Aug. 2, 2009, at A1; Sally Satel, Op-Ed., *For Some, the War Won't End*, N.Y. TIMES, Mar. 1, 2006, <http://www.nytimes.com/2006/03/01/opinion/01satel.html>. See generally 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, 65-68 (2010) (discussing the relationship between posttraumatic stress disorder (PTSD) and criminal conduct).

mental health needs of veterans has become a growing concern in many communities throughout the country.⁷⁷ Veterans treatment courts are a recent innovation in the field of problem solving justice that have emerged to address the unique needs of combat veterans in the criminal justice system.⁷⁸ The first veterans court was developed in Buffalo, New York with the mission of diverting defendant veterans with addiction, severe mental illnesses, and co-occurring disorders from the criminal justice process and providing access to substance abuse and other community-based services in an effort to rehabilitate them and eliminate their criminal behavior.⁷⁹ The NADCP National Clearinghouse for Veterans Treatment Courts reports that there are currently seventy-eight specialized veterans courts throughout the United States in twenty-eight states with the highest concentrations of courts in California, New York, Pennsylvania and Texas.⁸⁰ The NADCP and National Drug Court Institute have established a Veterans Treatment Court Mentors Program featuring four courts that serve a pivotal role in training, research and technical assistance in collaboration with the Center for Substance Abuse Treatment (CSAT) within the U.S. Department of Health and Human Services

⁷⁷ THE CTR. FOR MENTAL HEALTH SERVS.'S NAT'L GAINS CTR., RESPONDING TO THE NEEDS OF JUSTICE-INVOLVED COMBAT VETERANS WITH SERVICE-RELATED TRAUMA AND MENTAL HEALTH CONDITIONS (Aug. 2008), available at http://www.gainscenter.samhsa.gov/pdfs/veterans/CVTJS_Report.pdf; Melody Finnemore, *Firestorm on the Horizon: Specialists Say Legal Professionals Ill-Prepared To Help Growing Population of U.S. Military Members with Post-Traumatic Stress Disorder*, 70 OR. ST. B. BULL. 19, 20 (Apr. 2010); accord Adam Caine, *Fallen From Grace: Why Treatment Should be Considered for Convicted Combat Veterans Suffering From Post Traumatic Stress Disorder*, 78 U. MO. KAN. CITY L. REV. 215, 216-17 (Fall 2009); Satel, *supra* note 76.

⁷⁸ See Russell, *supra* note 76, at 357, 364. Other responses include "the passage of sentencing mitigation legislation in several states, including California, Minnesota, Texas, and Illinois. Another set of responses continues to develop under the tutelage of the Substance Abuse and Mental Health Services Administration (SAMHSA) and the National GAINS Center within the 13 federally funded state jail diversion pilots." Fairweather et al., *supra* note 24.

⁷⁹ Russell, *supra* note 76, at 364.

⁸⁰ *Veterans Treatment Courts Studies and Statistics*, NADCP, <http://www.VeteransTreatmentCourt.com/JusticeForVets-studies/statistics> (last visited October 14, 2011)

(providing, on the right-hand side, a complete list of Veterans Treatment Courts by state).

Substance Abuse and Mental Health Services Administration (SAMHSA).⁸¹ The four courts include: the Buffalo Veterans Treatment Court; the Tulsa Veterans Treatment Court in Tulsa, Oklahoma; the Orange County Combat Veterans Court in Santa Ana, California; and the Santa Clara County Veterans Treatment Court in San Jose, California.⁸²

The predominant model of veterans courts is a hybrid of the drug and mental health courts models⁸³ that follows the ten key components of drug courts advocated by the U.S. Department of Justice⁸⁴ as well as the ten primary elements of mental health courts.⁸⁵ Drug and mental health court models developed in the 1980s and 1990s in response to increasing awareness of the impact of substance abuse and mental illness on criminal

⁸¹ *Veterans Treatment Court Mentor Court Program*, *supra* note 21.

⁸² *Id.*

⁸³ Tracy Russo, *Honoring and Serving America's Veterans*, U.S. DEP'T OF JUSTICE: THE JUSTICE BLOG (Nov. 10, 2009), <http://blogs.usdoj.gov/blog/archives/328>.

⁸⁴ *See generally* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997), *available at* <http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefDefinin.pdf> (discussing the ten key components of drug courts).

⁸⁵ MICHAEL THOMPSON ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., *IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT* (2007), *available at* http://www.ojp.usdoj.gov/BJA/pdf/MHC_Essential_Elements.pdf (listing the ten essential elements of mental health court design and implementation). The elements combine into a veterans court model that promotes the following ten components: (1) "[I]ntegrat[ion] [of] alcohol, drug treatment, and mental health services with justice system case processing;" (2) "Using a non-adversarial 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" – this includes a "continuum of graduated responses to continuing drug use and other noncompliant behavior;" (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;" and (10) "Forging partnerships among the Veterans Treatment Court, the VA, public agencies, and community-based organizations generates local support and enhances the Veterans Treatment Court's effectiveness." Russell, *supra* note 76, at 364-67.

activity and recidivism.⁸⁶ The models combine case-processing and treatment services and use a non-adversarial approach to combine the prosecution, defense, project coordinator, treatment providers, probation officers, case managers and specially-trained judges together as a cohesive team that monitors the participant's progress.⁸⁷ The treatment courts employ the "coercive power of the court"⁸⁸ and the participant often enters a guilty plea to the original charges – the threat of a permanent conviction is a motivating factor for the defendant to successfully complete the program.⁸⁹ A system of rewards for completion of program requirements and sanctions for noncompliance are used to motivate the participants towards successful program completion.⁹⁰ If a participant completes the program, the criminal charges are often dismissed and the defendant's plea is stricken or his/her sentence is reduced.⁹¹ The drug court model has shown to be effective in reducing recidivism among substance abusing offenders⁹² and has received considerable state funding⁹³ as well as federal support in grant funding through the U.S. Department of Justice Bureau of Justice Assistance.⁹⁴

⁸⁶ CASEY & ROTTMAN, *supra* note 14, at 6, 8; Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVICES 457, 457 (2001). While drug courts have evolved to have a somewhat universal structure with extensive guidance from the U.S. Department of Justice and other national technical assistance providers, mental health courts have been less prolific and have not developed with the same level of uniformity. *Id.* at 457.

⁸⁷ CASEY & ROTTMAN, *supra* note 14, at 6.

⁸⁸ *Id.*

⁸⁹ *Id.* "The majority of drug courts employ a combination of two or more types of the following programs: pre-plea, post-plea/deferred judgment, post-adjudication, and probation violators" *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² C. WEST HUDDLESTON III ET AL., NAT'L DRUG COURT INSTITUTE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 2 (May 2008), available at http://www.nadcp.org/sites/default/files/ndci/PCPII1_web%5B1%5D.pdf.

⁹³ See *id.* at 16-18 (noting state appropriations for drug courts in 2007).

⁹⁴ *BJA Programs*, *supra* note 21 (noting that fiscal year 2010 funding for drug courts was forty-five million dollars).

B. Procedure and Eligibility

For veterans court programs, like with drug and mental health courts, eligibility is determined through early case screening and offender assessment.⁹⁵ The programs generally accept offenders charged with non-violent felony or misdemeanor crimes.⁹⁶ Participation is voluntary and the participants engage in a closely supervised treatment plan coordinated by the judge, court staff, peer mentors, health care professionals, and treatment providers.⁹⁷ Like in a typical drug court program, the participants usually enter a guilty plea to the crimes charged and receive a suspended sentence.⁹⁸ Participants then engage in counseling, random drug and alcohol testing and frequent court appearances to monitor their progress.⁹⁹ Many veterans treatment courts also incorporate a mentoring program, which often consists of veterans who volunteer with the courts to provide participants with critical support and encouragement from peers who understand their experiences.¹⁰⁰

C. Current Controversies

The concept of veterans courts has been endorsed by the American Bar Association,¹⁰¹ the National District Attorneys

⁹⁵ Fairweather et al., *supra* note 24. Federal guidelines prohibit the defendants from entering a drug court program if they are currently charged with or have ever committed a violent offense. CASEY & ROTTMAN, *supra* note 14, at 7.

⁹⁶ Russell, *supra* note 76, at 368.

⁹⁷ BUFFALO VETERAN'S COURT, *supra* note 23.

⁹⁸ Nicolas Riccardi, *Where Justice Isn't Blind to the Needs of Veterans*, L.A. TIMES, Mar. 10, 2009, at 1, *available at* 2009 WLNR 4536644.

⁹⁹ *Id.*

¹⁰⁰ Russell, *supra* note 76, at 369-70.

¹⁰¹ See ABA Comm'n on Homelessness and Poverty, Recommendation 1 (2010), http://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/ABA_Policy_on_Vets_Treatment_Courts_FINAL.authcheckdam.pdf ("FURTHER RESOLVED, That the American Bar Association urges state, local, and territorial courts to facilitate 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.").

Association¹⁰² and numerous state and local governments.¹⁰³ In addition, there is federal legislation pending in the House of Representatives to “provide grants to establish veteran’s treatment courts.”¹⁰⁴ The U.S. Department of Justice, Bureau of Justice Assistance, in partnership with the Department of Veterans Affairs, launched the pilot Veterans Court Planning Initiative facilitated by the NADCP.¹⁰⁵ Despite the preliminary signs of success¹⁰⁶ and state and federal support, veterans courts are not without controversy. Several chapters of the American Civil Liberties Union have expressed concern that veterans courts created “a unique class of criminals based on their status as veterans,”¹⁰⁷ and provide rights to veterans to which other defendants who also suffer as a result of traumatic experiences do not have access.¹⁰⁸ Another major controversy that exists within the veterans courts debate relates to the admission of violent offenders and defendants charged with violent offenses.¹⁰⁹ The

¹⁰² See Nat’l Dist. Attorneys Ass’n, Recommendation 26b (“This Nation owes an incalculable debt to those who have served in the defense of our freedoms. When veterans go astray they deserve every reasonable effort to get them back where they began: clean, sober and on the right the [sic] side of the law.”).

¹⁰³ See HUDDLESTON III ET AL., *supra* note 92.

¹⁰⁴ Services, Education, and Rehabilitation for Veterans Act, H.R. 2138, 111th Cong. (2009). This bill was introduced April 28, 2009 by Representatives Kennedy, Sullivan, Higgins, Schakowsky, Michaud and Boren. *Id.*

¹⁰⁵ Russo, *supra* note 83.

¹⁰⁶ Russell, *supra* note 76, at 370-71; see ROBERT T. RUSSELL, ACTING JUDGE OF THE ERIE COUNTY COURT, VETERANS TREATMENT COURTS DEVELOPING THROUGHOUT THE NATION 3, available at <http://www.nadcp.org/sites/default/files/nadcp/Future%20Trend%20Article-Final%202009.pdf> (noting that graduates of the Buffalo treatment court have experienced drastic positive life changes).

¹⁰⁷ Lithwick, *supra* note 76, at 20.

¹⁰⁸ *Id.*; see also Paul Elias, *Veterans Increasingly Find Service Helps in Court*, ASSOC. PRESS (May 22, 2010, 2:22 PM), http://www.breitbart.com/print.php?id=D9FS21T81&show_article=1 (noting that there is a debate over whether special treatment for those suffering from service-related maladies is fair).

¹⁰⁹ See Lithwick, *supra* note 76; see also 42 U.S.C. § 3797u-1 (2006) (requiring the Attorney General to issue regulations or guidelines to ensure violent offenders are not permitted to participate in drug courts); CASEY & ROTTMAN, *supra* note 14, at 7 (noting that federal guidelines prohibit offenders from participating in drug courts if they have committed a violent offense); Christina Salvo, *New Veterans Court to Handle Felonies*, COLO. CONNECTION (July 22, 2009, 7:49 PM), http://www.coloradoconnection.com/news/story_print.aspx?id=327987&type=story (discussing the El Paso Veterans Trauma Court’s

extensive controversy surrounding the admission of general violent crimes to veterans courts is beyond the scope of this note. I focus, rather, on the inclusion of intimate partner violence cases to these programs.

It is difficult to determine exactly how many and which veterans court programs admit intimate partner violence cases due to the high level of controversy about the issue and a reluctance of programs to disclose the information. While a few programs admit outright that they take domestic violence cases,¹¹⁰ many pay lip

admission of felonies, including violent felonies); accord Dan Herbeck, *Veteran Gets 2nd Chance from a Court with a Heart*, BUFFALO NEWS (Sept. 14, 2010, 12:00 AM), <http://www.buffalonews.com/city/communities/buffalo/article189920.ece> (reporting that, in September 2010, Army Veteran Britten Walker's federal criminal charges for assaulting a federal police officer and making death and bomb threats were dismissed by the District Court for the Western District of New York so that his case could be transferred to the Buffalo Veterans Treatment Court Program, and noting that Walker's case was the first instance of a federal criminal case being transferred to a state veterans treatment court program); Anthony Lane, *Fight Risk: Officials Struggle To ID Crimes too Violent for Vets Courts*, COLO. SPRINGS INDEP., <http://www.csindy.com/colorado/fight-risk/Content?oid=1556365> (last visited July 9, 2011) (describing Colorado Springs officials' intentions to admit violent offenses to their veterans court program); Kibret Markos, *Helping Vets Stop Cycle of Crime*, NORTHJERSEY.COM (Sept. 20, 2010), http://www.northjersey.com/news/state/103261059_Police_on_mission_to_assist_war_vets.html (discussing the fact that the Buffalo Veterans Treatment Court admits cases involving "simple assault" and "domestic violence," but not "serious, violent crimes," and noting that although the new Veterans Assistance Project opening in New Jersey is "technically open to veterans who are charged with serious or violent crimes," due to the "high bail that comes with such charges," a veteran's chance of participating would be limited).

In 2009, two national teleconferences brought together a total of 49 organizations, advocates, and justice professionals to discuss the admission of violent offenders to the emerging veterans treatment courts. . . . At issue was whether prohibition of admission for those in the following categories would exclude the bulk of current conflict offenders: domestic violence cases, illegal possession of firearms . . . and what might be deemed cases of 'simple assault' (bar fights). . . .

Fairweather et al., *supra* note 24. "The teleconferences generated efforts towards lifting blanket prohibitions for the admission of what the Uniform Crime Report defines as 'violent offenders' to veteran treatment courts." *Id.* Additionally, veterans courts in Orange County, California, and Santa Clara County, California are accepting intimate partner violence cases into the program. *Id.*

¹¹⁰ Fairweather et al., *supra* note 24 (explaining that veterans courts in Orange County, California, and Santa Clara County, California, are accepting offenders of intimate partner violence on a case-by-case basis).

service to an exclusion policy or use vague descriptions of eligibility where “[t]ypically, offenders who are transferred to [the program] have committed felony or misdemeanor non-violent crimes,”¹¹¹ but later disclosed to the media that participants charged with domestic violence are, in fact, admitted.¹¹² It is also difficult to establish rates of intimate partner violence within the general population of veterans involved in the criminal justice system.¹¹³ However, Amy Fairweather, Guy Gambrill and Glenna Tinney report that, based on research conducted in Travis County, Texas, “intimate partner violence and related offenses may constitute up to one quarter of all veteran offenders entering the justice system.”¹¹⁴ Given the increasing emergence of veterans courts throughout the country and the lack of a clear policy regarding the handling of intimate partner violence cases in these programs from local, state and federal agencies and technical assistance providers,¹¹⁵ as well as the push to broaden the scope of eligibility to include violent offenses in general,¹¹⁶ it is to be expected that an increasing number of veterans courts will be faced with domestic violence cases. Furthermore, two of the four courts featured as model programs in the Veterans Treatment Court Mentors Program,¹¹⁷ the Orange County and Santa Clara County programs in California, explicitly accept intimate partner violence cases,¹¹⁸ while a third mentoring court, the Buffalo program, appears to accept some domestic violence cases based on the presiding judge’s recent comments in *The Record*.¹¹⁹

¹¹¹ Russell, *supra* note 76, at 368.

¹¹² See Markos, *supra* note 109 (“The participants include men and women who were arrested for drunken driving, petty theft, simple assault and domestic violence The program is not open to veterans arrested for serious, violent crimes . . .”).

¹¹³ Fairweather et al., *supra* note 24 (explaining that the last Department of Justice, Bureau of Justice Statistics report, *Veterans in Jail and Prison*, was released in 2007, but only reported data collected through 2004, thereby excluding most veterans of the current conflicts in Iraq and Afghanistan).

¹¹⁴ *Id.*

¹¹⁵ See *supra* notes 21-22.

¹¹⁶ See *supra* note 109.

¹¹⁷ See *Veterans Treatment Court Mentor Court Program*, *supra* note 21.

¹¹⁸ Fairweather et al., *supra* note 24 (explaining that veterans courts in Orange County, California, and Santa Clara County, California, are accepting intimate partner violence cases into the program).

¹¹⁹ Markos, *supra* note 109 (“The participants include men and women who were arrested

III. THE PROBLEM WITH INTIMATE PARTNER VIOLENCE CASES IN VETERANS TREATMENT COURTS

There are a number of concerns that arise when veterans treatment courts accept domestic violence cases into their programs. Research about the intersection of domestic violence and trauma-related mental health issues arising from active combat such as PTSD and TBI is in its early stages and few, if any, court or mental health professionals have the expertise necessary to perform adequate screening and assessments of program participants.¹²⁰ Despite the claim that the domestic violence offenders who are admitted to the Orange County and Santa Clara County veterans courts “must demonstrate a clear relationship between combat deployment and the perpetration of intimate partner violence,”¹²¹ it is not clear how this could conclusively and reliably be done at such a preliminary stage in the case given the current state of the research on this issue and the lack of available assessment tools.¹²² There is a likelihood that cases involving the power and control dynamic¹²³ are finding their way into these programs, which is an inappropriate forum due to the great risk of victim coercion,¹²⁴ the inconsistent message from the criminal justice system about the criminality of intimate partner violence,¹²⁵ the wider cultural and social context of violence against women in the military¹²⁶ and the ineffectiveness of treatment in reducing violence.¹²⁷

for drunken driving, petty theft, simple assault and domestic violence . . .”).

¹²⁰ Fairweather et al., *supra* note 24 (“Few providers, researchers, lawyers and judges have an understanding of the issues related to combat trauma and intimate partner violence, much less cultural obstacles to care and reporting within the military and veteran culture.”); *cf. Veterans Court*, THURSTON COUNTY DISTRICT COURT, <http://www.co.thurston.wa.us/distcrt/veterans-court.htm> (last visited July 30, 2011) (listing “Domestic Violence Victim Advocate” in its “Staffing” section).

¹²¹ Fairweather et al., *supra* note 24.

¹²² See discussion *infra* Part III.A.

¹²³ See discussion *supra* Part I.B.i.

¹²⁴ See discussion *infra* Part III.B.

¹²⁵ See *supra* note 25.

¹²⁶ See discussion *supra* Part I.A. and note 40.

¹²⁷ See discussion *infra* Part III.C.

A. Assessment and Lack of Expertise

The general principle behind veterans treatment courts is that a participant's criminal behavior is a result of trauma experienced during their military service.¹²⁸ In keeping with this principle for domestic violence cases, skilled screening is necessary to determine whether there is a link between a veteran's violence against his partner and a mental health issue related to his experience of active combat or, instead, if there is an ongoing power and control dynamic that exists in the relationship independent of or pre-existing combat trauma. In some cases, there may be a combination of both factors. In-depth knowledge about domestic violence dynamics, mental health disorders, trauma and its effects, and military culture is required to effectively conduct this type of eligibility assessment – expertise that the vast majority of courts, lawyers, advocates and mental health professionals do not currently have.¹²⁹

Advancements in this field are certainly under way. The Battered Women's Justice Project (BWJP),¹³⁰ a technical assistance provider for the U.S. Department of Justice's Office on Violence Against Women (OVW), is currently implementing the Military Advocacy Resource Network, to provide resources to domestic violence advocates who serve victims of active duty military personnel or veterans.¹³¹ Research initiatives are also

¹²⁸ See discussion *supra* Part II.

¹²⁹ Fairweather et al., *supra* note 24 ("Few providers, researchers, lawyers and judges have an understanding of the issues related to combat trauma and intimate partner violence, much less cultural obstacles to care and reporting within the military and veteran culture.").

¹³⁰ Battered Women's Justice Project, *About the Battered Women's Justice Project*, http://www.bwjp.org/about_bwjp.aspx (last visited Aug. 7, 2011) (describing "The Battered Women's Justice Project [a]s a nationally-recognized partnership and collaboration between the programs of the Domestic Abuse Intervention Programs (formerly Minnesota Program Development, Inc.) and the National Clearinghouse for the Defense of Battered Women" and noting that the BWJP is funded by the U.S. Department of Justice Office on Violence Against Women and the U.S. Department of Health and Human Services).

¹³¹ Battered Women's Justice Project, *Military Advocacy Resources Network*, <http://www.bwjp.org/military.aspx> (last visited Aug. 7, 2011) ("The Military Advocacy Resource Network is a project funded by the Office on Violence Against Women (OVW) to provide

in progress from the Veterans Health Research Institute,¹³² Blue Star Families¹³³ and Swords to Plowshares,¹³⁴ as well as others.¹³⁵ However promising this research may be, it is still in its infancy, years from completion and replication. Until a reliable knowledge base and evidence-based practice is developed for proper assessment, veterans charged with intimate partner violence should not be admitted to veterans court programs.

B. Problematic Messages About the Nature of Intimate Partner Violence and Reinforcement of the Cycle of Violence and Manipulation of the Victim

Intimate partner violence cases in military families are uniquely complex. While each case must be evaluated on its own individual merits when being processed by a court, from a policy perspective, it is important to contextualize domestic violence cases in military families within the broader history of

technical assistance, resources, and support for all advocates, military and civilian, who serve military and veteran families and work with victims of domestic violence/sexual assault/stalking and dating violence perpetrated by military personnel or veterans.”).

¹³² The Veterans Health Research Inst., *Grants Funded*, 19 RES. IN REV., Spring 2010, at 1, 4 (reporting that Karen Seal, MD, MPH, received a grant from the Blue Shield of California to conduct the study “Intimate Partner Violence in Iraq and Afghanistan Veterans: Assessing Prevalence and Intervention). The “[k]ey objectives [of this study] are to determine the prevalence and correlates of aggression and impulsivity and intimate partner conflict and violence, and to measure the efficacy of motivational interviewing to engage perpetrators and victims of intimate partner violence in mental health treatment.” Fairweather et al., *supra* note 24.

¹³³ Fairweather et al., *supra* note 24 (noting that the Blue Star Families’ 2010 “Military Life Issues Survey” will “examine key stressors that may lead to partner violence, PTSD, traumatic brain injury, and/or mental health and psychological factors”).

¹³⁴ *Id.* (noting that the Veteran Family Violence: Increasing Awareness and Access to Service project will link domestic violence advocates and military family service providers around San Francisco concerning military culture competence and resources).

¹³⁵ See, e.g., APRIL A. GERLOCK, PHD, RN, RELATIONSHIPS AND PTSD STUDY: DETECTION OF INTIMATE PARTNER VIOLENCE, VA PUGET SOUND HEALTH CARE SYSTEM, TACOMA, NRI 04-040, available at http://www.pugetsound.hsrp.research.va.gov/docs/Relationships_PTSDF.pdf (explaining that the objective of the research is “to describe the differences between VA PTSD clinic patients with and without IPV [intimate partner violence], and to examine what indicators may be related to the accurate detection of IPV perpetration” which could be extremely useful to screening and assessment for potential participants in a veterans treatment court).

women's experiences of exclusion, discrimination and sexual assault in the military environment.¹³⁶ Ignoring this backdrop, even when combat trauma could be a contributing factor to an individual veteran's violence against his partner, does not paint a holistic picture. Conceptualizing the violence as an isolated incident involving a dysfunctional or idiosyncratic couple without examining the larger social and cultural messages about gender that lead to such a high prevalence of intimate partner violence in military families results in a limited understanding of the problem and can lead to potentially dangerous interventions.¹³⁷ This will become increasingly problematic as programs broaden their eligibility to encompass violent offenses.¹³⁸ Accepting domestic violence perpetrators into a veterans court sends the victim and the larger community the message that the offender is unable to control his behavior and implies that his violence is attributable to a mental health and/or substance abuse problem when court staff and mental health professionals are not currently qualified to establish this kind of causal connection.¹³⁹ Most significant and most troubling is the implication that, with counseling and treatment, the offender can be rehabilitated and his violence will cease, making it safe for the victim to return to or remain in the relationship despite the research that shows that treatment for domestic abusers is rarely (or at best, inconclusively) effective.¹⁴⁰

Victims of typical intimate partner violence are at a high risk of coercion and manipulation given the dynamics of their relationships and the patterns of violence and attempted

¹³⁶ FAMILY VIOLENCE PREVENTION FUND, THE FACTS ON THE MILITARY AND VIOLENCE AGAINST WOMEN, available at http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Military.pdf; see generally Moffeit & Herdy, *supra* note 34 (presenting the stories of many women who said they were victims of domestic abuse or were sexually assaulted while serving in the military).

¹³⁷ See discussion *supra* Part I.A.

¹³⁸ See *supra* note 109.

¹³⁹ See discussion *supra* Part III.A.

¹⁴⁰ See *infra* Part III.C.

reconciliation common to abusive men.¹⁴¹ The potential for rehabilitation offered by veterans treatment court programs is likely to reinforce the cycle of violence and the abuser's manipulation of the victim.¹⁴² Following an acute battering incident, abusers often plead for forgiveness and promise to seek help or treatment in order to convince their victims to return to or remain in the home and/or the relationship, or to refrain from taking action against them in court or with law enforcement.¹⁴³ During this stage of the cycle where abusers exert powerful coercion and manipulation, a victim could easily be persuaded by her abuser's acceptance into a veterans court to remain in the relationship because she is being told that the treatment the abuser will receive as part of his participation will stop the violence – this raises serious ethical concerns, especially given the expectation of relapse and re-offense that are common to the drug court model.¹⁴⁴ If the veteran's violence is part of a systematic and conscious effort to maintain power and control over the victim, the veterans court is actually reinforcing the offender's manipulation and abuse by taking the case.

Additionally, the victim may be encouraged to assist and support the abuser in his treatment goals rather than seek her own supportive services to address her needs for safety and independence. As described by Lenore Walker in her Cycle of Violence Theory, battered women are often convinced that they alone are responsible for their abuser's emotional stability and well-being.¹⁴⁵ This common dynamic sets the stage for victims to put the abusers' needs before their own. Ironically, in many battering relationships, it is the victims who often suffer from

¹⁴¹ See *supra* Part I.B.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See Fairweather et al., *supra* note 24 (noting that in drug courts, there is an expectation of relapse).

¹⁴⁵ WALKER, *supra* note 62, at 45; see also *supra* notes 48-55.

PTSD and other ongoing psychological effects,¹⁴⁶ yet the focus in veterans treatment courts is purely on determining and supporting the offender's needs. By adopting a treatment model and conceptualizing the domestic violence as a problem related to the offender's mental health, the veterans court has transformed the primary issue in the case from addressing the abuser's criminal responsibility for his violence against his partner to a coordinated effort to help the abuser overcome his affliction. This response is simply inappropriate regardless of whether the abuser is a combat veteran.

C. Ineffectiveness of Treatment

An additional reason that domestic violence cases are not suited to veterans treatment courts is that treatment has not proven to reduce recidivism or alleviate the abuse in the vast majority of domestic violence cases.¹⁴⁷ Treatment for perpetrators of domestic violence generally involves three potential interventions: substance abuse treatment, mental health treatment and/or Batterers' Intervention Programs ("BIPs").¹⁴⁸ The conventional wisdom of the battered women's movement has continually asserted that none of these interventions presents an appropriate or effective solution to battering.¹⁴⁹ While it is true that research has shown that not all

¹⁴⁶ WALKER, *supra* note 62, at 48; see BUZAWA & BUZAWA, *supra* note 28, at 25, 191-92 (discussing the psychological and quality-of-life effects, including PTSD, on victims).

¹⁴⁷ See Stark, *supra* note 13, at 39-40, 68-69; Patricia Anne Fazzone et al., *Substance Abuse Treatment and Domestic Violence: Treatment Improvement Protocol (TIP) Series 25, Chapter 3 – Batterers: An Overview*, in SAMHSA/CSAT TREATMENT IMPROVEMENT PROTOCOLS (SAMHSA ed. 1997), available at <http://www.ncbi.nlm.nih.gov/books/NBK14419/>; *What Do Professionals Need to Know?*, N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, http://www.opdv.state.ny.us/professionals/mental_health/abusertrmt.html (last visited Nov. 11, 2011).

¹⁴⁸ See SCHNEIDER ET AL., *supra* note 13, at 342-43, 346.

¹⁴⁹ See Stark, *supra* note 13, at 39 (noting that Mary Morrison, a spokeswoman for the NCADV, stated, "[b]ecause the Coalition has a systematic analysis of woman abuse, we do not believe that therapy for abusers is the solution. Battering is not an individual problem that can be solved with therapy or drug and alcohol abuse counseling. What we need to do is change the system that allows woman abuse").

batterers fit the same typology or should necessarily be subject to the same criminal justice interventions,¹⁵⁰ there has also been no conclusive evidence of success in the treatment of domestic violence offenders.¹⁵¹

i. Substance Abuse Treatment

The relationship between substance abuse and domestic violence is very complex. While causal relationships between the two issues are unclear and controversial,¹⁵² there appears to be a statistically significant correlation between drug and alcohol abuse and intimate partner violence in some circumstances.¹⁵³ A great deal of research suggests that large percentages of batterers abuse alcohol and other substances at higher rates than the general population,¹⁵⁴ and that substance abuse is correlated with acts of severe physical violence.¹⁵⁵ Studies have found that almost half of the suspects accused of spousal homicide were under the influence of alcohol at the time of the murder,¹⁵⁶ and a study of incarcerated domestic violence offenders found that thirty-nine percent reported a history

¹⁵⁰ Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1568 (1997-98) (“[T]he emerging research on biology and human behavior may provide valuable future insights. Additionally, screening abusers for medical as well as psychological factors might be prudent. Some men might benefit from medical as well as psychological interventions, especially in cases involving substance addictions or patterns of antisocial behavior. At the very least, this research suggests that we need to take a broader view of what ‘treatment’ or other interventions might entail apart from the current feminist-based group therapy models currently in vogue.”).

¹⁵¹ See *supra* note 147.

¹⁵² See Fazzone et al., *supra* note 147 (providing treatment providers with information on the role of substance abuse in domestic violence); see also BUZAWA & BUZAWA, *supra* note 28, at 38 (discussing a study examining the role between alcohol abuse and violence).

¹⁵³ BUZAWA & BUZAWA, *supra* note 28, at 38 (noting that substance abuse is highly correlated with intimate partner violence among batterers).

¹⁵⁴ *Id.* at 37.

¹⁵⁵ *Id.*

¹⁵⁶ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ-149259, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 6 (1994); BUZAWA & BUZAWA, *supra* note 28, at 38 (citing a study that found forty percent of intimate partner homicide offenders were reportedly using alcohol at the time of the incident).

of alcoholism and twenty two percent reported a history of substance abuse.¹⁵⁷ However, despite these apparent linkages, other research has reported that when attitudes and other demographic and social predictors of intimate partner violence are controlled, the connections between substance abuse and domestic violence are no longer clear.¹⁵⁸ Stronger predictors of intimate partner violence appear to be abusers' attitudes in support of the right to physically assault their partners with the highest rates of abuse being committed by men with these belief systems who are also substance abusers.¹⁵⁹

While the exact nature of the connections between substance abuse and domestic violence may be unclear, the issue has serious implications for treatment and criminal justice approaches employed with substance abusing batterers.

While abstinence from drugs and alcohol does not alter battering behavior, substance abuse problems negatively affect a batterer's capacity to change and increase the chance that violence will occur. . . . Although intoxication may trigger an individual episode of violence, addiction does not predispose one to be a batterer. This distinction is crucial for a provider to understand when treating batterer clients, because *a batterer's violence does not necessarily end when he stops abusing alcohol or other drugs*.¹⁶⁰

¹⁵⁷ Bo Bergman & Bo Brismar, *Characteristics of Imprisoned Wife-Beaters*, 65 FORENSIC SCI. INT'L 157, 159 (1994).

¹⁵⁸ Holly Johnson, *Contrasting Views of the Role of Alcohol in Cases of Wife Assault*, 16 J. OF INTERPERSONAL VIOLENCE 54, 54 (2001).

¹⁵⁹ See Sandra M. Stith & Sarah C. Farley, *A Predictive Model of Male Spousal Violence*, 8 J. OF FAMILY VIOLENCE 183, 185 (1993) (noting that investigations have found that men who approve of marital violence are more likely to use it).

¹⁶⁰ Fazzzone et al., *supra* note 147.

It is a problem that the common societal perception that people who abuse alcohol and/or drugs are unable to control their conduct often allows addicted batterers to escape responsibility for their violence.¹⁶¹ This problem is magnified by the acceptance of intimate partner violence offenders into veterans treatment court programs because the court model is based on the foundational premise that the defendants in the programs are engaging in criminal conduct as a result of their substance abuse and/or mental health issues that stem from their traumatic military experiences. Further, it has been shown that due to the complicated interaction of many individual and social factors that contribute to an abuser's violence, treatment for substance abuse alone generally does not result in alleviation of intimate partner violence.¹⁶² Coupling a perspective that shifts responsibility for the abuser's violence away from the defendant with a treatment approach that has not proven effective is not only illogical, but also manipulative and dangerous for domestic violence victims who are eager to hold onto hope that the abuser will change.

ii. Batterers' Intervention Programs

Despite continuing doubt about the appropriateness of treatment for domestic violence offenders, BIPs are widely used in all criminal justice contexts in pre-trial diversion programs, alternative to detention/incarceration programs, or conditions of probation both in the veterans treatment court context and the traditional criminal justice setting.¹⁶³ In reality, most offenders arrested for domestic violence who receive any type of sanction are mandated into BIPs rather than incarcerated.¹⁶⁴ The programs have provided

¹⁶¹ *Id.*

¹⁶² Richard M. Tolman & Larry W. Bennett, *A Review of Quantitative Research on Men Who Batter*, 5 J. INTERPERSONAL VIOLENCE 87, 88-91 (1990); accord Fazzzone et al., *supra* note 147.

¹⁶³ STARK, *supra* note 13, at 39-40.

¹⁶⁴ *See id.* at 67 (noting that court-mandated batterers accounted for eighty percent of all offenders attending counseling by the early 1990s).

“a relatively economical solution to the political dilemma [of] how to satisfy the demand for offender accountability without overresponding to the minor nature of most partner assaults.”¹⁶⁵ Modern BIPs generally utilize a combination of psychoeducational approaches that address power, control, sexism, and cognitive-behavioral skills commonly known as anger management.¹⁶⁶ The programs vary considerably in duration, design, intensity of monitoring and the response to non-compliance and violations.¹⁶⁷ In some states, domestic violence activists have made an effort to monitor and regulate the operations of BIPs, but the programs have continued to encounter obstacles to preadmission screening, effective post-completion monitoring, interventions for participants who continue to commit violence against their partners and imposing sanctions for noncompliance.¹⁶⁸

Studies of the effectiveness of BIPs vary widely in their results.¹⁶⁹ A significant problem limiting the efficacy of BIPs concerns the lack of offender compliance with attendance.¹⁷⁰ While only approximately one-third of mandated men ever contact the program,¹⁷¹ approximately forty to fifty percent of the offenders who enroll do not complete the program.¹⁷² However, the question of effectiveness for the offenders

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 67-68.

¹⁶⁹ See *id.* at 69-72 (noting various studies about the effectiveness of Batterers' Intervention Programs ("BIPs")). A major shortcoming of most research on the effectiveness of BIPs is the focus on repeat physical violence. *Id.* at 72. "Even in relationships where violence stops, many women report high levels of fear and continued entrapment." *Id.* Additionally, there are often methodological weaknesses such as high attrition rates, inaccessible victims, and lack of standardized service delivery among BIPs. *Id.* at 71.

¹⁷⁰ *Id.* at 70.

¹⁷¹ *Id.*

¹⁷² Maureen A. Pirog-Good & Jan Stets, *Program for Abusers: Who Drops Out and What Can be Done*, 9 RESPONSE, no. 2, 17, 17 (1986); accord Jeffrey L. Edleson & Maryann Syers, *The Effects of Group Treatment for Men Who Batter: An 18-Month Follow-Up Study*, 1 RES. ON SOC. WORK PRAC. 227, 229 (1991).

who do complete the programs still remains. Some studies demonstrate remarkable success,¹⁷³ while other research has shown mixed results.¹⁷⁴

Other research has even shown BIPs to increase violence. An experiment conducted by the Urban Institute in Baltimore, Maryland found that fifteen months after their case disposition, eighty-eight percent of men who had not participated in one of three local BIPs remained nonviolent whereas only fifty-seven percent of the men who were in a BIP had not been violent with their partners.¹⁷⁵ After twenty-nine months, nineteen percent of the men from the BIPs were charged with new domestic violence crimes compared with only seven percent of the non-counseled men.¹⁷⁶ The researcher, Adele Harrell, suspects several factors for the results including men in BIPs supporting each other and reinforcing the violent conduct and entitlement to control their partners, and the message from the criminal justice system about the unlikelihood of more serious sanctions for domestic violence,

¹⁷³ See Donald G. Dutton, *The Outcome of Court-Mandated Treatment for Wife Assault: A Quasi-Experimental Evaluation*, 1 VIOLENCE AND VICTIMS 163, 166 (1986) (reporting that two and a half years after arrest, four percent of men who participated in court-ordered treatment were rearrested for committing violence against their partners in comparison with forty percent of the offenders who did not undergo treatment); see also Edleson & Syers, *supra* note 172, at 238, 240 (finding that 67.1% of men who completed the program were still non-violent eighteen months following program completion).

¹⁷⁴ MELISSA LABRIOLA ET AL., CTR. FOR COURT INNOVATION, TESTING THE EFFECTIVENESS OF BATTERER PROGRAMS AND JUDICIAL MONITORING: RESULTS FROM A RANDOMIZED TRIAL AT THE BRONX MISDEMEANOR DOMESTIC VIOLENCE COURT 62 (2005) (describing a study of the Bronx Misdemeanor Domestic Violence Court from 2002 to 2004 that found no statistically significant differences in the probability of arrest between offenders assigned to BIPs and those who were not). However, the research did show that victims demonstrated increased satisfaction with their case outcomes when their abusers were mandated to a BIP despite the program's failure to prevent future violence. *Id.* at 48. Research conducted in Broward County, Florida found that men sentenced to a twenty-six week BIP and a year of probation were no less likely to demonstrate attitude changes, be rearrested, or violate probation than the men sentenced only to probation. Lynette Feder & Laura Dugan, *A Test of the Efficacy of Court-Mandated Counseling for Domestic Violence Offenders: The Broward Experiment*, 19 JUST. Q. 343, 371 (2002).

¹⁷⁵ ADELE HARRELL, URBAN INST., EVALUATION OF COURT ORDERED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS 65-68, 92-94 (1991).

¹⁷⁶ *Id.*

such as time in prison.¹⁷⁷ Future intimate partner violence following a batterer's participation in a BIP may also be more likely because of increased access – victims often remain with or return to abusers who seek treatment in the hopes that the abusers will change.¹⁷⁸ These factors raise serious concerns in the context of veterans treatment courts given the similar messages to offenders about the unlikelihood of a prison sentence upon completion of the program as well as the risk of victim coercion into remaining in the relationship on the condition that the abuser receives treatment.

iii. Mental Health Interventions

The final possibility for treatment of domestic violence perpetrators is mental health intervention. Some research indicates that the perpetration of domestic violence is sometimes associated with psychological and biomedical conditions.¹⁷⁹ Studies have found strong relationships between battering and mental health issues including depression, schizophrenia, severe personality disorders,¹⁸⁰ anxiety disorders,¹⁸¹ and traumatic brain injuries and other effects of head trauma.¹⁸² However, despite some findings of strong correlations between intimate partner violence and mental health disorders, other research has failed to uncover specific psychological profiles of abusive men.¹⁸³

¹⁷⁷ *Id.*, STARK, *supra* note 13, at 72.

¹⁷⁸ Lewis Okun, *Termination or Resumption of Cohabitation in Woman Battering Relationships: A Statistical Study*, in COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 107, 115 (Gerald T. Hotaling et al. eds., 1988); see STARK, *supra* note 13, at 69-72 (summarizing additional research of the effectiveness of batterer intervention programs).

¹⁷⁹ BUZAWA & BUZAWA, *supra* note 28, at 32; Hanna, *supra* note 150, at 1567-68.

¹⁸⁰ BUZAWA & BUZAWA, *supra* note 28, at 32-33.

¹⁸¹ Terrie E. Moffitt & Avshalom Caspi, *Findings About Partner Violence from the Dunedin Multidisciplinary Health and Development Study*, NAT'L INST. OF JUST. RES. IN BRIEF, July 1999, at 1, 5.

¹⁸² Hanna, *supra* note 150, at 1567; Alan Rosenbaum & Steven Hoge, *Head Injury and Marital Aggression*, 146 AM. J. OF PSYCHIATRY 1048, 1048 (1989); see generally William J. Warnken et al., *Head-Injured Males: A Population at Risk for Relationship Aggression?*, 9 VIOLENCE AND VICTIMS 153 (1994) (discussing a possible link between male head injuries and marital aggression).

¹⁸³ MARY P. KOSS ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 19-20 (1994).

Unfortunately, it is typically true that a single predisposing personality attribute cannot explain psychological dimensions of battering. Instead, a complex constellation of factors is thought to predispose someone to batter. This is important because the genesis of a particular problem affects the likelihood that it might be easily remedied by societal intervention, including sanctions directly imposed by the criminal justice system as well as prospects for rehabilitation through court-ordered counseling.¹⁸⁴

In addition to disorders that fit the criteria of psychological disorders listed by the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV),¹⁸⁵ perpetrators of intimate partner violence are also often found to exhibit behaviors that correlate with personality traits such as low self-esteem, problems with anger control and conflict resolution, immature personalities, and childhood experiences of aggression by a parent.¹⁸⁶

¹⁸⁴ BUZAWA & BUZAWA, *supra* note 28, at 32.

¹⁸⁵ THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (AM. PSYCHIATRIC ASS'N 4th ed.) (1994). The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) is the standard classification of mental disorders used by mental health professionals in the United States. *Diagnostic and Statistical Manual*, AM. PSYCHIATRIC ASS'N, <http://www.psych.org/MainMenu/Research/DSMIV.aspx> (last visited Aug. 12, 2011).

¹⁸⁶ BUZAWA & BUZAWA, *supra* note 28, at 33-37. However, other researchers who have worked with perpetrators of intimate partner violence are skeptical of the relationship between childhood abuse and the subsequent commission of violence against a partner later in life. LUNDY BANCROFT, *WHY DOES HE DO THAT?: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN* 25 (2002). As Lundy Bancroft reports, "men who are violent toward other *men* are often victims of child abuse—but the connection is much less clear for men who assault women." *Id.* (alteration in original). An exception to this finding is abusers who are intensely and severely physically abusive, which tends to support the notion that while there does not appear to be a strong causal connection between experiencing childhood abuse and violence against an intimate partner, childhood abuse could increase the severity of a perpetrator's physical violence against his partner. *Id.*

There is a dearth of information about the effectiveness of mental health interventions on the prevention or reduction of intimate partner violence. Lundy Bancroft, a former co-director of Emerge, a counseling program for men who batter,¹⁸⁷ has found that psychotherapy alone has been largely unsuccessful in establishing long-term changes in abuse patterns¹⁸⁸ and actually in some instances can increase and refine an abuser's coercive and manipulative tactics against his partner.¹⁸⁹ Similarly, the New York State Office for the Prevention of Domestic Violence states that mental health treatment has not shown to be an effective means of reducing intimate partner violence because it does not address the attitudinal beliefs that perpetrators generally maintain about their entitlement to abuse, it provides an excuse for the abuse and increases the abuser's capacity to manipulate his victim by eliciting her sympathy, and it sends the message that the criminal justice system does not take the issue of domestic violence seriously and will not provide a severe sanction.¹⁹⁰ However, other research, such as that of Donald Dutton and Edward Gondolf, has shown that not all abusers are alike or equally dangerous, and different interventions may have more or less success with various psychological profiles.¹⁹¹ This suggests that increased screening skills may allow the criminal justice system to more effectively intervene with batterers exhibiting certain characteristics that are more susceptible to change than others.¹⁹²

¹⁸⁷ EMERGE, <http://www.emergedv.com/> (last visited Aug. 7, 2011).

¹⁸⁸ BANCROFT, *supra* note 186, at 25.

¹⁸⁹ *Id.* ("He may work through other emotional difficulties, he may gain insight into himself, but his behavior continues. In fact it typically gets worse, as he uses therapy to develop new excuses for his behavior, more sophisticated arguments to prove that his partner is mentally unstable, and more creative ways to make her feel responsible for his emotional distress.").

¹⁹⁰ *What Do Professionals Need to Know?*, *supra* note 147.

¹⁹¹ Hanna, *supra* note 150, at 1563-66.

¹⁹² *Id.* at 1573-74.

Overall, the three areas of treatment options for perpetrators of domestic violence that are at the disposal of veterans treatment courts have not proven successful in alleviating the vast majority of typical domestic violence perpetration. While it is possible that treatment efforts could be more effective in domestic violence cases resulting solely from an offender's acute psychological issue related to combat trauma and not a broader effort to maintain power and control over a victim, research in this area does not yet exist and the courts do not currently have the ability screen out the cases involving the power and control dynamic.¹⁹³ As such, there is a great risk of offenders being ordered into treatment that will not assist them and that could even increase abusive behavior and put the victim in greater danger.

IV. ALTERNATIVE SOLUTIONS

A. Recommendation for Blanket Exclusion of Intimate Partner Violence Cases from Veterans Treatment Courts

All intimate partner violence cases should be excluded from veterans treatment courts, at least until research has been completed and replicated and evidence-based screening and assessment tools are developed to ensure that the cases that are accepted are truly reflective of the goals and values of veterans court programs – to rehabilitate veterans whose experience of combat trauma has led them to criminal behavior. Intimate partner cases characterized by a power and control dynamic do not appropriately fit those goals. Currently, there is greater societal and individual harm caused by accepting typical intimate partner violence cases into a veterans treatment court than by excluding cases where PTSD or TBI is a factor. In a traditional court setting, the offender will have defense counsel who is able to protect his rights and raise various defenses

¹⁹³ See *supra* Part III.A.

on his behalf and a fact-finder can determine whether the offender's experience of combat caused his violence.¹⁹⁴ For serious intimate partner violence offenses, the ideal venue is a specialized felony domestic violence court where all indicted domestic violence felonies within a jurisdiction are concentrated into a single docket to be handled by dedicated judges, court staff and prosecutors who receive ongoing training on domestic violence issues and victims have expanded access to counseling, advocacy and other local resources.¹⁹⁵

Domestic violence cases are of the most difficult to prosecute in any venue. Victims are frequently reluctant to participate in the prosecution, there can be complicated emotional, family, and cultural dynamics involved, evidence can be difficult to obtain, and there are often few witnesses to intimate partner assaults.¹⁹⁶ Like most criminal prosecutions, the vast majority of cases are resolved through plea negotiations and do not go to trial.¹⁹⁷ The purpose of excluding domestic violence cases from veterans treatment courts is not based on the argument that the cases are prosecuted and convictions are obtained with great success in other venues. Rather, accepting intimate partner violence cases into a veterans treatment court model makes difficult and highly volatile situations even worse due to mixed messages about criminal responsibility, emphasis on treatment, and the risk of victim coercion.

¹⁹⁴ See *infra* Part IV.B.

¹⁹⁵ LISA NEWMARK ET AL., URBAN INST., SPECIALIZED FELONY DOMESTIC VIOLENCE COURTS: LESSONS ON IMPLEMENTATION AND IMPACTS FROM THE KINGS COUNTY EXPERIENCE vii-viii (Oct. 2001).

¹⁹⁶ BUZAWA & BUZAWA, *supra* note 28, at 181-85; Komanski & Magill, *supra* note 28 at 200-01.

¹⁹⁷ ANDREW R. KLEIN, NAT'L INST. OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 36 (June 2009).

B. PTSD as a Criminal Defense and in Sentencing

The effect of PTSD on a defendant's criminal responsibility is a growing and changing area of law.¹⁹⁸ With the increased validity of PTSD as a clinical diagnosis and the recognition of its impact on combat veterans, "greater weight may be given to the premise that PTSD is a mental disorder that provides grounds for a 'mental status defense,' such as insanity, a lack of mens rea, or self-defense."¹⁹⁹ Defense attorneys who serve veterans should increase their awareness of PTSD and other combat-related mental health disorders in order to provide the most effective representation possible as well as necessary referrals to treatment.²⁰⁰ "[A]ttorneys can make sure that, where a veteran has committed a crime, even a violent one, that crime is put into the context of the trauma the defendant experienced as a warrior in an unpopular and terrifying conflict."²⁰¹

If a combat veteran is charged with domestic violence, his attorney may present evidence of PTSD to avoid or reduce his criminal culpability for the jury's evaluation. The insanity

¹⁹⁸ See 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, 112-23 (2010) (discussing PTSD in the context of the insanity defense and the caselaw supporting it); see also Burgess et al., *supra* note 76, at 68-72 (noting defendants with PTSD commonly assert not guilty by reason of insanity as a defense); Christopher Hawthorne, *Bringing Baghdad into the Courtroom: Should Combat Trauma in Veterans Be Part of the Criminal Justice Equation?*, 24 CRIM. JUST. 5, 8-12 (Summ. 2009) (noting how PTSD has gained acceptance as a defense); Mary Tramontin, *Exit Wounds: Current Issues Pertaining to Combat-Related PTSD of Relevance the Legal System*, 29 DEV. MENTAL HEALTH L. 23, 38-39 (2010) (discussing PTSD as a legal defense).

¹⁹⁹ Hafemeister & Stockey, *supra* note 198, at 87.

²⁰⁰ See 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, 161-62 (2009) (noting that attorneys in veterans treatment courts cannot effectively advise their clients without knowledge of PTSD and the rehabilitative options); accord Hawthorne, *supra* note 198, at 13 (noting resources for attorneys confronted with criminal defendants suffering from combat trauma).

²⁰¹ Hawthorne, *supra* note 198, at 13.

defense, as defined by *Black's Law Dictionary*, is “[a]n affirmative defense alleging that a mental disorder caused the accused to commit the crime.”²⁰² In a traditional court setting, the burden is properly placed on the defendant to prove, by a preponderance of the evidence, that there is a causal connection between his violence and his experience of combat trauma, contrasted with a pre-trial, cursory, and unqualified assessment in a veterans treatment court eligibility screening. While problem-solving models have frequently employed this “presumption of causation” in the drug and mental health court arenas where the substance abuse or mental health issue is assumed to have “caused” the criminal behavior, there has been a strong emphasis on excluding violent offenses from treatment court programs.²⁰³ Given the recent mobilization to expand the scope of veterans treatment courts to include violent offenses,²⁰⁴ this presumption becomes increasingly problematic even beyond the realm of domestic violence cases. Once domestic violence and other violent crimes are admitted into treatment courts, the risks and consequences of incorrectly presuming the causes of defendant’s criminality are markedly more severe, putting abuse victims and the general public at great risk of future harm.

Sentencing is another phase of criminal prosecution where evidence of PTSD, TBI or other similar trauma-induced mental health issues may be relevant. If a combat veteran is found guilty of a domestic violence offence, mitigating evidence may be presented to reduce his sentence.²⁰⁵ California²⁰⁶ and Minnesota²⁰⁷ have both updated their

²⁰² BLACK’S LAW DICTIONARY 865 (9th ed. 2009).

²⁰³ See Lithwick, *supra* note 76 (noting that drawing lines between violent and nonviolent offenders is a tough legal question).

²⁰⁴ See *id.*

²⁰⁵ See Hawthorne, *supra* note 198, at 12-13 (noting that most of Vietnam-era criminal cases concerning PTSD commonly result in a reduced sentence).

²⁰⁶ CAL. PENAL CODE § 1170.9(a) (West 2010).

²⁰⁷ MINN. STAT. § 609.115 (2010).

sentencing mitigation statutes to acknowledge the experience of combat veterans, and similar provisions are being considered in other states.²⁰⁸ In the federal context, the Supreme Court recently overturned the death sentence of George Porter, Jr. convicted in 1987 of murdering his former girlfriend and her boyfriend because Porter's court-appointed attorney failed to present evidence of his military service in the Korean War to the jury.²⁰⁹ Additionally, the U.S. Sentencing Commission voted to revise the federal Sentencing Guidelines "regarding age, mental and emotional conditions, physical condition, and military service recognizing that these factors may be relevant to the sentencing process courts undertake."²¹⁰ These changes took effect on November 1, 2010²¹¹ and as a result, federal courts are now mandated to take issues related to military service into account when sentencing criminal defendants.

CONCLUSION

In sum, there is no doubt that combat veterans experience significant trauma as a result of their service, which can have long-lasting and devastating effects on their mental health. Veterans treatment courts have served as an important innovation in the criminal justice system to provide justice, resources, mentors and access to much needed treatment to

²⁰⁸ Hawthorne, *supra* note 198, at 13.

²⁰⁹ *Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam). In *Porter*, the Supreme Court stated:

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.

Id. at 455.

²¹⁰ *News Release*, U.S. Sentencing Comm'n (Apr. 19, 2010), http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20100419_Press_Release.htm (last visited Aug. 8, 2011).

²¹¹ *Id.*

the men and women who make extreme sacrifices to keep our Nation and its citizens safe. It is also true that veterans courts are a dangerous forum for intimate partner violence cases until reliable research has uncovered the complicated interplay between symptoms of combat trauma and domestic violence and evidence-based interventions have proved effective. In the meantime, all domestic violence-related offenses belong in a traditional criminal court setting where the case is treated as any other criminal offense and the burden is properly placed on the defendant to present an affirmative defense at trial or mitigating circumstances at sentencing related to the effects of trauma resulting from military service.