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Justice for Veterans: Does Theory Matter?

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JUSTICE FOR VETERANS: DOES THEORY MATTER?

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The Veterans Treatment Court (“VTC”) movement is sweeping the nation. In 2008, there were approximately five courts. Currently, there are over 350 VTCs and veteran-oriented tracks in the United States. Most view this rapid proliferation as a positive phenomenon. VTC growth, however, has occurred haphazardly and most often without deliberate foundational underpinnings.

While most scholars assume that a therapeutic jurisprudence (“TJ”) modality is the paradigm for VTCs, there has been little examination of other theories of justice as appropriate for veterans and the courts that treat them. This Article addresses whether an alternative theory of justice—specifically, restorative justice (“RJ”)—can inform the theoretical foundation of a VTC to enhance its beneficial impact on veterans with post-traumatic stress disorder (“PTSD”), traumatic brain injury (“TBI”), or substance abuse issues. A primary feature of the RJ philosophy is that it is community-driven: it involves the victim, offender, and “community of interests” in the solution, process of restoration, and prevention of future misconduct. These principles are well suited for a VTC, which is also collaborative, community-based, and places extreme importance on the reintegration of the veteran back into society. These characteristics stem from an evolved theory that the community is ultimately responsible for the misconduct that was caused by the defendant’s military service. A hypothetical criminal case common in a VTC illustrates that RJ principles and framework may enhance the beneficial impact of VTCs. RJ may be just the theory of justice that brings to bear Sebastian Junger’s notion of a tribe as a means for the successful reintegration of veterans back into the community.

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INTRODUCTION

Communities across the United States have been grappling for years with the consequences of two protracted armed conflicts. In 2014, there were approximately 2.6 million veterans in the post-9/11 veteran population.¹ The U.S. Department of Veterans Affairs (“VA”) predicts that by 2019 there will be close to 3.5 million veterans in the post-9/11 cohort, with no end date established for this wartime era.² Many of these men and women left, or will leave, the service with physical and mental health injuries, which may include any one or more of the following: post-traumatic stress disorder (“PTSD”), traumatic brain injury (“TBI”),

1. NAT’L CTR. FOR VETERANS ANALYSIS AND STATISTICS, PROFILE OF POST-9/11 VETERANS: 2014, at 2 (2016), http://www.va.gov/vetdata/docs/SpecialReports/Post_911_Veterans_Profile_2014.pdf; *see also* PHILLIP CARTER ET AL., CENTER FOR NEW AMERICAN SECURITY, PASSING THE BATON: A BIPARTISAN 2016 AGENDA FOR THE VETERAN AND MILITARY COMMUNITY 9 (2015), https://s3.amazonaws.com/files.cnas.org/documents/CNASReport_PassingtheBaton_151104_final.pdf.

2. NAT’L CTR. FOR VETERANS ANALYSIS AND STATISTICS, *supra* note 1, at 2.

depression, acute anxiety, and substance abuse problems.³ Numerous studies have linked these conditions, combined with learned conduct that was necessary for survival in a war zone, to criminal behavior.⁴ Veterans treatment courts (“VTCs”) recognize that military service and exposure to combat may have a negative impact on soldiers, not only causing profound challenges to assimilating back into civilian life, but also resulting in criminal conduct. VTCs, like drug treatment or mental health courts, are problem-solving courts that favor treatment over incarceration because an underlying condition may have led to the misconduct.⁵ VTCs address a unique subpopulation of defendants who may benefit from a treatment court that is tailored to their particular social and psychological needs and, importantly, their common military culture.⁶

The popularity and ostensible success of VTCs is leading to their rapid growth across the country.⁷ In 2008, the first official VTC was established and by early 2014, there were approximately 350 VTCs, veteran dockets, or tracks for veterans in an existing specialized docket throughout the United States, with hundreds more planned.⁸

3. See CARTER ET AL., *supra* note 1, at 18; CONG. BUDGET OFFICE, THE VETERANS HEALTH ADMINISTRATION’S TREATMENT OF PTSD AND TRAUMATIC BRAIN INJURY AMONG RECENT COMBAT VETERANS 11 (2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/02-09-PTSD_0.pdf (stating that up to 25% exhibit PTSD and 23% experience TBI); TERRI TANIELIAN ET AL., RAND CTR. FOR MILITARY POLICY HEALTH RESEARCH, INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES 29 (2008) [hereinafter RAND REPORT 2008], <http://justiceforvets.org/sites/default/files/files/RAND%20invisible%20wounds%20of%20war.pdf>.

4. See Kristine A. Huskey, *Reconceptualizing “the Crime” in Veterans Treatment Courts*, 27 FED. SENT’G REP. 178, 180–82 (2015) (citing numerous studies showing linkage between PTSD and behaviors that may lead to misconduct); Michelle Slattery et al., *Catch, Treat, and Release: Veteran Treatment Courts Address the Challenges of Returning Home*, 48 SUBSTANCE USE & MISUSE 922, 923–24 (2013) (citing various studies showing higher rates of justice involvement for veterans with PTSD, TBI, and substance abuse problems).

5. Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 364 (2009).

6. *Id.*

7. See generally U.S. DEP’T OF VETERAN AFFAIRS, VETERANS HEALTH ADMINISTRATION FACT SHEET, VETERANS COURT INVENTORY 2014 UPDATE: CHARACTERISTICS OF AND VA INVOLVEMENT IN VETERANS TREATMENT COURTS, DOCKETS, AND TRACKS FROM THE VETERANS JUSTICE OUTREACH SPECIALIST PERSPECTIVE (2016) [hereinafter VA FACT SHEET], <http://www.va.gov/HOMELESS/docs/VTC-Inventory-FactSheet-0216.pdf>; JUSTICE FOR VETS, <http://justiceforvets.org/vtc-history> (last visited Sept. 25, 2016).

8. See Russell, *supra* note 5, at 364. Some accounts note that the first informal veterans court program originated in Anchorage, Alaska, four years earlier. See Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 565 (2009); VA FACT SHEET, *supra* note 7, at 2; see also JUSTICE FOR VETS, *supra* note 7.

The proliferation of treatment courts and veterans dockets is primarily viewed as a positive phenomenon—helping veterans get back on their feet.⁹ However, their growth has been haphazard and with little cohesion or thought given to foundational underpinnings. While most assert that problem-solving courts, including VTCs, are based on a therapeutic jurisprudence (“TJ”) modality, others criticize such courts for straying from TJ principles.¹⁰ In any case, most scholars and practitioners assume the TJ approach as the given paradigm for VTCs. Indeed, TJ is linked to drug treatment courts, the predecessor treatment courts to VTCs.¹¹ And VTCs have unquestionably borrowed from and reformatted the well-known “ten components” of drug treatment courts to fit the particular defendant.¹² Accordingly, the TJ modality is the presumptive lodestar for all problem-solving courts—yet there has been little examination of it in the context of VTCs or any theory of justice as an appropriate philosophy for VTCs. The rapid proliferation of VTCs without an intentional foundation suggests that now may be a key moment to explore and experiment with different theories.

This Article addresses whether an alternative theory of justice, restorative justice (“RJ”), can help form a theoretical foundation for VTCs to improve upon such courts. The RJ modality strives to restore the victim, the offender, and the community.¹³ It seeks to repair the harm suffered by the victim and community and to avoid causing hurt (i.e., punishment) to the offender.¹⁴ An important RJ *value* is

9. See, e.g., Claudia Arno, Note, *Proportional Response: The Need for More—and More Standardized—Veterans’ Courts*, 48 U. MICH. J.L. REFORM 1039, 1040 (2015). Jeremiah M. Glassford, “In War, There are No Unwounded Soldiers”: *The Emergence of Veterans Treatment Courts in Alabama*, 65 ALA. L. REV. 239, 261–63 (2013); Russell, *supra* note 5, at 370.

10. See Michael L. Perlin, “John Brown Went Off to War”: *Considering Veterans Treatment Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445, 455–56 (2013) (offering TJ as the basis for VTC); Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 29 (2011) (discussing TJ in context of VTCs); Samantha Walls, *The Need for Special Veteran Courts*, 39 DENV. J. INT’L L. & POL’Y 695, 719 (2011) (asserting TJ as basis for VTCs); Michael S. King, *Should Problem-Solving Courts Be Solution-Focused Courts* 3–4 (Monash University Law, Paper No. 2010/03), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1725022 (criticizing problem-solving courts for straying from TJ principles); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1066 (2003) (explaining TJ can be understood as providing a theoretical foundation for problem-solving courts).

11. See, e.g., Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 479 (1999) (advocating TJ as theoretical foundation for drug treatment courts).

12. See U.S. DEP’T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997), <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>; Russell, *supra* note 5, at 364–67.

13. Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work?*, 3 ANNU. REV. L. SOC. SCI. 161, 162–65 (2007).

14. John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

the reintegration of the offender back into the community, while a primary feature of the RJ *process* is that it is community-driven—often involving several community stakeholders in the solution and process of restoration and prevention of future misconduct.¹⁵ Such prevention tools could include treatment of the offender's underlying issues, which may be mental health disorders and substance abuse problems. Thus, RJ values and processes are well-suited for a VTC, which seeks to remove obstacles to civilian-life reintegration and is viewed as highly collaborative and even more grounded in notions of community participation than other problem-solving courts. This is due to an evolved understanding that the community is ultimately responsible for the crime or misconduct that was caused directly or indirectly by the defendant's military service.¹⁶

Part I introduces VTCs, describing their origins and characteristics. It discusses the target clientele—military veterans—and posits a reconception of the underlying crime as being a community responsibility. Part II addresses TJ and its presumptive role with respect to VTCs. Part III examines the values, processes, and outcomes of RJ. Part IV addresses the interplay between RJ, TJ, and VTCs. Lastly, a hypothetical scenario in a VTC illustrates that imbuing these courts with RJ principles may enhance the beneficial impact of such courts.

I. VETERANS TREATMENT COURTS

A. A Veterans Treatment Court Story¹⁷

Staff Sergeant Brad Eifert was an infantry gunner and a truck commander in Iraq during two years of the war's most violent fighting. When he returned to Ft. Carson, he knew something was wrong. The aggression that had carried him through deployments was still very much alive inside him. He was irritated by bad drivers: "You're so used to being king of the road, to having people get out of the way," he said. He was irritated by the seeming obliviousness of the people around him.

At a mental health screening, he told an Army psychiatrist that he was drinking too much, having panic attacks, and waking up from nightmares of his house exploding or his hand being blown off. Mr. Eifert continued through life as an army recruit, but he also continued drinking, sometimes as much as a fifth of Jack Daniel's a day. He was haunted by memories: friends being killed; the day he shot up a house filled with women and children, killing many of them; when he watched a truck full of military contractors burn and did nothing to save them. He was receiving psychiatric

15. See Allison Morris & Warren Young, *Reforming Criminal Justice: The Potential of Restorative Justice in* RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 11, 13–14 (John Braithwaite & Heather Strang eds., 2000).

16. See Huskey, *supra* note 4, at 182.

17. This is just one of many similar stories about veterans who find themselves caught up in the criminal justice system. See Erica Goode, *Coming Together to Fight for a Troubled Veteran*, N.Y. TIMES (July 17, 2011), http://www.nytimes.com/2011/07/18/us/18vets.html?_r=0.

medication and counseling from the VA but made two suicide attempts nonetheless.

On a particularly bad day, Mr. Eifert took three guns and went into the woods behind his house. The police were called. He raised the gun to his head and then lowered it. Then he fired nine rounds. Leaving his weapon, he ran into the driveway, shouting, "Shoot me! Shoot me! Shoot me!" The police officers subdued and arrested him. A few hours later, he sat in a cell at the local jail, charged with five counts of assault with intent to murder the officers, each carrying a potential life sentence.

Determined individuals and a compassionate judge got him into the newly established VTC in his county. In the VTC, Mr. Eifert pled guilty to a single charge of carrying a weapon with unlawful intent, a felony, and entered the treatment program. Moving forward, he will have to adhere to the strict regimen of treatment through the VA hospital and supervision set by the court. If he does, the charge could be dismissed or reduced to a misdemeanor. Because of this treatment, Mr. Eifert was able to stay at home with his family; he abstained from drinking, worked part-time on a family farm, and most importantly, began to see a future for himself.¹⁸

B. The Development of Veterans Treatment Courts

The United States has been engaged in armed conflict on two or more fronts in far-away lands for over fifteen years, resulting in tremendous consequences on the home front. By mid-2015, 2.7 million men and women were deployed to Afghanistan, Iraq, or other theaters of war to serve in an assortment of post-9/11 contingency operations, including the well-known Operation Enduring Freedom ("OEF") and Operation Iraqi Freedom ("OIF"), the lesser-known Operation New Dawn, and relatively unknown operations occurring in Yemen and many other places.¹⁹ Over half of these men and women served two or more combat tours; many engaged in four or more tours; and some have been in and out of armed conflict for over ten years.²⁰ Most of these 2.7 million individuals have left the service by now, and it is estimated that by 2019, the post-9/11 veteran population will be slightly less than 3.5 million.²¹ While many of these men and women will not incur

18. *Id.*

19. CARTER ET AL., *supra* note 1, at 9.

20. Gregg Zoroya, *Repeated Deployments Weigh Heavily on U.S. Troops*, USA TODAY (Jan. 13, 2010), http://usatoday30.usatoday.com/news/military/2010-01-12-four-army-war-tours_N.htm; WATSON INST. FOR INT'L & PUB. AFFAIRS, *Costs of War, US Veterans & Military Families*, BROWN UNIVERSITY, <http://watson.brown.edu/costsofwar/costs/human/veterans>. See generally Steven Berenson, *The Movement Toward VTCs*, 44 CLEARINGHOUSE REV. 37 (2010).

21. CARTER ET AL., *supra* note 1, at 9; NAT'L CTR. FOR VETERANS ANALYSIS AND STATISTICS, *supra* note 1, at 2.

psychological injury, data suggest that approximately one-third of those deployed since 9/11 already suffer from some mental health condition, including PTSD or TBI, have a substance abuse problem, or have some combination thereof.²² These numbers will remain stable or likely increase as troops continue to deploy and because symptoms of certain disorders may manifest months or years after origination.²³ The high rates of disorders and substance abuse joined with continued deployments have a ripple effect, impacting much more than a veteran's difficult quest at the VA for disability benefits for service-related injuries—a well-known narrative in the media. A lesser-known narrative, however, is the one depicting the difficulties, ranging from mundane to extraordinary, that veterans go through in attempting to assimilate back into civilian life.²⁴

There is substantial evidence suggesting a link between military service or exposure to combat; symptoms relating to PTSD, TBI, and other mental health problems; and criminal conduct.²⁵ For example, an individual with PTSD may re-experience trauma in survivor mode and consequently exhibit one or more behaviors, such as aggression, risk-taking, exaggerated startle response, or reacting violently to others or to oneself.²⁶ People with TBI may experience depression, irritability, rage, aggression, mood swings, apathy, and acting on impulse.²⁷ As mentioned, some soldiers return from deployment with a comorbidity of these conditions, as well as substance-use issues, the latter being the “single greatest predictive factor for incarceration for veterans.”²⁸ It is not surprising then that uncontested data reveal that since the Vietnam era, compared to the general population, a disproportionate number of veterans have been incarcerated in jails and prisons.²⁹ The high number of justice-involved veterans (veterans in the criminal justice system) prompted the VA to establish Veterans Justice Outreach

22. See CARTER ET AL., *supra* note 1, at 18–21; CONG. BUDGET OFFICE, *supra* note 3, at 11 (stating that up to 25% exhibit PTSD and 23% experience TBI); RAND REPORT 2008, *supra* note 3, at 29.

23. Slattery et al., *supra* note 4, at 923 (suggesting there may be a lag in time for development of PTSD symptoms); Berenson, *supra* note 20, at 38 (TBI may not present symptoms until well after the injury).

24. See Glassford, *supra* note 9, at 242–44 (2012). See generally Jayme M. Cassidy, *Suddenly Discharged the Combat Continues: Eliminating the Legal Services Gap to Ensure Veterans' Success After Leaving Military Service*, 45 U. MEM. L. REV. 837 (2015).

25. See Huskey, *supra* note 4, at 180 (citing numerous studies showing linkage between PTSD and behaviors that may lead to misconduct); Slattery et al., *supra* note 4, at 923–24 (citing various studies showing higher rates of justice involvement for veterans with PTSD, TBI, and substance abuse problems).

26. Huskey, *supra* note 4, at 181; April A. Gerlock & Glenna Tinney, *Intimate Partner Violence, Military Personnel, Veterans, and Their Families*, 52 FAM. CT. REV. 400, 404 (2014).

27. Gerlock & Tinney, *supra* note 26, at 405.

28. Slattery et al., *supra* note 4, at 924 (quoting Drug Policy Alliance (2009)).

29. Huskey, *supra* note 4, at 181 (relaying data showing high disproportionality of veterans incarcerated in jails and prisons). See generally William B. Brown et al., *The Perfect Storm: Veterans, Culture and the Criminal Justice System*, 10 JUST. POL'Y J. 2, 8–9 (2013).

(“VJO”) specialists in almost every state and publicly emphasize their importance and that of VTCs.³⁰

VTCs were not singularly caused by the VA’s creation of VJO specialists, though their creation was an important step in the growing recognition that OEF/OIF veterans were a struggling cohort. A multitude of factors helped ignite the VTC movement, including: the high suicide rates of veterans; the apparent rash of homicides committed by veterans; the now oft-cited 2008 Rand report on PTSD and TBI in post-9/11 service members and veterans; and the work of highly motivated individuals.³¹ The first official VTC was established in 2008 in Buffalo, New York by Judge Robert Russell.³² The following year, there were a handful of such courts and by early 2014, there were over 350 VTCs, veterans dockets, or tracks for veterans in an existing specialized docket.³³ Justice for Vets, the nation’s leading non-profit promoter and informal coordinator of VTCs, claims there are hundreds more VTCs in the planning stages.³⁴

These special courts recognize the negative impact of military service—particularly, exposure to combat and war zones—and the possible connections between such service, mental health and substance abuse issues, and misconduct. VTCs are a response to the noticeable presence of veterans in the criminal justice system. They acknowledge that veterans are a unique population, who could benefit from a treatment court tailored to their needs.³⁵ These individuals share certain characteristics—they served in the military, many have seen combat, many are suffering from PTSD, TBI, other mental health issues, alcohol or substance abuse problems, or some combination thereof—and ultimately, they were caught in the

30. U.S. DEP’T OF VETERANS AFFAIRS, *Veterans Justice Outreach Program*, <http://www.va.gov/homeless/vjo.asp>; Secretary Robert A. McDonald, Remarks at Women’s Veteran Career Development Forum (Nov. 10, 2014), http://www.va.gov/opa/speeches/2014/11_10_2_2014.asp; Deputy Secretary Sloan Gibson, Remarks at MOAA-NDIA 2014 Warrior Family Symposium (Sept. 10, 2014), http://www.va.gov/opa/speeches/2014/09_10_2014.asp; see also Kristine A. Huskey & Jayme Cassidy, *Veterans Treatment Courts*, in *SERVICEMEMBER AND VETERANS RIGHTS* § 10.02 (Brian Clauss & Stacey-Rae Simcox, eds., 2016) (noting VA Informational Letter establishing VJO initiative).

31. Paul Rieckhoff, *22 a Day is Unconscionable: Preventing Veteran Suicide*, HUFFINGTON POST (Sept. 9, 2014, 5:38 PM), http://www.huffingtonpost.com/paul-rieckhoff/22-a-day-isunconscionabl_b_5793528.html; Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES (Jan. 13, 2008), <http://www.nytimes.com/2008/01/13/us/13vets.html?mcubz=0> (analyzing 121 cases involving veterans and active service members charged with a homicide crime across the United States); RAND REPORT 2008, *supra* note 3.

32. Russell, *supra* note 5, at 364. Some accounts note that the first informal veterans-court program originated in Anchorage, Alaska, four years earlier. See Hawkins, *supra* note 8.

33. See VA FACT SHEET, *supra* note 7; see also JUSTICE FOR VETS, *supra* note 7.

34. JUSTICE FOR VETS, *supra* note 7.

35. See Russell, *supra* note 5, at 363–64.

criminal justice system.³⁶ Judge Russell, who was presiding over Buffalo's Drug Treatment and Mental Health Treatment courts in 2008, observed that veterans responded more favorably to other veterans in court and that they were a "niche population with unique needs."³⁷ In establishing the first official VTC, Judge Russell sought to create a treatment court that blended aspects of the drug and mental health court programs, but was tailored to those experiences that veterans share such as military culture and combat. He sought to link these individuals with service providers who also understood those experiences.³⁸

In essence, a VTC is a problem-solving court similar in modality to drug, mental health, domestic violence, or other specialized criminal courts, the total of which currently number close to 3,000 in the United States.³⁹ Problem-solving courts "attempt to solve a variety of human problems that are responsible for bringing the case to court."⁴⁰ A problem-solving court works with community service providers to address a defendant's social, behavioral, psychological, or substance abuse problems, taking a "collaborative, multidisciplinary, problem-solving approach to address the underlying issues of individuals appearing in court."⁴¹ These courts are also called diversion courts because they divert offenders from the conventional criminal justice system to a specialized program where compliance with treatment, rather than incarceration, is the primary force driving resolution of the case. Despite variations in substance and form amongst jurisdictions, VTCs are considered to be modeled after drug treatment and mental health courts though most of the literature models vet courts after drug courts.⁴²

36. See *id.* at 360–62; see also Julie Marie Baldwin, *Investigating the Programmatic Attack: A National Survey of Veterans Treatment Courts*, 105 J. CRIM. L. & CRIMINOLOGY 705, 741 (2015).

37. Russell, *supra* note 5, at 363.

38. See *id.* at 364.

39. Shauna Boliker & Mark Kammerer, *Veteran Treatment Courts and State Benefits*, in SERVICEMEMBER AND VETERANS RIGHTS § 8.01[1] (Brian Clauss, ed. 2013); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1610–11 (2012). Problem-solving courts are sometimes also referred to as *treatment courts* or *therapeutic courts*. See Seamone, *supra* note 10, at 29 (2011); WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 37 (2011), <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.pdf> (estimating number at over 3,648).

40. Winick, *supra* note 10, at 1055.

41. See PAMELA M. CASEY & DAVID B. ROTTMAN, NAT'L CTR. FOR STATE COURTS, PROBLEM-SOLVING COURTS: MODELS AND TRENDS 1 (2003), http://www.floridacac.com/files/document/COMM_ProSolProbSolvCtsPub.pdf.

42. Russell, *supra* note 5, at 364–67; Pamela Kravetz, *Way Off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 180–81 (2012); Slattery et al., *supra* note 4, at 923; Arno, *supra* note 9, at 1045.

Indeed, the VTC movement adopted the well-known drug court “ten components,” only slightly rewording them to fit the particular veteran defendant.⁴³

C. Veterans Treatment Courts as Unique Problem-Solving Courts

A VTC, however, is substantially different from a drug treatment or mental health court—every defendant is a military veteran.⁴⁴ In a VTC, the defendant’s former (in some cases, present) occupation is the starting point for eligibility.⁴⁵ In drug treatment court, the defendant’s underlying substance abuse is the focal point, while in mental health court, the defendant’s mental status dictates initial eligibility.⁴⁶ In drug treatment and mental health courts, the participants have a

43. See Huskey & Cassidy, *supra* note 30, at § 10.03[2]; see also Seamone, *supra* note 10, at 37, app. C. The ten key components in veterans treatment court are the following:

- (1) VTC integrates 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 VTC Program;
- (4) The VTC provides access to a continuum of alcohol, drug, mental health, and other related treatment and rehabilitative services;
- (5) Abstinence is monitored by frequent alcohol and other drug testing;
- (6) A coordinated strategy governs VTC responses to participants’ compliance;
- (7) Ongoing judicial interaction with each veteran is essential;
- (8) Monitoring and evaluation measures the achievement of program goals and gauges effectiveness;
- (9) Continuing interdisciplinary education promotes effective VTC planning, implementation, and operation; and
- (10) Forging partnerships among the VTC, the VA, public agencies, and community-based organizations generates local support and enhances the VTC’s effectiveness.

Seamone, *supra* note 10, at 189; Russell, *supra* note 5, at 364–67; JUSTICE FOR VETS, THE TEN KEY COMPONENTS OF VETERANS TREATMENT COURTS, <http://justiceforvets.org/sites/default/files/files/Ten%20Key%20Components%20of%20Veterans%20Treatment%20Courts%20.pdf>. Compare this list for veterans courts with U.S. DEP’T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997), <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>.

44. Some VTCs allow active service members into their programs if they are eligible based on other requirements applicable to veterans as well, such as type of charge, whether it is a first offense, non-violent crime, etc. The Regional Municipalities Veterans Treatment Court and the Pima County Justice Veterans Court (both of which are in Tucson, Arizona) allow active service members to participate.

45. Baldwin, *supra* note 36, at 705–07.

46. DOUGLAS B. MARLOWE ET AL., NAT’L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES 15 (2016), <http://www.nadcp.org/sites/default/files/2014/Painting%20the%20Current%20Picture%202>

shared problem—drug use and mental illness, respectively. In a VTC, participants' military experiences, training, and work culture—positive traits—are shared. Additionally, while VTC defendants have gained access to the treatment court due to their employment history, they may also be abusing alcohol or drugs; suffering from one or more psychological issues—e.g., PTSD, depression, anxiety; and they may have had a traumatic head injury or currently have a physical disability.⁴⁷ Indeed, an underlying mental health problem or TBI is a requirement of eligibility in many VTCs.⁴⁸ The proportion of individuals in a VTC with PTSD/TBI is likely much higher than those with PTSD/TBI in drug or mental health courts. In fact, there may be little or no instances of PTSD in a drug or mental health court.⁴⁹ While certainly some drug- and mental-health-court defendants suffer from multiple issues, they do not necessarily share a singular profession: one that values service to country and community, as well as aggression and auto-responsiveness, among other traits. A soldier is unlike most other professions. Our post-9/11 troops are an all-volunteer force, trained in weapons and killing, taught to survive in urban combat zones and to be proficient at internalizing physical and mental pain. Vietnam veteran Ray Essenmacher, President of the Bay County Veterans Council, stated:

If you come up behind [some combat veterans] and tap them on the shoulder, they're liable to come around swinging. They're hyper-alert, always trying to keep up with everything going on around them and always ready to go into combat at a moment's notice. We were trained to do one thing, and some of us were trained rather well. It takes a lot to "untrain" someone.⁵⁰

Simply put, behaviors such as "hypervigilance, aggressive driving, carrying weapons at all times, and command and control interactions, all of which may be beneficial in theater, can result in negative and potentially criminal behavior back home."⁵¹

016.pdf; E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 520–21 (2012).

47. Baldwin, *supra* note 36, at 708–11.

48. Huskey, *supra* note 4, at 179. Some VTCs do not make the existence of an underlying psychological or substance abuse problem an eligibility requirement. *Id.*

49. See Perlin, *supra* note 10, at 459–63. Typically, eligibility for a mental health court includes a psychiatric diagnosis of an Axis I mental illness—schizophrenia, bipolar disorder, or severe depression. Ursula Castellano & Leon Anderson, *Mental Health Courts in America: Promises and Challenges*, 57 AMER. BEHAVIORAL SCIENTIST 163, 164 (2012). Indeed, a prosecutor who served in a drug treatment court and a mental health court, relayed to the Author that she had never heard of PTSD until she started working in a VTC, describing people in mental health courts as bipolar or schizophrenic.

50. Lania Coleman, *Idea Floated to Create Court for Special Needs of Returning Veterans*, BAY CITY TIMES (Mich.), July 9, 2010, at A1, A2.

51. CTR. FOR MENTAL HEALTH SERVS., NAT'L GAINS CTR., RESPONDING TO THE NEEDS OF JUSTICE-INVOLVED COMBAT VETERANS WITH SERVICE-RELATED TRAUMA AND MENTAL HEALTH CONDITIONS 5 (2008), http://www.ncdsv.org/images/GAINS_ResNeedsJustInvolvCombatVetsServRelTrauma_8-08.pdf.

Thus, at some level, the very existence of VTCs is the public recognition that conduct that was valued on the battlefield is often criminalized in civilian life. This general populace acceptance and support makes the veteran a unique treatment court defendant. A VTC, then, is a unique type of problem-solving court. Unlike its predecessor treatment courts, a VTC views the misconduct as connected to positive conduct—the defendant’s service to the country. In other words, the defendant’s military service is viewed as having caused—directly or indirectly—the defendant’s criminal charges. This causation, plus the sincere support of “our troops,” leads to an evolved understanding of the veteran’s crime. It is no longer viewed as bad behavior deserving of punishment, nor is it viewed as misconduct that is a consequence of socioeconomic factors; rather, “the crime” is the condition caused by military service—a public good.⁵² With respect to veterans, the community feels some responsibility for the consequences of military service—i.e., the underlying physical or mental health condition—and therefore, feels responsible for the crime.⁵³ Accordingly, in VTCs, we conceptualize “the crime” differently from crimes in drug or mental health courts. This provides VTCs with a rich opportunity to have a more collaborative and community-driven approach to addressing injury and misconduct than other problem-solving courts.

Indeed, while some justifications given for VTCs are the same as those for drug treatment court, advocates of VTCs denote additional rationale. For example, both drug court and VTC advocates tout reduced recidivism and drug use and lowered costs as benefits.⁵⁴ VTCs, however, are also promoted as removing roadblocks to civilian-life reintegration and serving those who have served.⁵⁵ The

52. See Huskey, *supra* note 4, at 182 (explaining the theory of evolved understanding of defendant’s crimes in a VTC); see also Craig Logsdon & Michelle Keogh, *Homeland Justice for Veterans: Why Veterans Need Their Own Court: Uncommon Criminals*, 47 ARIZ. ATT’Y 14, 24 (2010) (“They are victims of PTSD, brain injuries, depression, mental problems, flashbacks and sleepless nights because of their duty, loyalty and service to us.”).

53. PTSD from military service has been used as a defense in nondiversion criminal cases and may be a factor in sentencing mitigation. See Huskey, *supra* note 4, at 182 n.71; Justin G. Holbrook, *Veterans’ Courts and Criminal Responsibility: A Problem Solving History & Approach to the Liminality of Combat Trauma*, at 30–32 (Widener U. Sch. L. Paper No. 10-43, 2010), <http://ssrn.com/abstract=1706829>; Porter v. McCollum, 558 U.S. 30, 40 (2009); U.S. SENTENCING GUIDELINES MANUAL, § 5H1.11 (U.S. SENTENCING COMM’N 2013).

54. See JUSTICE FOR VETS, *supra* note 7; NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://nadcp.org/> (last visited Sept. 26, 2016); see also Timothy Casey, *When Good Intentions are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 S.M.U. L. REV. 1459, 1502–04 (2004); Justin G. Holbrook & Sara Anderson, *Veterans Courts: Early Outcomes and Key Indicators for Success* 3–4 (Widener U. Sch. L., Paper No. 11-25, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912655. Drug courts also highlight public safety as a benefit while VTCs rarely cite public safety, presumably owing to the extremely uncomfortable suggestion that veterans are a threat to public safety. See Hora et al., *supra* note 11, at 533–35.

55. See, e.g., Arno, *supra* note 9, at 1040; Huskey, *supra* note 4, at 178; Glassford, *supra* note 9, at 248–49, 252–53 (VTCs are justified due to their ailments caused by service to America); Perlin, *supra* note 10, at 456; Walls, *supra* note 10, at 719. As one VTC judge stated, “This program is a merciful one. . . . It’s what the men and women who sacrificed

website of Justice for Vets—a non-profit organization devoted to promoting VTCs—states, “Veterans fought for our freedom. We fight for theirs.”⁵⁶ In essence, VTCs, unlike drug courts, are promoted as a communal, indeed a *national* responsibility to veterans to aid them in their transitions back to society.

The alleged successes of the first VTCs, their popularity notwithstanding any evidence of success or lack thereof,⁵⁷ and the continuing public sentiment that favors caring for our veterans⁵⁸ have all helped to stimulate the growth of these courts across the country. As stated, less than a decade after the establishment of the first official VTC, over 350 vet courts or dockets now exist, with no indication that the expansion will stop any time soon. The majority of VTCs are local courts—situated in municipal, county, and state jurisdictions—only a handful are in federal court.⁵⁹ Many of these courts do not derive from statute but rather were established by a well-intentioned judiciary.⁶⁰ Many VTCs do not have written policies or guidelines; procedures have occurred organically and ad hoc.⁶¹ Additionally, there is no federal statute or model rules (other than the basic “ten components”) providing guidance on implementation or procedures.⁶² Accordingly, VTCs vary substantially across jurisdictions in terms of eligibility, the types of charges allowed, process, and outcomes.⁶³ Some VTCs require participants to be honorably discharged or VA eligible to have standing; others allow in any individual who has ever served in the

everything for every one of us deserve.” Petula Dvorak, *A Troubled Marine Goes to Veterans’ Court: ‘I Didn’t Want to Do This. At All.’*, WASH. POST (May 30, 2016), https://www.washingtonpost.com/local/a-troubled-marine-goes-to-veterans-court-i-didnt-want-to-do-this-at-all/2016/05/28/d2f2a864-2421-11e6-aa84-42391ba52c91_story.html?utm_term=.c3a60420ed64.

56. JUSTICE FOR VETS, *supra* note 7.

57. Winick, *supra* note 10, at 1062; *see* Seamone, *supra* note 10, at 38.

58. Frank Newport, *Americans Say “Yes” to Spending More on VA, Infrastructure*, GALLUP (Mar. 21, 2016), <http://www.gallup.com/poll/190136/americans-say-yes-spending-infrastructure.aspx>. “Americans have more confidence in the military than in any other U.S. institution, and this high regard extends to military veterans as well. The idea of allowing veterans to get their healthcare from any provider that accepts Medicare receives almost no pushback from Americans.” *Id.*; *see also* CHARITY WATCH, *A Donor’s Guide to Serving the Needs of Veterans and the Military* (Jan. 26, 2015), <https://www.charitywatch.org/charitywatch-articles/a-donor-39-s-guide-to-serving-the-needs-of-veterans-and-the-military/150> (noting that from 2008 to 2013, the number of new veterans charities grew by 41% compared with 19% for charities in general).

59. *See* Seamone, *supra* note 10, at 36.

60. *See* Arno, *supra* note 9, at 1042–44.

61. *See id.* at 1049, 1060–61. The general absence of written policies and procedures became apparent to the Author while researching for this Article and her previous works on VTCs.

62. The Uniform Law Commission is currently drafting a model vet court act. *See* Huskey & Cassidy, *supra* note 30, at ch. 8; UNIFORM LAW COMM’N, MODEL VETERANS COURT ACT (Draft 2017), http://www.uniformlaws.org/shared/docs/veterans%20court/2016feb_MVCA_Mtg%20draft_Clean.pdf.

63. *See* Huskey & Cassidy, *supra* note 30, at ch. 8; Arno *supra* note 9, at 1040–44, 1060–61.

military.⁶⁴ Many VTCs only allow misdemeanor charges, while some allow felony charges.⁶⁵ Some VTCs require the defendant to plead guilty before participating in the program; the guilty plea may then be set aside upon successful completion of the program.⁶⁶ Other VTCs do not require the defendant to plead guilty first or have his or her charges adjudicated before entering the treatment program (“pre-adjudication courts”); some VTCs are post-adjudication courts, only allowing in defendants who are on supervised probation.⁶⁷ Despite the variation, VTCs share the goal of attempting to treat the veteran’s underlying problems through therapy, counseling, attendance at alcohol or drug programs, and other rehabilitative means. Many of these courts also try to connect the veteran to social services such as housing, employment, and food stamps.⁶⁸ A significant aspect is the use of mentors who engage in peer-to-peer navigation.⁶⁹ VTC mentors are typically veterans themselves who assist the veteran-defendants with anything from providing transportation to being their battle buddies during late-night crisis calls when the veterans may feel like drinking or taking their own lives.⁷⁰

Most of the scholarship addressing VTCs focuses on issues such as policy, mission, the veteran population, PTSD, criminal justice, and court procedures.⁷¹ Given the proliferation of VTCs, it is concerning that little discourse addresses the theoretical foundation of such courts.⁷² As discussed earlier, because VTCs are modeled after drug courts, which are viewed as having a TJ approach, it is often assumed that VTCs are, or should be, similarly based on the TJ modality.⁷³ However, TJ has been examined in depth only in the context of drug or general

64. VA FACT SHEET, *supra* note 7, at 3; Huskey, *supra* note 4, at 179.

65. VA FACT SHEET, *supra* note 7, at 3.

66. *Id.*

67. *Id.*

68. *See* Russell, *supra* note 5, at 368.

69. *Id.* at 366, 369–70.

70. MARLOWE ET AL., *supra* note 46, at 27–28; Russell, *supra* note 5, at 369–70.

71. *See, e.g.,* Russell, *supra* note 5; Hawkins, *supra* note 8; Holbrook, *supra* note 53; Arno, *supra* note 9; Huskey, *supra* note 4; Mark A. McCormick-Goodhart, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PENN. ST. L. REV. 895 (2013).

72. *But see* Perlin, *supra* note 10. By its own terms, Perlin’s article seeks to determine whether VTCs can fulfill Professor Amy Ronner’s TJ vision of “voice, voluntariness, and validation.” *Id.* at 456. While Perlin’s article is compelling, it focuses rather on elucidating TJ principles generally and on responding to policy arguments against veterans’ treatment courts. Perlin also states that “[m]any of the veterans courts consciously ‘utilize the therapeutic jurisprudence ideology in creating the treatment-rehabilitate model.’” *Id.* at 457 (citing Samantha Walls, *The Need for Special Veteran Courts*, 39 DENV. J. INT’L L. & POL’Y 695, 716 (2011)). Yet, Walls simply makes that assertion without citing any authority. *Id.*; *see also* Julie Marie Baldwin & Joseph Rukus, *Healing the Wounds: An Examination of Veterans Treatment Courts in the Context of Restorative Justice*, 26 CRIM. JUST. POL’Y REV. 183, 183–207 (2015) (addressing VTCs and RJ).

73. *See generally* Hora et al., *supra* note 11. *But see* Baldwin & Rukus, *supra* note 72 (addressing VTCs and RJ).

problem-solving courts.⁷⁴ This is in large part because VTCs are relatively new compared to drug and mental health courts. Additionally, because there has been relatively robust discussion of TJ in the context of drug treatment courts and general problem-solving courts already, TJ has become the presumptive lodestar for any problem-solving court that is modeled after these courts, such as VTCs.⁷⁵ More importantly, there is little examination of alternative theories of justice with respect to VTCs and whether substituting or supplementing the TJ approach with a different theoretical framework may be beneficial for VTCs.⁷⁶

The goal of this Article is not to court problems where none may lie simply to fashion a solution. Nor is the purpose to throw out TJ altogether as an important approach. Rather, this Article seeks to address an area that has not been deeply explored, to test the waters with a theory of justice that has been overlooked in the VTC pool—RJ—and to begin a dialogue about how VTCs could be theorized to maximize their beneficial impact. Now is perhaps a critical moment in time to carefully consider the foundations as VTCs continue to grow.

II. THERAPEUTIC JURISPRUDENCE AND PROBLEM-SOLVING COURTS

TJ began as an interdisciplinary scholarly pursuit in mental-health law.⁷⁷ David Wexler, its co-founder, describes it as

the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or antitherapeutic consequences. Such consequences may flow from substantive rules, legal procedures, or from the behavior of legal actors (lawyers and judges).⁷⁸

TJ studies the law's impact on emotional life and the psychological status of individuals.⁷⁹ It is a means of empirically identifying and examining relationships

74. See Hora et al., *supra* note 11, at 536; Winick, *supra* note 10. "Thus, therapeutic jurisprudence can be understood as providing a theoretical foundation for much of the problem-solving court movement, and a variety of principles that can help judges play this new and exciting role." Winick, *supra* note 10, at 1066.

75. See generally Hora et al., *supra* note 11; Winick, *supra* note 10; Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 *TOURO L. REV.* 479 (2002).

76. But see Baldwin & Rukus, *supra* note 72. Baldwin and Rukus ask whether VTCs fit the RJ model, assuming without discussion that VTCs are based in RJ principles. No other literature has made such an assumption or even discussed VTCs in RJ context. In fact, contrary to the authors' assertion, Michael O'Hear proposes that drug treatment courts be retooled to incorporate RJ principles because the treatment court model currently does not. Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 *STAN. L. & POL'Y REV.* 463, 466 (2009).

77. DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* 3–4 (1990); DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 6–7 (1991) [hereinafter *ESSAYS IN TJ*].

78. *ESSAYS IN TJ*, *supra* note 77, at 8.

79. Winick & Wexler, *supra* note 75, at 479.

between legal arrangements and therapeutic outcomes.⁸⁰ In addition to exploring law and criminal justice, TJ uses the tools of the behavioral sciences—philosophy, psychiatry, psychology, social work, public health—and other fields in its research.⁸¹ Though thoroughly submerged in academia, TJ has a reform agenda.⁸² It seeks to effect legal change that is designed to increase therapeutic consequences and decrease antitherapeutic ones.⁸³ While Wexler has resisted an exact definition of *therapeutic*, others have used it to mean beneficial to or improving upon the psychological and physical well-being of a person.⁸⁴ Thus, TJ-oriented research informs policy determinations with the goal of reshaping the law and legal processes to improve the emotional welfare of those affected by the law and its processes.⁸⁵ TJ “humanize[s] the law.”⁸⁶

TJ assesses the law’s effects from three aspects: legal rules, legal procedures, and the role of legal actors. Legal rules are the substantive laws; legal procedures include hearings and trials; and the role of legal actors looks at the behavior of judges, lawyers, and therapists in these legal contexts.⁸⁷ To illustrate TJ in action in these three areas, Wexler provides examples:

- The former Don’t Ask, Don’t Tell provision regarding homosexuals and bisexuals in the U.S. military, while intended to ease scrutiny of individuals, may also cause isolation, marginalization, and superficial social relationships, thereby resulting in unintended consequences that are antitherapeutic.⁸⁸
- The adversary process in a child custody dispute exemplifies antitherapeutic legal procedures. TJ asks whether there is a way to resolve issues that is less traumatic and damaging to the child and the parents’ relationship.⁸⁹
- The way in which a judge behaves at a sentencing hearing when granting probation and how this behavior affects compliance with the conditions of probation illustrate the role of legal actors and how their behavior may have therapeutic or antitherapeutic consequences.⁹⁰

80. See Hora et al., *supra* note 11, at 445.

81. ESSAYS IN TJ, *supra* note 77, at 8.

82. Winick & Wexler, *supra* note 75, at 479.

83. *Id.*

84. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in LAW IN A THERAPEUTIC KEY, DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 767 (David B. Wexler & Bruce J. Winick eds., 1996).

85. Hora et al., *supra* note 11, at 445.

86. David B. Wexler, *Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development*, 7 IRISH PROB. J. 94, 95 (2010).

87. *Id.* at 96.

88. *Id.*

89. *Id.* at 97.

90. *Id.* at 97–100.

In these three scenarios, TJ draws on findings in other disciplines to improve the consequences for the individuals impacted by the law as it exists in action.

While the TJ approach is applicable across a range of legal issues—contracts, family law, mental health law, employment law, and torts—scholars and practitioners have paid special attention to the application of TJ in the criminal justice system.⁹¹ In particular, TJ takes prominence in literature addressing problem-solving courts, though this is not the case with VTCs.⁹² Though TJ began independently and slightly predated the first problem-solving court, TJ and problem-solving courts are now understood to be closely aligned.⁹³ But, they are not identical. TJ is an interdisciplinary academic study with law reform in mind while problem-solving courts are a practical legal innovation.⁹⁴ While some view both TJ and problem-solving courts as vectors in the comprehensive-law movement, they truly are not on the same conceptual plane.⁹⁵ Even Bruce Winick, co-founder of TJ, recognizes that “[p]roblem solving courts often use principles of therapeutic jurisprudence to enhance their functioning.”⁹⁶ Problem-solving courts then may implement certain principles, such as those of TJ or other theories.

Problem-solving courts, however, were not initially conceived with a particular theory of justice as their starting point.⁹⁷ They grew out of a practical need to try new judicial approaches where conventional ones were failing in cases involving substance abuse, mental illness, child neglect, domestic violence, and other kinds of criminality.⁹⁸ Problem-solving courts started with the first official drug treatment court in 1989 and then expanded to include community, mental health, domestic violence, animal, and other types of specialty courts, including VTCs.⁹⁹ Some courts are more oriented toward the behavioral treatment of the offender, such as drug treatment courts, mental health courts, and VTCs. Others focus more on the victim, such as domestic-violence courts. Today, there are

91. See Perlin, *supra* note 10, at 454 (noting consideration of a range of topics through the TJ lens including, but not limited to, mental disability law, domestic-relations law, criminal law and procedure, employment law, “gay rights” law, and tort law); Slobogin, *supra* note 84, at 763 (noting that the TJ perspective has grown from mental health law to disparate areas such as tort, contract, and criminal law).

92. See, e.g., Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82 (2006); Winick, *supra* note 10, at 1055; Hora et al., *supra* note 11.

93. Winick, *supra* note 10, at 1064–65.

94. James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1546 (2003).

95. See Winick, *supra* note 10, at 1064 (citing Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465 (Dennis P. Stolle et al. eds., 2000)); Nolan, *supra* note 94, at 1546.

96. Winick, *supra* note 10, at 1064.

97. *Id.* at 1062.

98. Nolan, *supra* note 94, at 1541–42.

99. *Id.* at 1542–45.

approximately 3,000 problem-solving courts in the United States.¹⁰⁰ While problem-solving courts may have developed atheoretically, they—drug treatment courts in particular—became forever tethered to the notion of TJ in 1999 when drug court judges Peggy Hora and William Schma recognized the theoretical relevance of TJ to the drug court movement.¹⁰¹ Just a few years later, the “founding fathers” of TJ put their imprimatur on the alignment of TJ and drug treatment courts, noting their common cause and engaging in a call to action to “join together to enlist law and the courts in the battle against addiction.”¹⁰² By 2003, the association between problem-solving courts in general and TJ was a *fait accompli*, when Winick stated that “[t]herapeutic jurisprudence can be seen as a theoretical grounding for this developing judicial movement. We can understand the problem-solving courts’ revolution by situating it within the scholarly and law reform approach known as therapeutic jurisprudence.”¹⁰³ Drug courts and other problem-solving treatment courts are said to take a TJ approach to processing cases because their goal is not necessarily to punish but to rehabilitate the offender using legal processes and legal actors, particularly the judge, to accomplish this goal.¹⁰⁴ Both problem-solving courts and TJ look at the law as a means to a therapeutic—i.e., beneficial—outcome for the individuals involved in the criminal justice system, as well as for society in general.¹⁰⁵

While problem-solving courts vary depending on their subject matter, local resources, and other factors, the TJ principles at the heart of a typical problem-solving court are the following: “integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and governmental organizations.”¹⁰⁶ These principles may touch down in any or all of the three TJ areas—legal rules, legal procedures, and legal actors—but a strong emphasis is placed on the role of judges in problem-solving courts. This is especially true for drug courts and those modeled after them—e.g., VTCs.¹⁰⁷ Under TJ principles, judges are therapeutic agents: they are expected to

100. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of Shifting Criminal Law*, 100 GEO. L.J. 1587, 1610–11 (2012).

101. See Hora et al., *supra* note 11, 440–41.

102. Winick & Wexler, *supra* note 75, at 485; see also CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM’RS, CCJ RESOLUTION 22/COSCA RESOLUTION 4: IN SUPPORT OF PROBLEM-SOLVING COURTS (2006) [hereinafter CCJ RESOLUTION 22/COSCA RESOLUTION 4], <https://www.wicourts.gov/courts/programs/docs/problemsolvingresolution.pdf> (adopting resolution approving growing movement in the direction of problem-solving courts and their use of principles of TJ in performing their functions).

103. Winick, *supra* note 10, at 1062.

104. *Id.* at 1064–65.

105. See *id.* at 1066.

106. CCJ RESOLUTION 22/COSCA RESOLUTION 4, *supra* note 102; see also Winick, *supra* note 10; Hora et al., *supra* note 11; Nolan, *supra* note 94; Russell, *supra* note 5.

107. See David Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463, 463–64 (2014) (TJ principles in context of “practices and techniques”

approach each case with a heightened degree of care and with insights based on findings in psychology, criminology, social work, and other behavioral sciences.¹⁰⁸

In a drug treatment court or VTC, the judge is the leading actor and director in the “therapeutic drama” staged in the courtroom.¹⁰⁹ The judge motivates all of the players on the problem-solving team, which typically includes the prosecutor, defense counsel, treatment providers, and court staff. Most importantly, the judge takes time to engage the defendant—typically face-to-face—because interactions are seen as essential to drug courts and VTCs.¹¹⁰ Ultimately, the judge uses judicial authority aggressively to motivate defendants to accept needed treatment and monitor their compliance and progress with that treatment. The entire team works collaboratively to support this effort with the holistic goal of ending the addiction and behaviors that led to the defendant’s appearance in court and ultimately preventing further misconduct.¹¹¹

It is this intensive role of the judge and the heightened collaboration, combined with the treatment goal, that raises concerns. Given these factors, coercion and paternalism can easily imbue the treatment-court environment, raising the spectre of old-school rehabilitative theory, which was viewed as coercive, paternalistic, and overly harsh.¹¹² For example, Judges Hora and Schma suggest that *smart punishment*—what is doled out when an individual fails a urinalysis, for example—is the minimum amount of punishment necessary to achieve reduced criminality and drug usage. Yet they don’t consider it “really punishment at all, but a therapeutic response to the realistic behavior of drug offenders in the grip of addiction.”¹¹³ Sanctions typically used by drug courts for noncompliance—e.g., missing treatment or failing a drug test—are used “not to simply punish inappropriate behavior but to augment the treatment process.”¹¹⁴ They go on to note that “treatment regimes are not punishment, but the restructuring of the defendant’s lifestyle.”¹¹⁵ Scholars have noted concern with drug-court judges using phrases such as *benevolent coercion*¹¹⁶ and *not imposing punishment but providing help*.¹¹⁷ These

(legal roles) figure prominently in literature due to the easy application in problem-solving courts).

108. See Winick, *supra* note 10, at 1065–90 (advancing TJ “prescriptions” for the problem-solving court judge who may be the most important member of collaborative team).

109. *Id.* at 1060.

110. See Huskey, *supra* note 4, at 179 (referencing ten components of drug courts, which were adopted by VTCs).

111. Glassford, *supra* note 9, at 254–55.

112. See Nolan, *supra* note 94, at 1554–55. Because drug courts have been around longer than VTCs, there exists much more literature critiquing the former.

113. Hora et al., *supra* note 11, at 470.

114. *Id.* at 469 (quoting GENERAL GOV’T DIV., U.S. GOV’T ACCOUNTING OFFICE, *Drug Courts: Information on a New Approach to Address Drug-Related Crime* 23 (1995)).

115. *Id.* at 523. Hora also unapologetically asserts, “The procedures of the treatment program reflect the premise that the DTC utilizes the coercive power of the court to encourage the addicted offender to succeed in completing the treatment program.” *Id.* at 475–76.

116. Winick, *supra* note 10, at 1073.

117. Nolan, *supra* note 94, at 1556. In one of the local VTCs in which the Author’s students practice, the judge was heard to say that one day in jail was “probably good for Mr.

brief sentiments are not just questions of semantics but rather allude to elements of coercion and paternalism.

The collaborative approach taken by the treatment team—the judge, court staff, prosecutor, defense counsel, and treatment providers—may be a key to the success of these courts. Yet such cooperative efforts can also increase coercion and paternalism and decrease perceived fairness by placing defense counsel on the team, in opposition to the defendant. While the lack of an adversarial nature is one of the ten components of drug treatment courts and VTCs, this is commonly understood to mean the lack of the traditional adversarial relationship between the prosecutor and the defense attorney.¹¹⁸ The dynamics in a treatment court may actually set up an adversarial relationship between the treatment team and defendant. The collaborative team effort may lead defendants to believe their attorney has sold them out,¹¹⁹ seeing the lawyer's advice as adversarial to their interests, or, at best, making decisions that are inconsistent with their true wishes.¹²⁰

A related critique of drug treatment courts is that the treatment team players are the central participants in the drama, as opposed to defendants themselves.¹²¹ These legal actors (symbolizing the court) appear to be responsible for solving the underlying problems of defendants, while they play only a bit part. In other words, the person with the problem is not in control of, nor even central to, the decision-making process in a treatment court.¹²² For example, prior to a court hearing where the defendant appears for check-in and monitoring, typically the entire treatment team meets without the defendant present to discuss each case on the docket. There, the team assesses whether the individual is compliant with treatment and if not, what sanctions should be issued.¹²³ The judge and court staff rely on the treatment providers to provide accurate information on matters such as attendance and whether the individual has a positive attitude toward treatment.¹²⁴ The defendant is not present, and the defense counsel is likely hearing these allegations of noncompliance

[Smith]" even though the jail time was the result of court mistake. *See also* Casey, *supra* note 54, at 1498–99.

118. *See* Huskey, *supra* note 4, at 179, 182.

119. Winick & Wexler, *supra* note 75, at 484.

120. *See* Hora et al., *supra* note 11, at 469. As summarized by one defense counsel, "You realize that doing the best thing for your client means getting the best life outcome, not simply the best legal result." *Id.*; *see* Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 569–72 (2007). In one case, during discussion with his pro bono attorney who was suggesting in-patient treatment, the defendant asked if he could "get his own attorney." This story was retold to the Author by her students who represent veterans in a VTC.

121. Michael S. King, *Should Problem-Solving Courts Be Solution-Focused Courts?*, 80 REV. JURÍDICA. U.P.R. 1005, 1007 (2011).

122. *Id.*

123. *See* Baldwin & Rukus, *supra* note 72, at 198. Note, this illustration of a pre-hearing treatment team meeting (known as *staffing* in some VTCs), is based, in part, on the Author's experience in the local VTC where her students practice.

124. This, too, is based on the Author's experience.

for the first time.¹²⁵ The judge may make certain preliminary determinations during that pre-hearing meeting regarding noncompliance and sanctions; these decisions are made before the hearing—not in open court—and without the defendant’s input.¹²⁶ Depending on local practices, whether the defendant has defense counsel (some VTCs do not provide one), and the presiding judge’s tolerance to revisit issues during the subsequent court hearing, defendants may not have an adequate opportunity to fully explain whether they were compliant, why they were not, and how to be compliant in the future.¹²⁷ Not only are defendants not involved in their own TJ but due process can become a significant issue.

TJ proponents recognize that paternalism and coercion, even perceived coercion, are inconsistent with TJ principles and that problem-solving courts, particularly drug courts, may have a tendency to promote such behaviors.¹²⁸ Additionally, TJ proponents have asserted that TJ goals should not trump traditional criminal justice principles, such as the due process rights of the defendant to have effective counsel.¹²⁹ Indeed, some notable TJers have criticized problem-solving courts, drug courts specifically, as straying from TJ principles.¹³⁰ Yet, the founding fathers’ success at grounding problem-solving courts in the TJ framework has perhaps proven too successful. Nowadays, the two may be difficult to tell apart even when it comes to concerns around paternalism, coercion, and the (lesser) value of legal rights over TJ values. Arguably, these particular concerns arise in problem-solving courts largely *because* they are grounded in TJ principles. This may be

125. This is based on the Author’s experience.

126. This has occurred in one of the VTCs where the Author’s students practice. In some instances, the information given by treatment providers was incorrect or the court did not know the reasons for missed treatment, such as death of a loved one, illness, loss of job, or inadequate transportation. This could easily lead to preset bias against the defendant.

127. See *supra* note 123.

128. See Winick, *supra* note 10, at 1071–78 (providing “prescriptions for judges” on combatting paternalism and coercion in problem-solving courts); Winick & Wexler, *supra* note 75, at 483; King, *supra* note 121, at 3–4.

129. Winick & Wexler, *supra* note 75, at 484. *But see* Nolan, *supra* note 94, at 1554.

In the drug courts, then, treatment, healing, problem-solving, constitute the very meaning of justice. Given such a redefinition it would not seem that therapeutic jurisprudence, at least as applied in the drug courts, is simply one perspective among others, and one that does not subordinate “due process and other justice values” as therapeutic jurisprudence scholars regularly claim. Instead, it appears to comprehensively reshape the very essence of criminal adjudication and fundamentally redefine the meaning of justice in the process.

Id.

130. See, e.g., King, *supra* note 121; David Wexler & Michael King, *Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence*, 2–3 (Ariz. Legal Studies, Discussion Paper No. 10-46, 2011, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722278 (suggesting drug treatment courts, while having a symbiotic relationship with TJ, do not promote TJ principles when engaging in coercive behavior modification that does not permit autonomy or participation in rehabilitative decision-making).

evident from early critiques of TJ. In his 1996 essay, John Petrila writes compellingly that autonomy, while seemingly a core TJ value, is valued only until the individual chooses badly.¹³¹ Others (the judge and treatment providers) arbitrarily decide when the person loses the power to decide and what the proper decision is.¹³² Such “well-intended paternalism . . . is paternalism nonetheless.”¹³³ The dilemma of balancing constitutional rights and TJ values was raised by Christopher Slobogin in critiquing TJ a decade ago, and this tension has resurfaced in literature on problem-solving courts.¹³⁴ It is fair to suggest that the concerns around coercion, paternalism, and competing values are not strictly a problem-solving court phenomena in action untethered to TJ, the scholarly pursuit.

Where do VTCs fit in this discourse? The first step is to ascertain whether VTCs are grounded in the TJ framework. The answer is yes, generally—to the same degree that drug treatment courts generally are. Though VTCs vary across jurisdictions, they are typically modeled after drug treatment courts, sharing their rehabilitative theory and ten components. VTCs, like drug courts, use judicial case processing, judicial intervention, and close monitoring, and collaborate with governmental organizations to provide treatment services to defendants.¹³⁵ Further, the mission of a VTC is wholly consistent with the TJ approach of using law to achieve therapeutic outcomes. Judge Russell describes the mission of the first official VTC:

The mission driving the Veterans Treatment Court is to successfully habilitate veterans by diverting them from the traditional criminal justice system and providing them with the tools they need in order to lead a productive and law abiding lifestyle. In hopes of achieving this goal, the program provides veterans suffering from substance abuse issues, alcoholism, mental health issues, and emotional disabilities with treatment, academic and vocational training, job skills, and placement services. The program provides further ancillary services to meet the distinctive needs of each individual participant, such as housing, transportation, medical, dental, and other supportive services.¹³⁶

131. John Petrila, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY, DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 695 (David B. Wexler & Bruce J. Winick eds., 1996) (quoting Bruce J. Winick, *Competency to Consent to Treatment: The Distinction between Assent and Objection*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1992)).

132. *Id.* at 695.

133. *Id.*

134. Christopher Slobogin, *supra* note 84, at 783–88; see Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617 (2003).

135. See Huskey & Cassidy, *supra* note 30, at §§ 10.01[2][a], 10.03[2]–[3]; Baldwin, *supra* note 36, at 731–34; Russell, *supra* note 5, at 365–68. Extensive literature is devoted to discussing TJ in problem-solving courts generally. See Winick & Wexler, *supra* note 75, at 482 n.12. However, VTCs were not well established at the time this academic discussion was at its height.

136. Russell, *supra* note 5, at 364.

Thus, in theory, VTCs are based on TJ principles.

There is good reason to believe that the theory is being implemented in practice by many VTCs. A 2012 national survey of VTCs reveals that treatment, frequent court monitoring, and intensive agency supervision of treatment compliance were integral to 100% of the reporting court programs.¹³⁷ Over 75% of those reporting provided mental health and substance abuse counseling, as well as housing and vocational services, with some VTCs providing transportation, medical, home goods, and educational assistance.¹³⁸ It is possible that the rapid increase in number of VTCs has diluted the theory or provided more opportunities to stray from the mission. However, even the basic rehabilitative theory—treatment over incarceration, which TJ would support—is likely being followed in almost every VTC in the country.¹³⁹ As noted earlier with drug treatment courts, this is not to suggest that VTCs were conceived with the deliberate purpose of implementing a specific theory or that the TJ framework is knowingly incorporated into VTC policies and practices. Despite this lack of intentionality, it can still be fairly assumed that the concerns of paternalism, coercion, and competing values arise in VTCs. While appreciated, it merely places VTCs in the same standing as other problem-solving courts *vis-à-vis* TJ. Yet, this Article does not purport to address the downsides of TJ in the context of all problem-solving courts.

The second step of assessing VTCs' fit within TJ discourse asks whether the identified concerns present a risk to VTCs greater than the risk to the typical problem-solving court. In other words, is there something unique about VTCs that makes grounding these courts in TJ particularly problematic, more problematic than for other treatment courts? The answer is yes, though not enough to eschew TJ altogether in a VTC—a notion elaborated on below.

On the one hand, the TJ principle of using law and authority to transform behavior is fairly similar to the military's mission in training its recruits. Further, the paternalism, coercion, and the role of the judge as the primary legal actor found in a VTC could be seen as completely consistent with military culture.¹⁴⁰ Indeed, the VTC judge and other legal actors may be viewed as responsible for recreating a military-like atmosphere—a command-and-control structure—which is believed to be key to a successful program.¹⁴¹ Particularly for those veterans who adapted well

137. Baldwin, *supra* note 36, at 743. This data is limited quantitatively—at the time, the Author was able to discern only 114 VTCs in operation and only 79 such courts participated in the survey. Four years later, there are well over 350 such programs operating in the United States. See Holbrook & Anderson, *supra* note 54, at 36–40.

138. Baldwin, *supra* note 36, at 747.

139. See Arno, *supra* note 9, at 1045–48. See generally *id.*; VA FACT SHEET, *supra* note 7.

140. See Nate Carlisle, *Utah's New Veterans; Court Organized Like a Military Unit*, SALT LAKE TRIB. (Jan. 12, 2015), <http://www.sltrib.com/news/2027135-155/utahs-new-veterans-court-organized-like> (using military structure to organize VTCs with judge as “commanding officer” and defendants as the “troops”).

141. For example, in the Regional Municipalities VTC in Tucson, Arizona, the defendant is “trained” by the mentor (also a veteran) to stand at parade rest and state his name and branch of service when called to the bench by the judge. The presiding judge often points

to military life, being back in a military-like structure may positively impact performance and hence compliance with treatment. This is one argument in favor of creating treatment courts for veterans distinct from drug or mental health courts.¹⁴²

On the other hand, if a goal of VTCs (and other veterans advocacy organizations) is to assist in the reintegration of veterans back into the civilian world, then perpetuating a military structure, including the paternalism and coercion that may be inherent in the military, for resolving behavioral issues arguably undermines that goal.¹⁴³ A VTC that recreates military life for veterans who are already demonstrating difficulty with the civilian world may be doing a disservice to veterans. This structure may continue to isolate veterans from the looser structures of the civilian world where a commanding officer is not around to issue orders or a staff sergeant is not responsible for morale and discipline.¹⁴⁴ In a VTC, that is precisely the judge's role, particularly in the TJ framework. This gap has caused consternation in the military because "reintegrating service members into communities whose understanding of the war is gleaned largely from television may be as difficult as fighting the war."¹⁴⁵ Thus, perpetuating a military-like structure and using coercion and invoking paternalism to motivate behavior in a legal setting arguably increases the likelihood that reintegration in the civilian world will fail or, at least, make reintegration even more difficult.

The success of VTCs is in debate. Some assert that VTCs are highly successful;¹⁴⁶ others point to the lack of data;¹⁴⁷ and still others point to examples of

out to participants that the program may recreate the rigidity of military structure, therefore enabling their success. *See also* Jillian M. Cavanaugh, Note, *Helping Those Who Serve: Veterans Treatment Court Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 481 (2011) (noting VTCs value military camaraderie in court).

142. *Id.* (noting that VTCs can capitalize on previous structure and discipline from military life to help veterans succeed in treatment program).

143. *See supra* note 55; Michelle Zielenski, *Post Deployment Treatment for Successful Reintegration*, 5 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 35, 37–38 (2015) (addressing need for VA treatment plans that aid in reintegrating veterans back into civilian life).

144. David Zucchini & David S. Cloud, *U.S. Military and Civilians are Increasingly Divided*, L.A. TIMES (May 24, 2015), <http://www.latimes.com/nation/la-na-warrior-main-20150524-story.html>; PEW RESEARCH CENTER, *The Military-Civilian Gap: Fewer Family Connections* (Nov. 23, 2011), <http://www.pewsocialtrends.org/2011/11/23/the-military-civilian-gap-fewer-family-connections/>.

145. Zucchini & Cloud, *supra* note 144.

146. *See, e.g.*, Glassford, *supra* note 9, at 261–63 (citing benefits of VTCs); Slatery et al., *supra* note 4, at 928–29 (citing results of limited study of 83 participants in Colorado Springs VTC); Russell, *supra* note 5, at 370–71 (discussing success rates in Buffalo VTCs). *See generally* Seamone, *supra* note 10 (advocating for more rehabilitative ethic in court martial proceedings based on success of VTCs).

147. MARLOWE ET AL., *supra* note 46, at 26 (noting that the absence of well-designed studies make it premature to conclude whether VTCs reduce criminal recidivism, improve the psychosocial functioning of veterans, or produce other positive benefits); *see also* Baldwin, *supra* note 36, at 734–77.

the success of drug courts or lack thereof as an analog.¹⁴⁸ In fact, comprehensive and national data on the *results* of VTCs—e.g., program completion, decrease in recidivism rates, lower costs, and whether program participants stay alcohol and drug free and continue counseling—does not exist.¹⁴⁹

Despite the lack of national data on beneficial results, it is likely that VTCs, using the TJ framework, have some therapeutic consequences.¹⁵⁰ However, this Article has demonstrated that VTCs may also have unintended antitherapeutic consequences. Add these antitherapeutic consequences to the largely unexplored theoretical foundations of VTCs, and one is led to ask whether the TJ approach is doing all that it can for VTCs.¹⁵¹ The TJ vision may not be the *only* vision for VTCs. Perhaps there are other theories of justice that can substitute or should supplement TJ principles, particularly given veterans' distinct differences from defendants in other treatment courts, the uniqueness of VTCs, and the evolved notion of the crime as a community responsibility.

III. RESTORATIVE JUSTICE

TJ uses the law and legal roles to produce beneficial outcomes for individuals in the criminal justice system. Despite being an alternative to traditional criminal justice, a TJ framework still utilizes the authority of the state, placing it (the judge and treatment providers) in the role of the decision-maker. TJ even relies on the state's authority over defendants not just in court but in their behavioral treatment as well. While VTCs may find grounding in TJ, they may also be uniquely receptive to alternative theories of justice that allow the larger community and other stakeholders, such as the victim and wrongdoer, to be the arbiters of justice, increasing the beneficial impact of such courts. Restorative Justice is one such theory, to which little attention has been paid in the VTC context.¹⁵²

148. See, e.g., Glassford, *supra* note 9, at 261 (referencing problem-solving courts generally); Cavanaugh, *supra* note 140, at 470–73 (citing drug and juvenile courts success).

149. See MARLOWE ET AL., *supra* note 46, at 26 (“In the absence of well-designed studies, it is premature to conclude whether VTCs reduce criminal recidivism, improve the psychosocial functioning of veterans, or produce other positive benefits.”). *But see* Baldwin, *supra* note 36; VA FACT SHEET, *supra* note 7. These two studies are the most comprehensive national empirical surveys on VTCs, but they are both limited to providing a portrait of the structure, policy, and procedures of VTCs—not results.

150. See *supra* note 147 and accompanying text.

151. Though there is some scholarship that addresses TJ in the context of VTCs, the treatment is brief. See Seamone, *supra* note 10; Walls, *supra* note 10. Michael Perlin's article is the only scholarly piece to delve deeply into VTCs and TJ. Perlin, *supra* note 10. Perlin asks whether VTCs are achieving TJ goals, but this Article asks whether TJ is the best or only instrument to achieve VTCs' goals. *Id.*

152. *But see* Baldwin & Rukus, *supra* note 72, at 184–86. Based on a case study, Baldwin and Rukus examine whether the structure and practice of a specific VTC embody Braithwaite's idea of RJ. *Id.* However, the introduction makes clear that the authors believe that VTCs are based upon the RJ model. For a contrary opinion, see generally O'Hear, *supra* note 76.

A. What is Restorative Justice?

Restorative justice (“RJ”) is both a theory and process that addresses harm.¹⁵³ It brings together the individuals affected by a wrongful act, with the goal of agreeing how to repair the harm.¹⁵⁴ It is an effort to transform the mainstream approach to punishment, which is the response to misconduct.¹⁵⁵ In a perfect RJ world, punishment would be avoided altogether because it only adds more hurt to the world.¹⁵⁶ Rather, RJ is about healing.¹⁵⁷ Its purpose is “to restore the victim, restore the offender, and restore the communities in a way that all stakeholders believe is just.”¹⁵⁸ As a normative matter, it is often contrasted with retributive justice, which is punitive in nature.¹⁵⁹ RJ rejects a notion of justice that values punishment in and of itself.¹⁶⁰

RJ began in the 1970s in small victim–offender mediation programs in North America and Europe; not until the 1990s did it take root as a social practice and global movement.¹⁶¹ The movement was informed by earlier justice paradigms in indigenous cultures throughout the world, including many Native American tribes within the United States, the Aboriginal or First Nation people of Canada, the Maori in New Zealand, and many others.¹⁶² These practices for resolving disputes and addressing injury were radically communitarian, involving whole communities coming together in a circle, hence giving rise to the language, *sentencing circles* or *healing circles*.¹⁶³

Modern-day RJ was a reaction to the overly harsh criminal justice system of the 1980s, which did not appear to be deterring crime or rehabilitating offenders.¹⁶⁴ It began in practice in local fora and was later conceptualized and

153. See Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 255 (2005) (RJ is a different way of understanding and responding to harm).

154. Braithwaite, *supra* note 14, at 1743.

155. Menkel-Meadow, *supra* note 13, at 162 (referencing its “conceptual and practical founders,” John Braithwaite, Howard Zehr, Mark Umbreit, among others).

156. Braithwaite, *supra* note 14, at 1743 (“One value of restorative justice is that we should be reluctant to resort to punishment.”).

157. See *id.*; Menkel-Meadow, *supra* note 13, at 162.

158. Braithwaite, *supra* note 14, at 1743.

159. O’Hear, *supra* note 76, at 488.

160. Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice?*, 48 BRIT. J. CRIMINOLOGY 337, 339 (2008); Umbreit et al., *supra* note 153, at 257.

161. See Menkel-Meadow, *supra* note 13, at 163; Braithwaite, *supra* note 14, at 1743.

162. Braithwaite, *supra* note 14, at 1743; Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 515 (2007) (including Native Hawaiians, African tribal councils, the Afghani practice of jirga, the Arab or Palestinian practice of Sulha, and many of the ancient Celtic practices found in the Brehon laws).

163. Braithwaite, *supra* note 14, at 1743. The southern hemisphere variants were called *conferences*. *Id.*

164. *Id.*; Menkel-Meadow, *supra* note 13, at 163.

theorized by scholars such as John Braithwaite, Howard Zehr, and Mark Umbreit.¹⁶⁵ RJ was seen as the new lens through which to approach appropriate responses to crime.¹⁶⁶ It was also often perceived as the third theory of justice, in response to the more severe, albeit popular, retributive and rehabilitative theories.¹⁶⁷ In some ways, the seemingly oppositional contrast between retributive and restorative theories grew out of the preceding juxtaposition of retributive and rehabilitative theories.¹⁶⁸ This earlier contrast can be explained simply: retributive justice focuses on the offense and blame for the past behavior with the goal of punishing the offender, while rehabilitative justice focuses on the offender and on changing future behavior with the goal of treating the offender.¹⁶⁹ RJ, however, may be understood as encompassing some elements of both these theories as well as containing several new elements.¹⁷⁰ It is concerned with both the offense and the offender, with past and future behavior, and with just outcomes for all stakeholders, including the victim, who has received little attention in either retributive or rehabilitative theories.¹⁷¹

B. Values of Restorative Justice

Though it may include some general elements of both retributive and rehabilitative theories of justice, RJ has a distinct value system, which is easily understood when compared to the conventional criminal justice system. The conventional criminal justice system emphasizes the centrality of state authority and gives primacy to state interests, also viewed as the public interest.¹⁷² One manifestation of this authority is objective or impersonal decision-making by judges or other professionals who represent the state.¹⁷³ Its ethic is about individualism and individual culpability; punishment is used both symbolically and as requital.¹⁷⁴ Strict adherence to the rule of law and a priority on legal rights are the principal means for achieving legitimacy in this system.¹⁷⁵

In contrast, RJ returns the conflict to those who are most affected by the misconduct—victims, offenders, and their “communities of interest”—giving

165. See Menkel-Meadow, *supra* note 13, at 163; Tali Gal & Hadar Dancig-Rosenberg, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2316–17 (2013).

166. Gal & Rosenberg, *supra* note 165, at 2316, n.11.

167. Kathleen Daly, *Revisiting the Relationship between Retributive and Restorative Justice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 33, 35 (John Braithwaite & Heather Strang eds., 2000); Gal & Rosenberg, *supra* note 165, at 2316.

168. Daly, *supra* note 167, at 35.

169. *Id.* at 35, tbl.1.

170. *Id.*; see also Charles Barton, *Empowerment and Retribution in Criminal Justice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 55, 61–63 (John Braithwaite & Heather Strang eds., 2000).

171. Barton, *supra* note 170.

172. Morris & Young, *supra* note 15, at 11, 13 (note, TJ and problem-solving courts rely heavily on state authority to rehabilitate the offender).

173. *Id.* at 13.

174. *Id.* at 16.

175. *Id.* at 13–14.

primacy to those interests.¹⁷⁶ RJ endorses a collective ethos and collective responsibility, believing that people who share in the concerns of the victim, the offender, and the community are in a better position than the state to identify reparation and how to prevent future crime.¹⁷⁷ In essence, RJ embraces the idea that the true stakeholders are better able to negotiate appropriate and acceptable outcomes. RJ places extremely high importance on the victims with the goal of not only repairing their harm endured but restoring their security, self-respect, and sense of control.¹⁷⁸ Yet RJ is also concerned with the offenders: desiring to restore a sense of responsibility to them for the misconduct and a sense of control to make amends.¹⁷⁹ Importantly, RJ is “premised on the belief that the reasons behind the offending, and hence the solutions to it, lie in the community.”¹⁸⁰

C. Processes of Restorative Justice

The processes of RJ also contrast significantly with those of the conventional criminal justice system, which are public, highly formal, and designed to eliminate emotion by using objective professionals with no ties to the parties before them.¹⁸¹ In stark contrast, RJ brings together in a private forum all those with a stake in the offense to collectively resolve how to deal with the offense, its consequences, and its implications for the future.¹⁸² The United Nations’ *Basic Principles on the Use of Restorative Justice Programmes* in Criminal Matters defines *restorative process* as

any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative justice process include mediation, conferencing and sentencing circles.¹⁸³

Specifically, the goal is to consider ways to compensate and make whole the victim and prevent the offender from engaging in future misconduct.¹⁸⁴ The latter may include various forms of counseling, treatment, and means for reintegrating the

176. *Id.* at 14. *Community of interest* does not mean elected or appointed community representatives but rather the different people who share concerns about the offender, the victim, and the offense and its consequences and who can contribute towards a solution to the problem that the crime represents. *Id.* at 13. RJ values connections between the victim, offender, and community. *Id.*

177. *Id.* at 14.

178. *Id.*

179. *Id.*; Daly, *supra* note 167, at 35.

180. Morris & Young, *supra* note 15, at 14.

181. *Id.* at 15.

182. *Id.*

183. Economic and Social Council Res. 2002/12, art. I(3) (July 24, 2002).

184. See Menkel-Meadow, *supra* note 13, at 163; Morris & Young, *supra* note 15, at 14, 19–20.

offender. The process is meant to be informal, flexible, and sensitive, including culturally.¹⁸⁵ Thus, norms may be negotiated and interpreted for each unique case.¹⁸⁶

There are three common forms of RJ processes: victim–offender mediation (“VOM”), conferencing, and circles.¹⁸⁷ They all share the dominant tenet of the victim experience and allow the victim a meaningful voice in the process and outcome.¹⁸⁸ All three forms also require the offender to be present, participate in the process, and be allowed a voice as well.¹⁸⁹ Both the victim and the offender must voluntarily participate for the process to go forward.¹⁹⁰ To illustrate, community conferencing typically involves a meeting with the victim, offender, support persons—e.g., parents or friends—for the offender and victim(s), community representatives, and a trained facilitator.¹⁹¹ The facilitator is expected to be competent and impartial—neither advocating nor acting as the decision-maker—simply facilitating the discussion.¹⁹² The meeting usually includes “naming what happened, identifying its impact, and coming to some common understanding, often including reaching agreement as to how any resultant harm w[ill] be repaired.”¹⁹³ Offenders are expected to address their wrongful conduct and related matters, to apologize, and to take part in the decision-making regarding the outcome—especially as it relates to preventing future misconduct.¹⁹⁴ Ultimately, the victim, offender, and community stakeholders are the decision-makers, coming to an agreement on reparations, solutions for reintegration, and prevention of future misconduct.

D. Restorative Justice in Practice

Communities throughout the United States and abroad are using a wide range of RJ principles, processes, and programs.¹⁹⁵ Almost every state in the United States has some type of RJ initiative, ranging from marginal to extensive, with many

185. Morris & Young, *supra* note 15, at 14.

186. See Menkel-Meadow, *supra* note 13, at 180–81.

187. Gal & Rosenberg, *supra* note 165, at 2321.

188. Umbreit et al., *supra* note 153, at 258–59; Morris & Young, *supra* note 15, at 14.

189. See Gal & Rosenberg, *supra* note 165, at 2320; O’Hear, *supra* note 76, at 488; see also Umbreit et al., *supra* note 153, at 258–59.

190. Gal & Rosenberg, *supra* note 165, at 2320.

191. O’Hear, *supra* note 76, at 488.

192. W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31 AM. J. TRIAL ADVOC. 501, 504–05 (2008).

193. O’Hear, *supra* note 76, at 488.

194. Morris & Young, *supra* note 15, at 17–18.

195. Umbreit et al., *supra* note 153, at 261.

state and county justice systems undergoing major systemic change.¹⁹⁶ The voluminous RJ literature abounds with examples—to list a few:¹⁹⁷

- The Milwaukee Community Conferencing Program is operated by the Milwaukee County District Attorney's Office and takes cases of nonviolent crime referred by line prosecutors prior to sentencing and often prior to charging. Before the process begins, both the victim and the offender must agree to participate and the offender must admit to wrongdoing. The facilitators meet separately with each to prepare them for the conference, which is held in a community space, such as in a meeting room at the public library, not at court. Conference participants usually include the victim, offender, support people, defense counsel, one or two community members, and at least one facilitator. The participants discuss the offense and its impact on the victim and the community. They next try to reach an agreement as to what the offender will do to repair the harm. Agreements are in writing and include specific conditions for the offender that must be satisfied by a particular date. Conditions may include a form of reflection (an essay, painting, or poem), letter of apology to the victim, specific community service, restitution, tasks related to a job or school, sharing experiences with youth, and drug or alcohol counseling or treatment. Successful compliance with the conditions will result in some benefit from the prosecutor, such as dismissal or reduction of the charge, or a recommendation to the judge for a reduced sentence.¹⁹⁸
- In Eugene, Oregon, in response to a hate crime against the local Muslim community that occurred within hours of the 9/11 attacks, the prosecutor's office gave the victimized representatives of the Muslim community a choice of either following the conventional path of prosecution and severe punishment or the RJ path of participating in a neighborhood accountability board including face-to-face conversations with the offender and others in the community who were affected by the crime. The victims elected to meet in dialogue; together they talked openly about the full impact of this hate crime and developed a specific plan to repair the harm and promote a greater sense of tolerance and peace within the community.¹⁹⁹

196. *Id.* (Arizona, California, Colorado, Illinois, Iowa, Minnesota, New York, Ohio, Oregon, Pennsylvania, Texas, Vermont, and Wisconsin are states initiating systemic changes).

197. *Id.* at 254 (a number of books, over 750 law articles, and hundreds more in other journals have been written on RJ). For an informative overview of RJ, its history, numbers, and types of initiatives in the United States and elsewhere, different RJ processes, and criticisms of RJ, see *id.*

198. O'Hear, *supra* note 76, at 489.

199. Umbreit et al., *supra* note 153, at 264.

- In 2004, Circles of Peace, or *Círculos de Paz*, began in Nogales, Arizona as the first court-referred domestic violence treatment program to use an RJ circle approach to reduce violent behavior in families. The program consists of 26 to 52 weeks of conferences, or *circles*, bringing partners who have been abusive together with willing family members (including those who have been abused), support people, a facilitator, and community volunteers. The goal is to encourage dialogue about the history of violence in the family, the incident, and meaningful change. The inclusion of the extended family network in the treatment helps those in the circle understand how violence is transmitted across generations and serves to hold applicants accountable. It also keeps the treatment flexible and culturally sensitive, as all circle members have an opportunity to speak and the language and concepts used can be adapted to the parties involved. Someone close to the family is appointed to serve as safety monitor before the first circle convenes. This person performs frequent check-ins with the family and seeks help if tensions begin to increase. Finally, circles are enhanced through mental health and drug- and alcohol-treatment services, available to both applicants and participants when necessary or helpful.²⁰⁰

E. Outcomes of Restorative Justice

In the conventional criminal justice system, criminal misconduct is primarily resolved through state sanctions.²⁰¹ They are for the benefit of the larger community, “to reassert particular values, cultural meanings, and symbols.”²⁰² Sanctions convey state authority, educate the public, and deter offenders and others.²⁰³ In the RJ process, offenders are held accountable in ways that are meaningful to the victim, offender, and community.²⁰⁴ The offender makes amends to the victim in a manner that can be both symbolic and real.²⁰⁵ For example, one means of amends may be community service as a way of recognizing the harm and compensating the victim.²⁰⁶ Finally, it aims to remove negative stigmatization of the individual, instead recognizing the wrongfulness of the act.²⁰⁷ It seeks to shame the act, not the person, with the goal of redemption.²⁰⁸

200. Linda G. Mills et al., *Círculos de Paz and the Promise of Peace: Restorative Justice Meets Intimate Violence*, 33 N.Y.U. REV. L. & SOC. CHANGE 127, 129–30 (2009).

201. Morris & Young, *supra* note 15, at 15–16.

202. *Id.* at 16.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 16; Gal & Rosenberg, *supra* note 165, at 2321 (reparation plan typically includes monetary reparation and rehabilitative program, with community work often agreed upon by participants).

207. Menkel-Meadow, *supra* note 13, at 165.

208. *Id.* at 164–65.

An overarching goal of a RJ process is the reintegration of the victim and offender back into the larger community.²⁰⁹ The victim is reintegrated through empowerment, security, and voice. The wrongdoer may be integrated through apology, restitution, and support, such as the provided social or treatment services.²¹⁰ Under this reintegration umbrella, RJ desires to see reconciliation between the offender and the victim, with a “renewed commitment to shared social norms.”²¹¹

Without a doubt, RJ works. Numerous studies show that RJ processes effectively lower recidivism rates and reduce crime.²¹² Evidence also demonstrates that participants in the restorative process experience improved emotional states and high levels of satisfaction.²¹³ Even skeptics of RJ have not detected that RJ processes make things worse.²¹⁴

209. See Michael King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1102–04 (2008) (noting that restorative justice addresses both victim and offender’s needs, restoring them both).

210. Menkel-Meadow, *supra* note 13, at 164.

211. *Id.*

212. See Leverton, *supra* note 192, at 504 (citing meta-analysis of recidivism rate after victim-offender mediation); Gal & Rosenberg, *supra* note 165, at 2323 n.40 (citing LAWRENCE W. SHERMAN & HEATHER STRANG, THE SMITH INST., *RESTORATIVE JUSTICE: THE EVIDENCE* 68–71 (2007); James Bonta et al., *Restorative Justice and Recidivism: Promises Made, Promises Kept?*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 108, 113–15 (Dennis Sullivan & Larry Tift eds., 2006) (reviewing 39 RJ studies in various jurisdictions, and presenting reductions in recidivism rates); Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 137–39 (2005) (conducting a meta-analysis of findings from 22 studies regarding recidivism rates following RJ programs and showing a significant reduction of crime compared with recidivism rates following court processes).

213. Leverton, *supra* note 192, at 504; Gal & Rosenberg, *supra* note 165, at 2323 n.41 (citing HEATHER STRANG, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE* 132–39 (2002)) (presenting findings regarding enhanced satisfaction and healing for victims whose cases were randomly assigned to conferences instead of court in Canberra, Australia); Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167 (combining data from seven evaluation studies comparing RJ and court processes, and showing that in all psychological measures RJ produced significantly better outcomes for victims); Caroline M. Angel, *Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice Conferences on Victims’ Post-Traumatic Stress Symptoms* (Jan. 1, 2005) (unpublished Ph.D. dissertation, University of Pennsylvania), [http:// repository.upenn.edu/dissertations/AAI3165634](http://repository.upenn.edu/dissertations/AAI3165634) (presenting findings regarding reduced post-trauma symptoms among robbery and burglary victims whose cases were randomly referred to conferences).

214. John Braithwaite, *Evidence For Restorative Justice*, 40 VT. B.J. 18 (2014) (citing Don Weatherburn & Megan Macadam, *A Review of Restorative Justice Responses to Reoffending*, 1 EVID. BASE 1 (2013)) (pointing to meta-analysis).

IV. RESTORATIVE JUSTICE IN VETERANS TREATMENT COURTS

Today's soldiers carry a heavier burden . . . because the public has been disconnected from the universal responsibility and personal commitment required to fight and win wars.²¹⁵

Given the demonstrated success of RJ processes and concerns with TJ in the problem-solving court context, RJ is at least worth considering in the VTC context. This Article argues for increased consideration because, in addition to the above factors, VTCs are uniquely situated to be receptive to RJ principles and processes. Bringing these principles and processes to bear would likely enhance the beneficial impact of VTCs.

A. *The Relationship Between Restorative Justice and Therapeutic Jurisprudence*

Before looking at VTCs in the RJ framework, it is important to briefly address the relationship between RJ and TJ. First, RJ is both a theory, encompassing norms and values, and a process for responding to wrongdoing.²¹⁶ While TJ was originally conceived as an academic study of behavioral sciences with respect to law and legal rules and actors, it has also sought to transform the law and legal processes to increase therapeutic outcomes—i.e., emotional well-being.²¹⁷ TJ became closely affiliated with problem-solving courts and, in time, became understood as their theoretical grounding. Thus, such courts are often viewed as implementing TJ.²¹⁸ In this way, the processes of problem-solving courts may be seen as TJ-driven or at least TJ may be seen as an active partner of these practical processes.²¹⁹

Some have suggested that RJ is a form of TJ because ultimately RJ also seeks to provide a therapeutic outcome.²²⁰ While this sentiment may be overly consequentialist, the two share certain characteristics. Both have a normative dimension, seeking to transform legal practices in accordance with their respective theories, which are alternative to the traditional criminal justice or retributive system.²²¹ Both are therapeutic in that they share an interest in the emotional and

215. Zucchini & Cloud, *supra* note 144 (quoting George Baroff, a 90-year-old WWII veteran).

216. *See supra* note 153; Section III.A.

217. *See supra* Part II.

218. *See* Winick, *supra* note 10, at 1064.

219. David Wexler, *Therapeutic Jurisprudence*, 20 *TOURO L. REV.* 353, 357 (2004).

220. *See* Tali Gal & Vered Shidlo-Hizroni, *Restorative Justice as Therapeutic Jurisprudence: The Case of Child Victims*, in *THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES* 139 (E. Erez et al. eds., Carolina Academic Press 2011); *see also* Elizabeth Richardson et al., *The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing*, 25 *J. JUD. ADMIN.* 148, 155 (2016) (“Therapeutic jurisprudence principles underpin other fields of legal scholarship and practice such as restorative justice . . .”).

221. Nolan, *supra* note 94, at 1546; John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 *CRIM. L. BULL.* 244, 244 (2002).

psychological well-being of individuals.²²² Both perspectives also support a problem-solving orientation.²²³ Some suggest that they both rely on values in the traditional legal system.²²⁴ But TJ doesn't purport to have values other than desiring a therapeutic outcome as long as those therapeutic goals do not trump other goals, such as justice and other normative values.²²⁵ RJ theorists, on the other hand, are prone to listing definitive RJ values, sometimes numbering over 20.²²⁶ Even if some of these can be characterized as consistent with traditional legal values, such as "honoring upper legal limits of sanctions" and human rights, RJ values are still considered independently and are interwoven and symbiotic with RJ processes.²²⁷

There are significant differences, some of which are particularly important in the VTC discussion. TJ, in examining the law and legal systems, relies on the state, the court, the judge's authority, and impartial decision makers—e.g., treatment providers—to produce outcomes. In this way, TJ is more similar to the conventional criminal justice system. In VTCs, the outcome produced is behavioral modification. RJ relies on the participation of all stakeholders to restore balance and is a community-based mechanism for regulating criminal behavior, as reflected in its values, processes, and outcomes. Michael King aptly described the contrast between the two:

[R]estorative justice has criticised the criminal justice system for stealing the resolution of criminal matters from victims and offenders and has emphasised the need to hand the process back to them, the work of therapeutic jurisprudence has focused more on improving court processes and advocacy through the application of therapeutic principles such as self-determination.²²⁸

B. Benefits of Restorative Justice in Veterans Treatment Courts

The importance of the community in RJ values and processes makes it well-suited for VTCs. As elucidated earlier, VTCs have an evolved concept of the crime as a community responsibility due to the causal factor of military service, which is a sacrifice for the nation.²²⁹ This concept is wholly consistent with and would seem eagerly receptive to the RJ value that the community is responsible for the offense and therefore the solution. A *community* in the restorative sense may not be defined by geography but may be a network of social, familial, and professional ties.²³⁰ Community members, representing the shared responsibility of the community, take part in the design of the restorative plan.²³¹ The participation of the

222. Nolan, *supra* note 94, at 1546; Braithwaite, *supra* note 221, at 244.

223. Nolan, *supra* note 94, at 1546; Braithwaite, *supra* note 221, at 246.

224. Nolan, *supra* note 94, at 1546–47.

225. Wexler, *supra* note 86, at 95; Quinn, *supra* note 120, at 549–50, n.53.

226. Braithwaite, *supra* note 221, at 247–52.

227. *See id.*

228. King, *supra* note 209, at 1115.

229. *See* Huskey, *supra* note 4, at 182 and accompanying text.

230. Gal & Rosenberg, *supra* note 165, at 2332.

231. *Id.*

community in the process helps to repair and strengthen ties between the victim, offender, and their communities.²³² This is vastly different from the TJ reliance on the treatment team, made up of the judge, treatment providers, prosecutor, and defense counsel, as participants in the process. Thus, RJ values, such as collective responsibility and reliance on the true stakeholders' ability (over the state's) to repair and prevent future harm, would seem to promote the VTC goal of reintegrating the veteran back into the community. The collective ethos of RJ provides fertile soil for veteran offenders to re-establish community ties. This is because veterans are receptive to the collective ethos, as they have been trained in a system that places value on the cohesiveness of the group over the individual.²³³

A common criticism of TJ and of problem-solving courts is their failures to genuinely consider the victims, their injuries, and their own ideas of meaningful reparations.²³⁴ Distinctly different, the RJ processes, which are meant to be private and flexible, focus on the voices of the victim and the offender and bring in families and communities of interest to participate in the process. Considering all voices not only acknowledges the victim's view of the injury, it also allows the participants to recognize the sacrifices made by the veteran and the veteran's family, the burden military service places on the whole family and community, and the consequences of such service.²³⁵ This enhances the idea that the community is responsible for going to war and therefore responsible for the consequences of war, including the effect on its warriors. All parties have a say in determining the most appropriate way to repair the harm and how to prevent future misconduct. The offender may be asked to undergo treatment or counseling and, at the same time, the community may be asked to assist in connecting the offender to social services or employment. These processes strive to reconcile the victim and the offender and to make families whole and communities cohesive.²³⁶

In this way, RJ processes enhance deliberative democracy and move toward the realization of the *tribe*, as eloquently discussed in Sebastian Junger's book of the same name.²³⁷ RJ processes may go a long way in addressing the problem as Junger sees it—that veterans suffer trauma when they attempt to transition from the collective back into a society from which they are disconnected.²³⁸ Junger posits that if a veteran returned from war to a cohesive society, one with which she or he felt a connection, the trauma of transition would be lessened.²³⁹ For example, despite decades of armed conflict, Israeli soldiers

232. *Id.*

233. *See* Baldwin & Rukus, *supra* note 72, at 199.

234. *See id.* at 204.

235. *See* Kristine A. Huskey, *Military Spouses and Kids Bear the Burden of Service*, TIME (May 27, 2016), <http://time.com/4337925/memorial-day-family-benefits/>.

236. Menkel-Meadow, *supra* note 13, at 164.

237. *Id.* at 165 (RJ enhances participatory and deliberative democracy).

238. *See Sebastian Junger Examines Veteran Life After Leaving 'Tribe'*, NPR.ORG, <http://www.npr.org/2016/05/21/478962909/sebastian-junger-s-examines-veteran-life-after-leaving-tribe> (last visited Oct. 3, 2016).

239. *Id.*

exhibit PTSD rates as low as 1%.²⁴⁰ Junger explains that this is due to the “proximity of the combat—the war is virtually on their doorstep—and national military service,” as almost every Israeli is required to serve in the armed forces.²⁴¹ There is very little disconnect because those who come back from war reintegrate into a society that understands those experiences.²⁴² Ethicist Austin Dacey describes it as a “shared public meaning” of war.²⁴³ RJ values and processes in a VTC would make that shared public meaning possible.

C. A Veterans Treatment Court Hypothetical

What would a VTC look like if it were imbued with RJ principles? For purposes of illustration, let us examine the following possible and likely scenario in a VTC:

Joe Veteran is in a local VTC on misdemeanor criminal charges of disorderly conduct and domestic violence (“DV”) for yelling at his spouse in a public space. He also received a criminal damage charge for breaking a neon sign over the entrance of a local mom-and-pop restaurant. The restaurant owner is claiming damage of approximately \$1,500. The police were called by a third party who witnessed the disturbance. Mr. Veteran deployed to Afghanistan twice, receiving an honorable discharge and several service medals. He may have both PTSD and TBI due to trauma suffered in combat but does not want to go to the VA to see a “shrink” and claims he can just “deal with it.” He also smokes marijuana and claims he has a medical marijuana card but has not been able to produce it. He was drinking at the time of the incident. His wife attended the first court hearing and supports his participation in the treatment program. She has conveyed to the prosecutor that she loves her husband, they have a good marriage, and that he only started acting out after he returned from his second deployment.

1. The Therapeutic Jurisprudence Approach to Veterans Treatment Courts

In a traditional non-RJ VTC, Mr. Veteran would be allowed to participate in the program and would likely be required to go through both DV and substance abuse counseling and remain drug- and alcohol-free while in the program (unless he can produce the medical marijuana card), regardless of whether he has a drug- or alcohol-abuse problem. He would also be subject to random drug testing, failure of which would subject him to sanctions of a day in jail, or writing a reflection, or possibly even dismissal from the program. He would also have to get PTSD treatment at the VA if he is diagnosed with such. For him to participate in the treatment program, he may have to admit responsibility and pay restitution to the restaurant owner before entering the program, if the prosecutor requires it. The judge

240. SEBASTIAN JUNGER, *TRIBE: ON HOMECOMING AND BELONGING* 96 (2016).

241. *Id.*

242. *Id.*

243. *Id.* at 97.

leads the program but relies on the treatment providers for their advice and the prosecutor, who is adamant about DV counseling due to the DV charge. The wife and restaurant owner speak with the prosecutor independently, because they are the victims, but do not participate in the hearing; they do not speak to the judge or anybody else participating in the process. The veteran may ultimately choose to participate in the treatment program—even if he believes he does not have an alcohol or drug problem or did not engage in DV—because his charges will be dismissed.²⁴⁴

In some VTCs, Mr. Veteran may be required to plead guilty first before entering the program. The charges may be dismissed if he is successful but, while in treatment, his guilty DV plea may prohibit him from possessing firearms. Any job requiring weapons would then be off limits to Mr. Veteran until he completes the program.

2. The Restorative Justice Approach to Veterans Treatment Courts

In an RJ process, there is no presiding judge and the proceedings would likely not take place in a courtroom. A conference may be held privately with a facilitator. The concerns of the wife and restaurant owner, as well as those of Mr. Veteran, family, friends, and other community members are all heard and considered. They collaborate in designing the plan to resolve concerns or conflicts and restore financial loss, personal security, control, and dignity. The conference participants all have a say in how to repair the harm and prevent future misconduct. Mr. Veteran may be required to get properly evaluated at the VA or another treatment service provider if Mr. Veteran does not want to go to the VA, and attend counseling appropriate to the diagnosis. The wife may ask her husband to get PTSD counseling at the VA (if so diagnosed) and go to couple's therapy. The wife's request would likely be viewed by her husband as less coercive than the judge's and prosecutor's requiring DV and substance abuse counseling in the previous scenario. In meeting the veteran and his family, learning of his honorable service and combat trauma, the restaurant owner may simply ask for an apology and community service instead of money. Or the owner may suggest Mr. Veteran pay a nominal token amount or help in fixing the broken sign. The owner may also learn that Mr. Veteran just lost his job or has difficulty keeping a job due to his PTSD. The community participants will try to understand the veteran's service and the current challenges for his whole family. The community might conceive of ways to support him and his wife as they navigate his PTSD, healthcare, and the VA. The participants may also assist Mr. Veteran in finding employment. They may also agree that if a treatment provider determines that Mr. Veteran does not have a substance or alcohol abuse problem, he does not have to abstain from drinking or smoking marijuana, which helps him sleep at night. While Mr. Veteran must accept responsibility for the harm caused, he will also be given the opportunity to discuss his behavior, explore

244. This scenario is based on a real case that occurred in a VTC where the Author's students practice. Most troublesome was the prosecutor's requirement that the veteran attend DV counseling even though the VA treatment professional determined that he only had PTSD and was not engaging in intimate partner violence tactics. *See also* Gerlock & Tinney, *supra* note 26, at 402–07 (explaining distinction between PTSD symptoms and intimate partner violence tactics and the need to properly diagnose and treat).

possible underlying causes, and share with his community his positive and negative wartime experiences and the challenges he faces in transitioning back to civilian life.

3. Comparing Therapeutic Jurisprudence and Restorative Justice in Veterans Treatment Courts

There are several differences between the two processes—each with obvious consequences. Still, perhaps the most concerning and most subtle is the requirement that the veteran attend DV and substance abuse counseling and abstain from alcohol and drugs. While attending DV counseling may not be contraindicated, doing so in the above scenario *if* the veteran was *not* engaging in intimate partner violence tactics may be counterproductive for the following reasons: (1) in some programs if the focus is on the DV treatment, the PTSD symptoms may not get addressed or treated, particularly if the veteran had not been previously diagnosed or was recalcitrant about such a diagnosis; (2) the negative work-related consequences for being identified as a DV perpetrator; (3) the stigma of being a “batterer,” which may alienate family and friends; (4) the financial stress caused by time away from work to attend counseling, and transportation and counseling fees, even if nominal; and (5) the physical and emotional stress on the veteran and family for time commitment in undergoing several types of counseling.²⁴⁵ Additionally, the requirement of being treated for substance abuse and abstaining from drugs and alcohol even if the offender does not have a substance abuse problem may undermine the legitimacy of the program from the veteran’s and other participants’ perspectives. The not-so-rare approach in treatment courts that abstinence may be “good for him” raises the specter of paternalism and only compounds the legitimacy problem. Lastly, having to pay a steep restitution before participating in treatment may delay necessary treatment and increase the financial stress substantially—both of which are decidedly antitherapeutic outcomes.²⁴⁶

In contrast, the benefits of a RJ-imbued process are significant, with some benefits more obvious than others. These outcomes include the following: (1) allowing the views of the wife and the restaurant owner to contribute to the outcome makes the reparations more meaningful to those who were actually harmed; (2) treatment that is targeted to the actual and diagnosed problem makes a high rate of compliance more likely and legitimizes the outcome; and (3) the process of participation by the victims and the offender plus family, friends, and community members drives the community toward a Hegelian *commonality of consciousness*.²⁴⁷

245. Email from April Gerlock, Ph.D., to Kristine A. Huskey (Sept. 24, 2016, 08:09 MST) (on file with author). Gerlock, Ph.D., ARNP, PMHNP-BC, PMHCNS-BC, is a board-certified adult mental health/psychiatric advanced registered nurse practitioner and research scientist. She is also a clinical associate professor with Psychosocial and Community Health Nursing at the University of Washington School of Nursing in Seattle, Washington.

246. In the Regional Municipalities VTC, the payment of restitution before a veteran can enter the program is a policy of the prosecutor’s office. While all VTCs are different, many, if not most, place great discretion in the prosecutors to determine policies and practices.

247. Phil Klay, *After War, a Failure of the Imagination*, N.Y. TIMES (Feb. 8, 2014), <http://www.nytimes.com/2014/02/09/opinion/sunday/after-war-a-failure-of-the->

and creates a cohesive *tribe*, helping to promote the reintegration of the veteran back into the community.

Whether recidivism rates of VTCs as they currently operate, presumably with the TJ approach, are lower or higher than those for RJ processes is all but impossible to divine. Likewise, assessing satisfaction rates of VTC participants is hampered by the sheer lack of information on VTCs, as well as the myopic focus on the offender as the sole participant in such courts. However, it is not the purpose of this Article to compare data. First, no national data or meta-analyses of recidivism rates exist for such courts. Nor does there exist comprehensive data on whether VTCs assist in behavior modification or assimilating veterans back into the civilian world. Indeed, there is little comprehensive or national data in the VTC literature, except for criminologist Julie Marie Baldwin's 2012 survey of 79 VTCs and the 2016 Veterans Affairs inventory of VTCs.²⁴⁸ Baldwin's pointed assessment that VTCs are rapidly proliferating without any evidence-based models or practices is the more significant point. Similarly, VTC expansion without serious examination of theoretical foundations is equally troubling. As these treatment courts continue to expand without either evidence-based models or serious examination of theoretical foundations, relying only on charismatic leaders in the movement and a support-our-troops morale, which will eventually dwindle with the wars' ends, VTCs may be headed for a legitimacy crisis.²⁴⁹

CONCLUSION

Some of the concerns raised by the traditional VTC model have been recognized by TJ proponents. To be clear, paternalism and coercion are not elements of a treatment court that TJ intends to create. Moreover, the TJ study of behavioral sciences to assess laws and legal processes and the TJ goal—to improve therapeutic outcomes for all involved in the legal process—is a significant development in the legal academy and the “law in action.” In short, TJ's contributions to criminal justice reform cannot be understated. Yet, relying *solely* on TJ to carry the theoretical weight of VTCs seems unfair to TJ, and excluding other theories, value systems, and processes that may be highly beneficial does a disservice to veterans and these courts.

RJ may be a therapeutic approach to addressing injury and criminality, but its value system and processes are distinctive from a TJ or rehabilitative framework. Its community-driven approach and process of incorporating the true stakeholders in designing the reparations and prevention of future conduct make it a theory of justice highly suitable for the unique features of VTCs. Though lesser-known than

imagination.html?_r=0 (noting gap between civilians and warriors and political consequences for civilian failure to try to understand wartime experiences).

248. Baldwin, *supra* note 36 (providing a “national portrait of the structure, policy, and procedures of VTCs,” not results); VA FACT SHEET, *supra* note 7 (providing data on number of VTCs and structure). These two studies are the most comprehensive national empirical surveys on VTCs, but they are both limited to providing a portrait of the structure, policy, and procedures of VTCs—not results.

249. Casey, *supra* note 54, at 1503–04 (addressing the lack of rationale-based legitimacy in problem-solving courts, which are neither fair nor neutral, and suggesting the authority of such courts will deteriorate and plunge into a legitimacy crisis).

TJ in the problem-solving court world, RJ can enhance the positive impact of VTCs and thus should be seriously considered as these courts continue to proliferate. Serving RJ to those who have served can be a community's solution to what should be a community's challenge.