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CONSIDER COLLATERAL CONSEQUENCES: THE INHERENT HYPOCRISY OF VETERANS TREATMENT COURTS' FAILURE TO DISMISS CRIMINAL CHARGES

*Julia W. Williams**

American veterans are often plagued by psychological and physical injuries, among other hardships, which, when unaddressed, can lead to substance abuse, criminal behavior, and suicide. As public awareness of the difficulties that American veterans face was growing, the problem-solving court movement was also gaining momentum. Largely inspired by therapeutic jurisprudence, an interdisciplinary framework that sees the law as a way to reach therapeutic outcomes, problem-solving courts seek to identify the root causes of criminal behavior and address those causes in ways that promote rehabilitation and reduce recidivism. Veterans Treatment Courts (“VTCs”) emerged when veterans advocacy intersected with the problem-solving court movement. This Note explores the origins, growth, and general structure of VTCs. Focusing on the legal implications for veterans who graduate from VTCs, this Note argues that leaving veterans with a criminal conviction directly contradicts the reasons the programs were created and exposes veterans to collateral consequences, only adding additional barriers to reintegration into American civil society.

* J.D. Candidate, Brooklyn Law School, 2023. B.A., New York University, 2020. I would like to thank my friends and family for their unwavering support and the Journal of Law and Policy staff for their hard work throughout this entire process. I would also like to thank the Shelby County Public Defender, particularly Jayniece Harris and Jennifer Dilley, for giving me the opportunity to interact with the Shelby County Veterans Treatment Court and ultimately inspiring this Note. I dedicate this Note to my late grandfather, Jack Fielden, a WWII veteran who knew too well the pain and suffering of a life after war, and to everyone who is trying to rethink and reshape how we respond to crime in America. All errors and omissions are my own.

INTRODUCTION

The American veteran's struggle has become increasingly more visible to the public, in part because of our increased—though far from perfect—understanding of Post-Traumatic Stress Disorder (“PTSD”).¹ Returning home from their time in service, veterans carry psychological and physical wounds that many are unwilling or afraid to address and are faced with a host of challenges as they try to re-enter civilian society.²

Actors in the criminal legal system increasingly understand that “PTSD plays a role in veteran arrests.”³ In the early 2000s, judges began to notice both that veterans were frequently standing before them charged with crimes and that the criminal legal system was unable to address them effectively.⁴ As a response to this problem, Veterans Treatment Courts (“VTCs”), problem-solving courts designed specifically for veterans, emerged. VTCs seek to address veterans' highly specific set of needs and common experiences that other problem-solving courts, like mental health courts and drug courts, have been unable to fully address.⁵ Founded on principles of therapeutic jurisprudence, which views the law as a way to achieve therapeutic outcomes, problem-solving courts, including VTCs, “serve a diversionary function by facilitating alternatives to criminal sanctions—especially incarceration—attempting to foster rehabilitation, [and] reducing recidivism.”⁶

¹ F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEVS. MENTAL HEALTH L. 1, 3 (2010).

² See *infra* Part I, Section A.

³ Barry C. Edwards et al., *How to Transform the Judicial System: Lessons from the Institutionalization of Veterans' Treatment Courts*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 841, 864 (2019).

⁴ See *infra* Part I, Section C.

⁵ See Jeremiah M. Glassford, “*In War, There Are No Unwounded Soldiers*”: *The Emergence of Veterans Treatment Courts in Alabama*, 65 ALA. L. REV. 239, 248–49 (2013).

⁶ David C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 U. MIA. L. REV. 660, 668, 672 (2021).

Although the first VTC was created in 2004,⁷ the VTC created by Judge Robert Russell four years later in Buffalo, New York has inspired others and provided the framework for the hundreds that exist today.⁸ Despite criticism of their efficacy,⁹ lack of standardization,¹⁰ implications on procedural rights,¹¹ and moral justifications,¹² VTCs—and problem-solving courts in general—are well established in the criminal legal system.¹³ These non-adversarial courts provide mental health and substance abuse treatment along with other social services as an alternative to the traditional court system.¹⁴

Despite their noble goals, VTCs leave many of their proud graduates¹⁵ with criminal records, undermining the goals that VTCs were established to further in the first place.¹⁶ Around “600,000 people leave prisons every year hoping that their

⁷ R. Scott Johnson et al., *US Veterans’ Court Programs: An Inventory and Analysis of National Survey Data*, 52 CMTY. MENTAL HEALTH J. 180, 180 (2016).

⁸ Edwards et al., *supra* note 3, at 848–49.

⁹ See Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1578 (2021) [hereinafter *Problem-Solving Courts*] (questioning the efficacy of problem-solving courts).

¹⁰ See Claudia Arno, *Proportional Response: The Need for More—and More Standardized—Veterans’ Court*, 48 U. MICH. J.L. REFORM 1039, 1060 (2015) (discussing the adverse effects of not having standardization).

¹¹ See Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 83 (2017) (explaining that problem-solving courts “often diminish the procedural rights of defendants.”).

¹² See Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1505 (2017) (noting that veterans’ treatment courts and those like it “use a discourse of difference and empiricism as a cover for moral judgment.”).

¹³ Edwards et al., *supra* note 3, at 849 (“VTCs are the fastest growing type of specialty court in the country.”).

¹⁴ Glassford, *supra* note 5, at 254–55.

¹⁵ This Note will at times refer to veterans who have successfully completed VTCs as “graduates,” as jurisdictions like Tennessee do. See *Veterans Treatment Court Graduation Celebrates Lives Changed*, TENN. STATE CTS., (Nov. 11, 2020), <https://www.tncourts.gov/news/2020/11/11/veterans-treatment-court-graduation-celebrates-lives-changed> [https://perma.cc/R428-NWZF].

¹⁶ See discussion *infra* Part II.

punishment has ended, only to encounter a combination of laws, rules, and biases forming barriers that block them from jobs, housing, and fundamental participation in our political, economic, and cultural life.”¹⁷ This number, already high, does not include the individuals who graduated from VTCs or those who plead guilty in criminal court and avoided incarceration, but are still left with criminal convictions.

An important VTC case, *Commonwealth v. McCabe*, just reached the Supreme Court of Pennsylvania.¹⁸ In *McCabe*, the State Supreme Court faced the overarching question: are VTCs governed by the same statute that requires Pennsylvania’s pretrial diversion program to dismiss a successful participant’s charge(s) and sentence(s)?¹⁹ Affirming the lower court’s opinion, the Supreme Court of Pennsylvania found VTCs and diversionary programs to be sufficiently distinct, despite the lack of statutory governance for VTCs.²⁰ However, these programs are much more similar in how they function and in their ultimate goals than the court suggests and perhaps *should* have the same legal implications given these similarities.²¹ Although the Pennsylvania Supreme Court may have correctly interpreted Pennsylvania’s legislative intent, the preferable approach would be one that requires VTCs to dismiss a graduate’s charges.

Even under the umbrella of problem-solving courts and VTCs, there is debate over whether a pre-adjudication model is better than a post-adjudication model.²² Post-adjudication models, generally

¹⁷ Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> [https://perma.cc/Y4ZY-QXX3].

¹⁸ *Commonwealth v. McCabe*, 265 A.3d 1279 (Pa. 2021).

¹⁹ See *Commonwealth v. McCabe*, No. 226 MAL 2020 (Pa. 2020) (granting the Petition for Allowance of Appeal); see generally *Commonwealth v. McCabe*, 230 A.3d 1199 (Pa. Super. Ct. 2020).

²⁰ *McCabe*, 265 A.3d at 1288.

²¹ See *infra* Part II, Section B.

²² See Evan C. Tsai, *The Practitioner’s Guide to Due Process Issues in Veterans Treatment Courts*, 43 MITCHELL HAMLIN L. REV. 577 (2017); see also Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the*

avored by prosecutors, bring a participant into the program after that participant has entered a guilty plea.²³ On the other hand, pre-adjudication courts, generally favored by defense attorneys, bring participants in before any formal disposition on the case.²⁴ Despite blanket claims that pre-adjudication courts may be better attuned to the therapeutic and rehabilitative goals of VTCs, graduates from pre-adjudication VTCs do not necessarily escape criminal convictions.²⁵ The therapeutic and rehabilitative goals cannot ultimately be achieved through either a pre- or post-adjudication model so long as graduates are still left with criminal convictions. A criminal record carries extensive collateral consequences that can severely inhibit VTC graduates throughout their lives.²⁶ This Note proposes that VTCs will not achieve their goals until they account for collateral consequences by requiring that criminal charges be dismissed upon graduation.

This Note does not attempt to reconcile the critics of VTCs with the supporters, nor is it a blanket endorsement of the very concept of VTCs. Rather, this Note recognizes the existence of these courts and seeks to identify a concrete point of improvement as they exist today. Part I of this Note explores the history and growth of VTCs in the context of therapeutic jurisprudence and the unique needs of veterans. Part II uses *Commonwealth v. McCabe* to illustrate how VTCs' unwillingness to consider and fight against collateral consequences undermines their stated purpose. Part III argues that VTCs should require that all charges be dismissed upon successful completion of a VTC in order to adequately address collateral consequences.

Ethical Obligations of the Zealous Criminal Defender, 12 BERKELEY J. CRIM. L. 75 (2007).

²³ See *infra* Part III, Section A.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *infra* Part II, Section A.

I. VTCs: WHERE THEY CAME FROM AND WHERE THEY ARE NOW

A. *The Struggle of the American Veteran*

Compared to the general population, veterans are more likely to experience psychological harm, ranging from diagnosable mental and substance abuse disorders to physical injuries.²⁷ Most notably, 36% of veteran males experience PTSD compared to 8% of non-veteran males.²⁸ Active duty caused one fourth of all veterans to have a disability or have a preexisting disability worsen.²⁹ Among veterans involved in the criminal legal system, over 50% struggle with mental health or substance abuse disorders.³⁰ Among diagnosable mental disorders, veterans have a higher chance of developing PTSD, depression, and anxiety than non-veterans.³¹ Beyond physical and mental injury from their time in the armed forces, veterans often experience “feelings of displacement and alienation.”³² Complaints of this nature are increasingly common due to the recent withdrawal of U.S. troops from Afghanistan after twenty years of occupation marked by immense spending and the loss of over 170,000 lives, followed by the Taliban’s quick seizure of the country.³³

²⁷ JONATHAN E. VESPA, U.S. CENSUS BUREAU, *THOSE WHO SERVED: AMERICA’S VETERANS FROM WORLD WAR II TO THE WAR ON TERROR* 1, 8–11 (2020).

²⁸ Maria Olenick et al., *US Veterans and Their Unique Issues: Enhancing Health Care Professional Awareness*, 6 *ADVANCES MED. EDUC. & PRAC.* 635, 636 (2015).

²⁹ VESPA, *supra* note 27, at 8–9.

³⁰ Mike Richman, *Veterans and the Criminal Justice System*, U.S. DEP’T VETERANS AFFS. (Sept. 7, 2018), <https://www.research.va.gov/currents/0918-VA-researcher-examines-Vets-who-collide-with-criminal-justice-system.cfm> [<https://perma.cc/48WG-WKK6>].

³¹ Edwards et al., *supra* note 3, at 863–64.

³² Jennifer Steinhauer, *Veterans Struggle with Issues That Are Often Invisible to Others*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/09/07/us/politics/afghan-war-iraq-veterans.html> [<https://perma.cc/J7XK-6WVH>].

³³ Adam Nossiter & Eric Schmitt, *U.S. War in Afghanistan Ends as Final Evacuation Flights Depart*, N.Y. TIMES (Oct. 5, 2021),

Homelessness, although declining among veterans in recent years³⁴ has been, and continues to be, a major issue for veterans.³⁵ A close look at veteran homelessness in 2020 revealed stark racial disparities. Black Americans, who make up 12% of the U.S. veteran population, are “considerably overrepresented among the homeless veteran population”—they comprise one third of the veteran population experiencing homelessness.³⁶ Similarly, Hispanic Americans make up 7% of the veteran population and 11% of the veteran population experiencing homelessness.³⁷ White Americans, on the other hand, make up 81% of the U.S. veteran population but only 57% of the veteran population experiencing homelessness.³⁸ Additionally, among the previously mentioned 50% of justice-involved³⁹ veterans who struggle with substance abuse and mental health disorders, “a large percentage of those veterans are also homeless or at-risk for homelessness.”⁴⁰

A returning soldier, struggling to reenter civilian life⁴¹ with “psychological injuries and lack of sufficient treatment” will too frequently turn to drugs, alcohol, criminal behavior,⁴² and,

<https://www.nytimes.com/2021/08/30/world/asia/afghanistan-us-occupation-ends.html> [<https://perma.cc/4WEX-N45M>].

³⁴ MEGHAN HENRY ET AL., U.S. DEP’T OF HOUS. & URB. DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1, 52 (2021). It is important to note that this decline in veteran homelessness has been accompanied by a general decline in the number of veterans in the U.S. Various factors have caused this decline: “the armed forces are substantially smaller today than in the past” and “veterans of past wars—particularly World War II, Korea, and Vietnam—are aging and dying.” See VESPA, *supra* note 27, at 2–3.

³⁵ See Glassford, *supra* note 5, at 246.

³⁶ HENRY ET AL., *supra* note 34, at 53.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Richman, *supra* note 30 (“The term justice-involved Veterans is used to describe former service members who have been detained by or are under the supervision of the criminal justice system. Their involvement can range from arrest, to court involvement, to incarceration in jail or prison.”).

⁴⁰ *Id.*

⁴¹ Glassford, *supra* note 5, at 246.

⁴² *Id.* at 245; see Lizette Alvarez, *After the Battle, Fighting the Bottle at Home*, N.Y. TIMES (July 8, 2008), <https://www.nytimes.com/2008/07/08/us/08vets.html> [<https://perma.cc/FH78-7DVQ>] (discussing the reality that

increasingly in the past year, suicide.⁴³ Daily stressors that merely frustrate most people, like “traffic jams, the inability to pay bills, or interpersonal conflict” can trigger aggressive behavior in people who suffer from PTSD.⁴⁴ Additionally, untreated PTSD has detrimental effects on a person’s biological stress response system—causing that person to seek out situations to release pent up anger, irritability, and hostility.⁴⁵ To further complicate matters, veterans often self-medicate, ignore, or refuse treatment for their mental health concerns due, in part, to “the warrior code,” characteristic of training in the armed forces, which teaches soldiers “to be tough and ignore their fear.”⁴⁶

B. Therapeutic Jurisprudence and Problem-Solving Courts

Therapeutic jurisprudence (“TJ”) is the “growing intellectual and socio-political movement”⁴⁷ from which problem-solving courts emerged.⁴⁸ Founded in the late twentieth century by law professors David Wexler and Bruce Winick, TJ focuses on

combat veterans, who often struggle with alcohol abuse, particularly those who have PTSD, “are spilling into the criminal justice system.”)

⁴³ Elissa Esher, *Veterans with PTSD Are Struggling in the Pandemic. Could Cannabis Help?*, SFGATE (Nov. 18, 2020), <https://www.sfgate.com/cannabis/article/Veterans-with-PTSD-Are-Struggling-in-the-15736612.php> [<https://perma.cc/HV3T-VDHT>].

⁴⁴ Edwards et al., *supra* note 3, at 861.

⁴⁵ *Id.*

⁴⁶ Alvarez, *supra* note 42.

⁴⁷ Candace McCoy, *Commentary: The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1513 (2003).

⁴⁸ See Yamada, *supra* note 6, at 663 (discussing the application of therapeutic jurisprudence to problem-solving courts); Michael L. Perlin, *Wounds of War: The Symposium Edition: “John Brown Went Off to War”: Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445, 455 (2013) (“Problem-solving courts grew out of an interdisciplinary approach—an approach immersed in therapeutic jurisprudence—to address the underlying problem.”); Edwards et al., *supra* note 3, at 855 (explaining that veterans treatment courts and other problem-solving courts, inspired by therapeutic jurisprudence, seek to use “laws and judicial processes” to “solve problems”).

promoting “human dignity and psychological wellbeing.”⁴⁹ Grounded in mental health law, this interdisciplinary framework views the law as a way to achieve therapeutic outcomes.⁵⁰ TJ is based on the theory that “[l]egal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences.”⁵¹ Wexler and Winick note that “[t]herapeutic jurisprudence simply seeks to focus attention on an often neglected ingredient in the calculus necessary for performing a sensible policy analysis of mental health law and practice—the therapeutic dimension—and to call for its systematic empirical examination.”⁵²

TJ does not attempt to dominate other theories and approaches to legal issues, but instead provides a “new and distinct perspective,”⁵³ centered around values of dignity and compassion⁵⁴ that encourages a rehabilitative orientation “rather than a retribution orientation based on isolation and punishment.”⁵⁵ TJ offers a way of shaping the law and addressing legal issues beyond “strict legal rights, duties, and obligations.”⁵⁶ Problem-solving courts, using TJ as a guiding force, look at the root causes of criminal behavior⁵⁷ and seek to promote rehabilitation while reducing the likelihood of recidivism.⁵⁸ This focus on greasing the

⁴⁹ See Yamada, *supra* note 6, at 663–68; see also David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIA. L. REV. 979, 983 (1991).

⁵⁰ Yamada, *supra* note 6, at 668, 671.

⁵¹ *Id.* at 679.

⁵² Wexler & Winick, *supra* note 49, at 983.

⁵³ Hon. 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, 445 (1999).

⁵⁴ Yamada, *supra* note 6, at 680–82.

⁵⁵ Edwards et al., *supra* note 3, at 854.

⁵⁶ Perlin, *supra* note 48, at 454.

⁵⁷ Hon. Peggy Fulton Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits*, 2 CHAP. J. CRIM. JUST. 7, 7 (2011).

⁵⁸ Yamada, *supra* note 6, at 672.

anti-recidivism wheels of the criminal legal system can be troubling if problem-solving courts “further entrench” the emphasis on individual responsibility for criminalized behavior, rather than contextualize this behavior within a larger, often unjust society.⁵⁹

The decontextualization inherent in the therapeutic jurisprudence model of problem-solving courts has been dubbed “neorehabilitation.”⁶⁰ Neorehabilitation focuses on reducing recidivism “in the hopes of ensuring a more cost-effective and efficient system,” which “identifies and manages offenders through treatment for the benefit of society, not the individual.”⁶¹ This efficiency-focused mode of criminal legal reform, however, is somewhat disrupted by the evolution of certain problem-solving courts, like VTCs.⁶²

Former public defender and current law professor Erin R. Collins groups problem-solving courts into three generations: treatment courts, accountability courts, and status courts.⁶³ Treatment courts, Professor Collins explains, are prototypical problem-solving courts, identifying and attacking a particular issue that led to the defendant’s criminality.⁶⁴ Accountability courts, like domestic violence courts, focus on “increasing offender accountability to the victims of their behavior.”⁶⁵ These first two types of problem-solving courts are what Professor Collins considers “release-valve reforms that seek to relieve strain on the overburdened system.”⁶⁶ These courts, in her view, promote neorehabilitation. Alternatively, status courts, like VTCs, focus on the unique needs of a population that the traditional legal system—with its focus on case processing and tackling crime through convictions—often fails to address.⁶⁷ Status courts contextualize

⁵⁹ Collins, *supra* note 12, at 1519–20.

⁶⁰ See generally Jessica M. Eaglin, *Neorehabilitation and Indiana’s Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867, 868 (2013).

⁶¹ *Id.* at 875.

⁶² Collins, *supra* note 12, at 1500.

⁶³ *Id.* at 1488–94.

⁶⁴ *Id.* at 1488.

⁶⁵ *Id.* at 1490.

⁶⁶ *Id.* at 1486.

⁶⁷ *Id.* at 1492.

criminal behavior, recognizing both individual accountability and the “structural factors and external experiences,” like enduring structural racial and economic inequality, that can influence criminal behavior.⁶⁸

C. Growth of VTCs Across the Country

VTCs accomplish this contextualization by treating an individual’s status as a veteran as if it were an external “problem” to be solved. This formally began in the early 2000s, when the American veteran’s unique set of shared past experiences and present struggles⁶⁹ caught the attention of a few judges.⁷⁰ Most VTCs are judicially created, “without a statutory baseline,”⁷¹ though thirteen states and Guam have some statutory guidance.⁷²

With over 4,000 problem-solving courts in the United States,⁷³ there is a wealth of both support⁷⁴ and criticism⁷⁵ for this fast-

⁶⁸ *Id.* at 1521.

⁶⁹ See discussion *supra* Part I, Section A.

⁷⁰ See Jack W. Smith, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004 – December 31, 2010*, 29 ALASKA L. REV. 93, 96 (2012) (discussing the efforts of two judges in Anchorage, Alaska to create a specialized court for Veterans); Hon. Robert Russell *Reflects on the Founding and Future of Veterans Treatment Courts*, HARV. L. TODAY (Dec. 5, 2016), <https://today.law.harvard.edu/hon-robert-russell-reflects-founding-future-veterans-treatment-courts/> [<https://perma.cc/3T8P-ATPQ>] (discussing Hon. Robert Russell’s creation of the Veterans Court that ultimately led the Veterans Court movement).

⁷¹ Clare Murphy, *Limitations of Retributivist Justice in ADR: How the Judge’s Role in Veterans Treatment Court Impacts One of Our Nation’s Most Vulnerable Populations*, 36 OHIO ST. J. ON DISP. RESOL. 183, 184–85 (2020).

⁷² *Veterans Treatment Courts: 2015 Survey Results*, BUREAU JUST. ASSISTANCE (BJA) DRUG CT. TECH. ASSISTANCE PROJECT 1, 31 (2016), <https://www.american.edu/spa/jpo/initiatives/drug-court/upload/veterans-treatment-courts-2015-survey-results.pdf> [<https://perma.cc/Z867-Y6ZX>].

⁷³ *Problem-Solving Courts*, *supra* note 9, at 1575 (including “mental health courts, veterans courts, human trafficking courts, re-entry courts, and opioid intervention courts, along with many others.”).

⁷⁴ Glassford, *supra* note 5, at 249–52 (discussing the efficacy of drug and mental health courts).

⁷⁵ *Problem-Solving Courts*, *supra* note 9, at 1580 (“[Problem-solving courts] have become self-reinforcing institutions that are protected from

growing phenomenon. VTCs and other problem-solving courts aim to tackle the root causes of crime, focusing on a specific population, and then tailoring a response to that population.⁷⁶ Generally, VTCs aim to improve the lives of veterans by diverting them out of the traditional criminal legal system and releasing some of the pressure of reintegration into civil society.⁷⁷ Judges created separate courts for veterans because veterans' issues share commonalities and frequently transcend the barriers of other problem-solving courts that focus only on one issue, such as drug treatment or domestic violence,⁷⁸ which some scholars argue will increase their likelihood of success.⁷⁹

The first VTC was created in 2004 in Anchorage, Alaska⁸⁰ to better connect the many veterans who were in other treatment courts with VA benefits.⁸¹ Judges Sigurd Murphy and Jack Smith designed the specialized court to take "advantage of veterans' eligibility for a range of VA services not available to the general population, and the special relationship among veterans."⁸² Because they did not widely promote their creation, another VTC did not develop until 2008 in Buffalo.⁸³ There, Judge Robert

meaningful external scrutiny."); McCoy, *supra* note 47, at 1533 ("Drug courts are playing a small but helpful role in combating drug-related crime, but they are doing little to address the underlying social problems that give rise to such crime."); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012) ("[I]n their currently predominant institutional forms, specialized criminal courts threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration.").

⁷⁶ Glassford, *supra* note 5, at 249.

⁷⁷ Edwards et al., *supra* note 3, at 892.

⁷⁸ Glassford, *supra* note 5, at 252; see Kristine A. Huskey, *Justice for Veterans: Does Theory Matter?*, 59 ARIZ. L. REV. 697, 699 (2017).

⁷⁹ Glassford, *supra* note 5, at 252; Arno, *supra* note 10, at 1040 ("At a minimum, these differences [between non-veterans and veterans] suggest that, from the perspective of criminal rehabilitation, it makes sense to treat these populations differently.").

⁸⁰ Johnson et al., *supra* note 7, at 180.

⁸¹ Edwards et al., *supra* note 3, at 845.

⁸² *Id.*

⁸³ *Id.* at 846–47.

Russell was similarly inspired to create a specialized court for veterans because he noticed, in his role as presiding judge in drug court and mental health court, that many of the individuals in front of him were veterans.⁸⁴ Unlike the judges in Alaska, Judge Russell created a VTC handbook “to provide a blueprint for establishing VTCs in other jurisdictions” and promoted the new court-model, garnering “significant national media attention.”⁸⁵

In a 2008 interview discussing his VTC, Judge Russell explained that he and his team “wanted to be anticipatory rather than just reactionary.”⁸⁶ He later wrote that “[t]he mission driving 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.”⁸⁷ Other early coverage of the Buffalo VTC noted that it was “trying to do right by veterans while also trying to prevent incidents of suicide or violence.”⁸⁸ More generally, the creation of VTCs reflected a shift in the legal world’s understanding of the difficulties re-entering soldiers face.⁸⁹

Since 2008, nearly 500 VTCs have developed across the country.⁹⁰ This rapid growth reflects the changing criminal legal landscape that seems to be moving away from purely punitive responses to crime.⁹¹ Beyond the practical justification for VTCs—that veterans face unique struggles that can be better approached in a separate court—the moral justification posits that

⁸⁴ *Id.* at 847.

⁸⁵ *Id.* at 848–49.

⁸⁶ Cheryl Corley, *Judge: Keep Vets Out of Jail*, NPR (June 18, 2008, 12:00 PM), <https://www.npr.org/templates/story/story.php?storyId=91633166> [<https://perma.cc/DZV5-VBL6>].

⁸⁷ Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 364 (2009).

⁸⁸ Libby Lewis, *Court Aims to Help Vets with Legal Troubles*, NPR (Apr. 29, 2008, 12:11 AM), <https://www.npr.org/templates/story/story.php?storyId=90016059> [<https://perma.cc/LQ9T-4G6W>].

⁸⁹ See Perlin, *supra* note 48, at 462 (2013); Marta Hoes, *Invisible Wounds: What Texas Should Be Doing for the Mental Health of its Veterans*, 13 TEX. TECH. ADMIN. L.J. 369, 378 (2012).

⁹⁰ U.S. DEP’T VETERANS AFFS., VETERANS COURT INVENTORY 2016 UPDATE 1, 2 (2017).

⁹¹ Edwards et al., *supra* note 3, at 856.

the country as a whole has a responsibility to give back to and support our veterans.⁹² Given this cultural backdrop, it makes sense that “veterans lead the way in judicial reforms that embody empathy.”⁹³

A common criticism of VTCs tends to focus on this moral justification—that veterans are given a way out of the traditional legal process merely because they served in the armed forces.⁹⁴ Another very similar critique is that veterans with mental health issues get diverted out of the traditional system while non-veterans do not.⁹⁵ Professor Michael Perlin, a renowned expert on mental health and disability law, responds to both of these critiques, noting that: (1) VTCs were not created to give special treatment to veterans, but to better respond to their unique experience that often leaves them with visible and invisible traumas, which can cause or worsen criminalized behavior; and (2) in a perfect world, perhaps one for which we should be striving, this therapeutic response would be extended to everyone.⁹⁶ Essentially, he argues that problem-solving courts should not stop with veterans.⁹⁷ However, Professor Perlin overlooks that VTCs *were* created partially because of the moral justifications previously mentioned.⁹⁸ The existence of this other justification does not negate the argument

⁹² See *Editorial: A Court for Veterans*, N.Y. TIMES (June 4, 2008), <https://www.nytimes.com/2008/06/04/opinion/04wed4.html> [<https://perma.cc/6NLK-AFCS>]; Corley, *supra* note 86 (“[F]or someone who has made these sacrifices for our liberty, why shouldn’t we have a veterans’ treatment court?”); Hon. Robert T. Russell, *Veteran Treatment Courts*, 31 TOURO L. REV. 385, 395 (2015) (“[A]ll veterans deserve special consideration for their willingness to serve and defend their nation.”); Edwards et al., *supra* note 3, at 856–57.

⁹³ Edwards et al., *supra* note 3, at 857.

⁹⁴ Perlin, *supra* note 48, at 465.

⁹⁵ *Id.* at 466; Kristina Shevory, *Why Veterans Should Get Their Own Courts*, ATLANTIC (Dec. 2011), <https://www.theatlantic.com/magazine/archive/2011/12/why-veterans-should-get-their-own-courts/308716/> [<https://perma.cc/2SUZ-N598>] (“[T]he idea of an entirely different court system based on status doesn’t make sense.”).

⁹⁶ Perlin, *supra* note 48, at 465–67.

⁹⁷ *Id.* at 467.

⁹⁸ Edwards et al., *supra* note 3, at 878.

that “[y]ou don’t have to oppose veterans’ courts to want that type of justice for all.”⁹⁹

Another response to this wariness of VTC’s moral justification is that “conduct that was valued on the battlefield is often criminalized in civilian life.”¹⁰⁰ Thus, perhaps, on some level, disparate treatment of veterans is justified because certain behaviors are learned for survival in times of war and unlearning those behaviors is a difficult process. This view, similar to Professor Perlin’s argument, is also not only applicable to veterans. Rates of trauma and PTSD in individuals who grow up in low-income, high-crime neighborhoods are similar, if not higher, than those of veterans.¹⁰¹ This highlights the reality that the issues veterans face are not necessarily unique to them. However, their shared experience as members of the armed forces does give them a truly unique position within American civil society. Despite this criticism and the limited empirical evidence of their efficacy, VTCs remain the fastest growing problem-solving court.¹⁰²

D. General Structure of VTCs

Generally, VTCs give judges the opportunity to join defense attorneys, prosecutors, Veterans Affairs (“VA”) representatives, mentors, local veterans organizations, mental health experts, and case managers¹⁰³ in addressing “the criminogenic needs of the veteran through treatment planning.”¹⁰⁴ Depending on the jurisdiction, individuals enter a VTC either pre- or post-adjudication of their criminal charges.¹⁰⁵ These courts go beyond other problem-solving courts by involving veteran-specific organizations and individuals.¹⁰⁶ The normally adversarial parties

⁹⁹ Dahlia Lithwick, *A Separate Peace*, SLATE (Feb. 11, 2010, 1:33 PM), <https://slate.com/news-and-politics/2010/02/specialized-courts-for-war-veterans-work-wonders-but-why-stop-at-veterans.html> [<https://perma.cc/Z4HY-FGDR>].

¹⁰⁰ Huskey, *supra* note 78, at 708.

¹⁰¹ Collins, *supra* note 12, at 1501.

¹⁰² Edwards et al., *supra* note 3, at 884, 849.

¹⁰³ Glassford, *supra* note 5, at 254.

¹⁰⁴ Tsai, *supra* note 22, at 579.

¹⁰⁵ See discussion *infra* Part III, Section A.

¹⁰⁶ Glassford, *supra* note 5, at 254.

join with a treatment team to “establish a plan of rehabilitation, supervision, and monitoring”¹⁰⁷ while also providing “primary health care, housing, educational assistance, vocational training and job placement, and family counseling to help veterans reintegrate into civilian society.”¹⁰⁸

The first step of a VTC is determining eligibility and accepting individual cases.¹⁰⁹ Ultimately, participation in the program is voluntary.¹¹⁰ Once the accepted veteran agrees to the terms of the program, he¹¹¹ will be connected to treatment, benefits, and other services.¹¹² Treatment programs can be recommended by the treatment team, but is ultimately up to the judge, who can modify treatment requirements.¹¹³ At this point, if mentorship is part of the program, the veteran is matched with a mentor—their relationship is “informal and confidential.”¹¹⁴ Once a treatment plan is established, the participant will undergo “consistent monitoring and evaluation” of his performance in the program, which includes drug and alcohol testing and possible sanctions for noncompliance.¹¹⁵ If the participant successfully completes the program, his charges can be reduced or dismissed entirely.¹¹⁶ Participants can also fail out of the program for not complying with the requirements and obligations, or for getting arrested on other charges.¹¹⁷

Modeled after drug courts,¹¹⁸ VTCs are united by ten key components.¹¹⁹ First, VTCs are structured as a combination of mental health and substance abuse treatment in addition to

¹⁰⁷ Tsai, *supra* note 22, at 580.

¹⁰⁸ Glassford, *supra* note 5, at 254–55.

¹⁰⁹ *Id.* at 255.

¹¹⁰ *Id.* at 259.

¹¹¹ This Note will use “he” in referring to individual veterans simply for ease of reading.

¹¹² Glassford, *supra* note 5, at 255.

¹¹³ *Id.*

¹¹⁴ *Id.* at 257.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Russell, *supra* note 87, at 388.

¹¹⁹ Tsai, *supra* note 22, at 583.

traditional case processing in the criminal legal system.¹²⁰ Second, VTCs are a departure from the adversarial approach of the traditional criminal legal system, shifting the focus away from charges and prosecution.¹²¹ Relevant to these first two components is the concern that problem-solving courts, in general, deny individuals normal procedural protections they are entitled to in the traditional criminal court system¹²² and that defense attorneys have to shift away from zealous representation to accommodate this non-adversarial environment.¹²³

Third, VTCs ensure prompt entry into the program to avoid the adverse effects of the criminal legal system.¹²⁴ Yet, as this Note will propose, these courts do not account for *long-term* adverse effects, as many VTC graduates leave with a criminal record despite successful completion of the program.

Fourth, VTCs connect veterans with a host of social services and programs.¹²⁵ These services seek to address many “co-occurring problems such as primary medical problems, transmittable diseases, homelessness, basic educational deficits,

¹²⁰ JUSTICE FOR VETS, THE TEN KEY COMPONENTS OF VETERANS TREATMENT COURTS (Mar. 20, 2017), <https://justiceforvets.org/wp-content/uploads/2017/02/The-Ten-Key-Components-of-Veterans-Treatment-Courts.pdf> [<https://perma.cc/JKG9-LBJ6>].

¹²¹ *Id.*

¹²² Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 S.M.U. L. REV. 1459, 1459 (2004) (“The procedural due process protections accorded to criminal defendants and traditional barriers to the use of coercion are eliminated, as the adversarial process is abandoned in favor of a collaborative endeavor involving the judge, prosecutor, defense attorney, probation officer, treatment provider and defendant.”).

¹²³ Meekins, *supra* note 22, at 78–79 (“Defense attorneys in particular are expected by other actors in the specialty courts, such as judges, prosecutors, and case managers, to shed their staunch adversarialism and to conform to the way they represent their clients to the goals of the specialty court. This expected change in defense role can present problems and confusion for the individual defense attorney and client.”); Tamar M. Meekins, “*Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*,” 40 SUFFOLK U. L. REV. 1, 3 (2006) (“[T]he defender in specialty courts becomes, in most instances, a collaborator.”).

¹²⁴ JUSTICE FOR VETS, *supra* note 120.

¹²⁵ *Id.*

unemployment and poor job preparation, spouse and family troubles—especially domestic violence—and the ongoing effects of war time trauma.”¹²⁶ Fifth, the program requires that participants be substance-free, as confirmed through frequent testing.¹²⁷ Drug testing, “a fundamental component of a VTC,” is a way for the treatment team to “establish a framework for accountability and to gauge each participant’s progress.”¹²⁸

Sixth, VTCs have “a coordinated strategy” for responding to compliance and noncompliance.¹²⁹ Because participants in problem-solving courts waive some of their procedural rights, there is some concern that at a moment of noncompliance, “the ‘traditional’ court system has been resurrected and the due process rights and protections must be replaced” since the judge must then make a decision “based not on a legal standard, but on a clinical standard” that impacts the participant’s liberty.¹³⁰ Lack of standardization in this realm of decision-making expands judicial discretion without protecting the participant’s procedural rights.¹³¹ Additionally, some defense attorneys worry that coercion coupled with the non-adversarial environment of problem-solving courts contradicts their normal objectives and obligations.¹³²

Seventh, there is frequent communication between the judge and the participants.¹³³ Eighth, the treatment team frequently monitors the success of the program and makes adjustments.¹³⁴ Ninth, all of the players in the program are provided with relevant

¹²⁶ *Veterans Treatment Courts: 2015 Survey Results*, *supra* note 72, at 42.

¹²⁷ JUSTICE FOR VETS, *supra* note 120.

¹²⁸ *Veterans Treatment Courts: 2015 Survey Results*, *supra* note 72, at 21, 42.

¹²⁹ JUSTICE FOR VETS, *supra* note 120.

¹³⁰ Casey, *supra* note 122, at 1483.

¹³¹ *Id.* at 1484.

¹³² Meekins, *supra* note 22, at 84 (“Specialty court attorneys are expected not to object to the use of these coercive tools because they are used in the pursuit of therapeutic jurisprudence or are otherwise in the client’s best interests. This acquiescence by the lawyer in the punishment of his or her client runs afoul of traditional ethical rules.”).

¹³³ JUSTICE FOR VETS, *supra* note 120.

¹³⁴ *Id.*

training.¹³⁵ Finally, tenth, VTCs focus on “forging partnerships” among organizations, health care providers, and the court system.¹³⁶

E. VTCs’ Lack of Standardization

Beyond these ten guideposts, there is significant variation across jurisdictions in how VTCs function.¹³⁷ In some jurisdictions, the judge has the final say on acceptance into the program, but in others that decision is left to the prosecutor.¹³⁸ Some VTCs limit eligible participants to those who were honorably discharged or those who faced combat.¹³⁹ Others require a clear connection between the alleged criminal activity and that veteran’s experience in the armed forces.¹⁴⁰ Regarding the alleged crime, some courts exclude cases of domestic violence or any violent offense.¹⁴¹

Without much standardization,¹⁴² “veterans who suffer from similar conditions and commit similar crimes, but live in different states (or even different counties within a state) receive disparate treatment” in VTCs.¹⁴³

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Benjamin Pomerance, *The Best-Fitting Uniform: Balancing Legislative Standards and Judicial Processes in Veterans Treatment Courts*, 18 WYO. L. REV. 179, 188 (2018); Allison E. Jones, *Veterans Treatment Courts: Do Status-Based Problem-Solving Courts Create an Improper Privileged Class of Criminal Defendants*, 43 WASH. U. J. L. & POL’Y 307, 310 (2013).

¹³⁸ Pomerance, *supra* note 137, at 190.

¹³⁹ *Id.* at 189.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 189–90; see also Pamela Kravetz, *Way Off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 166–68 (2012) (noting that one argument for the exclusion of domestic violence cases in VTCs concentrates on the fact that VTCs are “ill-equipped” to handle these cases effectively and in a way that will not send the wrong message to the victims and the community).

¹⁴² Tsai, *supra* note 22, at 592 (explaining that VTCs “vary widely as to how they are administered and how they operate.”).

¹⁴³ Arno, *supra* note 10, at 1060.

Crucially, VTC jurisdictions also have not standardized the legal impact of graduation on a veteran's charges or sentencing.¹⁴⁴ Within Minnesota, for example, the "legal benefit" of graduation from a VTC is not standardized.¹⁴⁵ That means that VTC graduates in one Minnesota jurisdiction have their charges dismissed upon graduating, but another graduate who committed the same crime in a different VTC jurisdiction would graduate with his criminal record intact, left to deal with the collateral consequences of that conviction.¹⁴⁶ Often, the VTC is not required to dismiss a participant's charges upon graduation and can even require fines, costs, and restitution.¹⁴⁷ This leaves veterans who have graduated the program with a criminal record and, often, a mountain of debt.

Since the advent of VTCs, there has been controversy over how efforts to legitimize problem solving courts through standardization implicate separation of powers principles.¹⁴⁸ Specifically, should judges have free reign to make the rules or should the legislature provide guidance through standardization?¹⁴⁹ Because VTCs currently allow judges to give veterans the opportunity to "undergo a court-prescribed individualized course of rehabilitative treatment in lieu of incarceration," some judges prefer to be free from legislative intervention to keep treatment individualized and localized.¹⁵⁰ Standardization, however, would allow the legislature to impose rules to rein in judicial discretion, which could make it easier for the general public to believe in the

¹⁴⁴ Pomerance, *supra* note 137, at 191–92.

¹⁴⁵ See Tsai, *supra* note 22, at 597 n. 142 (discussing the existence of both pre- and post- adjudication VTCs in Minnesota).

¹⁴⁶ *Id.* at 596–97.

¹⁴⁷ See Pomerance, *supra* note 137, at 211–27 (discussing different states' approaches).

¹⁴⁸ See Sohil Shah, *Authorization Required: Veterans Treatment Courts, the Need for Democratic Legitimacy, and the Separation of Powers Doctrine*, 23 S. CALI. INTERDISC. L.J. 67, 105–06 (2014); see also Pomerance, *supra* note 137, at 181.

¹⁴⁹ Pomerance, *supra* note 137, at 182.

¹⁵⁰ *Id.* at 181–82.

supposed impartiality of judges in the problem-solving court context.¹⁵¹

II. VTCs FAIL TO ADDRESS COLLATERAL CONSEQUENCES

A. *What Are Collateral Consequences?*

Although it is often true that “imprisonment is treated as the only significant sanction imposed upon conviction” of a criminal offense, indirect consequences of a criminal record often haunt individuals for the rest of their lives.¹⁵² These indirect consequences, referred to as collateral consequences, are the societal “sanction[s] or disabilit[ies]” beyond court-imposed punishment that individuals with criminal convictions live through.¹⁵³ The presence and severity of collateral consequences underscores the “excessively retributive nature” of the criminal legal system in America.¹⁵⁴

Collateral consequences, while insidious, are not a covert element of the U.S. criminal legal system, in fact they play an increasingly large role in the work of lawyers and judges.¹⁵⁵ Defense attorneys must advise clients of relevant collateral consequences so that the client “can make informed decisions

¹⁵¹ *Id.* at 198; see also Wendy Serra, *Public Perception of the Judiciary Bolsters the First Amendment’s Right of Access*, YALE L. SCH.: MEDIA, FREEDOM, & INFO. ACCESS CLINIC (Apr. 21, 2019), <https://law.yale.edu/mfia/case-disclosed/public-perception-judiciary-bolsters-first-amendments-right-access> [https://perma.cc/75U9-CSY3] (“As public perception of the impartiality and integrity of the judiciary comes under increased partisan attack, it has become abundantly clear that public faith is integral to the judiciary’s very functioning.”).

¹⁵² Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 WAKE FOREST L. REV. 1, 7 (2019).

¹⁵³ *Id.* at 3 (providing examples of collateral consequences which include “removal from the United States, sex offender registration, firearm prohibitions, and disqualification from public benefits”).

¹⁵⁴ Kimble & Grawert, *supra* note 17.

¹⁵⁵ See Crane, *supra* note 152, at 18–20.

about whether to accept a plea bargain or to go to trial.”¹⁵⁶ Prosecutors will either purposefully charge certain offenses to trigger or avoid triggering certain collateral consequences.¹⁵⁷ Even the American Bar Association’s Criminal Justice Standards encourage judges to consider collateral consequences during sentencing.¹⁵⁸

In her acclaimed book *The New Jim Crow*, Michelle Alexander discusses mass incarceration’s impact on collateral consequences,¹⁵⁹ including the “larger web” of discrimination that affects anyone with a criminal record.¹⁶⁰ According to Alexander, “[o]nce released, former prisoners enter a hidden underworld of legalized discrimination and permanent social exclusion. They are members of America’s new undercaste.”¹⁶¹ That is, criminal convictions not only severely restrict access to employment,

¹⁵⁶ See McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 497 (2005).

¹⁵⁷ See Crane, *supra* note 152, at 19; see also Paul T. Crane, *Charging on the Margin*, 75 WM. & MARY L. REV. 775, 780 (2016) (“Prosecutors are more likely to file misdemeanor charges because they can still achieve the penalty they desire without having to endure the greater costs generated by felony prosecutions.”).

¹⁵⁸ AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19–2.4(a) (3d ed. 2004) (“The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence.”).

¹⁵⁹ Mass incarceration refers to “both the trend toward historically high incarceration rates in the United States and the causes and effects of that trend.” See Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 426–36 (2012) (discussing mass incarceration and its harms).

¹⁶⁰ See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 960 (2003) (“[M]ere contact with the criminal justice system, in the absence of any transformative or selective effects, severely limits subsequent employment opportunities.”).

¹⁶¹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2012).

education, housing, and public benefits, but can also negatively affect a person's mental wellbeing.¹⁶²

Beyond the “intangible burdens”¹⁶³ on an individual's self-esteem or mental health, common tangible collateral consequences are deportation, sex offender registration, gun ownership restrictions, ineligibility for public benefits¹⁶⁴ or housing, and disenfranchisement.¹⁶⁵ As long as VTCs leave veterans with criminal records, graduates of these programs will be subject to these consequences.

1. Sex Offender Registries

As of 2019, every state, the District of Columbia, and the federal government require individuals convicted of sex offenses to be listed on the sex offender registry after being released from custody; many states even include some misdemeanors as registerable offenses.¹⁶⁶ Sex offender registries, which can be required for life depending on the conviction, carry their own consequences “involving registration requirements, community notification, residential and employment restrictions, and potential government monitoring by GPS.”¹⁶⁷ While supporters of sex offender registration see registries as a way to monitor and restrict individuals convicted of some sex offenses, “no evidence supports the premise that public safety is thereby enhanced in any way.”¹⁶⁸ In fact, sex offender registration requirements often fuel cycles of recidivism and homelessness.¹⁶⁹

¹⁶² David A. Singleton, *The Criminalization of Poverty: Restoring Humanity by Forgetting the Past*, 81 OHIO ST. L.J. 1011, 1012–14 (2020).

¹⁶³ *Id.* at 1016.

¹⁶⁴ Crane, *supra* note 152, at 3.

¹⁶⁵ Kimble & Grawert, *supra* note 17.

¹⁶⁶ Crane, *supra* note 152, at 12–13.

¹⁶⁷ *Id.* at 15.

¹⁶⁸ Rachel Marshall, *I'm a Public Defender. My Clients Would Rather go to Jail Than Register as Sex Offenders.*, VOX (July 5, 2020, 8:00 AM), <https://www.vox.com/2016/7/5/12059448/sex-offender-registry> [<https://perma.cc/9QFN-HENQ>].

¹⁶⁹ *Id.*

2. Criminal Disenfranchisement

Criminal disenfranchisement, which refers to the loss of the right to vote due to a felony conviction, can be traced back to the Jim Crow Era—when Black codes were enacted to facilitate arbitrary arrests of Black citizens along with laws disenfranchising individuals with criminal convictions.¹⁷⁰ Despite its “racist legacy,” criminal disenfranchisement is constitutional¹⁷¹ and continues to exist in some form in thirty states.¹⁷² Currently, there are over five million individuals who have been disenfranchised because of a felony conviction.¹⁷³

3. Employment Challenges

In the U.S., a criminal conviction has severe negative impact on an individual’s employment and earning prospects.¹⁷⁴ Individuals who have spent time in jail or prison are “four to six times more likely to be unemployed than peers” who have never been incarcerated.¹⁷⁵ If an individual is able to find work with a criminal conviction, “it is often temporary, part-time, and low paying, thus lacking in prospects for upward mobility.”¹⁷⁶ Unsurprisingly, there is evidence that Black Americans are likely

¹⁷⁰ Kimble & Grawert, *supra* note 17.

¹⁷¹ *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

¹⁷² Kimble & Grawert, *supra* note 17.

¹⁷³ Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENTENCING PROJECT (July 28, 2021), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [<https://perma.cc/TD5H-B3TT>].

¹⁷⁴ Lucius Couloute, *The Case for Temporary Guaranteed Income for Formerly Incarcerated People*, THE APPEAL (June 9, 2021), <https://theappeal.org/the-lab/white-paper/the-case-for-temporary-guaranteed-income-for-formerly-incarcerated-people/> [<https://perma.cc/5X9S-2F3U>]; Kimble & Grawert, *supra* note 17.

¹⁷⁵ Dallas Augustine et al., *Why Do Employers Discriminate Against People With Records? Stigma and the Case for Ban the Box*, UCLA INST. FOR RSCH. ON LAB. & EMP. 1, 1 (July 2020), <https://irle.ucla.edu/wp-content/uploads/2020/07/Criminal-Records-Final-6.pdf> [<https://perma.cc/7JH3-2ANJ>].

¹⁷⁶ Kimble & Grawert, *supra* note 17.

more affected by a criminal conviction in the employment context than white Americans.¹⁷⁷ One study found that Black Americans with criminal records are “less than half as likely to receive consideration by employers, relative to their white counterparts.”¹⁷⁸ In response to this reality that criminal records are barriers to employment and “reinforce[] socioeconomic disadvantages along racial lines,” many states have passed “Ban the Box” or “Fair Chance” legislation that restricts when employers can request criminal histories and how they can use them.¹⁷⁹

4. Denial of Social Benefits

The severe limitations on employment opportunities for individuals with criminal records creates a “poverty trap,” fueled in part by the inability for many to lean on government welfare programs such as Temporary Assistance for Needy Families (“TANF”) or Supplemental Nutrition Assistance Program (“SNAP”) which, since the 1990s, exclude people with certain drug convictions on their records.¹⁸⁰ Additionally, certain convictions restrict access to public housing entirely.¹⁸¹ Blanket bans that restrict access to anyone with any type of criminal record are increasingly being called into question, but individuals with certain convictions can still be permanently excluded.¹⁸²

B. Pennsylvania Court’s Decision Not to Dismiss Charges in VTCs

Despite claiming to address the root causes of crime and reduce recidivism,¹⁸³ VTCs—and problem-solving courts more generally—leave many successful graduates with criminal

¹⁷⁷ Pager, *supra* note 160, at 961.

¹⁷⁸ *Id.* at 960.

¹⁷⁹ Augustine et al., *supra* note 175, at 1–2.

¹⁸⁰ Kimble & Grawert, *supra* note 17.

¹⁸¹ *Id.*

¹⁸² *Id.* (discussing efforts in New York and New Orleans to remove bans for all people with criminal records from public housing).

¹⁸³ Arno, *supra* note 10, at 1040.

records,¹⁸⁴ ultimately failing to address the reality that a criminal record often carries long-term consequences.¹⁸⁵ This failure to address collateral consequences strikes a fatal blow to the very purpose of having special courts in the first place. What problem is the court truly solving if, at the end of the program, former participants are left with the stain of a criminal record?

A recent case in Pennsylvania highlights some of this inherent hypocrisy.¹⁸⁶ *Commonwealth v. McCabe* has made its way to the state's Supreme Court, questioning whether Pennsylvania VTCs are governed by the same statutes as their diversion programs.¹⁸⁷ Pretrial diversion, normally run out of the prosecutor's office, refers to the process in which "an individual accused of a crime could comply with certain conditions and in return have their case dismissed."¹⁸⁸ As part of the criminal legal landscape since the 1960s, these programs attempt to reduce crime and to find individuals who will benefit more from "community restitution than criminal sanction" in order to address the issues that cause criminal behavior.¹⁸⁹

The VTC in Montgomery County, Pennsylvania was "established to more effectively address the needs of veterans cycling through the court and prison system"¹⁹⁰ and operates as a post-plea court with the option for an individual's charges to be reduced or dismissed entirely upon successful completion of the program.¹⁹¹ Accelerated Rehabilitative Disposition ("ARD") is a

¹⁸⁴ See Pomerance, *supra* note 137, at 192.

¹⁸⁵ See discussion *supra* Part II, Section A.

¹⁸⁶ See generally *infra* Part III.

¹⁸⁷ See *Commonwealth v. McCabe*, 230 A.3d 1199, 1203, 1209 (Pa. 2020) (granting the Petition for Allowance of Appeal).

¹⁸⁸ Scott-Hayward, *supra* note 11, at 53.

¹⁸⁹ Spurgeon Kennedy et al., *Promising Practices in Pretrial Diversion*, NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES (2009), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d201e1c8-5c1a-442c-a1bc-c7dc77909e28&forceDialog=0> [<https://perma.cc/T8UK-ZR2S>].

¹⁹⁰ MONTGOMERY CNTY. VETERANS TREATMENT CT., POL'Y AND PROC. MANUAL 1, 1 (April 2011), <https://www.montcopa.org/DocumentCenter/View/740/Veterans-Treatment-Court-Policy-and-Procedure-Manual?bidId=> [<https://perma.cc/DPH3-QZ9R>].

¹⁹¹ *Commonwealth v. McCabe*, 230 A.3d 1199, 1203 (Pa. Super. Ct. 2020).

“pretrial diversionary program” that rejects a punitive response to certain crimes in favor of a rehabilitative one, requiring dismissal of charges at the end of the program.¹⁹²

Mr. McCabe, after successfully completing Montgomery County’s VTC, was still left with his sentence of restitution despite his indigency.¹⁹³ He argued that “Chapter 3, the statutory authority for ARD, governs all diversionary programs, including Veterans Treatment Court” because: (1) problem-solving courts and diversion fall under the same umbrella; and (2) there is no other applicable statutory governance.¹⁹⁴ In March of 2020, the Pennsylvania Superior Court rejected his claims, interpreting the statute to cover only ARD, not problem-solving courts.¹⁹⁵ The court distinguished ARD and VTCs, finding it dispositive that ARD requires charges to be dismissed and VTCs only offer dismissal as a possible outcome.¹⁹⁶

Mr. McCabe argued that the Superior Court decision may create a disincentive by thwarting “the benefit of entering problem-solving courts . . . that charges are dropped once the defendant has completed the program.”¹⁹⁷ On the other side, Montgomery County’s District Attorney (“DA”) said, “[w]e are always concerned with how to best rehabilitate veterans and address their unique challenges. But that effort obviously has to be balanced against societal needs, including protecting society as well as making innocent victims whole. This decision recognizes that balance.”¹⁹⁸ What the DA failed to consider is that problem-solving courts *have* been grouped together with diversionary programs.¹⁹⁹ The court, rather than recognizing a balance between

¹⁹² *Id.* at 1204.

¹⁹³ *Id.* at 1202.

¹⁹⁴ *Id.* at 1205.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1206.

¹⁹⁷ Max Mitchell, *Justices to Eye if Diversion Program Rules Bind Problem-Solving Courts; Court Administration*, 43 PA. L. WKLY. 1, 2 (Sept. 1, 2020).

¹⁹⁸ Zack Needles, *Problem-Solving Courts Are Not Governed by ARD Statute, Court Rules; Criminal Procedure*, 43 PA. L. WKLY. 1, 4 (Apr. 7, 2020).

¹⁹⁹ See Scott-Hayward, *supra* note 11, at 51 (calling problem-solving courts the “dominant form of diversion” in the criminal legal system).

crime control and the root of crime, hid behind a veil of statutory interpretation, shying away from grappling with the larger question of whether problem-solving courts and pretrial diversion are actually all that distinct.

Pretrial diversion programs and problem-solving courts function very similarly with their criteria for eligibility, application process, acceptance or denial by the court, agreeing to the terms (therapy, community service, etc.), and taking part in the program.²⁰⁰ One difference, which the Pennsylvania Superior Court correctly pointed out,²⁰¹ is in the result of completing the program: pretrial diversion programs end with dismissing the charge(s),²⁰² while VCTs do not have this requirement.²⁰³

With similar goals of addressing the root causes of crime and offering a more therapeutic outcome to particular individuals in the criminal legal system and with similar methods to achieve those goals,²⁰⁴ pretrial diversion and problem-solving courts are not as distinct as the Pennsylvania Superior Court seems to think. This decision begs the question: if there are such strong similarities between the two types of programs, is there any legitimate reason why VTCs—and perhaps all problem-solving courts—should not require dismissal of charge(s) upon graduation?

²⁰⁰ Scott-Hayward, *supra* note 11, at 55.

²⁰¹ *McCabe*, 230 A.3d at 1206 (distinguishing ARD and VTCs in the legal implication of successful completion of the programs).

²⁰² *See* Scott-Hayward, *supra* note 11, at 55.

²⁰³ *See* Glassford, *supra* note 5, at 257.

²⁰⁴ Kennedy et al., *supra* note 189, at 33 (“Though pretrial diversion programs and problem-solving initiatives often differ in their histories, sponsoring agencies, funding sources, and available resources, they share many practices and goals. Whether relying on national standards, promising practices, or evidence-based practices, both attempt to provide the least restrictive alternative to traditional case processing and case disposition. Both recommend assessing individual defendant risks and needs and providing individualized responses to a defendant’s specific issues. Both target the defendant’s underlying issues or behaviors and call for measured responses to noncompliance. Both seek to enhance public safety and reduce recidivism through effective and comprehensive responses.”).

III. THE CASE FOR VTCs TO REQUIRE DISMISSAL OF CHARGE(S) UPON GRADUATION

A. What the Debate Over Pre- Versus Post-Adjudication Programs Misses

Much of the conversation surrounding the legal implication of graduation from problem-solving courts focuses on whether a pre- or post-adjudication model is more suitable for the goals of the program.²⁰⁵ Post-adjudication problem-solving courts require a guilty plea²⁰⁶ or a bargained-for plea agreement and a waiver of pretrial due process rights for entry into the program.²⁰⁷ These courts generally operate on a deferred sentencing model, leaving the decision regarding what to do with the case until after successful treatment; otherwise, the participant is sentenced as usual.²⁰⁸ Under this model, participation in the program often serves as the sentence after a participant makes a guilty plea.²⁰⁹ One justification for the post-adjudication model is that “the real incentive for participants is to become clean, sober, and productive.”²¹⁰ Another is that “convictions are a necessary

²⁰⁵ See generally Ryan S. King & Jill Pasquarella, *Drug Courts: A Review of the Evidence*, SENTENCING PROJECT (2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Drug-Courts-A-Review-of-the-Evidence.pdf> [<https://perma.cc/2ZX9-LDD8>]; see generally Meekins, *supra* note 22; see Hon. Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 785–801 (2008).

²⁰⁶ King & Pasquarella, *supra* note 205, at 3.

²⁰⁷ Meekins, *supra* note 22, at 88. See Suzanne M. Strong & Tracey Kyckelhahn, *Census of Problem-Solving Courts, 2012*, BUREAU JUST. STATS., at 6 (Oct. 12, 2016), <https://bjs.ojp.gov/content/pub/pdf/cpsc12.pdf> [<https://perma.cc/W7B4-N6JN>] (highlighting that as of 2012, 65% of all problem-solving courts and 81% of VTCs operated as post-plea courts).

²⁰⁸ Meekins, *supra* note 22, at 88.

²⁰⁹ See Michael D. Sousa, *Procedural Due Process, Drug Courts, and Loss of Liberty Sanctions*, 14 N.Y.U. J.L. & LIBERTY 733, 747 (2021).

²¹⁰ Tsai, *supra* note 22, at 619; see Caitlin T. Harrington, *Breaking the Cycle and Stepping out of the “Revolving Door:” Why the Pre-Adjudication Model is the Way Forward for Illinois Mental Health Courts*, 2013 U. ILL. L. REV. 319, 347 (2013) (regarding Mental Health Courts, “[a]ccording to some, this model is also preferable because by forcing the defendant to publicly admit

function of criminal prosecution.”²¹¹ This model is generally preferable to prosecutors because the case is disposed of before the individual goes into treatment,²¹² thus removing the case from a crowded docket, which “lessens the burden on prosecutors.”²¹³

This model, however, may be “potentially more onerous”²¹⁴ and “less therapeutic” for the participant because it coerces treatment with the requirement of a guilty plea, incentivizing individuals to take the plea regardless of actual guilt because the program is likely a better process than the traditional legal system.²¹⁵ Additionally, because one of the ten key components of effective drug courts and VTCs is prompt entry into the program,²¹⁶ post-plea programs may frustrate that goal since there is a “longer gap between the arrest and the treatment.”²¹⁷

Pre-adjudication problem-solving courts on the other hand, similar to diversion programs,²¹⁸ bring individuals into the program before entering a guilty plea, allowing them to escape further prosecution upon successfully completing the program.²¹⁹ Failure to complete the program results in the case being transferred back to traditional court, where it resumes its “pretrial stance.”²²⁰ Defense attorneys—rather than prosecutors—tend to prefer this model since their clients do not have to waive any rights or enter a guilty plea before entering the program.²²¹ Support for

guilt and accept treatment, he may begin to accept his mental illness and the effects that it has on his life and the lives of others.”).

²¹¹ Tsai, *supra* note 22, at 619.

²¹² Meekins, *supra* note 22, at 88.

²¹³ Harrington, *supra* note 210, at 322, 345.

²¹⁴ Hora & Stalcup, *supra* note 205, at 785.

²¹⁵ Meekins, *supra* note 22, at 88.

²¹⁶ See discussion *supra* Part I, Section D.

²¹⁷ Hora & Stalcup, *supra* note 205, at 785–86.

²¹⁸ See Meekins, *supra* note 22, at 87.

²¹⁹ King & Pasquarella, *supra* note 205, at 3.

²²⁰ Meekins, *supra* note 22, at 87.

²²¹ See *id.*

pre-plea problem-solving courts has also come from mental health professionals.²²²

Prosecutors, however, find this model less appealing because “the longer the case remains on the court’s docket, the more difficult it may be to preserve evidence and case files to put the defendant on trial”²²³ if the participant fails the program and the case ends up going to trial after all.²²⁴ Essentially, the concern is that witnesses and other sources of evidence will be less accessible or reliable if a case is not adjudicated as quickly as possible.²²⁵ In addressing prosecutorial concerns about the pre-adjudication model, law professor and public defender, Evan Tsai, notes that although “the idea of a pre-adjudication veterans treatment court may seem to flummox the uninformed prosecutor, the implementation of exactly such a court may indeed enhance public safety, save taxpayer money, and promote less recidivism better than a post-adjudication court or a model that combines both pre- and post-adjudication participants.”²²⁶

While the debate over pre- versus post-adjudication is relevant to whether problem-solving courts are living up to their purported purposes, it is not dispositive of the issue. It fails to address that both pre- and post-adjudication models may leave participants with a criminal record regardless of their success in the program.²²⁷ Scholars have claimed that pre-adjudication programs are favorable because they help successful participants avoid criminal convictions.²²⁸ Yet, in post-adjudication problem-solving courts,

²²² *Position Statement 53: Mental Health Courts*, MENTAL HEALTH AM. (June 13, 2019), <https://www.mhanational.org/issues/position-statement-53-mental-health-courts> [<https://perma.cc/E3JF-G35T>].

²²³ Harrington, *supra* note 210, at 345.

²²⁴ *See* Hora & Stalcup, *supra* note 205, at 801.

²²⁵ *See* Meekins, *supra* note 22, at 87.

²²⁶ Tsai, *supra* note 22, at 619.

²²⁷ *See* Harrington, *supra* note 210, at 341–42 (noting that the pre-adjudication model does not always result in a dismissal of charges).

²²⁸ *See* Tsai, *supra* note 22, at 623 (“[P]retrial diversion programs result in positive outcomes for participants, including less time spent incarcerated, avoidance of criminal convictions that make finding gainful employment difficult, and improved substance use and mental health outcomes.”); *see also* Meekins, *supra* note 22, at 87–88 (mentioning that one of the benefits of pre-adjudication problem-solving courts is that the dismissal of charges functions as

participants' convictions are sometimes removed from their records even with a guilty plea requirement²²⁹ and pre-adjudication courts do not necessarily require dismissal of charges upon successful completion of the program.²³⁰ Thus, even if all VTCs adopted a pre-adjudication model, participants could still graduate the program with criminal convictions on their records—the very consequence that scholars arguing for pre-adjudication courts are trying to avoid.²³¹

B. Requiring Dismissal of Charges Accounts for Collateral Consequences

This Note, rather than dancing around the reality of criminal convictions, proposes a more effective solution to this problem: VTCs should require that participants' criminal convictions be dismissed upon successful completion of the program. In a pre-adjudication model, this solution would be easy to achieve—VTCs could require that charges be dismissed if the participant graduates from the program. In a post-adjudication model, this could mean that convictions would be eligible for expungement. Expungement, though possible, would be much more complex and likely require new or revised legislation—varying from jurisdiction to jurisdiction—on what offenses and circumstances may be expunged.²³² Although problem-solving courts have “high

a reward for participants); Harrington, *supra* note 210, at 355 (“[B]y requiring defendants to plead guilty and giving few, if any, opportunities to have their charges automatically dismissed or expunged, [post-adjudication problem-solving] courts will require defendants to go through life with this mark on their record.”).

²²⁹ King & Pasquarella, *supra* note 205, at 3; Harrington, *supra* note 210, at 345.

²³⁰ See Glassford, *supra* note 5, at 260 (noting that in pre-adjudication VTCs, charges *can*—not *must*—be dismissed entirely).

²³¹ See Harrington, *supra* note 210, at 354.

²³² Because “[e]ach state . . . has its own laws about whose records are eligible for expungement, which offenses may be expunged, procedures for application, and definitions of how records will be managed under an expungement order[.]” trying to standardize VTCs through expungement requirements would be a messy affair. *What is “Expungement?”*, AM. BAR ASS’N (Nov. 20, 2018), https://www.americanbar.org/groups/public_education

completion rates,”²³³ scholars are divided over their ability to reduce recidivism.²³⁴ However, given the harsh reality of collateral consequences, VTCs—and perhaps problem-solving courts generally—cannot fully reduce recidivism or achieve therapeutic outcomes if participants are left with new or longer criminal records, regardless of their current efficacy.²³⁵

Procedurally, courts can ignore collateral consequences despite increased knowledge and understanding in recent years because “collateral consequences continue to be treated as if they are external” to the criminal legal process.²³⁶ There are exceptions to this lack of integration, namely the informal integration of collateral consequences into the plea bargaining process between prosecutors and defense attorneys²³⁷ and case law requiring judges to think about relevant collateral consequences in administering sentences.²³⁸ However, these exceptions remain “peripheral to the allocation of procedural entitlements”²³⁹ and peripheral to VTCs. Despite their goal of easing the struggles of re-entry into civilian life for veterans,²⁴⁰ VTCs will only impose more obstacles on the population that they are dedicated to diverting out of the traditional legal system as long as they leave veterans with criminal convictions.

/publications/teaching-legal-docs/what-is-_expungement-/ [https://perma.cc/F6F6-KLEA].

²³³ Scott-Hayward, *supra* note 11, at 57.

²³⁴ See *Problem-Solving Courts*, *supra* note 9, at 1578 (questioning the research on the efficacy of problem-solving courts); see also Scott-Hayward, *supra* note 11, at 57 (noting that there is little research on problem-solving courts’ effectiveness in combatting recidivism); but see Russell, *supra* note 87, at 401.

²³⁵ See discussion *supra* Part II, Section A.

²³⁶ Crane, *supra* note 152, at 4.

²³⁷ See discussion *supra* Part II, Section A.

²³⁸ See *U.S. v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009) (concluding that a court cannot impose a fair punishment “if it does not consider the collateral effects of a particular sentence.”).

²³⁹ Crane, *supra* note 152, at 4.

²⁴⁰ See Huskey, *supra* note 78, at 701.

CONCLUSION

Driven by principles of therapeutic jurisprudence,²⁴¹ VTCs were created to address the problems facing veterans today.²⁴² These courts differ from other problem-solving courts in that the veteran-offenders' actions are considered the result of both "external circumstances" and personal agency.²⁴³ This contextualization of criminal behavior directly repudiates the criminal legal system's traditional retributivist approach to justice.²⁴⁴

Yet, despite the therapeutic and rehabilitative principles that VTCs claim inspired and continue to drive them,²⁴⁵ there is no nationwide requirement that VTCs dismiss a veteran-graduates' criminal charges upon successful completion of the program.²⁴⁶ Thus, graduates whose charges are not dismissed may be left with criminal convictions or restitution, like in *Commonwealth v. McCabe*.²⁴⁷ Despite the growing awareness that collateral consequences often follow criminal convictions, VTCs continue to stamp veterans with convictions, exposing them to possibly life-long consequences.²⁴⁸

Simply requiring all VTCs to follow a pre-adjudication model will not resolve this issue.²⁴⁹ As long as veteran-graduates, and perhaps other problem-solving court graduates, are made victims of collateral consequences, VTCs will be inherently hypocritical programs that pride themselves in their noble goals, while remaining blind to the harsh reality of a veteran's life beyond the program.

²⁴¹ See *supra* Part I, Section B.

²⁴² See *supra* Part I, Section C.

²⁴³ See Collins, *supra* note 12, at 1484.

²⁴⁴ See *id.* at 1484–85.

²⁴⁵ See *supra* Part I.

²⁴⁶ See *supra* Part I, Section E.

²⁴⁷ See *supra* Part II, Section B.

²⁴⁸ See *supra* Part II, Section A.

²⁴⁹ See *supra* Part III, Section A.