“Society Owes Them Much”: Veteran Defendants and Criminal Responsibility in Australia in the Twentieth Century

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Abstract

Criminal responsibility now forms the subject of a rich vein of socio-historical scholarly work. But finding concrete ways to grasp the social dimension of criminal responsibility has proved challenging. This article presents one way of examining the social dimension of responsibility practices in criminal law: taking a social, rather than a traditional, or typical, legal unit of analysis, it presents a study of returned service personnel charged with serious offenses after returning home to Australia. I argue that, premised on veterans as a distinct social category, ex-soldiers are accorded special status in criminal adjudication and sentencing practices—as “veteran defendants.” The special status of “veteran defendants” has two substantive dimensions: “veteran defendants” as *über-citizens*, civic models or exemplars, to whom gratitude is owed and who generate responsibility in others involved in the adjudication and evaluation process, on the one hand, and legal persons with “diminished capacity” who have impaired or reduced responsibility for crime, on the other hand. These two substantive dimensions of the specialness of “veteran defendants” are underpinned by a formal quality of “veteran defendants”—that they are “see-through subjects,” both more known and more knowable than other defendants. In the Australian context, there is a historical interplay between the two substantive dimensions of the specialness of “veteran defendants,” with the latter becoming more prominent over time.

I. Introduction

Criminal responsibility is experiencing something of a “moment” in historicized studies of law. Socio-historical scholarship on criminal responsibility, which has developed in part in critical dialogue with the legal-philosophical scholarship that still dominates the field, has now come to form a vibrant domain in its own right. Like other work in the socio-historical scholarly tradition, this scholarship subjects criminal responsibility principles and practices to analysis in light of the substantive social, political and institutional conditions under which these principles and practices are given life.1 This approach has

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1 See further Markus D. Dubber & Lindsay Farmer, Introduction: Regarding Criminal Law Historically, in Modern Histories of Crime and Punishment 1 (Markus D. Dubber & Lindsay Farmer eds., 2007); see also Markus D. Dubber, Historical Analysis of Law, 16 Law & Hist. Rev. 159 (1998).
generated (and continues to generate) deep insights into criminal responsibility. Scholars working in the socio-historical tradition chart the dynamic relationship between ideas about criminal responsibility and the development of the modern state; the changing coordination and legitimation requirements of criminal law into the current era, the role of the police power, and the influence of Enlightenment liberalism on the structures and operation of the criminal law. These accounts reveal the complex and non-linear ways in which individual responsibility for crime has become the central organizing principle of the criminal law in the current era.

In order to build on existing socio-historical scholarly work on criminal responsibility, this article explores the social dimension of responsibility for crime, and presents one way in which it might be examined in concrete terms. By the social dimension of responsibility for crime, I refer to the way in which criminal responsibility practices refract (rather than reflect, in a straightforward or direct way) social norms around responsibility. As their name implies, socio-historical (and critical) scholars are particularly interested in the social dimension of responsibility for crime. As Nicola Lacey argues, criminal responsibility is an idea which is “located within a social practice” of holding individuals to account, and the “social, intellectual and institutional environment within which legal ideas emerge” influences the way legal rules are developed and applied. Alan Norrie suggests that, in criminal law, individual responsibility is always intermixed with social responsibility for wrongdoing. Finding concrete ways to examine the social dimension of criminal responsibility practices has not proved straightforward, however. As Lacey notes, in relation to conceptual accounts of criminal responsibility, the connection between the account and broader social ideas and institutions “too often slips out of view.” And for socio-historical scholars, who are aware of the significance of “the social” in criminal responsibility, translating this awareness into specific research projects has proved challenging.

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3 Nicola Lacey, Responsibility and Modernity in Criminal Law, 9 J. Pol. Phil. 249 (2001); Nicola Lacey, In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory, 64 Mod. L. Rev. 350 (2001); Nicola Lacey, Character, Capacity, Outcome: Towards a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law, in Dubber & Farmer, supra note 1, at 14.


6 See Celia Wells, “I Blame the Parents”: Fitting New Genes in Old Criminal Laws, 61 Mod. L. Rev. 724 (1998). Wells argues that “the mixed audience to which they are addressed and the mixed aetiology of the sorts of cases which enshrine principles of criminal law ensure that they refract rather than reflect cultural ideas of responsibility.” Id. at 735. As this suggests, the ideas of responsibility presented in the criminal law are mediated by the institutional and other aspects of the context in which those ideas are developed.


9 See Lacey, supra note 7, at 4.
How might we move beyond invocation of the significance of the social dimension of criminal responsibility, to examine it in concrete ways? One way to explore the social dimension of responsibility for crime is to adopt social (or, at least, more self-evidently social) rather than legal units of scholarly analysis. By this, I suggest taking a unit of analysis that differs from traditional legal units of analyses, which, typically, concern acts that can be committed by anyone. While there are multiple examples of “social” units of analysis that might be of interest in socio-historical and critical legal study, it is notable that socio-historical scholars typically borrow standard doctrinal or theoretical units of analysis for socio-historical inquiry (all defendants convicted of violent offenses, or child sexual assault, for example). There is, however, a good reason to adopt different units of analysis—it opens different ways of thinking about criminal responsibility. Studying a social category or group cuts across familiar legal categories and presents a way of tapping broader currents of meaning around responsibility.

For the empirical study presented in this article, I adopt the social category of ex-soldiers or war veterans. Ex-soldiers are a particularly apt social group for the study of criminal responsibility for two main reasons. First, they are a distinctive and privileged group, and, in the Australian context, enjoy a high profile. Over the course of the twentieth century, war has loomed large on the Australian social landscape, and it has proved to be important in Australia’s self-understanding, both popular and scholarly. War has played a crucial role in development of Australian national identity, and was integral to the project of nation building in the period after the end of the colonial era. Australian experiences of war in the twentieth century—World War I (WWI), World War II (WWII), Korea, Vietnam, and Iraq and Afghanistan—and other military engagements—such as East Timor—have varied significantly. But, despite declining numbers of active military personnel, fewer military casualties and scant public support for war or overseas deployment of Australian troops, the social status of returned service men (and women) has remained high. Second, veterans are a particularly apt social group for the study of criminal responsibility because, as former agents of the state, they bring the state into the criminal courtroom in distinctive ways. In the modern era of “mass soldiering in an age of total war,” soldiers are a group set apart from others, licensed to kill on behalf of the

13 See Davies, supra note 11.
state which otherwise enjoys a definitional monopoly on violence. This complicates the standard criminal law dynamic of “state versus individual” and opens the way for different, and more complex, responsibility dynamics to appear.

This article offers an analysis of the criminal legal treatment of men (all my cases concerned men) who, having been in the military, and, in some cases, having served in war, face serious criminal charges after returning home to Australia. The cases examined in this study span the period of the twentieth century (and the first years of the twenty-first century). The cases comprise reported and unreported criminal trials, appeals and sentencing hearings, in which the defendant was identified as an ex-soldier. Neither military justice cases nor civil cases are included in this study. My research indicated that there were a number of decisions in which the defendant’s military or war service was mere background to his or her trial or sentencing (such as when military or war service took place much earlier in the defendant’s life), and did not appear to have played a real role in evaluation of the defendant. This was the case even when the military service resulted in the defendant developing post-traumatic stress disorder (PTSD). In the majority of cases, however, military or war service was considered by the court to be relevant in some way: as my study reveals, military or war service has multiple effects in criminal adjudication and evaluation practices, and such effects vary over time and place. In some trials, military or war service relates to claims of mental incapacity, and thus to defenses that go to criminal responsibility. In some sentencing decisions, military or war service is considered in relation to (prior) good character, and interacts with other factors, such as age, guilty pleas, and remorse.

Premised on the status of veterans as a distinct social category, ex-soldiers are accorded special treatment in criminal adjudication and sentencing practices. To reflect this special status, I label them “veteran defendants,” a legal status arising from the social meanings of war, soldiers and soldiering. As I discuss in this article, the specialness of “veteran defendants” centers on the ex-soldier as a complex figure, simultaneously agentic and victim-like, courageous and vulnerable, both more and less than other defendants. I suggest that the special status of “veteran defendants” has two substantive dimensions: “veteran defendants” as über-citizens, civic models or exemplars, to whom gratitude is owed.

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16 My research generated over 55 written trial records: see Appendix. This is likely to be an underestimate of cases involving returned servicemen (and women), as the largest jurisdictions, the local court and the District court, dealing with minor offenses, do not produce written records.
17 As elsewhere, in Australia, the military justice system is sui generis and runs parallel to civilian systems. For an overview, see Gabrielle Appleby, The New Australian Military Court: A Fair Go for Defence Force Personnel?, The Conversation (Nov. 25, 2014) (http://theconversation.com/the-new-australian-military-court-a-fair-go-for-defence-force-personnel-7861). In relation to the civil cases, a number were brought by or against the Department of Veterans affairs, regarding matters such as entitlements.
and who generate some form of responsibility in others involved in the evaluation and adjudication process, and as individuals with “diminished capacity” whereby “veteran defendants” have impaired or reduced responsibility for crime. These two substantive dimensions of the specialness of “veteran defendants” are underpinned by a formal (as opposed to substantive) quality of “veteran defendants”—as “see-through subjects,” both more known and more knowable to the criminal law than other defendants. There is a historical interplay between the two substantive dimensions of the specialness of “veteran defendants,” with the latter becoming more prominent over time, as over the course of the twentieth century, ideas about war, soldiers and soldiering have changed.

In this article, I present my study of “veteran defendants” in three parts. In Parts II and III, I discuss the two substantive dimensions of the criminal legal treatment of returned servicemen that I suggest capture the special status of the “veteran defendant” in criminal law—the idea of the individual veteran as an über-citizen and the idea of ex-soldiers as legal persons with “diminished capacity.” In Part IV, I discuss the formal quality of “veteran defendants” that underpins each of these two substantive dimensions of specialness, “veteran defendants” as “see-through subjects.” I conclude with a brief discussion of the implications of my analysis for scholarly study of criminal responsibility.

At this point, a note of explanation about my use of the term criminal responsibility is useful. I use the term criminal responsibility broadly, to denote the dynamics of the processes of blaming and holding individuals accountable (rather than the “philosophical contours” of the concept of responsibility). In studying criminal responsibility, I seek to set these dynamics of blaming and holding individuals to account in their wider institutional and procedural context, taking into account sentencing decisions as well as adjudication, for instance. As a result, I am as interested in the language, arguments and reasoning used in the courtroom as I am in the substantive outcomes (not guilty, sentence reduced, etc.) of the decisions discussed here. My approach stretches across categories and distinctions typically taken for granted in criminal law theory. While scholars tend to take the building blocks of the study of criminal responsibility—responsibility and liability, conviction and sentencing, character and capacity, defenses and mitigation, and punishment and treatment—to be separate and distinct, I proceed on the basis that there is value in resisting the neat grooves into which some scholarly thinking on criminal responsibility has settled.

II. “Veteran Defendants” as Über-citizens

In this section of the article, I outline the first of the two substantive dimensions of the criminal legal treatment of returned servicemen that I suggest captures the special status of “veteran defendants.” This is the idea of the individual veteran as a über-citizen, a civic model or exemplar, to whom gratitude is owed and who generates some form of responsibility in

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20 See Nicola Lacey, Response to Norrie and Tadros, 1 Crim. L. & Phil. 267, 268 (2007).

21 For an overview of the outcomes of the decisions discussed in this article, see Appendix.
others involved in the evaluation and adjudication process. Here, while war or military service may be “regarded as part of [the defendant’s] good character,” the multiple ways in which such service is considered in the courtroom over-spill any one legal technology, such as good character. Thus, through a rather nuanced notion of gratitude for service and allegiance to the state, the defendant’s status as a returned soldier may go so far as to affect the way in which the offense reflects back on the defendant himself, altering the understanding of the crime or allowing the conduct to be described as “out of character” for the individual. As I discuss below, “veteran defendants” as über-citizens transcend the boundary between trial and sentence, and seems to have been most prominent after WWI, becoming less prominent over the course of the twentieth century.

This idea of “veteran defendants” as über-citizens is evident in the decision of R. v. Goldrick, handed down by the NSW Supreme Court in 1924. Goldrick had pleaded guilty to embezzlement on the basis of stealing from his employer several times over a period of six months. Because he had stolen money on several occasions, the trial judge did not give him the benefit of the sentencing discount available to first time offenders charged with minor offenses. On appeal, the court held that the nature of the offense, the circumstances in which it was committed and the defendant's status as a returned soldier “who had undoubtedly during the course of his war service displayed conspicuous gallantry and devotion to duty” warranted an extension of the sentencing discount to him. While this decision is a sentencing appeal—the conviction was neither challenged nor questioned, and it's clear that the Supreme Court was acting within the bounds of its discretion—the offense was effectively reconstructed for the purposes of sentencing—as a singular, minor offense—in part on the basis of the defendant’s veteran status.

The ethos imbuing this sort of case is an idea of exceptionality—based on the distinct and privileged social status of Australian soldiers. In Australia, returned servicemen (and women) became a distinct social group over the twentieth century (and law played a role in the way in which this group came to be constructed as a social group). It is possible to detect this idea of exceptionality early in the twentieth century in relation to soldiers who had served in the colonial wars, but WWI was a watershed moment, producing what historians have called the “citizen soldier.” Coming not long after Federation in 1901, WWI was regarded as the moment of the birth of the Australian nation. Soldiers, all of whom were volunteers, were looked upon in quasi-religious light, as

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22 See R. v. Watson, (1945) St R Qd 6, 10 (per Macrossan, A.C.J.). Reflecting English common law, in Australian criminal systems, good character evidence may be relevant at trial—to suggest that the defendant did not commit the offense(s)—and at sentencing—as mitigation. See generally Nigel Walker, Sentencing: Theory, Law and Practice [4.18] (1985).

23 R. v. Goldrick, (1924) 24 NSW St R 396, 399 (per Street, A.C.J.).

24 E.g., A Veteran Soldier in Want, Brisbane Courier, Sept. 15, 1900, at 14 (describing a Boer War veteran who had fallen into “miserable” poverty and entreating the government to provide “some light employment for the old man” in this “extremely touching case”).

25 See Patricia Grimshaw et al., Creating a Nation 209 (1994); see also id. at ch. 9. As these authors explain, the equivalent identity for women was the “citizen mother,” id. at 209.
“Anzac legends,” whose sacrifice had given birth to the nation. 26 It is notable that it was during WWI that the Returned Soldiers’ and Sailors’ Imperial League of Australia (RSSILA), which later became the Returned and Services League of Australia (RSL), was formed to advocate for the special interests of Australian servicemen (and later women). Since WWI, the RSSILA/RSL has performed this task on the basis of the “enhanced citizenship status” of its members. 27

In the aftermath of WWI, soldiers’ special and privileged status was not only reflected in their treatment in court, in decisions such as Goldrick, but in the development of a welfare scheme specifically for veterans. The development of such a scheme was premised on a sense of state and collective responsibility for the fate of ex-soldiers after the end of the war, which points to the way in which the construction of “veteran defendants” as über-citizens creates some form of responsibility on the part of others. The Australian state’s welfare scheme was multifaceted—it included a gratuity for all who served in the war, a pension scheme for the dependents of soldiers killed or disabled in war, land grants for which only veterans were eligible, loans to purchase War Service Homes, and special access to education and training. 28 The specialness of “veteran defendants” with “diminished capacity” (which I discuss in the next subsection of this article) was also evident in this scheme. During WWI, a split emerged in asylum care, in which returned servicemen were quarantined from civilian patients, either in separate wards or separate hospitals. This separation reflected both the stigma attached to mental illness and the more deserving status of mentally ill veterans, 29 as well as the idea that mentally ill servicemen might infect the civilian population. 30 Separate treatment for “mental soldiers” was part of the welfare scheme which gave effect to the privilege of “citizen soldiers.” The veteran welfare scheme was both expensive and far-reaching, and profoundly shaped Australian economic and social development in the inter-war period. Australian welfare was extended after WWII, when all families became eligible for benefits such as child endowment and the widows’ pension. 31

The notion that gratitude should be extended to “veteran defendants” on the basis of their demonstrated allegiance and service to the state seems to have been rather

26 “ANZAC” is an acronym—Australian New Zealand Army Corps—referring to Australians (and New Zealanders) who fought in WWI as part of the Allied forces. It has come to be used in Australian public discourse to refer to Australian military veterans in general. For critical discussion of ANZAC, masculinity and nationhood, see id. at 209, 218 and, generally, ch. 9; see also Lake, supra note 12.


31 See Grimshaw et al., supra note 25, at 257-58 & ch. 11.
nuanced. This is evident in the distinction between volunteers and conscripts, sharply drawn in one Queensland decision. In *R. v. Byers* in 1942, the Queensland Court of Appeal had to consider whether Byers’s 2.5 years suspended sentence for the drunk driving deaths of three road workers was adequate.\(^{32}\) The trial judge had taken into account that the defendant had been called up, was reported to be a “very good soldier,” and would be received back into his military unit if not sentenced to imprisonment.\(^{33}\) The appeal court was split about the propriety of this reasoning, in particular, whether a conscript was entitled to the same consideration as a volunteer, and the appropriateness of the non-custodial sentence. Webb, C.J., held that, “[i]n these terrible days when the services of every man must be used to the best advantage if the nation is to survive,” the trial judge’s decision should be left undisturbed.\(^{34}\) But Douglas, J., held that “service in the army, however meritorious, does not justify” a suspended sentence for a serious offense.\(^{35}\) Similarly, Philip, J., agreed that the sentence should be quashed, and a custodial sentence substituted, stating that, while a volunteer or someone who has undertaken active service is “entitled prima facie to some leniency from the State when he offends against its laws,” a conscript is not so entitled.\(^{36}\) While the fact that this was a wartime decision seems significant, the distinction drawn between volunteers and conscripts suggests that those who shouldered the burden of military service voluntarily enjoyed the highest esteem as *über-citizens*.

Another illustration of “veteran defendants” as *über-citizens* is provided by the more recent South Australian decision of *R. v. Hicks*.\(^{37}\) Hicks had served in the army in WWII and been stationed in Darwin, Northern Territory, when it was under attack from the Japanese, and later in New Guinea, and had sustained physical injuries. He was charged with causing death by dangerous driving, having killed two people in another car, and was sentenced to two years imprisonment. Hicks appealed his sentence, on the basis that the personal or subjective factors of his case meant he should have been subject to the more lenient provisions of the Offenders Probation Act 1913 (SA). The appeal court allowed the appeal, stating that Hicks “had to be given full credit for his service to his country in time of war.”\(^{38}\) According to the Chief Justice, who gave the leading judgment, “[a]ctual exposure to prolonged danger to life in the course of service to one’s country must, in my view, carry special weight in the sentencing process.”\(^{39}\) Although the

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\(^{32}\) *R. v. Byers*, (1942) St R Qd 277.

\(^{33}\) Extracted in id. at 282-83.

\(^{34}\) Id. at 278-79 (per Webb, C.J.).

\(^{35}\) Id. at 284 (per Douglas, J.).

\(^{36}\) Id. at 286 (per Philip, J.). Byers’s suspended sentence was quashed and he was sentenced to nine months imprisonment with hard labor instead.


\(^{38}\) Id. at 278 (per King, C.J.). The Court of Appeal upheld the sentence of two years imprisonment, but reduced the non-parole period from 12 months to 6 months.

\(^{39}\) Id. at 285 (per King, C.J.).
appeal court had no particular details of Hicks’s service, the leading judgment concluded that “it can be inferred that he volunteered his services for his country, went to areas where he was sent, and was subjected to the potential risks of action in notoriously adverse conditions and climate.”40 Here, this list of what are presented as logical or necessary inferences from military service—being willing to step up, a sense of obedience or duty, and bravery—are transformed into indicia of good character for criminal legal purposes.

A further example of “veteran defendants” as über-citizens to whom gratitude was due is provided by the decision of R. v. Allpass in 1993.41 The defendant was a WWII veteran, and had been captured by the Germans and held as a prisoner of war for three and half years. Allpass pleaded guilty to the sexual assault of a nine year old girl, and the trial judge deferred passing sentence, requiring instead that Allpass enter into a recognizance of $5000 to be of good behavior for five years. The Crown appealed the sentence on the basis of inadequacy but the appeal judges denied the appeal, affirming that it was appropriate to take into account Allpass’s “previous unblemished character and his impressive record of war service.”42 Similarly, in R. v. Chapman, the trial judge took into account the fact that the defendant, who had a gambling addiction and pleaded guilty to a charge of defrauding the Commonwealth of more than $274,000, “had given a lifetime of service to the Army and had attained a degree of excellence in his service.”43 The appeal court declined to adjust the sentence.

As is to be expected, the gratitude due to “veteran defendants” as civic models or exemplars extended only so far, and claims for special treatment did not always result in an outcome favorable to the defendant. In R. v. Lindsay, the defendant was unsuccessful in arguing that his sentence was manifestly excessive because the judge had failed to recognize sufficiently that Lindsay served in Vietnam, having been conscripted, without attempting to avoid that obligation.44 The appeal court declined to vary the sentence after Lindsay had pleaded guilty to drug supply and other related offenses, because the sentencing judge had adequately taken into account war service, which, according to the court, had to be weighed against the need for deterrence of this kind of offense.45

As these cases indicate, character proved a useful legal technology for accommodating war or military service, which was regarded “as part of [the defendant’s] good character.”46 In some instances, however, “veteran defendants” over-determined this legal technology. An illustration of this over-determination is provided by R. v. PGM, which

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40 Id. at 278 (per King, C.J.).
42 Id. at 566. The appeal court considered the non-custodial sentence “unduly lenient” but declined to intervene to alter it.
44 R. v. Lindsay, [2004] QCA 444.
45 Id. The court concluded that the allowance made for matters in Lindsay’s favor was adequate.
46 See R. v. Watson, (1945) St R Qd 6, 10 (per Macrossan, A.C.J.).
was decided in 2008.47 PGM was convicted of multiple counts of sexual assault and indecent assault of a child and sentenced to 7 years imprisonment with a non-parole period of 4.5 years. The prosecution appealed on the basis that the trial judge had wrongly classed the offenses as low-range, and given unwarranted weight to the defendant’s prior good character. The trial judge had referred to the defendant’s history of volunteer work and involvement with other Vietnam veterans as positive evidence of his contribution to the community and an indication that he was a community minded citizen.48 The trial judge concluded that the offenses—which took place over a number of months—were out of character for the defendant.49 With this conclusion, “veteran defendant” status operates to eclipse the offenses themselves. However, in this instance, the appeal court disagreed with the trial judge: it granted the appeal, and held that the judge was not warranted in according prior good character “very significant weight,” because that failed to recognize that the conduct was a “determined and conscious course of offending.”50

The über-citizen dimension of the specialness of “veteran defendants” was particularly prominent when the defendant had received awards or commendation for his military service, or when his service had been otherwise exemplary. Indeed, in R. v. Hicks, discussed in detail above, the court lamented the absence of “more concrete and specific submissions” about the defendant’s war record, apparently on the basis that this would readily justify special treatment.51 The court stated that “the services rendered by each servicemen or group of servicemen differed in quality and duration”: in some cases of “exceptional valour” or serious injury, “society owes them much,” while in other cases in which “service was not greatly different from that of numerous civilians at home,” “society owes them less.”52 Such evidence was available in the decision of R. v. Evans, in which the defendant pleaded guilty to several charges relating to a violent robbery that took place on an Australian Navy ship.53 In rejecting the prosecution appeal against manifest inadequacy of sentence, the court noted that Evans was commended for his “courage and exemplary conduct in the finest tradition of the Navy,” evidence that formed the basis for the sentencing judge’s conclusion that the crimes were out of character.54 The court noted that, although the offense involved a breach of trust against the Navy, Evans was strongly

48 Extracted in id. [42].
49 See id. [44].
50 Id. The appeal court quashed the sentences and substituted longer sentences with an effective non-parole period of 7.5 years.
52 Id.
54 Id. [24] (emphasis added).
supported by serving members, including a commanding officer, who gave his view that Evans still had a lot to contribute to society.\textsuperscript{55}

The construction of “veteran defendants” as \textit{über-citizens} creates some form of responsibility on the part of others involved in the criminal adjudication and evaluation process. From my study, it is apparent that it is judges who assume this “responsibility for responsibility.” In apportioning responsibility between, broadly, the state who sent “veteran defendants” to war or benefited from their military service, and the individual who committed the offense, judges were engaged in an informal but meaningful weighing up of the weight of the sacrifice made by the “veteran defendant” on the one hand and the seriousness of the offense on the other. As Chief Justice King (an ex-serviceman himself) put it in \textit{R. v. Hicks}, discussed above, “[w]hen a returned serviceman offends against the criminal law and society demands that he be punished, that serviceman is entitled to credit proportionate to the service which he rendered to it in time of war.”\textsuperscript{56} In this balancing task, it is judges who must resolve any tension between giving effect to the specialness of “veteran defendants,” and, at the same time, ensuring that no impression was given that “because a man has been to war he should be in any way privileged to commit an offence.”\textsuperscript{57} This was a difficult task because, as connoted by the concept of status, “veteran defendants” were different from other defendants, and their adjudication and evaluation at law seems to threaten to overwhelm neat legal technologies, for instance, of good character.

\section*{III. The “Diminished Capacity” of “Veteran Defendants”}

In this section, I outline the second of the two substantive dimensions of the legal treatment of returned servicemen that I suggest captures the specialness of “veteran defendants,” the idea of ex-soldiers as legal persons with “diminished capacity,” as having impaired or reduced responsibility for crime because their actions were in some sense caused or determined. As I discuss in this section of the article, the construction of “veteran defendants” as legal persons with “diminished capacity” emerges when war trauma is

\begin{itemize}
  \item \textsuperscript{55} Id. [24].
  \item \textsuperscript{57} See \textit{R. v. Goldrick}, (1924) 24 NSW St R 396, 401 (per James, J.).
\end{itemize}
regarded as “a contributory cause” in the commission of the offense,\textsuperscript{58} or otherwise mitigates the offending. Again, the idea of ex-soldiers as legal persons with “diminished capacity” over-spills legal categories, such as particular mental incapacity defenses, and affects the criminal legal treatment of “veteran defendants” in various ways.

To reflect change over time, in this part, I present what I am suggesting about “veteran defendants” as legal persons with “diminished capacity” as two points on a continuum, “mental soldiers” I and “mental soldiers” II, to convey looser and tighter versions of the idea that war causes crime, and that the conduct of “veteran defendants” is in some (weaker or stronger) sense, determined.\textsuperscript{59} In broad terms, from my study, the transition from the first to the second of these two points on a continuum corresponds to the period of the Vietnam War.

\textbf{A. “Mental Soldiers” I}

Alongside the idea of the soldier as “Anzac legend” that appeared even before the end of WWI, another cultural figure emerged, the nerve-shattered returned soldier or the “mental soldier.” “Mental soldiers” were regarded as “peculiar, weak in character, morally unreliable, troublesome or even dangerous.”\textsuperscript{60} These soldiers were regarded as “failed Anzacs” because they had either been “unable to stand the heat of battle or they were cowards who lacked the moral fibre to stay in the trenches and face the enemy.”\textsuperscript{61} The mental trauma caused by WWI was encapsulated in the term “war neurosis” or “shell shock,” a loose term, which captured a range of mental and emotional symptoms.\textsuperscript{62} As a simple concept that allowed those on the home front to grasp the “distant horrors of war,” “shell shock” captured the public imagination.\textsuperscript{63} In a way that paralleled other developments in psychological knowledge, the concept of “shell shock” constructed a “thoroughly social phenomenon—the emotion associated with trench warfare, death and dying”—as a disease.\textsuperscript{64} This disease and the war trauma it connoted were significant factors in the association between war and crime, as it provided a ready explanation for criminal conduct, and reduced responsibility, as I discuss below.

\textsuperscript{58} R. v. Watson, (1945) St R Qd 6, 10 (per Macrossan, A.C.J.).

\textsuperscript{59} The term “mental soldiers” was coined by Larsson, Shattered Anzacs, supra note 29, to describe the effects of war on soldiers, but I use it here in a sui generis way to capture the idea of the “diminished capacity” of “veteran defendants.”

\textsuperscript{60} Larsson, Shattered Anzacs, supra note 29, at 157.

\textsuperscript{61} Id. at 159-60.


\textsuperscript{64} Blackmore, supra note 62, at 145. On the basis that conditions like hysteria, neurasthenia and cowardice were blamed on the individual, Blackmore concludes that “the range of disabilities attributable to war was partly determined by the way the war itself had been defined.” Id. at 149.
The specter of the “mental soldier” on the post-WWI landscape was part of a wider recognition of the negative effects of the war on individual soldiers and the communities to which they returned. Even before the end of WWI, major Australian newspapers were spotted with stories about the “downfall” of ex-servicemen—those who had been charged with serious offenses, or who had turned to drink.⁶⁵ In 1919, soldiers rioted in Sydney and Melbourne,⁶⁶ and the 1920s saw growing popular and official or governmental awareness of the “soldier problem with alcohol.”⁶⁷ Historians have suggested that police, juries and magistrates were sympathetic to returned soldiers, at least up to point.⁶⁸ Nonetheless, newspaper commentary conveyed concern about the attitude that unruliness—“brawling and boozing”—was part of being a good soldier.⁶⁹ And in the 1920s (and also in the 1940s), there was a jump in arrest rates, indicating a “short, sharp intensification of personal conflict” that accompanied the return of servicemen,⁷⁰ and, in the interwar period, ex-servicemen came to dominate men’s prisons and asylums.⁷¹

“Mental soldiers” were the subject of considerable governmental consternation. This was reflected in debate about the aetiology of “shell shock.” Although the concept of “shell shock” generally enjoyed expert and popular acceptance, during and after WWI, there was widespread discussion in Australia (and elsewhere) about whether “shell shock” cases were the result of war trauma or whether they reflected pre-disposition or hereditary weakness. The then popular theory of predisposition influenced the attitudes and practices of military psychiatrists and others, who placed the blame for “nervous” conditions squarely on the shoulders of the soldier affected.⁷² As Kate Blackmore argues, the “indeterminate” nature of “shell shock” (evidence of the disease might be flimsy, and proof of the trauma might be inconclusive) meant that, in Army doctors’ assessments, responsibility for it could be readily transferred to the individual soldier, making him ineligible for the Army pension.⁷³ To avoid any implication that war caused illness, military and government personnel used terms such as “anxiety state,” and prohibited the use of the term

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⁶⁵ E.g., Soldier’s Downfall, Sydney Morning Herald, Oct. 20, 1913, at 9 (summarizing the trial for a sexual offense of a South African veteran whose counsel stated that his client’s “downfall was due to drink”).

⁶⁶ See Garton, supra note 28, at 197.

⁶⁷ See Nelson, supra note 63, at 89.

⁶⁸ See Garton, supra note 28, at 197-99; see also Judith A. Allen, Sex and Secrets: Crimes Involving Australian Women since 1880, at 135 (1990).

⁶⁹ See The Commie-Paper Digger; Absurd Legend Disappears; Army Back to 1918 Tradition, Sydney Morning Herald, June 24, 1942, at 6 (celebrating the demise of the “communist” paper, Digger).

⁷⁰ Garton, supra note 28, at 197. As Garton notes, this reflects in part the presence of more men in the community, and the decline in crime during the war years. Alongside crime, rising divorce rates were regarded as indicia of disruption.

⁷¹ See Allen, supra note 68, at 130. As Allen argues, women bore the “interpersonal brunt” of WWI when men returned home. Id. at 131.

⁷² See Muir, supra note 30.

⁷³ Blackmore, supra note 62, at 143, 145; see also Larsson, Shattered Anzacs, supra note 29, at 159.
“shell shock,” an approach self-consciously designed to discourage fabrication and ensure such a diagnosis was “unheroic and generally undesirable,” in turn enabling the government to minimize the costs of dealing with incapacitated veterans.\(^74\)

From my study, it is not clear whether, in the years after WWI, the debate about the aetiology of “shell shock” extended to the courtroom, or to what extent the conduct of “veteran defendants” with “shell shock” was judged to be caused or determined.\(^75\) But there is other evidence to indicate that “mental soldiers” were treated sympathetically when they came to the attention of the courts, having been charged with offenses.\(^76\) In her close study of arrest rates and trials for violent and sexual offenses against women, Judith Allen concludes that the “heroes of the First World War received recognition in criminal justice responses” to violence against women.\(^77\) And based on her close examination of cases of non-fatal violence against women, Elizabeth Nelson argues that ex-soldiers readily raised war trauma to explain or mitigate allegations of violence at home.\(^78\) Nelson suggests that, generally, in public fora such as courts, such explanations were not questioned, as juries and judges proved willing to accept that returned soldiers could not control themselves under stress or drink, and thus that “men’s violence was an involuntary action.”\(^79\) As this suggests, war trauma readily enabled a legal reading of the conduct of “veteran defendants” as determined.

The tendency to blame individual “mental soldiers” rather than the war itself persisted after WWII, a period marked by significant continuities in psychiatric knowledge from the post-WWI period.\(^80\) From my study, in the first decades after WWII, suggestions in court that military or war service produced “mental soldiers” were greeted with some resistance. An illustration is provided by the 1955 decision of R. v. Pepper, which concerned a WWII veteran charged with two counts of indecent assault of a boy of about fifteen years of age. The appeal court refused to alter the sentence of two years imprisonment, despite accepting that the offenses could be traced to a state of mind affected by “some mental upset” in the army. The appeal court concluded that this “mental upset” was “secondary” to the “nervous upset” of his early “unfortunate upbringing.”\(^81\) While it seems

\(^{74}\) See Muir, supra note 30.

\(^{75}\) My own study did not identify any cases of WWI veterans who were constructed as having “diminished capacity,” and thus, at this point, I rely on research of others.

\(^{76}\) Newspaper reports include reference to trials for minor crimes at which “war neurosis” was considered relevant. E.g., War Neurosis and Crime, Sydney Morning Herald, Dec. 4, 1946, at 4 (in which the Minister for Repatriation is reported as welcoming any appeal on behalf of a WWI veteran suffering from “war neurosis” who had been convicted of the theft of a garden hose).

\(^{77}\) Allen, supra note 68, at 155.

\(^{78}\) See Nelson, supra note 63, at 90-95.

\(^{79}\) Id. at 99.


\(^{81}\) R. v. Pepper, (1955) 72 WN (NSW) 100, 101 (per Maxwell J.).
that the specter of homosexuality as perversion colors this judgment, it captures a more generalized idea that “mental soldiers” were considered to be pre-disposed to such a “nervous” state prior to their combat experience.

Some returned servicemen defendants were regarded with greater sympathy, even if factors other than war service were considered significant causes of their criminal conduct. In *Reg. v. Simpson*, decided in 1959, the defendant was convicted of manslaughter, and sentenced to three years imprisonment, for killing another army warrant officer who had begun an “irregular association” with Simpson’s wife. The court observed that having just been diagnosed at the military hospital as suffering from an “anxiety state,” his wife’s departure produced a “serious emotional upset” in the defendant. Simpson had had a “long and honourable career” and been commended in the highest terms by his commanding officers. But, according to the court, even giving “fullest weight” to the factors personal to the defendant, the sentence was inadequate. More recently, in *R. v. Logan*, the court dealt with a young defendant who had pleaded guilty to unlawful possession of a weapon and break and enter, having committed an offense with an army mate. At trial, Logan was sentenced on the basis that, at the time of the offense, he was suffering from PTSD and major depression after “harrowing and horrifying” experiences serving in East Timor, and treated leniently by the court because, as a result of the “peculiar and necessary bonding and mateship encouraged by the army,” he felt obliged to help his co-offender. On appeal, the NSW Court of Appeal reiterated that this was indeed an exceptional case, in which leniency was warranted, and the prosecution appeal against manifest inadequacy of sentence failed.

Another category of “veteran defendants” whose conduct was depicted as caused or determined comprised those veterans who, having been traumatized in war, had come to self-medicate with drugs and alcohol. In a way that prefigures the stronger causal relationship between war and crime, discussed below, where successfully used in mitigation, these servicemen demonstrated some nexus between the offending, the trauma and self-medication. Thus, even if a “veteran defendant” had “sought refuge in drugs and alcohol” as a result of trauma while in military service, evidence that the offending was for financial gain meant such a history would not greatly assist him. In *Tran v. R.*, the defendant pleaded guilty to supplying heroin and, because of the quantity, was sentenced to the maximum penalty of twenty years imprisonment. The sentencing judge had accepted that

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83 Id. at 593.
84 Id. at 594. The sentence was increased to five years imprisonment by the appeal court.
86 Extracted in id [17], [19].
87 Id. [27].
88 See Henderson v. R., [2012] NSWCCA 65, [20]. Henderson had served as part of the peacekeeping mission in East Timor where he witnessed the death of a civilian.
Tran had been using drugs to self-medicate after his traumatic experiences in the Vietnam War (Tran was diagnosed with PTSD by experts for the defense).\(^9\) In this instance, however, the sentencing judge did not accept that the offense was the result of drug addiction as it involved some planning.\(^9\) Similarly, in *Headley v. The Queen*, the defendant had pleaded guilty to several counts of drug manufacture and possession.\(^9\) In appealing sentence on the grounds of severity, the defense argued that Headley, a Vietnam veteran who had been diagnosed with PTSD, had become addicted to amphetamines in dealing with his “total physical incapacitation” (“as a means of coping”), and that he became involved in the offenses primarily to fund and provide for his own use of the drugs.\(^2\) The appeal court held that these matters had been adequately taken into account by the sentencing judge and declined to reduce the sentence.

**B. “Mental Soldiers” II**

The second of the two points on the continuum regarding “veteran defendants” as legal persons with “diminished capacity,” “mental soldiers” II, captures the stronger causal relationship between war and crime—the idea that war itself is criminogenic, an idea that rose to prominence in the decades after the Vietnam War. As I discuss in this subsection, from my study, significant war trauma, and a tight nexus between the trauma and the offending, provided strong grounds for claims of exculpation and mitigation.

This idea of “veteran defendants” as legal persons with “diminished capacity,” whose conduct is, in a significant way, determined, is particularly strong for veterans of the war in Vietnam. As was the case elsewhere, the Vietnam War was deeply controversial in Australia, and the effect of the conflict on individual soldiers became the subject of strong popular interest, evident, for instance, in media commentary.\(^9\) The combination of the specifics of that conflict and both contemporaneous and subsequent developments in psychiatric knowledge readily produced a veteran with “diminished capacity,” that is, a defendant with reduced responsibility for crime. For instance, in *R. v. Mawson*, the defendant’s PTSD and acquired brain injury arising from his service in Vietnam formed the basis of his plea of diminished responsibility to the charge of murdering a family friend, a plea accepted by the prosecution.\(^9\) In sentencing Mawson, the NSW Supreme Court referred to him as “one of the walking wounded,” stating that although his wound could not be seen, it was “deep, it was permanent, it was painful, it profoundly changed his personality and it was

\(^9\) Tran v. R., [2006] NSWCCA 266.

\(^9\) Id. [12]. The appeal against sentencing severity was allowed on another ground.


\(^9\) Id. [22], [24], [41].

\(^9\) E.g., War Creates Crime Wave, Sydney Morning Herald, May 20, 1984, at 31 (describing an American TV documentary entitled “Vietnam Requiem” covering Vietnam veterans then in prison, and suggesting that the America experience is “just as relevant here, to help Australia come to a belated understanding of our returned veterans”).

suffered in the course of doing his duty for his country."95 The court accepted that Mawson’s disorder resulted in “increased vigilance, perception of threat, and a tendency to return to states of mind associated with former trauma” and that his criminal responsibility was substantially impaired.96 Mawson’s sentence (of seven years imprisonment) was moderated to reflect his war service, which had had “such a catastrophic effect on him.”97

While Mawson’s disorder affected him in the requisite way (such that his criminal responsibility was substantially impaired), in other cases, “veteran defendants” were held to have retained their cognitive and volitional capacities, despite the effects of trauma occurring during war or military service. In R. v. Lange, the defendant raised insanity (mental incompetence, as it is known in South Australia) in response to multiple charges of wounding, aggravated robbery and attempted murder, having held a neighbor prisoner in an attempt to obtain money.98 The court accepted Lange’s argument that his experience fighting in an Australian army mercenary group in Vietnam had caused PTSD, depression and cognitive impairment (although, on the basis of the expert evidence, the court doubted that his brain damage was the result of head injury in Vietnam, suggesting instead that it was the result of prolonged alcohol abuse).99 But the court held that, while his conduct may have been “explicable” by reference to these impairments, Lange remained in control at the time of the offenses, and carried out a “purposeful and directed” course of conduct with the motive of obtaining money to buy alcohol.100 As a result, the presumption of mental capacity was not displaced and Lange was not able to raise an insanity defense.

As the decisions of both Mawson and Lange suggest, in cases in which “veteran defendants” raised mental incapacity defenses, the court exhibits significant concern with the aetiology of the defendants’ condition, a concern which echoes the expert concern with the causes of “shell shock,” discussed above. In relation to PTSD, preoccupation with aetiology in part reflects the clinical definition of PTSD, in which, uniquely, aetiology (a traumatic event) is a component.101 It also reflects a long-standing concern with the boundaries between doctrines such as insanity and intoxication that has troubled the treatment of mental incapacity in criminal law.102 But in addition, this concern reflects the

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95 Id. [8].
96 Id. [29], [31].
97 Id. [41].
99 Id. [42], [61].
100 Id. [42], [61].
102 See for discussion, Arlie Loughnan & Nicola Wake, Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication, in General Defences in Criminal Law: Domestic and Comparative Perspectives 113 (Alan Reed & Michael Bohlander eds., 2014).
special status of "veteran defendants": because it is war or military service that sets these individuals apart from other defendants, making them "veteran defendants," as "mental soldiers," the aetiology of their disorder is an essential component of their claim to special status.

It appears from the cases that courts are alive to the possibility that war trauma might be blamed for the "diminished capacity" of "veteran defendants" when it was most properly sheeted home to personal failings. For instance, in a case involving a defendant who had been convicted of two counts of rape, and appealed his continuing detention order, the court expressed doubt about the defendant’s own account of his experience in Afghanistan and Lebanon. With reference to the expert evidence tendered in court, the court found that the defendant was “intelligent and calculating” and “not unaware” of the benefit which might accrue to him from a diagnosis of PTSD.103 This led the court to cast doubt on the expert psychiatric diagnoses of personality disorder, and thus the defendant’s need for treatment: the court rescinded the continuing detention order to which the defendant was subject, and ordered a supervision order.104 Similarly, in The Queen v. Goodwin; The Queen v. McGregor, the appeal court declined to reduce McGregor’s sentence for drug trafficking and possession on the basis that it was open to the trial judge to conclude that McGregor was seeking to avoid all responsibility for the offenses “by attributing his conduct solely to his [Vietnam] war service” which had resulted in PTSD.105 The sentencing judge had observed that McGregor’s complaints about how his life had been changed by the war were tinged with “self-pity and self-indulgence,” and concluded that the defendant could not take “further refuge behind his war service and acquired physical and psychiatric conditions.”106

The strongest claims for the idea that “veteran defendants” had "diminished capacity," and reduced responsibility for crime, arose when ex-soldiers claimed to have had a flashback to the war, or to be in some state of derealization, at the time of the offense. One of the most important Australian cases on the doctrine of automatism concerned a defendant who had served in Vietnam and who later killed a person he believed was his wife’s new (woman) partner when he was in what he alleged was an automatistic state.107 There was expert psychiatric evidence to the effect that the defendant’s state of depersonalization or disassociation was brought on by emotional stress, and that, when the killing was committed by the defendant, he believed he was in combat and

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103 AG for Qld v. Hynds and Anor (No. 3), [2012] QSC 318, [118]. The court also noted other falsities and Hynds’s lack of remorse in the course of the sentencing decision.

104 Id. [122]-[124], [135].

105 The Queen v. Goodwin; The Queen v. McGregor, Unreported, VSCA, 14 Aug. 2013. The appeal court also noted that there was “no doubt” that McGregor’s PTSD had been raised on sentencing for his previous conviction of drug trafficking.

106 Extracted in id.

accompanied by another soldier. Similarly, in *R. v. Walsh* in 1991, the defense raised insanity in response to the defendant’s murder charge, on the basis that Walsh suffered from a delusional belief that he was in Korea defending himself from an enemy soldier at the time he killed a fellow veteran. Department of Veterans’ Affairs files and medical files indicated that Walsh had been diagnosed with “war neuroses” and “anxiety neurosis” as early as 1965. The jury rejected the insanity defense, and, on appeal, the court held that the defendant’s delusions should have been considered as part of the circumstances relevant to the question of whether the accused was acting in self-defense.

The exception to the sympathy with which cases of “diminished capacity” were regarded is those cases in which military training and service appeared to enable “veteran defendants” to commit a particular crime more effectively. For example, in *The Queen v. King*, the defendant was charged with several offenses, including assault and unlawful imprisonment, which followed a violent siege of his landlord and her property. Both the sentencing judge and appeal court accepted that the offenses were committed when King was suffering from PTSD that followed his involvement in an accident while serving in the Australian Defence Force in Somalia, but each concluded that the fact that King said he did what he did in a “professional military fashion in a war-time situation” indicated lack of remorse. In this case, the individual agency and skill associated with military training and service seems to have undercut and, indeed, to have been incompatible with, any claim to “diminished capacity.”

When evidence of war trauma or war-induced mental illness was insufficiently strong to ground a defense like insanity or diminished responsibility, it could still be taken into account in sentencing “mental soldiers.” In some of the cases in my study, the evidence of the mental (and physical) health effects of war was merely part of a standard sentencing inquiry into how the defendant would experience prison. In other cases, war trauma or war-induced mental illness was considered to have only a limited mitigating effect. For example, in *R. v. O’Sullivan*, it was acknowledged that the “disruptive effect” of war service might make it hard for someone to adapt to civilian life, but this was considered inadequate for substantial mitigation. Similarly, in *R. v. Simpson*, the defendant’s PTSD and depression, which followed his service in Vietnam, were regarded as mitigating, but, as he was charged with two counts of indecent assault and gross indecency and

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108 Id. This expert evidence was not left to the jury and the appeal court held that this was one of the grounds on which the trial miscarried.


110 Id. at 422.


112 Id. (referring to the unreported lower court decision).

113 E.g., *R. v. EK*, [2013] QCA 278.

114 E.g., *R. v. O’Sullivan*, Unreported, NSWCCA, 9 April 1986 (in which the sentencing judge is quoted as stating, “Whilst I can appreciate the difficulty in adaptation to civilian life I am unable to find in this [psychiatric] evidence any acceptable basis which provides substantial mitigation of the prisoner’s present culpability”).
such offenses are “not uncommonly committed by persons of good character,” these factors were considered to be of limited weight.\textsuperscript{115}

In other cases, evidence of war trauma or war-induced mental illness had strong mitigating effects, meaning the “veteran defendant” was readily regarded as having “diminished capacity.” In The Queen v. El Aridi, in which the defendant had pleaded guilty to trafficking and possession of heroin, the court held that all the circumstances of the case—severe post-traumatic stress from service in the war in Lebanon, and loss of members of his family in that war—reduced his culpability and made him “an inappropriate subject for general deterrence.”\textsuperscript{116} Similarly, in R. v. Kennedy, the court stated that the defendant’s mental illness (PTSD) resulting from his exposure to “terrible events” in Vietnam meant less weight was given to the principle of general deterrence in sentencing Kennedy for several counts of sexual assault.\textsuperscript{117} As these last extracts indicate, in some cases, the special treatment of “veteran defendants” with “diminished capacity” as “mental soldiers” is expressly linked to rationales for sentencing (such as deterrence). But, as I discuss below, it is only in a few cases that such rationales are expressly identified by the courts. This feature of the legal treatment of “veteran defendants” relates to another dimension of their specialness, to which I now turn.

IV. “Veteran Defendants” as “See-through Subjects”

The third and final perspective through which I outline the specialness of “veteran defendants” is a formal rather than substantive dimension of that specialness in that it relates to the form or shape of the category of “veteran defendants,” rather than the substantive meaning according to “veteran defendants.” This is the idea of “veteran defendants” as “see-through subjects,” more known and knowable to the law than other criminal defendants. Here, I suggest that the construction of “veteran defendants” as “see-through subjects” means that veteran status eclipses the person of the defendant, such that part of his individuality is hidden behind his veteran identity. Each of the two substantive dimensions of the “see-through” quality of “veteran defendants” that I discuss below rests on the “knowability” of “veteran defendants,” which itself rests on a particular type and quantum of information being made available to courts.

As mentioned above, there are a couple of cases involving “veteran defendants” in which sentencing rationales are expressly referenced in sentencing decisions found in my study.\textsuperscript{118} Both the reduced relevance of general deterrence for “mental soldiers” and

\textsuperscript{115} R. v. Simpson, [2013] SASCFC 28 [15].

\textsuperscript{116} The Queen v. El Aridi, Unreported, VSCA, 4 May 1998. The appeal court held that the sentencing judge had taken all this into account in the appropriate way and declined to alter the sentence on the grounds of severity.

\textsuperscript{117} R. v. Kennedy, [2011] NSWDC 223, [14], [21]; see also R. v. Egan, [2013] NSWCCA 196 (in which the special circumstances of the case—the defendant’s adjustment disorder, which arose after service in the South Pacific and Indonesia—reduced the need for general deterrence, id. [48]-[53]).

\textsuperscript{118} E.g., R. v. Mawson, [2007] NSWSC 1473, [41] (in which the defendant’s PTSD makes it “inappropriate to take into account any significant degree of general deterrence”); R. v. Rushby, [2002] VSCA 44, [9] (in
the belief that serving military personnel who have already sought to mend their ways are considered to be more likely to be rehabilitated seem to hint at the special status of “veteran defendants.” But, somewhat counter-intuitively, I suggest that it is the general absence of express reference to sentencing rationales in cases involving “veteran defendants” that provides the strongest evidence of the “see-through” status of this cohort. The general absence of express references to sentencing rationales in the cases suggests that it is not sentencing law that explains (or legitimates) these decisions, but rather something more dependent on social and cultural norms, with the effect that the case of “veteran defendants” is rendered sui generis, with judicial references to standard sentencing considerations less relevant than might otherwise be the case. As I have suggested in this article, this is the idea of the specialness of “veteran defendants,” a legal status premised on the social meanings of war, soldiers and soldiering.

The idea of “veteran defendants” as “see-through subjects” means that veteran status eclipses the person of the defendant, such that some part of his individuality is hidden behind his veteran identity. The “knowability” of a particular “veteran defendant” is based on his or her membership in a status group and, as a result, what functions to make such individuals “knowable” to the criminal process also operates to obscure. This is the case even in sentencing, the part of the criminal process in which, it has been argued, the individual is re-contextualized, having been de-contextualized for the purposes of conviction. The specificity of the individual veteran before the court is to some extent subsumed beneath more generic aspects of his status as a “veteran defendant”—understood via currents of bravery, honor, loyalty and service (“veteran defendants” as über-citizens) or sacrifice, harm, injury and trauma (“veteran defendants” as legal persons with “diminished capacity”), according to dynamic social ideas about war, soldiers and soldiering.

Some evidence of the “see-through” quality of “veteran defendants” is apparent in the enumeration of collateral costs of punishment for particular defendants. The decision of R. v. T. provides an illustration of this aspect of the effect of military service. T, who was in the Air Force at the time of the hearing, was charged with and pleaded guilty to multiple counts of sexual assault of his daughter when she was aged between 5 and 12 years. In this case, although the leading judgment noted that the otherwise good character of perpetrators of these offenses provides cover to conceal the criminal acts, the judge concluded that the seriousness of the defendant’s (likely) loss of his gratuity and retirement benefits was given insufficient weight by the sentencing judge. For the majority, it was significant that the defendant could have denied the charges, ensuring which the defendant’s “good start at rehabilitation” was thought to be connected to the “highly disciplined environment of the Australian Defence Forces”).

119 See Norrie, supra note 5.

120 In this respect, the sentencing decisions involving “veteran defendants” seem similar to those involving “white collar” defendants, where loss of professional standing and reputation appears to be significant: see John Braithwaite, White Collar Crime, 11 Ann. Rev. Sociology 1 (1985).
that the proceedings would not be finished before T had completed 20 years of service and been entitled to claim his benefits. According to Justice Allen, the payments due to T as a “long serving serviceman” would be crucial in “the transition, without undue hardship, from the regulated life of the serviceman to the competitive life of the general community in which the serviceman lacks experience as a member of the workforce.”

Several other decisions indicate that the loss of entitlements is regarded as a significant loss for convicted veterans. As this suggests, the pension due to a “long serving serviceman” is recognition of good character, and its loss a weighty collateral punishment for wrongdoing.

It is in light of the idea of “veteran defendants” as “see-through subjects” that the judicial consideration given to the currently serving defendant’s probable discharge from the military should be understood. The case law indicates that judges take the consequences of criminal conviction for serving military particularly seriously (arguably, more so than other defendants losing jobs). An illustration is provided by R. v. Lancaster; R. v. Touhy, in which the appeal court quashed the defendants’ sentences of imprisonment, replacing them with good behavior orders, on the basis that the fact that Lancaster and Touhy “would suffer certain discharge from the Army as a consequence of the imposition of a custodial sentence was not made perfectly clear” to the sentencing judge, and thus he did not give “the consequences of discharge” sufficient weight. In R. v. Labanon, the appeal court twice refers to dishonorable discharge from the Navy and loss of financial entitlements as “additional punishment.” Probable discharge seems to be regarded with such seriousness because, unlike loss of a civilian job, discharge is considered a negative moral-evaluative judgment of the defendant himself.

Further evidence of the “see-through” quality of “veteran defendants” is apparent in the way military service quantifies the defendant’s professional standing in the community, in part by reference to his rank. By this, I mean to suggest that the regimented and hierarchical nature of the military facilitates ready moral assessments of “veteran defendants,” according to which some defendants are “more deserving” than others. In R. v. Caple, it was accepted that the defendant, who was convicted of seriously assaulting his partner’s 19 month old son, was a “senior sailor of very good character.” According to the court, the trial judge had given sufficient weight to good character, alongside other relevant matters (including the serious injury the child sustained) and it declined the

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122 Id. at 40. The defendant’s effective sentence was reduced from 14 years imprisonment. See also Reg. v. Simpson, (1959) 76 WN (NSW) 589, 593.
124 R. v. Labanon; ex parte Commonwealth DPP, [2006] QCA 529, [17], [19].
126 R. v. Labanon; ex parte Commonwealth DPP, [2006] QCA 529, [17], [19].
Crown appeal against sentence.128 Similarly, in Reg. v. Simpson, the defendant was a warrant officer who had had a “long and honourable” career, had been decorated and whose service was spoken of “in the highest of terms.”129 Simpson was charged with the manslaughter of another officer for whom his wife had left him. In that case, Simpson’s past record and conduct, his service to the community and “the substantial [financial] loss [of benefits] which he must sustain” was taken into account (although it was not sufficient to justify the sentence, which was still considered too lenient).130

The “knowability” of “veteran defendants” itself rests on a particular type and quantum of information available to the court for adjudication and evaluation. When veterans came to the attention of the courts, and made claims about their war and military service, they were aided in part by the comprehensive record-keeping of the armed forces and the Repatriation Department which later became the Department of Veterans Affairs (DVA).131 For my purposes here, what is significant is that, as a practical matter, such records provided the evidentiary basis on which the “knowability” of the ex-soldier depends. Through the records available to the courts, “veteran defendants” become more known and more knowable at law. These records seem to have been particularly important for “mental soldiers.” For instance, in R. v. Kennedy, the defense tended a DVA assessment dating from the time of the offenses (for which Kennedy was charged much later), which revealed “the terribly pathetic lifestyle” that Kennedy had at that time.132 Stephen Garton argues that Repatriation Department files effectively captured personal problems of returned servicemen as war problems, and the knowledge generated about these individuals and families seemed to be proof that there was something “especially troubled” about these men and their family lives.133 In relation to “veteran defendants,” the criminal justice lens achieves the same thing—the effect of a veteran’s status as a “mental soldier” is to scope subsequent offenses through a war trauma lens. In this sense, “veteran defendants” are made subjects via a range of indirect, informal measures of governance and the various expert social knowledges that came to the fore in Western liberal political systems in the twentieth century.134

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128 Id. at 117.
130 See id. at 594. The sentence was increased from 3 years to 5 years by the appeal court.
131 These sources have been mined by historians: for a discussion of the value of these sources, see Larsson, Shattered Anzacs, supra note 29, at 23-25.
132 R. v. Kennedy, [2011] NSWDC 223, [15]. This evidence assisted the defendant in that it allowed the court to conclude that specific deterrence should not play a “significant part” in sentence because the offenses occurred some time earlier, had not been repeated and were the “product of the situation which existed at the time.” Id. [24].
133 Garton, supra note 28, at 199.
V. Conclusion

This article has offered a study of the criminal responsibility of returned service personnel charged with serious offenses after military or war service. Aiming to build on existing socio-historical work on criminal responsibility, my study presented one way of examining the social dimension of criminal responsibility practices. As I discussed in this article, premised on veterans as a distinct social category, ex-soldiers are accorded special status in criminal adjudication and sentencing practices—as “veteran defendants.” My analysis of the special status of “veteran defendants”—centering on the veteran as a complex figure, simultaneously agentic and victim-like, courageous and vulnerable, both more and less than other defendants—is not merely an acknowledgment that, as part of a wider set of penal institutions and practices, adjudication and evaluation are cultural practices, influenced by legal traditions and norms as well as the relevant law. Rather, I have suggested that the social status of veterans is the basis on which members of this cohort are given special treatment in law—as über-citizens, who generate responsibility in others involved in the criminal process, and individuals with “diminished capacity” for crime. Each of these two substantive dimensions of the specialness of “veteran defendants” is underpinned by a formal quality of “veteran defendants”—as see-through subjects,” both more known and more knowable than other defendants. I suggested that there was a historical interplay between the two substantive dimensions of the specialness of “veteran defendants,” with the latter becoming more prominent over time. By way of conclusion, I briefly highlight some of the implications of my approach by reference to the existing scholarly literature on criminal responsibility.

Veterans have already received some attention in criminal responsibility scholarship. In the legal-philosophical scholarly tradition—broadly, the scholarship inspired by normative philosophical thinking—veterans are one example of what have been labelled “difficult” responsibility cases. These cases present a challenge because the individuals involved do not seem to have the necessary “human agency” to be appropriately held to account for their actions through criminal law, but are not amenable to categorization within traditional categories of non-responsibility, such as insanity. In relation to these “difficult” responsibility cases, the approach now prominent in the legal-philosophical literature utilizes prosecutorial standing to “resolve” such cases. Several authors have questioned the state’s standing to blame certain individuals, including military veterans and poor individuals. Challenging the standing of the state to pursue a criminal charge

137 In significant part, this approach is inspired by Antony Duff’s work on responsibility as answerability. See Duff, supra note 136.
is a procedural solution because it invokes the scope of legal authority, and so the issue of the (questionable or problematic) responsibility of certain individuals is pushed to the side.

My own study offered an alternative perspective on criminal responsibility in one category of these “difficult” types of cases. It showed that the criminal responsibility of “veteran defendants” is negotiated in complex ways—across the distinctions between responsibility and liability, conviction and sentencing, character and capacity, defenses and mitigation, and punishment and treatment that, as mentioned above, generally mark criminal responsibility scholarship (including socio-historical scholarship). My study revealed that the relevance of veteran status to criminal law adjudication and evaluation did not reduce to any one of these grooves marking criminal responsibility scholarship. Indeed, it is clear that veteran status is significant in multiple respects, and at multiple points in time, in criminal law practices. As a result, focusing exclusively on the criminal trial, the moment of adjudication—the standard focus of criminal responsibility scholars—would have occluded other significant dimensions of the complex negotiation of responsibility in criminal law.

In particular, my study revealed that, in relation to the responsibility of “veteran defendants,” the practice of sentencing was especially significant. While sentencing is not typically a focus of criminal responsibility scholarship, it seems clear that it may be understood as a negotiation of responsibility in some loose but important sense, and thus that it would be usefully incorporated into responsibility scholarship. In a scholarly context in which the dominant theories of sentencing, grand notions of retributivism or just deserts, seem to operate in a way that is disconnected from sentencing practices (and oriented according to abstract, moral notions of culpability and harm), the individualization of sentencing—mitigation and aggravation—is not well theorized. The personal or individual aspects of the practice of sentencing have resisted reduction to desert theory, with its overarching limitation of proportionality, and have been considered in a “theoretical vacuum.” In particular, there is a “residue of mitigating factors,” such as character, which does not fit neatly within dominant sentencing theory. War service seems to fall into its own “miscellaneous” mitigation category. My own study revealed that veteran status

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140 It is possible that veteran status impacts on the decision to prosecute (which, in the Australian context, revolves around a public interest test) and on jury decision-making (where such status is known) but my sources—reported and unreported judgments—did not enable me to test these possibilities.

141 See Andrew Ashworth, Sentencing and Criminal Justice 156 (5th ed. 2010).

142 See Allan Manson, The Search for Principles of Mitigation: Integrating Cultural Demands, in Mitigation and Aggravation at Sentencing 40, 45 (Julian V. Roberts ed., 2011).

143 Id.

144 Nigel Walker suggests that, in terms of mitigation, war service can be chalked up as “moral credit.” According to Walker, the idea that the defendant should receive “moral credit” for conduct that is unconnected to the offense (such as war service or donation of a kidney) is based on two assumptions: “that
is taken into account at sentencing in multiple ways—both for and against the defendant—and, indeed, that sentencing practices revealed a rather nuanced accounting of responsibility for crime.

This nuanced accounting for responsibility for crime exposed the ways in which actors other than the defendant are implicated in responsibility within the criminal process. As discussed in relation to “veteran defendants” as über-citizens, ascribing greater agency to “veteran defendants” generated responsibility in others involved in the adjudication and evaluation process. I suggested that judges assumed responsibility for weighing up the sacrifices involved in war or military service to the state, on the one hand, and the seriousness of the offense on the other (“responsibility for responsibility”). By contrast, and as discussed in relation to “veteran defendants” as legal persons with “diminished capacity,” to the extent that individuals were to blame for their war or military trauma, with mental illness characterized as a personal failing rather than a consequence of war or military service to the state, society’s responsibility for them is reduced. This complex economy of individual and social responsibility became apparent in adopting a social rather than a traditional or typical legal unit of analysis. Appreciating this complex economy of responsibility demands that socio-historical or critical scholars of criminal responsibility think differently about individual defendants, and take into account the broader institutional, social and political context in which they are located.

In recent years, the special status of returned service men (and women) charged with committing crimes has generated calls to establish specialist veterans’ courts, along the lines of such courts in the U.S.145 The calls for veterans’ courts in Australia represent the epitome of the idea of “veteran defendants” as a distinct and privileged group. While, to date, such courts have not been established, generalized appreciation that soldiers deserve gratitude and sympathy, on the one hand, and that war is criminogenic and ex-soldiers have special needs,146 on the other, continues to impact on criminal responsibility practices.

offenders are being sentenced not for the offense but for their moral worth,” and “that moral worth can be calculated by a sort of moral book-keeping, in which spectacular actions count for more than negative decency.” See Walker, supra note 22, [4.20]. Walker’s palpable scepticism about these “remarkable” cases seems to arise from the fact that they involve a reduction in the “proportionate” sentence on grounds other than harm and culpability.


146 See Criminal Records Begin When Their War Ends, supra note 145. Other narratives about “veteran defendants’ subsist. For instance, a Northern Territory magistrate was reported in the press as telling a former soldier who had punched a man in the head that “public generosity” for servicemen suffering from PTSD was being eroded by its use as a reason for committing crime. See Joe Hildebrand, A Quiet Word to the Nation’s Bravest, The Daily Telegraph, Mar. 15, 2014, at 43.
VI. Appendix: Index of Cases

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