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Discharged and Discarded: The Collateral Consequences of a Less-Than-Honorable Discharge

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ESSAY

DISCHARGED AND DISCARDED: THE COLLATERAL CONSEQUENCES OF A LESS-THAN-HONORABLE MILITARY DISCHARGE

*Hugh McClean**

Between 2011 and 2015, 57,141 soldiers, sailors, and airmen were separated from service with less-than-honorable (LTH) discharges for minor misconduct related to mental health problems. These discharges disproportionately affected servicemembers of color. These veterans and others like them face daunting reintegration challenges when they return to civilian society, as federal agencies and state governments deny them the benefits that usually facilitate a veteran's smooth transition to civilian society. This Essay adds to the scholarly discourse on military discharges by comparing these veterans' plight to that of persons arrested or convicted of criminal offenses, who also suffer from collateral consequences related to their criminal records long after their involvement with the criminal legal system. Military review boards, the Department of Defense (DOD) agencies charged with reviewing and correcting veterans' discharges after service, were never intended to address the collateral consequences of military discharges, and the laws governing discharge review do not provide the boards with the authority to do so; however, DOD may finally be poised to institute reforms. This Essay responds to DOD's recent call for the military service branches to consider the collateral consequences of military discharges in reviewing veterans' petitions for discharge upgrades. This Essay examines why current laws and regulations are inadequate to implement DOD's call and asserts that reform efforts aimed at addressing the collateral consequences of arrests and convictions in the criminal legal system must be replicated in the military. This Essay concludes that, without reform, a permanent class of dishonored veterans will never successfully reintegrate into society.

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INTRODUCTION

Mr. Gonzalez served in the U.S. Army from 2000 to 2014 as a motor transport operator, or truck driver.¹ During his first deployment to Iraq,

1. See Memorandum from Mr. Gonzalez to the Convening Gen. of the U.S. Army Recruiting Command 1 (Mar. 5, 2013) (on file with the *Columbia Law Review*). The author supervised students representing Mr. Gonzalez (an actual client whose name has been changed to protect confidentiality) while serving as the Director of the Bob Parsons Veterans Advocacy Clinic at the University of Baltimore School of Law. Prior to founding

Mr. Gonzalez led multiple convoys that were struck by improvised explosive devices (IED), mortars, and small arms fire.² After witnessing the deaths and injuries of fellow soldiers in these attacks, he returned from Iraq and began experiencing symptoms of depression, anxiety, and sleep disturbances, and he sought counseling from the Army.³ He was diagnosed with major depressive disorder and referred to a psychotherapy program.⁴ His symptoms worsened, and he was subsequently diagnosed with post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) and was prescribed antidepressants.⁵ Despite knowing that Mr. Gonzalez suffered from depression and alcohol dependence related to his PTSD and TBI, the Army deployed Mr. Gonzalez twice more during his career, exposing him to additional IED blasts and trauma.⁶

The incident that led to Mr. Gonzalez's discharge occurred three years after his last deployment. He was arrested on post for driving while intoxicated with his son in the vehicle and was charged under the Uniform Code of Military Justice (UCMJ).⁷ Mr. Gonzalez accepted an "Article 15," an administrative forum for addressing violations of the UCMJ, and was found guilty by his unit commander.⁸ The Army subsequently discharged him for the misconduct and issued an other-than-honorable (OTH) discharge, despite his severe history of PTSD and TBI and his successful completion of three deployments.⁹ The criminalization of Mr. Gonzalez's mental health condition effectively terminated his chances of receiving medical treatment in service for his PTSD or TBI and reduced his chances

the clinic, the author served as an officer in the U.S. Air Force Judge Advocate General's Corps for more than ten years, where he litigated military discharge cases both for and against the Air Force.

2. *Id.*

3. *Id.*

4. Memorandum from an Attending Psychiatrist, Trauma Recovery Program, Walter Reed Nat'l Mil. Med. Ctr., to the Record 1 (Feb. 24, 2014) (on file with the *Columbia Law Review*).

5. See Memorandum from Mr. Gonzalez, *supra* note 1, at 1. Mr. Gonzalez began experiencing increased nightmares, startle response, and irritability. Memorandum from an Attending Psychiatrist, *supra* note 4, at 2.

6. Memorandum from Mr. Gonzalez, *supra* note 1, at 1.

7. See *id.* The UCMJ is a federal law that codifies military criminal offenses. 10 U.S.C. §§ 801–946 (2018). Mr. Gonzalez was charged with various UCMJ offenses, including (1) driving while under the influence of alcohol; (2) driving while under the influence of alcohol while transporting a minor; (3) failure to transport a child under age sixteen in a seat belt; and (4) operating a motor vehicle with the operator not restrained by a seat belt. See *id.* § 913.

8. 10 U.S.C. § 815. Article 15 of the UCMJ authorizes commanders to hear evidence, make findings of guilt, and punish servicemembers without a trial by court-martial. Servicemembers have the right to decline Article 15 adjudication and demand trial by court-martial.

9. Certificate of Release or Discharge from Active Duty, U.S. Dep't of the Army (Aug. 2009) (on file with the *Columbia Law Review*).

of obtaining Department of Veterans Affairs (VA) healthcare after service.¹⁰ More importantly, it discounted his medical condition and characterized his service such that it would create lasting barriers to employment, education, housing, healthcare, and other critical aspects of civilian life.

Unfortunately, Mr. Gonzalez's case is not unique. In 2017, the Government Accountability Office (GAO) reported that 62% of servicemembers discharged from service for misconduct between 2011 and 2015 had been diagnosed with PTSD, TBI, or some other mental health disorder within the two years preceding their discharges.¹¹ Of those who were discharged, 23% received an OTH discharge and 70% received a "general" discharge.¹² The GAO concluded that servicemembers with mental health issues were being disproportionately discharged with OTH or general discharges, collectively referred to as "less-than-honorable (LTH) discharges," without due consideration of their mental health statuses.¹³

Statistically, Mr. Gonzalez's skin color also likely played a role in his discharge. In June 2020, the House Armed Services Committee Military Personnel Subcommittee held a hearing where a GAO official testified that servicemembers of color were twice as likely to face courts-martial as white servicemembers and were more likely to face nonjudicial punishment.¹⁴ In response to these statistics, top officials in the Air Force and Army testified that determining the causes of the racial disparities would require further

10. Letter from U.S. Dep't of Veterans Affs. to Mr. Gonzalez (Mar. 7, 2015) (on file with the *Columbia Law Review*); see also 38 C.F.R. § 3.12(c)(6) (2020) ("However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity . . . or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits.").

11. Randall B. Williamson, U.S. Gov't Accountability Off., GAO-17-260, DOD Health: Actions Needed to Ensure Post-Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations 12 (2017) [hereinafter GAO Discharge Report]. According to the report, the military separated the servicemembers for minor misconduct including drug use, absenteeism, and insubordination. *Id.* at 6.

12. *Id.* at 14. A general discharge signifies separation with a lesser degree of honor than an honorable discharge. The discharge is given when "faithful service is marred by negative aspects of a person's duty performance or personal conduct, but the negative aspects definitely outweigh the good." U.S. Dep't of the Air Force, Instr. 36-3208, Administrative Separation of Airmen, para. A3.3. (2019) [hereinafter AFI 36-3208].

13. See GAO Discharge Report, *supra* note 11, at 31.

14. Racial Disparity in the Military Justice System—How to Fix the Culture: Hearing Before the Subcomm. on Mil. Pers. of the H. Armed Servs. Comm., 116th Cong. (2020), (statement of Brenda Farrell, Dir., Def. Capabilities and Mgmt. Team, U.S. Gov't Accountability Off.); U.S. Gov't Accountability Off., GAO-20-648T, Testimony Before the Subcomm. on Mil. Pers., Comm. on Armed Servs., H.R., Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial Disparities 19 (2020) [hereinafter GAO Racial Disparity Report] (statement of Brenda S. Farrell, Dir., Def. Capabilities and Mgmt.); see also National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 540I, 133 Stat. 1198, 1369-71 (2019) (directing the Secretary of Defense to report the race, ethnicity, and gender of the victim and the accused in courts-martial, to establish criteria to determine when data indicating racial disparity should be further reviewed, and to take action to remedy racial inequality in the military legal system).

exploration.¹⁵ The tone-deaf responses from senior Department of Defense (DOD) officials echoed a DOD study that had reached the same conclusion some fifty years earlier.¹⁶

The cycle of injustice, then, is that servicemembers are promised benefits and, once enlisted, exposed to serious health hazards such as PTSD, TBI, and other mental health disorders.¹⁷ When they exhibit symptoms

15. See Barry K. Robinson & Edgar Chen, *Déjà Vu All Over Again: Racial Disparity in the Military Justice System*, Just Sec. (Sept. 14, 2020), <https://www.justsecurity.org/72424/deja-vu-all-over-again-racial-disparity-in-the-military-justice-system/> [https://perma.cc/EV46-BMZ4] (“Despite these jarring statistics, the GAO testified that it was not in a position to determine whether these figures were the result of unlawful discrimination.”).

16. See *id.* (noting that, in 1972, a task force commissioned by President Richard Nixon found that inadequate educational advancement opportunities and lack of diversity in the leadership corps drove racial disparities in the military justice system). Recent events, too, underscore the problem of institutionalized racism in the military. On January 6, 2021, a mob of President Donald Trump’s supporters invaded the U.S. Capitol, resulting in the death of five Americans. Among the mob of violent and armed protesters were military veterans with training and expertise, some in full tactical gear, who played an instrumental role in the attack on elected officials, including the Vice President, while Congress was engaged in carrying out its constitutional duties. See, e.g., Air Force Vet Photographed in Capitol Riot Arrest in Texas, *Mil. Times* (Jan. 10, 2021), <https://www.militarytimes.com/news/your-military/2021/01/11/air-force-vet-photographed-in-capitol-riot-arrested-in-texas/> [https://perma.cc/L8YL-Z7Y9] (reporting that retired Air Force Lt. Col. Larry Randall Brock, Jr. was charged in the District of Columbia on one count of entering or remaining in a restricted building without lawful authority and one count of violent entry on Capitol grounds); Michael Biesecker, Jake Bleiberg & James Laporta, Capitol Rioters Included Highly Trained Ex-Military and Cops, *AP News* (Jan. 15, 2021), <https://apnews.com/article/ex-military-cops-us-capitol-riot-a1cb17201dfddc98291e5badc257> [https://perma.cc/LQ4D-5CGN]; Rob Kuznia & Ashley Fantz, They Swore to Protect America. Some Also Joined the Riot, *CNN* (Jan. 15, 2021), <https://www.cnn.com/2021/01/12/us/military-extremism-capitol-riot-invs/index.html> [https://perma.cc/PY6L-2J5Q]. A 2019 Military Times survey of its readers found that more than one-third of active-duty troops and half of servicemembers of color had personally witnessed examples of white nationalism or racism in recent months. See Leo Shane III, Signs of White Supremacy, Extremism Up Again in Poll of Active-Duty Troops, *Mil. Times* (Feb. 6, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/02/06/signs-of-white-supremacy-extremism-up-again-in-poll-of-active-duty-troops/> [https://perma.cc/MS2-M5NX] (describing examples of white nationalist or ideologically driven racism such as swastikas drawn on servicemembers’ cars, stickers supporting the Ku Klux Klan, and Nazi-style salutes between individuals); see also Kim Hjelmggaard, Secret Audio Recordings Detail How White Supremacists Seek Recruits From Military, Police, *USA Today* (Oct. 15, 2020), <https://www.usatoday.com/story/news/2020/10/15/splc-releases-audio-how-neo-nazi-group-recruits-military-police/3661460001/> [https://perma.cc/9F2R-NCC4]; Military, Veterans, and Society Program, Virtual Roundtable: A Conversation on Race in the Military, *Ctr. for a New Am. Sec.* (Sept. 23, 2020), <https://www.cnas.org/events/virtual-roundtable-a-conversation-on-race-in-the-military> [https://perma.cc/TF64-Y4NP].

17. See generally Lisa K. Richardson, B. Christopher Frueh & Ronald Acerno, Prevalence Estimates of Combat-Related Post-Traumatic Stress Disorder: A Critical Review, 44 *Austl. & N.Z. J. Psychiatry* 4, 5, 15 (2010) (reporting that the prevalence of combat-related PTSD in U.S. military veterans since the Vietnam War ranges from about 2% to 17%). The prevalence of PTSD among servicemembers and veterans is difficult to determine due to underreporting and differences in diagnosing, sampling, and measurement strategies. See *id.* at 12 (attributing the considerable variability in the results of the study to differences in

related to these illnesses in the form of misconduct, they are drawn into the military legal system. Statistics show that this is twice as likely to happen to servicemembers of color than to white servicemembers.¹⁸ Involvement in the military legal system is then used as a basis for discharge and recorded as an LTH discharge in official records, creating a lifelong stigma of dishonorable service for the veterans.¹⁹

Much has been written about the collateral consequences of criminal convictions that prevent individuals with criminal histories from becoming productive members of society.²⁰ Less well understood, however, are the

sampling strategies and measurement strategies). Generally, the rate of PTSD among veterans varies by military conflict. *Id.* at 2 (listing findings of PTSD prevalence rates among veterans of the Vietnam War, Gulf War, and conflict in the Middle East). According to one major study of Vietnam veterans, 15.2% of male veterans and 8.5% of female veterans suffered from PTSD at the time of the 1988 study. Richard A. Kulka, William E. Schlenger, John A. Fairbank, Richard L. Hough, B. Kathleen Jordan, Charles R. Marmar & Daniel S. Weiss, *Trauma and the Vietnam War Generation: Report of Findings From the National Vietnam Veterans Readjustment Study 52* (Routledge 2013) (1990). Researchers estimated 30.9% of males and 26.9% of females had suffered from PTSD at some time in their lives. *Id.* at 53. According to the VA, in any given year, about 11% to 20% of veterans from Operation Iraqi Freedom, Operation Enduring Freedom, and Operation Desert Storm (the Gulf War) receive a PTSD diagnosis. How Common is PTSD in Veterans?, PTSD: Nat'l Ctr. for PTSD, U.S. Dep't of Veteran Affs., https://www.ptsd.va.gov/understand/common/common_veterans.asp [<https://perma.cc/UN9T-K989>] (last visited July 27, 2021). Moreover, PTSD is more prevalent in the military population than in the general population. See Posttraumatic Stress Disorder, Nat'l All. on Mental Illness, <https://www.nami.org/About-Mental-Illness/Mental-Health-Conditions/Posttraumatic-Stress-Disorder/> [<https://perma.cc/2BAF-BFSJ>] (last visited July 27, 2021) (noting that PTSD affects about 3.6% of the U.S. adult population).

18. GAO Racial Disparity Report, *supra* note 14, at 15.

19. See Dana Montalto, Bradford Adams, Barton Stichman & Drew Ensign, Veterans Legal Clinic, Legal Servs. Ctr. of Harvard L. Sch., *Underserved: How the VA Wrongfully Excludes Veterans With Bad Paper 2–3* (2016), https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5e67da6782e5f4e6b19760b0_Underserved.pdf [<https://perma.cc/6RUB-TG49>] [hereinafter *Veterans Legal Clinic, Underserved*] (“In 2013, VA Regional Offices labeled 90% of veterans with bad paper discharges as ‘Dishonorable’—even though the military chose not to Dishonorably discharge them.”). PTSD receives much media attention, though veterans suffer from other war-related mental health disorders as well. PTSD symptoms often coexist with depression, anxiety, and substance use. Symptoms usually begin within three months after experiencing a traumatic event, but symptoms may occasionally emerge years later. Posttraumatic Stress Disorder, *supra* note 17. Because of the potential latency of PTSD symptoms, a servicemember could be diagnosed with depression and anxiety during service but not develop or manifest the full symptoms of PTSD until after discharge. A related but separate problem involves the discharge of servicemembers for “personality disorders,” which do not qualify for VA disability compensation. Between 2001 and 2015, more than 31,000 servicemembers were separated with a personality disorder designation. See Joshua Kors, Investigative Reporter Alissa Figueroa Exposes Stunning Flaws in Veterans’ Benefits System, *HuffPost* (Dec. 29, 2014), https://www.huffpost.com/entry/investigative-reporter-al_b_6382880 [<https://perma.cc/4QS2-93TU>] (last updated Dec. 6, 2017).

20. See, e.g., James B. Jacobs, *The Eternal Criminal Record* 226 (2015) (“Employment discrimination has always made it especially difficult for an ex-convict to avoid resorting to crime as a necessary means of survival.”); Margaret Colgate Love, Jenny Roberts & Wayne A. Logan, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice*

collateral consequences of LTH discharges that create barriers to obtaining healthcare, disability compensation, education, housing, employment, and other transitional necessities for veterans.²¹ This Essay adds to the discourse on military discharges by examining the collateral consequences of discharge characterizations through a criminal law lens.²² This Essay argues that while discharges are technically administrative actions, they have been doing the work of criminal convictions in the military for some time. Since World War II, the lines between administrative action and criminal punishment have become increasingly blurred.²³ Today, veterans who are disciplined through either process continue to be punished long after service through the collateral consequences of their military service.²⁴ In this way, they share a hardship experienced by people involved in the criminal

§§ 1.11–1.12 (2018–2019 ed.) [hereinafter Love et al., *Collateral Consequences*] (describing the legal and reputational collateral consequences of criminal convictions); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. Pa. L. Rev. 1789, 1818 (2012) [hereinafter Chin, *The New Civil Death*] (arguing that civil death, an obsolete form of civil punishment, has reemerged in the form of a change in legal status of persons involved in the criminal legal system); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 459 (2010) [hereinafter Pinard, *Collateral Consequences*] (stating that individuals with criminal histories are confronted with a range of collateral consequences including ineligibility for public housing, welfare benefits, student loans, and employment opportunities).

21. See John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge From the Armed Forces*, 214 Mil. L. Rev. 1, 11–12 (2012) (“The military, through its discharge process, is creating huge handicaps to readjustment and reintegration into society by limiting the possibility of care and failing to at the least stabilize these warriors before their rough ejection.”); Liam Brennan, *How Veterans Affairs Denies Care to Many of the People It’s Supposed to Serve*, Wash. Post (Nov. 8, 2019), https://www.washingtonpost.com/outlook/how-veterans-affairs-denies-care-to-many-of-the-people-its-supposed-to-serve/2019/11/08/2c105b48-0183-11ea-9518-1e76abc088b6_story.html [<https://perma.cc/sn7f-755d>] (“These former service members [discharged as other than honorable] are often excluded from VA health care, from VA housing if they are homeless, from VA benefits payments even if they’re disabled by their service and from the educational supports provided to other veterans.”).

22. Recent scholarship on discharge review has focused on the service departments’ failure to apply favorable standards of review for veterans with PTSD and TBI who are seeking discharge upgrades. See, e.g., Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards’ Illiberal Application of Liberal Consideration for Veterans With Post-Traumatic Stress Disorder*, 108 Calif. L. Rev. 1357, 1387 (2019). Scholars have also criticized VA’s exclusionary eligibility criteria for receipt of veterans’ benefits. See, e.g., Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans From “Veteran” Services*, 122 Penn St. L. Rev. 69, 134 (2017).

23. See Stephanie Smith Ledesma, *PTSD and Bad Paper Discharges: Why the Fairness to Soldiers Act Is Too Little, Too Late*, 10 Elon L. Rev. 189, 227 (2018) (noting that commanders commonly circumvent constitutional protections of servicemembers by using administrative discharges to remove troops from service).

24. See Brooker et al., *supra* note 21, at 40 (describing the story of a veteran who was denied access to medical care more than five years after receiving an other-than-honorable discharge).

legal system. The movement to limit the collateral consequences of criminal arrests and convictions has much to offer military justice.

Part I of this Essay provides an overview of the current law, regulations, and policy governing the military discharge system. It also discusses the military's increasing use of administrative discharges in lieu of courts-martial to address minor misconduct. Part II examines the collateral consequences of criminal convictions, their disproportionate effects on communities of color, and their invisible role in the criminal legal system.²⁵ It examines recent advances at the state and local level to ease the undue weight and burden that criminal convictions place on individuals. It then draws lessons from these advances to argue that the collateral consequences of military discharges, which are strikingly similar to those of criminal convictions, must be addressed, and their disproportionate effect on disabled veterans eliminated. Part III explores solutions to the military's collateral consequences problem, analyzing efforts by DOD to adopt a clemency approach to discharge review, and examines other proposals to adopt a more redemptive approach to collateral consequences. This Essay concludes that a multifaceted approach is necessary, and it must include the codification of DOD's clemency guidance, broader access to VA benefits for veterans with LTH discharges, and statewide efforts to reduce the effects of discharge characterizations on employment.

I. DISCHARGE CHARACTERIZATIONS

The military has long been an attractive option for young adults looking to escape the confines of poverty, racial inequality, family strife, or the dearth of employment opportunities in their local communities.²⁶ For these individuals, the opportunity for economic security is hard to pass up. In exchange for their service, the military promises them competitive salaries and a generous benefits package, including disability compensation for injuries sustained in service.²⁷ Most servicemembers, however, are not

25. See Gabriel J. Chin, *Collateral Consequences*, in *4 Reforming Criminal Justice: Punishment, Incarceration, and Release* 371, 372 (Erik Luna ed., 2017) (explaining that the negative consequences for people convicted of a crime are perpetuated by being labeled as a criminal and subjected to collateral consequences even after release from incarceration).

26. John Bowden, *Ocasio-Cortez Calls for End to Federal Funding for Military Recruitment in Schools*, Hill (July 27, 2020), <https://thehill.com/policy/defense/budget-appropriations/509218-ocasio-cortez-calls-for-end-to-federal-funding-for/> [<https://perma.cc/5ZKN-MY9W>] (arguing that the Army and Navy target high school students in low-income communities for enlistment, often using popular video games, such as *Call of Duty: Warzone*, in their recruitment messaging).

27. See Brian Martucci, *Joining the Military After High School—Benefits & Risks*, Money Crashers (Jan. 4, 2021), <https://www.moneycrashers.com/joining-military-benefits-risks/> [<https://perma.cc/46HR-SWM4>] (describing the rewards of military service, including finding purpose, serving the country, tuition assistance, training, travel, competitive salary, enlistment bonuses, and post-service benefits, but acknowledging the risks of death or physical and mental injury).

informed that these benefits are conditioned on the award of an honorable discharge characterization.²⁸ They do not understand that the process of awarding service characterizations, a status that military commanders confer upon servicemembers at the time of discharge, is wrought with inequities, and that benefits promised at enlistment are denied to those with LTH discharges.²⁹ This section provides an overview of the discharge process, with a focus on the military's increasing reliance on LTH administrative discharges as a means to hastily separate servicemembers for minor misconduct, thereby denying them the benefits promised at the time of their enlistment.

A. *Military Discharges*

Most servicemembers are authorized to leave the military after completing their service obligation.³⁰ Those who are discharged or released from military duty prior to the expiration of their terms of service require special authorization.³¹ DOD provides general discharge guidance to the military departments through regulations and policy memoranda but delegates the authority to discharge servicemembers to the service secretaries.³² Discharges are divided into two broad categories: voluntary and involuntary.³³ Voluntary discharges may be authorized for hardship, pregnancy, schooling, and a variety of other reasons.³⁴ Involuntary discharges occur when the military releases a servicemember from duty against their will because of misconduct or because the member lacks the potential for further service.³⁵ This Essay focuses on involuntary discharges because they are more likely to result in OTH discharge characterizations.

28. Umar Moulta-Ali & Sidath Viranga Panangala, Cong. Rsch. Serv., R43928, *Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility 15–16* (2015) (depicting a flowchart used to determine the limited circumstances under which a veteran with an OTH discharge might be eligible for benefits).

29. Wherry, *supra* note 22, at 1368.

30. See DOPMA/ROPMA Policy Reference Tool: Military Service Obligation and Active Duty Service Obligation, Rand Corp., <http://dopma-ropma.rand.org/military-service-obligation.html> [<https://perma.cc/R3EK-B9FR>] (last visited July 27, 2021) (listing the different service obligations and their accompanying federal statutes for each branch of the military).

31. See, e.g., AFI 36-3208, *supra* note 12, at para. 1.1 (“No member may be discharged or released before expiration of term of service (ETS) except as prescribed by the Secretary of the Air Force, by sentence of court-martial, or as otherwise prescribed by law.”).

32. See U.S. Dep't of Def., Instr. 1332.14, *Enlisted Administrative Separations*, enclosure 5 (Jan. 27, 2014) [hereinafter DODDI 1332.14] (describing how each military department has its own discharge regulations that comply with DOD instructions).

33. See, e.g., AFI 36-3208, *supra* note 12, at tbls.1.2 & 1.3.

34. *Id.*

35. U.S. Air Force, *The Judge Advocate General's School, The Military Commander and the Law* 75 (17th ed. 2021), <https://www.afjag.af.mil/Portals/77/documents/Publications/MCL%202021.pdf?ver=ong1RuaOkGtvCugyNeniLA%3d%3d> [<https://perma.cc/ZC8P-DQW4>] [hereinafter *The Military Commander and the Law*].

1. *Punitive Discharges.* — Of the two types of involuntary discharges,³⁶ punitive discharges, the more severe form of punishment, may only be authorized through courts-martial and may be characterized as either a bad conduct discharge or dishonorable discharge.³⁷ Punitive discharge characterizations are intended to be stigmatizing and to reflect the criminal behavior and poor duty performance of the servicemember.³⁸ Because of its stigma, a punitive discharge is considered by servicemembers to be the most serious sanction that the military can impose.³⁹

2. *Administrative Discharges.* — In contrast, an administrative discharge is a personnel action. It is executed through a streamlined administrative process that affords considerably less due process to servicemembers than courts-martial.⁴⁰ Because of their expediency, administrative discharges are by far the more common form of involuntary discharge.⁴¹ A servicemember can receive an administrative discharge under honorable, general (under honorable conditions), or OTH conditions.⁴²

36. See DODDI 1332.14, *supra* note 32, at enclosure 4, para. 2(c). For a historical perspective on discharge characterizations, see Adams & Montalto, *supra* note 22, at 74. The practice of characterizing servicemembers' discharges was borrowed from the British. In the late eighteenth century, during the Revolutionary War, the Continental Congress adopted the British practice of separating soldiers with honorable or dishonorable characterizations. See Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 Mil. L. Rev. 1, 2–4 (1973). Much like today, the dishonorable discharge was rarely used, reserved only for servicemembers who committed grave offenses, and could only be imposed by order of a general court-martial. In the late nineteenth century, the military adopted administrative discharges as a means for commanders to discharge servicemembers for various reasons without holding a court-martial. These reasons included unsuitability for service, unfitness, misconduct, for the good of the service, and general conduct falling between honorable and dishonorable. See Harry V. Lerner, *Effect of Character of Discharge and Length of Service on Eligibility to Veterans' Benefits*, 13 Mil. L. Rev. 121, 132 (1961). Character of discharges have always played an important role in the determination of military pensions and other benefits.

37. Manual For Courts-Martial, United States, R.C.M. 1003(b)(8) (2019). A court-martial is the equivalent of a civilian criminal court. A dishonorable discharge may only be imposed by order of a general court-martial, the highest level of trial court in the military. *Id.* at 1003(b)(8)(B); see also Richard J. Bednar, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 Mil. L. Rev. 1, 4 (1962).

38. Christopher H. Lunding, *Judicial Review of Military Administrative Discharges*, 83 Yale L.J. 33, 35 (1973) (noting that though dishonorable discharges and bad conduct discharges are expressly punitive, a general discharge characterization constitutes “a stigma of tremendous impact which [has] a lifelong effect” and creates a “definite disadvantage” to veterans seeking civilian employment).

39. See Adams & Montalto, *supra* note 22, at 74 (“[T]his classification has always been reserved for the most severe misconduct and remains relatively rare.”).

40. See Marcy L. Karin, “Other Than Honorable” Discrimination, 67 Case W. Res. L. Rev. 135, 159 (2016) (“Unfortunately, there is no clear, uniform definition of what misconduct will result in an OTH discharge, and each military branch has separate guidance.”).

41. See Veterans Legal Clinic, *Underserved*, *supra* note 19, at 50 (noting that OTH discharges account for 5.8% of all characterized discharges while punitive discharges account for about 1% of discharges).

42. DODDI 1332.14, *supra* note 32, at enclosure 4, para. 3(a)(1)(a).

DOD provides broad definitions for these terms, though each military branch defines these terms slightly differently.⁴³ Navy regulations state that honorable service “generally [meets] the standard of acceptable conduct and performance for naval personnel, or is otherwise so meritorious that any other characterization of service would be clearly inappropriate.”⁴⁴ DOD defines OTH service as “[c]onduct involving one or more acts or omissions that constitute a significant departure from the conduct expected of members of Naval Service.”⁴⁵ The definitions of these terms among the services are generally the same despite their subtle differences.⁴⁶

3. *Distinctions Between Punitive and Administrative Discharges.* — The distinctions between administrative and punitive discharges can be confusing, even for servicemembers. Discharge characterizations are recorded on an official discharge document known as the “DD-214,” memorializing both the character of discharge (e.g., “other-than-honorable”) and the narrative reason for discharge (e.g., “misconduct”).⁴⁷ Both punitive and administrative discharges use service characterizations to denote misconduct or problematic service, making the labels a source of confusion. Servicemembers are generally familiar with the term “dishonorable discharge” and its connotations but are less familiar with the tiers of administrative discharge characterizations.⁴⁸ A thorough understanding of the collateral effects of both is immensely important, especially when a servicemember accused of misconduct is offered a discharge in lieu of a court-martial during pretrial plea bargaining.⁴⁹

43. *Id.* at enclosure 4, para. 3(b)(2)(a). The Secretary of Defense has authorized each service branch to promulgate its own standards for discharges. Each branch has a slightly different definition for the types of service characterizations, but all the branches generally follow the DOD definition. See U.S. Dep’t of Homeland Sec. & U.S. Coast Guard, COMDTINST M1000.4, Military Separations (Aug. 21, 2018); U.S. Dep’t of the Army, Reg. 635-200, Active Duty Enlisted Administrative Separations, paras. 3–4 (Dec. 19, 2016) [hereinafter AR 635-200]; U.S. Marine Corps, MCO P1900.16F, Separation and Retirement Manual, para. 1004 (2013); U.S. Dep’t of the Navy, Naval Military Personnel Manual (Milsperson) 1910-100 (2002).

44. U.S. Dep’t of the Navy, Military Personnel Manual (Milsperson) 1910-304, para. 1 (June 30, 2008).

45. *Id.*

46. Wherry, *supra* note 22, at 1368.

47. See e.g., Certificate of Release or Discharge From Active Duty, U.S. Dep’t of the Army, <https://www.dhrm.virginia.gov/docs/default-source/veteran-related/dd214-sample.pdf?sfvrsn=2/> [<https://perma.cc/X25P-XHCV>] (last visited July 27, 2021) (showing an example of a DD-214).

48. See Daniel Scapardine, Note, Leaving “Other Than Honorable” Soldiers Behind: How the Departments of Defense and Veterans Affairs Inadvertently Created a Health and Social Crisis, 76 Md. L. Rev. 1133, 1137 (2017) (describing how OTH veterans require competent and effective representation in order to successfully navigate the discharge petition process).

49. See DODDI 1332.14, *supra* note 32, at enclosure 3, para. 11(a) (noting that a servicemember may request to be discharged in lieu of standing trial in order to avoid the possibility of a conviction and its collateral consequences).

The authority to discipline and separate servicemembers rests with military “commanders.”⁵⁰ Commanders have tremendous discretion to criminally charge or administratively separate servicemembers for misconduct.⁵¹ As Mr. Gonzalez’s case demonstrates, the discretion is sometimes abused. How could a soldier with an obvious case of mental illness be discharged for misconduct and given an OTH service characterization rather than a medical discharge? Even though Mr. Gonzalez’s misconduct can be attributed to mental illness, commanders may choose from these basic options when acting in such cases: (1) court-martial, (2) nonjudicial punishment,⁵² (3) administrative action, (4) medical discharge,⁵³ or a combination of these options.⁵⁴

Mr. Gonzalez’s commander chose nonjudicial Article 15 punishment and an OTH discharge to resolve Mr. Gonzalez’s situation. Although a medical discharge may have been more appropriate, the discharge system favors misconduct separations over medical separations.⁵⁵ A number of extraordinary events must occur for a servicemember to be discharged for medical reasons rather than for misconduct.⁵⁶ The process begins when the servicemember’s unit commander initiates discharge proceedings based on the servicemember’s misconduct.⁵⁷ Servicemembers discharged

50. See Michael Moran, *Modern Military Force Structures*, Council on Foreign Rels. (Oct. 26, 2006), <https://www.cfr.org/background/modern-military-force-structures> [<https://perma.cc/SWG8-SL94>] (explicating the current command structure of the military including ground forces which are organized by squad, platoon, company, battalion, regiment, brigade, division, and corps, each led by commanding officers); see also Stuart Johnson, John E. Peters, Karin E. Kitchens, Aaron L. Martin & Jordan R. Fischbach, RAND Nat’l Defense Rsch. Inst., *A Review of the Army’s Modular Force Structure 2* (2012), https://www.rand.org/pubs/technical_reports/TR927-2.html [<https://perma.cc/PXR2-WMYC>] (reporting on the Army’s transition to a “modular” force structure to address the challenges of waging war and conducting extended stabilization operations); *The Military Commander and the Law*, supra note 35, at 3 (describing the military command structure).

51. Monu Bedi, *Unraveling Unlawful Command Influence*, 93 *Wash. U. L. Rev.* 1401, 1403–04 (2016) (comparing prosecutorial misconduct in the military and civilian systems).

52. 10 U.S.C. § 815 (2018). Nonjudicial punishment under Article 15 of the UCMJ is often a precursor to administrative separation.

53. See, e.g., AR 635-200, supra note 43, at para. 1-33(a). Since the late 1980s, the military has significantly increased its mental health screening and treatment for servicemembers with mental health disorders. Today, all servicemembers returning from deployment are required to be screened for mental health problems and are required to complete annual suicide awareness training.

54. See, e.g., AFI 36-3208, supra note 12, at para. 6.43 (explaining that a commander may process a recommendation for discharge as a single action when the recommendation is made for more than one reason).

55. AR 635-200, supra note 43, at para. 1-33; see also U.S. Dep’t of the Army, Reg. 635-40, *Disability Evaluation for Retention, Retirement, or Separation*, para. 4-3 (Jan. 19, 2017), [hereinafter AR 635-40] (noting that criminal or administrative processing for misconduct takes precedence over medical separations).

56. See AR 635-40, supra note 55, at para. 4-3 (outlining the process for obtaining medical discharge compared to discharge for misconduct).

57. See *id.*

for misconduct are required to obtain both a physical exam and a mental status evaluation.⁵⁸ Medical separations take precedence over other administrative separations *except* for misconduct separations, which are processed concurrently with medical separations.⁵⁹ If a medical treatment facility commander or attending medical officer determines that a soldier does not meet the medical fitness standards for retention, the servicemember is referred to a Medical Evaluation Board (MEB) for an official medical fitness determination.⁶⁰ Even if the MEB finds that the servicemember is not medically qualified for service, the servicemember may still be discharged for misconduct if a higher-level commander determines that the servicemember's medical condition is not "the direct and substantial contributing cause" of the misconduct.⁶¹

Though a medical discharge may seem like the obvious choice in Mr. Gonzalez's case, three main factors drive commanders' decisions to opt for administrative discharges based on misconduct rather than medical reasons.⁶² First, misconduct discharges are exponentially faster than medical

58. 10 U.S.C. § 1145(a)(5) (2018). This was not always the case. Prior to 2017, medical exams were not routinely provided to servicemembers facing discharge. For example, the Navy did not require a medical exam or screening for a servicemember separating in lieu of facing a trial by court-martial. Although the services are now required to provide medical exams prior to separating servicemembers for misconduct, the services have not adhered to the statutory requirement. See GAO Discharge Report, *supra* note 11, at 16–22.

59. AR 635-200, *supra* note 43, at para. 1-33(a). Commanders have discretion to discharge servicemembers for misconduct rather than for medical reasons, presumably to maintain good order and discipline in their units. *Id.* at para. 2-2(3)(c).

60. *Id.* at para. 1-33(b)(1); AR 635-40, *supra* note 55, at para 4-3; see also U.S. Dep't of the Army, Reg. 40-501, Standards of Medical Fitness, ch. 3 (outlining the disqualifying medical conditions and/or physical defects that disqualify soldiers from further military service).

61. AR 635-200, *supra* note 43, at para. 1-33(b)(1)(a)–(b). The ultimate decision is reserved for the General Court-Martial Convening Authority (GCMCA), usually one of the highest-ranking commanders assigned to a military installation. The GCMCA must consider multiple factors before discharging a servicemember for medical reasons. A GCMCA may only direct that a servicemember be discharged through the medical disability channels when UCMJ action has not been initiated and when (1) the servicemember's medical condition is "the direct and substantial contributing cause" of the misconduct or (2) other circumstances warrant disability processing over misconduct processing. *Id.* If the GCMCA believes that the circumstances warrant a medical discharge, they must refer the case to a Physical Evaluation Board (PEB) for a determination of whether the soldier meets criteria for physical disability out-processing. *Id.* at para. 1-33(b)(1). If the GCMCA elects not to refer the case to the PEB, or if the PEB does not find that the soldier meets criteria for disability out-processing, the unit commander may continue discharging the soldier for misconduct. See *id.* at para. 1-33(b)(3)(b)(1).

62. In Mr. Gonzalez's case, a number of factors worked against his receipt of a medical discharge. See Memorandum from Colonel Keith A. Smith, Physical Evaluation Bd., to Dep't of Veterans Affs. (Apr. 11, 2014) (on file with the *Columbia Law Review*). First, misconduct discharges were faster and simpler for unit commanders to execute because they did not require the approval of the GCMCA. See AR 635-200, *supra* note 43, at para. 1-19(b)(2)(a). Second, at least three medical determinations must have been made to show that Mr. Gonzalez met the criteria for a medical discharge, including determinations by the out-processing medical officer, MEB, and PEB. Finally, even if Mr. Gonzalez met the medical criteria

discharges. Units are able to expel and replace troops and return to full end-strength faster if they opt for a misconduct discharge than if they elect to medically discharge their troops.⁶³ Second, misconduct discharges are less burdensome on unit leadership and are a convenient way to remove “problem” troops from service.⁶⁴ Finally, commanders may be concerned about the erosion of “good order and discipline” in their units and may elect a misconduct discharge to address particular problems or to ratchet up discipline in their units.⁶⁵

B. *The Rise of Administrative Discharges*

Administrative discharges have long been closely associated with the military’s criminal legal system, though they have never been formally recognized as part of it.⁶⁶ When a servicemember receives judicial or nonjudicial Article 15 punishment, the action is often followed by an administrative

for discharge, the GCMCA could have decided that Mr. Gonzalez’s mental health was not a direct and substantial cause of the misconduct and chosen not to intervene with a discharge for misconduct. See *id.* at para. 1-33(b). Mr. Gonzalez’s case is like many other soldiers’ cases in that he met the criteria for a medical discharge but the GCMCA declined to intervene. That is, Mr. Gonzalez was found not medically qualified during a medical and mental health out-processing exam and, subsequently, an MEB and PEB determined that he was eligible for a medical discharge. *Id.* The GCMCA, however, did not believe that Mr. Gonzalez’s medical condition was a substantial factor in his misconduct and therefore discharged him for misconduct instead of medical reasons.

63. The pressure to administratively separate troops rather than to diagnose and treat them is based on military readiness concerns. “Readiness” is a term used to articulate the preparedness of a unit. DODDI 1332.14, *supra* note 32, at para. 3. A servicemember undergoing the lengthy medical discharge process will stay on a unit’s rolls much longer than a servicemember who is discharged for misconduct. Compare *id.* at enclosure 7, para. 7(a)(1) (“Processing goals should not exceed 15 working days for the notification procedure . . .”), with U.S. Dep’t of Def., Instr. 1332.38, Physical Disability Evaluation, enclosure 3, para. 1.6.1 (Nov. 14, 1996) [hereinafter DODDI 1332.38] (“All members shall be referred for evaluation within one year of the diagnosis of their medical condition if they are unable to return to military duty.”). While awaiting medical out-processing, the servicemember may not be able to perform their regular duties, thus reducing the readiness of the unit. See DODDI 1332.38, *supra*, at enclosure 3, para. 3.2.1 (“A Service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating . . .”).

64. See Geoff Ziezulewicz, UCMJ Crackdown: Why Mattis Thinks Commanders Have Gone Soft on Misconduct, *Mil. Times* (Sept. 10, 2018), <https://www.militarytimes.com/news/your-military/2018/09/10/ucmj-crackdown-why-mattis-thinks-commanders-have-gone-soft-on-misconduct/> [https://perma.cc/MNZ9-GRJA] (“Administrative discipline tends to be bureaucratically easier and less time-consuming than traditional UCMJ measures to punish misconduct.”).

65. See Jeremy S. Weber, *The Disorderly, Undisciplined State of the “Good Order and Discipline” Term 7–16* (Feb. 16, 2016) (unpublished manuscript) (on file with the *Columbia Law Review*) (“[T]heir answers essentially just equated good order and discipline with unity of command—in other words, military commanders should be responsible for military justice decisions because commanders handle important issues in their units.” (footnote omitted)).

66. See Adams & Montalto, *supra* note 22, at 76 (noting that in the late nineteenth century, the military began expanding the types of discharges beyond honorable and dishonorable to permit a “more nuanced assessment of conduct” and that these administrative

discharge.⁶⁷ For example, an administrative discharge is routinely issued subsequent to a court-martial conviction when the servicemember's sentence does not include a punitive discharge.⁶⁸ In misconduct cases not involving a court-martial, such as if the servicemember received a series of counseling letters and an Article 15, a discharge is often the final administrative action.⁶⁹ Despite the close relationship between administrative discharges and punitive action, discharges are rarely discussed in plea negotiations even though the parties are fully aware that pleading to criminal charges almost always results in a discharge.⁷⁰ DOD maintains that administrative discharges are not punitive.⁷¹ As stated in DOD regulations, administrative discharges promote the readiness of the military and provide a means to evaluate the suitability of servicemembers based on their ability to meet required performance, conduct, and disciplinary standards.⁷²

Recent trends show an increase in the military's use of administrative discharges.⁷³ Between 2007 and 2017, the number of courts-martial declined

discharges were made available to commanders without resort to courts-martial or judicial process).

67. See Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F. L. Rev. 115, 137 (2007) ("An Article 15 or summary court-martial conviction for drug use or possession generally results in an administrative discharge from the military, but does not trigger the same collateral consequences as a parallel misdemeanor or felony drug conviction in the civilian court system.").

68. See, e.g., AFI 36-3208, *supra* note 12, at paras. 5.48–5.52 (recommending OTH discharge characterizations for a broad array of ill-defined misconduct such as a pattern of misconduct, discreditable involvement with military or civil authorities, conduct prejudicial to good order and discipline, civilian convictions, commission of serious offenses, and sexual assault and requiring discharges in certain cases); see also National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 572, 126 Stat. 1632, 1754 (2013) (explaining that the Secretary of each military department must ensure that policies conform with the removal of members of the Armed Forces when the member has received a final offense, even if it is not a punitive discharge); DODDI 1332.14, *supra* note 32, at enclosure 2, para. 2(f) ("[E]nlisted Service members who are convicted of a covered sexual offense and are not punitively discharged are processed for administrative separation in accordance with section 572(a)(2) of Reference (c), as described in the procedures of this instruction.").

69. See, e.g., 7th Bomb Wing Legal Off. & 7th Bomb Wing Pub. Affs., *Article 15 and Discharge Actions*, Dyess A.F. Base (Apr. 13, 2017), <https://www.dyess.af.mil/News/Article-Display/Article/1151399/article-15-and-discharge-actions/> [<https://perma.cc/JMF3-QKC9>] (reporting administrative disciplinary action and discharges for March 2017).

70. Jeff A. Bovarnick, *Plea Bargaining in the Military*, 27 Fed. Sent'g Rep. 95, 96 (2014) ("After a lengthy discussion with his defense counsel, the soldier now realizes that based on his crimes, his career in the military is essentially over. The soldier's primary concern is limiting his jail time.").

71. See DODDI 1332.14, *supra* note 32, at enclosure 4, para. 3 ("Prior service activities, including records of conviction by court-martial, records of absence without leave, or commission of other offenses for which punishment was not imposed will not be considered on the issue of characterization.").

72. *Id.* at para. 3(a).

73. See Jeremy R. Bedford, *Other Than Honorable Discharges: Unfair and Unjust Life Sentences of Decreased Earning Capacity*, 6 U. Pa. J.L. & Pub. Affs. 687, 721–22

by nearly 70%.⁷⁴ Nonjudicial Article 15 punishment declined by almost 40%.⁷⁵ Experts attributed the declines to a variety of factors, including commanders' preference to discharge rather than seek justice, an institutional focus on prosecuting resource-intensive rape and sexual assault crimes, and an overall decline in the commission of serious offenses.⁷⁶ Meanwhile, the number of administrative discharges has continued to rise. Since World War II, the percentage of servicemembers who receive OTH discharges has increased fivefold, from about 1% of all veterans with characterized discharges during the World War II era to 5.8% of veterans in the post-9/11 era.⁷⁷ VA has denied services to roughly 6.5% of veterans who have served since 2001, or about 125,000 veterans to date.⁷⁸

The increase in administrative discharges has drawn the ire of military leadership.⁷⁹ In a 2018 memo, Secretary of Defense James Mattis reminded commanders of the power of the judicial system. He instructed commanders to choose the "harder right over the easier wrong" and not default to less burdensome administrative actions to instill discipline in American

(2021) (suggesting that commanders are resorting to OTH discharges rather than courts-martial as a means of redressing misconduct).

74. Evan R. Seamone, James McGuire, Shoba Sreenivasan, Sean Clark, Daniel Smee & Daniel Dow, *Moving Upstream: Why Rehabilitative Justice in Military Discharge Proceedings Serves a Public Health Interest*, 104 *Am. J. Pub. Health* 1805, 1808 tbl.1.1 (2014) (reporting a decline in court-martial cases tried between the Vietnam War era and the Global War on Terrorism era); Ziezulewicz, *supra* note 64.

75. Ziezulewicz, *supra* note 64.

76. *Id.*; see also National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, div. E, §§ 5001–5542, 130 Stat. 2000, 2894–968 (2016) (providing various reforms to the Uniform Code of Military Justice); Meghann Myers, *Here's What You Need to Know About the Biggest Update to UCMJ in Decades*, *Mil. Times* (Jan. 15, 2019), <https://www.militarytimes.com/news/your-army/2019/01/15/heres-what-you-need-to-know-about-the-biggest-update-to-ucmj-in-decades/> [<https://perma.cc/A6A8-WMFZ>] (discussing the Military Justice Act of 2016, a law that significantly changed the court-martial process with the intention of aligning it with federal district court procedures, all while maintaining due process protections for defendants).

77. Veterans Legal Clinic, *Underserved*, *supra* note 19, at 43. During the World War II Era, which spanned from 1941 to 1945, approximately 1% of veterans with characterized discharges, or about 70,686 out of 6,894,169 servicemembers, received OTH discharges. *Id.* During the post-9/11 Era, spanning from 2002 to 2013, approximately 5.8% of veterans with characterized discharges, or about 103,581 out of 1,790,316 servicemembers, received OTH discharges. *Id.*

78. *Id.* at 8.

79. Ziezulewicz, *supra* note 64; see also Eugene R. Fidell, *Where Have All the Cases Gone?*, *Glob. Mil. Just. Reform* (May 22, 2014), <https://globalmjreform.blogspot.com/2014/05/where-have-all-cases-gone.html> [<https://perma.cc/5N7L-99H5>] (discussing the decline of courts-martial over the last fifty years); Aaron Mehta, *Mattis Wants Commanders to Rely More on UCMJ for Disciplinary Problems*, *Mil. Times* (Aug. 14, 2018), <https://www.militarytimes.com/news/2018/08/14/mattis-wants-commanders-to-rely-more-on-ucmj-for-disciplinary-problems/> [<https://perma.cc/3E4C-97GL>] (discussing how former Secretary of Defense James Mattis wished to see a more aggressive use of the military justice system).

forces.⁸⁰ Although Secretary Mattis recognized the danger of blurring administrative and criminal procedures, his motives were misplaced. The increase in LTH discharges and its effect on the health and wellbeing of veterans should be of far greater concern to military leadership than fears about soft criminal justice practices. Military leaders must start addressing the collateral consequences of their actions and stop downplaying the devastating effects of LTH discharges.

II. COLLATERAL CONSEQUENCES: A FRAMEWORK FOR COMPARING THE EFFECTS OF ARRESTS AND CONVICTIONS TO MILITARY DISCHARGES

The criminal legal system, with its stigmatizing labels and disproportionate impact on people of color, offers a useful framework for examining military discharges. Scholars have developed a rich body of literature addressing the collateral consequences of involvement in the criminal legal system.⁸¹ First, this Part examines the legal consequences of arrests and convictions and explores the redemption-focused approaches to reducing their impact on economic opportunities and family stability. Then it compares the collateral consequences and redemption-focused approaches of the criminal legal system to those of the military discharge system. These similarities particularly focus on the stigmatizing effects of adverse discharges.

A. *The Criminal Legal System: Collateral Consequences and Redemptive Approaches*

1. *Collateral Consequences.* — In the criminal context, collateral consequences refers to the legal constraints placed on individuals with criminal

80. Memorandum from James Mattis, Sec’y of Def., U.S. Dep’t of Def., to Sec’y of the Mil. Dep’ts, Chiefs of the Mil. Servs., Commanders of the Combatant Commands 1 (Aug. 13, 2018), https://partner-mco-archive.s3.amazonaws.com/client_files/1534283120.pdf [<https://perma.cc/MCF5-8XST>]. Declines in UCMJ action stem from commanders’ preference for less bureaucratic and time-consuming administrative disciplinary methods. Commanders have often complained that UCMJ action reduces military readiness because it requires considerable attention from military leadership, often removes the accused, victims, and witnesses from their regular duties, affects unit morale, and takes extensive time for resolution. See Bovarnick, *supra* note 70, at 97 (stating that the “time required by other ‘outside’ members of the court-martial process” like the “witnesses, bailiffs, escorts, and most importantly panel members” is a factor in the plea-negotiation process); Ziezulewicz, *supra* note 64.

81. See e.g., Love et al., *Collateral Consequences*, *supra* note 20, §§ 5:1, 5:5; Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 *Marq. L. Rev.* 233, 233 (2018) [hereinafter Chin, *Collateral Consequences and Criminal Justice*] (explaining the debilitating legal and societal effects of criminal convictions); Wayne A. Logan, *Informal Collateral Consequence*, 88 *Wash. L. Rev.* 1103, 1104–05 (2013) [hereinafter Logan, *Informal Collateral Consequence*] (describing the formal and informal effects of collateral consequences related to criminal convictions); Pinard, *Collateral Consequences*, *supra* note 20, at 461 (exploring how collateral consequences in the U.S. criminal justice system impede an individual’s life and ability to reintegrate with their community after their incarceration).

records in the communities to which they return.⁸² Formal consequences include those mandated through laws or regulations, such as limitations on accessing housing, employment, and public benefits, as well as voting restrictions.⁸³ Informal consequences refer to the “social” consequences of a criminal conviction, or those that do not attach by virtue of a legal norm but exist because of the perceived negative implications of criminal convictions.⁸⁴ Examples of informal consequences are vast, and include landlords and employers who use criminal history as a screening device, friends and family who endure secondary stigma as a result of their association with convicted individuals, and the secondary effects of imprisonment, such as an increased risk of sexual or physical assault and decreased access to healthcare.⁸⁵ Predictably, the combination of formal and informal consequences has created a permanent underclass of primarily minority individuals who are excluded from society and who are more likely to be stopped, ticketed, arrested, charged, sentenced, and incarcerated than any other class of individuals in the United States.⁸⁶

82. See Alec C. Ewald, “Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 Wis. L. Rev. 1045, 1049 n.13 (referring to “civil death” as the condition in which a convicted offender loses all political, civil, and legal rights); Pinard, *Collateral Consequences*, supra note 20, at 478 (noting that collateral consequences have been referred to as “civil death”); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. Crim. L. & Criminology 1213, 1214–15 (2010) (framing the extensive collateral consequences problem as a national crisis).

83. See Pinard, *Collateral Consequences*, supra note 20, at 474.

84. See Love et al., *Collateral Consequences*, supra note 20, § 5:5; Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 Criminology 327, 339–40 (2009); Logan, *Informal Collateral Consequence*, supra note 81, at 1104–05; Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. Legis. & Pub. Pol’y 963, 974 (2013) [hereinafter Pinard, *Criminal Records*]; Mary Swanton, *Background Bias: EEOC Steps Up Pressure on Employers That Reject Applicants Based on Criminal Records and Credit Scores*, Inside Counsel (Apr. 1, 2010), https://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=222715238 (on file with the *Columbia Law Review*) (condemning the widespread use of criminal records to discriminate against people of color).

85. Logan, *Informal Collateral Consequence*, supra note 81, at 1108–09.

86. Pinard, *Criminal Records*, supra note 84, at 967–68; see also Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 Stan. L. & Pol’y Rev. 153, 153 (1999) (noting that “upon release from prison or discharge from non-incarcerative sentences, many [individuals] find themselves internally exiled . . . [and] saddled with restrictions that exclude them from major aspects of society”); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Pol’y Initiative (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/8ZLJ-GATY>] (describing a recursive incarceration trend where “[a]t least 1 in 4 people who go to jail will be arrested again within the same year”). In 2020, approximately 2 million people were confined in jails or prisons, up from about 500,000 in 1980. Chin, *Collateral Consequences and Criminal Justice*, supra note 81, at 237. The increase in incarcerations was in large part due to the War on Drugs and many jurisdictions’ “zero-tolerance” policies. About 75 million Americans have criminal records. *Id.* at 239. About one-third of all individuals in the United States can expect to be arrested by age twenty-

Collateral consequences are legally imposed by federal, state, and local laws in hundreds of jurisdictions across the United States.⁸⁷ These laws make many individuals ineligible for certain jobs, occupational licenses, subsidized housing, public benefits, and civil rights, from the right to vote to the right to possess firearms.⁸⁸ Despite their deleterious effects, courts have held that many collateral consequences are not so restrictive as to constitute punishment and thus are not subject to the Fifth Amendment prohibition against double jeopardy or the Eighth Amendment prohibition on cruel and unusual punishment, and that they do not violate *ex post facto* prohibitions.⁸⁹ Further, courts have reasoned that people with convictions do not constitute a suspect class under the equal protection doctrine, and as long as legislative constraints on such persons pass rational basis review, the constraints remain constitutional.⁹⁰

three. Pinard, *Criminal Records*, supra note 84, at 964. In 2015, Black people made up 13.3% of the population but accounted for 26.6% of arrests. Love et al., *Collateral Consequences*, supra note 20, § 6:9. In 2010, Black people were arrested for marijuana offenses at a rate of 716 per 100,000 individuals, while white people were arrested for the same offense at a rate of 192 per 100,000 individuals. Ezekiel Edwards, Will Bunting & Lynda Garcia, ACLU, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* 17 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell.pdf [<https://perma.cc/GH7N-4TAV>] [hereinafter ACLU, *The War on Marijuana*]. There were 1,717,064 drug arrests in the United States in 2010. Of these, 889,133 were for marijuana, and 784,021 were for marijuana possession. Since 2010, marijuana arrests have decreased by 18%, though that trend has stalled. There were more arrests in 2018 than in 2015, despite the passage of decriminalization laws in a number of states. See Ezekiel Edwards, Emily Greytak, Brooke Madubonwu, Thania Sanchez, Sophie Beiers, Charlotte Resing, Paige Fernandez & Sagiv Galai, ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* 7 (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform/> [<https://perma.cc/9ZRC-GVHN>]. The arrest rate was substantially disproportional even though statistically both groups use marijuana at similar rates across all age groups. See Found. for Crim. Just., Nat'l Ass' of Crim. Def. Laws., *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime* 23 (2014), <https://www.nacdl.org/getattachment/4a1f16cd-ec82-44f1-a093-798ee1cd7ba3/collateral-damage-america-s-failure-to-forgive-or-forget-in-the-war-on-crime-a-roadmap-to-restore-rights-and-status-after-arrest-or-conviction.pdf> [<https://perma.cc/W9CL-M963>] [hereinafter *Collateral Damage*]. Prison statistics are similarly disturbing. Studies show that one in three Black males and one in six Latino males will spend time in prison at some point in their lives. Pinard, *Criminal Records*, supra note 84, at 968 (comparing this statistic to one in seventeen white males).

87. See Chin, *The New Civil Death*, supra note 20, at 1791 (“People convicted of crimes are not subject to just one collateral consequence, or even a handful . . . [i]nstead, hundreds and sometimes thousands of such consequences apply under federal and state constitutional provisions, statutes, administrative regulations, and ordinances.”); Love et al., *Collateral Consequences*, supra note 20, § 4:1; ACLU, *The War on Marijuana*, supra note 86, at 11.

88. Chin, *Collateral Consequences and Criminal Justice*, supra note 81, at 235.

89. *Id.* at 243.

90. *Id.* Laws denying benefits based on cost-savings reasons have been upheld under rational basis review. See, e.g., *Houston v. Williams*, 547 F.3d 1357, 1363–64 (11th Cir. 2008) (holding that denial of assistance to convicted felons and registered sex offenders to conserve funds is rational). Denial of licensure and employment for public safety is rational. See *Rinehart v. La. Dep't of Corr.*, No. 93-5624, 1994 WL 395054, at *1, *1 (5th Cir. July 7,

Collateral consequences can devastatingly impact employment.⁹¹ One survey found that 92% of responding employers performed criminal background checks on at least some job candidates while 73% performed background checks on every candidate.⁹² The proliferation of collateral consequences and their effect on employment has caused a number of organizations to begin tracking their expansion.⁹³ The American Bar Association (ABA) created a database of more than 44,778 federal and state collateral consequences, 80% of which limit employment opportunities for those with criminal records.⁹⁴ Depending on the jurisdiction, various laws prohibit persons with criminal records from serving as nurses,⁹⁵

1994) (per curiam) (finding employment prohibition rationally related to safety and security). Laws related to the promotion of public confidence in government or a regulated industry are rational. See, e.g., *DiCola v. Food & Drug Admin.*, 77 F.3d 504, 507 (D.C. Cir. 1996) (deciding that debarment of convicted felons under the Food, Drug, and Cosmetic Act does not constitute double jeopardy or violate ex post facto clauses). However, categorical disqualifications have been found to be irrational. See *Barletta v. Rilling*, 973 F. Supp. 2d 132, 135 (D. Conn. 2013) (finding that disqualification of all persons who have ever been convicted of a felony who are seeking licensure for precious metals trading is unconstitutional). A criminal defendant may raise an ineffective assistance of counsel claim based on defense counsels' misadvice about collateral consequences or for failing to warn about the possibility of deportation. See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) ("[C]ounsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."); *State v. Ellis-Strong*, 899 N.W.2d 531, 538–39 (Minn. Ct. App. 2017) ("In sum, even though predatory-offender registration is a collateral consequence of a guilty plea, affirmative misadvice about such consequences may amount to ineffective assistance of counsel.").

91. See generally Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (2007) (chronicling the effects of the "War On Crime" and the subsequent employment consequences of mass incarceration); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277, 299–300 (2011) (noting that an increase in misdemeanor offense convictions and a decrease in felony convictions has resulted in a net increase in collateral consequences, especially for indigent persons).

92. See *Collateral Damage*, supra note 86, at 22.

93. Love et al., *Collateral Consequences*, supra note 20, § 9:7 (highlighting how organizations such as the American Bar Association and Uniform Law Commission have compiled and organized laws and regulations in various jurisdictions involving collateral consequences of arrests and convictions).

94. *Collateral Consequences Inventory*, Nat'l Inventory of Collateral Consequences of Conviction, https://niccc.nationalreentryresourcecenter.org/?jurisdiction=&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1 [<https://perma.cc/TVM2-QZDD>] (last visited July 28, 2021); see also *Court Security Improvement Act of 2007*, Pub. L. No. 110-177, § 510, 121 Stat. 2534, 2543 (2008) (capturing the collateral consequences of criminal convictions for criminal offenses in the United States, each of the states and territories, and the District of Columbia). The ABA database was compiled through a grant awarded by the National Institute of Justice, an organization that is required by federal statute to gather the data.

95. See, e.g., Md. Code Regs. 10.09.53.03D(10) (2021) (prohibiting individuals convicted of felonies involving moral turpitude or theft, or with any other criminal history that

teachers, bus drivers,⁹⁶ social workers,⁹⁷ and other professionals. Categorical prohibitions against persons convicted of “felonies” or “crimes of moral turpitude” exclude millions of individuals from employment in a host of other career fields.⁹⁸ With the proliferation of publicly and commercially available criminal records on the internet, applicants’ abilities to shield their records or to put them in context for a potential employer have diminished.⁹⁹

States have drastically different laws regarding the restrictions placed on individuals with criminal records.¹⁰⁰ For example, twenty-one states ban incarcerated individuals convicted of felonies from voting until they complete their sentences.¹⁰¹ Eleven states disenfranchise individuals with certain felony convictions indefinitely, unless they are pardoned, or impose waiting periods after the completion of their sentences.¹⁰²

By contrast, several states and the federal government have adopted reforms to ease the obstacles presented by criminal records. “Ban-the-box” laws require employers to “consider a job candidate’s qualifications first—without the stigma of a conviction or arrest record.”¹⁰³ As of October 2020,

indicates a risk of harm to patients, from serving as private nurses to individuals younger than twenty-one).

96. See, e.g., id. 13A.06.07.07C(1)(a) (prohibiting drivers convicted or charged with crimes of violence or offenses related to driving or minors from operating school vehicles).

97. Ohio Admin. Code 4757-11-01(C)(7) (2021) (making the commission of “a felony or any crime involving moral turpitude” grounds for revoking a license).

98. See Chin, *Collateral Consequences and Criminal Justice*, supra note 81, at 239–41. Although there are no general bars to federal employment for people with criminal convictions, there are specific exclusionary rules for certain career fields, such as federal law enforcement, enlistment in the military, and some national service programs such as AmeriCorps and VISTA. Love et al., *Collateral Consequences*, supra note 20, § 2:9. Additionally, persons convicted of sex crimes, drug-related felonies, or offenses involving child-victims may not be employed as childcare providers for federal employees. Id.

99. See *Collateral Damage*, supra note 86, at 22.

100. See Wayne A. Logan, “When Mercy Seasons Justice”: Interstate Recognition of Ex-Offender Rights, 49 U.C. Davis L. Rev. 1, 15–16 (2015) (noting that relief provided to ex-offenders in one state is not necessarily recognized in other states).

101. Sarale Sewell & Elizabeth Paukstis, U.S. Comm’n on C.R., *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* 29 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/ANN8-T23R>]. In some of these states, individuals convicted of felonies lose their right to vote for a period of time after they are released from incarceration, while they are on parole or probation. Id.; see also Nat’l Conf. of State Legislatures, *Felon Voting Rights* (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/8K9U-XT8L>].

102. Nat’l Conf. of State Legislatures, supra note 101.

103. Beth Avery & Han Lu, Nat’l Empl. L. Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People With Past Convictions* 2 (2020), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2020.pdf> [<https://perma.cc/7T6Y-EWEA>]; see also Jessica S. Henry, *Closing the Legal Services Gap in Prisoner Reentry Programs*, 21 *Crim. Just. Stud.* 15, 22–23 (2008) (describing how legal aid organizations can play a role in helping those with criminal records reintegrate into society). Those laws may, however, prompt

thirty-six states and 150 cities and counties have adopted various forms of ban-the-box laws.¹⁰⁴ Many jurisdictions have gone beyond ban-the-box by adopting laws that delay criminal record-related inquiries until after the first interview or a conditional job offer.¹⁰⁵ For example, despite its long history of imposing collateral consequences, Georgia has adopted significant reforms that have eased reentry burdens for its residents.¹⁰⁶ Until 2015, employers in Georgia's public and private sectors could lawfully deny employment to applicants with criminal records, including records of arrests not leading to convictions.¹⁰⁷ Through an executive order, then-Governor Nathan Deal eliminated questions about criminal records from state employment applications and signed into law a bill that prohibited

some employers to discriminate against Black applicants instead. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment 1* (Univ. of Mich. L. & Econ. Rsch. Paper No. 16-012, 2016), <https://ssrn.com/abstract=2795795> [<https://perma.cc/UP8S-FUFX>] (“Our results confirm that criminal records are a major barrier to employment, but they also support the concern that [ban-the-box] policies encourage statistical discrimination on the basis of race.”).

104. Avery & Lu, *supra* note 103, at 2.

105. *Id.* at 3; 50 State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing, Restoration of Rts. Project, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/> [<https://perma.cc/QE9S-56ZV>] (last visited Aug. 31, 2021); see also, e.g., California Fair Chance Act, ch. 789, 3 Cal. Stat. 5976 (2017); New York City Fair Chance Act, Int. No. 318-A (2015).

106. H. Lane Dennard, Jr. & Patrick C. DiCarlo, *Collateral Consequences of Arrests and Convictions: Policy and Law in Georgia* 26 (2008), <https://www.gjp.org/wp-content/uploads/Collateral1.pdf> [<https://perma.cc/C2TK-5CXV>].

107. See *id.* at 7 (describing the lack of discrimination protection in Georgia as of 2008). In 1971, then-Governor Jimmy Carter created the Georgia Crime Information Center (GCIC). While the primary purpose of the database was to serve law enforcement officers, Georgia and many other states have used these databases to conduct background checks for purposes other than law enforcement. Background checks have become one of the most significant barriers for individuals with criminal records. See Mary Madden, Michele Gilman, Karen Levy & Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 Wash. U. L. Rev. 53, 66 (2017). Many agencies have policies refusing to hire persons with criminal records when the position requires a security clearance. See Love et al., *Collateral Consequences*, *supra* note 20, § 2:9; Chin, *Collateral Consequences and Criminal Justice*, *supra* note 81, at 241. In 2015, President Obama implemented a series of reentry policies aimed at protecting former inmates from employment and housing discrimination by eliminating rules requiring disclosure of criminal records. A related problem involves employers' use of background checks in facially neutral but factually discriminatory hiring practices. See *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972) (finding that requiring applicants to disclose arrest records had a disproportionate impact on Black people, in violation of Title VII). Title VII prohibits employment practices that adversely affect individuals because of their race, color, religion, sex (including sexual orientation), or national origin. An adverse effect may be shown by establishing that a particular hiring practice has a disparate impact on members of a protected class. See 42 U.S.C. § 2000e-2(a)(2) (2018). Once established, the burden shifts to the employer to show that the practice relates to the job and meets the business necessity exception. See *id.* § 2000e-2(k)(1)(A)(i).

the refusal or revocation of professional licenses based on felony convictions, unless the felony “directly relates” to the occupation for which the license is sought or held.¹⁰⁸ Georgia also retreated from mandatory public housing policies that excluded persons with criminal records, opting instead for policies giving housing authorities discretion to admit applicants with criminal records or retain tenants who commit crimes during tenancy.¹⁰⁹

Unfortunately, new administrations can rescind or amend orders of previous administrations, and they often reverse course on policies involving collateral consequences of involvement with the criminal legal system.¹¹⁰ After Governor Deal’s overhaul of discriminatory employment and housing laws, newly elected Governor Brian Kemp unveiled plans to ratchet up penalties for “street gangs” and sex traffickers, and he proposed a budget that would cut funding for the public defender system and problem-solving courts.¹¹¹ The constant churn of legislation makes it difficult to catalog regulations governing collateral consequences and inhibits the implementation of effective long-term strategies to identify and call attention to their use.

Collateral consequences prove insidious for several reasons. First, they disproportionately affect Black and brown communities.¹¹² The mass arrest, conviction, and incarceration of people of color has been primarily responsible for these disproportionate effects.¹¹³ Second, their expansion across federal, state, and local jurisdictions has made collateral consequences not only ubiquitous but also hidden.¹¹⁴ The patchwork of discriminatory regulations makes collateral consequences less transparent and

108. Ga. Code Ann. § 43-1-19(q)(1) (2017); see also Bonita Ann Huggins, Note, Give It To Me, I’m Worth It: The Need to Amend Georgia’s Record Restriction Statute to Provide Ex-Offenders With A Second Chance in the Employment Sector, 52 Ga. L. Rev. 267, 281–83 (2017) (“The [ban-the-box] solution, however, merely pushes the problem further down the hiring timeline rather than eliminating it Introducing the criminal record to employers at a later stage of the hiring process essentially makes the employer’s final decision of which qualified applicant to hire.”).

109. Dennard & DiCarlo, *supra* note 106, at 72. Georgia residents with criminal records are still subject to federal lifetime bans on receiving Temporary Assistance for Needy Families (TANF) benefits. See 21 U.S.C. § 862(a) (2018).

110. See, e.g., Md. Exec. Order No. 01.01.2016.06, 43-12 Md. Reg. 663 (June 10, 2016).

111. Greg Bluestein & Maya T. Prabhu, Kemp Pursues a New Criminal Justice Policy, Unnerving Critics, Atlanta J.-Const. (Jan. 22, 2020), <https://www.ajc.com/news/state-regional-govt-politics/kemp-pursues-new-criminal-justice-policy-unnerving-critics/kjbylgLsPWnDE2RrWROM5L/> [<https://perma.cc/ZM4Z-QP7E>]. Governor Kemp also unveiled plans to more closely track immigrants with criminal records. *Id.*

112. Pinard, *Collateral Consequences*, *supra* note 20, at 516–17.

113. See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 179 (2020) (discussing the impact of collateral consequences on African Americans “churn[ed] . . . in and out of prisons today”); Pinard, *Criminal Records*, *supra* note 84, at 971 (noting that mass incarceration and conviction are separate issues and have distinct collateral consequences).

114. See Chin, *Collateral Consequences and Criminal Justice*, *supra* note 81, at 247–48 (“[L]aws governing convicted persons are scattered throughout codes and regulations, and individuals charged with crimes generally cannot hire lawyers to comb the laws . . .”).

more resistant to public scrutiny than clearly defined bodies of law, such as criminal statutes.¹¹⁵ Third, many courts do not recognize collateral consequences as punishment for constitutional purposes.¹¹⁶ As a practical matter, they may be the most significant aspect of punishment. Criminal defendants are, however, generally not informed about the collateral effects of their pleas.¹¹⁷ Less than 10% of criminal cases reach the trial stage, meaning that millions of Americans take plea deals without understanding the impact the convictions will have on the rest of their lives.¹¹⁸ The next section discusses the diverse and complex strategies adopted by different jurisdictions to remedy the problem of collateral consequences.¹¹⁹

2. *Redeeming Persons Involved in the Criminal Legal System.* — The approaches to restoring rights for individuals with criminal records vary widely across federal, state, and local jurisdictions.¹²⁰ Approaches to mitigating collateral consequences involve either “forgiving” past crimes through executive pardon or judicial dispensation, or “forgetting” them by restricting access to records through record sealing, expungement, vacatur, or other methods.¹²¹ Generally, scholars and law reform advocates

115. See *id.* at 253 (describing how the “piecemeal” development of collateral consequences has shielded legislatures from the need to justify their decisions).

116. See *id.* at 243 (“Many courts have held that collateral consequences are not punishment and are thus not covered by the Eighth Amendment prohibition on cruel and unusual punishments or the Fifth Amendment prohibition against double jeopardy.” (citation omitted)).

117. See *id.* at 248 (“[I]ndividuals charged with crimes generally cannot hire lawyers to comb the laws and produce a compendium containing all relevant [collateral consequences].”). But see *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that the Sixth Amendment requires counsel to inform her client when a guilty plea may result in deportation).

118. See Emily Yoffe, *Innocence is Irrelevant*, *Atlantic* (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171> (on file with the *Columbia Law Review*) (“The vast majority of felony convictions are now the result of plea bargains—some 94 percent at the state level, and some 97 percent at the federal level. Estimates for misdemeanor convictions run even higher.”).

119. See, e.g., Margaret Colgate Love & Susan M. Kuzma, U.S. Dep’t of Just., Off. of the Pardon Att’y, *Civil Disabilities of Convicted Felons: A State-by-State Survey 1* (1996), <https://www.ncjrs.gov/pdffiles1/pr/195110.pdf> [<https://perma.cc/S2LY-BU9J>] (referring to the varying state mechanisms to address collateral consequences as “something of a national crazy-quilt”).

120. Love et al., *Collateral Consequences*, *supra* note 20, § 7:1 (“Like collateral consequences themselves, widely varying state restoration mechanisms result in ‘something of a national crazy-quilt.’” (quoting Kuzma & Love, *supra* note 119, at 1)).

121. See Margaret Love, Josh Gaines & Jenny Osborne, *Collateral Consequences Res. Ctr., Forgiving and Forgetting in American Justice: A 50-State Guide to Expungement and Restoration of Rights 2* (2018), <https://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Aug-2018.pdf> [<https://perma.cc/WX4Z-CTGK>] [hereinafter Love et al., *Forgiving and Forgetting*] (“[P]olicy-makers are again debating whether it is more effective to forgive a person’s past crimes (through executive pardon or judicial dispensation) or to forget them (through record-sealing or expungement).”). Expungement technically means to “obliterate” the record, whereas record sealing is a mechanism to limit access to records. Vacatur is an order to set aside a judgment or annul a proceeding. These mechanisms may have broader or narrower practical effects, depending on the jurisdiction in which they are employed. See Love et al., *Collateral Consequences*, *supra* note 20, §§ 5:1, 5:5.

prefer forgiveness because this, theoretically, restores individuals to their original legal position before the conviction occurred.¹²² Forgiveness mechanisms take different forms depending on the jurisdiction but generally include executive pardons, judicial set-asides, legislative durational limits, and administrative waiver provisions.¹²³ Proponents of forgiveness argue that convictions should have an end-point, and that one of the goals of the criminal legal system should be that individuals graduate from it.¹²⁴

Record sealing and expungement mechanisms, on the other hand, do not affect the disabilities related to convictions but rather shield or remove the records, thus reducing the informal consequences and stigma stemming from criminal databases.¹²⁵ Even though reform advocates generally favor these mechanisms, some argue that they are too costly and ineffective in both moral and legal terms.¹²⁶ The legal costs relate to their sporadic effectiveness. Variances among states as to when records are sealed or expunged, who retains access to them, and the possibility that records were disseminated and saved on private servers prior to sealing or expungement all undermine the goals of these tools.¹²⁷ Those who oppose expungement and sealing on moral grounds either believe that the mechanisms absolve society of its obligation to address institutional racism and subvert open and transparent discussion of the issues or believe that expungement creates a “right to lie.”¹²⁸ Nonetheless, these mechanisms offer

122. See, e.g., Love et al., *Collateral Consequences*, supra note 20, § 7:1 (discussing how these programs may have a restorative impact). Pardons relieve individuals of all legal disabilities and penalties, but do not negate the predicate effect of the conviction or prohibit its use in subsequent criminal proceedings. See *id.* § 7:7.

123. *Id.* § 7:2.

124. See, e.g., *id.* § 7:1 n.11 (“More than forty years ago, two veteran probation officers remarked on this phenomenon: ‘We solemnize the offender’s induction into the system. When he successfully concludes the program, though, we fail to institutionalize his departure correspondingly. It’s fun to catch the fish but hard to let him go.’” (quoting Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 *J. Crim. L., Criminology & Police Sci.* 378, 390 (1970))).

125. Black’s Law Dictionary defines “expungement of record” as “[t]he removal of a conviction (esp. for a first offense) from a person’s criminal record.” *Expungement of Record*, Black’s Law Dictionary (11th ed. 2019).

126. See, e.g., Jacobs, supra note 20, at 113 (providing an overview of expungement and alternatives such as sealing and certificates of rehabilitation); Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 *Hofstra L. Rev.* 733, 735 (1981); Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 *J. Crim. L., Criminology & Police Sci.* 378, 391 (1970) (“It is a profound mistake to mix in with redemptive legislation any provision for concealing the records.”).

127. See Franklin & Johnsen, supra note 126, at 747; Madden et al., supra note 107, at 77 (stating that data is being scraped from publicly available websites and stored for perpetuity); Sarah Esther Lageson, *There’s No Such Thing as Expunging a Criminal Record Anymore*, *Slate* (Jan. 7, 2019), <https://slate.com/technology/2019/01/criminal-record-expungement-internet-due-process.html> [<https://perma.cc/5T8N-QQCS>].

128. See Jacobs, supra note 20, at 123 (cleaned up) (arguing that expungement authorizes beneficiaries to falsely deny arrests and convictions and prohibits employers from

individuals a relatively accessible and practical solution to address the collateral consequences of their criminal records and provide some relief to those who suffer from the consequences of institutional racism.

Beginning in the 2000s, interest in collateral consequences experienced a rebirth.¹²⁹ Between 2004 and 2017, the ABA, Uniform Law Commission (ULC), and American Law Institute (ALI) issued a panoply of proposed reforms for the states and federal government to consider.¹³⁰ Providentially, their approaches shared a few broad principles. First, they proposed that collateral consequences be identified and catalogued so that individuals charged with crimes can assess the impact of their pleas.¹³¹

asking about them); Kogon & Loughery, *supra* note 126, at 391 (arguing that expungement protects society from confronting its aberrant attitudes).

129. Love et al., *Collateral Consequences*, *supra* note 20, § 1:6. In 2004, President George W. Bush referenced “second chance[s]” and “a better life” for individuals with criminal records in his State of the Union Address. Text of President Bush’s 2004 State of the Union Address, *Wash. Post* (Jan. 20, 2004), https://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html (on file with the *Columbia Law Review*). In 2010, the Supreme Court decided *Padilla v. Kentucky*, holding that the Sixth Amendment requires that defendants be advised of deportation consequences of their pleas. See 559 U.S. 356, 373–74 (2010) (finding that Sixth Amendment precedent and the severity of deportation require counsel to inform defendants of the risk of their deportation during the plea-bargaining process). In 2011, the Department of Justice redoubled their efforts to collect data on collateral consequences in every U.S. jurisdiction; in 2012, the Equal Employment Opportunity Commission (EEOC) promulgated guidance on collateral consequences of employment. See Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act, U.S. Equal Emp. Opportunity Comm’n, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> [<https://perma.cc/JZY6-V3WK>] (last visited July 27, 2021). In 2014, the National Association of Criminal Defense Lawyers issued an extensive report urging states to address the issue. See generally *Collateral Damage*, *supra* note 86 (reporting on the legal and social barriers that a person faces after a court-imposed criminal sentence).

130. Love et al., *Collateral Consequences*, *supra* note 20, § 9:2. In 2008, Congress passed the Second Chance Act, a law that supported various reentry programs for incarcerated individuals. See Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified at 34 U.S.C. § 60501 (2018)) (helping formerly incarcerated individuals circumvent collateral consequences to obtain services but not directly reforming collateral consequence laws); see also Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *Fordham Urb. L.J.* 1705, 1708–17, 1723–25 (2003) (detailing various efforts to reform collateral penalties); Ronald D’Amico, Christian Geckeler & Hui Kim, Nat’l Crim. Just. Reference Serv., *An Evaluation of Seven Second Chance Act Adult Demonstration Programs: Impact Findings at 18 Months*, at xi–xii (2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/251139.pdf> [<https://perma.cc/P7R8-8XVK>]; Pamela K. Lattimore & Christy A. Visher, Nat’l Crim. Just. Reference Serv., *The Multi-Site Evaluation of SVORI: Summary and Synthesis*, at vi–vii (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/230421.pdf> [<https://perma.cc/9XPZ-GBR5>].

131. Chin, *Collateral Consequences and Criminal Justice*, *supra* note 81, at 247 (2018); see also National Inventory of the Collateral Consequences of Conviction, Nat’l Inst. of Just. (Nov. 13, 2018), <https://nij.ojp.gov/topics/articles/national-inventory-collateral-consequences-conviction> [<https://perma.cc/A5BA-X3ET>]. In 2007, Congress passed the Court Security Improvement Act that directed the Director of the National Institute of Justice (NIJ) to create a compendium of collateral consequences in the United States. In concert with the

Second, they urged the consideration of collateral consequences in criminal prosecutions.¹³² For example, they proposed that collateral consequences be considered in sentencing, recognizing the broad authority of courts to hear mitigating evidence.¹³³ Third, they warned that jurisdictions must carefully consider whether new or existing collateral consequences actually promote public safety. They recommended an evidence-based approach to considering the link between consequences and risk reduction laws, rather than relying on perceived assumptions. Finally, they suggested specific relief mechanisms for adoption by states and the federal government.¹³⁴ These mechanisms of relief ranged from consequences in individual cases to broader automatic relief mechanisms based on the completion of sentences and the passage of time.¹³⁵

Modern trends favor a combination of judicial and legislative action to address collateral consequences.¹³⁶ Some jurisdictions have experimented with court-issued “Certificates of Restoration of Rights” that relieve all remaining collateral consequences and affirm the full rehabilitation and good character of individuals with criminal records.¹³⁷ Based on legislatively determined standards that authorize brief waiting periods for review and no categorical exclusions, courts review individual cases, at sentencing or thereafter, to help society assess the risk of extending benefits to justice-involved individuals. Additionally, many

ABA, the NIJ created an online publicly available database. See Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510, 121 Stat. 2534 (2008) (“The Director of the National Institute of Justice . . . shall conduct a study to determine and compile the collateral consequences of convictions for criminal offenses in the United States.”).

132. See Chin, *Collateral Consequences and Criminal Justice*, supra note 81, at 249. In *Padilla v. Kentucky*, the Supreme Court noted that both prosecutors and defendants can leverage the bargaining power of collateral consequences in charging and plea-bargaining negotiations. Both the ABA Standards for Criminal Justice and the ALI’s 2017 Model Penal Code incorporated the Supreme Court’s dicta into their standards and identified stages in criminal prosecutions that allow for the consideration of collateral consequences. See *Padilla*, 559 U.S. at 373 (noting that collateral consequences can play a crucial role in plea-bargaining negotiations).

133. *Collateral Sanctions*, ABA, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_collateral_blk/#2.4/ [<https://perma.cc/77ZE-RVHH>] (last visited July 27, 2021); see also *United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016) (doling out a one-year probation in consideration of the collateral consequences the defendant would face); Uniform Collateral Consequences Conviction Act (Unif. L. Comm’n 2010); Model Penal Code: Sentencing § 6x.02(2), 6x.04 (Am. L. Inst. 2017).

134. Chin, *Collateral Consequences and Criminal Justice*, supra note 81, at 247.

135. See *id.* at 252 (noting that the ABA, Model Penal Code, and Uniform Collateral Consequences Act of 2009 all contemplate that rehabilitation may be indicated by the passage of time, completion of a sentence, and criminal history).

136. See Margaret Colgate Love, *Forgiving, Forgetting, and Forgoing: Legislative Experiments in Restoring Rights and Status*, 30 Fed. Sent’g Rep. 231, 232 (2018) [hereinafter Love, *Forgiving, Forgetting, and Foregoing*] (noting that an effective strategy for dealing with collateral consequences requires a more nuanced and practical approach).

137. *Id.*

courts facilitate the deferral or dismissal of criminal cases through problem-solving courts or other programs that steer defendants away from convictions.¹³⁸ Most jurisdictions still favor expungements and sealing laws, though legislatures have generally been hesitant to expand relief beyond low-level offenses and crimes not resulting in convictions.¹³⁹ However, a few jurisdictions have adopted progressive expungement provisions that come close to automatic concealment for minor offenses.¹⁴⁰ For example, California's Health and Safety Code calls for the immediate destruction of records involving misdemeanor marijuana possession arrests for which there were no convictions and the destruction of records within two years for cases with convictions.¹⁴¹ Petitioners must still file a court petition to ensure the destruction of agency records.¹⁴²

Two states in particular exemplify new approaches to collateral consequences reform. In 2019, New Jersey created a "clean slate" expungement system that eased access for petitioners and authorized the expungement of all offenses after ten years, with exceptions for the most serious violent offenses.¹⁴³ It also began a process for automating expungements rather than requiring individual petitions to the courts.¹⁴⁴ In 2018, Indiana developed a systemic approach to collateral consequences reform by enacting extensive licensing and employment law aimed at stemming collateral consequences.¹⁴⁵ The law requires licensing boards to list all disqualifying crimes for licensure, and to include only those crimes that directly relate to the duties of the occupation or profession.¹⁴⁶ The law also

138. See Kristine A. Huskey, *Justice for Veterans: Does Theory Matter?*, 59 *Ariz. L. Rev.* 697, 705 (2017) (noting that veterans treatment courts divert participants from the conventional criminal legal system to specialized dockets where compliance with treatment, rather than incarceration, drives resolution of the case).

139. See Love, *Forgiving, Forgetting, and Foregoing*, *supra* note 136, at 232 (explaining that judicial relief has rarely reached beyond minor offenses).

140. See *id.* at 235 (noting that Indiana automatically purges records after a certain period of time).

141. Cal. Health & Safety Code § 11361.5 (2019); see also Gerald F. Uelmen, *California's New Marijuana Law: A Sailing Guide for Uncharted Waters*, 51 *Cal. St. Bar J.* 27, 75–76 (1976) (offering an early perspective on California's progressive drug laws, including its expungement law, and identifying potential issues for litigation).

142. See, e.g., Steve Escovar, *Post-Conviction Relief! Health and Safety Code Section 11357(c) Controlled Substance Offense Record of Arrest and Conviction Destroyed Pursuant to Health and Safety Code Section 11361.5!*, Escovar L., APC (May 22, 2019), <https://www.escovarlaw.com/blog/2019/may/post-conviction-relief-health-and-safety-code-se2/> [<https://perma.cc/3PPV-PV7J>] (noting that the petitioner had to obtain a court order to ensure the destruction of records).

143. S. 4154, 218th Leg., 2nd Ann. Sess. (N.J. 2018).

144. *Id.*

145. H. 1245, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2018).

146. Indiana Restoration of Rights and Record Relief, Restoration of Rts. Project, https://ccresourcecenter.org/state-restoration-profiles/indiana-restoration-of-rights-pardon-expungement-sealing/#IV_Criminal_record_in_employment_licensing/ [<https://perma.cc/Q3P9-4LKR>] (last updated May 25, 2021).

forbids the use of vague terms such as “crimes of moral turpitude” or “good character” in licensing determinations, and it forbids consideration of arrests not resulting in convictions.¹⁴⁷ The disqualifying period for listed convictions was capped at five years, with consideration for individual petitions at any time.¹⁴⁸

Recent studies have shown that mechanisms aimed at reducing the collateral consequences of arrests and convictions are indeed effective.¹⁴⁹ One study examined the effect of judicially issued “certificates of relief” on hiring practices in Ohio. The certificates lifted occupational licensing restrictions, limited employer liability for negligent hiring claims, and demonstrated to employers that the certificate holder had been rehabilitated.¹⁵⁰ Researchers found that certificate holders were three times as likely to receive interviews as applicants with records but without certificates, and equally as likely to receive interviews as applicants with clean records.¹⁵¹ Another study examined employment and earning statistics of individuals who had received record clearing interventions at the East Bay Community Law Center’s Clean Slate Clinic in California.¹⁵² The clinic offered post-conviction set-aside and dismissal interventions for individuals with convictions that did not result in prison sentences, as well as felony reduction interventions.¹⁵³ The study found that clearing interventions increased employment rates for clinic clients by as much as 85% and boosted average earnings by as much as \$6,000.¹⁵⁴ More data is needed to demonstrate the effectiveness of other record clearing remedies, such as certificates of rehabilitation, expungements, vacatur, and record sealing, but these studies hold promising results.

B. *Discharges: Collateral Consequences and the Failure of Discharge Review*

1. *Collateral Consequences of Military Discharges.* — Although the military does not classify administrative discharges as punitive, they have formal and informal consequences much like those imposed on individuals

147. *Id.*

148. *Id.*

149. See Chin, *Collateral Consequences and Criminal Justice*, supra note 81, at 253 (“Because of the limited judicial review, legislatures have not had to articulate the reasons for their enactment [of collateral consequence laws] or evaluate their effectiveness or costs.”).

150. Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 *Yale L. & Pol’y Rev. Inter Alia* 11, 14 (2016).

151. *Id.* at 19.

152. Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 *J. Crim. L. & Criminology* 1, 29 (2018).

153. *Id.* at 33. Under California law, individuals convicted of certain infractions, misdemeanors, and felonies not resulting in a prison sentence can petition the court to set aside and dismiss their convictions. Cal. Penal Code §§ 1203.4, 1203.4a, 1203.41 (2020). Individuals convicted of felonies that do not result in prison sentences may petition the court to have their felonies reduced to misdemeanors. *Id.* § 17(b).

154. Selbin et al., supra note 152, at 8.

with criminal records.¹⁵⁵ Many of the formal consequences of LTH discharges involve prohibitions on receiving veterans' benefits. Veterans who are most in need of VA benefits, including healthcare, housing, employment, and disability benefits, are generally not eligible to receive them.¹⁵⁶ Informally, veterans with LTH discharges face discriminatory practices when seeking employment and housing, much like the discrimination experienced by individuals with criminal records.¹⁵⁷ Veterans must also endure the unique psychological impact of discharge characterizations, which has its own debilitating effects.¹⁵⁸ Despite the technical differences between discharges and criminal prosecutions, the collateral effects remain predictably the same. Veterans marked with denigrating labels, often for life, have a reduced chance for successful reentry or reintegration into civilian society.¹⁵⁹

a. *Loss of Military Benefits and Career.* — Collateral consequences experienced by people involved with the criminal legal system parallel the collateral consequences for servicemembers with LTH discharges in significant ways. In both cases, collateral consequences are serious and immediate. Incarcerated persons may lose their jobs, homes, access to routine medical and dental care, and basic civil rights, including the right to vote and the right to be secure in their personal effects against unreasonable searches and seizures.¹⁶⁰ Convictions may extend the abdication of civil rights beyond any period of confinement.¹⁶¹

For servicemembers, the immediate effects include the loss of military employment, salary, medical, dental, clothing, commissary, and housing

155. See Bednar, *supra* note 37, at 2 (finding that the impact of a dishonorable discharge goes far beyond a loss of important benefits and rights for the concerned party); Jones, *supra* note 36, at 10 (noting that “any less than honorable discharge may substantially hinder the post-service life of its recipient”).

156. See Veterans Legal Clinic, *Underserved*, *supra* note 19, at 11 (“In other words, 85% of veterans with bad-paper discharges who applied for some VA benefit have been told that their service was so ‘[d]ishonorable’ that they forfeited all rights to almost every federal veteran benefits.”).

157. See Brooker et al., *supra* note 21, at 12–13. There is a perception that an offender whose conduct required a dishonorable discharge designation “deserves” to have a hard transition back to civilian life. The brand of “bad paper[s]” has been characterized as a “life sentence” or “a ticket to America’s underclass [and] a bar to leaving it.” *Id.* at 12.

158. See Scapardine, *supra* note 48, at 1135–36 (2017) (finding that an OTH discharge carries with it a negative stigma that “greatly limits the opportunities for both public and private civilian employment”).

159. See Veterans Legal Clinic, *Underserved*, *supra* note 19, at 21 (“The high rates of ineligibility have grave consequences for the veterans denied access to the VA, as well as to society as a whole.”).

160. See Bernice B. Donald & Devon C. Muse, *Lifelong Collateral Consequences: The Modern-Day Scarlet Letter*, 68 *Drake L. Rev.* 707, 708 (2020) (explaining that collateral consequences compound societal issues of social inequity, poverty, and poor health and prevent individuals who have been previously incarcerated to move forward, even after “paying their debts” to society).

161. See *id.*

benefits, as well as access to all family support services.¹⁶² For military members serving away from their state of legal residence, a frequent occurrence for servicemembers, a discharge also means relocating and establishing residency in another state or country.¹⁶³ Skills acquired during service may not be transferable to the private sector.¹⁶⁴ Therefore, a discharge often means the end of a career for many servicemembers.¹⁶⁵ The termination of benefits and career opportunities are catastrophic for many servicemembers, especially those suffering from mental health issues.¹⁶⁶

b. *Loss of VA Benefits.* — The lingering effects of criminal arrests and convictions also parallel the long-term consequences of an LTH discharge. In the mid-90s, federal and state welfare reform resulted in the enactment of legislation that imposed lifetime bans on public benefits for individuals convicted of drug-related offenses.¹⁶⁷ In the last decade, many states have opted out of those bans.¹⁶⁸ Nonetheless, some states still impose bans or make the receipt of benefits conditional on drug tests and enrollment in treatment programs.¹⁶⁹

162. See Veterans Legal Clinic, *Underserved*, supra note 19, at 21–22 (giving an overview of the impact that an OTH discharge can have on a veteran, including increased risk of mental health conditions and suicide, of becoming involved in the criminal justice system, and of homelessness).

163. See *id.* at 22 (“The VA’s restrictive implementation of the Other Than Dishonorable eligibility standard leaves most veterans with bad paper discharges unable to access crucial support that could help them find stable and secure housing.”)

164. See Jennifer Steinhauer, *Veterans are Working, but Not in Jobs That Match Their Advanced Training*, N.Y. Times (Mar. 7, 2020), <https://www.nytimes.com/2020/03/07/us/politics/veterans-jobs-employment.html> (on file with the *Columbia Law Review*) (last updated Mar. 16, 2020) (indicating that underemployment is one of the biggest issues faced by veterans returning from combat).

165. *Id.*

166. See Wherry, supra note 22, at 1377 (describing how after a finding of military misconduct, many individuals are pushed out of service with OTH discharges, which results in no or reduced benefits, poor job prospects, and societal stigma).

167. See The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 862a (1996); Crystal S. Yang, *Does Public Assistance Reduce Recidivism?*, 107 Am. Econ. Rev. 551, 551 (2017).

168. Chesterfield Polkey, *Most States Have Ended SNAP Ban for Convicted Drug Felons*, Nat’l Conf. of State Legislators: NCSL Blog (July 30, 2019), <https://www.ncsl.org/blog/2019/07/30/most-states-have-ended-snap-ban-for-convicted-drug-felons.aspx> [<https://perma.cc/XHM4-A8YS>]; see also Yang, supra note 167, at 554 (concluding that felons who are provided access to public benefits are less likely to return to prison within a year).

169. See, e.g., *Drug Testing for Welfare Recipients and Public Assistance*, Nat’l Conf. of State Legislatures (Mar. 24, 2017), <https://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx> [<https://perma.cc/TAV9-4H4Y>] (listing Alabama, Arkansas, Arizona, Florida, Georgia, Kansas, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin as the states which have passed legislation regarding drug testing or screening for public assistance applicants or recipients).

Veterans with OTH discharges are also banned from receiving benefits.¹⁷⁰ VA bars most veterans with OTH discharges from accessing the military's safety net of benefits that was designed to assist veterans transitioning out of the military.¹⁷¹ In 1944, in part to aid struggling World War II veterans returning from service, Congress enacted the G.I. Bill of Rights, the largest expansion of military benefits in U.S. history.¹⁷² The bill provided a myriad of benefits, including education, housing, healthcare, disability compensation, vocational rehabilitation, burial, pension, retirement, and other benefits and services for veterans.¹⁷³

Importantly, Congress made the benefits available to all servicemembers discharged "under other than dishonorable conditions."¹⁷⁴ In provisions known as the "statutory bars," Congress enumerated the dishonorable conditions under which servicemembers were not eligible to receive benefits.¹⁷⁵ The conditions included severe misconduct, such as desertion for more than 180 days, and discharges ordered pursuant to a general court-martial.¹⁷⁶ VA added its own exclusions, under congressional authority, that

170. See Brooker et al., *supra* note 21, at 50 (explaining that "a veteran with an OTH discharge due to a 38 C.F.R. § 3.12(c) violation is barred from "eligibility for any VA health care benefits").

171. See Brooker et al., *supra* note 21, at 40. VA implemented its regulatory bars after World War II. Prior to World War II, Congress set eligibility requirements that were specific to each military conflict. See Adams & Montalto, *supra* note 22, at 82, 85. For example, veterans of the Spanish-American War, Philippine Insurrection, and Boxer Rebellion were required to have an honorable discharge for disability pensions. Veterans with bad conduct or dishonorable discharges were barred from receiving many benefits, including medical and burial benefits. *Id.* at 82.

172. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284. Congress passed the bill to help servicemembers who were drafted and removed from their civilian jobs. See Adams & Montalto, *supra* note 22, at 73-74 (reviewing the history of the G.I. Bill). But see Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* 114 (2005) (noting that Black servicemembers received considerably fewer G.I. Bill benefits than white servicemembers).

173. 58 Stat. 284.

174. See Hearings on H.R. 3917 and S. 1767 to Provide Federal Government Aid for the Readjustment in Civilian Life of Returning World War II Veterans Before the H. Comm. on World War Veterans' Legis., 78th Cong. 415 (1944) [hereinafter *House Hearings on G.I. Bill*] (statement of Harry W. Colmery, past commander, the American Legion). The legislative history of the bill makes clear that Congress did not want benefits distributed only to those with an honorable discharge because, as one past commander stated, "[W]e are seeking to protect the veteran against injustice . . . [W]e are trying to give the veteran the benefit of the doubt, for we think he is entitled to it." *Id.*

175. 38 U.S.C. § 5303(a) (2018).

176. *Id.* The statute specifies bars to benefits for servicemembers who were discharged under certain conditions: by sentence of a general court-martial; for conscientious objection, when the servicemember refused to perform military duty or wear the uniform or otherwise comply with lawful orders of a competent military authority; for desertion; for absence without authority from active duty for a continuous period of at least 180 days if the servicemember was discharged under conditions other than honorable; by seeking discharge as an alien during a period of hostilities; and for resignation by an officer for the good of the service.

made thousands more veterans ineligible for benefits, including most veterans with OTH discharges.¹⁷⁷ These “regulatory bars” include broader exclusions for “willful and persistent misconduct,” offenses involving “moral turpitude,” and other minor offenses for which servicemembers were administratively discharged rather than court-martialed.¹⁷⁸ The ill-defined terms provide VA with the discretion to exclude additional veterans whose circumstances fall outside of the limited statutory categories defined by Congress.¹⁷⁹

VA denies an extensive number of benefits to most veterans with OTH discharges.¹⁸⁰ Veterans with honorable and general (under honorable conditions) discharges receive government-backed home loans, subsidized housing vouchers, small-business loans, burial benefits, pensions, disability compensation, comprehensive healthcare, case management services, rehabilitation services, residential care, compensated work therapy, employment training, tuition assistance, and telecounseling services, among other benefits.¹⁸¹ Only veterans with honorable discharges receive benefits under the Montgomery or Post-9/11 G.I. Bill, which provided educational assistance to servicemembers and veterans.¹⁸² While these benefits help veterans with honorable and general discharges,

177. See 38 C.F.R. § 3.12 (2020); Adams & Montalto, *supra* note 22, at 106 (“[E]xclusions based on the “other than dishonorable conditions” element have become known as the “regulatory bars,” referring to the VA regulations that elaborate the term.”).

178. See 38 C.F.R. § 3.12(d).

179. In *Camarena v. Brown*, 6 Vet. App. 565, 567 (1994), *aff’d per curiam*, 60 F.3d 843 (Fed. Cir. 1995), the Court of Appeals for Veterans Claims and the Federal Circuit addressed whether VA overstepped its statutory authority in excluding veterans with bad conduct discharges from receiving VA benefits. The Court found that the phrase “dishonorable conditions” gave VA discretion to exclude veterans with other than fully dishonorable discharges, but stated that Congress clearly intended to exclude only those veterans who committed misconduct equivalent to the dishonorable standard. See Adams & Montalto, *supra* note 22, at 103.

180. See VA Benefits for Servicemembers, U.S. Dep’t of Veterans Affs., <https://www.va.gov/service-member-benefits/#va-benefits-you-can-use-during-and-after-service> [<https://perma.cc/33HG-EHAA>] (last updated July 29, 2021) (providing information on various benefits for servicemembers). VA distinguishes between veterans with honorable, general, and OTH discharges when distributing VA benefits. Veterans with honorable and general discharges are eligible to receive most VA benefits, except for educational benefits, which VA only grants to honorably discharged veterans. Servicemembers whom VA deems ineligible to receive benefits may request reconsideration on a case-by-case basis. See Applying for Benefits and Your Character of Discharge, U.S. Dep’t of Veterans Affs., https://www.benefits.va.gov/benefits/character_of_discharge.asp [<https://perma.cc/TZ8K-BZDY>] (last updated Dec. 10, 2020) (listing benefits available to veterans with honorable versus general discharges).

181. See Veterans Benefits Administration Fact Sheets, U.S. Dep’t of Veterans Affs., <https://benefits.va.gov/BENEFITS/factsheets.asp#BM4/> [<https://perma.cc/3L77-LELH>] (last updated July 26, 2021); see also Brooker et al., *supra* note 21, at 42–51 (describing the various benefits available to veterans and the types of discharges required to receive such benefits).

182. 38 C.F.R. § 21.9520(a)(2).

veterans with OTH discharges have the most difficulty transitioning to civilian society and need them the most.¹⁸³

c. *Ineligibility for VA Healthcare.* — Persons with felony convictions have notoriously limited access to healthcare.¹⁸⁴ Similarly, healthcare is one of the most significant VA benefits that is denied to veterans with LTH discharges. Generally, veterans with OTH discharges do not qualify for healthcare unless they prove that their illness is related to service.¹⁸⁵ Even then, VA will only treat a veteran's service-connected disability but will not provide general healthcare.¹⁸⁶ Yet in response to the mental health discharge crisis reported by the GAO in 2017, VA implemented regulations to provide emergency mental health services to any veteran for up to ninety days, including inpatient, residential, and outpatient treatment services, regardless of their discharge characterization.¹⁸⁷ Additionally, Congress passed the Honor Our Commitment Act of 2018 that extended healthcare to a limited number of veterans with OTH discharges.¹⁸⁸ Under the Act, veterans who served at least 100 days on active duty and deployed in a theater of combat operations or in support of combat operations, or who are survivors of military sexual trauma, are eligible for extended mental and behavioral healthcare, regardless of their discharge.¹⁸⁹ While these efforts are laudable, they are limited in scope and exclude thousands of veterans who do not meet the criteria.¹⁹⁰ Further, VA often misinterprets

183. See Veterans Legal Clinic, *Underserved*, supra note 19, at 7–8 (indicating exclusion from the VA due to OTH discharge can mean the denial of a variety of benefits that help in the transition back into civilian life, including housing, healthcare, and employment support).

184. See Jay Hancock, *Out of Jail, Uninsured, Ex-Inmates Face Health Care Challenges*, *Balt. Sun* (Apr. 23, 2016), <https://www.baltimoresun.com/health/bs-hs-ex-inmate-health-care-20160424-story.html> (on file with the *Columbia Law Review*) (indicating that thousands of people who were previously incarcerated leave prison with mental illness or chronic health issues, but live without access to healthcare).

185. See 38 C.F.R. § 3.360(a) (allowing health benefits to be given “to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty”).

186. *Id.*; see also Veterans Legal Clinic at the Legal Servs. Ctr. of Harvard L. Sch., *Veterans Legal Servs., Wilmer, Cutler, Pickering, Hale & Dorr LLP, Turned Away: How VA Unlawfully Denies Health Care to Veterans With Bad Paper Discharges 2* (2020) <https://www.legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf> [<https://perma.cc/4BRQ-25J5>] (noting that every person seeking VA healthcare is entitled to apply, but VA offices often exclude veterans completely from services they could be eligible for on the basis of their discharge paperwork).

187. See 38 U.S.C. § 1702 (2018); 38 C.F.R. § 17.34.

188. See Consolidated Appropriations Act, Pub. L. No. 115-141, § 258, 132 Stat. 348, 826 (2018) (codified as amended in scattered sections of the U.S.C.).

189. *Id.*

190. See Ledesma, supra note 23, at 191 (commenting that while there is an administrative process that allows servicemembers who received a “bad paper” discharge to challenge that characterization in order to seek benefits, the processes are incredibly lengthy and difficult to navigate, leaving many servicemembers without healthcare benefits).

its own regulations and denies care to qualifying veterans, who tend to lack access to legal counsel or knowledge of their legal rights to challenge these denials.¹⁹¹

d. *Ineligibility for VA Housing Programs.* — Just as criminal background checks often disqualify persons with criminal records from obtaining housing, veterans with OTH discharges have limited housing options.¹⁹² VA offers an array of housing and residential treatment programs for its veterans, but again, the programs are limited to veterans with honorable or general discharges.¹⁹³ Veterans with OTH discharges represent 25% of the total homeless veteran population and account for 5% of all separated servicemembers.¹⁹⁴ At the end of 2020, under the U.S. Department of Housing and Urban Development-VA Supportive Housing (HUD-VASH) program, HUD and VA provided permanent housing and supportive services to 100,570 homeless veterans and their families.¹⁹⁵ Since the program is based on eligibility for VA healthcare, it excludes most homeless veterans with OTH discharges.¹⁹⁶ Additionally, many states offer VA-subsidized assisted-living and skilled-nursing facilities for veterans, but only to those who were discharged under honorable conditions.¹⁹⁷

e. *Exclusion from State and Federal Education and Employment Programs for Veterans.* — Veterans with “bad paper” who are transitioning into the workforce face the same dearth of employment and education opportuni-

191. See Brennan, *supra* note 21 (indicating that VA staff members routinely misapply the law and misinterpret military records, thus preventing eligible veterans from receiving treatment).

192. See Fair Housing for People With a Criminal History, Fair Housing Ctr. for Rts. & Rsch., <https://www.thehousingcenter.org/resources/criminal-history/> [<https://perma.cc/DC2R-3XNE>] (last visited July 27, 2021) (explaining that criminal background checks are often used as a screening criterion for rental housing to determine qualified applicants, resulting in continued penalty for those with a criminal history even after they leave prison).

193. *Id.*

194. Adi V. Gundlapalli, Jamison D. Fargo, Stephen Metraux, Marjorie E. Carter, Matthew H. Samore, Vincent Kane & Dennis P. Culhane, Military Misconduct and Homelessness Among US Veterans Separated From Active Duty, 2001–2012, 314 JAMA 832, 832 (2015) (noting also that the “[i]ncidence of homelessness was significantly greater for misconduct vs normal separations at first VHA encounter (1.3% vs. 0.2% . . .), within 1 year (5.4% vs. 0.6% . . .), and 5 years (9.8% vs. 1.4% . . .) of first VHA encounter”).

195. U.S. Department of Housing and Urban Development-VA Supportive Housing (HUD-VASH) Program, U.S. Dep’t of Veterans Affs., <https://www.va.gov/homeless/hud-vash.asp> [<https://perma.cc/27RP-7LJQ>] (last updated Mar. 30, 2021).

196. HUD-VASH Eligibility Criteria, U.S. Dep’t of Veterans Affairs, https://www.va.gov/homeless/hud-vash_eligibility.asp [<https://perma.cc/GZ66-MVPX>] (last updated Feb. 19, 2019).

197. See, e.g., Admissions Eligibility, Charlotte Hall Veterans Home, <https://www.charhall.org/content/admissions/eligibility.cfm> [<https://perma.cc/7UZH-2XR8>] (last visited Aug. 26, 2021) (noting that in order to be eligible for admission to Charlotte Hall Veterans Home, the individual must be “a Maryland veteran who served full time active duty in the U.S. Armed Forces, other than active duty for training, and was discharged or released under honorable conditions” (emphasis added)).

ties as people with criminal convictions upon their reentry into the workforce.¹⁹⁸ While states and federal agencies offer transition programs specifically tailored for veterans, these programs also follow VA's eligibility determinations and exclude veterans with LTH discharges. For example, under the Illinois Veterans' Grant program, honorably discharged veterans receive tuition assistance at all Illinois state colleges, universities, and community colleges.¹⁹⁹ Illinois' "Troops to Teachers" program assists servicemembers who are pursuing careers in public school teaching.²⁰⁰ Military members who served during wartime or overseas receive a one-time "Service Bonus."²⁰¹ In Texas, disabled veterans receive tuition waivers at in-state colleges and free driver's licenses.²⁰² These innovative programs are tremendously helpful to veterans transitioning from military service, but their exclusionary policies limit their effectiveness.

Veteran employment programs intended to protect veterans and to facilitate their transition into the workforce are generally not available to veterans with OTH discharges. One of the most comprehensive federal employment programs, the Uniformed Services Employment and Reemployment Act (USERRA), was intended to prevent employment discrimination against servicemembers entering or reentering civil employment after military service.²⁰³ For example, the wars in Iraq and Afghanistan saw record numbers of Reserve Component servicemembers mobilized for federal service, often for multiple tours of duty.²⁰⁴ These servicemembers left and returned to civilian jobs multiple times over a period of years.²⁰⁵ USERRA protects these servicemembers from employment discrimination, but not veterans with OTH discharges.²⁰⁶ Section 4304 of the Act excludes servicemembers with OTH separations and punitive discharges from its protections.²⁰⁷ As such, even a servicemember with multiple enlistments of

198. See Brooker et al., *supra* note 21, at 13–14 (“[S]tatistics on the connection between post-traumatic stress disorder (PTSD) and crime leave much to be desired . . . [but] enough data now exist[s] to conclude that the military has essentially criminalized mental illness . . .”).

199. Illinois Veteran's Benefits, MilitaryBenefits.info, <https://militarybenefits.info/illinois-veterans-benefits> [<https://perma.cc/5DPG-ZTSC>] (last visited July 27, 2021).

200. *Id.*

201. *Id.*

202. *Id.*

203. Uniformed Service Employment and Reemployment Rights Act, Pub. L. No. 103-353, sec. 2, § 4301, 108 Stat. 3149, 3150 (1994) (codified at 38 U.S.C. §§ 4301–4331 (2018)). USERRA added additional protections to an earlier law that provided workplace protections for veterans. See S.J. Res. 286, 76th Cong. (1940); Karin, *supra* note 40, at 137 (explaining that the goal of USERRA was to help servicemembers integrate into civilian life after military service and foster participation in the workforce).

204. Karin, *supra* note 40, at 138.

205. *Id.*

206. *Id.* at 157 (“[L]abor standards terminate with (1) a dishonorable or bad conduct discharge; [or] (2) an other than honorable conditions (OTH) separation . . .”).

207. 38 U.S.C. § 4304(2).

honorable service who is discharged during his last enlistment with an OTH discharge is denied protections under the Act.²⁰⁸

The “veterans’ preference” offered by federal, state, and private sector employers is a valuable employment tool, but it is often reserved only for veterans discharged under honorable conditions.²⁰⁹ Veterans’ preferences attempt to remedy unemployment and reintegration problems experienced by many veterans.²¹⁰ Historically, these preferences were offered by public sector employees. In the last decade, a number of states have expanded veterans’ preferences to include private sector employment, but again, these too bar veterans with OTH discharges.²¹¹

Even when veterans are not explicitly excluded from employment programs because of their discharge characterization, they are often excluded because of discriminatory hiring practices. There are no per se Title VII protections for veterans if employers use a veteran’s discharge status to deny them employment.²¹² While the Equal Employment Opportunity Commission (EEOC) has taken the position that the use of criminal history questions in hiring may constitute unlawful race or national origin discrimination under either disparate treatment or disparate impact theories, it is not clear that veterans have these same claims.²¹³ It is also unknown whether employers may violate the Americans with Disability Act by using discharge status in hiring, given the disproportionate impact of discharges on veterans with mental illness.²¹⁴

208. See *Tootle v. Merit Sys. Prot. Bd.*, 559 F. App’x 998, 998 (Fed. Cir. 2014) (holding that the appellant’s three honorable discharges for previous periods of service did not provide standing for his USERRA claim after the appellant was discharged with a dishonorable discharge during his last period of service).

209. See Michael D. Sutton, Comment, Forging a New Breed: The Emergence of Veterans’ Preference Statutes Within the Private Sector, 67 *Ark. L. Rev.* 1081, 1090 (2014) (explaining that some statutes regarding preference status include requirements regarding residency, honorable discharge, or disability status).

210. See *Koelfgen v. Jackson*, 355 F. Supp. 243, 254 (D. Minn. 1972) (holding that preferential treatment in veteran hiring does not violate equal protection principles when legislatures provide a rational basis for the preference).

211. Ark. Code Ann. § 21-3-302(b)(1) (2013); Ga. Code Ann. § 43-1-13 (2014); Idaho Code § 65-502(17) (2014); Sutton, *supra* note 209, at 1090 n.59 (citing 5 U.S.C. § 2108(1) (2012)).

212. Cf. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e et seq. (2018) (omitting protections for veterans); Karin, *supra* note 40, at 184 (“[T]here is no per se violation of Title VII if an employer uses criminal history to make an employment decision”); Alyssa Peterson & Arjun Mody, How Employers Illegally Discriminate Against Veterans With Less-Than-Honorable Discharges, *Harv. C.R.-C.L. L. Rev.* (May 29, 2018), <https://harvardcrcl.org/how-employers-illegally-discriminate-against-veterans-with-less-than-honorable-discharges> [<https://perma.cc/M895-A5W7>] (“After receiving a less-than-honorable discharge, veterans cannot access most state and federal veterans’ benefits. Moreover, a number of employers have gone so far as to adopt blanket bans on hiring veterans with bad paper.”).

213. See Karin, *supra* note 40, at 184 (“Of relevance to USERRA’s statutory OTH exclusion, the EEOC’s updated guidance confirms that not all use of criminal history is illegal”).

214. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b), 104 Stat. 327, 329 (“It is the purpose of this Act— (1) to provide a clear and comprehensive national

A few states have become acutely aware of the disparate impact of OTH discharges on people of color and disabled individuals and have taken steps to protect veterans from disclosing an unfavorable discharge status.²¹⁵ In 2018, Connecticut became the first state to formally recognize that discrimination based on discharge status can violate protections based on race.²¹⁶ The Connecticut Commission on Human Rights and Opportunities (CHRO) issued a fact sheet warning employers of blanket policies that may run afoul of antidiscrimination laws since data shows that adverse discharges are disproportionately issued to servicemembers of protected classes.²¹⁷ Illinois and Wisconsin have also adopted statutory protections against employment discrimination of veterans with OTH discharges.²¹⁸

Despite the efforts of a few states, the disclosure of military discharge status for a variety of purposes remains commonplace in civilian society. Veterans must disclose their DD-214 to obtain employment, benefits, or to show proof of military service.²¹⁹ The document's conventional use is striking, given that DD-214s include other sensitive information in addition to

mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”).

215. See Karin, *supra* note 40, at 185 (indicating that twenty-four states and over one-hundred cities and counties have instituted ban-the-box laws).

216. Veterans Legal Services Clinic, IAVA-CT: Protecting Veterans With Bad Paper From Employment Discrimination, Yale L. Sch., <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/iava-ct-protecting-veterans-employment-discrimination/> [<https://perma.cc/W6B7-SYRJ>] (last visited July 27, 2021).

217. See Conn. Comm'n on Hum. Rts. & Opportunities, Guide to Nondiscrimination in Hiring and Employing Connecticut Veterans: Questions and Answers for Employers, <https://portal.ct.gov/-/media/chro/veteranemployerqaguidancepdf.pdf> [<https://perma.cc/L6TZ-3W4F>] [hereinafter Human Rights Report] (last visited July 27, 2021) (“Policies that discriminate against veterans who received a less-than-honorable discharge from the military may also subject you to liability under current federal and state law, as a result of their disparate impact on veterans of color, LGBT veterans, and veterans with disabilities.”). The Commission also published a “know your rights” page, alerting veterans to the employer liability under the Connecticut Fair Employment Practices Act. See Comm'n on Hum. Rts. & Opportunities, Know Your Rights, <https://portal.ct.gov/-/media/chro/knowyourrights-veteranspdf.pdf> [<https://perma.cc/L2UK-3FCF>] (last visited July 27, 2021); see also Conn. Gen. Stat. § 46a-60(b) (2019); Peterson & Mody, *supra* note 212 (describing Connecticut's model for addressing the adverse impacts of biased policies discriminating based on discharge status).

218. See 68 Ill. Comp. Stat. 5/1-102(A) (2016) (prohibiting discrimination based on “unfavorable discharge from military service in connection with employment”); Wis. Stat. §§ 111.32(3), 111.322, 111.335 (2016) (prohibiting employment discrimination based on military service, discharge characterization, or military criminal record).

219. Joe Wallace, DD214: Understanding Character of Discharge, MilitaryBenefits.info, <https://militarybenefits.info/character-of-discharge/> [<https://perma.cc/U559-WD46>] (last visited July 27, 2021) (explaining the uses for the DD-214); see also Kevin Lonergan, Service Discharges; DD Form 214 Explained, U.S. Army (Feb. 8, 2012), <https://www.army.mil/>

discharge characterizations, such as social security numbers, birthdates, home addresses, and dates of service.²²⁰ It is not clear why military discharge characterizations must be included on the DD-214, other than to make them available for employment and benefits purposes. The fact that the military has not addressed this issue is an indication of its blindness to the collateral consequences of its characterizations.

f. *Moral Injury*. — The psychological impact of an OTH discharge, especially on those suffering from mental illness, is as equally overlooked as the psychological impact of incarceration on people involved with the criminal legal system.²²¹ Researchers have used the term “moral injury” to describe experiences in which individuals “perpetrate, fail to prevent, or bear witness to acts that transgress deeply held moral beliefs and expectations.”²²² This type of injury is exemplified by Vietnam War veterans, many of whom endured traumatic combat experiences and later returned to the United States to face scorn by the public and national media.²²³ Some Vietnam veterans and other servicemembers have reported experiencing moral injury in both combat and noncombat roles. For example, moral injury may be experienced when a servicemember is ordered to shoot the driver of a quickly approaching vehicle whose intentions are unknown, seeing wounded civilians and being unable to assist, being exposed to human remains, feeling a rush or enjoyment during war or killing, or making

article/73343/service_discharges_dd_form_214_explained/ [https://perma.cc/NZ33-JMS4] (noting that “most individuals and employers want to see an Honorable Discharge”).

220. Joe Wallace, How to Read DD Form 214, MilitaryBenefits.info, <https://militarybenefits.info/how-to-read-dd214/> [https://perma.cc/488B-FVKZ] (last visited Aug. 18, 2021).

221. Mika'il DeVeaux, The Trauma of the Incarceration Experience, 48 Harv. C.R.-C.L. L. Rev. 257, 257 (2013) (“The experience of being locked in a cage has a psychological effect upon everyone made to endure it. No one leaves unscarred.”).

222. Brett T. Litz, Nathan Stein, Eileen Delaney, Leslie Lebowitz, William P. Nash, Caroline Silva & Shira Maguen, Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy, 29 *Clinical Psych. Rev.* 695, 697 (2009) (cleaned up); see also Shira Maguen & Brett T. Litz, Moral Injury in Veterans of War, 23 *PTSD Rsch. Q.* 1, 1 (2012) (defining moral injury as “an act of serious transgression that leads to serious inner conflict because the experience is at odds with core ethical and moral beliefs”); Jonathan Shay, Moral Injury, 31 *Psychoanalytic Psych.* 182, 184 (2014) (describing a form of moral injury experienced by service members who act in violation of their own ideals, ethics, or attachments in war).

223. Approximately 2.7 million Americans served in the Vietnam War (1961–1975), and about 58,000 were killed. DOD discharged thousands of servicemembers for minor misconduct who had experienced traumatic events and who were later diagnosed with mental health disorders. The Vietnam War is particularly associated with moral injury because of the social and political volatility of the conflict, and because of the well documented atrocities that were committed against civilians as the U.S. struggled to adapt to guerilla warfare style of fighting. As a result of the bloody conflict and the moral ambiguity of the war, many Vietnam era veterans have experienced prolonged postwar symptoms of medical, psychological, and spiritual distress including moral injury. See Lindsey K. Slaughter, Psychologist, U.S. Dep’t of Veterans Affs., Richmond, Virginia VA Hospital, Community Hospices: Moral Injury in Vietnam Veterans, Presentation to Capital Caring Hospice (June 12, 2019) (on file with the *Columbia Law Review*).

decisions that affect the survival of others.²²⁴ In extreme cases, it may involve being ordered to break the rules of engagement, believing that commanders gave negligent orders or did not adequately support troops, or mistreating civilians or captured enemy combatants, as well as incidents involving death or harm to civilians, such as killing children, witnessing or perpetrating violence or sexual abuse on civilians, or disrespecting dead bodies.²²⁵ These actions may violate moral principles “that are rooted in religious or spiritual beliefs, or culture-based, organizational, and group-based rules about fairness and the value of life.”²²⁶

The symptoms of moral injury are often masked as behavior problems. Studies show that conflict between morally challenging situations and personally held beliefs or standards can cause servicemembers to experience negative self-attributions, guilt, shame, changes in ethical attitudes and behavior, difficulty with forgiveness, and a reduced ability to trust others.²²⁷ Manifestations of moral injury include self-harm, “poor self-care, alcohol and drug abuse, severe recklessness, and parasuicidal behavior.”²²⁸ In 2013, these new perspectives of trauma were recognized in an updated edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which is the official listing of psychological disorders used by healthcare professionals, including VA.²²⁹ The DSM-5 moved PTSD from the anxiety disorders section to the trauma and stressor-related disorders section of the manual.²³⁰ Feelings of guilt, shame, and self-deprecation were added

224. Craig J. Bryan, AnnaBelle O. Bryan, Michael D. Anestis, Joyce C. Anestis, Bradley A. Green, Neysa Etienne, Chad E. Morrow & Bobbie Ray-Sannerud, *Measuring Moral Injury: Psychometric Properties of the Moral Injury Events Scale in Two Military Samples*, 23 *Assessment* 557, 557–58 (2016) [hereinafter Bryan et al., *Measuring Moral Injury*].

225. Victoria Williamson, Neil Greenberg & Dominic Murphy, *Moral Injury in UK Armed Forces Veterans: A Qualitative Study*, 10 *European J. of Psychotraumatology* 1, 3–7 (2019). This study included qualitative interviewing of six veterans who reported moral injury and four clinicians who had treated veterans with moral injury. The data from the interviews was analyzed using thematic analysis. The researchers found that after experiencing events which caused moral injury, veterans experienced consistent and significant psychological distress, including flashbacks, nightmares, intrusive thoughts, emotional numbness, suicidal ideation, negative appraisals of themselves and others, and exhibiting risky behaviors or self-neglect.

226. AnnaBelle O. Bryan, Chad E. Morrow, Neysa Etienne & Bobbie Ray-Sannerud, *Moral Injury, Suicidal Ideation, and Suicide Attempts in a Military Sample*, 20 *Traumatology* 154, 154 (2014).

227. *Id.* at 154–55; see also Bryan et al., *Measuring Moral Injury*, *supra* note 224, at 557–70 (discussing the effects of violating moral standards on a servicemember’s emotional, mental, and social wellbeing).

228. Litz et al., *supra* note 222, at 701.

229. See *The Diagnostic and Statistical Manual of Mental Disorders* § 309.81 (5th ed. 2013) [hereinafter *DSM-V*] (noting DSM-5’s categorizing of PTSD as a trauma and stressor-related disorder rather than an anxiety disorder); *DSM-5 Measures*, U.S. Dep’t of Veterans Affs., https://www.ptsd.va.gov/professional/assessment/dsm-5_validated_measures.asp [https://perma.cc/67G8-2K5H] (last visited Aug. 26, 2021).

230. See Bryan et al., *Measuring Moral Injury*, *supra* note 224, at 557–58. In 1980, the American Psychiatric Association (APA) added PTSD to its *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*. It was a landmark moment for servicemembers that marked

to the diagnostic criteria for PTSD under a new cluster referred to as “negative alterations in cognition and mood.”²³¹ This classification was an important step in understanding the data showing marked increases in PTSD among servicemembers and veterans.²³²

Despite VA’s recognition of this unique kind of trauma and its relationship to PTSD, the military continues to discharge servicemembers for misconduct rather than treat their mental illness.²³³ LTH discharges perpetuate servicemembers’ feelings of guilt and shame, increase the chance of reexperiencing moral injury, and reduce the chance for self-forgiveness and recovery.²³⁴ Researchers have identified factors for measuring moral injury and have discovered associations between these factors and those used to measure self-injurious thoughts and behaviors.²³⁵ VA reported that, in 2017, about seventeen veterans committed suicide per day.²³⁶ More studies are needed to understand the association between moral injury and suicide, the second-leading cause of death for servicemembers, though moral injury is clearly a risk factor for suicide.²³⁷

The military must be cognizant that discharge characterizations involve more than administrative personnel matters and indeed affect the lives of those who have served long after they have departed the battlefield. VA must be particularly cognizant of the healthcare and housing needs of

the start of a major body of neuroscience and clinical research that continues to evolve and shape our understanding of trauma and warfighting today. The recategorizing of PTSD as a trauma and stressor-related disorder marked another important moment in the evolution of the medical community’s understanding of the disorder. See Anushka Pai, Alina M. Suris & Carol S. North, *Posttraumatic Stress Disorder in the DSM-V: Controversy, Change, and Conceptual Considerations*, *Behav. Scis.*, Mar. 2017, at 7, 7 (noting “considerable research has demonstrated that PTSD entails multiple emotions (e.g., guilt, shame, anger) outside of the fear/anxiety spectrum, thus providing evidence inconsistent with the inclusion of PTSD with the anxiety disorders”).

231. Pai et al., *supra* note 230, at 4 (“The DSM-5 increased the number of symptom groups [for a PTSD diagnosis] from three to four and the number of symptoms from 17 to 20.”).

232. *Inst. of Med., Treatment for Posttraumatic Stress Disorder in the Military and Veteran Populations: Final Assessment 41* (Nat’l Acads. Press ed., 2014) (noting that data from DOD and VA show marked increases in PTSD among servicemembers and veterans).

233. GAO Discharge Report, *supra* note 11 (noting that “91,764 servicemembers were separated for misconduct from fiscal year 2011 through 2015; of these servicemembers, 57,141 - 62 percent - had been diagnosed within the 2 years prior to their separation with PTSD, TBI, or other certain conditions that could be associated with misconduct”).

234. Litz et al., *supra* note 222, at 701 (finding that servicemembers with moral injury tend to suffer in isolation, creating a feedback loop in which they withdraw from others due to feelings of shame).

235. Bryan et al., *Measuring Moral Injury*, *supra* note 224, at 155.

236. *Off. of Mental Health & Suicide Prevention, U.S. Dep’t of Veterans Affs., 2019 National Veteran Suicide Prevention Annual Report 3* (2019), https://www.mentalhealth.va.gov/docs/data-sheets/2019/2019_national_veteran_suicide_prevention_annual_report_508.pdf [<https://perma.cc/L9U5-H52Q>].

237. See Bryan et al., *Measuring Moral Injury*, *supra* note 224, at 154.

veterans during the current COVID-19 pandemic.²³⁸ Jeremy Travis, former chief of the National Institute of Justice, famously said of the thousands of Americans sent to prison that “they all come back.”²³⁹ Likewise, veterans with LTH discharges all come back seeking opportunities to reenter civilian society. Rather than providing them with the tools they need to recover from the experiences of war, they are met with exclusionary policies that create barriers to their reentry and successful transition to civilian society.²⁴⁰

2. *The Failure of Discharge Review.* — Discharge review boards are the primary means of obtaining relief from LTH discharges.²⁴¹ However, as one board president recently noted, “the [Navy Discharge Review Board] is a review board, not a clemency board.”²⁴² Review boards were never intended to consider post-service conduct and evidence of rehabilitation, and the standards governing discharge review do not support the consideration of such evidence.²⁴³ As a result, thousands of veterans with LTH discharges continue to be placed in a semicriminal status with no hope of reclaiming their honor or shedding their stigmatizing discharge characterizations.²⁴⁴

a. *The Legal Basis for Discharge Upgrade.* — Veterans may petition their service branch to upgrade their discharges, though the process is notoriously slow and the majority of those who apply for upgrades are denied relief.²⁴⁵ Discharges may be changed or corrected through administrative

238. Amy Palmer, *How COVID-19 Shifted the Way We Support Veterans*, Mil. Times (May 19, 2020), <https://www.militarytimes.com/opinion/commentary/2020/05/19/how-covid-19-shifted-the-way-we-support-veterans/> [https://perma.cc/R29E-EY29] (explaining how COVID-19 cut off much of the volunteer support which helps to assist the functioning of VA hospitals, has prevented visitors to many of the patients within VA hospitals, and has increased the severity of the housing crisis already faced by homeless veterans).

239. See Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, U.S. Dep’t of Just., Sent’g & Corr.: Issues for the 21st Century, May 2000, at 1, 1 (“If current trends continue, this year more than half a million people will leave prison and return to neighborhoods across the country . . .”).

240. See Brooker et al., *supra* note 21, at 40 (describing the difficult transition for veterans with LTH discharges who are barred from receiving VA health care).

241. *Character of Discharge Types*, Senior Veterans Serv. All., https://www.veteransaidbenefit.org/correcting_military_discharge.htm [https://perma.cc/CCU2-PD3C] (last visited Aug. 17, 2021).

242. Robert Powers, President, Navy Discharge Rev. Bd., Sec’y of the Navy, Council of Rev. Bds., NDRB Presentation to Veterans Legal Assistance Conference of 2019, at 11 (June 7, 2019) (on file with the *Columbia Law Review*) (cleaned up).

243. 10 U.S.C. §§ 1552–1553 (2018).

244. Veterans Legal Clinic, *Underserved*, *supra* note 19, at 2 (noting that administrative discharges such as the “Other Than Honorable” designation place veterans in an eligibility limbo which they cannot escape).

245. Veterans can wait anywhere between twelve to thirty months for a decision. Many veterans are not aware of their right to discharge review. VA Disability Claims and Appeals Process Timeline, Chisholm Chisholm & Kilpatrick Ltd (Apr. 30, 2019), <https://cck-law.com/blog/va-disability-claims-and-appeals-process-timeline/> [https://perma.cc/52KQ-AKGM]. Those that do are overwhelmed by the process and rules for applying. The boards

boards whose decisions are reviewable in federal court.²⁴⁶ Each service branch has two boards that review discharge petitions.²⁴⁷ Discharge review boards (DRBs) have the authority to change the character of discharge or narrative reason for a discharge,²⁴⁸ except for discharges that were either issued pursuant to the sentence of a general court-martial or not issued within the DRB's 15-year statute of limitations.²⁴⁹ Boards for the correction of military records (BCMRs) have the same powers as the DRBs but also have the authority to reinstate veterans to active duty, authorize retirement, and issue backpay.²⁵⁰ Generally, petitioners must seek review at the DRB before appealing to the BCMR or federal courts.²⁵¹

Both review boards have similar standards of review. The DRB may take action on a servicemember's discharge based on "equity,"²⁵² while the BCMR may take action if there is an "injustice."²⁵³ The standards of equity and injustice are generally the same and apply under three regulatory circumstances: (1) if the policy that led to the veteran's discharge has now been changed to such a degree that the veteran would not have been discharged as the policies currently stand; (2) if, at the time the veteran was discharged, the discharge was inconsistent with the standards of discipline

began a campaign in 2014, pursuant to a DOD mandate, to educate veterans on the discharge review process. See Memorandum from Chuck Hagel, Sec'y of Def., U.S. Dep't of Def., to Sec'ys of the Mil. Dep'ts attach. 2 (Sept. 3, 2014) (on file with the *Columbia Law Review*) [hereinafter Hagel Memo] (directing the boards to create a comprehensive public messaging campaign); see also National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 533, 130 Stat. 2000, 2121 (2016) (codified at 10 U.S.C. § 1553 (2018)) (requiring the boards to publish their decisions on the internet).

246. Conn. Veterans Legal Ctr., Veterans Discharge Upgrade Manual 12 (2011), <https://ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-20111.pdf> [<https://perma.cc/9343-64BN>] [hereinafter Veterans Discharge Upgrade Manual] (listing the standards of review for discharge review boards).

247. See *id.* at 10. The names of these boards differ among the services, though the laws and procedures are generally the same. See *id.* at 11. Section 523 of the National Defense Authorization Act for Fiscal Year 2020 added a "final" DOD-level review board for servicemembers who exhaust their administrative appeal rights at their respective service branch DRBs and BCMRs. See 10 U.S.C. § 1553a (2018); National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, § 523, 133 Stat. 1198, 1354 (2019) (codified as amended at 10 U.S.C. § 1553a (2019)). The Deputy Secretary of Defense designated the Secretary of the Air Force with oversight of the new board, officially titled the DOD Discharge Appeal Review Board (DARB), though the board hears appeals from every service branch. See Memorandum from David L. Norquist, Deputy Sec'y of Def., U.S. Dep't of Def., to Senior Pentagon Leadership, U.S. Dep't of Def. 1 (Jan. 29, 2021) (on file with the *Columbia Law Review*).

248. 32 C.F.R. § 70.8 (2020).

249. 10 U.S.C. § 1553(a).

250. *Id.* § 1558; see also Veterans Discharge Upgrade Manual, *supra* note 246, at 10.

251. See Veterans Discharge Upgrade Manual, *supra* note 246, at 10.

252. 32 C.F.R. § 70.9(b)-(c).

253. 10 U.S.C. § 1552(a)(1).

in military service of which the veteran was a member; and (3) if the discharge was inequitable or unjust based on evidence relating to (A) quality of service or (B) capability to serve.²⁵⁴ Petitioners may also seek review based on clemency, but only if their discharge was issued pursuant to the order of a court-martial.²⁵⁵

The DRB and BCMR may also take action on grounds of “error” and lack of “propriety.”²⁵⁶ Error and impropriety fall under two regulatory circumstances: (1) an error of fact, law, procedure, or discretion occurred, *and* the error was prejudicial to the veteran during the discharge process;²⁵⁷ and (2) a change in policy by the military service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.²⁵⁸ Changes based on error or impropriety are rare and, when invoked, typically involve retroactive policy changes.²⁵⁹

In 2014, as a result of heavy lobbying efforts by Congress and Veterans Service Organizations (VSOs) as well as a federal lawsuit filed on behalf of Vietnam veterans with PTSD who were seeking relief from LTH discharges,²⁶⁰ then-Secretary of Defense Chuck Hagel issued a policy memo

254. 32 C.F.R. § 70.9(c). The majority of discharge upgrade petitions are based on allegations of inconsistent standards or inequalities rather than on policy changes. For example, after the repeal of the “Don’t Ask Don’t Tell” policy, the military invited gay and lesbian servicemembers to petition for discharge upgrades during a specified window of time, a rare occurrence. See Dave Philipps, *Ousted as Gay, Aging Veterans Battling Again for Honorable Discharges*, N.Y. Times (Sept. 7, 2015), <https://www.nytimes.com/2015/09/07/us/gay-veterans-push-for-honorable-discharges-they-were-denied.html> (on file with the *Columbia Law Review*) (detailing that many veterans were given LTH discharges, barring them from veterans’ benefits and government jobs and/or other employment, for being gay).

255. 10 U.S.C. §§ 1552(f)(2), 1553(a). Clemency generally refers to a change in a discharge or dismissal adjudged by courts-martial. But see Memorandum from Robert L. Wilkie, Under Sec’y of Def., U.S. Dep’t of Def., to Sec’y of the Mil. Dep’ts 1 (July 25, 2018), <https://arba.army.pentagon.mil/documents/Wilke20180725JusticeEquityClemency.pdf> [<https://perma.cc/6FKB-3L8T>] [hereinafter *Wilkie Memo*] (calling for the review boards to consider clemency in all cases, not only discharges or dismissals pursuant to courts-martial).

256. 10 U.S.C. § 1552(a)(1); 32 C.F.R. § 70.9(b).

257. 32 C.F.R. § 70.9(b)(1)(i) (explaining that “prejudicial error” means that there is a “substantial doubt” that the discharge would have remained the same if the error had not been made).

258. *Id.* § 70.9(b)(1)(ii).

259. There are a number of reasons why the boards generally do not upgrade discharges based on error. First, errors must be prejudicial, and boards do not often find prejudice. Second, the boards are generally boards of equity, and the members are not persuaded by technical errors. Finally, the formalization and inclusion of a Judge Advocate Corps in every service has reduced error rates. Cf. Alexander Holtzoff, *Administration of Justice in the United States Army*, 22 N.Y.U. L.Q. Rev. 1, 9 (1947) (noting how the dearth of military lawyers during World War II contributed to inequities in the military justice system).

260. *Monk v. Mabus*, No. 3:14cv260(WWE), 2014 WL 7794807, at *2 (D. Conn. Nov. 18, 2014). In 2014, students at the Veterans Clinic at Yale Law School filed a class action lawsuit against the Navy on behalf of less-than-honorably discharged veterans suffering from PTSD and other mental illness. All five individual plaintiffs named in the case received discharge upgrades from the Board of Correction for Navy Records, and the class certification was

regarding discharge petitions raising mental health issues.²⁶¹ The “Hagel Memo” stated that liberal consideration would be given to veterans petitioning for discharge relief based on mental health reasons, including PTSD or related conditions.²⁶² Subsequent memoranda provided guidance for implementing liberal consideration and expanded its scope to include matters related to sexual assault and sexual harassment.²⁶³

Notably, liberal consideration did not change the legal standards for an upgrade. Rather, it gave the boards the additional authority to liberally

dismissed. See *Monk v. Mabus*, Yale Law School Veterans Legal Services Clinic, <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/monk-v-mabus> [<https://perma.cc/PG88-DXZA>] (last visited July 27, 2021) (revealing that “[f]ive Vietnam combat veterans and three veterans’ organizations filed a class action lawsuit . . . seeking relief for tens of thousands of Vietnam Veterans” that received an other-than-honorable discharge after developing PTSD during the war); see also Andrew Tilghman, DOD Willing to Reconsider Discharges of Vietnam Vets With PTSD, *Mil. Times* (Sept. 3, 2014), <https://www.militarytimes.com/news/pentagon-congress/2014/09/03/dod-willing-to-reconsider-discharges-of-vietnam-vets-with-ptsd/> [<https://perma.cc/BQ64-AJW6>] (explaining that DOD had agreed to “reconsider the bad-paper discharges for thousands of Vietnam-era veterans” after the federal lawsuit was filed).

261. See Hagel Memo, *supra* note 245, at 1.

262. *Id.* The Secretary of Defense regulates the military at the discretion of the President. See 10 U.S.C. § 113 (2018). The Secretary of Defense’s policy memoranda carry the weight of military orders or directives. See What Are the DOD Issuances?, Wash. Headquarters Servs., <https://biotech.law.lsu.edu/blaw/dodd/general.html> [<https://perma.cc/WND2-JNDA>] (last visited Aug. 26, 2021) (“Directive-type memoranda signed by the Secretary or Deputy Secretary of Defense are policy-making documents. A directive-type memorandum shall be converted into a DoD Directive or DoD Instruction within 180 days, unless the subject is classified with limited distribution or is material of limited or temporary relevance.”).

263. Memorandum from A.M. Kurta, Acting Under Sec’y of Def. for Pers. & Readiness, U.S. Dep’t of Def., to Sec’y of the Mil. Dep’ts 1 (Aug. 25, 2017), <https://dod.defense.gov/portals/1/documents/pubs/clarifying-guidance-to-military-discharge-review-boards.pdf> [<https://perma.cc/V29A-E79C>] [hereinafter Kurta Memo]; see also Memorandum from Brad Carson, Acting Under Sec’y of Def. for Pers. & Readiness, U.S. Dep’t of Def., to Sec’y of the Mil. Dep’ts 1 (Feb. 24, 2016), <http://veteransclinic.law.wfu.edu/files/2017/09/Carson-Memo.pdf> [<https://perma.cc/VXB5-M7RD>]. The Kurta Memo articulated four questions for petitioners seeking review: (1) Does the veteran have a condition or experience that may excuse or mitigate the discharge; (2) Does that condition exist or did the experience occur in service; (3) Does that condition or experience actually excuse or mitigate the discharge; and (4) Does the condition or experience outweigh the discharge. The most contested issue in the Kurta Memo is whether the condition or experience excuses or mitigates the discharge. The Kurta Memo provides favorable guidance to veterans on this question, stating that “[c]onditions or experiences that may reasonably have existed at the time of discharge will be liberally considered as excusing or mitigating the discharge.” Kurta Memo, *supra*, at attach. 2. The Kurta Memo questions provided much needed guidance to petitioners, most of whom are unrepresented. Tom Turcotte, *Mil. L. Task Force of the Nat’l Law’s Guild, Basics of Discharge Upgrading 4* (2020), https://dd214.us/reference/DischargeUpgrade_Memo.pdf [<https://perma.cc/5UU3-F2SR>] (“Most of [the Military Discharge Review Board’s] caseload involves unrepresented applicants or those represented by traditional veterans’ organizations that often employ a very route [sic] approach . . .”). The policy was codified at 10 U.S.C. § 1553(d) for the DRBs and at 10 U.S.C. § 1552(h) for the BCMRs.

construe facts in such a way that recognized the myriad circumstances that may establish evidence of mental illness and its influence on servicemembers' behavior.²⁶⁴ For example, it allowed for relaxed evidentiary standards in cases involving mental illness, such as permitting veterans' own statements to establish illness and to provide a nexus between the illness and the unlawful behavior.²⁶⁵ Evidence of misconduct or changes in behavior, including requests for transfer, deterioration in work performance, substance abuse, episodes of depression, panic or anxiety attacks without an identifiable cause, and unexplained economic or social behavior changes, could be used to infer a mental health condition.²⁶⁶ It also allowed for the consideration that mental health conditions often remain undiagnosed until years after service and are frequently unreported in service.²⁶⁷ Overall, liberal consideration allowed the boards to exercise "greater leniency and excusal from normal evidentiary burdens" and instructed them not to expect the same burdens of proof for injustices committed at a time when the military had a limited understanding of mental illness and its behavioral effects.²⁶⁸

b. *The Failure of Substantive Rules for Discharge Upgrade.* — Despite DOD's laudable policy, liberal consideration did not produce the results that veterans' advocates had hoped to obtain. For example, for the first two quarters of 2019, almost five years after implementation of the Hagel Memo policies, the NDRB reported grant rates near preliberal consideration levels, hovering around 23% for petitions involving PTSD, TBI, and other mental health conditions.²⁶⁹ The Army fared better, with grant rates around 60%.²⁷⁰

264. See Wherry, *supra* note 22, at 1388 n.199 (explaining "liberal consideration requires the boards to consider the facts liberally and with an understanding of how facts may establish a mental health condition and a nexus between a mental health condition").

265. See Kurta Memo, *supra* note 263, at attach. 2. The memo stated that evidence may come from sources other than a veteran's service record, including a victim's statement in a sexual assault case, "rape crisis centers, mental health counseling centers, hospitals, physicians, pregnancy tests, tests for sexually transmitted diseases, and statements from family members, friends, roommates, co-workers, fellow servicemembers, or clergy." *Id.* at attach. 4.

266. *Id.*

267. *Id.* at attach. 4.

268. *Id.* at attachs. 3–4.

269. See Boards Statistics CY2019, Boards of Review Reading Rooms, U.S. Dep't of the Air Force, https://boards.law.af.mil/stats_CY2019.htm (on file with the *Columbia Law Review*) (last updated Oct. 3, 2021) (reporting Navy board statistics for the first two quarters of 2019). See generally Wherry, *supra* note 22, at 1387 n.197 (discussing recent grant rates for the Navy Discharge Review Board). For the same period, the NDRB reported granting 26.9% of petitions involving military sexual trauma, and 12.2% of petitions not involving mental health or military sexual trauma.

270. See Boards Statistics CY2019, *supra* note 269 (illustrating that the Army Discharge Review Board (ADRB) has granted 57.9% of the 126 mental health claims it has adjudicated).

The mixed results invited a pair of class action lawsuits against the Army and Navy alleging that the class of veterans, those with LTH discharges suffering from mental health disorders, had been denied liberal consideration in violation of the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act.²⁷¹ The lawsuits blamed the review boards for misapplying the evidentiary rules and for failing to follow special procedures for applicants with mental health problems as mandated in the DOD memos described above.²⁷² In April 2021, the U.S. District Court for the District of Connecticut approved a settlement agreement between the Army and a class of veteran plaintiffs that allowed for the automatic reconsideration of thousands of veterans' discharge upgrade applications that were denied between 2011 and 2020.²⁷³ In October 2021, the same court approved a similar settlement agreement in the Navy lawsuit.²⁷⁴

c. *Inadequate Standards for Discharge Review.* — While the class action lawsuits addressed the improper application of standards, the standards themselves remain woefully inadequate. Neither equity nor propriety, the two bases for upgrade of an administrative discharge, provide a means for

271. See *Manker v. Spencer*, 329 F.R.D. 110, 123 (D. Conn. 2018) (stating that Navy and Marine Corps veterans who served in Iraq and Afghanistan from 2001 to today and were (1) discharged with an LTH status, (2) failed to receive upgrades on their discharge status, and (3) have PTSD, properly form a class under Federal Rule 23 (b)(2)); *Kennedy v. Esper*, No. 16CV2010 (WWE), 2018 WL 6727353, at *1 (D. Conn. Dec. 21, 2018) (certifying a class of Army, Army Reserve, and Army National Guard veterans of the Iraq and Afghanistan era who were discharged with an LTH service characterization, had not received discharge upgrades, and suffered from PTSD or PTSD-related conditions).

272. See *Manker*, 329 F.R.D. at 115 (granting class certification to a group of plaintiffs “challenging the NDRB’s characterization upgrade decision-making procedures, which are allegedly in violation of the Administrative Procedure Act and the Fifth Amendment’s due process protections”); *Kennedy*, 2018 WL 6727353, at *2–4 (denying defendant’s challenge to an injunction “ordering ADRB to take into consideration, follow, and apply the Hagel Memo and medically appropriate standards for PTSD into the applications for a change in discharge status”).

273. See *Kennedy v. McCarthy*, No. 3:16-cv-2010 (CSH), 2020 WL 7706604, at *1 (D. Conn. Dec. 28, 2021); Federal Court Approves Major Nationwide Settlement for Post-9/11 Army Veterans, Yale L. Sch. (Apr. 29, 2021), <https://law.yale.edu/yls-today/news/federal-court-approves-major-nationwide-settlement-post-911-army-veterans/> [<https://perma.cc/M TZ3-NNG6>] (explaining that the agreement’s conditions include permission for veterans who filed petitions between 2001–2011 to reapply; requirements that the Army articulate why an applicant does not qualify for an upgrade and that the ADRB inform applicants about legal representation; telephonic personal appearances; and training for ADRB members); see also Press Release, *Kennedy v. McCarthy*, Yale L. Sch., <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-mccarthy/> [<https://perma.cc/2CUU-FQZX>] (last visited July 28, 2021) (explaining that suit was filed, through Yale’s Veterans Legal Services Clinic, on behalf of about 50,000 less-than-honorably discharged Iraq and Afghanistan era Army veterans with PTSD and other mental health related conditions).

274. See *Manker v. Del Toro*, No. 3:18-cv-00372 (CSH), slip op. at 2, (D. Conn. Oct. 12, 2021).

considering evidence related to relief from collateral consequences. Propriety applies only to errors of fact, law, and procedure, or changes in policy relevant to the period of service in question.²⁷⁵ Certainly, legal and procedural arguments can and should be made challenging LTH discharges of servicemembers suffering from mental illness. Yet given the discretion and complexities involved in discharging servicemembers for misconduct rather than the underlying medical reasons, boards usually do not make findings of error based on legal or procedural grounds in these cases.²⁷⁶

Equity provides a broader basis for discharge upgrade than propriety, though it provides no relief for collateral consequences. Under the equity standard, the boards may determine that relief is warranted based on the consideration of the petitioner's service record "and other evidence presented to the DRB viewed in conjunction with the factors listed in [the] section."²⁷⁷ The factors listed in the section include awards and decorations, combat service, and other equitable factors directly related to the service period under review, but do not include any factors related to post-service conduct or evidence of rehabilitation.²⁷⁸ The only reference to post-service evidence is in a provision allowing for the consideration of prior military service or outstanding post-service conduct that "provide[s] a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review."²⁷⁹ The regulations simply do not contemplate changes in discharge status based upon evidence of collateral consequences or the consideration of post-service conduct or rehabilitation unrelated to the time service period under review. Discharge review focuses on a narrow period of time in the past and not on what veterans have accomplished or experienced after service.

d. *Reluctance to Embrace Liberal Consideration.* — Liberal consideration has provided the best opportunity for the review boards to look beyond the service period in question and to consider post-service evidence. Liberal consideration invites the review boards to examine evidence obtained long after service to determine whether a servicemember's misconduct was related to a mental health condition. Servicemembers may submit lay and expert testimony developed after service to support their claims that previously undiagnosed conditions contributed to their misconduct. To

275. See 38 C.F.R. § 70.9(b) (2020).

276. See Powers, *supra* note 242, at 2–3 (highlighting the few findings of error or change in medically-related cases).

277. 32 C.F.R. § 70.9(c) (3) (2020).

278. *Id.* § 70.9(c) (listing equitable factors such as service history, rank, awards and decorations, letters of commendation, combat service, promotions, length of service, prior military service, convictions by civil authorities while a servicemember, family and personal problems, arbitrary or capricious action, and discrimination).

279. *Id.* § 70.9(j).

offset the difficulties of this endeavor, liberal consideration provides relaxed standards for the consideration of post-service evidence of mental illness and its relationship to service misconduct.²⁸⁰ Despite the flexibility provided by these standards, the boards have clung to their rigid preliberal consideration standards and have not consistently applied liberal consideration in cases that warrant its application.²⁸¹

e. *Conflict With Longstanding Discharge Review Policy.* — There are several reasons for boards' reluctance to embrace liberal consideration. First, the policy is at odds with longstanding rules governing discharge review, such as the presumption that discharges were properly executed.²⁸² Evidentiary rules put the burden of proving errors or inequities on veterans.²⁸³ The boards presume that discharges were properly executed unless a petitioner rebuts the presumption.²⁸⁴ Further, the boards apply a "presumption of regularity" in all discharge cases.²⁸⁵ That is, the boards presume regularity in the conduct of government affairs unless there is substantial and credible evidence to rebut the presumption.²⁸⁶ This evidentiary presumption can be difficult for veterans to overcome, particularly when the evidentiary record is incomplete. There is no formal discovery process for discharge review. Veterans must request records from their military service branch and VA. The records are often incomplete, especially for reservists and National Guard servicemembers.²⁸⁷

For example, in a case before the Army BCMR, a veteran received an Article 15 for disrespecting two noncommissioned officers and destroying government property, all of which occurred on the same occasion.²⁸⁸ He was subsequently given an OTH discharge based on a "pattern of misconduct," a discharge typically reserved for servicemembers with a pattern of

280. See Kurta Memo, *supra* note 263, at attachs. 1–4 (providing guidance to relevant authorities on how to handle applications for upgrading discharges related to mental health conditions).

281. See Wherry, *supra* note 22, at 1386–95.

282. DODDI 1332.28, *supra* note 63, at enclosure 3, para. 2.12.6 ("There is a presumption of regularity in the conduct of governmental affairs. This presumption shall be applied in any review unless there is substantial credible evidence to rebut the presumption.").

283. 32 C.F.R. § 581.3(e)(2) (2020); *id.* § 70.8 (b)(12)(vi).

284. See Wherry, *supra* note 22, at 1392 ("[T]he Board . . . rejected the veteran's request . . . [w]hile not explicit, the why and how was likely the presumption of government regularity and the Veteran's failure to overcome the presumption.").

285. 32 C.F.R. § 724.211; see also Peter Michael Gerdes, A Bit of History on the Presumption of Regularity, *PrawfsBlawg* (Jan. 14, 2019), <https://prawfsblawg.blogs.com/prawfsblawg/2019/01/a-bit-of-history-on-the-presumption-of-regularity.html> [<https://perma.cc/MEQ7-DTT8>] (highlighting that the presumption of regularity is an evidentiary presumption that people act appropriately, and the party claiming this presumption bears the burden to disprove).

286. 32 C.F.R. § 724.211.

287. Army Bd. for Corr. of Mil. Recs., ARAB No. AR20140016725 (May 21, 2015) (on file with the *Columbia Law Review*).

288. *Id.*

minor disciplinary infractions over a period of time.²⁸⁹ The veteran petitioned the Army BCMR for a discharge upgrade because his military record lacked sufficient evidence to support the basis for discharge.²⁹⁰ In its decision denying an upgrade, the Army BCMR conceded that the petitioner's record was void of the specific facts and circumstances concerning the events which led to his discharge from the Army.²⁹¹ However, because the petitioner's official discharge document, the DD-214, listed "pattern of misconduct" as the basis for discharge, the Army BCMR explained that they could presume that there were other instances of misconduct upon which the discharge was based even though they were absent from the record.²⁹²

f. *Deference to Commanders.* — Second, boards routinely defer to the discharge decisions of commanders who have "boots on the ground" experience and are in the best position to make decisions affecting their servicemembers.²⁹³ Deference to commanders is a perennial doctrine in the profession of arms that strongly influences both military and civilian decisionmakers.²⁹⁴ Its influence on the review boards is no exception.²⁹⁵ The boards view their role as a limited one, like appellate courts reviewing lower court decisions using an arbitrary and capricious standard. The boards will not second-guess commanders' decisions unless there are clear

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. See John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 Ga. L. Rev. 161, 162 (2000) (stating that lower federal courts "sometimes misstate, misapply, or erroneously fail to apply the military deference doctrine"); Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 Clev. St. L. Rev. 123, 129 (2017) [hereinafter Weber, *Whatever Happened*] (explaining that "[t]he military justice system places commanders in the central disciplinarian role").

294. See *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (stating that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); Kalyani Robbins, *Framers' Intent and Military Power: Has Supreme Court Deference to the Military Gone Too Far?*, 78 Or. L. Rev. 767, 775 (1999) (discussing the Supreme Court's "deference to the military" doctrine as the basis for numerous rejections of challenges to military action).

295. See Michael Ettlinger & David F. Addlestone, *Military Discharge Upgrading and Introduction to Veterans Administration Law 1S/1* (2d ed. 1990), https://civeteranslegal.org/wp-content/uploads/2012/12/MilitaryDischargeUpgrading_lr.pdf [<https://perma.cc/JDC9-FCK5>] ("[A]gencies . . . are much more prone to assume that the veteran's command's actions were legally proper and that it exercised its discretionary powers correctly in characterizing the veteran's discharge"); Michael J. Wishnie, "A Boy Gets Into Trouble": Servicemembers, Civil Rights, and Veterans' Law Exceptionalism, 97 B.U. L. Rev. 1709, 1770 (2017) (noting that military law reflects a substantial deference to decentralized command decisions that are rarely overturned by post-hoc administrative review).

inequities or improprieties.²⁹⁶ Because of this stalwart concept of military governance, the review boards are hesitant to broaden their concept of equity.

The boards are especially reluctant to interfere with the services' decisions concerning the good order and discipline of their servicemembers.²⁹⁷ Each service branch has its own disciplinary issues that may impact the assignment of discharge characterizations. For example, a service with drug or alcohol problems may want to increase punitive measures for substance use offenses. As such, it may issue OTH discharges or even conduct courts-martial for marijuana offenses, while another branch issues general discharges for the same offense.²⁹⁸ These disparities are sanctioned under the discharge review regulations. To prove inequity, a veteran must show that "the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member."²⁹⁹ Each service branch, as well as the individual components within each service branch, is within its authority to issue varying discharges depending on the needs and preferences of the individual unit. The boards are aware of these individual needs and are wary of interfering with the services' disciplinary strategies.

The composition of the boards also helps to explain their reluctance to interfere. DRBs are comprised of no fewer than three commissioned and noncommissioned officers.³⁰⁰ The BCMRs are comprised of senior executive civil servants from various components of DOD, including some who have previous military service.³⁰¹ Few, if any, of the voting members

296. See 32 C.F.R. § 724.211 (2020) ("There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.").

297. See David A. Schlueter & Lisa M. Schenck, *A White Paper on American Military Justice: Retaining the Commander's Authority to Enforce Discipline and Justice 1* (2020), <https://www.court-martial-ucmj.com/files/2020/07/White-Paper-on-Military-Justice-Reforms-2020-w-App.pdf> [<https://perma.cc/A3ES-AHJV>] (stating that transferring prosecutorial discretion away from commanders will undermine their authority to maintain good order and discipline); Weber, *Whatever Happened*, supra note 293, at 161 (stating that commanders were thought to require a free hand to rule their commands with near-absolute authority).

298. See Wilkie Memo, supra note 255, at attach. 2 ("Similarly situated Service members sometimes receive disparate punishments. A Service member in one location could face court-martial for an offense that routinely is handled administratively across the Service.").

299. 32 C.F.R. § 70.9(c)(2) (emphasis added).

300. See 10 U.S.C. § 1553(a) (2018) ("The Secretary concerned shall . . . establish a board of review, consisting of not fewer than three members, to review the discharge or dismissal . . . of any former member of an armed force . . . or, if he is dead, his surviving spouse, next of kin, or legal representative."); see also 32 C.F.R. § 70.8(b)(1) ("As designated by the Secretary concerned, the DRB and its panels, if any, shall consist of five members."). Commissioned and noncommissioned officers are selected by the service secretaries and generally have served at least five years in the military.

301. 10 U.S.C. § 1552; see also 32 C.F.R. §§ 581.3(c)(1), 723.2(a), 865.1.

are lawyers or judges. Given the narrow constraints of equity and impropriety and the deference traditionally afforded to discharging commanders, especially in matters related to the discipline of troops, boards are unlikely to substitute their own judgment for that of commanders. While the consideration of liberal standards, collateral consequences, and post-service rehabilitation may all be relevant and essential to the successful reintegration of less-than-honorably discharged veterans, these considerations often do not carry weight with board members and do not override the decisions of commanders.

g. *Merit-Based Discharge Review.* — Finally, the boards are cognizant of the merit-based reasons for awarding discharge characterizations and will not interfere with the meritocracy of administrative discharges. Discharge characterizations are assigned based on standards of conduct and performance in service.³⁰² Honorable discharges are awarded to servicemembers who have performed adequately and are denied to those who have not.³⁰³ The merit-based approach to discharges is evident in the decisions issued by the review boards. For example, in one representative decision, the NDRB stated:

The NDRB recognizes that serving in the all-volunteer Armed Forces is challenging but reflects a commitment to our Nation; thus, servicemembers deserve to be recognized upon completion of their service. One of the ways in which our servicemembers are recognized is through the determination of their characterization of service. Most servicemembers, however, serve honorably and therefore earn their Honorable discharges. In fairness to those Marines and Sailors who served honorably, Commanders and Separation Authorities are tasked to ensure that undeserving servicemembers receive no higher characterization than is due.³⁰⁴

Liberal consideration disrupts the meritocracy because it considers factors other than merit in the awarding of honorable discharges. As the decision demonstrates, boards are weary of diluting the badge of honor by applying more liberal standards than those applied during the original separation.

Discharge review, the sole mechanism available to veterans to escape the bounds of their discharge characterizations, is woefully inadequate to address the collateral consequences of LTH discharges. The boards were never intended to provide review beyond the scope of characterizing military service. Liberal consideration provides some consideration of post-service evidence but stops short of considering collateral consequences and rehabilitation evidence. Mechanisms are needed to address the needs

302. DODDI 1332.14, *supra* note 32, at enclosure 4, para. 3(b)(1)(d).

303. *Id.* at enclosure 4, para. 3(b)(2)(a).

304. Naval Discharge Rev. Bd., No. ND12-01437 (June 12, 2018) (on file with the *Columbia Law Review*).

of veterans with OTH discharges, much like the strategies that states have adopted to address the collateral consequences of arrests and convictions.

III. REIMAGINING DISCHARGE REVIEW AS A REDEMPITIVE PROCESS

In 2018, a memorandum from Secretary of Defense for Personnel and Readiness, Robert Wilkie, to service secretaries addressed the need for a more redemptive approach to discharge review.³⁰⁵ Secretary Wilkie explained that states were paying increasing attention to pardons for criminal convictions and “the circumstances under which citizens should be considered for second chances and the restoration of rights forfeited as a result of such convictions.”³⁰⁶ He called upon the DRBs and BCMRs to consider using their statutory authority to grant clemency relief to veterans whose applications were based on pardons for military criminal convictions.³⁰⁷

Interestingly, the memo stated that in addition to granting clemency in criminal cases, the boards could grant clemency relief based upon “any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.”³⁰⁸ It outlined guiding principles for clemency consideration and called upon the boards to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds.³⁰⁹ The memo concluded with a list of factors to be considered in reviewing matters for clemency relief, including collateral consequences, length of time since misconduct, critical illness or old age, acceptance of responsibility, remorse, atonement for misconduct, and evidence of rehabilitation.³¹⁰

The memo was remarkable for two reasons. First, it provided recognition that administrative discharges have collateral consequences that are detrimental to veterans, and that relief must be provided when warranted. Second, it urged the boards to consider clemency in non-courts-martial cases even though the statutory and regulatory authority to do so is unclear.

This Part responds to the Wilkie Memo and to scholars who have called for more procedural fairness and deference to veterans in the discharge review system, and for the expansion of VA benefits for veterans

305. See Wilkie Memo, *supra* note 255, at 1. Robert Wilkie served as Secretary of the Department of Veterans Affairs from 2018 to 2021 and served as the Under Secretary of Defense from 2016 to 2018. He served as an officer in the United States Navy and Air Force Reserves.

306. *Id.* (stating in the introduction that the Memo will close the gap and set clear standards for relief that should be granted through Military Discharge Review Boards).

307. See *id.* at attach. 1 (“Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority that DRBs and BCM/NRs have to ensure fundamental fairness.”).

308. *Id.*

309. See *id.* at attachs. 1–3.

310. *Id.* at attach. 3.

with LTH discharges.³¹¹ The below proposals offer a bold first step toward creating a system that provides procedural safeguards and ensures the expansion of military benefits for veterans regardless of their minor misconduct in service. The first proposal calls for the codification and mandatory implementation of clemency consideration in all cases. The second proposal urges VA to expand benefits for veterans with OTH discharges. Subsequent proposals call for the adoption of reforms tested in the criminal law context. A thorough discussion of each proposal is beyond the scope of this Essay. Rather, the purpose of this Part is to briefly discuss the approaches and to demonstrate the need for a combined approach, similar to that taken by state jurisdictions to address the consequences of arrests and convictions.³¹²

A. *Decoupling Benefits From Discharge Characterizations*

Benefits promised at enlistment should not be dependent on discharge characterizations awarded through a system marred by inequities.³¹³ The following proposals offer important first steps in separating the award of benefits from the faulty discharge characterization process. Clemency allows for an upgrade resulting in benefits based on factors beyond the narrow sliver of a veteran's military service record.³¹⁴ Expanding benefits to veterans with LTH discharges fully recognizes that Congress intended for VA to provide benefits to all veterans except under the gravest circumstances.³¹⁵

An overhaul of the discharge system and the award of benefits to all veterans regardless of discharge characterization would be ideal. Congress

311. See, e.g., Adams & Montalto, *supra* note 22, at 135 (arguing for the expansion of VA benefits for all but the most egregious cases); Rebecca F. Izzo, *In Need of Correction: How the Army Board for Correction of Military Records Is Failing Veterans With PTSD*, 123 *Yale L.J.* 1587, 1601 (2014) (arguing for a presumption of causation for veterans with PTSD, acceptance of veteran's testimony of combat events, and a presumption that later expert medical opinions rebut medical assessments at the time of discharge); Ledesma, *supra* note 23, at 236 (arguing for a new "general-pending" discharge characterization that would provide a temporary discharge status so that veterans with PTSD could seek treatment); Wishnie, *supra* note 295, at 1770 (arguing that the current "military law conception" of board review gives too much deference to commanders and that the system should incorporate more substantive and procedural laws consistent with administrative law, veterans law, or civil service systems such as the U.S. Merit Systems Protection Board).

312. See, e.g., Cal. Health & Safety Code § 11361.5 (2019) (California's automatic expungement law).

313. See Wherry, *supra* note 22, at 1371 ("Many servicemembers were (and continue to be) kicked out of the military with an other-than-honorable discharge characterization for misconduct when that misconduct is actually a result of PTSD, traumatic brain injury (TBI), military sexual assault, or other mental health conditions.").

314. See Wilkie Memo, *supra* note 255, at attachs. 1–3.

315. See House Hearings on G.I. Bill, *supra* note 174, at 415 ("We cannot use the words 'honorable discharge' because . . . each of the services [differ] and would not include those discharges under honorable conditions. We do not like the words 'under honorable conditions' because we are trying to give the veteran the benefit of the doubt . . .").

is not likely, however, to impose such reforms on the military or VA, nor is VA likely to adopt such a system in the near future.³¹⁶ More importantly, decoupling benefits from discharges would not eliminate the stigma associated with LTH discharges or the resulting collateral consequences.³¹⁷ As such, the following proposals offer important and achievable steps to reform the discharge review process so that more veterans receive the benefits they were promised at enlistment.

B. *Codification and Mandatory Clemency Consideration*

1. *Codification of Clemency Authority.* — The Wilkie Memo was a response to review board members who believed that they were constrained by the narrow standards of propriety and equity and prohibited from granting upgrades based on any other grounds.³¹⁸ The memo was groundbreaking because, for the first time, DOD explicitly addressed the problem of collateral consequences and outlined a progressive and revolutionary approach that looked beyond a servicemember's conduct in service.³¹⁹ Even so, the memo was only the first step toward addressing the problem of collateral consequences. In order to bring awareness to the issue and to increase the boards' reliance on clemency as a basis for discharge, Congress must provide explicit statutory authority for clemency to serve as the basis for a discharge upgrade in non-courts-martial cases.³²⁰ Further, DOD must mandate the consideration of clemency relief in all cases. Without support from Congress and DOD, the clemency guidance will not likely change board outcomes or make a significant difference in the lives of veterans.

Without clear statutory authority, clemency consideration for administrative discharges will likely fail. In the context of discharge review, clemency refers to relief granted from a criminal sentence.³²¹ Statutory authority for clemency is provided under 10 U.S.C. §§ 1552 and 1553. The statutes provide clear authority for the boards to correct records and to

316. See Bedford, *supra* note 73, at 715–18 (“While Congress has taken small steps in granting some benefits to OTH discharged former [servicemembers], it is still unlikely Congress will change the definition of “veteran,” create a new eligibility requirement, or grant an exception to eligibility requirements for disability compensation.”).

317. See Brooker et al., *supra* note 21, at 17 (noting that more than 300,000 veterans were given stigmatizing characterizations).

318. Some board members believed that if the petition did not demonstrate error or inequity, other factors such as rehabilitation, pre- or post-service conduct, and letters from witnesses demonstrating the good character of the petitioner could not be considered as a basis for discharge upgrade. See Email from Robert Powers, President, Naval Discharge Rev. Bd., to Hugh McClean, Dir., Bob Parsons Veterans Advoc. Clinic, Univ. of Baltimore Sch. of L. (May 15, 2020) (on file with the *Columbia Law Review*).

319. See Wilkie Memo, *supra* note 255, at attach. 3 (noting that, in determining whether to grant relief on the basis of clemency, an applicant's candor and character should be considered).

320. See 10 U.S.C. §§ 1552(f)(2), 1553 (a) (2018).

321. *Id.*

change discharges or dismissals adjudged by courts-martial for purposes of clemency.³²² There is no explicit statutory authority for the boards to grant clemency in non-courts-martial cases.³²³ The Wilkie Memo instructed the boards to consider clemency pursuant to the boards' authority to address equity and injustice.³²⁴ Prior to the memo, the clemency authority had not been interpreted so broadly and was strictly limited to cases involving courts-martial or UCMJ action.³²⁵ The boards do not publish statistics that identify the bases for granting discharge upgrades. But a review of cases decided by the Army Discharge Review Board in 2019 and 2020 yielded no results for discharge upgrades based on clemency in non-courts-martial cases, and only one upgrade of a court-ordered discharge.³²⁶ To overcome the boards' historically narrow application of clemency and to address the lack of clear statutory authority, Congress will need to codify the policy if it is to have any effect on reducing collateral consequences of LTH discharges.

2. *Mandatory Clemency Consideration.* — Even if Congress codified the policy, the boards' application of clemency would likely be inconsistent and underutilized. In 2014, Secretary Hagel introduced the liberal consideration policy to address the issue of less-than-honorably discharged Vietnam veterans with PTSD.³²⁷ In 2017, Congress codified the policy when it passed the National Defense Authorization Act.³²⁸ By 2019, the boards were still seeing inconsistent and low grants rates across the services, prompting two class action lawsuits against the Army and Navy for failing to properly apply DOD's liberal consideration policy to thousands of veterans suffering from mental illness.³²⁹

322. *Id.* The DRB may only grant relief based on clemency if the discharge was the result of a special court-martial conviction. The BCMR may grant clemency relief for discharges adjudged by a special or general court-martial.

323. See U.S. Air Force, The Judge Advocate's General Corps, Advisory Opinion on Air Force Discharge Review Board Authority Over Discharges From Special Courts-Martial I (Sept. 27, 2017), <https://www.afjag.af.mil/LinkClick.aspx?fileticket=nwUWUQEz2Y%3D&portalid=77> [<https://perma.cc/3X96-UWCU>] [hereinafter Air Force Advisory Opinion].

324. Wilkie Memo, *supra* note 255, at 1.

325. See Air Force Advisory Opinion, *supra* note 323, at 1.

326. Boards of Review Reading Rooms, U.S. Dep't of Def., <https://boards.law.af.mil> [<https://perma.cc/5YYP-CH3H>] (last visited Aug. 18, 2021). The boards publish decisions and statistics in "Boards of Review Reading Rooms." The author reviewed 100 cases from 2019 and 2020 in which the ADRB granted discharge upgrades. The only clemency relief offered was in a case involving a court-ordered punitive discharge.

327. See Hagel Memo, *supra* note 245, at 1 ("BCM/NRs will fully and carefully consider every petition based on PTSD To assist the BCM/NRs in the review of records and to ensure fidelity of the review protocol in these cases, the supplemental policy guidance . . . is provided . . .").

328. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2123–24 (2016).

329. See *Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. 2018); see also *Kennedy v. Esper*, No. 16-CV-2010 (WWE), 2018 WL 6727353, at *1 (D. Conn. Dec. 21, 2018).

Stronger implementation of recent DOD discharge review policies could increase their application and provide more consistency in board decisions. Scholars have proposed a number of reforms for ensuring the proper application of liberal consideration.³³⁰ For example, services could amend their regulatory definition of an honorable discharge to say, for example, “[h]onorable service includes behavior that may be categorized as misconduct under the UCMJ but is actually behavior consistent with a mental health condition due to military service.”³³¹ Presumptions that override mental health considerations could be amended so that they are consistent with liberal consideration.³³² For example, the presumption of an equitable discharge and the presumption of regularity could be limited in cases involving mental illness.³³³ Or, as some veterans’ advocates have suggested, Congress could even codify a presumption of record correction for veterans with documented PTSD.³³⁴

Similar changes could be made to strengthen the implementation of the clemency policy. For example, clemency consideration could be mandated in all cases, instead of leaving its application to the discretion of the boards. This would require the boards to consider the Wilkie Memo clemency factors in every case. A bifurcated approach to discharge review could allow for a finding that the original discharge was properly executed and otherwise equitable, but that clemency considerations warrant an upgrade.

In addition to stronger enforcement of the policies, true clemency consideration would require structural change. The current boards are not equipped to carry out the clemency mission and, given their history, it is difficult to imagine them pursuing a robust implementation of the policy.³³⁵ The boards’ narrow and inflexible approach to discharge review stands in stark contrast to the forward-looking and redemptive approach

330. See Wherry, *supra* note 22, at 1407.

331. *Id.*

332. *Id.* at 1410–11.

333. *Id.*

334. *Id.* at 1412 n.345 (“Legislation should codify a presumption of record correction for veterans with documented PTSD so that boards continue to improve their handling of PTSD-related discharge upgrade applications.” (quoting Sundiata Sidibe & Francisco Unger, Vietnam Veterans of Am. & Nat’l Veterans Council for Legal Redress, *Unfinished Business: Correcting “Bad Paper” for Veterans With PTSD* 9 (2016), <https://www.vetsprobono.org/library/attachment.312768> [<https://perma.cc/M2TR-T2HE>])); see also Sara Darehshori, Hum. Rts. Watch, *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors* 122 (2016), https://www.hrw.org/sites/default/files/report_pdf/us0516_military_web_1.pdf [<https://perma.cc/VSF6-JMVU>] (recommending that Congress “[c]odify a presumption for veterans with documented PTSD that the PTSD contributed materially to discharge classification”).

335. Wherry, *supra* note 22, at 1387 (discussing the review boards’ problematic implementation of the “liberal consideration” standard for discharge cases involving mental health).

that clemency provides.³³⁶ A restructuring of the boards could provide for both traditional discharge review and clemency consideration. The current two-tiered structure of DRBs and BCMRs has been criticized as redundant and unnecessary.³³⁷ A single board could perform the functions of the DRB and BCMR, while another board could provide clemency review. Since discharge review laws already allow for the consideration of clemency in court-martial cases, a specialized board could review clemency petitions stemming from both court-martial and administrative discharges and would consider factors such as collateral consequences and rehabilitation.³³⁸ This approach makes sense given the military's increasing reliance on administrative justice and the prevalence of discharges with complex mental health issues.

Any proposals for broader clemency power would likely face opposition. First, clemency could work against veterans. Commanders may be more likely to impose OTH discharges knowing that they can be upgraded by a clemency board. Second, clemency could be leveraged in plea negotiations to coerce servicemembers to consent to OTH discharges in lieu of courts-martial based on the likelihood of an upgrade.³³⁹ Third, opponents may view clemency as infringing on commanders' discretion and usurping their powers to maintain good order and discipline. Finally, clemency has garnered considerable negative attention in the last decade, including a string of headline-grabbing scandals involving the military that drew the ire of Congress and DOD. In one case, a Navy SEAL, who allegedly stabbed a prisoner and was convicted of war crimes, received a pardon from then-President Trump.³⁴⁰ Over the objection of Navy leadership, President Trump also intervened in the servicemember's pending discharge.³⁴¹ In another case, an Air Force pilot convicted of rape was granted clemency

336. See Wilkie Memo, *supra* note 255, at 1 (“Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority that DRBs and BCM/NRs have to ensure fundamental fairness.”).

337. Wishnie, *supra* note 295, at 1770–73 (arguing for a civil service conception of review boards, similar to the U.S. Merit Systems Protection Board).

338. The use of clemency boards is not unprecedented. See Holtzoff, *supra* note 259, at 8 (detailing how after World War II, the Secretary of War and the Secretary of the Navy appointed clemency boards to review sentences imposed by courts-martial, with the charge of reducing excessive sentences).

339. See DODDI 1332.14, *supra* note 32, at enclosure 3, para. 11(a) (describing the process for servicemembers to request an OTH discharge in lieu of trial by court-martial).

340. Dave Philipps, Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs, *N.Y. Times* (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/us/trump-seals-eddie-gallagher.html> (on file with the *Columbia Law Review*) (last updated Nov. 25, 2019) (stating that Chief Petty Officer Edward Gallagher was accused of “shoot[ing] civilians and murder[ing] a wounded captive with a knife, among other misconduct,” but was convicted only of one “relatively minor offense”).

341. *Id.* President Trump's eleventh-hour pardons cast light on the nepotism inherent in presidential pardons. See U.S. Dep't of Just., Off. of the Pardon Att'y, Clemency Recipients, <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021> [<https://perma.cc/6YQD-8HDY>] (last updated Apr. 28, 2021).

by the convening authority following the sentencing in his case.³⁴² The convening authority overturned the verdict, released the pilot from prison, and reinstated his rank.³⁴³

While both the military and civilian criminal legal systems have faced criticism over their use of clemency, it is not likely that administrative discharge cases would draw the same criticism.³⁴⁴ Boards issue panel decisions and operate as independent military agencies, thus reducing the chance of politically motivated clemency action. Further, board decisions are not as highly charged as criminal prosecutions, and decisions are generally issued long after the incidents of alleged misconduct. Lastly, any negative incentives created by clemency would be offset by positive incentives. For example, the opportunity for clemency based on evidence of rehabilitation, employment history, or collateral consequences would incentivize veterans to seek opportunities for rehabilitation after service.

C. *The Expansion of VA Benefits*

A second proposal addressing collateral consequences involves expanding VA coverage to include veterans with OTH discharges.³⁴⁵ The majority of reentry benefits denied to veterans are offered through VA. Expanding VA eligibility for less-than-honorably discharged veterans would be a significant step toward removing barriers to veteran reintegration.

There is precedent for expanding benefits for certain categories of veterans, and VSOs have overwhelmingly supported such efforts in the past.³⁴⁶ The basis for the current administrative discharge characterizations of honorable, general, and other-than-honorable evolved from an earlier dichotomic discharge system that awarded either honorable or “without honor” discharges to veterans.³⁴⁷ The limited choices under that system created a dilemma for military commanders whose troops had engaged in misconduct but had generally demonstrated satisfactory military

342. Robert Draper, *The Military’s Rough Justice on Sexual Assault*, N.Y. Times (Nov. 26, 2014), <https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html> (on file with the *Columbia Law Review*); see also Craig Whitlock, *Air Force General’s Reversal of Pilot’s Sexual-Assault Conviction Angers Lawmakers*, Wash. Post (Mar. 8, 2013), https://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html (on file with the *Columbia Law Review*) (stating that the convening authority used his clemency authority to reverse the pilot’s conviction).

343. Draper, *supra* note 342.

344. See, e.g., Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. Chi. L. Rev. 1, 19 (2015) (discussing the importance of independence in the clemency process).

345. See Adams & Montalto, *supra* note 22, at 135.

346. See Jones, *supra* note 36, at 2 (describing VA’s efforts in the mid-twentieth century to expand discharge characterizations in order to “insure more categories of eligibility for benefits among discharged servicemen”).

347. See *id.*

performance.³⁴⁸ Leveraging extensive congressional interest in the military justice system after World War II, VA successfully advocated for DOD to create definitive benefit-eligible discharge categories that later formed the basis for the current discharge system.³⁴⁹ VSOs have always supported the expansion of veterans benefits, as these organizations fulfill their statutory duties primarily by assisting veterans with benefits claims and appeals.³⁵⁰

Importantly, no congressional action would be needed to expand benefits and services for veterans. Pursuant to congressional delegation, VA administers its own regulatory bars for veterans.³⁵¹ Scholars have argued that limiting exclusions to serious offenses, such as those enumerated in the statute, is consistent with the legislative history and congressional intent of the G.I. Bill of Rights.³⁵² It is also consistent with the military's century-old interpretation of "dishonorable conduct," defined as conduct involving severe military offenses and civilian felonies.³⁵³ Further, an expansion of benefits would bring VA in line with current trends in military justice that show a decrease in the grant of honorable discharges and a corresponding increase in the grant of OTH discharges.³⁵⁴

Alternatively, VA could apply liberal consideration in character of discharge determinations. Currently, VA allows veterans with OTH discharges to request a character of discharge review to determine their eligibility for benefits under the statutory and regulatory bars.³⁵⁵ If VA determines that

348. Constitutional Rights of Military Personnel: Hearings on S. Res. 260 Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary, 87th Cong. 62–68 (1962) (statement of Alfred B. Fitt, Deputy Under Sec'y of the Army). In 1913, the Army created "unclassified" discharges that fell between honorable and without honor discharges. Adams & Montalto, *supra* note 22, at 76. In 1916, "blue" discharges replaced unclassified and without honor discharges. *Id.* In 1947, the blue discharge was replaced by the general and undesirable discharges, that latter category serving as the precursor to the other-than-honorable discharge. *Id.* at 95. Undesirable discharges were later replaced by the other-than-honorable discharges, resulting in three categories: honorable, general, and other-than-honorable. *Id.*

349. See Jones, *supra* note 36, at 2.

350. 38 U.S.C. § 5902 (2018); see also Memorandum from Chuck Hagel, Sec'y of Def., U.S. Dep't of Def., to Sec'ys of the Mil. Dep'ts, Chairman of the Joint Chiefs of Staff, Under Sec'y of Def. for Pers. & Readiness, Chiefs of the Mil. Servs., Chief of the Nat'l Guard Bureau, Gen. Couns. of the Dep't of Def. & Assistant to the Sec'y of Def. for Pub. Affs. 1–2 (Dec. 23, 2014), <https://DOD.defense.gov/Portals/1/Documents/pubs/OSD015110-14-VSO-MSO-memo.pdf> [<https://perma.cc/HAC8-Z83G>] (describing the "privileges granted [to VSOs] under the law" and "direct[ing] implementation" of further measures across the DOD to facilitate delivery of the organizations' services).

351. 38 C.F.R. § 3.12 (2020).

352. Adams & Montalto, *supra* note 22, at 109.

353. *Id.* at 96.

354. *Id.* at 97.

355. See U.S. Dep't of Veterans Affs., Claims for VA Benefits and Character of Discharge: General Information (2014), https://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf [<https://perma.cc/LQG8-QNCA>].

the conditions that led to a veteran's OTH discharge were not dishonorable (i.e., not barred by statute or regulation), then the veteran is deemed "eligible for VA purposes," despite their OTH discharge.³⁵⁶ For example, if a veteran received an OTH discharge for using marijuana, VA could conceivably find that their conduct was not barred by statute or regulation. In practice, few veterans are deemed eligible to receive benefits upon discharge review.³⁵⁷ Most are found ineligible because the conditions underlying their discharge are determined to involve moral turpitude or willful and persistent misconduct under the regulatory bars.³⁵⁸ VA could apply liberal consideration in cases alleging mental illnesses, as the military has done, rather than having veterans wait years to receive discharge upgrades from the military. Applying liberal consideration to VA's character of discharge review, or even granting benefits for a preliminary period while veterans' cases work their way through either military or VA review, would expand care for veterans who are most in need of VA's services.

Similarly, VA could apply liberal consideration in service-connected cases. Veterans with OTH discharges are eligible to receive healthcare benefits but not other VA benefits when VA determines that they suffer from service-connected illnesses or injuries and they are not otherwise statutorily barred from receiving benefits.³⁵⁹ Veterans may establish service connection in a variety of ways, but it is generally proven by demonstrating that a current injury or illness was incurred or aggravated during military service.³⁶⁰ VA could lower the evidentiary bar to obtain healthcare benefits for applicants who suffer from mental health conditions and have OTH discharges.

356. 38 U.S.C. § 5303(e); 38 C.F.R. § 3.12.

357. See Veterans Legal Clinic, *Underserved*, supra note 19, at 2 (noting that in 2013, VA labeled 90% of veterans with LTH discharges as "dishonorable" and not eligible to receive benefits).

358. *Id.* at 23–25. On July 10, 2020, VA proposed a new rule in response to a petition for rulemaking submitted by Swords to Plowshares, a veterans' advocacy group. In its proposed rule, VA clarified the ambiguous terms it uses in its character of discharge determinations, such as "moral turpitude" and "willful and persistent misconduct." The new rule provided some clarity for these terms, deleted outdated terminology, such as "homosexual acts," and added language for VA to consider "compelling circumstances" that may mitigate veterans' misconduct and qualify them for VA services. The proposed rule, however, did not significantly broaden the standards to make more OTH veterans eligible for VA services. See *Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge*, 85 Fed. Reg. 41,471, 41,473–74 (proposed July 10, 2020) (to be codified at 38 C.F.R. § 3.12).

359. Act of Oct. 8, 1977, Pub. L. No. 95-126, § 2, 91 Stat. 1106, 1107–08 (1977) (providing that veterans with bad Conduct or dishonorable discharges are not eligible to receive healthcare benefits).

360. 38 U.S.C. § 1110; see also *Gilbert v. Derwinski*, 1 Ct. Vet. App. 49, 51 (1990) ("In order to demonstrate entitlement to benefits for a disability . . . a veteran must show that the disability resulted from either an 'injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty.'" (quoting 38 U.S.C. § 331 (1988))).

Finally, VA could provide mental health care for all veterans, regardless of discharge, and forgo the framework of emergency exceptions and limited categories imposed by statutes and regulations. First, such a policy is prudent because it addresses a current crisis. Second, VA is the largest healthcare system in the country and has some of the most sophisticated technology and expertise to treat military-related mental health issues.³⁶¹ VA has the resources and expertise to extend mental health services to more veterans.³⁶² Third, providing veterans with comprehensive mental health treatment is in the interest of national security. The United States has not relied on a draft since the Vietnam War.³⁶³ Men and women, the majority of whom are between the ages of eighteen and twenty-four, volunteer to sacrifice their lives in service to the nation. If this trend is to continue, the nation must improve care for more veterans. Lastly, providing health care to veterans is the right thing to do. Withholding expert VA mental health care from any veteran violates the sacred military ethos: “*Never leave a fallen comrade.*”³⁶⁴

D. *Applying Criminal Law Reforms to the Military*

In addition to the technical approaches discussed above, several mechanisms employed in the criminal law context to remove collateral consequences stemming from involvement in the criminal legal system could be applied to the military discharge system. This section briefly outlines the application of those mechanisms.

1. *Certificates of Restoration of Rights for Veterans.* — Several jurisdictions have experimented with certificates restoring rights or establishing the rehabilitation of persons involved in the criminal legal system.³⁶⁵ The military discharge review system was intended to achieve similar goals by upgrading veterans’ discharges and restoring benefits eligibility. Yet the boards have been reluctant to accept mitigating factors, including mental health, in cases involving misconduct.³⁶⁶

361. See Sarah Kliff, *Five Facts About Veterans’ Health Care*, Wash. Post (Nov. 12, 2012), <https://www.washingtonpost.com/news/wonk/wp/2012/11/12/five-facts-about-veterans-health-care/> (on file with the *Columbia Law Review*) (noting that VA “operates the country’s largest health system” and “has pioneered electronic health records”).

362. See U.S. Gov’t Accountability Off., GAO-21-545SP, *Veterans’ Growing Demand for Mental Health Services 1–2* (2021), (explaining that VA has expanded mental health services, is preparing for continued increase in demand for mental health services, and is working to increase awareness of mental health services through tools such as telehealth).

363. Bernard D. Rostker, *The Evolution of the All-Volunteer Force 1* (2006), https://www.rand.org/pubs/research_briefs/RB9195.html [<https://perma.cc/SZX7-EUV5>].

364. Gary Riccio, Randall Sullivan, Gerald Klein, Margaret Salter & Henry Kinnison, U.S. Army Rsch. Inst. for the Behav. & Soc. Scis., *Warrior Ethos: Analysis of the Concept and Initial Development of Applications 17* (2004), <https://www.hsdl.org/?view&did=21479/> [<https://perma.cc/37TZ-YWZB>].

365. See Love et al., *Forgiving and Forgetting*, *supra* note 121, at 15–17.

366. See *Stipulation and Agreement of Settlement at 2, Kennedy v. McCarthy*, No. 16-cv-2010-CSH, 2020 WL 7706604 (D. Conn. filed Nov. 17, 2020) (noting that plaintiffs alleged

The creation of clemency boards would resolve this problem by decoupling benefits from discharge characterizations. For example, if a veteran's military service involved serious misconduct but their post-service conduct demonstrated successful rehabilitation, a clemency board could issue a certificate of rehabilitation restoring the veteran's VA benefits.³⁶⁷ Such authority would require federal legislation, but it would give the boards an option to restore benefits for rehabilitated veterans by sidestepping the often contentious characterization issue. The stigma of an LTH discharge would remain, but at least the veteran would obtain benefits for their service.

2. *Presidential Pardons.* — Presidential pardons are wrought with politics, bureaucracy, and cronyism, though there is precedent for their use in resolving thorny military discharge issues.³⁶⁸ In 1974, President Gerald Ford signed Proclamation 4313 authorizing an incentive program for Vietnam War veterans who had evaded the draft or deserted their military duties to upgrade their discharges.³⁶⁹ Upon completion of twenty-four months of alternative service promoting the health, safety, or interests of the United States (not including military service), veterans could receive a “clemency discharge” in lieu of their undesirable discharge.³⁷⁰ In 1977, President Jimmy Carter granted pardons to all veterans who could be alleged to have committed an offense in violation of the Military Selective Service Act by evading the draft.³⁷¹ These pardons did not restore benefits or grant full absolution to veterans, though they arguably helped unite a divided nation reeling from the Vietnam War.³⁷²

Any sitting president could issue clemency discharges granting benefits to veterans with mental health problems that received LTH discharges. Eligibility could be tailored to a specific time period, as it was for Vietnam War veterans, or tailored to cover veterans of any conflict who experienced

that veterans with service-connected PTSD, TBI, and related mental health conditions received OTH and general discharges and were subsequently denied status upgrades by the ADRB).

367. See Frank M. Headley, *The Exemplary Rehabilitation Certificate*, 22 JAG J. 77, 77–78 (1968) (noting that during the Vietnam War, the Department of Labor awarded rehabilitation certificates to veterans with LTH discharges based upon exemplary post-service conduct).

368. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 NYU L. Rev. 802, 819–24 (2015).

369. Proclamation No. 4313, 88 Stat. 2504 (Sept. 16, 1974).

370. *Id.* at 2506. The clemency discharge did not make veterans eligible for VA benefits. *Id.* The undesirable discharge was a precursor to the other-than-honorable discharge. Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41,471, 41,474 (proposed July 10, 2020) (to be codified at 38 C.F.R. § 3.12).

371. Proclamation No. 4483, 91 Stat. 1719 (Jan. 21, 1977).

372. Andrew Glass, *Ford Issues Partial Amnesty to Vietnam Deserters*, Sept. 16, 1974, Politico (Sept. 16, 2018), <https://www.politico.com/story/2018/09/16/ford-amnesty-vietnam-deserters-815747/> [<https://perma.cc/W3BM-UBPM>] (stating that President Ford noted in his proclamation that “reconciliation calls for an act of mercy to bind the nation’s wounds and to heal the scars of divisiveness”).

mental health problems in service. Clemency boards could oversee the process, including the review of more complex cases. Unlike the clemency discharges issued by Presidents Ford and Carter for Vietnam War veterans, benefits could be restored under a presumption that medical reasons were a contributing cause of the veteran's discharge.

3. *Ban-The-Box for Veterans.* — There is no clear reason why veterans must disclose their discharge status to civilian employers, at least not initially. Reference checks are a common practice in hiring, but few job candidates are vetted at the outset of the process using previous employers' performance evaluations.³⁷³ Like ban-the-box protections, questions about veterans' discharges should be eliminated from job applications, and a refusal to hire based on an applicant's discharge characterization should only be permitted if the circumstances underlying the discharge are directly related to the occupation for which employment is sought.³⁷⁴

No single approach to addressing collateral consequences is comprehensive, and there is no shortage of policies that could address the problem. Ban-the-box regulations and statutes could be adopted to eliminate questions about discharge status, the military could remove discharge characterizations from the DD-214, and the discharge process could be amended to create less stigmatizing outcomes for servicemembers with mental illness. Unlike the contentious issues that divide criminal law reform along political lines, policies facilitating veteran reintegration are bipartisan.³⁷⁵ Yet the stigma and bias surrounding less-than-honorably discharged veterans remain a barrier to much needed reform. The codification of clemency and its mandatory application in discharge review, along with a realignment of VA exclusions that more closely track with congressional intent, offer two technical approaches to address the problems inherent in military discharge review. These proposals offer bold approaches that will begin to address the mental health crisis facing our veterans.

CONCLUSION

The military discharge review system is broken. Veterans with mental health conditions are discharged at alarming rates and labeled with LTH discharges that have lasting and debilitating consequences. The situation

373. Policy, Data, Oversight: Assessment & Selection, Off. Pers. Mgmt., <https://www.opm.gov/policy-data-oversight/assessment-and-selection/other-assessment-methods/reference-checking/> [https://perma.cc/A4QJ-PZ7G] (last visited July 28, 2021).

374. See Human Rights Report, *supra* note 217, at 2. See generally Avery & Lu, *supra* note 103 (reviewing ban-the-box laws at the city, county, and state levels).

375. See, e.g., Nikki Wentling, *Sweeping Veterans Bill Becomes Law, Impacting "Every Corner" of the Community*, Stars & Stripes (Jan. 6, 2021), <https://www.stripes.com/theaters/us/sweeping-veterans-bill-becomes-law-impacting-every-corner-of-the-community-1.657643/> [https://perma.cc/FCJ6-NSUU] (noting that a bill "that aims to help veterans facing a variety of challenges" obtained unanimous approval in Congress).

is not unlike the problem affecting a growing number of Americans suffering from the collateral consequences of criminal arrests and convictions. The criminal legal system disproportionately affects people of color, predominantly Black and brown people, whose criminal records are subsequently used to formally and informally exclude them in the contexts of employment, licenses, permits, housing, public benefits, and civil rights. As a result, a significant and vital segment of our population is continually funneled into additional criminality and imprisonment with no hope of reintegration.

States have begun to address the problem through various statutory and judicial reforms. “Forgiveness” models favor court-issued certificates of rehabilitation that absolve individuals of past wrongs and serve as a token of full remediation, while executive pardons offer relief to individuals by removing legal disabilities and penalties associated with convictions. Concealment models offer expungement and record-sealing to remove criminal histories from public view. Some states have adopted licensing and employment laws that exclude the consideration of criminal records that do not directly relate to the duties of the profession. These reforms are promising and will serve as models for more states to address the problem.

Less well known or understood are the collateral consequences of LTH discharges. Less-than-honorably discharged veterans are excluded from dozens of life-saving VA programs, such as healthcare and housing programs, that are aimed at assisting veterans facing reintegration challenges. In addition to VA exclusions, these veterans are excluded from federal employment protections and from state employment, education, and licensing programs. Moral injury, the psychological strain that veterans may experience as a result of their discharge, is the least understood but arguably the most troubling of these consequences. VA’s recognition of this trauma, especially in Vietnam Era veterans, is an essential first step in understanding its harmful impact and eliminating it as a barrier to reentry.

Shockingly, there are no effective remedies to address the collateral consequences of LTH discharges. Discharge review, which offers relief for a limited number of veterans whose petitions are granted based on equity and impropriety grounds, does not consider the collateral consequences of discharges. Liberal consideration provides the review boards with limited discretion to upgrade discharges based on evidence of mental illness obtained after service. Otherwise, the boards do not consider clemency, collateral consequences, or evidence of rehabilitation that is not directly linked to the period of service under review. As a result, most veterans carry a lifetime label of dishonorable service that can never be forgiven or forgotten.

Soldiers, sailors, and airmen, often experiencing social and economic hardship, enlist in the military in part based on the promise of benefits that will assist with their successful reintegration after service. When they

are injured and exhibit symptoms in the form of misconduct, they are discharged with LTH service characterizations and succumb to the burdens of the collateral consequences resulting from those discharges. The military, VA, and Congress must stop ignoring the burden our veterans carry long after service and instead start providing veterans with a chance to succeed by addressing these collateral consequences.