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Michael Boucai

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"Balancing Your Strengths Against Your Felonies": Considerations for Military Recruitment of Ex-Offenders

MICHAEL BOUCAI*

I. INTRODUCTION

A recent *New Yorker* cartoon wittily, if unwittingly, captures a growing reality of today's job market. Perusing an applicant's résumé,

* Associate, Kasowitz, Benson, Torres & Friedman LLP. Juris Doctor, Georgetown University Law Center, 2005; Bachelor of Arts, History, Yale University, 2002. The author thanks the Michael D. Palm Center for its generous support of this study, as well as Aaron Belkin, Ryan Lozar, and Michael Ottolenghi for their advice and encouragement. This Article was primarily composed while the author was a Visiting Researcher at the Georgetown University Law Center.

an employer confesses: "I'm trying to find a way to balance your strengths against your felonies."[1] Though merely a punch line to most readers, such tepid words of welcome are taken anything but lightly among the numerous ex-offenders in the nation's workforce. The 600,000 individuals released each year from federal and state prisons face tremendous difficulties finding employment – especially when, like the applicant in the *New Yorker* cartoon, they are honest about their backgrounds.

As those who hide their arrests and convictions well know, the criminal closet is hardly conducive to job retention, performance, or promotion. Nonetheless, secrecy is often the only alternative to unemployment. Echoing a widespread expert consensus, criminologist Joan Petersilia has said that "finding a job is critical" to convicts' effective reintegration into society.[2] Employers' reluctance or outright refusal to hire ex-offenders keeps many of these individuals at the margins of society, increasing their likelihood of recidivism and reincarceration.[3]

This Article deals with ex-offender employment in one context where the necessity of balancing strengths against felonies is taken very seriously indeed: the U.S. Armed Forces.[4] It suggests revising the traditional wisdom that the military's "eligibility requirements are for the protection of the government, and not for the soldier."[5] In a spirit of greater reciprocity, civilian society ought to pay closer attention to whether and how ex-offenders gain access to military employment. Service in the Armed Forces should be cautiously but seriously and frankly considered as a potential career path for some of these individuals. Certainly we should continue to ask what former criminals can do for the military; but we should also ask what the military can do for former criminals – and what, in turn, the military can do for the communities in which ex-offenders are expected, and so often fail, to build new and

1. Leo Cullum, Cartoon, NEW YORKER, Sept. 19, 2005, at 74.

2. Joan Petersilia, *Hard Time: Ex-Offenders Returning Home After Prison*, CORRECTIONS TODAY, Apr. 2005, at 66, 67 (2005).

3. *See, e.g.*, *Doing More than Time*, Op-Ed, CHRISTIAN SCI. MONITOR, May 4, 2001, at 10, *available at* 2001 WLNR 1242682 ("True, about 40 percent of former convicts turn to crime again. But that statistic would almost certainly shrink if more businesses looked beyond the question of past felony convictions, and if state corrections departments did more to give inmates an opportunity to prepare for life on the outside.").

4. In assessing potential recruits, including those with criminal histories, the military uses a "whole person" standard that entails "evaluating [whether] the applicant's strengths outweigh the reasons for disqualification." Leonard L. Etcho, The Effect of Moral Waivers on First-Term, Unsuitability Attrition in the Marine Corps, at 4 (Mar. 1996) (thesis, Naval Postgraduate School), *available at* http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA309309&Location=U2&doc=getTRDoc.pdf.

5. *Ex parte* Dostal, 243 F. 664, 672 (N.D. Ohio 1917).

productive lives.[6]

Recent developments at home and abroad make ex-offender enlistment a particularly timely question. First, the issue relates in multiple ways to the Armed Forces' faltering ability to fill ranks.[7] As we will see, ex-offenders' presence in the Armed Forces can be characterized as a cause, effect, or even correction of the military's apparent recruitment problem. Second, ex-offender enlistment constitutes, in and of itself, a major recruitment trend.[8] Many readers will be surprised to learn just how many ex-offenders the Armed Services knowingly admit each year – despite a statutory presumption against such accessions, and despite a burden on enlistees to prove their qualifications.[9] Finally, the public has responded to the Abu Ghraib prison abuse scandal,[10] as well as other disturbing instances of servicemember misconduct,[11] with heightened

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6. Norman Mailer's evocative description of the situation of a convict upon release from prison has lost none of its force or truth:

> Then one day they put the convict out the front door, told him today is magic. . . . Now, do it on your own. Go out, find a job, get up by yourself, report to work on time, manage your money, do all the things you were taught not to do in prison. Guaranteed to fail. Eighty percent went back to jail.

NORMAN MAILER, THE EXECUTIONER'S SONG 482 (1979).

7. *See* Tom Bowman, *Army Accepts Crime in Recruits to Fill Its Needs, Military Issues Waivers for Some Past Minor Offenses*, BALT. SUN, Feb. 14, 2006, at 1A, *available at* 2006 WLNR 2554076; Frank Main, *More Army Recruits Have Records: Number Allowed in with Misdemeanors More than Doubles*, CHI. SUN-TIMES, June 19, 2006, at 3, *available at* 2006 WLNR 10550175. More general expressions of recruitment-related anxiety, from a mere two-month period in 2005, include Philip Carter, *The Quiet Man*, N.Y. TIMES, July 6, 2005, at A19, *available at* 2005 WLNR 10629369, Victor Davis Hanson, *Are They in the Army Now? Cries of Shortfall, Exhaustion, and Overstretch*, NAT'L REV., July 4, 2005, at 17, Greg Jaffe, *To Fill Ranks, Army Acts to Retain Even Problem Enlistees*, WALL ST. J., June 3, 2005, at B1, and Greg Jaffe & Yochi R. Dreazen, *Army Might Seek Waivers to Call Guards Back Up*, WALL ST. J., Jan. 7, 2005, at A3.

8. The mainstream press has devoted some attention to the significant population of ex-offenders recruited into the Armed Forces. *See, e.g.*, *The Army, After Iraq*, Op-Ed, N.Y. TIMES, Mar. 18, 2007, § 4, at 11, *available at* 2007 WLNR 5097688 ("You do not have to look very hard these days to see the grave damage the Bush administration's mismanagement of the Iraq conflict has inflicted on the United States Army. *Consider the moral waivers for violent offenders, to meet recruitment targets.*" (emphasis supplied)); Bowman, *supra* note 7; Main, *supra* note 7.

9. *See, e.g.*, DEP'T OF THE ARMY, ARMY REGULATION 601-210, at 4-2(c) (2005) [hereinafter ARMY REGULATION 601-210], *available at* http://www.usapa.army.mil/pdffiles/r601%5F210.pdf ("The burden is on the applicant to prove to waiver authorities that he or she has overcome their disqualifications for enlistment and that their acceptance would be in the best interests of the Army.").

10. James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15, *available at* 2004 WLNR 5501121; Thom Shankner & Dexter Filkins, *Army Punishes 7 with Reprimands for Prison Abuse*, N.Y. TIMES, May 4, 2004, at A1, *available at* 2004 WLNR 5604118; Tim Golden & Eric Schmitt, *General Took Guantanamo Rules to Iraq for Handling of Prisoners*, N.Y. TIMES, May 13, 2004, at A1, *available at* 2004 WLNR 5538678.

11. Ryan Lenz, *GIs May Have Planned Iraq Rape, Slayings*, ABC NEWS, July 1, 2006, *available at* http://abcnews.go.com/International/wireStory?id=2142323; John Kifner, *Hate*

concern about the "checkered backgrounds" of some military recruits.[12]

As the public continues to engage the issue of ex-offender enlistment, it should take care to avoid the military's single-minded focus on "suitability" disparities between ex-offenders and other recruits.[13] These well-documented differences are important considerations, but others, which look beyond mere numbers, also merit attention: the fact that a substantial majority of servicemembers with criminal histories are successfully integrated into the Armed Forces;[14] the possibility that a problem in military culture, not military recruitment per se, is a more proximate cause of the most disturbing instances of servicemember misconduct;[15] and the more general possibility that the crimes committed by recidivist offenders as civilians are worse in quantity, quality, or effect than those committed by recidivists in uniform.[16]

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Part II of this Article discusses the legal and empirical aspects of ex-offender enlistment in the U.S. Armed Forces. It begins with the laws, policies, and procedures regarding the "moral waivers" by which individuals with criminal histories are admitted into the military. It then describes the waiver system in action, drawing on original Department of Defense ("DOD") data furnished directly to the author under the Freedom of Information Act. The startling trends exposed in Part II – from the military's use of moral waivers to knowingly recruit thousands of persons with criminal backgrounds each year, to its failure to detect

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Groups Are Infiltrating the Military, Group Asserts, N.Y. TIMES, July 7, 2006, at A14, *available at* 2006 WLNR 11719901.

12. Ken Silverstein, *Pentagon Alerted to Trouble in Ranks*, L.A. TIMES, July 1, 2004, at A1, *available at* 2004 WLNR 19762878; *see also* Kate Zernike, *Three Accused Soldiers Had Records of Unruliness That Went Unpunished*, N.Y. TIMES, May 27, 2004, at A13, *available at* 2004 WLNR 5482807.

13. *See infra* Parts II.A-.B.

14. *See infra* Parts III.A-.B. It is worth questioning the efficiency, not to mention the fairness, of excluding the whole class of ex-offenders from any and all kinds of military service. A more reasonable, well-tailored solution might be to keep such recruits away from particularly sensitive or consequential tasks (like guarding or interrogating enemy prisoners), or to do so until they have sufficiently demonstrated their reliability in uniform. Of course this is, in some regards, current military practice. *See generally* U.S. GEN. ACCOUNTING OFFICE, MILITARY RECRUITING: NEW INITIATIVES COULD IMPROVE CRIMINAL HISTORY SCREENING (1999) [hereinafter GAO MILITARY RECRUITING], *available at* http://www.gao.gov/archive/1999/ns99053.pdf.

15. *See, e.g.*, Elizabeth L. Hillman, *Guarding Women: Abu Ghraib and Military Sexual Culture*, *in* ONE OF THE GUYS: WOMEN AS AGGRESSORS AND TORTURERS 111 (Tara McKelvey ed., 2007); Hank Nuwer, *Military Hazing*, *in* THE HAZING READER 141 (Hank Nuwer ed., 2004); Carie Little Hersh, *Crossing the Line: Sex, Power, Justice, and the U.S. Navy at the Equator*, 9 DUKE J. GENDER L. & POL'Y 277 (2002) (describing in detail the simulated sex, degradation, and humiliation involved in the Navy's initiation of sailors upon first crossing the equator).

16. *See infra* notes 191-202 and accompanying text. There is evidence, for example, that recidivism rates are lower for those who enter the military with moral waivers and/or criminal backgrounds than for those who do not enter the military at all.

the criminal backgrounds of many thousands more – are discussed in light of the competing needs and pressures faced by our contemporary Armed Forces.

Part III describes some of the practical, social, and political considerations that are and should be at play in the formulation and implementation of the Armed Forces' waiver policy. These include: the characteristics of the American youth population from which recruits are drawn; moral waiver recipients' performance, retention, and attrition levels; ex-offenders' employment difficulties and the effect of these difficulties on criminal recidivism; and the social advantages of military service among ex-offenders.

Synthesizing the descriptive information presented in Part II with the policy concerns addressed in Part III, this Article concludes that ex-offender recruitment, currently pursued through a system of winks and nods, should be approached more forthrightly, and perhaps more vigorously, for the good of civilian society *and* the Armed Forces.

II. THE MORAL WAIVER SYSTEM

A. *Substantive Laws and Policies Governing the Moral Waiver System*

The Supreme Court has held that "voluntariness and capacity are the only two requirements for a valid enlistment" into the U.S. Armed Forces.[17] Beyond these criteria, the federal government has long been entrusted to "prescribe the requisite qualifications, and insist upon or waive them in its discretion."[18] Generally, Congress has delegated this authority to the Secretary of Defense, authorizing the Secretary to establish "physical, mental, moral, professional, and age" requirements for enlistment.[19] A notable limitation on the Armed Forces' power to set their own standards is the statutory exclusion of persons who have been convicted of a felony.[20] The U.S. Department of Justice ("DOJ") cites loss of the "right" to serve in the military as one of the many collateral consequences of a felony conviction,[21] and it is regularly described as such in judicial opinions.[22] Generally, disqualification on the basis of

17. Hodges v. Brown, 500 F. Supp. 25, 28 (E.D. Pa. 1980) (citing *In re* Grimley, 137 U.S. 147, 151-53 (1890), *aff'd*, 649 F.2d 859 (3d Cir. 1981).

18. United States v. Cottingham, 40 Va. 615, 631 (Va. 1843).

19. *See, e.g.*, 10 U.S.C. § 12102(b) (2006) (relating to the Reserves).

20. 10 U.S.C. § 504(a) (2006).

21. *See* DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 3 (2000) (citing 10 U.S.C. § 504) [hereinafter COLLATERAL CONSEQUENCES UPON CONVICTION], *available at* http://www.usdoj.gov/pardon/collateral_consequences.pdf.

22. *See, e.g.*, Mulloy v. United States, 937 F. Supp. 1001, 1006 (D. Mass. 1996);

moral character "encompasses individuals under judicial restraint [or] with significant criminal records," persons "displaying antisocial or other problematic behavior," and one-time service members whose discharge was less than honorable.[23]

The same statute that disqualifies felons from military service permits the Secretary of Defense to "authorize exceptions, in meritorious cases."[24] Such exceptions are called "moral waivers," a designation that underscores the military's use of criminal history as a proxy for moral character.[25] Just as the Armed Services may admit recruits who are physically heavier than the rules allow via "weight waivers," they may admit those with criminal histories – from traffic violations to felony convictions – via moral waivers, which overcome these enlistees' prior misconduct. Though the procedures and requirements governing their allocation differ from Service to Service, moral waivers are widely used throughout the Armed Forces.[26]

The military's nominal ban on ex-offenders – merely nominal because the moral waiver system enjoys widespread observance in the breach – is part of a larger legal and policy framework that particularly discourages criminal behavior among servicemembers. The Uniform Code of Military Justice ("UCMJ") and the Court of Appeals for the Armed Forces, whose operation is by no means limited to situations where enforcement of civilian laws by civilian courts is impracticable,[27] are prominent examples of society's deference to the military's need to

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Commonwealth v. Duffy, 639 A.2d 1174, 1176 (Pa. 1994); *In re* Disciplinary Proceedings Against Hyndman, 638 N.W.2d 293, 300 (Wis. 2002) (Wilcox, J., dissenting) ("The crime that the court glosses over is not a minor one. Such a felony drug conviction would prevent Hyndman from joining the Armed Forces, from becoming a police officer . . . ." (footnotes omitted)); *see also* COLLATERAL CONSEQUENCES UPON CONVICTION, *supra* note 21, at 3.

23. SHEILA NATARAJ KIRBY & HARRY J. THIE, RAND, ENLISTED PERSONNEL MANAGEMENT: A HISTORICAL PERSPECTIVE 66 (1996).

24. 10 U.S.C. § 504(a) (2006).

25. Anthony W. Frabutt, The Effects of Pre-Service Legal Encounters on First-Term Unsuitability Attrition in the U.S. Navy, at 2-4 (Mar. 1996) (unpublished thesis, Naval Postgraduate School), *available at* http://www.stormingmedia.us/47/4767/A476703.html. Criminal history is an imperfect measure of moral character. As Frabutt explains,

> committing a crime does not necessarily equate with low moral character. First, individual circumstances that may not reflect moral character can determine one's behavior. There may be economic or environmental factors that influence an individual's actions. Second, one must also take into account remorse, reform, or rehabilitation, . . . as well as the fact that people "pay" for their crimes with legally-defined forms of punishment.

Id. at 4.

26. Thus, it is the policy of "the Military Services" *as a whole* to acquire and use, whenever possible, criminal history records to identify "those who may not be enlisted in the Military Services *unless a waiver is granted.*" 32 C.F.R. § 96.4(b) (emphasis supplied). Notably, this is the "highest" legal reference to moral waivers.

27. *See* 10 U.S.C. § 802 (2006) (listing the persons subject to UCMJ jurisdiction).

regulate the discipline and character of its troops. Individuals may be discharged or dismissed from the military for committing a crime,[28] and federal law sometimes ensures that even veterans are subject to special punishment.[29]

A DOD directive explains that moral character requirements' "underlying purpose" is to screen out individuals "who are likely to become disciplinary cases or security risks or who disrupt good order, morale, and discipline."[30] An earlier version of the directive invokes the military's "responsibility to parents," who do not wish to see "their sons and daughters . . . placed into close association with persons who have committed serious offenses or whose records show ingrained delinquency behavior patterns."[31] In a similar vein, some commentators have suggested that the prohibition reflects concern over the Armed Forces' "public image," because a "criminal element" in the military would affect not only recruiting and retention but also popular support and respect.[32]

Yet the military's policy on ex-offenders, and even the statutory disqualification of convicted felons, hardly amounts to a "class-wide" exclusion.[33] The intricate system employed to detect meritorious exceptions, like the widespread use of waivers, demonstrates the Armed

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28. *See generally* Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*; 10 U.S.C. § 804; 10 U.S.C. §§ 816-20.

29. "No [military] pension . . . shall be paid to . . . an individual who has been imprisoned in a Federal, State, [or] local . . . penal institution . . . as a result of conviction of a felony or misdemeanor for any part of the period beginning sixty-one days after such individual's imprisonment begins and ending when such individual's imprisonment ends." 38 U.S.C. § 1505(a) (2006). Nonetheless, the lost pension *may* be paid to the spouse or children of the imprisoned veteran. 38 U.S.C. § 1505(b).

30. DEP'T OF DEFENSE, INSTRUCTION 1304.26 art. E2.2.7 (2005) [hereinafter DOD INSTRUCTION 1304.26], *available at* http://www.dtic.mil/whs/directives/corres/pdf/130426p.pdf. Roughly the same rationales have been articulated from a more empirical perspective. *See* Frabutt, *supra* note 25, at 1. The primary justifications for excluding ex-offenders include, albeit more credibly, some of the same concerns advanced by those who argue against homosexuals in the military, an association reinforced in DOD's own recruitment literature. *See, e.g.*, William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. REV. 121, 163-64 (1995). The recruitment directive moves directly from the Services' policy on homosexuals to its policy on ex-offenders. The "explanation/determination" guidelines for the Air Force's "Category 1 ineligibility factors" – major offenses "which cannot be waived" – refer in the same breath to persons who admit to engaging in homosexual conduct and persons who have been convicted "of an offense punishable by death." Other Category 1 ineligibility factors are "transexualism and other gender identity disorders, exhibitionism, transvestism, [and] voyeurism." AIR NAT'L GUARD, INSTRUCTION 36-2002, at 15, 57 (2004), *available at* http://www.e-publishing.af.mil/pubfiles/ang/36/angi36-2002/angi36-2002.pdf.

31. DEP'T OF DEFENSE, DIRECTIVE 1304.26 art. E1.2.7 (1993), *available at* http://www.dtic.mil/whs/directives/corres/text/d130426p.txt.

32. *See, e.g.*, Frabutt, *supra* note 25, at 2.

33. Woodruff, *supra* note 30, at 164 ("Within each of [the] broad categories [upon which the military chooses to restrict enlistment,] there may be individuals who could perform well in

Forces' collective refusal to reject "personnel irrespective of their *individual* suitability."[34] Instead, most applicants benefit from the "whole person" standard.[35] Sometimes criticized for its failure to provide concrete guidance to recruiters,[36] the "whole person" standard permits consideration of "the circumstances surrounding the criminal violations, the age of the person committing them, and personal interviews" with the applicant and others, as well as a recruit's other aptitudes, experiences, and characteristics.[37]

Documents used throughout the DOD refer to a common set of waiver codes, but the offenses encompassed under each code vary by Service, with one or more Services foregoing notation of certain codes – and therefore certain offenses – altogether.[38] DOD Form 1966 initially classifies offenses by their time of commission: enlistment waivers for violations that occurred prior to entry into Armed Forces' Delayed Entry Program ("DEP") and accession waivers for violations that occurred after entry into DEP but before the formal start of military service.[39] The alphabetical code that Form 1966 applies to either kind of waiver is determined first by infraction type (law violation or illegal substance-related admission) and then by a variety of potential factors: the offender's age (juvenile or adult); the offense's magnitude (serious or non-serious); the type of offense (traffic violation, non-traffic violation, felony); and/or the substance involved (alcohol, marijuana, or another drug).[40]

In addition to the categories suggested by DOD Form 1066, the Services further distinguish between felonies (e.g., kidnapping, murder),[41] serious misdemeanors (e.g., assault, petty larceny), minor misde-

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certain positions in the military. Enlistment qualifications, however, exclude them on a class-wide basis."). There are, in fact, very few class-wide exclusions.

34. *Id.* (stating that "*Congress* has imposed a number of restrictions on entry that disqualify personnel irrespective of their individual suitability") (emphasis supplied).

35. *See, e.g.*, ARMY REGULATION 601-210, *supra* note 9, at 4-2(c) ("Waiver authorities will apply the 'whole person' concept when considering waiver applications.").

36. One study calls for research that would allow the services to "establish guidelines for those who must approve/deny requests for moral character waivers, and provide empirically grounded criteria and standards on which to base those decisions." DAN J. PUTKA ET AL., EVALUATING MORAL CHARACTER WAIVER POLICY AGAINST SERVICEMEMBER ATTRITION AND IN-SERVICE DEVIANCE THROUGH THE FIRST 18 MONTHS OF SERVICE, at viii-ix (2003).

37. GAO MILITARY RECRUITING, *supra* note 14, at 2.

38. *See id.* at 2-5. Like the Services' lack of uniformity in the substantive criteria used for granting or withholding moral waivers, this lack of consistency in categorization has been criticized as confusing and inefficient. *See* PUTKA ET AL., *supra* note 36, at vii (recommending adoption of a "DoD-wide, standard law violation classification framework").

39. DEP'T OF DEFENSE, FORM 1966, RECORD OF MILITARY PROCESSING §§ II-17(h), -18(f), *available at* http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd1966.pdf.

40. *See* PUTKA ET AL., *supra* note 36, at 8.

41. GAO MILITARY RECRUITING, *supra* note 14, at 3; Frabutt, *supra* note 25, at 20. Felonies,

meanors (e.g., discharging a firearm within city limits, removing public property), minor non-traffic offenses (e.g., disorderly conduct, vandalism), serious traffic offenses (e.g., driving with a revoked license), and minor traffic offenses (e.g., speeding).[42] Even at this level of specificity, there are differences between the various branches' classification of crimes.[43] By far the most important of these are the Army's decision to ignore – that is, to forgive without granting a moral waiver – pre-service abuse of illegal substances, and the Marine Corps' requirement of a moral waiver for even onetime marijuana use.[44]

Offense categorization is important because it largely determines whether an enlistee will be eligible for a waiver and, if so, how many other offenses are waivable. Table 1 below, based on information compiled by the U.S. Government Accounting Office ("GAO"), summarizes the extent to which each Service will consider waiving certain kinds of offenses. Evidently, all branches take advantage of their wide discretion to create substantive moral waiver policy. Three of the four Services decline to use one category, "Serious Traffic Offenses," which the DOD nonetheless employs in its waiver-related operations. The Navy and the Air Force will consider waiving multiple felonies, but the Army and Marine Corps allow no more than one.[45] Apart from crimes specifically classified as drug offenses, serious misdemeanors (also known as serious non-traffic offenses) account for a majority of all moral waivers[46] and are treated quite differently from one Service to another – the Navy will waive no more than two such offenses, the Army refuses to waive more than four, the Marine Corps sets its limit at five, and the Air Force imposes no formal numerical restriction whatsoever.[47]

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generally understood to be offenses whose punishment equals or exceeds one year in prison, encompass a wide range of offenses. As indicated by the earlier reference to the Air Force's automatic disqualification of individuals convicted of felonies carrying the death penalty, some crimes in this category will be treated more harshly than others.

42. GAO MILITARY RECRUITING, *supra* note 14, at 3.

43. "While the standards across the Services are similar, there are minor variations which create Service-specific requirements." DEP'T OF DEFENSE, OFFICE OF DEPUTY UNDER SECRETARY OF DEFENSE, MILITARY RECRUITING AND WAIVERS 3 (2007) [hereinafter DOD MILITARY RECRUITING AND WAIVERS] (on file with author).

44. *See* GAO MILITARY RECRUITING, *supra* note 14, at 27-28 (explaining that the Army defines pre-service illegal substance use as a medical, not a moral, problem); DOD MILITARY RECRUITING AND WAIVERS, *supra* note 43 at 1.

45. GAO MILITARY RECRUITING, *supra* note 14, at 4. This should not be taken to mean that the Navy and the Air Force habitually admit individuals who require more than one felony waiver. It is likely that most such individuals are excluded on recruiters' discretion rather than by automatic disqualification.

46. *See infra* tbl.4.

47. GAO MILITARY RECRUITING, *supra* note 14, at 4.

B. *Moral Waiver Procedure: The Practice and Efficacy of Character Screening*

"Moral character screening" is the process by which recruiters review enlistees' criminal and substance abuse histories.[48] Screening procedures are "extensive," furnishing up to fourteen separate opportunities (involving up to seven different recruiting personnel) for recruits to disclose facts relevant to a moral waiver application.[49] Although the screening process is different from branch to branch, each Service uses a similar set of methods,[50] including interviews, briefings, forms,[51] as well as state, local, and federal record checks.[52] Such persistent inquiry is especially important in light of the consequences of dishonesty or non-disclosure: enlistees who intentionally conceal disqualifying information "may be refused enlistment at any point during the recruiting process or, after enlisting, [may be] discharged for fraudulent enlistment."[53]

Beginning at the first recruitment interview, an applicant is asked to disclose "*all* arrests or convictions," regardless of when the incident occurred and, in the case of arrests, regardless of whether the applicant was found guilty.[54] If a "significant" issue arises, the recruiter and the applicant are expected to discuss all relevant facts and circumstances. In deciding whether to seek a moral waiver, recruiters are guided in part by

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48. PUTKA ET AL., *supra* note 36, at v.

49. GAO MILITARY RECRUITING, *supra* note 14, at 1, 6.

50. PUTKA ET AL., *supra* note 36, at 1 (citing J.L. BURNFIELD, K. HANDY, D.E. SIPES & J.H. LAURENCE, MORAL CHARACTER AND ENLISTMENT STANDARDS: DOCUMENTATION, POLICY, AND PROCEDURE REVIEW (1999)).

51. Applicants are required to complete the following forms used in obtaining criminal history information: (1) Record of Military Processing – Armed Forces of the United States (DD Form 1966), (2) Personnel Security Questionnaire (SF-86), (3) the Police Record Check (DD Form 369), and (4) the Armed Forces Fingerprint Card (DD Form 2280). These forms elicit information on police record histories, drug and alcohol use and abuse, financial records and delinquencies, and any juvenile arrest or criminal activity.

GAO MILITARY RECRUITING, *supra* note 14, at 8 (footnote omitted). The respective Services will pose similar questions on forms of their own. For example, the Air Force Enlistment questionnaire asks:

> 1. Have you *ever* been involved, arrested, indicted, or convicted for any violation of civil or military law, including nonjudicial punishment pursuant to Article 15 of the Uniform Code of Military Justice (UCMJ) or minor traffic violations?
>
> . . . .
>
> 8. Are you under investigation by military or civilian authorities? . . .
>
> 9. Are you under the influence of drugs or alcohol? . . .
>
> 10. Have you ever tested positive for an illegal drug/substance?

AIR NAT'L GUARD, INSTRUCTION 36-2002, *supra* note 30, at 36 (emphasis in original).

52. GAO MILITARY RECRUITING, *supra* note 14, at 5 (noting that "[e]ach service screens for criminal background information in a similar manner.).

53. *Id.* at 9.

54. PUTKA ET AL., *supra* note 36, at 1 (emphasis in original).

the offense classification rules described above.[55] Admission or suspected concealment of a criminal record triggers a more rigorous background investigation than the general national agency check conducted upon admission into DEP.[56] Although recruits normally enter DEP "[r]egardless of moral character status,"[57] subsequent participation entails considerable inquiry into their so-called "moral" background.[58]

At any point during the enlistment process, discovery of information that would render the applicant ineligible for a waiver – for example, a judicial conviction for spousal abuse – automatically terminates the recruitment process.[59] So long as the applicant's offense does not entail such immediate disqualification, the first disclosure or discovery

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55. *Id.* at 1, 2.

56. *Id.* at 2; *see also, e.g.*, ARMY REGULATION 601-210, *supra* note 9, at 2-11(b)(2)-(4). This section entitled "Moral and Administrative Criteria," states that

> [a]pplicants who claim no law violations or claims [sic] only minor traffic offenses (except reckless or careless or imprudent driving) will have police record checks, based on current residence, obtained from three levels: (a) City or municipal, military installation law enforcement. (b) County law enforcement. (c) State law enforcement. (3) Applicant who claims law violations other than minor traffic offenses will have police record checks completed where applicant has lived, worked . . . and attended school during the 3 years prior to application into the DEP/DS/DTP; police/court documents where the offense(s) occurred will be obtained from: (a) City or municipal, military installation law enforcement. (b) County law enforcement. (c) State law enforcement. (d) Court documents. (e) Probation departments. (f) Adult correctional facility. (g) Juvenile correctional facilities. (4) Applicants requiring a moral waiver for any misdemeanor or felony level charge, regardless of disposition, will have police record checks obtained from: (a) City or municipal, military installation law enforcement. (b) County law enforcement. (c) State law enforcement. (d) Court documents. (e) Probation departments. (f) Adult correctional facility. (g) Juvenile correctional facility.

Id. (internal divisions omitted).

57. PUTKA ET AL., *supra* note 36, at 2.

58. When the [national agency] checks involve fingerprints, the services request a fingerprint verification – a comparison of an enlistee's fingerprints against FBI criminal records to ensure that they are from the same individual whose name was associated with a possible arrest record identified through [a] descriptive data search. Also, during the [DEP], recruiters are in contact with the enlistees and continue to inquire about their criminal background and any current contact with law enforcement agencies. . . . After the [DEP] period, . . . enlistees are asked again to disclose disqualifying information when they report to basic training, which lasts from 6 to 12 weeks depending on the service.

GAO MILITARY RECRUITING, *supra* note 14, at 8-9.

59. The Lautenberg Amendment to the Gun Control Act makes it a felony for anyone convicted of a "misdemeanor crime of domestic violence" to ship, receive, or possess firearms or ammunition, and provides no military or law enforcement exception. *See* 18 U.S.C. § 922(g)(9) (2005). Studies reveal, however, that "a small number of waivers have been granted to individuals convicted of domestic violence-related charges." DEP'T OF DEFENSE, DEFENSE TASK FORCE ON DOMESTIC VIOLENCE: INITIAL REPORT 53 (2001); *see also* PUTKA ET AL., *supra* note 36, at 2 ("If the recruiter discovers that the applicant is subject to further or pending judicial proceedings, the application process is also terminated immediately.").

of any law violation initiates the moral waiver process.[60] Recruiters may begin this process at any point in the recruitment schedule.[61] Once a waiver's necessity becomes apparent, DOD-wide policy requires collection of all possible information "about the 'who, what, when, where, and/or why'" of the offense at issue, as well as letters of recommendation from "responsible community leaders."[62]

Though moral waiver requests may be rejected at any level of the recruitment hierarchy, an offense's severity is the most important factor determining the level at which a waiver request may be granted.[63] Recruiting commanders are responsible for approving waivers of the most serious offenses.[64] At the other end of the spectrum are disclosures of illegal substance use, which may be excused by low-level recruiters who are otherwise unqualified to grant waivers.[65] The third letter of an offense's waiver code signals the required "waiver authority level."[66]

Clearly, the moral screening process is elaborate. But is it effective? Do a dozen requests for confession make the system airtight, or does such persistence betray a certain lack of confidence in the confessor?

Although the precise failure rate is impossible to measure, the moral screening process, as presently constituted, is fundamentally and drastically flawed. Official background checks for all enlistees – that is, across-the-board criminal history searches – were discarded in 1986 because formal prohibitions on the release of such information constantly thwarted recruiters' investigations.[67] Since 1986, however, the same problem continues to arise in a smaller (and, per capita, more problematic) segment of the applicant pool – namely, individuals who have

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60. For a helpful description of the moral character waiver approval process, see PUTKA ET AL., *supra* note 36, at 1-2.

61. GAO MILITARY RECRUITING, *supra* note 14, at 9.

62. *See* DOD INSTRUCTION 1304.26, *supra* note 30, art. E2.2.7.2.2.

63. PUTKA ET AL., *supra* note 36, at 2.

64. GAO MILITARY RECRUITING, *supra* note 14, at 9.

65. PUTKA ET AL., *supra* note 36, at 1, 8.

66. *Id.* at 8. The codes are as follows:

A: Waiver granted by the highest authority level
B: Waiver granted by the Recruiting Command Headquarters level
C: Waiver granted by the USMC Regional Command level
D: Waiver granted by the USA Brigade, USN Area, USMC District, USAF Group level
E: Waiver granted by the USA Battalion, USN District, USAF Squadron level, USMC Recruiting Station
F: Waiver granted by the Coast Guard Recruiting Center

Id.

67. ELI S. FLYER, DIRECTORATE FOR ACCESSION POLICY OFFICE OF THE ASSISTANT SEC'Y FOR DEF., RECRUITS WITH A PRESERVICE ARREST HISTORY: IDENTIFICATION, CHARACTERISTICS, AND BEHAVIOR ON ACTIVE DUTY 4-5 (1995).

actually confessed to an arrest or conviction or who have otherwise acknowledged the existence of a criminal record.[68] The special protection that background concealment statutes afford juvenile offenders is particularly frustrating for military recruiters given that seventeen to twenty-one year olds constitute the primary recruit population.[69] The DOD and other military voices have complained that such restrictions are a serious defect in the moral screening system.[70] Anthony Frabutt, for one, urges the military "to investigate ways" to fix this problem, including the repeal or modification of federal,[71] state,[72] and local policies that bar or restrict official disclosure of criminal histories.[73]

The Armed Forces' narrowly constrained use of official criminal records entails almost complete reliance on recruits' own confessions of wrongdoing.[74] Because the military is hardly immune from ex-offenders' tendency to hide their criminal pasts from employers,[75] many indi-

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68. *See id.* at 2-3.

69. GAO MILITARY RECRUITING, *supra* note 14, at 12; *see also* BETH J. ASCH, CAN DU & MATTHIAS SCHONLAU, RAND, POLICY OPTIONS FOR MILITARY RECRUITING IN THE COLLEGE MARKET: RESULTS FROM A NATIONAL SURVEY 1 (2004) (referring to the "military's traditional recruiting market, namely high school graduates with no immediate plans to attend college").

70. Before publication, the GAO's report on moral character screening was submitted to the DOD for comment. The GAO devoted a considerable portion of its discussion to criminal record access, a problem discussed in as much or more detail than any other subject covered in the report. Nonetheless, the DOD noted that "the report does not fully address [its] need for timely local and state criminal history information at a reasonable cost." GAO MILITARY RECRUITING, *supra* note 14, at 36.

71. DOD policy states that the military services shall obtain and review criminal history record information from the criminal justice system and Defense Security Service to determine whether applicants are acceptable for enlistment and for assignment to special programs. However, under the Security Clearance Information Act (5 U.S.C. § 9101), criminal justice agencies are required to provide this information to DOD only when an individual is being investigated for eligibility for access to classified information or sensitive national security duties. These agencies, which include federal, state, and local agencies, are not required to provide this information for determining basic eligibility or suitability for enlistment (i.e., employment).

Id. at 11 (footnote omitted).

72. Many states, and indeed many municipalities, charge fees for releasing information. A Navy Recruiting Command survey found that "33 states charged fees ranging from $5 to $59." *Id.* at 12. The effect of such fees varies depending on the particular Service:

> The Army has a policy to request local and state record checks for all applicants, but will not pay these fees, and therefore, does not obtain information from states that charge fees. The other services request these record checks only if an applicant admits to a criminal history. Navy and Marine Corps policy allows recruiters to pay for the checks; Air Force policy requires applicants to obtain the checks and pay any fees associated with the checks.

Id.

73. *Id.* at 2. *See generally*, Frabutt, *supra* note 25, at 50.

74. Frabutt, *supra* note 25, at 3.

75. *See infra* Part III.B.2.

viduals with moral disqualifications are admitted into the Services without even applying for the necessary waiver. The self-preservationist impulse underlying ex-offenders' reticence is hardly incomprehensible in light of honesty's often harsh consequences, and a decision to heed that impulse may be particularly understandable when it is so easy to get away with lying.[76] Sometimes, however, recruiters themselves may be responsible, in whole or in part, for an applicant's perjury – they might suggest or imply that a recruit keep certain facts hidden, or they might conceal information on their own initiative.[77]

Whatever their motive, cover-ups do happen: "[I]n reality, there are many enlistees in the military today with a concealed criminal history."[78] The criminal closet apparently pervades the Armed Forces. Of course, its exact prevalence is impossible to measure for the same reason that detection is difficult in the first place – namely, widespread restrictions on access to criminal records. What research exists is not encouraging. A 1995 study found that the majority of Navy recruits with an arrest history did not seek, let alone receive, a moral waiver.[79] Another Navy study conducted one year later found a non-disclosure rate of thirty-one percent for non-felony convictions and ninety-one percent for felony convictions; in the juvenile sample, the figures were even higher for both offense categories.[80] And while it is true that among a sample of more than 48,000 Navy recruits, only thirty-eight percent of those with a documented "prior legal encounter" entered the service without the appropriate waiver,[81] this relatively encouraging figure was offset by

76. To emphasize how irresistible lying may seem to an ex-offender, consider again that an "applicant is instructed to divulge" information about any offense even "if [the] records were sealed or expunged." PUTKA ET AL., *supra* note 36, at 1.

77. *See* Frabutt, *supra* note 25, at 23-24; *see also* Damien Cave, *Army Recruiters Say They Feel Pressure to Bend Rules*, N.Y. TIMES, May 3, 2003, at A23, *available at* 2005 WLNR 6894465 ("Several [recruiters] spoke of concealing mental-health histories and police records. . . . [One recruiter said] he has been ordered [by his superiors] to conceal police records and minor medical conditions . . . .").

78. *See* Frabutt, *supra* note 25, at 10.

79. *See* Miguel A. Lake, Navy Personnel with In-Service Criminal Records: Characteristics of Offenders and Career Implications, at 7 (Dec. 1996) (unpublished M.S. thesis, Naval Postgraduate School), *available at* http://handle.dtic.mil/100.2/ADA326534 (citation omitted).

80. Juvenile convictions were disclosed at a rate of sixty percent for non-felonies and three percent for felonies. *See* Jeffrey W. Connor, The Effects of Pre-Service Criminal History on Recruit Performance in the U.S. Navy, at 31 (Mar. 1997) (unpublished M.S. thesis, Naval Postgraduate School), *available at* http://handle.dtic.mil/100.2/ADA331671.

81. Frabutt, *supra* note 25, at 23. Moral waivers are not required for mere "encounters" with the law (e.g., arrests that do not result in conviction), even though applicants are required to confess such encounters. Pre-service convictions are a good indicator of moral character for screening purposes. But as Frabutt observes, using "convictions instead of arrests to evaluate moral character . . . holds well with the values of American society, whose justice system is based on the concept of a person's innocence 'until proven guilty.' . . . [A]n arrest does not equate to guilt . . . [and] there is no reason to assume that the individual has broken the law." *Id.* at 3-4.

the discovery that convicted felons had a two percent disclosure rate, compared with seventy-nine percent for recruits convicted of misdemeanors.[82] Based on these findings, the study concluded that "the Navy's current system for providing moral waivers and reviewing the background of applicants for enlistment is ineffective in identifying persons with a pre-service arrest history."[83]

C. *Moral Waivers: The Numbers*

Although we cannot determine precisely how many ex-offenders enter the military, even the drastically deficient official figures – i.e., the number of moral waivers granted each year – establish that a startling percentage of servicemembers have criminal histories. Moreover, although many waivers excuse either minor offenses or admitted-but-unpunished illegal substance use, about one-third relate to what the DOD calls "serious non-traffic offenses."[84] Such offenses do *not* include felonies, which constitute a separate, significant, but relatively small class of crimes for which moral waivers are routinely granted.

Table 2 provides the number of moral waivers each Service bestowed, and the number the Armed Forces as a whole bestowed, for fiscal years 1990 through 1997.[85] The GAO compiled this data based on the Defense Manpower Data Center's enlistment and separation figures.[86] Table 3 provides the number of moral waivers the Armed Forces granted for fiscal years 2003 through 2006 obtained directly from the DOD for use in this Article.[87] Although the DOD was unable to provide reliable data for fiscal years 1998 through 2002,[88] it is likely that these years witnessed an increase in waiver rates given "the difficult

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82. *Id.* at 27.

83. *Id.* at 49.

84. *See* DOD MILITARY RECRUITING AND WAIVERS, *supra* note 43, at 4; DEP'T OF DEFENSE, OFFICE OF FREEDOM OF INFORMATION & SEC. REV., MORAL WAIVER DATA, REF. 05-5-0960 [hereinafter DOD FOIA 05-5-0960] (on file with author).

85. Throughout this section, references to years indicate fiscal, not calendar, years. For a summary of moral waiver trends prior to 1990, see generally ELI S. FLYER, DIRECTORATE FOR ACCESSION POLICY OFFICE OF THE ASSISTANT SEC'Y FOR DEF., CHARACTERISTICS AND BEHAVIOR OF RECRUITS ENTERING MILITARY SERVICE WITH AN OFFENSE HISTORY (1990).

86. GAO MILITARY RECRUITING, *supra* note 14, at 26.

87. *See* DOD MILITARY RECRUITING AND WAIVERS, *supra* note 43, at 2.

88. In February 2005, the author submitted a Freedom of Information Act ("FOIA") request to the DOD, seeking a variety of information regarding ex-offender enlistment in the Armed Forces between fiscal years 1998 and 2004. E-mail from Michael Boucai, Author, to Defense Manpower Data Center, Freedom of Information Act Officer, Undersecretary of Defense, DOD (Feb. 8, 2005) (on file with author). Although the author received a partial response to that request in October 2005, see DOD FOIA 05-5-0960, *supra* note 84, the DOD eventually disclaimed the data it provided in that response. In January 2007, the DOD furnished numbers pertaining to fiscal years 2003 through 2005, explaining that "data issues" – coding and compilation errors – made it "just too difficult to go back [as] far" as "originally requested."

recruiting experience of the late 1990s."[89]

Beyond formal, internal policy changes in the classification and treatment of offenses, the Armed Forces have had difficulty accounting for fluctuations in moral waiver rates.[90] In fact, such policy changes drastically obscure more salient variables relating to overall trends in recruit numbers and quality.[91] Nearly all military standards will reflect these fluctuations,[92] but waiver rates – moral and otherwise – should be one of the first manifestations of general recruitment developments, precisely because waiver systems, rather than outright bans, provide flexibility for dealing with the vicissitudes of supply and demand. In years when recruitment is flagging or when a good civilian job market attracts many well-qualified workers – developments that tend to coincide – recruiters, anxious to fill enlistment quotas, generally will accept more individuals who require waivers, and they will grant waivers for more serious offenses than they would in times of plenty.[93] As one study

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Email from Dennis J. Drogo, DOD, to Michael Boucai, Author (Jan. 19, 2006) (on file with author).

89. Christopher Jehn, *Sustaining the Force: Introduction*, *in* THE ALL-VOLUNTEER FORCE: THIRTY YEARS OF SERVICE 55-56 (Barbara A. Bicksler et al. eds., 2004); *see also* RICHARD J. BUDDIN, RAND, SUCCESS OF FIRST-TERM SOLDIERS: THE EFFECTS OF RECRUITING PRACTICES AND RECRUIT CHARACTERISTICS 7 (2005) ("In FY1998 and FY1999, the civilian economy boomed, and Army recruiting struggled, accepting more low-quality recruits to satisfy requirements.").

90. GAO MILITARY RECRUITING, *supra* note 14, at 28 ("The services could not explain the reasons for these trends.").

91. Annual recruitment cohorts, like grape vintages, become known for their size and quality. 2000 through 2003 are known in the Army as "strong recruiting years," a "success . . . related to a weak economy and, possibly, the patriotic fervor for the war against terrorism." BUDDIN, *supra* note 89, at 1. These years stand in contrast to the "difficult recruiting experience of the late 1990s." Jehn, *supra* note 89, at 56. Examining more long-term trends, Armor and Sackett noted that "there have been substantial variations in recruit quality over the past 20 years, from unprecedented lows in the late 1970s to record highs in the early 1990s." David J. Armor & Paul R. Sackett, *Manpower Quality in the All-Volunteer Force*, *in* THE ALL-VOLUNTEER FORCE: THIRTY YEARS OF SERVICE, *supra* note 89, at 90.

92. Minimum standards for acceptance into the military were established early in military history but generally these standards, as Eitelberg et al. . . . point out, act as "flexible gates that open and close in reaction to the shifting needs of national defense and manpower recruitment . . . . Certain circumstances, such as a recruiting drought or a need for mass mobilization, typically necessitate less stringent physical standards, lower education and ability criteria, and more lenient eligibility requirements in other areas. Conversely, during periods of peace when the standing army is streamlined to function as a 'caretaker,' or during periods of high unemployment when military 'jobs' are relatively more attractive to the youthful workforce, the Armed services are usually able to be more selective and the qualitative barriers to entry are strengthened."

KIRBY & THIE, *supra* note 23, at 66 (citing MARK J. EITELBERG ET AL., SCREENING FOR SERVICE 7 (1984)) (footnote omitted).

93. Lake, *supra* note 79, at 5 (explaining that a 1990 Eli S. Flyer study concluded "that the differences between services were likely due to differences on pressure on recruiters to fill enlistment quotas"). Referring to the Marine Corps, Leonard Etcho stated outright that "[t]he

concluded, moral waivers are "utilized by the services to fill immediate manpower needs."[94]

But recruiters' willingness to pursue a moral waiver for their enlistees does not always or necessarily ensure the triumph of quantity over quality. Moral waivers are regularly used to bolster the candidacy of otherwise good prospects. Several studies indicate that recruiters are more likely to grant moral waivers to recruits who excel in areas other than character, a practice that military policy researchers have explicitly recommended.[95] A 1988 study focusing on servicemembers assigned to sensitive occupations found that seventy percent of those who received a moral waiver performed in the upper half of the Armed Forces Qualification Test ("AFQT") and were, compared to those who enlisted without a waiver, more likely to be high school graduates.[96] The authors surmised that "the services are willing to take some risks in accessing personnel [by granting moral waivers] . . . if the personnel have higher aptitude levels."[97]

Focusing on Navy enlistees from California over a seven-year period, Frabutt determined that seventy-six percent of recruits who received a misdemeanor waiver and sixty-eight percent of those who received a felony waiver were in the middle AFQT category or higher.[98] Frabutt also investigated whether the tendency to grant waivers to individuals with compensatory qualities results in higher rates of criminal

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granting of moral waivers is often driven by the supply of applicants. It is necessary for the Marine Corps to grant moral waivers in order to meet first-term enlistment requirements." Etcho, *supra* note 4, at 4. In a similar vein, responding to a "dwindling" supply of troops, Army field commanders were recently instructed to "retain soldiers they had been intending to discharge for drug and alcohol abuse." Philip Carter, *The Quiet Man*, N.Y. TIMES, July 6, 2005, at A19, *available at* 2005 WLNR 10629369.

94. Martin F. Wiskoff & Norma E. Dunipace, *Moral Waivers and Suitability for High Security Military Jobs*, DEF. PERSONNEL SEC. RESEARCH AND EDUC. CTR., Dec. 1988, at 14; *see also* Carter, *supra* note 7; Jaffe, *supra* note 7 ("To keep more soldiers in the service, the Army has told battalion commanders, who typically command 800-soldier units, that they can no longer bounce soldiers from the service for poor fitness, pregnancy, alcohol and drug abuse or generally unsatisfactory performance. . . . Instead, the battalion commanders must send the problem soldiers' cases up to their brigade commander, who typically commands about 3,000 soldiers.").

95. *See generally* JANICE H. LAURENCE, JENNIFER NAUGHTON & DICKIE A. HARRIS, U.S. ARMY RESEARCH INST. FOR THE BEHAVIORAL & SOCIAL SCIENCES, ATTRITION REVISITED: IDENTIFYING THE PROBLEM AND ITS SOLUTIONS (1995); PUTKA ET AL., *supra* note 36, at 27 ("The Services may benefit from requiring higher standards on other selection criteria (e.g., being a high school diploma graduate, having higher AFQT scores) from recruits who require [moral waivers] for entry into Service. Using such factors in a compensatory manner for recruits who require [moral waivers] for entry into Service would likely help to bring attrition rates among such individuals more in line with attrition rates for those Servicemembers that don't require waivers for entry." (internal citation omitted)).

96. *See* Wiskoff & Dunipace, *supra* note 94, at 9-10.

97. *Id.*

98. Frabutt, *supra* note 25, at 25.

history non-disclosure among recruits with lower AFQT scores. He found that recruits with a prior legal encounter ("PLE") in the lower AFQT categories have "a hidden PLE percentage level" nine points higher than those with a PLE in the upper AFQT categories.[99] Recruiters' tendency to be more lenient with higher-quality applicants was documented even more dramatically in Leonard Etcho's study of moral character screening in the Marine Corps. In 1991, Etcho found that approximately sixty-four percent of moral waiver applicants in the highest AFQT category were approved, compared to approximately twenty-nine percent of those in the lowest AFQT category.[100]

Numbers are not everything, though. In some respects, the absolute quantity of moral waivers granted in a given year is less important than the substantive offenses underlying those waivers. Etcho's study recognized this possibility, distinguishing between the thousands of waivers granted for minor drug and traffic offenses and the "small percentage" – at the time of Etcho's writing, approximately 500 per year – related to felony convictions. The latter, he argued, "cannot be excused as typical 'youth mischief,'"[101] and neither can the "serious non-traffic offenses" that, as Table 4 shows, currently account for about one-third of the Armed Services' moral waivers.[102]

Available data ultimately leave us with a dramatic but woefully incomplete picture of ex-offender enlistment in the Armed Forces. On one hand, it is clear that the Services have admitted tens of thousands of recruits via moral waivers. On the other hand, the number of waiver recipients falls far short of the number of enlistees with criminal histories. The next section examines whether, why, and to what extent these trends matter.

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99. However, Frabutt also found that moral waiver recipients were less likely to have graduated from high school, which he considered puzzling in light of the fact that the Navy "carefully screen[s] to enlist only those who possess 'desirable' characteristics." *Id.* at 26, 32.

100. Etcho, *supra* note 4, at 28.

101. *Id.* at 25.

102. The data contained in Table 4 was obtained directly from the DOD for use in this study. *See* DOD MILITARY RECRUITING AND WAIVERS, *supra* note 43, at 4. In the moral waiver context, felonies basically retain their legal definition (and therefore include crimes like arson, cattle rustling, criminal libel, grand larceny, housebreaking, kidnapping, and murder); "serious non-traffic offenses," previously called "serious misdemeanors," include offenses like assault and petty larceny; discharging a firearm within city limits and removing property from public grounds are examples of "minor misdemeanors"; the category of "minor non-traffic" offenses encompasses infractions like disorderly conduct and vandalism, driving with a revoked license is an example of a "serious traffic" offense, while speeding is an example of a "minor traffic" offense. GAO MILITARY RECRUITING, *supra* note 14, at 2-3.

III. POLICY CONSIDERATIONS FOR MILITARY RECRUITMENT OF EX-OFFENDERS

A. *Ex-Offender Enlistment, Recruit Quality, and Servicemember Attrition*

"'Attrition' is typically defined in the military as the separation or discharge of a person, for any reason, prior to the completion of the first term of enlistment."[103] In addition to diminishing force size and troop morale, attrition entails the considerable expense of recruiting, training, and then replacing lost servicemembers.[104] Attrition is increasingly a major problem throughout the military.[105] In the Marine Corps, for example, approximately one-third of recruits attrite before completing their first term of service.[106]

Unsuitability is by far the most common reason for servicemember attrition.[107] Unsuitability attrition usually reflects a recruit's failure to meet basic standards of performance or behavior.[108] When a servicemember separates for unsuitability reasons, the assumption tends to be that he or she should never have been recruited in the first place – i.e., that the system failed to detect a fatal, inherent flaw in the applicant. Frequently, the undetected flaw is believed to reside in the recruit's moral character.[109]

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103. Frabutt, *supra* note 25, at 7.

104. In 1998, the DOD estimated that it costs $35,532 to recruit and train each enlistee. U.S. GEN. ACCOUNTING OFFICE, MILITARY ATTRITION: BETTER DATA, COUPLED WITH POLICY CHANGES, COULD HELP THE SERVICES REDUCE EARLY SEPARATIONS 3 (1998), *available at* http://stinet.dtic.mil/oai/oai?&verb=getRecord&metadataPrefix=html&identifier=ADA354034. Recruitment expenses alone account for a substantial portion of this figure. A publication released in 2005 by the RAND Corporation reported that "it costs the U.S. Army about $15,000 to recruit one soldier, and it must recruit 80,000 to 90,000 each year." BUDDIN, *supra* note 89, at xiii (footnote omitted).

105. "One recent memorandum from a senior Army personnel official branded the problem 'a matter of great concern.'" Jaffe, *supra* note 7; *see also* DON BOHN & EDWARD SCHMITZ, COMMANDER, NAVY RECRUITING COMMAND, RESEARCH REPORT, WAIVER POLICY AND ATTRITION 2-3 (1996) (discussing Naval attrition); PUTKA ET AL., *supra* note 36, at 1; David A. Anderson, *First-Term Attrition: Perception Versus Reality*, MARINE CORPS GAZETTE, Feb. 1998, at 47-48 (discussing Marine Corps attrition).

106. *See* Anderson, *supra* note 105, at 47.

107. *See, e.g.*, Frabutt, *supra* note 25, at 24 ("12,535 recruits, 26 percent of the California sample in this study, received an unsuitability discharge before completing their first term of service. An additional 10.2 percent of this group were discharged for reasons other than unsuitability, making the total attrition rate 36.2 percent. This suggests that 71.8 percent of all first-term attrition results from unsuitability.").

108. *Id.* at 7 ("Unsuitability discharges include personnel discharged prior to completion of their first time of enlistment under interservice separation codes . . . 60 through 87 and 101-102. These codes are defined by the Department of Defense . . . .").

109. *See* Anderson, *supra* note 105, at 47 (describing observers within the Marines who "are convinced that the root of the [attrition] problem is the type of young men and women the Marine Corps is recruiting. This perceived problem originates in the inordinate number of young men and

Nearly all research on the relationship between offense history and unsuitability attrition points to the unsurprising conclusion that recruits with criminal backgrounds are more likely to be discharged prematurely than those without such backgrounds. As early as 1965, a study of approximately 13,000 Air Force members found higher unsuitability discharge rates for recruits with multiple, concealed, or serious arrest history records.[110] Similarly, a series of studies conducted in various branches throughout the 1980s found a positive correlation between unsuitability attrition and receipt of a moral waiver.[111] The 1990s saw sustained research on the relationship between criminal history, moral waivers, and servicemember attrition.[112] In all relevant studies, the important question was how much – not whether – pre-service criminal history correlates with poor in-service performance and unsuitability attrition.[113] A GAO report covering 1990 to 1993 revealed that 20.6% of individuals with a moral waiver, compared to 13.3% of individuals without a moral waiver, separated from the Armed Forces due to "misconduct."[114] Similarly, researchers have discovered significant correlations in studies relating to the Army,[115] the Navy,[116] and the

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women who enter the Marine Corps with drug or moral waivers"); *cf.* BUDDIN, *supra* note 89, at xvi (factors listed that "make[ ] a difference" on first-term attrition from the Army – "Time in DEP [Delayed Entry Program]; Gender and education; FTU [fitness training unit] participation; BCT [basic combat training] base/time; Occupation [in Army]; ACF [Army College Fund], bonus, enlistment length; Recruiting environment; Recruiter characteristics" – contain no reference to moral waivers or criminal history).

110. Lake, *supra* note 79, at 3.

111. *Id.* at 4.

112. Eli S. Flyer is especially responsible for bringing research attention to moral waiver policy. Flyer's work even spurred the Navy to form a working group especially devoted to these issues. *See* EDWARD SCHMITZ & JOHN HOPPER, U.S. NAVY RECRUITING COMMAND: THE NAVY MORAL WAIVER STUDY (1996), *available at* http://www.ijoa.org/imta96/paper30.html; *see also* BOHN & SCHMITZ, *supra* note 105, at 2-3 (crediting Flyer with inspiriting research interest regarding this subject within the Navy).

113. "The big question" in all these studies "is the severity of the difference in attrition rates for recruits with moral waivers versus those without." Lyle D. Hall, Analyzing Success of Navy Enlistees with Moral Waivers, at 11 (Sept. 1999) (unpublished M.S. thesis, Naval Postgraduate School) (on file with the Naval Postgraduate School, Monterey, California).

114. GAO MILITARY RECRUITING, *supra* note 14, 31-32. Servicemembers without a moral waiver were also almost twice as likely to reenlist as servicemembers with a moral waiver – seventeen percent of the former category compared to nine percent of the latter. *Id.*

115. In 1994, Flyer's Army study identified "a high correlation between moral waivers . . . and pre-service and in-service criminal activities." Lake, *supra* note 79, at 6-7.

116. A 1995 Navy study, examining the relationship between pre-service and in-service criminal behavior, determined that "28 percent of male offenders were granted a moral waiver for entry into the Navy. Approximately 14 percent of female offenders were also granted a moral waiver. These proportions are higher than for their non-offender counterparts: 22.6 percent of male offenders and 10 percent of female non-offenders." *See* Lake, *supra* note 79, at 30. Flyer's own work regarding Naval recruitment in California, published in 1996, found that recruits with an arrest history had a much greater unsuitability attrition rate (41.8%) than recruits with no arrest history (22.9%). Of course, the military counts convictions – not arrests – as the basis of moral

Marines.[117]

Time and again, enlistees who receive (or should have received) moral waivers are shown to be less suitable than recruits with no prior offense history. But does this mean, as some commentators suggest, that the weaker group "should be screened out by tougher recruiting standards"?[118] Not necessarily. Even if ex-offenders are poorer long-term investments than other recruits, the price of their inclusion in the Armed Forces must be weighed against its multiple benefits. Though rarely discussed or even acknowledged in the attrition-related literature, some of these advantages – to the military, society, and ex-offenders themselves – are nonetheless always implicit in the very data used to make the case for more stringent enlistment and screening standards.

First, the effect of a criminal record appears to be statistically significant but hardly overwhelming. Although each of the studies cited above found a positive correlation between pre-service criminal history and unsuitability attrition or in-service misconduct, the difference between ex-offenders and non-offenders was almost always less than ten percent.[119] Thus, there is no reason to expect that attrition rates would plummet, or even substantially decrease, if the Armed Forces ceased granting moral waivers or ceased admitting individuals who have criminal backgrounds.[120]

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waiver requirements; but Flyer also found an attrition rate of 41.4% among members with a moral waiver. BOHN & SCHMITZ, *supra* note 105, at 3. These findings were supplemented that same year by Naval research that used a smaller sample but included more extensive and accurate information about the subjects' criminal histories. This research ascertained a discharge rate of almost fifty-percent for members with a felony history, "about 30 percentage points higher than the discharge rates for recruits" with no offense record whatsoever. Frabutt, *supra* note 25, at 24. A 1997 study of the effects of pre-service criminal history on in-service Naval personnel performance focused on enlistees from Illinois and Florida during the 1980s, covering six and four recruitment cohorts respectively. Individuals with any kind of felony history (arrest *or* conviction) had a discharge rate that was, in the Florida sample, approximately seven percentage points higher than the rate for individuals without a criminal history and, in the Illinois sample, approximately twelve percentage points higher. Connor, *supra* note 80, at 39-40. Emphasizing that attrition rates are not the only measure of in-service performance, this report also observed that recruits with a criminal history "are less likely to be promoted . . . , less likely to be reenlistment eligible, and less likely to remain in the Navy beyond their first term." *Id.* at 56. Finally, a study released the following year involving sailors discharged from the U.S.S. Eisenhower from 1991 to 1997 found that individuals who received moral waivers were eight percent more likely to be discharged for misconduct than those without; individuals with criminal waivers (i.e., waivers for actual criminal convictions) were twelve percent more likely to be discharged for misconduct. Hall, *supra* note 113, at 8 (citing DON BOHN, EVALUATION OF THE NAVY'S MORAL WAIVER POLICY: A CASE STUDY OF THE USS EISENHOWER (1998)).

117. A 1996 study found that recruits who enlisted in the Marines with moral waivers in 1988 were slightly more likely (by over six percentage points) to be discharged for unsuitability. Etcho, *supra* note 4, at 33-34.

118. BUDDIN, *supra* note 89, at xxii.

119. *See, e.g.*, Hall, *supra* note 113, at 61.

120. As researchers Don Bohn and Edward Schmitz concluded, "[e]xcluding applicants

Furthermore, the vast majority of individuals who enter the Armed Forces with a criminal background, even a felony conviction, are not ultimately unsuitable for military service. The rate of ex-offender attrition never reached fifty percent in any study, and in most cases the attrition rate was substantially lower.[121] In fact, the GAO's DOD-wide report found that moral waiver recipients, though more likely to be discharged for unsuitability, were *more* likely than individuals without moral waivers to complete their term of service.[122] In light of a forty percent overall criminal recidivism rate,[123] the trajectory of ex-offenders who enter the military may be more accurately characterized as a success story.

Finally, many studies showing a correlation between attrition and criminal history found that other variables were considerably more significant. Challenging the usual spin on ex-offender performance and attrition, one team of researchers discovered that "the importance of a waiver is not as great as that associated with race, education, AFQT, or even time in DEP."[124] Another study found that unsuitability discharge rates correlate much more strongly with high school graduation status than receipt of a moral waiver.[125] Thus, unless we are prepared to say that, across the board, non-graduates make bad troops, we should not say that ex-offenders cannot make good ones.

B. *Social Policy Considerations*

This section treats what the existing literature and research, surveyed above, consistently fails to take into account: the interests of civilian society per se in the question of ex-offender recruitment into the

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requiring waivers will reduce attrition" by a few percentage points "but the savings will be far outweighed by the cost to recruit additional qualified applicants." BOHN & SCHMITZ, *supra* note 105, at 9.

121. *See, e.g.*, Hall, *supra* note 113, at 61.

122. GAO MILITARY RECRUITING, *supra* note 14, at 31. The key distinction here is between attrition generally and attrition by dint of unsuitability. A 1983 study focusing on the former determined that moral waiver accessions are not much more likely than non-waiver accessions to separate from service for failure to meet behavioral or performance standards. *See* Connor, *supra* note 80, at 8. One factor that probably serves to counteract ex-offenders' greater likelihood of unsuitability attrition is their lack of feasible employment alternatives should they fail in military service – there is a positive correlation between offense history and unemployment in the civilian sector, see *infra* Part III.B.2, and also a positive correlation between unemployment at time of military enlistment and likelihood of completing one's first term of service, see BUDDIN, *supra* note 89, at 10-11.

123. *See Doing More Than Time*, *supra* note 3, at 10.

124. BOHN & SCHMITZ, *supra* note 105, at 6.

125. Wiskoff & Dunipace, *supra* note 94, at 20; *see also* JAMES R. HOSEK & MICHAEL G. MATTOCK, RAND, LEARNING ABOUT QUALITY: HOW THE QUALITY OF MILITARY PERSONNEL IS REVEALED OVER TIME 3 (2003) ("High school diploma graduates are far more likely than high school dropouts to complete their first term of service . . . ." (citation omitted)).

Armed Forces. Though military researchers have produced numerous studies on this topic,[126] their work focuses almost exclusively on ex-offender attrition and in-service performance. Civilian society has hardly picked up the slack. Criminal corrections experts and public policymakers seem wholly unaware of the "military option" that many ex-offenders actually choose and that so many more might do well to consider.[127]

The term "ex-offender" as used in this section does not refer to persons convicted or fined for petty offenses like littering or parking in a tow-away zone. Rather, it refers to individuals who are serving or have served prison sentences, including convicted felons. This focus is neither radical nor unwarranted. As noted earlier, thousands of felons have been knowingly admitted into the military, and serious misdemeanors constitute the single largest offense category for which moral waivers are actually granted each year. Nevertheless, in recommending that ex-offenders be considered more seriously – and candidly – for military recruitment, this Article contemplates only so-called "moral" qualifications. Offenders, especially more serious cases, are more likely than the general population to have intellectual, mental, and even physical limitations that would hinder their enlistment, regardless of criminal history.[128]

1. THE RECRUIT POOL

In 2001, the U.S. prison population exceeded two million inmates for the first time.[129] Since this "unprecedented event in the history . . . of liberal democracy,"[130] the number of Americans behind bars has remained relatively constant,[131] while the percentage imprisoned for violent crime continues to rise.[132] According to the DOJ, "[o]verall, the

126. *See supra* Part III.A.

127. For example, during recent congressional hearings on offender recidivism and rehabilitation, no one on either side of the aisle even mentioned the possibility, actual or imagined, of ex-offender recruitment into the Armed Forces. *See generally Confronting Recidivism: Prisoner Re-entry Programs and a Just Future for All Americans: Hearing Before the House Comm. on Gov't Reform*, 109th Cong. (2005) [hereinafter *Hearings*].

128. "The National Adult Literacy Survey established that 11 percent of inmates, compared with 3 percent of the general U.S. population, have a learning disability, and 3 percent are mentally retarded." Petersilia, *supra* note 2, at 66.

129. David Garland, *The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1 (David Garland ed., 2001).

130. *Id.*

131. *See Hearings*, *supra* note 127, at 6 (testimony of Rep. Cummings).

132. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2002, at 10 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf ("As a percentage of the total growth [in State inmates between 1995 and 2001], violent offenders accounted for 63% of the growth . . . .")

United States incarcerated 2,267,787 persons at [year-end] 2004," and "[t]he rate of incarceration in prison at [year-end] 2004 was 486 sentenced inmates per 100,000 U.S. residents."[133] The proportion of African-American men who are incarcerated is simply astounding: 3,218 for every 100,000.[134]

Of course, the prison door is rarely a one-way passage. Hundreds of thousands of people exit prison, as well as enter it, each year. Record incarceration rates have produced record release rates.[135] In 2003 alone, more than 600,000 inmates – approximately the population of Washington, D.C. – were returned to civilian society: about 1,600 people per day.[136] This represents more than a fourfold increase in annual prison releases since 1980.[137] Recognizing this drastic challenge, President Bush recently pleaded for compassion toward the hundreds of thousands of people annually "released from prison back into society."[138]

For many prisoners, the prison door is a revolving one.[139] Approximately forty percent of ex-convicts in the U.S. are reincarcerated.[140] Part of what makes ex-prisoner recidivism so distressing is the demonstrable failure of the "corrections" system to accomplish its nominal purpose, not to mention the immense waste of resources inherent in such failure. Thus, it is no surprise that, with the specific goal of reducing recidivism rates, "policymakers, correctional system administrators, and other concerned parties are looking for ways to more successfully reintegrate ex-offenders."[141]

The extent of incarceration and prison release is important here

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133. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2004, at 1 (2005), *available at* http://www.ojp.usdoj.gov/bjs/abstract/p04.htm.

134. This is compared to 1,220 Hispanic male inmates per 100,000 Hispanic males and 463 white male inmates per 100,000 white males. *Id.* at 8.

135. "Never before in U.S. history have so many individuals been released from prison." Petersilia, *supra* note 2, at 66.

136. *Id.* 630,000 was the figure Representative Cummings used before Congress in 2005. *See Hearings*, *supra* note 127, at 6 (testimony of Rep. Cummings).

137. In 1980, almost 150,000 inmates were released from prison. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, PRISONER RELEASES: TRENDS AND INFORMATION ON REINTEGRATION PROGRAMS 3 (2001) [hereinafter GAO PRISONER RELEASES].

138. *Hearings*, *supra* note 127, at 32 (testimony of Rep. Davis). For "most of those released from prison today," the extent of the help they need is exacerbated by

> serious social and medical problems. More than three-fourths of the inmates scheduled for release in the next year report a history of drug and/or alcohol abuse. One-fourth have histories of injection drug use and 16 percent report a mental condition. Yet less than one-third of exiting inmates received substance abuse or mental health treatment in prison.

Petersilia, *supra* note 2, at 66.

139. GAO PRISONER RELEASES, *supra* note 137, at 3 (discussing how "releasees are often subsequently reincarcerated").

140. *Id.* at 3.

141. *Id.* at 1-2.

because, first, these trends have a significant impact on the military recruitment pool. According to the DOJ, more than fifty million Americans – twenty-nine percent of the adult population – have an arrest record.[142] This number has doubled since a decade ago,[143] meaning that young people and especially young men, the most likely to commit crimes and the most eagerly sought military recruits, have increasingly problematic criminal histories.[144] More than thirteen million Americans are ex-felons – six percent of the adult population, eleven percent of the adult male population, and more than thirty percent of the adult African-American male population.[145]

Clearly, potential recruits with spotless records become harder to find each year, both proportionally and in absolute numbers. But criminal activity does not always entail a criminal record. If enlistees in the Armed Forces were as honest with recruiters as they are with researchers who ensure confidentiality, it is likely that the vast majority of recruits would require moral waivers. Criminologists have found that a large percentage of males will be arrested at least once for something more serious than a traffic infraction; and an even larger percentage, approximately ninety percent, commit at least one criminal offense (whether arrested or not) in their lifetime, most often in their youth.[146] The correlation between youth, male gender, and criminality is astounding.[147] Nearly seventy percent of persons arrested for serious crimes are under the age of twenty-five,[148] and men are anywhere from five to fifty times more likely than women to be arrested.[149] The effect of such trends on would-be recruits is as unsurprising as it is inevitable: increased difficulty of meeting the military's moral character standards.[150]

2. WHY ENLIST? – THE EX-OFFENDER'S SITUATION

A seasoned recruiter recently told the *New York Times* that "[t]he only people who want to join the Army now have issues. . . . They're

142. Petersilia, *supra* note 2, at 68.

143. *Id.*

144. *See infra* notes 146-50 and accompanying text.

145. Petersilia, *supra* note 2, at 68. By "ex-felon," Petersilia means persons who "had been convicted of a felony and served or are currently serving a felony probation, parole, prison, or jail sentence."

146. JAMES Q. WILSON & RICHARD HERRNSTEIN, CRIME AND HUMAN NATURE 146 (1985).

147. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 123-153 (1990).

148. DEP'T OF COMMERCE, ECONS. & STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 199 (1993), *available at* http://www2.census.gov/prod2/statcomp/documents/1993-01.pdf.

149. WILSON & HERRNSTEIN, *supra* note 146, at 104.

150. REBECCA M. KILBURN & JACOB A. KLERMAN, RAND, ENLISTMENT DECISIONS IN THE 1990S: EVIDENCE FROM INDIVIDUAL-LEVEL DATA 25 (1999).

troubled, with health, police or drug problems."[151] However hyperbolic his rhetoric,[152] the recruiter's statement refers to a very real dilemma. Not only has increased criminality among young men made acceptable recruits harder to find, individuals who have been arrested are "significantly" more likely to enlist than attend college.[153] This increased propensity exists *despite* the probable deterrent effects of the military's nominal disqualification of felons, its attempts to conduct criminal history investigations, and its extensive moral waiver procedures.[154]

As with any recruit pool, ex-offenders' increased probability of enlistment strongly relates to their overall employment situation. Ex-offenders must overcome tremendous obstacles to finding and maintaining a job. These obstacles sometimes arise from social or intellectual limitations that preceded, and are relatively unrelated to, their criminal conduct. Most inmates lack "marketable skills or sufficient literacy to become gainfully employed;"[155] and because they have little pre-prison experience as productive members of the workforce,[156] they do not know the mechanics of finding post-prison employment.[157] Thus, as explained in Robert Taggert's *The Prison of Unemployment*, a criminal conviction only exacerbates these individuals' earlier employment woes.[158]

If ex-offenders have comparatively less to offer employers by way of skills and capabilities, it is at least equally true that employers offer – and choose to offer – precious few opportunities to ex-offenders. Customarily, once "paroled or released, [the ex-convict] is excluded from a number of jobs and given little help in finding his way back into the world of work."[159] *The Ex-Inmate's Guide to Successful Employment*, itself written by a onetime prisoner, observes that "[a]lmost anyone who has spent time in prison has some story to tell about his or her quest for a job (and a fresh start) . . . and how his or her prison record" thwarted that quest.[160] And the more serious one's crime, the more difficult it is

151. Cave, *supra* note 77 (internal quotations omitted).

152. This recruiter's actual percentage of enlistments who were known to have "a problem that [either] needed concealing" or a moral waiver was one-third. *Id.*

153. KILBURN & KLERMAN, *supra* note 150, at xvi-xvii.

154. Similarly, Kilburn and Klerman found "that having been arrested or having a friend who has been arrested raises the likelihood of enlisting, which is surprising given that this variable was expected to proxy for having difficulty meeting the moral requirements for enlistment." *Id.* at 59.

155. Petersilia, *supra* note 2, at 66.

156. One-third of inmates were unemployed at the time of their most recent arrest. *Id.*

157. DEP'T OF LABOR, EMPLOYMENT INFORMATION HANDBOOK FOR EX-OFFENDERS 1 (2005).

158. ROBERT TAGGART III, THE PRISON OF UNEMPLOYMENT: MANPOWER PROGRAMS FOR OFFENDERS 2 (1972).

159. *Id.*

160. ERROL CRAIG SULL, THE EX-INMATE'S GUIDE TO SUCCESSFUL EMPLOYMENT, at vii (4th ed. 2003).

to find and maintain employment. In the recent words of D.C. Congressional Delegate Eleanor Holmes Norton, "a felony conviction is close to a death sentence in the job market."[161]

Increasingly, legislatures are the bodies imposing this job market "death sentence" by statutorily barring ex-felons from one occupation after another. Even as prisons reduce employment-related services to present and former inmates,[162] a generation's worth of punitive state and federal laws have narrowed the range of jobs open to ex-offenders.[163] At the federal level, in addition to an extensive array of outright restrictions imposed upon ex-offenders' employability,[164] certain kinds of work licenses are revoked or withheld from individuals convicted of various crimes.[165] Also, judges have significant latitude to impose occupational prohibitions as part of criminal sentencing.[166]

It has been argued that legal impediments to ex-offenders' employability support a regime of "invisible punishment" because their "effectiveness, impact, [and] implementation" are often hidden from the public eye and are difficult to measure.[167] This invisibility is reinforced by the fact that private individuals, not legislatures or courts, are primarily responsible for the job market "death sentence." Even when hiring policies do not explicitly exclude individuals convicted of a crime, the same result is often achieved more subtly.[168] About sixty-five percent of employers of unskilled workers in five major American cities would not "knowingly hire an ex-offender (regardless of the offense)," and almost forty percent actively investigate new hires' criminal records.[169]

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161. *Hearings*, *supra* note 127, at 18.

162. Petersilia, *supra* note 2, at 67.

163. *Id.*

164. *See* COLLATERAL CONSEQUENCES UPON CONVICTION, *supra* note 21, at 2-8.

165. *Id.* at 4-5.

166. For example,

> under 18 U.S.C. §§ 3563(b)(5), 3583(d), and the United States Sentencing Guidelines, the sentencing court may impose certain occupational restrictions as a condition of probation or supervised release. Restrictions are authorized when a "reasonably direct relationship'" exists between the defendant's occupation and the offense conduct, 18 U.S.C. § 3563(b)(5), U.S.S.G. § 5F1.5(a)(1); and the conditions are "reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted." U.S.S.G. § 5F1.5(a)(2). If such an occupational restriction is imposed, it must be imposed "for the minimum time and to the minimum extent necessary to protect the public." U.S.S.G. § 5F1.5(b).

COLLATERAL CONSEQUENCES UPON CONVICTION, *supra* note 21, at 4.

167. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS UNEMPLOYMENT 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

168. TAGGART, *supra* note 158, at 84.

169. Petersilia, *supra* note 2, at 68.

As one employment manual warns, individuals found guilty of felonies must "answer 'yes' to THAT question ('Were you ever convicted of a felony?')."[170] However, as we saw earlier in the military context, many applicants who technically should answer "yes" decide, for obvious reasons, to say "no." Prevarication of this sort is so widespread – and indeed, so understandable – that even the Department of Labor merely *suggests* that ex-offenders respond honestly when asked about their criminal histories.[171] It nearly goes without saying that ex-offenders are discouraged from ever volunteering such information.[172]

The drastically reduced range of occupational possibilities available to known ex-offenders has created a veritable criminal closet:[173] "Many ex-offenders have never honestly answered the question, '[h]ave you ever been convicted of a crime?'"[174] Eve Sedgwick's observation that the "double bind" of disclosure/non-disclosure is one of the hallmarks of the contemporary regime of the closet,[175] as the word is usually understood, is certainly true of the ex-offender's experience.[176] "As individuals with [criminal] records so frequently find out, you are either damned if you do and damned if you don't."[177] According to one criminologist, "[i]f parolees are truthful about their backgrounds, many employers will not hire them. If they are not truthful, they can be fired for lying if the

170. SULL, *supra* note 160, at iv.

171. "To tell or not to tell. It's up to you, but we recommend honesty." The authors continued, "[o]n the application put 'will discuss in interview' rather than a lengthy explanation of past convictions. In an interview, keep explanations short and stress what you learned in prison and what your skills and assets are. Be positive!" DEP'T OF LABOR, *supra* note 157, app. B. Interestingly, the Institute of Criminal Law and Procedure at Georgetown University Law Center used almost exactly the same language – "To lie or not to lie" – in a report on ex-offender employment published many years earlier. HERBERT S. MILLER & GEORGETOWN UNIV. LAW CTR. INST. OF CRIMINAL LAW AND PROCEDURE, THE CLOSED DOOR: THE EFFECT OF A CRIMINAL RECORD ON EMPLOYMENT WITH STATE AND LOCAL PUBLIC AGENCIES, at v (1972) (prepared for the Manpower Administration, U.S. Department of Labor, under research contract number K 81-09-70-02, authorized by Title I of the Manpower Development and Training Act.).

172. DEP'T OF LABOR, *supra* note 157, app. B (emphasis supplied).

173. Note the title of a very recent *Mother Jones* article detailing an ex-convict's employment search woes. Sara Catania, *Freedom = Silence*, MOTHER JONES, Sept.-Oct. 2005, at 16-17 *available at* http://www.motherjones.com/news/outfront/2005/09/freedom_silence.html?welcome=true.

174. DEP'T OF LABOR, *supra* note 157, app. B.

175. EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 54 (1990) (referring to "the double binds" that make "the stakes in matters of definitional control [so] extremely high").

176. As David J. Harding observed in *Jean Valjean's Dilemma*, ex-offenders must carefully "manage their deviant identities in the labor market. Institutional limitations imposed by both the labor market and the criminal justice system as well as subjects' interpretations of stigma play important roles in determining how they choose to present themselves to others." David J. Harding, *Jean Valjean's Dilemma: The Management of Ex-Convict Identity in the Search for Employment*, DEVIANT BEHAVIOR, Nov.-Dec. 2003, at 571.

177. MILLER ET AL., *supra* note 171, at v.

employer learns about their conviction."[178]

Given the formidable barriers to finding work, the military's evident willingness to grant moral waivers makes it an appealing option for many ex-offenders.[179] But the quantity of available work is not the only factor explaining the demonstrated propensity of ex-offenders to enlist; quality also matters. When "the only available jobs are often undemanding, unattractive, and unrewarding, offering the offender little inducement to turn [away] from criminal behavior,"[180] the opportunities that military service affords must appear especially attractive. Although "patriotic considerations" may be at play in some individuals' enlistment decisions, "self-interested considerations" tend to be primary for most of those who actually enter the Services.[181] These considerations – which include benefits such as technical training, an array of long-term career opportunities, and the inculcation of "endurance, self-reliance, and self-discipline"[182] – are bound to be particularly impressive to ex-offenders with a desire to restart their lives. Moreover, in such a "low-caste" population, certain symbolic rewards accompany the more material advantages of military service.[183] These include pride, social respect, and even "official government encouragement or approval."[184]

3. WHY RECRUIT? – BENEFITS TO SOCIETY

We have seen why enlistment is good for ex-offenders, and earlier

178. Petersilia, *supra* note 2, at 68; *see also* DEP'T OF LABOR, *supra* note 157, app. B ("Ex-offenders may be fired for falsifying information on their job application.").

179. "Potential recruits to the military face a choice among further education, the civilian workforce, working at home, and enlisting in the military. Potential recruits balance the advantages and disadvantages of each alternative to choose the most attractive life choice for themselves." MICHAEL P. MURRAY & LAURIE L. MCDONALD, RECENT RECRUITING TRENDS AND THEIR IMPLICATIONS FOR MODELS OF ENLISTMENT SUPPLY 2 (1999). Since further education and the civilian workforce are unlikely possibilities for most ex-offenders, there may be no genuine alternative (other than less desirable private sector employment) to military enlistment.

180. TAGGART, *supra* note 158, at 83.

181. Adrian M.S. Piper, *The Rationality of Military Service*, *in* CONSCRIPTS AND VOLUNTEERS: MILITARY REQUIREMENTS, SOCIAL JUSTICE, AND THE ALL-VOLUNTEER FORCE 126, 127 (Robert K. Fullinwider ed., 1983) ("Patriotic considerations are addressed less frequently to those who are to be convinced to enlist in the All-Volunteer Force itself. To those young men and women who are adjudged to be the most capable of making a contribution to this country's welfare through their military defense of it (rather than, say, through their technical or professional skills within the civilian sector, their roles as parents, or their anticipated roles as educated and productive citizens upon completion of their education), appeal is more often made to self-interested considerations. These considerations represent military life as the most attractive option available for pursuing personal aspirations.")

182. *Id.* at 126-27.

183. Stephen Cohen, *The Untouchable Soldier: Caste, Politics, and the Indian Army*, *in* RECRUITING, DRAFTING, AND ENLISTING: TWO SIDES OF THE RAISING OF MILITARY FORCES 167-68 (Peter Karsten ed., 1998).

184. *Id.*

we explored why ex-offender enlistment may be good for the military.[185] Now we will consider why such enlistment may be good for society. Ultimately, the same reasons that have been offered to encourage military recruitment of "disadvantaged Americans" may apply, perhaps even more strongly, to ex-offenders: "[M]ilitary service may complete the[ir] integration . . . as productive, self-respecting, and patriotic citizens. By ameliorating the deplorable social conditions of which most civilian institutions have apparently washed their hands, military service may have further positive consequences for society at large."[186]

The job market's widespread exclusion of individuals who have served their sentences is not only unfair;[187] by impeding ex-offenders' reintegration and rehabilitation, it is also tragically unwise. This isolation has a "profound" impact on these individuals' subsequent criminal trajectories.[188] Finding gainful employment "is critical to successful reintegration. Employment helps ex-offenders become productive, take care of their families, develop valuable life skills, and strengthen their self-esteem and social connectedness."[189] In the face of constant employment rejection, "too many ex-inmates give up, think they can't work within the system, and go back to . . . surviving the only way they think can work for them – illegally. The usual result? Back to prison for a longer time . . . or worse."[190]

Although it is hardly necessary to justify society's interest in reducing criminal recidivism, it should be noted that this necessity becomes only more pressing each year. As one congressman recently observed, "rehabilitating and reintegrating prisoners back into society continues to loom as one of the great needs of our day."[191] This Article's primary

185. *See supra* Parts III.A-.B.

186. Piper, *supra* note 181, at 137.

187. Travis eloquently suggested that this practice is *very* unfair:

> In this brave new world, punishment for the original offense is no longer enough; one's debt to society is never paid. Some commentators, seeing parallels with practices from another era when convicts were sent to faraway lands, refer to this form of punishment as "internal exile." Others liken this extreme labeling to "the mark of Cain," and the effects of these sanctions as relegating the offender to the status of "non-citizen, almost a pariah." The National Council on Crime and Delinquency summarized the effects this way: "Even when the sentence has been completely served, the fact that a man has been convicted of a felony pursues him like Nemesis."

Travis, *supra* note 167, at 19 (internal citations omitted).

188. Petersilia, *supra* note 2, at 67.

189. *Id.*

190. SULL, *supra* note 160, at vii.

191. *Hearings*, *supra* note 127, at 32 (statement of Rep. Davis).

concern is to suggest that ex-offender recruitment may be, and should be, considered by policymakers as one way of addressing this need.

The hypothesis that proactive military recruitment of ex-offenders could have a positive effect on recidivism is mainly based on two rationales: "(1) that the military environment removes the opportunity to commit crime; and/or (2) that military training teaches responsibility and discipline, thereby deterring future crime."[192] With regard to these rationales, "[o]ne potentially corrective influence is the drastic change in lifestyle required when entering the military."[193]

Although the relationship between criminality and military service is not extensively documented,[194] some existing studies confirm an inverse relationship between the two.[195] Some of these studies have quite an impressive vintage. A recent analysis of research conducted in the 1930s through the 1950s found that juvenile delinquents were "much more likely" to be dishonorably discharged than non-delinquents, but that entry into the military was a positive "turning point" for some in the former category.[196] A 1979 study found that recidivism was less prevalent among men paroled into the Army during the Second World War and the Korean War than for those who were paroled into civilian society,[197] and subsequent research involving Vietnam veterans found that among white ex-offenders, desistance occurred earlier in those who had "military experience" than among those who never enlisted.[198] More recently, a 1999 study found that drug use declined after military enlistment, even more than for individuals who started fulltime work or entered college.[199] Finally, an "exploratory" study conducted in 2004 indicated that "the military may produce desistence from crime, especially for the most serious offenders."[200]

Of course, desistence usually does not simply mean the absence of crime. In the case of ex-offenders recruited into the military, the major-

192. Leana Allen Bouffard & John H. Laub, *Jail or the Army: Does Military Service Facilitate Desistence from Crime?*, *in* AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 129, 130 (Shadd Maruna & Russ Immarigeon eds., 2004) ("The military . . . actively seeks to instil[l] structure and discipline with the initial basic training experience and with continued rigorous training throughout the military career. It is commonly thought that this disciplined environment will encourage a responsible lifestyle and discourage criminal behaviour.").

193. *Id.*

194. *Id.* at 146.

195. *Id.* at 133-34.

196. *Id.* at 132 (discussing the work of Sampson and Laub in 1993 and 1995).

197. *See* Bouffard & Laub, *supra* note 192, at 132 (discussing this 1979 study).

198. Bouffard & Laub, *supra* note 192, at 132-33 (discussing Rand's 1987 research).

199. Jerald G. Bachman et al., *Changing Patters of Drug Use Among U.S. Military Recruits Before and After Enlistment*, 89 AM. J. PUB. HEALTH 672 (1999).

200. Bouffard & Laub, *supra* note 192, at 147.

ity of whom successfully complete their terms of service, desistence comes along with positive contributions to society. In Robert Taggert's words,

> all too frequently, especially in the case of those who are arrested, found guilty, and sent to jail, their economic and social potential is squandered by them and by society. . . . From start to finish, the picture is one of wasted human resources – of skills and abilities which are underdeveloped and underutilized.[201]

Concerted recruitment of ex-offenders would acknowledge the very real potential these individuals possess, and it might often yield some very real contributions.[202]

IV. CONCLUSION

Earlier in this Article, we saw how an extensive moral waiver system undermines the Armed Forces' ostensibly stringent policy on ex-offender enlistment and permits thousands of known criminals to enlist each year. Relatedly, we explored a character screening process that fails to detect the criminal backgrounds of approximately half of those who should receive a waiver. Then, looking at ex-offenders' in-service performance, we learned that such recruits are somewhat (perhaps only slightly) less likely than non-offenders to be satisfactory servicemembers, while most ex-offenders admitted into the Armed Forces perform well enough to at least complete their contractual term of service. Finally, we examined some of the social policy issues at stake in this question, including the increasing proportion of ex-offenders in the military recruitment pool, the relative attractiveness of a military career to ex-offenders – many of whom face significant difficulties finding employment in any field – and the potential benefits to society of military service among ex-offenders.

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201. TAGGART, *supra* note 158, at 1-2.

202. The possibility of using military enlistment to advance such policy ends, to the mutual benefit of the Armed Forces and civilian society, is one that has been recognized and implemented before in the United States. For example,

> Secretary of Defense Robert S. McNamara initiated "Project 100,000" in response to President Johnson's War on Poverty under which men who would have been disqualified because of failure to meet mental standards or easily correctible physical defects were allowed to enlist. Generally referred to as the "New Standards" men, about 320,000 such recruits entered the military between 1967 and 1971, when the program was abandoned because of decreased manpower requirements. The DOD report describes the rationale behind the program: "We were convinced that a very high proportion of these men would qualify as fully satisfactory servicemen exposed to the modern instructional techniques used in the Armed Forces. As a by-product, their service would prepare them for more productive lives when they returned to civilian life."

KIRBY & THIE, *supra* note 23, at 67 n.6 (internal citation omitted).

This Article has aimed to elucidate rather than weigh these various considerations. Even so, it is hardly possible to reiterate each of the major points raised in the preceding pages without noticing that a current, *de facto* ex-offender recruitment policy exists within the U.S. Armed Forces. But because this practice, accomplished through a system of winks and nods, is characterized as an exception rather than the rule, almost no resources have been devoted to the development of strategies that would maximize the various interests at play – those of the military, ex-offenders, *and* civilian society.

Aside from admittedly serious ethical concerns – such as forcefully maintaining the line between recruitment and conscription – it is easy to see why ex-offenders and civilian society would probably benefit from a more forthright implementation of this recruitment practice.[203] It is important to emphasize that the military might also benefit – potentially in ways that are directly responsive to the attrition rates and performance defects lamented in the existing literature on ex-offender recruitment. A full, candid acknowledgement that such individuals serve in the military's ranks would allow for the development of programs, both pre- and post-enlistment, designed specifically with these recruits in mind. Ultimately, if the Armed Forces were more forthright and proactive in balancing recruits' strengths against their felonies, there is reason to think we might all be stronger.

203. *See supra* Part III.

TABLE 1. CRITERIA FOR REQUIRING MORAL WAIVERS BY OFFENSE AND SERVICE[204]

	Number of Offenses Requiring Moral Waiver			
Offense Level	**Army**	**Navy**	**Marines**	**Air Force**
Felony	1; no waiver allowed for more than 1.	1 or more.	1; no waiver allowed for more than 1.	1 or more.
Serious Misdemeanor	2; no waiver allowed for 5 or more.	1 or 2; no waiver allowed for 3 or more.	1 to 5; no waiver allowed for 6 or more.	1 or more.
Minor Misdemeanor	Category not used.	3 to 5; no waiver allowed for 6 or more.	Category not used.	1 or more.
Minor Non-Traffic	3 or more; 3 convictions for a combination of misdemeanors and minor non-traffic offenses.	3 to 5; no waiver allowed for 6 or more.	2 to 9; no waiver allowed for 10 or more.	Depending on seriousness of offense: 1 or more; 2 in the last three years; or 3 or more in a lifetime.
Serious Traffic	Category not used.	Category not used.	2 or more; no waiver for 6 or more.	Category not used.
Minor Traffic	6 or more where fine exceeded $100 per offense.	Within three years prior to enlistment, 6 or more in any twelve-month period or 10 or more in total.	5 or more.	Depending on seriousness of offense: 2 in last three years, or 3 or more in a lifetime; 6 or more minor traffic or five minor traffic and one minor non-traffic offenses in any one-year period within the last three years.

204. GAO MILITARY RECRUITING, *supra* note 14, at 4.

TABLE 2. 1990-1997 WAIVER GRANT FIGURES

Fiscal Year	1990	1991	1992	1993	1994	1995	1996	1997
Army Moral Waivers	5,989	5,648	5,186	4,301	3,304	3,203	2,260	2,394
Percentage of Enlistments	6.7	7.2	6.7	5.6	4.9	5.1	3.1	2.9
Navy Moral Waivers	11,890	9,016	7,244	8,028	5,759	6,248	7,323	6,554
Percentage of Enlistments	18.6	18.2	16.7	16.2	16.2	17.3	18.8	14.7
Marine Corps Moral Waivers	20,451	17,610	15,791	10,162	6,997	5,205	4,076	2,992
Percentage of Enlistments	61.2	59.2	49.7	29.3	22.0	16.2	12.4	11.7
Air Force Moral Waivers	712	850	1,672	2,269	1,883	2,093	1,945	1,868
Percentage of Enlistments	2.0	2.9	4.8	7.2	6.2	6.7	6.3	6.2
DOD Waivers	39,042	33,124	28,893	24,760	17,934	16,749	15,604	14,808
DOD Total Enlistments	222,567	187,156	187,146	193,029	164,921	161,707	175,466	190,464
Percentage DOD Enlistments	17.5	17.7	16.0	12.8	10.9	10.4	8.9	7.8

TABLE 3. 2003-2006 WAIVER GRANT FIGURES

Fiscal Year	2003	2004	2005	2006
Army Moral Waivers	4,918	4,529	5,506	8,129
Percentage of Enlistments	7.1	6.3	8.5	11.7
Navy Moral Waivers	4,207	3,846	3,467	3,502
Percentage of Enlistments	10.4	9.8	9.2	9.7
Marine Corps Moral Waivers	19,195	18,669	20,426	20,750
Percentage of Enlistments	49.6	50.7	52.5	54.3
Air Force Moral Waivers	2,632	2,530	1,123	2,095
Percentage of Enlistments	7.3	7.5	5.6	6.8
DOD Total Moral Waivers	30,952	29,574	30,522	34,476
DOD Total Enlistments	184,847	182,051	160,685	174,509
Percentage DOD Enlistments	16.7	16.2	19.0	19.6

TABLE 4. 2003-2006 WAIVER GRANT FIGURES BY OFFENSE CATEGORY

Fiscal Year	2003	2004	2005	2006
Felony	824	638	1,163	1,605
Serious Non-Traffic	10,324	9,235	10,523	13,895
Minor Non-Traffic	1,824	2,533	1,840	2,446
Serious Traffic	1,699	1,413	929	466
Minor Traffic	1,564	1,587	1,369	1,086
Drug	14,717	14,168	14,698	14,978