A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts

By Leroy D. Clark*

Our nation faces a growing problem that cries out for careful, rational reforms. As of June 2002, the prison and jail population exceeded two million inmates for the first time.¹ State prisons operated between 1% and 16% above capacity and federal prisons operated 31% above capacity.² The inmate population grew an average of 3.8% each year from 1995 to 2002.³

This inmate population naturally turns over—in 2001 over 600,000 prisoners were released on probation or parole, or because they completed their sentences.⁴ Those released persons face the daunting task of integrating themselves back into the very different mainstream society and most importantly into the work world. The task of integrating the ex-offender into employment is a valuable task for society to undertake because unemployment is strongly correlated with recidivism. Unfortunately, there are many laws and ordinances that prohibit ex-offenders from certain categories of employment, thus impeding that facet of the rehabilitation process.

This article explores the range and scope of the legal impediments to ex-offenders' employment, but it also has other goals. A question is raised as to what has prompted the imposition of the civil

* Professor of Law, Catholic University of America. I wish to acknowledge the excellent research provided by Ms. Yvette Brown of the Law Library at Catholic University Law School.

1. The precise figures were 1,344,748 in state and federal prisons and 665,475 in local jails for a total of 2,019,234. A jail is a local correctional facility that holds persons prior to trial or for service of jail time for misdemeanor convictions with a sentence of one year or less. Paige M. Harrison & Jennifer C. Karberg, Bureau of Justice Statistics, U.S. Dep't of Justice, Prison and Jail Inmates at Midyear 2002 1 (2003).
2. Id.
3. Id. at 2.
4. See id. at 6. The precise figure was 630,207.
disabilities imposed on ex-offenders regarding employment, and why they are so widespread and unchanging despite a wealth of scholarly objection to their maintenance. A very important question, not raised by other scholars on the topic, will be raised here—namely, should traditional civil rights organizations, concerned with improving the conditions for black Americans, begin to treat this problem as one that is in urgent need of law reform? If so, what resistances will such organizations meet, and what strategies are appropriate responses?

I. The Nature of Impediments to Employment of Ex-offenders

A. Licensing Laws

Under licensing laws, an individual is granted a privilege by the state (and not a “right”) to engage in particular occupations. Licensing laws come in two forms: revenue raising and regulatory. Generally, revenue raising license laws are merely tax measures. The applicant secures the license by paying a fee, and the state does not inquire into the applicant’s background or competence to perform particular tasks.

Regulatory license laws, however, are an exercise of the state’s police powers designed to protect the public’s health, safety, and welfare. The courts generally sustain the right of the state to bar access to the licensed occupations, and only under rare circumstances do the courts find that coverage of a particular job is unreasonable. Additionally, functioning without a license may itself be a crime. The United States Supreme Court held that it is not a violation of due

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5. See, e.g., In re Morris, 397 P.2d 475, 476 (N.M. 1964) (explaining that a license grants no vested right, but is a conditional privilege, which is revocable for cause).

6. See Ellestad v. Swayze, 130 P.2d 349, 353 (Wash. 1942) (holding that the state may exercise its licensing powers to protect the public welfare).

7. See, e.g., State v. Balance, 51 S.E.2d 731, 736 (N.C. 1949) (holding that licensing of photographers was unreasonable in that it had no relation to public health, morals, or safety); Dasch v. Jackson, 183 A. 534, 542 (Md. 1936) (holding that regulation of paper hangers was unreasonable). One scholar, however, argues that most trade groups can convince the courts that there is some “public interest” in controlling access to the occupation, despite the fact that such groups may be more interested in protecting their income by restraining the number of competitors. See Walter Gellhorn, The Abuse of Occupational Licensing, 44 U. CHI. L. REV. 6, 10–13 (1976).

8. See, e.g., CAL. BUS. & PROF. CODE § 23301 (West 2003) (establishing misdemeanor and felony charges for selling alcoholic beverages without a license).
process for a state to establish disqualifications based on criminal conviction in order to exclude persons from certain employment.9

The major way in which the state denies ex-convicts employment is under the regulatory provisions that govern the issuance of a license to practice a profession or engage in a particular occupation. The laws of every state,10 some federal statutes,11 and innumerable municipal ordinances12 expressly include a felony conviction as a disqualifying factor with regard to the majority of regulated occupations. A study done in the 1970s showed that there were 1,948 separate statutes that utilized an arrest or conviction as a disqualifying factor when applying for a license.13 Occasionally, the disqualification will attach even to a misdemeanor conviction.14 Under some statutes a conviction is only one negative factor that employers should evaluate in addition to mitigating factors, like the length of time since conviction, or evidence of subsequent conduct that may show rehabilitation. Under other statutes a conviction is an absolute and permanent bar of access to that occupation.15

The state may also deny an ex-convict a license under statutes that do not expressly make for disqualification through a conviction. Regulatory licensing provisions are aimed at screening for two qualities: "competence" or "character." An ex-felon may qualify under the "competence" standard by receiving appropriate training and education. However, a number of the licensing provisions require an assessment of whether the applicant is a person "of good moral


15. See S.D. Codified Laws § 35-2-6.2 (Michie 1999). The provision governs obtaining a liquor license: "Any licensee under this title, with the exception of a solicitor, must be a person of good moral character, never convicted of a felony, and if a corporation, the managing officers thereof must have like qualifications." Id.
character." Naturally, a number of licensing agencies utilize a felony conviction as conclusive proof of a lack of "good moral character." The terms are often not defined in the statute, thus giving the licensing agency broad and almost untrammeled discretion. While the United States Supreme Court, in dictum, noted the inherent ambiguity in the terms, generally courts have not sustained challenges that such statutes are unconstitutionally vague.

B. Exclusion from Public Employment

Ex-offenders are excluded by statute not only from licensed occupations, but also from many forms of public employment with federal and state agencies. One study shows that federal and state laws bar or restrict employment of ex-offenders in approximately 350 occupations, which employ ten million persons. At least six states have a permanent bar on ex-offenders from public employment.

C. Private Employment and Ex-offenders

Ex-offenders are blocked from employment not only by formal statutes and ordinances, but by private employers. One study done in five major cities showed that two-thirds of employers would not knowingly hire ex-offenders and at least one-third checked for criminal histories to weed ex-offenders out. A strong incentive for private employers to avoid hiring persons with a criminal record is the fast-growing tort of negligent hiring. Courts have held employers liable to plaintiffs who alleged that an employee of the employer injured them.


17. See Konigsberg v. State Bar of Cal., 353 U.S. 252, 263 (1957) (holding that good moral character "can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial . . .").

18. See Zemour, Inc. v. State Div. of Beverage, 347 So. 2d 1102, 1103 (Fla. Dist. Ct. App. 1977) ("We doubt that the legislature could in its infinite wisdom detail each salient standard for good moral character. What constitutes good moral character is a matter to be developed by the facts, evaluated by the agency, with a judicial review of same ever available.").


21. Travis et al., supra note 20, at 31.
The tort of negligent hiring requires the plaintiff to prove three things: (1) the employer foresaw the risk; (2) the employee inflicted harm; and (3) the employer's negligent hiring proximately caused the plaintiff's harm. The key is proof that the employer knew or should have known that his employee might render harm to the plaintiff; the fact that the employee has a criminal conviction can play a part in establishing that proof. Indeed, some courts have held that the employer has a duty to apprise himself of any criminal conviction that his employees have, and that the employer is liable if the plaintiff's injury is foreseeable given that conviction. In Tallahassee Furniture Co. v. Harrison, the employer did not apprise himself of an employee's prior criminal record and the District Court of Appeal of Florida held him liable to the injured plaintiff for compensatory damages of $1,900,000 and punitive damages of $600,000. These are amounts that could cause the bankruptcy of a small employer.

II. Notice to Ex-offenders of Employment Disabilities

An important question is when and how ex-offenders are apprised of the impediments to employment generated by their conviction. Approximately 90% of criminal charges are disposed of by a plea of guilty. The United States Supreme Court ruled that as part of validating the guilty plea as voluntary and intelligent, the trial judge's duty extends to informing the defendant of only the direct consequences of the plea and not any collateral consequences, like civil disabilities that may attach to a conviction. Defense counsel may have responsibilities to the defendant, like advising a defendant whether to plead guilty, that the trial judge does not have. However, the current law in most jurisdictions is that the defense counsel also has no duty to inform the defendant of collateral civil consequences that may flow from his guilty plea.

22. See generally Steven C. Bednar, Employment Law Dilemmas: What To Do When the Law Forbids Compliance, 12 BYU J. PUB L. 175, 178-79 (1997) (suggesting that employers inquire of all applicants about any criminal convictions, while "carefully consider[ing] the 'job-relatedness' of any conviction before disqualifying the applicant").
24. Id. at 748.
27. Chin & Holmes, supra note 25, at 706.
It has been argued that this is an unanalyzed position that does not accord with the most recent decisions of the United States Supreme Court on ineffective assistance of counsel, particularly where the collateral consequence for the defendant may be that he is barred from practicing a profession that he has spent many years developing. However, for the bulk of the defendant population, with no special expenditures in education and training, the length of the prison sentence offered in a negotiated plea is likely the guiding factor in the basic decision of whether or not to plead guilty. But, in any event, one of the consequences of defense counsel having no obligation to inform the defendant is that most defendants will only discover the impediment once they finish their sentence and need work. Consequently, they may unknowingly spend time and resources in and out of prison to prepare for certain kinds of employment that are blocked by virtue of their conviction.

III. The Raison d'Etat of Mass Imprisonment and Widespread Civil Disabilities

One of the important questions to ask is how did we, as a society, arrive at a point of relying on mass imprisonment and the concomitant of barring ex-offenders from employment? In his book, Race to Incarcerate: The Sentencing Project, Marc Mauer, of the Sentencing Project, lays out the history of the post 1970s period of increased reliance on punishment of persons convicted of crime, as opposed to resorting to alternatives focused on their rehabilitation. Mr. Mauer's explanation is as follows: the prison population rose 500% between 1972 and 1999, whereas the national population rose only 28%. Some of the increase in imprisonment flowed from an increase in crime: crime rose in the 1970s, declined from 1980 to 1984, rose again from 1984 to 1991, and declined from 1991 to 1995. Some of the increase in

29. See Chin & Holmes, supra note 25, who argue that the choice may not be as limited as to whether or not the defendant pleads guilty. The defense counsel may negotiate with the prosecutor for a plea to a different offense which does not have professional disqualification as a necessary outcome. Id.
30. Even if collateral civil consequences were taken into account in determining ineffective assistance of counsel, Hill requires that the defendant allege that he would not have entered a guilty plea if he were properly informed. If the defendant was primarily seeking a lighter sentence through the negotiated plea, he would not be able to satisfy the Hill standard. Hill, 474 U.S. 52.
32. See id. at 82.
crime resulted from the baby-boomer group reaching the ages of fifteen to twenty-four, an age group that has a higher rate of crime than older age groups. Additionally, some of the increase was due to increased urbanization, which is associated with increased crime. However, the increased incarceration is not a strict response to the general increase in crime because the inmate population increased even during the two periods in which crime decreased.

Mark Mauer reports the following: prior to the 1970s, there was widespread reliance on minimum and maximum sentences, with judicial discretion to set the actual sentence. Liberal and conservative groups criticized this posture of the law. The liberals complained that such judicial discretion could produce arbitrary differences in sentences—thus they argued for set minimum sentences to prevent that kind of outcome. The conservatives also pushed for set sentences but argued for the longer, maximum sentences. Since neither group supported the continuance of judicial discretion in sentencing, one of their perspectives was likely to prevail. It turns out that, over time, the conservative viewpoint won.

Mr. Mauer raises the issue of politics: naturally the public was concerned about the increase in crime in the post 1970s era, and this concern was intensified by the media, which began to report more actively on a daily basis ugly crimes of rape, murder, and robbery. Politicians began to hype themselves as protectors of the public who were "tough-on-crime." Translation: more defendants should get longer, mandatory sentences and release on parole should be abolished. This approach was a key feature of Republican Presidents Richard Nixon and Ronald Reagan. However, even Bill Clinton, in his "centrist" Democratic politics, actively sought to avoid being labeled as "soft-on-crime." Clinton supported the death penalty and "three-strikes-you're-out" legislation, which gave a life sentence to any indi-

33. See id. at 51.
34. See id.
35. See id. at 45.
36. See id. at 47.
37. See id. at 46–48.
38. See id. at 47–49.
39. See id. at 49.
40. Mauer notes that this concentration on crime reporting was, in part, profit-driven. It was much less costly than other kinds of programming and news stories. See id. at 171–77. The impact of this media approach can be seen in the instances in which a local crime became national news—e.g., the rape of the female jogger in Central Park in New York City.
41. See id. at 59–68.
individual with a third felony conviction. Most recently, the United States Supreme Court, generally conservative on crime issues, held that a life sentence under “three strikes” legislation does not violate the federal constitution, even if the last conviction was a non-violent felony.

Given the two political parties’ common front on a more punitive approach to those convicted, the outcome is not surprising: in 1995 154,361 more persons received a prison sentence than in 1985. This was an 84% increase. This phenomenon was more intense for drug offenses: there was a 447% increase in the risk of receiving a prison sentence between 1980 and 1992—a by-product of imposing high, mandatory sentencing in this area. Not only has there been an increase in the numbers of persons incarcerated, but also the United States exceeds other countries in the length of prison sentences. In the United States burglars serve an average of 16.2 months in prison, compared to 6.8 months in England. Convicted thieves serve three to six times as long as persons convicted of that offense in Canada.

In the 1980s, many states restricted the employment opportunities of released offenders even further, to reinforce the “war” on crime.

IV. The Injustice of Blocking Employment of Ex-convicts

Articles addressing the problem of blocking ex-offenders from employment quite appropriately address the injustice and dysfunctional consequences of making idle a group with, perhaps, some potential towards criminal activity. While some early studies found

42. See id. at 68–78.
43. See Ewing v. California, 538 U.S. 11, 30 (2003); Lockyer v. Andrade, 538 U.S. 63, 75–76 (2003). The court held that the cruel and unusual punishment provision of the federal constitution was not violated. Ewing, 538 U.S. at 19. The defendants 25 years to life sentences were triggered by felony thefts of $400 (Ewing) and approximately $150 (Andrade). Ewing, 538 U.S. at 19; Andrade, 538 U.S. at 63.
44. See Mauer, supra note 31, at 32.
45. Id.
46. Id. at 37.
rehabilitation of criminals impossible, later studies show that being employed, particularly in jobs that pay greater than the minimum wage, is associated with lower rates of re-offending. It is also clear that a conviction substantially lowers the chances of securing employment: one study done in California in the early 1990s showed that only 21% of the parolee population had full-time employment.

A. Why a Task for Civil Rights Organizations?

What few scholars have addressed, however, is why the almost universal legal scholarly argument for removing impediments to ex-offender employment has had so little impact. There has been some diminution in the state laws that deprive ex-offenders of the right to vote, but no significant decrease in laws that bar them from employment. Indeed, the number of employment and licensing requirements, which make a criminal conviction pertinent, have increased substantially in recent years.

A part of the problem must be that there are few groups of persons in the country who are more feared and despised by the general public than ex-convicts. Perhaps illegal immigrants, as a group, share some of the political impotence of ex-convicts in that they, too, are not permitted to vote and do not have visible organizations that they join to work on their behalf. Nor do they, like ex-convicts, have financial resources they can spend to begin to develop a more favorable public opinion with regard to their problems. However, illegal immigrants are not uniformly despised like ex-convicts—indeed they are often sought after by employers for low-paying, unskilled jobs that many American citizens do not actively seek. Nor is it possible to label

50. TRAVI S ET AL., supra note 20, at 31.
51. Id. at 32.
such public attitudes of hostility to ex-convicts as arbitrary or crudely discriminatory—for, after all, the ex-convicts have assaulted or invaded the property of many members of that public.

It is precisely this dilemma of political impotence that calls for help from those outside the class of ex-convicts. They are desperately in need of the more accepted voice of those citizens who have not been convicted of a crime. This is a task for civil rights organizations for a number of reasons.55

By the mid-1990s approximately half of the inmates nation-wide were African-American, despite the fact that blacks were only 13 percent of the total population.56 Additionally, the overwhelming bulk of inmates were male as opposed to female.57 However, black females are five times more likely than white females to be incarcerated.58 The incarceration of black females has a more devastating impact on the black family because the black female is often the parent of last resort. The blocking of ex-convicts from employment is thus, very much, a “black” problem.

One might expect that ex-convicts' relatives, who themselves do not have criminal records, might be a group advocating for reform, particularly since some family members may benefit from support from ex-convicts re-employment. However, some relatives will shun contact with ex-convicts, and the imprisonment may have estranged the ex-convict from a spouse (and children), such that the family unit may have been forced to learn how to survive without his help. Moreover, even if the ex-convict maintains relationship with family members, they are more likely to be (like him) poor or near poor. The poor, even though eligible to register and vote, do so in lower proportions than middle or upper class persons—thus diminishing their impact

55. This article is limited to civil rights organizations that primarily concentrate on African-American problems. Civil disabilities that block employment also have a disproportionate impact on Hispanics, and a conviction can have the impact of deportation for immigrants. However, this writer is not as acquainted with all of the additional problems that other minorities must face, so the comment is limited. There is, however, most assuredly a basis for coalition amongst minority organizations to seek reform.

56. MAUER, supra note 31, at 124.

57. In relation to their number in the population, men are 15 times more likely than women to be incarcerated. On June 30, 2002, 60 females per 100,000 were serving a sentence of more than one year compared to a male ratio of 902 per 100,000. HARRISON & KARBERG, supra note 1, at 5.

58. The rate was 349 per 100,000 for black females and 68 per 100,000 for white females in 2002. Id. at 11.
on the politics of reform.\textsuperscript{59} The poor also do not now have visible national organizations—like the National Welfare Rights Organization—which began in the 1960s but is no longer functioning.\textsuperscript{60}

Civil rights organizations are the prime candidates to take on the difficult task of changing the laws blocking ex-convicts from employment. Why? It is because civil rights organizations successfully invalidated a host of laws that formally segregated the black population.\textsuperscript{61} The organizations also successfully changed the attitudes of millions of white Americans towards racial acceptance, despite the fact that racially discriminatory attitudes existed for over 200 years of slavery and during the legally enforced apartheid that followed slavery. The result was a host of laws that forbade racial discrimination in employment, housing, voting, and public accommodations.\textsuperscript{62}

These accomplishments were not easy—indeed the push for racial reform was often met with murderous violence and politicians who actively resisted change under the "state’s rights" banner.\textsuperscript{63} However, with mobilization of the black masses, eloquent and persuasive appeals to the white public, and non-violent demonstrations, the advances were secured.

Some of that same energy and creativity should now be applied to the problems of ex-convicts. This is particularly appropriate since civil rights organizations today face an identity crisis. The very success of structuring an attack on formal and open racial discrimination raises the question: what should such organizations concentrate on now?

At one time in our slavery history (and occasionally in a more sophisticated way, in recent history), whites viewed blacks as geneti-

\footnotesize{\textsuperscript{59} Mary H. Cooper, \textit{Low Voter Turnout: Is America’s Democracy In Trouble?}, 10 CQ Researcher 833, 839 (2000).}

\footnotesize{\textsuperscript{60} The organization was created by George Wiley in 1966, and at its peak had a membership of 22,000 families nationwide. It ceased functioning in 1975. See Mark Toney, \textit{Revisiting the National Welfare Rights Organization}, \textit{Color Lines: Race Culture Action}, Fall 2000, at 27.}


\footnotesize{\textsuperscript{63} In 1963, the then Governor George Wallace tried to block the enrollment of two black students in the University of Alabama under a “state’s right” claim. See \textit{Jack Greenberg, Crusaders in the Courts} 338, 338–40 (1994).}
cally inferior.\textsuperscript{64} Such notions of blacks' biologically derived "laziness" were sustained in the face of black slaves working six and seven days a week. These notions, however, begin to lose respectability in the face of research denying the claim that there is any such thing as pure "race" groups and rebutting the charges of heredity (as opposed to environment) explaining differences between groups.\textsuperscript{65} Civil rights groups successfully countered such notions in the white community through appeals to access to basic citizenship rights.

Today, however, there is a lingering public view that blacks are, as a group, highly prone towards criminal activity. One may be able to label this view as incorrect or as a broad "stereotype" to the extent that it is taken to describe every single black person in all situations. However, it is a view that many whites will continue to sustain because if one wants to lump all blacks together and treat them as a separate "group," there is some empirical basis for the claim.\textsuperscript{66} Our newspapers and magazines (and more indirectly many of our movie and TV shows) contain such portrayals—and thus, the white public's view is sustained and they will act on it. It may explain, in part, some of the white flight to the suburbs from inner cities as formal racial segregation broke down and thus augured the possibility of more racial interaction. It may contribute to much of the racial profiling by white police officers.

It is not, however, a phenomenon that only blacks have experienced. At one time in our history, Jewish and Italian immigrants were tainted with the brush of being "criminals" because they had very high crime rates in the areas in which they lived upon their entry into the country.\textsuperscript{67} Those crime rates diminished (as did the concomitant negative reputations) as the groups became more middle class. But that history may explain some of the uneasiness that some Italians have today with the HBO program "The Sopranos," which depicts Italian Mafia figures. Therefore, civil rights organizations today have a stake

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\item \textsuperscript{64} For a connotation of the notion in more recent history, see Richard J. Herrnstein \& Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life (1994).
\item \textsuperscript{65} See Bernie Devlin et al., Intelligence, Genes, and Success: Scientists Respond to the Bell Curve (1997); Stephen Fraser, The Bell Curve Wars: Race, Intelligence and the Future of America (1995); Ashley Montagu, Race and IQ (2003).
\item \textsuperscript{66} See Randall Kennedy, Race, Crime, and the Law 13 (1997) ("a notably large proportion of the crimes that people fear most—aggravated assault, robbery, rape, murder—are committed by persons who happen to be black.").
\end{itemize}
in terms of blacks' reputation, as a group, to fight for programs and changes in the law that would contribute to the diminishment of crime in the black community.

Moreover, changing the group's reputation may have some practical, positive effects. Blacks have generally had an unemployment rate that is double that of their white counterparts.\(^6\) There are a number of factors, not involving race discrimination, that contribute to that gap (lower levels of education, for example), but it is possible that some private employers avoid hiring blacks (even those who do not have a criminal conviction) by relying on the group's statistical propensity toward criminal activity. Reducing the extent to which ex-convicts contribute to that statistical propensity may, therefore, have a protective impact on blacks as a whole in their seeking of employment.

B. Programs for Change

The civil rights organizations should focus on legislative changes or litigation to improve employment prospects of ex-convicts.

1. Repeal of Licensing Statutes

Civil rights organizations should begin to seek repeal of the statutes that bar employment of persons solely on the basis of a conviction, when the nature of the conviction has no relationship to the capacity to perform the tasks of that occupation. Most of such legislation is in the states, and civil rights organizations may be aided in their reform efforts by adverse conditions that exist in many states at this time. Many states are experiencing serious budgetary problems—their expenditures far exceed the level of income through taxes. States in every region in the country will institute, for the academic year 2003–2004, the steepest increases in public college and university tuitions in the last ten years.\(^6\)\(^9\) Such increases might, speculatively, be affected by accelerating costs of the increased inmate population.

Moreover, since sentences are longer, the inmate population will be increasingly older, bringing increased costs for health and hospice care. States could reduce some of this cost by releasing more inmates, but the state would then have a stake in removing barriers to their employment or the ex-convicts would simply be re-incarcerated for

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crimes committed just for support purposes. One study shows that within three years, 46% of released felons were re-convicted. Civil rights organizations could also enlist the support of the Congressional Black Caucus (a group of black politicians holding seats in the House of Representatives), as there is also a need to repeal federal legislation that blocks ex-convicts from employment.

2. The Impact of Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race. The statute does not expressly restrict the ability of employers to consider criminal conviction records within employment related decisions. However, a theory under the statute postulates that it is unlawful for an employer to use criteria for exclusion from employment when it has a disparate impact on minorities protected under the statute and bears no relationship to performance of the job. Consequently, it has been held by some courts that reliance on a criminal record to refuse employment violates Title VII where the criteria have an adverse impact on blacks and are not shown to be job-related. Civil rights litigating outfits should use this statute more actively to protect black job applicants.

It may be difficult to rely on Title VII for litigation in the private sector because many private employers may rely on a criminal conviction to refuse employment, but the applicant may never learn that that was the basis upon which he or she was refused employment. Civil rights litigating units, however, should begin to attack the state statutes that expressly deny persons with criminal convictions from holding certain state jobs. The argument could be made that where the exclusion has an adverse impact on blacks and is not job-related, then the state statute is pre-empted because of the collision with the federal statute.

72. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The Court invalidated the company's practice of barring persons from hire who did not have a high school degree because this requirement eliminated a disproportionate number of black applicants without a job-related justification. A number of whites who did not have a high school degree occupied the jobs to which the new rule had been applied.
One means by which civil rights organizations could increase public support is by making clear that while there is a concern for the disproportionate impact of exclusion from work on black ex-convicts, the goal is to protect all ex-convicts, including whites, from arbitrary exclusion from employment. This could be realized by a civil rights litigating outfit bringing a suit on behalf of a white ex-convict who is excluded from employment because of his conviction, alleging a violation of Title VII. Such a suit would likely be met with the challenge that the white plaintiff could not satisfy the Griggs criteria that utilizing a conviction as a disqualification had an adverse impact on whites as a group.

A Griggs challenge could be met with the following arguments. If the particular conviction was one in which it could be demonstrated that utilizing it would have an adverse impact on blacks, and was not job-related, then the employer would be asserting that he is entitled to use a criteria to exclude whites that could not be relied upon to exclude blacks. However, the United States Supreme Court has ruled that Title VII bars discrimination on the grounds of "race" and therefore whites, in addition to blacks, are protected against racial discrimination.

In McDonald v. Santa Fe Trail Transportation Co.,\(^74\) one black and two white employees were charged with theft from their employer.\(^75\) The white employees were fired and the black man remained employed.\(^76\) The Court held that the white employees had a prima facie case of discriminatory treatment under Title VII because they were fired, and the black employee was not, despite the fact that all three had allegedly committed the same offense.\(^77\)

It could be countered that McDonald is not on point, for in that case there was conclusive proof that a black had benefited from preferential treatment and in the case of the white suing to prevent use of his conviction as a disqualifier, that he could not show such specific previous preferential treatment for blacks. However, McDonald could be read broadly for the principle that Title VII does not permit differential refusal of employment of any racial group on grounds unrelated to the performance of the job.

There is, however, another ground that may be argued to support a suit on behalf of a white male ex-convict. As noted earlier in this

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\(^74\) 427 U.S. 273 (1976).
\(^75\) See id. at 275–76.
\(^76\) See id. at 282–83.
\(^77\) See id. at 285.
article, males vastly exceed females in criminal convictions for most crimes. Title VII also bars discrimination on the basis of "sex" and courts have interpreted this as barring discrimination against males, under the same standards as would be applicable to females. In *Dothard v. Rawlinson*, the court held that it was discriminatory to utilize a height requirement for access to employment, because it had a disparate impact on females, and could not be proven to be related to adequate performance of the job. Likewise it could be argued that it is discriminatory to disqualify from employment on the basis of a previous criminal conviction, where that has a disparate impact on males and is not job-related.

### 3. Affirmative Protection

Civil rights organizations should also lobby for passage of legislation, such as that which exists in New York, prohibiting denial of employment to persons solely because of a prior conviction. There are two circumstances under the New York statute in which an employer may reject an ex-offender applicant. Under the first circumstance, an employer may reject an ex-offender where there is a direct relationship between the employment or license sought and the prior criminal offense. This is defined as a circumstance where the "nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought."

Eight factors are listed in the statute to assist the employer in making the judgment about the existence of such a direct relationship: (1) the public policy encourages the employment of persons with previous convictions; (2) the specific duties of the job; (3) the impact the previous conviction may have on the applicant's fitness to perform those duties; (4) how much time has elapsed between the conviction and the application for employment (an old conviction should be given less weight); (5) the applicant's age (if a minor, presumably the conviction should be given less weight); (6) the seriousness of the offense; (7) any evidence of rehabilitation or good

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80. See id. at 331.
82. Id. at § 750(3).
conduct post the conviction; (8) the safety and welfare of individuals or the general public.\(^8\)

The second circumstance, in which an employer may reject an ex-offender under the New York statute, is where his employment might create an "unreasonable risk" to persons or property.\(^4\) This term is not defined, but some courts have held that it is to be determined on a case-by-case basis, taking into account the eight factors involved in determining a direct relationship.\(^5\)

The value of the New York statute is that it rejects per se disqualifications of ex-convicts solely on the basis of a conviction in the abstract. It requires a contextual evaluation of the impact of a conviction on the applicant's capacity to perform a specific job efficiently, and without undue risk to others encountered in the normal course of work.

**4. Restriction of the Tort of Negligent Hiring**

Civil rights organizations should, however, seek a supplement to the New York law. At present, as noted earlier in this article, the tort of negligent hiring can dissuade some employers from employing ex-convicts if they fear that the courts will hold them liable for any injury occasioned by such an employee when an assertion is made that the employer should have been able to predict the injury based on the employee's prior conviction. Civil rights organizations should lobby for a restriction of the tort of negligent hiring in this form as a means of reinforcing the public policy of hiring ex-convicts.

If one restricted the tort of negligent hiring, how would the public and customers of an employer be protected? The supplement to the New York law should require employers to inquire of all employment applicants whether they have ever been convicted of a crime. The employer should advise the applicant that under the (New York) law a conviction does not operate as a per se disqualification for employment. However, the employer should warn the applicant that if an applicant deliberately lies and refuses to disclose a prior police record, he can be discharged for the falsification.\(^6\) If the applicant does not

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\(^8\) Id. at § 753(1).
\(^4\) Id. at § 752(2).
\(^6\) See Jimerson v. Kisco Co., 542 F.2d 1008 (8th Cir. 1976). The court held that the black plaintiff could not have been refused employment because of a police record (an arrest) because that would have had an adverse impact on black applicants as a group. Id. at 1010. The court also found, however, that the plaintiff was fired for lying about his
disclose a prior conviction the employer would have absolute immunity to the tort of negligent hiring based on the lack of knowledge. \(^{87}\) If the applicant does disclose a prior conviction, the employer can make a judgment as to whether the applicant's conviction clearly does not jeopardize factor eight above the "safety and welfare of individuals or the general public" or create an "unreasonable risk" to persons or property. If there is absolute clarity that the conviction could never bottom a suit for negligent hiring, then the employer need do nothing further—he can hire the ex-convict. (Indeed if the employer refuses to hire under these circumstances, where the applicant is otherwise qualified, he would run the risk of violating the basic New York law.)

In the event that there is any ambiguity at all about potential risk, an administrative board should be established and the employer would be required to submit the case to that board for a final judgment. It is assumed that the employer would only submit ex-convict applicants who met all other criteria for holding the job—the only thing at stake is the impact of the prior conviction. If the administrative board found that the ex-convict's conviction did not create an "unreasonable risk" of injury to the public or fellow employees, then the employer would have absolute immunity against a tort of negligent injury based on that conviction. Employers would be strongly urged, as a matter of protecting themselves prospectively against any negligent hiring tort, to submit generally all known convictions for clearance by the board. Only employers who had knowledge of a conviction and who had not taken advantage of the clearance option by the board would be subject to a tortuous action. Naturally, the state would have to be very aggressive in informing employers (especially small employers) about this process of protection. Civil rights organizations should have the employer community backing their lobbying for this supplement to the law.

**Conclusion**

This article has attempted to identify a problem that disproportionately diminishes employment for blacks, since they loom large in the population of ex-convicts. It attempts also to suggest strategies for civil rights organizations to cope with that problem. Civil rights organ-
nizations concerned about blacks should now increasingly focus on those blacks at the lower end of the class level. Middle class blacks, in many instances, have professional organizations (e.g., the National Medical Association, the National Bar Association) that attend to the special needs of their membership and thus they will require less intervention by civil rights organizations. Civil rights organizations have already secured a formal prohibition against any overt or covert racial discrimination against such middle class persons. Black ex-convicts are likely to have, as a group, little education and thus they must compete for only low-skilled employment. It is especially important to have this group employed because they victimize other blacks, disproportionately, if they return to crime. The measures proposed in this article, if adopted or litigated successfully, would benefit the black community and society at large.
