

# A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis

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*In the United States, over 600,000 offenders rejoin society annually, though little has been done to facilitate their transition from the prison to the community. Offender reentry into the workplace has emerged as a particular concern, given that many statutes prohibit public employment for ex-offenders and create obstacles to private-sector employment through occupational licensing requirements. These mandates may explicitly reject ex-offenders, or require "good moral character" or job/relationship tests that all but eliminate meaningful employment options. Several states are reconsidering the implications of these prohibitions, but a clear framework for assessing the validity of exclusionary occupational mandates is often lacking. This article proposes that the bona fide occupational qualification (BFOQ) defense found in employment discrimination law provides a helpful framework for guiding these reform efforts.*

## I. INTRODUCTION

The costs associated with the war on crime have been a dominant theme in the justice literature for nearly three decades. Research has long documented the unprecedented numbers of individuals under correctional supervision, and the human and financial toll of twenty years of get-tough strategies. The strain of these strategies on state budgets (Jacobson 2006; Braz et al. 2000; Irwin, Austin and Baird 1998), offenders (Haney 2003; Irwin and Owen 2005; Johnson and Toch 1982; Sykes 1958; Zamble 1992), their families (Braman 2002, Hairston 2003; Kazuraa 2001; Murray 2005; Park and Clarke-Stewart 2003; Western and McLanahan 2000), and communities (Clear, Rose and Ryder 2001; Hagan and Dinovitzer 1999; Lynch et al. 2001; Rose and Clear 1998) have been especially implicated in the critical discourse on punitive justice.

Attempts to redress some of these costs can be seen in the latest reform movement known as offender reentry. Offender reentry has become the

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umbrella term for various strategies that aim to successfully transition offenders from prison to the community through the coordinated efforts of criminal justice and social service agencies. In marked contrast to the get-tough rhetoric of the 1980s and 1990s, reentry initiatives have employed the much softer language of “redemption” (Lattimore 2006) and “land of second chances” (Bush 2004; State of Florida 2005). Programmatic examples of this reform thus far have included preprison release transition services, postprison release transition centers and reentry courts. Legislation calling for the reversal or tempering of collateral sanctions affecting felony offenders has come under the umbrella of reentry as well.

Collateral sanctions (Archer and Williams 2006; Pinar 2006; American Bar Association (ABA) 2004: 1) or what have been termed “invisible punishments” (Travis 2002), have emerged as a key issue in the national dialogue on offender reentry. Travis employs the term “invisible punishments” to refer to the collection of laws and regulations that operate outside the jurisdiction of sentencing judges, yet diminish the rights and privileges of those who have been convicted of a felony offense. Similarly, the American Bar Association (ABA) defines collateral sanctions as a “legal penalty, disability, or disadvantage . . . that is imposed upon a person automatically upon that person’s conviction for a felony, misdemeanor, or other offense, even if it is not included in the sentence” (ABA 2004: 1). The ABA considers these collateral sanctions to be so serious and punitive that courts and lawyers should fully inform defendants about them prior to the acceptance of any plea bargain (Pinar 2006; ABA 2004). Included among these collateral sanctions or “invisible” punishments are various regulatory and statutory sanctions that restrict or prohibit offender eligibility for civil rights (i.e., voting, holding public office) numerous licensed and public sector occupations, state and federal benefits (e.g., welfare assistance, food stamps, Social Security Income, student loans) and public housing (ABA 2004; Archer and Williams 2006; Pinar 2006; U.S. Department of Labor 2001).

The consequences of “invisible” or “collateral” sanctions on offender reintegration have been widely documented, both in terms of the number of individuals affected and their capacity to aggravate existing hurdles to law abiding behavior. Approximately 47 million Americans have a criminal history file on record, and between 13 and 18 million Americans may be subject to some form of temporary or permanent social exclusion due to prior convictions for drug and other felony offenses (Uggen 2000; Uggen, Manza and Behrens 2001). It is estimated that 600,000 offenders subjected to these sanctions will also be leaving state and federal prisons each year—amounting to roughly 1,600 releases per day—with poor communities of color often disproportionately bearing the burden of the reentry of these ex-offenders (Archer and Williams 2006; Leavitt 2002; Petersilia 2003). Of the offenders leaving prison, reportedly one-third will have received vocational or educational training, and one-fourth will have participated in substance abuse programming (Petersilia 2003). Fewer than 10 percent will have

participated in a pre- or postprison release program (*ibid.*), and two-thirds will likely remain unemployed for up to three years after their release (Saxonhouse 2004).

A core concern of reentry policy is the problem of ex-offender unemployment. The unemployment rate, estimated at 25 to 40 percent (Petersilia 2003), is shaped by a number of factors, many of which relate to the offender's lack of job preparedness. Another significant factor, however, is the existence of collateral sanctions in the form of statutory and regulatory barriers to employment. While implemented for retributive and public safety purposes, these barriers have also excluded offenders from employment opportunities that may lift their families and them out of poverty, provide access to employer-sponsored benefits, particularly health care, and deter other destructive behaviors.<sup>1</sup> Consequently, to the extent these legal barriers are enforced, society too bears the fallout of ex-offender unemployment through potential increases in crime, criminal justice system costs, uncompensated health care and Medicaid expenses, welfare needs, and the general degradation of family and community life. It has even been estimated that the impact of removing large numbers of offenders from the workforce through incarceration or employment restrictions has resulted in an annual net loss in gross domestic product of \$100 to \$200 billion (Freeman 1992).

The current analysis focuses on these occupational barriers from a criminological and legal perspective. We briefly examine the various rationales for removing and/or retaining these barriers, paying particular attention to the crime, punishment, and employment nexus and the scope and basis of employer reluctance to hire ex-offenders. This is followed by a review of the statutory and regulatory occupational barriers that have developed over the past two decades and recent government proposals that seek to mitigate or eliminate these barriers.

We ultimately contend that while some of the proposals and new laws may ease the offender reentry process and ex-offender discrimination in the labor market, offenders and employers would be better served through a more exacting remedial measure. Drawing from employment discrimination law, we argue the bona fide occupational qualification (BFOQ) standard (42 USC §2000e-2(e) (2005); 29 CFR §1604.2 (2006); EEOC Compliance Manual §§15-44, 625.3 (2006)) provides a more effective and fair way to remove substantial barriers to employment, particularly when applied to the evaluation of occupational licensing requirements. The BFOQ concept only allows discrimination in narrowly defined instances in which the discriminatory classification is shown to be "reasonably necessary for the normal operation of the business" based on an analysis of the essence of the business operations and the expected job tasks of the employee (42 USC §2000e-2(e) (2005); 29 CFR §1604.2 (2006); EEOC Compliance Manual §§15-44, 625.3 (2006); see *International Union, UAW v Johnson Controls Inc.* 1991; *Western Air Lines, Inc. v Criswell* 1985; *Dothard v Rawlinson* 1977).

II. EX-OFFENDER EMPLOYMENT: CRIME, PUNISHMENT,  
AND EMPLOYER LIABILITY

One of the mainstream justifications for removing occupational barriers is the belief that unemployed offenders translates to higher crime rates. The relationship between unemployment and crime has indeed been a subject of long-standing interest in the academic community (for literature review, see Chiricos 1987 and Patterson 1991), but empirical findings on this relationship have been mixed. Some research has supported the link between economic marginalization and crime using a number of empirical indicators (Chiricos 1987; Bushway and Reuter 2002; Fagan and Freeman 1999). For example, Sampson and Laub (1993) indicate that higher levels of job instability contribute to higher arrest rates. Bausman and Goe (2004) have found that higher levels of employment volatility (i.e., access to stable employment) are associated with higher levels of property crime in general. Uggen (2000) reports that for offenders over the age of twenty-seven, even marginal employment can diminish the likelihood of criminal activity. Research has further shown that as wages increase, crime decreases (Bernstein and Houston 2000; Western and Petit 2000). Spelman's (2005) analysis of Texas counties has specifically found that decreases in property crime can be attributed to increases in real wages and wealth.

A body of research to the contrary also exists, particularly studies that focus on juveniles. Ploeger (1997) has found a positive relationship between youth employment and delinquency, especially alcohol use, marijuana use, and public drunkenness. Wright, Cullen and Williams (1997) have similarly found that the number of hours employed is positively associated with juvenile delinquency. Messner, Raffalovich and McMillan (2001) have found that while child poverty is positively related to juvenile arrest rates, changing unemployment is not. Lending empirical support to rational choice theory, Young's research (1993), has found that unemployment decreases opportunities for property crime.

Given the uncertainty of the unemployment-crime relationship, the case for removing occupational barriers cannot depend on the hope of reduced recidivism alone. It is perhaps more reasonable to assert that given the real and symbolic importance of work in both the penal system and in the ethos of American society, the statutory and regulatory barriers facing ex-offenders in the job market seem antithetical to expectations of good citizenship, familial responsibility, and meaningful (re)integration into community life.

For instance, American penology, past and present, testifies to work as a guiding principle and requirement in the management of criminal populations. Witness the origins and operations of the workhouse (Rothman 1977), penitentiary (Blomberg and Lucken 2000; Ignatieff 1978; Rothman 1977; Melossi and Pavarini 1981) and reformatory (Pisciotta 1994; Simon 1993) and the conditions of every form of community supervision since the inception

of probation and parole. The words of an 1887 California Penological Commission are particularly revealing in this regard.

Industrial labor is not only the most powerful agency of reformation; it is the indispensable instrument without aid of which reformatory results are wholly unattainable. Industry is the essential prerequisite of healthy life and progress in all human society; and to such a degree that any community deprived of productive labor must quickly lapse into moral corruption and decay. (Simon 1993: 28)

The recent comment by a New York City Probation Commissioner that offenders “either [they] work or go back to jail” (New York State Bar Association 2006: 59) suggests that twenty-first century corrections is equally tethered to the idea of work.

The irony of the ongoing connection between the penal system and work is the labeling and stigmatization effects of incarceration on employment chances (Davies and Tanner 2003; Bushway 1998; Harrison and Schehr 2004). Western (2002; see also Western, Kling and Weiman 2001) has shown that incarceration experience reduces access to steady jobs with earnings growth potential. Kling, Weiman, and Western (2000) also estimate that a period of incarceration can result in employment losses as high as 20 to 30 percent and earnings losses of between 10 and 30 percent. The effects of incarceration on job attainment have been particularly acute for African American and Latino men and women who are incarcerated at disproportionately higher rates and overwhelmingly for drug-related offenses (EEOC Policy Guidance 1990; EEOC Policy Guidance 1987; Pager 2003).

Results from employer surveys provide added insight into the effects of felony status on job attainment. A national survey of six hundred businesses participating in the Welfare to Work Partnership shows that 8 percent of employers would never hire anyone with a criminal record, while 40 percent would never hire anyone with a felony drug conviction. Forty-three percent of surveyed businesses have indicated they would never hire anyone with a violent felony conviction (Petersilia 2003). A study of 3,000 employers in Atlanta, Boston, Detroit, and Los Angeles indicates that more than 60 percent of employers who had recently hired low-skilled workers would “probably not” or “definitely not” hire an applicant with a criminal record (Holzer 1996). Holzer, Raphael, and Stoll (2002) have also found that employers are least likely to hire former prisoners when compared with other disadvantaged groups, such as welfare recipients. While employers are more likely to hire ex-offenders in manufacturing and construction positions, as opposed to service and retail sector positions, such jobs constitute 15 percent of all employment (Bania, Coulton and Leete 2000; Solomon et al. 2004).

Offender-based disqualifiers (e.g., limited education, substance abuse, limited work experience, job readiness) notwithstanding, employer reluctance to hire ex-offenders is chiefly rooted in concerns about legal liability for negligent hiring and retention. To avoid such claims, employers must exercise reasonable

care in hiring, retaining, and supervising employees, including both ex-offenders and other employees who have no criminal record (Barnett 2004; Williams 2003; Leavitt 2002). This duty of reasonable care generally requires that employers avoid foreseeable harm to co-workers, customers, tenants, and the general public that may interact with their employees. The employer can then be held liable if the employee's misconduct is reasonably foreseeable based upon their past actions before being hired or their conduct while employed. For example, if employers receive complaints about aggressive behavior by an employee, they may be held liable for negligence for subsequent violent conduct toward customers or co-workers for failing to act with reasonable care since such conduct was reasonably foreseeable (*Lange v National Biscuit Co.* 1973; see Barnett 2004; Leavitt 2002).

This liability concern, which potentially exists for all employees, regardless of their criminal record, is obviously heightened when ex-offenders are hired, as employers fear they may be more prone to harm others (Barnett 2004; Leavitt 2002; U.S. Department of Labor 2001). If the employer hires an ex-offender and a third party is harmed, courts will hold the employer liable if the previous conviction is reasonably related to the subsequent criminal act, and therefore reasonably foreseeable by the employer. However, courts have handed down mixed decisions on whether or not employers will be liable for the criminal conduct of their ex-offender employees. If the previous crime is unrelated to the later criminal acts, the court will hold that the employers could not reasonably foresee these acts and therefore cannot be held liable in most cases (Barnett 2004; Leavitt 2002). For example, in one case the court held an employer responsible for an ex-offender's murder of a co-worker when the employer hired that person knowing that he had previously killed another co-worker (*Ford v Gildin* 1994; see Barnett 2004). Conversely, the court found that an employer was not liable when the ex-offender had been convicted of manslaughter 25 years ago and then subsequently molested a child (*Yunker v Honeywell* 1993; see Barnett 2004). Courts have split on whether alcohol or drug-related crimes make subsequent criminal acts foreseeable (Leavitt 2002).

To be sure, questions of liability have typically arisen when ex-offenders have committed crimes that harm third parties (U.S. Department of Labor 2001), usually involving violent crimes such as murder of a co-worker (Barnett 2004; see *Yunker* 1993) or rapes of customers in their homes (Barnett 2004; Leavitt 2002; see *Keibler v Cramer* 1998; *Tallahassee Furniture Co. v Harrison* 1991; *Stephens v A-Able Rents Co.* 1995; *Abbott v Payne* 1984; *Ponticas v K.M.S. Investments* 1983). As egregious as these offenses are, however, wholesale fears about ex-offender violence in the workplace are largely (statistically) unfounded. It is true that approximately two million employees are victims of workplace violence annually, with homicide being the third leading cause of workplace deaths for all employees and the second leading cause for deaths of female employees (University of Iowa 2001). In addition, workplace violence costs employers between \$6 and \$36 billion

per year in productivity losses, insurance costs, increased security measures, weakened public image, and other related issues (Gray, Myers and Myers 1999). Nevertheless, it is not co-workers, but nonemployees, customers, and clients that perpetrate most workplace violence upon employees. Various sources indicate that the overwhelming majority of workplace violence results from third-party criminal activities in the late-night retail, taxi service, and health care industries (FBI Workplace Violence 2004; University of Iowa 2001; Occupational Safety and Health Administration (OSHA) 2001). Co-worker violence, on the other hand, accounts for 7 percent of workplace violence incidents (University of Iowa 2001). Unfortunately, figures on the level of employee violence against customers are not tracked by OSHA, and additional research is needed to accurately examine the bases and costs of workplace violence, including the role of ex-offenders.

Corporate liability for negligent hiring of offenders is also a relatively infrequent occurrence. Though Connerley, Arvey, and Bernardy (2001) report that employers have lost 72 percent of negligent hiring cases in general, resulting in average settlements of more than \$1.6 million, negligent hiring cases due specifically to the hiring of ex-offenders are fairly uncommon. In New York, for example, 10 percent of all negligent hiring claims were related to the hiring of ex-offenders (Legal Action Center 2004).

Of course, one could reasonably argue that co-worker violence and employer liability for the negligent hiring of ex-offenders are low precisely because ex-offender employment barriers and criminal background checks are in place. However, the former condition is not necessarily a function of the latter. The Bureau of Justice Statistics and the Sentencing Project indicate that 71 percent of state prisoners have been convicted of nonviolent offenses; among female offenders, in particular, the overwhelming majority of convictions are for property offenses. Research has also shown that nearly all violent offenses, including rape and murder, take place in nonwork leisure settings and/or in situations involving intimates and alcohol (Luckenbill 1977; Athens 1997; Bureau of Justice Statistics 1998; Wolfgang 1958). Consequently, rather than provide occasion for violent crime, the work environment may provide occasion for law-abiding behavior. Uggen (2000: 529) asserts that employment for offenders is important because “workers are likely to experience close and frequent contact with conventional others and because the informal social controls of the workplace encourage conformity.”

It is clear that work enables the support of families and the development of pro-social roles and support systems. It is also clear that risks posed by certain ex-offenders and employment restrictions are legitimate. The apparent question posed by the reentry movement, however, is whether fear of lawsuits and notions of “less eligibility” have gone too far.<sup>2</sup> The momentum of the reentry movement suggests reasonable boundaries in some areas may have been exceeded, but a legal framework that best balances the fundamental need to work with the need to prevent certain people from obtaining certain types of jobs has not been consistently identified and/or employed.

III. STATUTORY AND REGULATORY BARRIERS  
TO EX-OFFENDER EMPLOYMENT

Throughout the country, occupational barriers have operated at a number of statutory and organizational levels. In the private sector, for example, employers have been given broad latitude in considering an applicant's prior record. To date, five states have standards for governing a private employer's decision to refuse employment to someone with a conviction record (Legal Action Center 2004).

In the public sector, government employment has been permanently denied to felons in six states (Alabama, Indiana, Iowa, Nevada, Ohio, and South Carolina) (Bureau of Justice Statistics 2004; Archer and Williams 2006; Petersilia 2003). Rhode Island bars felons from public employment up to three years after release (Saxonhouse 2004; Bureau of Justice Statistics 2004), while six other states (California, Florida, Georgia, Kentucky, Louisiana, Minnesota) bar felons who commit certain types of crimes or whose crimes are directly related to the position sought (Bureau of Justice Statistics 2004). In New York, an individual can be barred from gaining or lose employment with a government agency if they have engaged in "immoral conduct" (New York Bar Association 2006).

State occupational licensing requirements, which the ABA refers to as "discretionary disqualifications" (ABA 2004), constitute another type of barrier to ex-offender employment. Approximately six thousand occupations are licensed in one or more states (Petersilia 2003), with thirty-seven states permitting all employers and occupational licensing agencies to inquire about and consider arrests that have not resulted in a conviction (Legal Action Center 2004).<sup>3</sup> Some occupational license requirements may explicitly reject those with past criminal convictions, while others may require a showing of "good moral character," no matter how distant in time or the nature of the prior conviction (ABA 2004; Archer and Williams 2006; Saxonhouse 2004). Every state has the power to issue certificates of rehabilitation as a discretionary way of lifting the barriers imposed by state licensing agencies, yet only six states utilize this authority (Legal Action Center 2004).

Many state regulations or court interpretations of these regulations forbid ex-offenders from obtaining positions in such fields as child care, security, home health care, and nursing primarily out of a desire to promote public safety and to safeguard vulnerable populations from abuse and violence (Gerlach 2006; Leavitt 2002; Petersilia 2003; U.S. Department of Labor 2001). State regulations also prohibit or severely limit ex-felons from a wide range of private-sector employment opportunities that do not directly involve vulnerable groups, including positions in interstate transport and finance, or as barbers, pharmacists, embalmers, dentists, optometrists, septic tank cleaners, accountants, plumbers, real estate professionals, and beauticians (Archer and Williams 2006; Saxonhouse 2004; Petersilia 2003). Certain states,

such as California, expressly prohibit parolees from working in the professional fields of law, real estate, medicine, physical therapy, and education (Archer and Williams 2006; Petersilia 2003). Colorado licensing regulations also prevent convicted felons from obtaining jobs as dentists, engineers, physicians, and pharmacists. Added to this list of exclusions are certain union affiliated jobs, as some unions ban ex-convicts altogether (Petersilia 2003).

Licensing requirements that serve as obstacles to ex-offender employment may be reasonable based upon the nature of the profession, such as law enforcement, but, as the reentry movement attests, others may unfairly block ex-offenders from substantive employment opportunities. Though most states make it illegal to disqualify an ex-offender outright, navigating the various application and appeals processes can be a strong disincentive. For instance, having one's record sealed or expunged, or acquiring a certificate of rehabilitation to minimize the effects of a prior incarceration or record generally requires that several years have elapsed since the last offense, that progress toward rehabilitation can be clearly documented, and that the offense must be of a less serious nature.

#### IV. REFORMING STATUTORY AND REGULATORY BARRIERS

The dialogue on occupational barriers and ex-offender unemployment has been facilitated by a number of government and private sector institutions.<sup>4</sup> Various collective forums have produced a series of recommendations that typically include inmate/ex-offender work preparation and assistance programs, life skills training, partnership building with local business communities, increased use of intermediary agencies that recruit and match ex-offender workers and employers, increased funding for existing bonding and tax credit programs, and restrictions on the dissemination of criminal history records (Hall 2003; U.S. Department of Labor 2001; Holzer, Raphael and Stoll 2002, 2003; Solomon et al. 2004; Raphael 2006; Pager 2006; ABA 2004; New York State Bar Association 2006). Other less conventional recommendations advocated by these forums have included prison job fairs, subsidized community service or other types of transitional work, and offender financial incentives to retain low-wage jobs. It has been further proposed that certain ex-offender employment disqualifications be removed, as the success of many reentry based programs depends upon the degree to which access to the labor market has been meaningfully expanded.

Since local communities often bear the brunt of reentry, cities such as Boston and San Francisco have tried to limit the impact of a previous criminal record on applicants for public employment. These cities have addressed public employment restrictions by prohibiting inquiries on their job applications about criminal records to avoid the rejection of candidates with criminal pasts at the outset of the application process. If the candidate is qualified for a position, then the city employers may conduct a criminal background check. Once

the background check is complete, the city employers may deny employment to a qualified applicant only after the consideration of various factors, such as the seriousness of the offense, the relevance of the crime to the position sought, the age of the applicant at the time of the offense, any evidence of rehabilitative progress, and the time that has elapsed since the offense. In addition, the Boston ordinance mandates that the city employer must provide “specific reasons” for the rejection of the qualified candidate and encourages its vendors to adopt similar policies (O’Brien and Darrow 2007).

Various state and federal proposals have met with uneven success, despite Democratic and Republican support for reentry initiatives. For example, in a comprehensive attempt to address ex-offender unemployment, Maryland’s General Assembly authorized the formation of the Governor’s Advisory Council on Offender Employment Coordination. In 2001, the legislature tasked the council with the development of transitional supports, expanded employment opportunities, more extensive employment counseling, job preparation, placement, and retention services, enhanced coordination of employment services, business mentoring programs, and mock job fairs in correctional facilities and needy communities (State of Maryland 2006). However, in the end, the legislative bills based on the council’s recommendations failed (2006 House Bill 1376) or were vetoed (2006 Senate Bill 193). These bills sought to mandate the provision of employment and transitional services through the Offender Rehabilitation and Reentry Pilot Program (2006 House Bill 1376) and the Pilot Program for Long-Term Employment of Qualified Ex-Felons (2006 Senate Bill 193).

The Maryland Advisory Council’s work with the state’s Departments of Education and Labor to examine and adjust occupational licensing requirement has also ceased. Yet, as of April 2007, a Prisoner Reentry Administrator for the Department of Labor, Licensing and Regulation has been hired to oversee what types of criminal backgrounds will be allowed for specific licenses. A brief discussion with the Prisoner Reentry Administrator revealed that decisions were still being made on a case-by-case basis, for “fear of lawsuits.”

In 2006, former Florida Governor Bush also established an Ex-Offender Task Force. Based on the task force’s recommendations, the governor directed each state agency to conduct a comprehensive inventory of their employment disqualifications and report the reasons for any automatic disqualifications and procedures for waivers. Specifically, state agencies were to review the state agency laws, policies, and practices that disqualified individuals from employment in state jobs, jobs in state licensed, funded, and regulated industries, and jobs requiring a state license of certification (Love 2006). Based on the findings of the inventory, each state agency was to eliminate or modify such disqualifications that were not designed to protect the public safety and create a case-by-case review mechanism whereby individuals could make a showing of their rehabilitations and qualifications for employment (*ibid.*). To encourage the private sector to follow the state’s lead, the governor’s task force also recommended that “ex-offenders should be disqualified from employment only when the offense is related to the

safety, trust, and responsibility required of the job and that an opportunity for a second chance through case-by-case review so that ex-offenders can prove they should not be disqualified" (State of Florida 2006: 44).

Though Florida's task force recommendations demonstrate a willingness to address occupational barriers, they do not provide state agencies with a definitive standard for making determinations of job relatedness or an adequate model for the private sector to follow in their hiring or retention practices. The use of language such as "trust" and "responsibility" is essentially a return to the broad "good moral character" requirements that permit the exclusion of ex-offenders, of any type, from employment opportunities. Consequently, it is not clear how the state agencies will define their disqualification parameters, nor is it clear how the work of the task force will fare under newly elected Republican Governor Crist. Crist and the Board of Executive Clemency have approved the automatic restoration of civil rights for ex-offenders, which affects the right to vote, hold public office, and apply for certain occupational licenses, but the measure's effect on the expansion of employment opportunities is questionable. Having one's rights restored does not mandate that a licensing board must issue a license to the applicant. Moreover, the measure only extends to ex-offenders who have completed their sentences, including all probation or parole obligations, and paid all restitution. Several categories of offenders are also ineligible without a hearing, namely murderers, sex offenders, those convicted of certain serious offenses, and habitual or career criminals.

The state of Illinois has addressed employment disqualifications through a law that ultimately gives officials considerable discretion in the granting of licenses (House Bill #0569; signed into law in August 2003). The law permits the granting of either a Certificate of Relief from Disabilities or a Certificate of Good Conduct to eligible ex-offenders who do not qualify for expungement or sealing of their criminal records. According to the written policy of the state's Department of Employment Security, the certificates function as a "letter of recommendation" that can be used with eighteen occupational acts listed by the appropriate licensing agency (Illinois Department of Employment Security 2006). The policy also states that the certificates do not guarantee that the occupational license bar will be removed and that employers do not have to honor the certificates. Additionally, anyone convicted of more than one felony is ineligible for a Certificate of Relief from Disabilities. Eligibility for a Certificate of Good Conduct also requires that persons who have committed Class 1, 2, 3, or 4 felonies wait three years before applying.

In Oklahoma, attempts to lift employment barriers for ex-offenders have fallen short of the initiating policymakers' intentions. Proposals originally sought to remove automatic disqualifications for nine occupational licenses; however, the only occupational bar that was removed was for licensing in the field of cosmetology (Myers-Peeples 2004). In contrast, Delaware has passed a law lifting the automatic ban on occupational licenses for over

thirty-five professions. Under the 2004 law (introduced as Senate Bill 229, which amends Title 24 of the Delaware Code relating to professions and occupations), licenses may only be refused if the applicant has been convicted of crimes that are “substantially related” to the profession of interest.

The legal standard employed by Delaware, namely “substantially related,” has also been a part of the standing employment policies of both Wisconsin and New York. Wisconsin offers protected class status to ex-offenders under Wisconsin’s Fair Employment Act, which prohibits employment discrimination against individuals based on their arrest and/or conviction records (Gerlach 2006; Barnett 2004; Todd 2004). Through judicial interpretations of the Wisconsin law, employers may discriminate against ex-offenders if their conviction is substantially related to the job tasks and responsibilities (referred to as “elements only test”) (Gerlach 2006; Todd 2004). Similarly, New York’s Human Rights Law also bars workplace discrimination based on an individual’s past convictions unless there is a “direct relationship” between the previous crime and the position sought or if the applicant’s employment would create an “unreasonable risk” to public safety or property (Gerlach 2006; Todd 2004). The New York law specifically exempts law enforcement and positions that mandate the possession of a firearm, and looks at the direct relationship between the ex-offender’s record, the job duties, and public safety concerns (Barnett 2004; Todd 2004; Leavitt 2002). In addition, the statute examines specific enumerated factors such as the seriousness of the criminal offense, the applicant’s age at the time of the crime, the time that has elapsed since the conviction, evidence of the applicant’s rehabilitation efforts, and the applicant’s overall fitness for the position in light of these circumstances (referred to as the “factor-specific approach”) (Gerlach 2006; Barnett 2004; Todd 2004; Leavitt 2002).

Both Wisconsin and New York provide the broadest protected class status to ex-offenders under their respective antidiscrimination employment laws, while some states, like Pennsylvania and Hawaii, explicitly limit the use of conviction records in employment decisions through other state laws (Gerlach 2006; Barnett 2004). Yet, even in these instances, courts have read exceptions into these prohibitions using various tests involving the assessment of the offenses involved and the position sought (Gerlach 2006; Barnett 2004; U.S. Department of Labor 2001). Although the Wisconsin and New York laws provide protected class status to ex-offenders, the ex-offender must still bring an individual discrimination action against employers. Depending on the state, this process could entail bringing administrative action with a state antidiscrimination agency as well as subsequent legal action in the courts. This process may involve time and money, producing a chilling effect on an ex-offender’s initiative and ability to seek meaningful employment.

The federal government has responded to the problem of ex-offender unemployment through two initiatives in particular. Under the Department of Labor’s Prisoner Reentry Initiative, funding is to be provided to local agencies in communities with high concentrations of ex-offenders.

Funds are to be used to develop transitioning, job mentoring, and job training services (New York Bar Association 2006). The Department of Justice's Serious and Violent Offender Reentry Initiative (SVORI)—which has been operational at select research sites—has adopted a comprehensive service approach that includes, but is not limited to, employment training and placement assistance for state prisoners. Neither of these federal initiatives, however, addresses the issue of employment disqualifications.

Should it be enacted, The Second Chance Act of 2007 (originally introduced as The Second Chance Act of 2005—House Bill 1704 and Senate Bill 1934) has the potential to offer relief in the area of disqualification for some federal prisoners. The Second Chance Act of 2007 (filed as H. R. Bill 1593 and Senate Bill 1060) is broadly designed to ensure the safe and successful return of federal prisoners to the community and recognizes the need to address barriers to employment, including licensing. As of July 23, 2007, the act has not yet been voted on.

On the whole, reentry initiatives have been weighted toward the less risky strategies of job preparedness and locating employment, without fully adjusting the statutory and regulatory impediments that restrict or disqualify ex-offenders from a sizable portion of the labor market. Those states that have considered this extra adjustment have had legislation fail or stagnate, or have limited relief to select minor offenders. Or, as in the case of Florida, proposals have provided little guidance in determining the offense/job relationship standard to be used when reassessing licensing requirements.

Future attempts at occupational license reform may do well to emphasize reducing employer liability for negligence when hiring and retaining ex-offenders. In some states, such as Florida and New York, employers may defend against negligence claims if a pre-hiring criminal background check or investigation shows that the prior misconduct does not make the applicant unsuitable for the job (Barnett 2004; Leavitt 2002). However, if the defense requires a background check, many employers may simply opt not to hire an ex-offender for fear of litigation (Leavitt 2002; U.S. Department of Labor 2001), or if they do hire the ex-offender, their judgment of suitability for the position may come under attack in a subsequent lawsuit (Barnett 2004). Building upon what has been established in other areas of employment discrimination law, the bona fide occupational qualification standard may be applied to licensing requirements to yield a more concise and consistent framework for guiding ex-offender employment in licensed occupations, thereby limiting employer liability for hiring properly licensed ex-offenders.

#### V. APPLYING BFOQ ANALYSIS TO STATUTORY AND REGULATORY BARRIERS

Employment discrimination law is primarily founded on notions of equal access to job opportunities and the importance of making employment decisions

based on one's job qualifications, rather than one's status, such as race or gender. Title VII and subsequent federal laws created protected classes out of recognition of historical discrimination against certain groups in society and the need to diversify the workplace by prohibiting employers from considering one's status in a protected class in employment decisions (Moran 2005; Twomey 2004). Despite the long history of discrimination against ex-offenders, federal laws and most states laws do not recognize ex-offender status as a protected class (Gerlach 2006; Leavitt 2002). Only Wisconsin, Pennsylvania, Hawaii, and New York offer limited forms of protected class protections to ex-offenders through prohibitions on the use of conviction records in employment decisions (Gerlach 2006; Barnett 2004).

To further aid ex-offender reentry into the world of work, one option would be to amend federal law to make ex-offender status a protected class (see Leavitt 2002; Todd 2004). If ex-offenders were given protected class status, occupational licensing regulations that exclude individuals with criminal records or that use "good moral character" standards could give rise to disparate treatment and/or disparate impact claims. Under a disparate treatment case, employers are prohibited from intentionally discriminating against a protected class regarding the terms and conditions of employment (*McDonnell Douglas Corp. v Green* 1973). An employer who refuses to hire a qualified ex-offender solely because of his protected class status could be held liable for illegal discrimination under disparate treatment. However, it is unlikely that ex-offenders will receive protected class status under federal and state laws since legal policymakers have argued that innocent immutable traits, like race and gender, should be treated differently from collateral consequences of volitional criminal conduct (Gerlach 2006; Hruz 2002).

Alternatively, a disparate impact claim involves the application of an employment policy that is neutral on its face, such as height requirements, but that results in an unfair discrimination against protected groups based on statistical evidence (*Griggs v Duke Power Co.* 1971; *Dothard* 1977). As regards disparate impact, the Equal Employment Opportunity Commission (EEOC) has long contended that use of arrest and conviction records in employment decisions may result in illegal discrimination (EEOC Policy Guidance 1987; EEOC Policy Guidance 1990). Even if the use of these records may be applied equally to all job seekers, such policies have an unfair impact on protected classes since African American and Hispanics are overrepresented and receive differential treatment in the criminal justice system (Mitchell 2005; Demuth and Steffensmeir 2004; Bontrager et al. 2005; Schlesinger 2005). Therefore, the EEOC has asserted that these hiring decision policies unfairly discriminate against the protected classes of race, color, and national origin (EEOC Policy Guidance 1987; EEOC Policy Guidance 1990; Gerlach 2006; Leavitt 2002; see *Green v Missouri Pacific Railroad Co.* 1975; *Gregory v Litton Systems, Inc.* 1972). Archer and Williams (2006) also argue that women may also suffer disproportionately since there has been a

dramatic increase in female incarceration in the past decade, especially for drug-related offenses (Belknap 2001; Blomberg and Lucken 2000; Chesney-Lind 1991). This is especially detrimental for African American females who are incarcerated three to six times more often than their white counterparts (Greenfeld and Snell 1999).

As regards disparate impact claims, the EEOC has recognized that an employer can refute such claims by supplying statistics that show there is no adverse impact against a protected class through the use of arrest and conviction records (EEOC Policy Guidance 1987).<sup>5</sup> Consequently, a disparate impact claim could be undermined if statistics show that protected class ex-offenders are not unfairly harmed in the regional or local applicant pool. The disparate impact approach is also underinclusive since it fails to address ex-offender employment discrimination against majority groups, such as male Caucasians reentering the community (Leavitt 2002).

Overall, ex-offenders have had varied success in challenging discriminatory licensing regulations through disparate treatment and/or impact claims. In some cases, the courts have determined that the discrimination is justified when applicants have sought positions in law enforcement, health care, and the legal profession. In those cases, the courts have determined that the limitation against ex-offenders is reasonable in light of the requirements of the positions, addressing the competing interests of the employer, the ex-offender applicant, and the public's safety and welfare (Saxonhouse 2004; see *Schanuel v Anderson* 1983; *Upshaw v McNamara* 1970). In other instances, ex-offenders have been successful when they can show that a government regulation or policy is so sweeping in its reach as to be arbitrary and unreasonable or unrelated to the stated policy objectives of protecting the public (Saxonhouse 2004). Various decisions have struck down permanent or general exclusions of ex-offenders from public employment opportunities (*Cronin v O'Leary* 2001; *Kindem v City of Alameda* 1980; *Butts v Nichols* 1974), bans on licenses to ex-offenders seeking to become private detectives, security guards (*Smith v Fussenich* 1977), vehicle salespeople (*Brewer v Department of Motor Vehicles* 1979), real estate professionals (*Brandt v Fox* 1979; but see *Golde v Fox* 1979), and elderly health care providers (*Nixon v Commonwealth of Pennsylvania* 2003), and denying opportunities for ex-offenders to become state towing contractors (*Lewis v Alabama Department of Public Safety* 1993).

Court decisions have primarily reflected the view that certain limitations on licensing requirements may make sense for ex-offenders, provided they are properly related to successful job performance and/or the protection of public safety. As previously discussed, the state of Delaware enacted, and the state of Oklahoma recently proposed a review of occupational regulations requiring that any disqualification be "substantially related" to the profession or occupation for which the license is sought (Myers-Peebles 2004). Although sometimes referred to as a "business necessity" approach, this designation has created some misperceptions about the use of that

defense in employment discrimination law. The business necessity defense is utilized in cases in which there is no intentional discrimination but merely a neutral policy that has statistically harmed certain protected classes. It would be disingenuous to argue that occupational qualifications that explicitly ban those with criminal records or require a showing of good moral character, typically aimed at excluding ex-offenders are not intentional discrimination. Although these requirements apply to all, they are clearly not neutral since they are grounded in the explicit and implicit discrimination against and exclusion of ex-offenders from licensed occupations.

The more accurate interpretation is that the Delaware law and Oklahoma proposal are using the bona fide occupational qualification or BFOQ defense found in disparate treatment cases (42 USC §2000e-2(e) (2005); 29 CFR § 1604.2 (2006); EEOC Compliance Manual §§15–44, 625.3 (2006)). This concept recognizes and allows intentional discrimination under certain narrow circumstances and to specific Title VII protected classes (42 USC §2000e-2(e) (2005), such as gender (29 CFR §1604.2 (2004); EEOC Compliance Manual §§15–44, 625.3 (2006)), religion (EEOC Compliance Manual §15–44 (2006)), national origin (29 CFR §1606.4 (2003); EEOC Compliance Manual §15–44 (2006)), as well as age (29 CFR § 1625.6 (2003), but not to race or color discrimination (42 USC §2000e-2(e)(1) (2005); EEOC Compliance Manual §§15–44 (2006); see *Johnson Controls* 1991; *Western Air Lines, Inc.* 1985; *Dothard* 1977). Although ex-offenders are not likely to be viewed as protected classes, the BFOQ defense can be an appropriate method for undertaking a wholesale review of discriminatory occupational licensing requirements (see Table 1 for a summary of the advantages and disadvantages of this approach).

Under the affirmative defense of the BFOQ, the courts recognize that some forms of employment discrimination are tolerable, and perhaps desirable, if the discrimination is “reasonably necessary for the normal operation of the business” (42 USC §2000e-2(e)(1) (2005); EEOC Compliance Manual §15–44 (2006); see *Johnson Controls* 1991; *Western Air Lines, Inc.* 1985; *Dothard* 1977). The courts have narrowly interpreted this permissive discrimination, focusing on the essence of the business enterprise and the nature of the job tasks to determine if the discrimination is appropriate (29 CFR §1625.6(a–b) (2003), see *Johnson Controls* 1991; *Western Air Lines, Inc.* 1985; *Dothard* 1977). Some states already use a BFOQ-style analysis, making it illegal for an employer to use criminal records against applicants unless it is related to the actual job duties (ABA 2004; U.S. Department of Labor 2001; Leavitt 2002). In these states, courts will assess an applicant’s age at the time of the crime, the elapsed time since the crime, the individual’s rehabilitation efforts, the needs of the employer for a secure workplace, and the overall safety and protection of the public (U.S. Department of Labor 2001; Leavitt 2002).

Using the approach approved in Delaware, occupational licensing boards must “promulgate regulations that specifically identify the crimes that are ‘substantially related’ to the profession or occupation” (State of Delaware 2004). In essence, the state is putting a BFOQ burden on its licensing

Table 1. Advantages and Disadvantages of Proposed Application of BFOQ Framework

Advantages	Disadvantages
Seeks to balance broader ex-offender access to employment opportunities with legitimate public safety concerns.	Does not elevate ex-offender status to those of other protected classes, such as race, gender, or religion.
Provides framework for wholesale review and revision of occupational licensing requirements.	Allows certain licensed occupations to continue to bar ex-offender participation.
Recognizes discrimination inherent in many current occupational licensing requirements.	Requires licensing agencies to expend time and resources to review and revise current mandates.
Narrowly construes legal employment discrimination by focusing on job tasks and essence of the business, rather than ex-offender status.	Expects licensing agencies to make good faith efforts to narrowly tailor exclusions to specific crimes based on nature of business and job tasks.
Limits "chilling effect" on ex-offenders of individual/case-by-case challenges of broadly discriminatory licensing requirements.	Needs concomitant legislative, judicial, and agency action on appropriate adjustments in employer liability and/or adoption of ameliorative programs to compensate future victims.
Provides opportunities for ex-offenders to still pursue individual appeals of post-BFOQ occupational licensing denials, if desired.	Continues to utilize licensing agency's resources to process and resolve individual challenges of post-BFOQ occupational license denials.
Mandates precise listing of objectionable offences rather than generalized exclusions of ex-offenders or vague use of good moral standing.	
Significant judicial precedent exists on BFOQ application to guide licensing agencies.	
Avoids both overinclusive and underinclusive aspects of disparate impact claims.	

boards, requiring them to apply a BFOQ analysis to their existing occupational licensing regulations and to identify which crimes would justify intentional discrimination against ex-offenders. While the BFOQ defense requires an employer to justify its discriminatory policies, the Delaware law similarly places the same obligation on its licensing authorities. The wholesale review of occupational licensing mandates being utilized in Delaware, and earlier noted in the Florida executive order, represent a more streamlined approach compared to states that may require the ex-offender to challenge any denial or exclusion from a licensed occupation on an individual case-by-case basis.

The process of challenging licensing regulations in court or through administrative processes one-by-one can be both expensive and time consuming, placing a chilling effect on ex-offenders seeking employment in licensed occupations. Rather than wait for individual cases to be brought forward, a more proactive approach, as implemented in Delaware and called for in Florida, for evaluating licensing requirements can be drawn from the existing BFOQ legal analysis. States can actively review their occupational licensing regulations to see if conviction records or good moral character regulations are really necessary for the normal operations of the business, considering the nature of the business and the required job tasks. As previously indicated, the state of Florida has required that such a review be taken, but it has not provided a particular legal or other standard to determine what is or is not reasonable for the normal operations of business as in the BFOQ.

Using the BFOQ analysis, certain broad exclusions of ex-offenders could be struck down, which the ABA views as “problematic,” at best, (American Bar Association 2004) while those related to the essence of the enterprise and the actual job duties would remain in place. For example, applying the BFOQ analysis, there is a clear connection between conviction records and the nature of law enforcement agencies and the job tasks of law enforcement officers, including the exercise of self-control given the use of guns and other weapons that would allow for the legal exclusion of ex-offenders. Conversely, an individual’s conviction record or demands for good moral character may not be necessary for the nature of the business of a barber-shop or septic tank cleaning business, nor may they be related to the actual job tasks associated with these positions. By using this approach in evaluating occupational licensing regulation, many obstacles to meaningful employment in licensed professions may be removed for ex-offenders as a group, without having to resort to case-by-case challenges to occupational requirements. Hence, the burden of justifying one’s deservingness for employment is shifted away from the offender. Furthermore, ex-offender licensing limitations that remain in effect after the initial BFOQ analysis could be reassessed by the regulating agency in the future as well as challenged on an individual basis by ex-offenders still seeking to obtain such occupational licenses.

The BFOQ analysis would also require regulating agencies to more narrowly tailor their exclusions or limitations to specific crimes related to the nature of the business and job tasks rather than the general category of felonies (Saxonhouse 2004). For example, certainly persons convicted of domestic or elder abuse should not be working in nursing homes, with the licensing requirements for applicable professions specifically addressing the disqualifying crimes (see Gerlach 2006; U.S. Department of Labor 2001). In this way, state licensing authorities would move away from generalized exclusions of those with criminal records or the use of overly broad good character determinations to more targeted lists of prohibited criminal acts.

The BFOQ analysis could once more play a helpful role in the arena of employer liability. If states review their occupational licensing requirements using the BFOQ framework, the state is indicating that there is not a substantive link between the previous crime and the tasks involved with the licensed profession. If the employee was properly licensed, then the employer should not be held liable for subsequent crimes that are not related to the essence of the business and the actual job tasks. Without this link, the employee's harmful behavior is not reasonably foreseeable; otherwise the state would not have allowed individuals with that particular criminal record to become licensed in that profession. There would be a defense or judicial presumption that the employer is not responsible for negligent hiring or retention for properly licensed ex-offenders. This presumption could be overcome only if the employer became aware of the employee's propensity to do harm through customer or co-worker complaints but failed to remedy the situation. In those instances, the employer could still be held liable.

Yet it is clear that society would not wish to have victims left uncompensated for harm suffered due to the misconduct of ex-offenders. Several options exist for insuring some level of compensation for injured third parties. One option would involve broadening the current federal bonding program to higher dollar amounts and to include violent acts against co-workers and customers. Employers who hire ex-offenders could also be required to pay into a private or government-sponsored insurance pool for ex-offender liability but later be compensated through a business expense deduction or tax credit (Leavitt 2002; see ABA 2004; U.S. Department of Labor 2001).

## VI. SUMMARY AND CONCLUSION

An examination of the history of reform movements reveals a pattern whereby policies are implemented and then corrected, and/or abandoned altogether and later resurrected in some repackaged form. This pattern was given classic expression by historian David Rothman when he posed the question "Why is it that reforms so often turn out to be in need of reform?" (1981: 5). That public officials are now discussing the problem of collateral sanctions and seeking to fund reentry programs, a policy that is a near return to the presumably defunct rehabilitative policy of offender reintegration, suggests that many of the reforms of the get-tough era have now arrived at their predictable destiny. They too are in need of reform.

The foregoing analysis has focused on the reform of get-tough policies that have limited employment prospects for millions of ex-offenders. Adjusting statutory and regulatory restrictions and prohibitions on employment, particularly in the context of occupational licensing, has been identified in reentry policy circles as one means of increasing the likelihood of ex-offender employment and the "collateral benefits" that may accrue as

a result of employment. However, many of the adjustments made to date have been, in the words of the New York Bar Association, relatively “moderate” (New York Bar Association 2006).

We have proposed that a first step for states would be to reassess their existing occupational licensing requirements using the BFOQ approach, which will more narrowly tailor employment exclusions to specified convictions that negatively impact job tasks and the essence of the business. In addition, ex-offenders who still are barred from certain professions may similarly challenge these restrictions individually, seeking exemptions on a case-by-case basis. Furthermore, employers need some protections from liability for negligent hiring and retention when ex-offenders are involved. Applying the BFOQ approach, employers should be allowed to raise a defense or judicial presumption that employers are not responsible for negligent hiring or retention for properly licensed ex-offenders, unless the employer became aware of subsequent employee conduct that indicates the employee’s propensity to do harm others. Lastly, improving the existing bonding or insurance options or establishing a workers compensation style program for workplace violence claims may also ameliorate harm to innocent third parties.

Though the BFOQ approach offers a recognized framework for reconsidering overly broad licensing requirements, some may question the challenging process of specifying crimes that will exclude ex-offenders from particular licensed occupations. Still others may question legal limitations on employer liability for ex-offender conduct that harms third parties. Nevertheless, the BFOQ and compensation approach articulated here balances a number of competing interests. Without undue risk to public safety, it makes it possible for ex-offenders to improve their success rates in reentering the community and bolster the financial well-being of their families and themselves through the world of gainful and legitimate employment. It also reduces employer liability, while still being sensitive to a victim’s need for compensation.

The ability of the BFOQ approach to reconcile these interests is an important advantage, given the persistent influence of “less eligibility” concerns on penal policy (Hawkins 1983). Garland (2001) has correctly observed that rehabilitative interventions—and reentry programming can surely be interpreted as reminiscent of rehabilitation—can only be justified in this day and age if they are seen as compatible with the interests of other stakeholders. The advantages of being more fair, rational, and effective are most readily seen when comparing the BFOQ approach to the unlikely options of protected class status, time-consuming and costly individual discrimination lawsuits, and the highly discretionary good moral character and varied job/offense relationship tests utilized in judicial and administrative processes.

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## NOTES

1. Offenders exhibit higher rates of AIDS/HIV infection, hepatitis, tuberculosis, and various hearing, vision, physical, and mental impairments that go untreated or are treated at more costly emergency stages due to the lack of employer-sponsored health care insurance (Maaruschak and Beck 2001; Hammett, Harmon and Rhodes 2002).
2. The concept of less eligibility reflects the idea that in order for prison to serve as an effective deterrent to crime, prison conditions must be worse than the worst socioeconomic conditions of law-abiding free society. Consequently, during the course of punishment, offenders should be "less eligible" for goods, services, and opportunities. Hawkins (1983) has observed that the principle of less eligibility has had a persistent influence on penal policy, affecting solutions to the problem of prisoners, work, and prison.
3. Ten states prohibit all employers and occupational licensing agencies from considering arrests that did not lead to conviction (Legal Action Center 2004).
4. A Reentry Policy Council has been formed and is funded through a private/public partnership that includes the U.S. Department of Justice, Department of Labor, and Health and Human Services. In 2004, the Urban Institute hosted a reentry roundtable that has produced a series of reports related to ex-offenders and employment. The Council of State Governments has also launched a comprehensive Web site that serves as a clearinghouse for all reentry issues, projects, reports, and up-to-date tracking of legislation. The American Bar Association and the New York State Bar Association are among many other groups that have convened special committees to address the issue of collateral sanctions and consequences due to felony convictions. The National Helping Individuals with Criminal Records Reenter through Employment (HIRE) has been the most ardent in working with legislators nationwide to reform their laws. HIRE is a project of the Legal Action Center.
5. In addition, when employers claim a business necessity to discriminate in disparate impact cases, the EEOC has urged employers to consider "the nature and gravity of the offense" . . . "the time that has passed since the conviction and/or the completion of the sentence and the nature of the job held or sought" (EEOC Policy Guidance 1987; *Smith v City of Jackson, Mississippi* 2005; Griggs 1971).

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