Missouri Law Review

Volume 41
Issue 3 *Summer 1976*

Article 9

Summer 1976

Employment of Criminal-Record-Victims in Missouri: Restrictions and Remedies

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Comments

EMPLOYMENT OF "CRIMINAL-RECORD-VICTIMS" IN MISSOURI: RESTRICTIONS AND REMEDIES

"Liberation is not deliverance. A convict may leave the galleys behind, but not his condemnation."

Victor Hugo, *Les Miserables**

I. INTRODUCTION

A criminal record's perpetual existence "victimizes" its holder with many lifelong burdens,[1] but none are as potentially devastating as the impaired ability to obtain employment. The record made of an arrest, charge, prosecution, probation, conviction, incarceration, or parole may seal the fate of the job applicant in both the public and private sectors, regardless of his behavior since the event and his actual ability to perform the work. This regrettable situation is at cross-purposes with every reformative expectation that society has for the holders of criminal records. This comment will document the plight of these persons, here designated "criminal-record-victims," when they seek employment in Missouri. It will not explain how employers can legitimately exclude persons with criminal records, but rather will consider how criminal-record-victims become *included* within the ranks of the employed through legal challenges to unreasonable restrictions on their employment. Two recurrent themes are that they can only overcome restrictions that are truly unreasonable, and that their relative indigence makes the more expensive remedies less available to them. The subject is analyzed by describing the persons involved, discussing the employment restrictions imposed, and delineating the remedies available to these aggrieved holders of criminal records.

A. *Who Are The "Criminal-Record-Victims"?*

The individuals who may receive "the life sentence of [a] stigmatic record"[2] include not only the "guilty," but also those who have at any time had a record-generating experience with any segment of the criminal justice system, regardless of whether it resulted in prosecution or conviction.[3] These people can be appropriately designated "criminal-record-

*1. V. HUGO, LES MISERABLES 98 (C. Wilbour transl. 1862).

1. For an exhaustive study of the history and nature of civil disabilities, including restrictions on voting, legal, judicial, and property rights as well as denial of employment, see *The Collateral Consequences of a Criminal Conviction,* 23 VAND. L. REV. 929 (1970).

2. A. NUSSBAUM, A SECOND CHANCE: AMNESTY FOR THE FIRST OFFENDER 99 (1974).

3. The most recent and tragic example of an innocent person's suffering in this way is reported in Paul v. Davis, 44 U.S.L.W. 4437 (U.S. Mar. 23, 1976). After the individual was arrested on a shoplifting charge, his photograph and

victims" because of the effect that such records have on their employment future. The number of criminal-record-victims is astonishingly large. In 1974 alone there were an estimated 9,055,800 arrests made in the United States.[4] It is reported that the total number of Americans with some form of criminal record is over 50 million.[5] Furthermore, every indication is that the frequency of the statistics-producing events is steadily on the rise. Criminal cases filed in the circuit courts of Missouri increased at the rate of 16 to 17 percent during both 1974 and 1975.[6] The ranks of Missouri's criminal-record-victims appear to be large and ever-growing. Their criminal records are widely available to the general public and to private companies,[7] and are frequently the basis for summary exclusion from employment consideration.

At least two characteristics of the criminal-record-victim population are crucial to an understanding of the problems involved. First, the heaviest burdens undoubtedly fall upon those who have had the deeper involvements with the criminal justice system. In Missouri, these would include such persons as the 2,017 prisoners incarcerated at the Missouri State Penitentiary in May, 1975,[8] and the 60,900 inmates held in Missouri's 134 jails during an average year.[9] The second characteristic is that certain social groups are disproportionately represented among criminal-record-victims. An estimated 50 to 90 percent of males in poverty areas have criminal records.[10] Black Americans over 18 years of age are approximately five times more likely to have been arrested than whites.[11] These

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name appeared in a police-prepared and -distributed flyer of "active shoplifters." Even after the charge was dismissed, the Supreme Court held that this action did not deprive the individual of any "liberty" or "property" rights protected by the fourteenth amendment.

4. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS—1974, Table 28 at 179 (1975).

5. Note, *Employment of Former Criminals,* 55 CORNELL L.Q. 306 (1970).

6. JUDICIAL DEPARTMENT OF MISSOURI, ANNUAL JUDICIAL CONFERENCE STATISTICAL REPORT 29 (1975). Data are for July 1—June 30 fiscal years.

7. Police departments are routinely the major suppliers of criminal record information for the general public and private companies. The St. Louis Board of Police Commissioners recently announced that it "will make available an arrest register for a period of up to thirty days from the date of arrest, even though no charge has been filed against the individual involved." St. Louis Board of Police Commissioners, Press Release (Mar. 18, 1976). The Kansas City Police Department will also provide arrest information to private companies, but only for arrests that have resulted in a conviction. Kansas City Police Department, Confidentiality of Computerized Information (1976). Conviction information is generally released to any company or individual.

8. Letter from George M. Camp, Deputy Director, Missouri Department of Social Services to Deverne Calloway, Missouri State Representative, July 21, 1975.

9. MISSOURI ASSOCIATION FOR SOCIAL WELFARE, SURVEYING MISSOURI'S JAILS Table 1 at 6 (1974).

10. PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967).

11. UNITED STATES COMMISSION ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE 48 (1969).

data attest to the following cogent description of a typical criminal-record-victim:

> . . . disproportionately male; from black or other racial or ethnic minority; under 25 years of age; unmarried; without a high school education; lacking in employment skills and experience; and stemming from broken homes with working mothers. He comes from a ghetto background which breeds crime and is characterized by inadequate housing, broken families, deteriorated neighborhoods, dilapidated and ineffective schools, unemployment and rampant drug use. . . . Poverty contrasted with economic affluence creates frustration and desires which can frequently only be satisfied by crime.[12]

B. *The Social Dysfunctions of Restrictions on Criminal-Record-Victim Employment*

The belief that employment is essential to the offender's successful reintegration into society was held by such mid-nineteenth-century correctional reformers as John Augustus.[13] The relationship has now been empirically demonstrated in careful criminological studies[14] and judicially noticed by several courts.[15] After fifteen years of action and research in the area, the Vera Institute of Justice has concluded that "employment is not only necessary for rehabilitation, but the process of employment itself with its discipline and associated learning process is an important part of the rehabilitative process."[16] This body of belief and knowledge makes the statistical reports that unemployment rates among criminal-record-victims are often over four times as high as the rates for the general population[17] all the more disturbing.

It has recently become stylish for scholars to scoff at the "mythology regarding the effectiveness of [correctional] treatment in any form."[18] Too few are recognizing that legal and not-so-legal impediments to a criminal-record-victim's subsequent employment may be making inordinate contributions to that ineffectiveness and to the consequential high rate of recidivism among criminal-record-victims. These impediments effectively prevent untold thousands of Missouri criminal-record-victims from adopting, or returning to, meaningful and law-abiding ways of life. The same restrictions thereby impose on Missouri citizens the unhappy burdens of increased crime and higher criminal justice system costs. Individuals bear-

12. NATIONAL ALLIANCE OF BUSINESSMEN, EX-OFFENDER PROGRAM UPDATE 4 (September, 1974).

13. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 2-4 (1967).

14. D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 329 (1964).

15. *See, e.g.*, Miller v. District of Columbia Bd. of Licenses, 294 A.2d 365, 370 (D.C. App. 1972).

16. VERA INSTITUTE OF JUSTICE, PROPOSED C.J.C.C.-V.E.R.A. SUPPORTIVE EMPLOYMENT PROGRAM FOR EX-ADDICTS AND EX-OFFENDERS 11 (1975).

17. G. POWNALL, EMPLOYMENT PROBLEMS OF RELEASED PRISONERS (1969).

18. J. WILSON, THINKING ABOUT CRIME 170 (1975). *See also* D. LIPTON, R. MARTINSON, J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975).

ing the less serious criminal records, such as arrests or probations, may become more serious criminal-record-victims if their records prevent their being gainfully employed. Almost 98 percent of this state's most serious criminal-record-victims—the inmates of the Missouri Department of Corrections—will eventually be released to their home communities.[19] If they cannot find employment the most severe social dysfunction may well be the resultant learning of illegal income-gathering techniques by the entire family. More than just the one criminal-record-victim will thus be lost to society, as the cycle may well produce a strange twentieth-century version of "visiting the iniquity of the fathers upon the children's children, unto the third and fourth generation."[20]

The social dysfunctions of employment discrimination against criminal-record-victims are many. Because the human and social costs involved are great, there is need for study and reform in this area.

II. Restrictions on Criminal-Record-Victim Employment in Missouri

A. *State Restrictions*

The Missouri constitution provides that persons convicted of felonies or crimes connected with voting may be excluded by law from voting.[21] It then limits the offices of representative,[22] senator,[23] and judge to qualified voters.[24] In addition, all elective executive officials of the state and judges of the supreme, appellate, and circuit courts are liable to impeachment for "crimes, misconduct, . . . or any offense involving moral turpitude. . . ."[25] These provisions are obviously of little concern to the typical criminal-record-victim described above, for the employment he seeks is almost never political or judicial office. A more relevant state constitutional provision is the one giving the head of each executive department the discretion to "select and remove all appointees in the department except as otherwise provided in this constitution, or by law."[26] The steady expansion of the state merit system has largely limited this discretion. Thus, the Missouri constitution itself does not provide major affirmative impediments to the employment of criminal-record-victims in Missouri.

Missouri statutes, however, contain a vast array of general disabilities and specific restrictions on the hiring and retention of criminal-record-

19. Missouri Department of Corrections, Annual Status Report 31 (July 1, 1974).

20. Exodus 34:7.

21. Mo. Const. art. VIII, § 2.

22. Mo. Const. art. III, § 4.

23. Mo. Const. art. III, § 6.

24. Mo. Const. art. V, § 25. Interestingly, the governor and other executive officers of Missouri are not subject to this "qualified voter" requirement. *Id.* at art. IV, §§ 3, 10, 13.

25. Mo. Const. art. VII, § 1. Removal, suspension, and discipline powers concerning other judicial officers' commissions of the same transgressions are vested in a commission on retirement, removal, and discipline of judges. *Id.* at art. V, § 27.

26. Mo. Const. art. IV, § 19.

victims. These include the temporary and permanent loss of voting rights for certain offenses,[27] forfeiture of "all public offices [of] trust, authority and power" upon being sentenced to a state institution,[28] and permanent disqualification from "holding any office of honor, trust or profit" for conviction of certain offenses.[29] The reach of these provisions has not been tested in Missouri. From Louisiana, however, comes the sad tale of a school bus driver who had been convicted of breaking and entering in 1937, but who had an unblemished record since that time, including his 1952-1961 employment by the school board.[30] He was nevertheless dismissed when the board learned of his offense 24 years after it occurred. The Louisiana Court of Appeals upheld the dismissal on the basis of a statutory provision against employing any persons with "criminal records" in "positions of trust or profit."[31] The corresponding provisions of Missouri statutes, if similarly interpreted, would significantly limit the employment opportunities of criminal-record-victims in Missouri.

Professional licensing is another area where state statutes restrict the employment of criminal-record-victims. There are more than seven million jobs in the nation potentially affected by laws on limited licensing for persons with criminal records.[32] In Missouri over 40 occupations[33] and more than 218,000 persons[34] are subject to the control of state occupational licensing authorities. The Young Lawyers Section of the Missouri Bar recently compiled a list of 41 occupations and professions from which criminal-record-victims can be excluded due to statutory licensing restrictions based on their criminal record rather than any personalized review of their individual abilities.[35] Even that listing fails to exhaust the

27. §§ 111.060, 559.470, 560.610, RSMo 1969.

28. § 222.010, RSMo 1969.

29. § 559.470, RSMo 1969. *See also* § 560.610, RSMo 1969.

30. Thomas v. Evangeline Parish School Bd., 138 So. 2d 658 (La. App. 1962).

31. *Id. See* Bromberger, *Rehabilitation and Occupational Licensing,* 13 WM. & MARY L. REV. 794, 800-01 (1972).

32. J. HUNT, J. BOWERS, N. MILLER, LAWS, LICENSES AND THE OFFENDER'S RIGHT TO WORK 4, 8 (1974). This publication by the National Clearinghouse on Offender Employment Restrictions provides, at Appendix A, an exhaustive list of "Statutory Conditions Affecting the Licensing of Ex-Offenders" for 307 occupations in all 50 states and the District of Columbia.

33. YOUNG LAWYERS' SECTION OF THE MISSOURI BAR, EMPLOYMENT RESTRICTIONS ON EX-OFFENDERS (1975).

34. Special Project, *Fair Treatment of the Licensed Professional: The Administrative Hearing Commission,* 37 Mo. L. REV. 410 (1972).

35. Young Lawyers' Section, *supra* note 32, at 11-15. The occupations are: accountant (§ 326.060, RSMo 1969), alcohol manufacturer or seller (§ 311.060, RSMo 1969), alcohol transporter (§ 311.420(2), RSMo 1969), architect (§§ 327.131, 327.151, 327.441, RSMo 1969), attorneys at law (§ 484.040, RSMo 1969, and Missouri Supreme Court Rule 8), barber (§§ 328.080, 328.127, RSMo 1969), chiropodist (§§ 330.030, 330.160, RSMo 1969), chiropractor (§ 331.030, RSMo 1969), cosmetologist (§§ 329.050, 329.060, RSMo 1969), dental hygienist (§§ 332.331, 332.410, RSMo 1969), dentist (§§ 332.131, 332.321, 332.331, RSMo 1969), drivers and chauffeurs (§ 302.060, RSMo 1969), embalmer (§§ 333.041, 333.121, RSMo 1969), engineer (§§ 327.221, 327.441, RSMo 1969), funeral director (§§ 333.041, 333.121, RSMo 1969), hairdresser (§ 329.050(1), RSMo 1969), industrial commission, member (§ 286.020, RSMo 1969), insurance agent

areas of statutorily restricted licensing.[36] The present restrictions generally do not consider the relationship between the offense and the work, the length of time since the conviction, and the post-conviction experience. These statutes generally provide for license denials based upon specific criminal offenses, offenses involving "moral turpitude," or the absence of "good moral character." Missouri courts have construed "moral turpitude" so broadly as to include "all acts done contrary to justice, honesty, modesty or good morals."[37] Empirical research in a variety of jurisdictions has shown that the "moral turpitude" standard is so vague that it can include almost any offense,[38] and that the "good moral character" requirement has been applied almost exclusively to criminal-record-victims.[39] The licensing authority may even base a denial on an *alleged* violation despite the individual's subsequent acquittal.[40] Licensing statutes are generally justified by the state's power to protect the public's health, safety, morals, and welfare.[41] As now written and interpreted, however, they constitute immense barriers to criminal-record-victims seeking employment in a licensed field.

Criminal-record-victims seeking employment with state governments themselves are often summarily excluded under authority conferred by statute.[42] Missouri statutes on the state merit system grant the following authorization:

> Subject to the regulations, the director may reject the application of any person for admission to an examination or may strike the

(§§ 375.018, 375.091, 375.141, RSMo 1969), insurance broker (§§ 375.091, 375.141, RSMo 1969), hearing aids: fitters and dealers (§§ 346.055, 346.105, RSMo 1969), land surveyor (§§ 327.311, 327.331, 327.441, RSMo 1969), liquor control agent (§ 311.620, RSMo 1969), liquor control supervisor (§ 311.610, RSMo 1969), liquor wholesalers (§ 312.040, RSMo 1969), manicurist (§ 329.050, RSMo 1969), manufacturer, distributor or dispenser (§ 195.040, RSMo 1969), nursing home administrator (§§ 338.055, 344.030, RSMo 1969), nursing home license (§ 198.120, RSMo 1969), optometrist (§§ 336.030 (2), 336.110, RSMo 1969), osteopath (§ 334.100, RSMo 1969), pharmacist (§§ 338.050, 338.055, RSMo 1969), physician/surgeon (§§ 334.100, 334.590, RSMo 1969), practical nurse (§ 335.060, RSMo 1969), professional physical therapist (§§ 334.530, 334.590, RSMo 1969), reader for the blind (§ 209.030, RSMo 1969), real estate agent (§§ 339.110, 339.040, RSMo 1969), securities dealer/salesman (§ 409.150, RSMo 1969), security broker (§ 409.204, RSMo 1969), speech pathologist and clinical audiologist (§§ 345.050, 345.065, RSMo 1969), tavern owner: liquor license (§ 311.480, RSMo 1969), teacher (§ 168.031, RSMo 1969), veterinarian (§§ 340.060, 340.140, RSMo 1969).

36. *See, e.g.*, §§ 325.030, 325.035, RSMo 1973 Supp. (the statutes on licensing of public adjusters and adjuster solicitors).

37. Neibling v. Terry, 352 Mo. 396, 397, 177 S.W.2d 502, 503 (Mo. En Banc 1944). *See also In re* Burrus, 258 S.W.2d 625, 626 (Mo. En Banc 1953); *In re* McNeese, 346 Mo. 425, 427, 142 S.W.2d 33, 34 (Mo. En Banc 1940).

38. J. HUNT, *supra* note 32, at 7.

39. Ohanesian, *Restoration of Rights to Felons in California*, 2 PACIFIC L.J. 718 (1971).

40. Crooms v. Ketchum, 379 S.W.2d 580, 587 (Mo. 1964).

41. *See* Dent v. West Virginia, 129 U.S. 114 (1899).

42. For a general analysis of restrictions on governmental employment, see H. MILLER, THE CLOSED DOOR: THE EFFECT OF A CRIMINAL RECORD ON EMPLOYMENT WITH STATE AND LOCAL PUBLIC AGENCIES (1972).

> name of any person from a register or refuse to certify the name of any person on a register for a position or withdraw the certification of such a person if he finds that such person . . . has been convicted of a crime or guilty of any notoriously disgraceful conduct . . . .[43]

The language grants even greater discretion for summary action against criminal-record-victims than do most of the licensing statutes. The Missouri Division of Personnel asks every applicant for a state job this question: "Have you ever been convicted of any law violation or are you now under charges for any offense other than minor traffic violation?"[44] At stake are approximately 68,000 jobs with the state government.[45]

The myriad "regulations" of licensing boards, the Division of Personnel, and other state agencies may either exacerbate or mitigate the limitations discussed above. Their effect is largely unknown at present due to their relative unavailability. The imminent creation of the Missouri Register and the Code of State Administrative Regulations[46] should make these administrative guidelines available for review. Unfortunately, they will most likely be found to contain still further state-imposed restrictions on criminal-record-victim employment in Missouri.

B. *Local and Federal Restrictions*

Local government ordinances generally include some restrictions very similar to those contained in the state statutes.[47] For example, the personnel director of Kansas City has the broad authority to make and amend rules on the rejection of job candidates due to defects in "moral character."[48] Similar obstacles may confront the criminal-record-victim seeking one of the almost 175,000 jobs available in Missouri local government.[49]

The federal government also has a major impact on criminal-record-victims seeking work in Missouri. For example, a federal statute prohibits persons convicted of certain offenses from working for a bank insured by the Federal Deposit Insurance Corporation.[50] Department of Defense regulations bar many former offenders from government contract work through security clearance restrictions.[51] The federal government itself directly provides over 67,000 jobs in Missouri.[52] The President of the United States has directed the Civil Service Commission to prevent

43. § 36.180, RSMo 1969.
44. Brief for Appellee at 36, Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 (8th Cir. 1975).
45. UNITED STATES DEPT. OF COMMERCE, PUBLIC EMPLOYMENT IN 1974, Table 8 at 16 (1975).
46. *See* § 536.015, RSMo 1973 Supp.
47. H. MILLER, *supra* note 42, at 37.
48. CITY OF KANSAS CITY, MISSOURI CHARTER Part V, § 116(3) (1967).
49. UNITED STATES DEPT. OF COMMERCE, PUBLIC EMPLOYMENT IN 1974, Table 8 at 16 (1975).
50. 12 U.S.C. § 1829 (1970).
51. 32 C.F.R. § 155.5, 156 (1970).
52. UNITED STATES DEPT. OF COMMERCE, PUBLIC EMPLOYMENT IN 1974, Table 8 at 12 (1975).

federal employers from unjustly discriminating against criminal-record-victims.[53] Nevertheless, the Commission's most recent "suitability disqualifications" still grant rather broad discretion to refuse to give an examination to an applicant, to deny an appointment to an eligible applicant, and to remove an appointee on the basis of "criminal, dishonest, infamous or notoriously disgraceful conduct."[54] Finally, there are certain express disqualifications from federal employment, such as for persons convicted of participation in certain riots[55] and of advocating the overthrow or destruction of the United States government.[56]

C. *Private Sector Restrictions*

The strongest, although least demonstrable, limitations on the employment of criminal-record-victims are probably those generated by the private sector. Criminal-record-victims face a widely-recognized, antagonistic network of "informal pressures."[57] In New York City, 311 of 475 potential employers stated that they would never hire a released offender.[58] Approximately 75 percent of the employment agencies contacted in another study refuse to refer any applicant with an arrest record, regardless of whether the arrest was followed by conviction.[59] Furthermore, most employers willing to hire criminal-record-victims will consider them only for relatively unskilled work.[60] Bonding requirements provide an additional barrier, because many bonding companies both demand that their clients avoid hiring criminal-record-victims and explicitly refuse to bond such persons.[61] There is usually no consideration given to whether a rational connection exists between the offense and the job and to whether behavior since the offense indicates any sort of personal reformation.

A criminal record may also preclude membership in labor unions or apprenticeship programs.[62] It was not until the Civil Rights Act of 1964 that Congress acted to assure the right of admission to unions on a broad basis. Even then, the right was extended only to those denied such membership because of "race, color, religion, sex, or national origin."[63] The Landrum-Griffin Act prohibits certain felons from serving as of-

53. June 19, 1975 CONG. REC. S 11021.
54. FEDERAL PERSONNEL MANUAL, § 731.202 (b) (2) (July 3, 1975).
55. 5 U.S.C. § 7313 (1970).
56. 18 U.S.C. § 2385 (1970). The employment bar resulting from this treasonous crime lasts for only five years. This seems ironic when compared to the permanent bars created by Missouri statutes for many less serious offenses. *See* text accompanying notes 35, 36, and 43 *supra*.
57. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 10, at 169.
58. Note, *supra* note 5, at 307.
59. *Id.*
60. Meltsner, Caplan, and Lane, *An Act to Promote the Rehabilitation of Criminal Offenders in the State of New York*, 24 SYRACUSE L. REV. 885, 890 (1973).
61. *Id.* at 892.
62. H. MILLER, *supra* note 42, at 51.
63. 42 U.S.C. § 2000 (e)-2 (e) (1970).

ficers or directors of labor unions,[64] and affects many more persons than just the organized crime figures it was designed to exclude. Finally, many labor contracts expressly permit the employer to discriminate against criminal-record-victims in hiring and discharge policies.[65]

III. Remedies for Unreasonable Restrictions on Criminal-Record-Victim Employment in Missouri

It has been shown that today's criminal-record-victim faces a veritable maze of state, local, and federal governmental restrictions on his employment opportunities, as well as greater barriers in the private sector. Many of the limitations may be reasonable and justifiable, but far too many are not. Some are arbitrary and capricious. It is this latter group of restrictions which the criminal-record-victim can hope to challenge successfully. The challenges may take the form of attempts to eliminate the criminal record itself, or of efforts to limit the effect through administrative, judicial, or legislative action.

A. *Remedies for Governmental Retention of Certain Criminal Records*

The victimizing effects of criminal records are lessened where the records themselves are subject to destruction under appropriate circumstances.[66] Missouri does not have an extensive statutory scheme pertaining to the retention of criminal records. The one major statute on the subject authorizes the "Bertillon signatelic card system" for accumulation and dissemination of felony records.[67] These and other records made by criminal justice officials are destroyed only in very rare instances. The ways to challenge their continued existence are limited to certain specific situations.

Missouri does have a statute allowing record destruction after a juvenile offender's seventeenth birthday.[68] It is based on the belief that the youth should be freed from the lifelong taint caused by a delinquency record. The statute, however, provides for only partial destruction of juvenile records, and even that provision is directory rather than mandatory. The "social histories, records, and information" which can be destroyed still expressly exclude "the official court file,"[69] so that "the statute leaves untouched the essential adjudication of status."[70] A motion by the court, the youngster, or the juvenile officer and a court finding of

64. 29 U.S.C. § 504 (a) (1970).
65. *See generally* Kovarsky, *Civil Rights and Arbitration,* 1974 Wash. U.L.Q. 59.
66. *See* Annot., 46 A.L.R.3d 900 (1972).
67. § 222.050, RSMo 1969. The statute provides that the person may be subjected to "the measurements, processes, and operations" used in the identification of criminals.
68. § 211.321 (3), RSMo 1969.
69. *Id.*
70. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 Wash. U.L.Q. 147, 177-78.

the child's best interest are required to be made before the court "may . . . enter an order to destroy."[71] Although the statute is more narrow than is generally recognized, a criminal-record-victim is well-advised to make full use of what record destruction it does allow.

Special consideration for the effects of a criminal record on young persons is also reflected in a recent Missouri statute which provides for the expungement of criminal records for persons not over 21 years of age who are placed on probation for certain minor narcotics violations.[72] The statute describes the mandated expungement in absolute terms, sets simple criteria based on probation and post-probation behavior, and directs that the court "shall enter" the order if the criteria are met. Of perhaps greatest significance is the provision that the individual will never be liable for failure to disclose his criminal justice encounter. This immunity can be crucial to the criminal-record-victim seeking employment.

Unfortunately, the relief this statute was designed to provide for the young criminal-record-victim has been diminished by two recent cases. The Missouri Supreme Court in *State v. Kraus*[73] held that an applicant cannot file his application for expungement until after his probationary period has ended. Only the lone dissenter interpreted the statute with a view to its purpose and its desired effect on the criminal-record-victim:

> I do not believe it is consistent with the remedial purpose behind Sec. 195.290 to interpret it so that a youthful offender with a good post-conviction record may have to wait anywhere from one to five years before he can obtain the relief of having his conviction expunged. By that time his chance of rehabilitation, higher education, useful employment, normal living and the opportunity to be a part of society free from the stigma of conviction may have passed. If the remedy is going to do him any good as a youthful offender, it must come soon. I think that is what the legislature had in mind and that the court of appeals was correct in holding that the application could be made and acted upon any time after the first six months of the probationary period has passed.[74]

71. § 211.321 (3), RSMo 1969.

72. Section 195.290, RSMo 1973 Supp. provides in part:
After a period of not less than six months from the time that an offender was placed on probation by a court, such person, who at the time of the offense was twenty-one years of age or younger, may apply to the court which sentenced him for an order to expunge from all official records . . . all recordations of his arrest, trial and conviction. If the court determines . . . that such person during the period of such probation and during the period of time prior to his application to the court under this section has not been guilty of any offenses, or repeated violation of the conditions of such probation, he shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied prior to such arrest and conviction. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest or trial or conviction in response to any inquiry made of him for any purpose.

73. 530 S.W.2d 684 (Mo. En Banc 1975).

74. *Id.* at 688 (Seiler, C.J., dissenting).

Some judges have refused to destroy the records, with one judge even deeming it proper merely to place "a record in his safe to prevent it from being made available to the public."[75] The Attorney General of Missouri counseled against this practice by declaring that the requirement of "expungement" could only be met by the "physical destruction of the records."[76] In *State ex rel. M.B. v. Brown*[77] the St. Louis District of the Missouri Court of Appeals directly contradicted the Attorney General's advice on the meaning of "expungement." It held that the statute "does not call for destruction or annihilation of the records themselves" and that the legislature intended only the striking out of that part of the record which identifies it with the offender.[78]

These decisions do not totally emasculate the statute, but it is clear that judicial interpretation has thus far construed this remedial piece of legislation so as to limit the remedy available to the criminal-record-victim. Nevertheless, the eligible criminal-record-victim should once again avail himself of whatever relief the statute can yield.

Missouri's new "sunshine law" on governmental meetings[79] contains some supplemental provisions of great potential importance to criminal-record-victims.[80] These sections call for the "closing" of arrest and detention records where there has been a delay in charging and for the "expungement" of those closed records when there has been a failure to convict.[81] There is also a required "closing" of official records when an arrestee's case is subsequently nolle prossed, dismissed, or concluded by a not guilty finding.[82] Finally, the statute grants immunity for failure to acknowledge closed or expunged records.[83] The Attorney General has issued strict ad-

75. 31 Mo. Att'y Gen. Op. No. 111 (Feb. 4, 1974).

76. *Id.* The Attorney General stated that the word "expunge" in this statute should be taken as meaning "not a legal act, but a physical annihilation."

77. 532 S.W.2d 893 (Mo. App., D. St. L. 1976).

78. *Id.* at 896.

79. Ch. 610, RSMo 1973 Supp.

80. The statute has already withstood a challenge based upon the rule against two subjects in one bill, as found in article III, section 23, of the Missouri constitution. See Cohen v. Poelker, 520 S.W.2d 50 (Mo. En Banc 1975).

81. Section 610.100, RSMo 1973 Supp., provides:
If any person is arrested and not charged with an offense against the law within thirty days of his arrest, all records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records to all persons except the person arrested. If there is no conviction within one year after the records are closed, all records of the arrest and of any detention or confinement incident thereto shall be expunged in any city or county having a population of five hundred thousand or more.

82. Section 610.105, RSMo 1973 Supp., provides:
If the person arrested is charged but the case is subsequently nolle prossed, dismissed or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged.

83. Section 610.110, RSMo 1973 Supp., provides:
No person as to whom such records have become closed records or as to whom such records have been expunged shall thereafter, under any provision of law, be held to be guilty of perjury or otherwise of giving a false

visory guidelines for "closing records,"[84] and has once again defined "expunge" to require "physical destruction."[85] In view of *State v. Kraus*[86] and *State ex rel. M.B. v. Brown*,[87] however, this definition will probably not be followed. The statute itself is very limited, with "expungement" being available only in a specific circumstance and then only in a city or county having a population of 500,000 or more. Also, "closing" is an extremely imprecise concept at best. It is again desirable, of course, for the criminal-record-victim to take advantage of whatever remedies are available to remove the burden of his record. Furthermore, it is only through greater and more regular use of these provisions that there can be hope for more expansive interpretations.

Missouri does not have statutes making the expungement remedy more broadly available to criminal-record-victims in general. Such comprehensive statutes have been urged by the National Advisory Commission on Criminal Justice Standards and Goals[88] and have recently been enacted in several states.[89] Legislation in other nations, such as Japan and the Soviet Union, contain some of the more far-reaching provisions for the expungement of criminal records.[90] The fundamental issue is whether our social policy should continue to sanction the infliction of permanent stigmata upon most criminal-record-victims and to allow only very limited means of removal. The extent of relief provided elsewhere demonstrates the limitations on opportunities now available in Missouri for the criminal-record-victim seeking record expungement, and the nature of his employ-

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statement by reason of his failure to recite or acknowledge such arrest or trial in response to any inquiry made of him for any purpose.

84. 31 Mo. Att'y Gen. Op. No. 109 (Mar. 25, 1974).

85. 30 Mo. Att'y Gen. Op. No. 299 (Sept. 28, 1973).

86. *See* note 74 and accompanying text *supra*.

87. *See* note 77 and accompanying text *supra*.

88. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COMMUNITY CRIME PREVENTION Recommendation 5.5 at 129-30 (1973). The relief involved in comprehensive statutes is variously referred to as expungement, record sealing, record destruction, obliteration, setting aside of conviction, annulment of conviction, nullification of conviction, and amnesty. The acts done to the records vary accordingly, with even the basic term "expungement" being subject to many interpretations.

89. ALASKA STAT. § 47.10.060(e) (1975); CAL. PENAL CODE § 1203.4 (West Supp. 1976); DEL. CODE ANN. tit. 11, § 4332(i) (Supp. 1970); IDAHO CODE § 19-2604 (Supp. 1973); KAN. STAT. ANN. § 21-4617 (Supp. 1973); MICH. COMP. LAWS ANN. § 780.622 (1968); MINN. STAT. ANN. § 609.166 (Supp. 1976); NEV. REV. STAT. § 179.245 (1967); N.J. REV. STAT. § 2A: 164-28 (1971); OHIO REV. CODE ANN. § 2953.32(C) (Page 1976); TEX. CODE CRIM. PRO. art. 42.12 § 7 (1966); UTAH CODE ANN. § 77-35-17.5 (Supp. 1973); WASH. REV. CODE ANN. § 9.95.240 (1961). Two of these statutes are carefully reviewed in Klinge, *Expungement of Criminal Convictions in Kansas*, 13 WASHBURN L.J. 93 (1974), and Comment, *Expungement in Ohio: Assimilation into Society for the Former Criminal*, 8 AKRON L. REV. 480 (1975).

90. *See* PENAL CODE OF JAPAN, art. 34-2, 2 E.H.S. LAW BULL. 10 (Ministry of Justice transl.); RSFSR CRIM. CODE art. 57, in BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 173-75 (1966). *See also* Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders*, 1966 WASH. U.L.Q. 147, 162-63, n.72.

ment dilemma argues for a much more sweeping statutory authorization for freeing the individual from the millstone of a criminal record.[91]

Criminal-record-victims should be aware that under certain circumstances they may have an equitable cause of action for record expungement. Federal courts have so held:

> The judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law.[92]

> The principle is well established that a court may order the expungement of records, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights.[93]

Similar recognitions have been made by several state courts.[94] Most of these cases are limited to the expungement of arrest records where the individual was not subsequently convicted, and some require a showing that the arrest was not based on probable cause.[95] Equitable actions to remove records naturally necessitate a demonstration that there is no adequate remedy at law.[96] The decisions typically turn on a balancing of society's interests in record retention against the criminal-record-victim's showing of infringed rights.[97]

Missouri case law on such "equitable expungement" is scarce.[98] In *State ex rel. Reed v. Harris*[99] the criminal-record-victim was seeking to enjoin the police from disseminating his arrest record. The state contended that no such cause of action exists in Missouri, but the court refused to "hold . . . that a cause of action cannot be stated."[100] Although the court

91. The National Council on Crime and Delinquency has proposed a model "Act to Authorize Courts to Annul a Record of Conviction for Certain Purposes." *See* A.B.A., COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS V-19 (2d ed. 1975).

92. Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974). This conclusion was particularly important in view of the lengthy history of this controversial case. *Id., remanding with instructions sub. nom.* Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971), *remanded with instructions,* 430 F.2d 486 (D.C. Cir. 1970).

93. Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir.), *cert. denied,* 414 U.S. 880 (1973). *See also* Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

94. *See, e.g.,* Davidson v. Dill, 503 P.2d 157 (Colo. 1972); Spock v. District of Columbia, 283 A.2d 14 (D.C. App. 1971); Doe v. Commander, Wheaton Police Department, 273 Md. 262, 329 A.2d 35 (1974); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).

95. Hughes v. Rizzo, 282 F. Supp. 881, 885 (E.D. Pa. 1968).

96. Haine, *Police Records of Arrest: A Brief for the Right to Remove Them from Police Files,* 17 ST. L.U.L.J. 263, 269, 274 (1972).

97. *E.g.,* the presumption of innocence, due process, freedom from unreasonable search and seizure, the right to privacy, and generally the penumbras of the specific guarantees of the Bill of Rights "formed by emanations from these guarantees that help give them life and substance." Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

98. Expungement in Missouri is briefly discussed in Note, *Expungement v. Retention of Arrest Records,* 41 U.M.K.C.L. REV. 106, 115-16 (1972).

99. 348 Mo. 426, 153 S.W.2d 834 (Mo. En Banc 1941).

100. *Id.* at 433, 153 S.W.2d at 837.

in *Cissell v. Brostron*[101] found against a plaintiff seeking similar relief, the case turned on two evidentiary questions: "[D]id the retention of . . . records by the police department interfere with respondent's pursuit of employment to his damage, and was respondent denied employment by reason of such retention . . . [?]"[102] The court thus implied that a plaintiff meeting those proof requirements would be granted relief. The relief, however, would not be timely because the criminal-record-victim is entitled to a court order only *after* he suffers the employment-related detriment. The deserving criminal-record-victim needs a way to be freed from the weight of his record *before* incurring such a detriment. Furthermore, the equitable orders involved in the Missouri cases would only enjoin dissemination and would not provide any form of expungement. Therefore, this remedy is a particularly unpromising one for the criminal-record-victim seeking relief in Missouri. Criminal procedure in Missouri seems to offer some potential criminal-record-victims the opportunity to avoid a "conviction," that most damaging of all criminal records, even though there has been an ascertainment of guilt by verdict or plea. Jurisdictions vary widely on what constitutes a conviction,[103] but the consistent Missouri interpretation has been that pronouncing judgment and imposing sentence are necessary before there can be a conviction.[104] Therefore, a criminal defendant can be spared an actual conviction through such means as probation prior to sentencing or suspended imposition of sentence.[105] A defendant who can emerge from his criminal justice experience without a "conviction" is much less likely to suffer the employment problems he might otherwise encounter as a result of that experience.

There is one federal law which can provide some assistance for young persons convicted of a federal criminal violation. If they are between 18 and 26 years of age, they are eligible for sentencing under the Federal Youth Corrections Act.[106] The Act provides that upon the youth's discharge from a correctional institution or from probation "the conviction shall be automatically set aside" and there shall be issued "to the youth offender a certificate to that effect."[107] This has been construed to require an "expungement,"[108] so it can be very helpful in avoiding future employment problems. Indeed, a major purpose of the "set aside" provision was "to help [the offender] and keep him from having to be turned down by a prospective employer because of the fact that he had had a

101. 395 S.W.2d 322 (St. L. Mo. App. 1965).
102. *Id.* at 325-26.
103. 24 C.J.S. *Criminal Law* § 1556(2) (1961).
104. *See* State v. Frey, 459 S.W.2d 359 (Mo. 1970); Neibling v. Terry, 352 Mo. 396, 177 S.W.2d 502 (1944); State v. Townley, 147 Mo. 205, 48 S.W. 833 (1898); Meyer v. Missouri Real Estate Commission, 183 S.W.2d 342 (K.C. Mo. App. 1944).
105. State v. Frey, 459 S.W.2d 359, 360-62 (Mo. 1970).
106. 18 U.S.C. § 5005-26 (1970).
107. 18 U.S.C. § 5021 (1970).
108. Tatum v. United States, 310 F.2d 854 (D.C. Cir. 1962).

conviction."[109] Unfortunately, the actual experience once again seems to be one of consistently thwarting that purpose.[110]

The total picture for the criminal-record-victim in Missouri seeking remedies for governmental retention of the records themselves is thus a relatively bleak one. This review lends some support to the conclusion that "expungement statutes are so riddled with legislative and case law exceptions that they are almost wholly ineffectual."[111] Criminal-record-victims and their advocates generally do not have the financial resources to undertake litigation aimed at getting more favorable interpretations. The Missouri expungement statutes apply in only a very limited number of situations, and there is essentially no Missouri authority for a meaningful "equitable expungement." Until this state's laws do provide a general right to expungement for deserving criminal-record-victims,[112] many of these people will continue to suffer major unemployment and underemployment problems, and the citizens of Missouri will continue to suffer higher than necessary recidivism rates and criminal justice system costs.[113]

B. *Administrative Remedies*

Administrative remedies would seem to be the most appropriate means by which an individual criminal-record-victim can seek relief from unreasonable employment restrictions. The criminal-record-victims who suffer the most from such restrictions are very often so destitute that they cannot retain a lawyer. Furthermore, adjudicatory relief is too infrequent, and too meager when granted, for many lawyers to be interested in undertaking such litigation. Certain forms of administrative relief can be obtained without an attorney's services, and most forms require less extensive legal representation than do court actions. It is logical, therefore, that unemployed and underemployed criminal-record-victims would look to administrative processes for possible assistance in overcoming employers' unreasonable restrictions. The most basic administrative remedy of use to the criminal-record-victim should be the right to challenge any inaccuracies in his criminal records. Kansas officials recently issued a lucid declaration of the individual's right to access, review, and challenge his criminal history records.[114] The person is explicitly entitled to an initial decision by the head of the agency holding the records. If that decision is

109. *Hearings on S. 1114 and S. 2609 before the Senate Comm. on the Judiciary,* 81st Cong., 1st Sess., 70 (1949).

110. *See* Schaefer, *The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction,* 39 FED. PROBATION 31 (1975).

111. Comment, *Criminal Records of Arrest and Conviction: Expungement from the Public Access,* 3 CALIF. WEST. L. REV. 121, 125 (1967).

112. For reference to an excellent model expungement statute, *see* note 91 *supra.*

113. A very cogent article has been written on the ethical questions regarding expungement statutes. Kogon & Loughery, *Sealing and Expungement of Criminal Records—The Big Lie,* 61 J. CRIM. L.C. & P.S. 378 (1970). Those questions should be addressed and resolved in the drafting of any such legislation.

114. Kansas Bureau of Investigation, Press Release (March 16, 1976).

adverse, it can be appealed to the Attorney General; and judicial relief is still available if the appeal is denied. If the challenge is anywhere sustained, the record-keeper is required to make the needed change, inform other criminal justice agencies possessing the information of the correction, and provide the individual with a list of non-criminal justice agencies known to have received the original information. A similarly specific administrative delineation of rights should be issued in Missouri.

The oldest form of relief for restoring civil rights to the criminal-record-victim is the pardon, an administrative procedure authorized in 49 states.[115] The Missouri constitution gives to the governor the power to grant reprieves, commutations, and pardons "upon such conditions and with such restrictions and limitations as he may deem proper."[116] He is statutorily empowered to appoint a "board of inquiry" to investigate clemency requests.[117] But all applications must be referred to the Missouri Board of Probation and Parole.[118] The Missouri statutes provide that only a gubernatorial pardon may remove a convicted person's disabilities regarding jury duty, voting, and holding any office of honor, profit or trust.[119] However, there are also provisions for the automatic restoration "to all the rights and privileges of citizenship" for absolutely discharged probationers or parolees[120] and for a first-time felon who has been discharged from detention and not been involved in any further crime for two years or who has been discharged from parole.[121] The first such form of automatic restoration has been held to be an express exception to the gubernatorial pardon requirement.[122]

The criminal-record-victim's employment outlook is certainly brightened by pardons and automatic restorations, at least to the extent of making him eligible to hold positions of honor, profit, or trust. Nevertheless, these forms of executive relief have only limited effects when compared to other forms of relief, such as expungement. They remit punishment and remove some disabilities, but they do not affect the legal event determinative of the criminal status, the conviction itself.[123] Furthermore, the pardon power is to be strictly construed so that it can extend only to state criminal offenses, and not to municipal ordinance violations[124] or license revocations based on some misbehavior.[125] A pardon can nonetheless be

115. NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS, REMOVING OFFENDER EMPLOYMENT RESTRICTIONS 42d ed. 1973).
116. Mo. CONST. art. IV, § 7. *See also* § 549.010, RSMo 1969.
117. § 552.070, RSMo 1969.
118. § 549.241, RSMo 1969.
119. § 222.030, RSMo 1969. For the statutory provisions regarding the loss of a convict's civil rights, *see* notes 20-29 and accompanying text *supra*.
120. § 549.111, RSMo 1969.
121. § 216.355, RSMo 1969.
122. State *ex rel.* Oliver v. Hunt, 247 S.W.2d 969, 973-74 (Mo. En Banc 1952).
123. *See* Carlesi v. New York, 233 U.S. 51 (1914).
124. State *ex rel.* City of Kansas City v. Renick, 157 Mo. 292, 57 S.W. 713 (Mo. En Banc 1900).
125. Theoror v. Dept. of Liquor Control, 527 S.W.2d 350 (Mo. En Banc 1975). *See also* Hughes v. State Bd. of Health, 348 Mo. 1276, 159 S.W.2d 277 (1942).

used to reinstate a license applicant's eligibility where the criminal record is shown to be the sole reason for denying the application.[126] In general, however, the pardon is not an effective means for improving a criminal-record-victim's employment possibilities because an employer can look behind the pardon to the criminal record.[127] The automatic restoration statutes are of potentially greater benefit to the criminal-record-victim. The automatic nature of this relief avoids the necessity of legal costs, and is thus responsive to the indigence of most criminal-record-victims. Missouri's current statutes in this area do not affect the criminal record itself, however, so that significant broadening of both the automatic restoration and pardon powers is clearly needed.

Criminal-record-victims aggrieved by the decisions of licensing authorities have historically had few effective remedies or ways to challenge the decisions.[128] In 1965 the Missouri General Assembly created the Administrative Hearing Commission[129] in order to give greater procedural protection to occupational licensees. The Commission has authority to conduct hearings and make findings of fact and conclusions of law on all questions involving the issuance, revocation, suspension, or probation of certain occupational licenses.[130] An aggrieved applicant or licensee can appeal to the Commission from the final decisions of 15 different licensing agencies,[131] and will be granted a hearing conducted in accordance with the Missouri Administrative Procedure and Review Act.[132] This carefully structured procedure has already generated several favorable determinations for criminal-record-victims. The most noteworthy of these took place when the Commission reversed a decision by the State Board of

126. Damiano v. Burge, 481 S.W.2d 562 (Mo. App., D.K.C. 1972).

127. National Council on Crime and Delinquency, *Annulment of a Conviction of Crime*, 8 CRIME AND DELINQUENCY 97 (1962).

128. Tepper & Feinstein, *Attacking Barriers to Employment* in PRISONER'S RIGHTS SOURCEBOOK 217, 219-20 (M. Hermann and M. Haft ed. 1973). An excellent commentary on state laws restricting the occupational licensing of former offenders is contained in J. HUNT, J. BOWERS, AND N. MILLER, LAWS, LICENSES, AND THE OFFENDER'S RIGHT TO WORK (1974).

129. §§ 161.252-.342, RSMo 1969. *See* Special Project, *Fair Treatment for the Licensed Professional: The Missouri Administrative Hearing Commission*, 37 MO. L. REV. 410 (1972).

130. § 161.272, RSMo 1969.

131. The statute gives the Commission authority over licensing decisions by the following agencies: Missouri State Board of Accountancy, State Board of Registration for Architects and Professional Engineers, State Board of Barber Examiners, State Board of Cosmetology, State Board of Chiropody and Podiatry, State Board of Chiropractic Examiners, Missouri Dental Board, State Board of Embalmers and Funeral Directors, State Board of Registration for the Healing Arts, Division of Insurance, State Board of Nursing, State Board of Optometry, Board of Pharmacy, Missouri Real Estate Commission, and Missouri Veterinary Medical Board. § 161.272, RSMo 1969. The Commission's rules state that it has jurisdiction over four additional agencies: Department of Agriculture, Division of Mental Health, Missouri Board of Nursing Home Administrators, and Commissioner of Securities. MO. ADMIN. HEARING COMM. RULE 1.00 (3) (1975); 11 V.A.M.S. § 161.342 (Supp. 1976).

132. § 536.100, RSMo 1969.

Registration for the Healing Arts and ordered that Dr. Bernard Finch, a convicted murderer, be permitted to take a licensing examination.[133] The Commission found favorably for Dr. Finch's "rehabilitation" and "good moral character" and concluded that the Board's determination had been "unreasonable, arbitrary, and . . . an abuse of discretion."[134] The court opinion upholding the Commission added an important procedural clarification: "Now, under the Administrative Hearing Commission Act, if the board determines to deny the application, the hearing on qualification is to be held by the administrative hearing commission, on complaint of the applicant."[135] The Act thus vested authority in the Commission to conduct an evidentiary hearing in regard to the seriousness of the alleged criminal conduct, the extent of repentence and rehabilitation, and all other factors bearing on license eligibility.[136] This interpretation of the Commission's powers was reaffirmed in *State Board of Registration for the Healing Arts v. De Vore*.[137]

The Administrative Hearing Commission's existence and authority has thus proven to be of substantial benefit to criminal-record-victims with licensing grievances. It must be pointed out, however, that the doctor-licensees in these two cases were not typical criminal-record-victims in terms of their wealth, and were therefore able to retain highly capable attorneys[138] and to present most impressive arrays of evidence.[139] The Administrative Hearing Commission is a "second-level" administrative process, a stage at which the indigence of most criminal-record-victims significantly reduces their ability to present their cases. Another limitation exists in the fact that several licensing authorities are not subject to the Commission's jurisdiction and procedures.[140] The procedural rights accorded applicants before these omitted licensing bodies are far less comprehensive,[141] and the administrator's discretion is much broader before being subject to judicial review.[142] These aggrieved applicants have no further administrative relief, and therefore they are limited to the even more expensive judicial remedies. The Administrative Hearing Commission's proceedings should be within the economic reach of criminal-record-victims and should

133. State Bd. of Registration for the Healing Arts v. Finch, 514 S.W.2d 608, 610 (Mo. App., D.K.C. 1974).

134. *Id.* at 612.

135. *Id.* at 613.

136. *Id.* at 615.

137. 517 S.W.2d 480 (Mo. App., D.K.C. 1974).

138. 517 S.W.2d 480, 481 (Mo. App., D.K.C. 1974); 514 S.W.2d 608, 609 (Mo. App. D.K.C. 1974).

139. 517 S.W.2d 480, 483 (Mo. App., D.K.C. 1975); 514 S.W.2d 608, 611 (Mo. App., D.K.C 1974).

140. *E.g.*, Division of Liquor Control (Department of Public Safety), State Board of Law Examiners, Council for Hearing Aid Dealers and Fitters, Division of Motor Vehicle and Licensing (Department of Revenue), Division of Insurance (Department of Consumer Affairs, Regulation, and Licensing), Commissioner of Securities (Secretary of State), Division of Urban and Teacher Education (*re:* "teacher certification;" Department of Elementary and Secondary Education).

141. *See, e.g.*, Peppermint Lounge, Inc. v. Wright, 498 S.W.2d 749 (Mo. 1973).

142. *See, e.g.*, Kehr v. Garrett, 512 S.W.2d 186 (Mo. App., D. St. L. 1974).

extend to more licensing authorities if their full potential value to criminal-record-victims is to be realized.

Federal civil rights legislation has created some administrative relief for certain criminal-record-victims. The Equal Employment Opportunity Commission (EEOC) was created by Title VII of the Civil Rights Act of 1964,[143] a comprehensive prohibition against racial discrimination in employment. The EEOC is mandated to seek compliance with the Act through conciliation and persuasion.[144] If those methods fail, it may bring a civil action or, if a governmental agency is involved, it may have the Attorney General instigate a suit.[145] Employment discrimination based on a criminal record may violate the fair employment practices contained in Title VII. The reason is that the high arrest and conviction rates for minority group members will mean that hiring policies giving undue weight to criminal records will result in rejections for a substantially disproportionate percentage of minorities. The EEOC has consequently held that employment polices based upon an individual's criminal record are inherently intimidating[146] and constitute unlawful discrimination against blacks as a class.[147] The drawing of arbitrary conclusions from the fact of a criminal record is expressly rejected.[148] The "business necessity" justification requires a showing that "the particular circumstances of each case—*e.g.*, the time, nature and number of the convictions and the employee's past employment record, indicate that employment of that particular person for a particular job is manifestly inconsistent with the safe and efficient operation of that job."[149] The EEOC's expansive interpretation of the Act and its history of strong holdings in the area of criminal records hiring policy make it an excellent administrative resource for the criminal-record-victim who is also a member of a minority group protected by the Act.

Several state and local counterparts of the EEOC have been very active in the area of criminal record discrimination related to employment,[150] but this has not been the experience in Missouri. The Missouri Commission on Human Rights[151] is the administrative agency charged with enforcing the State Fair Employment Practices Act.[152] That statute prohibits discrimination based on "race, creed, color, religion, national origin, sex

143. 42 U.S.C. §§ 2000 (e) to (e)-15 (1970).
144. *Id.* § 2000 (e)-5 (a).
145. Pub. L. No. 92-261, § 4 (a) (Mar. 24, 1972).
146. EEOC decision 74-25, 10 F.E.P. 260 (1973).
147. EEOC decision F4 02, 6 F.E.P. 830 (1973). *See also* EEOC decision 74-08, 6 F.E.P. 467 (1973); EEOC decision 74-90, 8 F.E.P. 430 (1974); EEOC decision 71-2682, 4 F.E.P. 25 (1971); EEOC decision 72-1497 (Mar. 30, 1972).
148. EEOC decision 73-0257, 5 F.E.P. 963 (1972).
149. EEOC decision 72-1460, 4 F.E.P. 718 (1972). *See also* EEOC decision 74-89, 8 F.E.P. 431 (1971).
150. The effective activities of state and local human rights commissions are described in Comment, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HASTINGS L.J. 1403, 1428-30 (1975).
151. *See* § 213.202, RSMo 1969.
152. Ch. 296, RSMo 1969.

or ancestry,"[153] and has provisions for complaints, hearings, and decisions.[154] This forum and format are well-suited to the indigent criminal-record-victim experiencing employment problems, but the Commission unfortunately has not taken the aggressive approach of its federal and some state counterparts in this area.[155] Despite similarly broad local authorizations, such as those in Kansas City[156] and Columbia,[157] there is no indication that local human rights commissions in Missouri are giving favorable consideration to complaints by aggrieved criminal-record-victims. In view of the fact that the EEOC has found the relationship between criminal record discrimination and racial discrimination to be very close, it is regrettable that criminal-record-victims cannot find relief with more state and local agencies. Again, the only possible way to open up that approach is to file greater numbers of meritorious claims with those bodies.

Labor arbitration has benefited some criminal-record-victims who were discharged when their employer learned of their prior criminal record. Arbitration clauses are contained in over 90 percent of all collective bargaining contracts,[158] and anti-racial discrimination clauses are present in 46 percent of the contracts.[159] Clauses relating to criminal records are rarely found, so the discharged criminal-record-victim's challenge centers on whether the employer had "just cause" under the agreement for discharging the employee. Critical considerations seem to be whether the event represented by the criminal record is material to the job[160] and whether it has an adverse impact on the company.[161] A clear advantage of proceeding by way of arbitration is that the aggrieved criminal-record-victim is not required to incur the expense of retaining a lawyer. The disadvantages include the individual employee's third-party beneficiary status, his usual lack of "standing" to bring arbitration on his own, and his being subject to discrimination by labor as well as management in many situations.[162] Thus, a prerequisite to the effective use of the arbi-

153. § 296.020 (1), RSMo 1969.

154. § 296.040, RSMo 1969.

155. *See* MISSOURI COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 1973-74 (1975). None of the 664 employment complaints handled by the Commission during this report-year was related to criminal records. *Id.* at 11.

156. ADMIN. CODE OF THE CITY OF KANSAS CITY, MISSOURI (Aug. 31, 1970 Supp.) declares it to be an "unlawful employment practice" to discriminate on the basis of "race, color, sex, religion, ancestry, national origin or because such individual is between forty and sixty-two years of age." *Id.* at § 26.222 (a).

157. The Columbia Commission on Human Rights and Community Relations is empowered to investigate complaints of "racial, religious and ethnic group tension, prejudice, intolerance, bigotry and discrimination. . . ." COLUMBIA REV. ORD. § 2.1330 (3) (a) (1971).

158. Comment, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HASTINGS L.J. 1403, 1407 n.23 (1975).

159. Beaird, *Racial Discrimination in Employment: Rights and Remedies*, 6 GA. L. REV. 469, 478 (1972).

160. *See* Dart Industries, Inc., 56 L.A. 799 (1971).

161. *See* Crutcher Resources Corp., 61 L.A. 758 (1973). This case involved a crime committed after the person had been hired.

162. Comment, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HASTINGS L.J. 1403, 1407 n.23 (1975).

tration process by the criminal-record-victim is the enthusiastic advocacy of the union representative.

There are, then, several administrative agencies and procedures available in Missouri to aid the criminal-record-victim. The relief they can provide is economically the most feasible and logically the most preferable. Still, these remedies could be of greater benefit to the criminal-record-victim if they were more comprehensive in coverage, more simple in procedure, and more sweeping in effect. Such revisions may come through subsequent litigation, but they are more likely to be achieved through new legislation.

C. *Judicial Remedies*

Criminal-record-victims may seek judicial relief based upon alleged violations of the United States Constitution or the Missouri constitution or any of the federal civil rights acts. The extensive litigation in these areas has generally focused on whether the employment restrictions involved bear a direct relationship or rational connection to job performance. This basic test has been consistently applied regardless of whether the cause of action was constitutional or statutory.

Constitutional challenges in the area of criminal-record-victim employment are available only where the restrictions are government-sanctioned because of the "state action" requirement of the fourteenth amendment.[163] The foremost substantive obstacle to these challenges has been the view that government-related employment is not a right but a privilege,[164] a distinction that the Supreme Court has now expressly rejected.[165] The restrictions are now subject to constitutional attack on the basis of the fourteenth amendment's due process and equal protection clauses and the eighth amendment's ban against cruel and unusual punishment.

The first due process argument is that some laws impermissibly create conclusive presumptions of the unfitness of criminal-record-victims to perform various functions. This contravenes the proposition that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment."[166] The Supreme Court has recently struck down such presumptions in several areas,[167] and at least one United States court of appeals has specifically

163. Civil Rights Cases, 109 U.S. 3 (1883).

164. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1454-55 (1968).

165. Graham v. Richardson, 403 U.S. 365 (1971).

166. Heiner v. Donnan, 285 U.S. 312, 329 (1932).

167. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (presumption against pregnant teachers' working); Vlandis v. Kline, 412 U.S. 441 (1973) (presumption against students' resident status); United States Dept. of Ag. v. Murry, 413 U.S. 508 (1973) (presumption against certain households' eligibility for food stamps); Stanley v. Illinois, 405 U.S. 645 (1972) (presumption against fitness of fathers of illegitimate children). Recently, however, the Court has somewhat limited the scope of the "irrebuttable presumption" doctrine. Weinberger v. Salfi, 95 S. Ct. 2457 (1975).

addressed the matter of irrebuttable presumptions against criminal-record-victims.[168] The state, as the party imposing the disability, is required to establish the validity of the presumption in such cases.[169] There is much literature now available to argue for the invalidity of conclusive presumptions against criminal-record-victims.[170] This steadily expanding area of constitutional law may prove to be extremely beneficial in future litigation by criminal-record-victims.

Employment restrictions may also be subjected to "direct relationship" or "rational connection" requirements imposed by the due process clause. In *Schware v. Board of Bar Examiners*[171] the Supreme Court reversed New Mexico's refusal to admit Schware to the bar because of his past arrest record:

> A State cannot exclude a person from the practice of . . . any . . . occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . [A]ny qualification must have a rational connection with the applicant's fitness or capacity to practice law.[172]

This test has been applied by both federal[173] and state courts.[174] It has yielded mixed results thus far in Missouri courts. The attacks have usually been phrased in terms of "unreasonableness" and "arbitrariness" rather than a "direct relationship" or "rational connection," but the conceptual framework has been the same. The Missouri Supreme Court, in *Liberman v. Cervantes,*[175] upheld the validity of a St. Louis ordinance requiring the Board of Police Commissioners to pass upon the "good moral character" of the applicant before a pawnbroker's license could be issued. It was found to be reasonable and non-arbitrary due to "the character of the business, which warrants stricter police regulation."[176] In *Kehr v. Garrett*[177] the St. Louis District of the Missouri Court of Appeals faced a challenge against an individual application of the statute, rather than the statutorily imposed requirement itself. The court held that the denial of a retail liquor-by-the-drink license because of the applicant's arrests which were in the remote past and which were not followed by convictions was "arbitrary and unreasonable."[178] A Missouri trial court held

168. Pordum v. Bd. of Regents, 491 F.2d 1281, 1287 n.14 (2d Cir. 1974).

169. Leary v. United States, 395 U.S. 6 (1969); Tot v. United States, 319 U.S. 463 (1943).

170. *See, e.g.,* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

171. 353 U.S. 232 (1957).

172. *Id.* at 238-39. *See also* Konigsberg v. State Bar of Cal. 353 U.S. 252 (1957).

173. *See, e.g.,* Green v. Dumke, 480 F.2d 624 (9th Cir. 1973); Pavone v. La. State Bd. of Barber Examiners, 364 F. Supp. 961 (E.D. La. 1973).

174. *See, e.g.,* Vielehr v. State Personnel Bd., 32 Cal. App. 3d 187 (1973); Miller v. District of Columbia Bd. of App. and Rev., 294 A.2d 365 (D.C. App. 1972).

175. 511 S.W.2d 835 (Mo. 1974).

176. *Id.* at 838, *citing* City of St. Louis v. Baskowitz, 273 Mo. 543, 554, 201 S.W. 870, 873 (Mo. 1918).

177. Kehr v. Garrett, 512 S.W.2d 186 (Mo. App., D. St. L. 1974).

178. *Id.* at 194.

that it was "arbitrary and unreasonable" for the Kansas City Department of Liquor and Amusement Control to deny an occupational amusement license to a 34-year-old applicant who had been convicted of second-degree burglary in Pennsylvania at age 17.[179] The direct relationship-rational connection-unreasonableness-arbitrariness test, although resembling the supposedly foregone "substantive due process,"[180] may thus be invoked to aid a criminal-record-victim's challenge of a restrictive statute itself or of an individual decision under the statute.

Procedural due process rights have been significantly clarified and expanded by recent decisions. Procedural safeguards will apply if there is a "substantial interest" in the loss of "liberty or property" which outweighs the inconvenience to the state.[181] There is some support for the view that the right to work is a basic liberty, the loss of which would constitute a grievous loss subject to due process safeguards.[182] A federal court of appeals has held that a person denied a driver's license due to his "substantial criminal record" has sufficient interest in the license to require a statement of reasons for the refusal, a hearing, and publication of the agency's procedural and substantive rules.[183] In Missouri the Administrative Hearing Commission Act and the Administrative Procedure and Review Act have rectified former deficiencies in the procedural due process afforded by many administrative agencies,[184] although several agencies may still be open to attack for inadequate safeguards.[185] Unfortunately, Missouri decisions in this area still seem to dismiss lightly the criminal-record-victims' procedural objections, often with such tautological reasoning as to fail in justifying or explaining their decision.[186]

The equal protection clause of the fourteenth amendment is a second major source of constitutional authority for the litigating criminal-record-victim. A state action which treats persons differently is upheld only if there is a rational basis[187] for the action or, where fundamental constitutional rights are involved, if the interest to be protected is a compelling

179. H.M. Studios, Inc. v. City of Kansas City, Sixteenth Judicial Circuit Court in Missouri, Division 4, Case No. 779756 (Sept. 4, 1975).

180. *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

181. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). *See also* Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

182. *See* Barsky v. Bd. of Regents, 347 U.S. 442, 472 (1954) (dissenting opinion). *See also* Allgeyer v. Louisiana, 165 U.S. 578 (1897).

183. Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973).

184. *See* note 127 and accompanying text *supra*.

185. *See* notes 138-39 and accompanying text *supra*.

186. An example is the following response to an alleged failure to give the procedurally required "notice:"

> The ordinance is not . . . arbitrary, vague . . . [or] violative of the due process clause, as contended. Specifically, the words . . . "good moral character" are not so vague and indefinite as to violate due process of law.

Liberman v. Cervantes, 511 S.W.2d 835, 838 (Mo. 1974).

187. McGowan v. Maryland, 366 U.S. 420 (1961).

state interest.[188] The Burger Court has seemingly moved to an intermediate "means-focused" test, whereby the classification must bear a substantial relationship to the means for which the legislation is adopted.[189] The unreasonable and unallowable classifications subject to invalidation under an equal protection analysis will probably include some differentiations which are not absolute enough to be reviewed under the due process irrebuttable presumption principles.[190] Furthermore, the equal protection clause applies to any state action while the due process clause applies only to state action which deprives persons of life, liberty, or property. Such considerations make the equal protection approach a perferable one for criminal-record-victims.

The case of boxing champion Muhammad Ali exemplifies the equal protection clause's wider applicability and greater relief. After being convicted of draft evasion, Ali was denied a license to box in New York. His first challenge to that denial was based on the due process clause and it was dismissed by the court.[191] Exercising his leave to amend, Ali changed the basis of his argument to the equal protection clause and won. The court found that the licensing authority's decision was "not based upon differences that are reasonably related to the lawful purposes" of the regulatory powers involved.[192] More recently, a federal district court used the reasonable means inquiry to invalidate an Iowa statute prohibiting employment of convicted felons in any civil service jobs.[193] The court refused to apply the "compelling interest" test based on either criminal records as a "suspect classification" or the right to seek employment as a fundamental interest.[194] Nevertheless, the statute was held to be unconstitutional due to the impermissible means used by the state to implement its goals. In dicta, the court stated that consideration should be given to the "nature and seriousness of the crime in relation to the job sought . . . [t]he time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed. . . ."[195] A second federal district court has adopted the same type of analysis to invalidate a blanket exclusion of former heroin addicts from employment, holding that the "ban . . . goes beyond any rational or legitimate needs of the

188. Shapiro v. Thompson, 394 U.S. 618 (1969).

189. Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 20 (1972).

190. *See* text accompanying notes 164-68 *supra.*

191. Ali v. Div. of State Athletic Commission of State of New York, 308 F. Supp. 11 (S.D.N.Y. 1969). Ali's 42 U.S.C. § 1983 suit in this case also claimed violation of the cruel and unusual punishment clause and the free exercise of religion clause.

192. Ali v. Div. of State Athletic Commission of State of New York, 316 F. Supp. 1246 (S.D.N.Y. 1970).

193. Butts v. Nichols, 381 F. Supp. 573 (S.D. Ia. 1974).

194. Excellent arguments for criminal records as a suspect classification and employment as a fundamental interest are contained in Comment, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners,* 26 HASTINGS L.J. 1403, 1420-22 (1975).

195. Butts v. Nichols, 381 F. Supp. 573, 581 (S.D. Ia. 1974).

[employer], and excludes persons just as qualified for employment as many who are hired. . . ."[196] Although Missouri criminal-record-victims have not made extensive use of equal protection challenges, this would seem to be a firm foundation for future litigation.

A third constitutional argument available to criminal-record-victims is that unreasonable employment restrictions violate the eighth amendment's prohibition of cruel and unusual punishment. In *Weems v. United States,*[197] the Supreme Court held that the amendment forbids punishment which is disproportionate to the offense and invalidated a statute imposing disabilities beyond the pronounced sentence of incarceration:

> His prison bars and chains are removed . . . but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime . . . he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.[198]

This aspect of the eighth amendment has been argued in criminal records cases,[199] but only rarely with success.[200] The eighth amendment has also been held to proscribe punishment based on a person's "status" in society,[201] but that principle has yet to be extended to unreasonable employment restrictions as punishment of the criminal-record-victim's status as a record-holder. The difficulty in using the eighth amendment arises in establishing the restrictions as "punishment;" therefore reliance on it is not advisable.

The argument that criminal-record-victims are being excluded from employment by an administrator working under an unconstitutional delegation of legislative power has less force in Missouri than any of the three foregoing approaches. The usual requirement of strict legislative standards for the exercise of administrative discretion[202] has been held to yield where the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare and where personal fitness is a factor to be taken into consideration.[203]

The Missouri constitution contains its own due process clause[204] and its own clauses declaring "that all persons are created equal and are en-

196. Beazer v. New York City Transit Authority, 399 F. Supp. 1032, 1058 (S.D.N.Y. 1975).
197. 217 U.S. 349 (1910).
198. *Id.* at 366.
199. Ali v. Div. of State Athletic Commission of State of New York, 308 F. Supp. 11 (S.D.N.Y. 1969).
200. People *ex rel.* Robison v. Haug, 68 Mich. 549, 37 N.W. 21 (1888).
201. Robinson v. California, 370 U.S. 660 (1962).
202. Clay v. City of St. Louis, 495 S.W.2d 672 (Mo. App., D. St. L. 1973).
203. Milgram Food Stores, Inc. v. Ketchum, 384 S.W.2d 510, 514 (Mo. 1964); State *ex rel.* Priest v. Gunn, 326 S.W.2d 314 (Mo. En Banc 1959); *Ex parte* Williams, 345 Mo. 1121, 139 S.W.2d 485 (1940); State *ex rel.* Mackey v. Hyde, 315 Mo. 681, 286 S.W. 363 (Mo. En Banc 1926).
204. Mo. CONST. art. I, § 10.

titled to equal rights and opportunity under the law"[205] and that "cruel and unusual punishment shall not be inflicted."[206] The cases construing these clauses contain some principles from which a criminal-record-victim could argue his case,[207] although there are not now any recorded instances of such state constitutional approaches being taken. Criminal-record-victims desiring a firm basis in constitutional law while wanting to be free of binding precedent, should consider challenges founded on these clauses.

Statutory causes of actions based upon civil rights legislation can be used as a supplement or alternative to a criminal-record-victim's constitutional claims. Title VII of the 1964 Civil Rights Act, as amended, makes it illegal for public or private employers:

> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[208]

The Act has been held consistently to prohibit facially nondiscriminatory practices and procedures which nevertheless tend to preserve or continue the effects of past discrimination. The United States Supreme Court, in *Griggs v. Duke Power Co.*,[209] stated that:

> Under the Act, practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices. . . . The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. . . . Where an employment practice perpetuates the effects of past discriminatory procedures, the employer's good faith or absence of discriminatory purpose is immaterial."[210]

The United States Court of Appeals for the Eighth Circuit has so held in an impressive list of cases which both pre-date and post-date *Griggs*.[211]

Some of the more unsavory aspects of America's social history have produced a situation which insures the Act's extensive application to criminal records cases: the disproportionate representation of minority

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205. Mo. CONST. art. I, § 2.

206. Mo. CONST. art. I, § 21.

207. *See, e.g.*, Federal National Mortgage Association v. Howlett, 521 S.W.2d 428 (1975) (due process); State v. Ewing, 518 S.W.2d 643, 646 (Mo. En Banc 1975) (equal rights); State v. Neal, 514 S.W.2d 544, 549 (Mo. En Banc 1974) (cruel and unusual punishment); State v. Kennedy, 513 S.W.2d 697 (Mo. App., D. St. L. 1974) (cruel and unusual punishment).

208. 42 U.S.C. § 2000 (e)-2 (a) (1970), *as amended* (Supp. III, 1973).

209. 401 U.S. 424 (1971).

210. *Id.* at 430-31.

211. *See* United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157 (8th Cir. 1971); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); United States v. Sheet Metal Workers Int. Ass'n, Local Union No. 36, 416 F.2d 123 (8th Cir. 1969).

groups among criminal-record-victims.[212] This circumstance results from the relative poverty of those groups as well as the selectively prejudicial features of our criminal justice system.[213] Statistical demonstration of this state of affairs is readily available, both for the nation and for Missouri. For example:

(1) Negroes constituted 26.7 percent of all persons arrested in the United States during 1974,[214] though they represented only 11.1 percent of the national population in the 1970 census.[215]
(2) As of May, 1975, 47.8 percent of the inmates in the Missouri State Penitentiary were black,[216] while only 10.3 percent of all Missourians in the 1970 census were black.[217]
(3) One study has determined that Negro defendants in Missouri have been found guilty by juries in 77 percent of their trials, while white defendants received guilty verdicts in only 33 percent.[218]

These data are evidentiary prerequisites for successfully challenging a criminal records policy under Title VII, either through the administrative processes of the EEOC[219] or through court challenges. "Business necessity" is the employer's only defense to a Title VII suit: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[220] The Eighth Circuit has held that the doctrine of business necessity " 'connotes an irresistible demand.' The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal."[221] This strictness toward the employer is complemented by an extremely liberal, sympathetic judicial attitude toward the complainant.[222] These factors combine to make Title VII litigation an area of unusually great promise for the aggrieved criminal-record-victim.

A valuable precedent in the Title VII area is the decision in *Gregory v.*

212. *See* Note, *Arrest Records, Hiring Practices, and Racial Discrimination,* 57 IOWA L. REV. 506 (1971).
213. *See* Wolfgang and Cohen, *The Convergence of Race and Crime,* in RACE, CRIME, AND JUSTICE 74 (C. Reasons and J. Kuykendall eds. 1972).
214. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS—1974, Table 38 at 191 (1975).
215. UNITED STATES DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES—1973, Table 24 at 25 (1973).
216. Letter from George M. Camp, Deputy Director, Missouri Department of Social Services, to Deverne Calloway, Missouri State Representative, July 21, 1975.
217. R. CAMPBELL AND T. BAKER, NEGROES IN MISSOURI, Table 1 at 3 (1974).
218. Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri,* 1970 WASH. U.L.Q. 415, 431, 436.
219. *See* notes 142-48 and accompanying text *supra.*
220. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
221. United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied,* 409 U.S. 1116 (1973) (emphasis in original). For criminal records cases where the court found for the employer on the basis of business necessity, *see* Lester v. Ellis Trucking Co., ____ F. Supp. ____ (W.D. Tenn. 1975); Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.,* 468 F.2d 951 (5th Cir. 1972).
222. Dent & Martin, *Multiple Remedies for Employment Discrimination: How Many Bites at the Apple?,* 16 S. TEX. L.J. 57 (1974).

Litton Systems, Inc.[223] In that case an employer was restrained from using arrest records in hiring decisions on the ground that the effect would be to discriminate against black applicants. Central to the opinion was the court's finding that the arrest records bore no relationship to job performance.[224] The first indication of the possible unacceptability of using conviction records came in *Carter v. Gallagher*,[225] where the Eighth Circuit held that an employer "at a minimum should not treat conviction as an absolute bar to employment."[226]

The Eighth Circuit has since issued an opinion which will extend even greater Title VII protection to the criminal-record-victim. In *Green v. Missouri Pacific Railroad Company*[227] the court reversed district court findings of non-discriminatory impact and business necessity in the defendant's absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense.[228] After carefully reviewing the relevant decisions, the court held:

> [A] sweeping disqualification for employment resting solely on past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis.[229]
>
> . . . .
>
> We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.[230]

The strong wording of the *Green* decision has significantly eased the criminal-record-victim's burden in establishing his Title VII cause of action. *Green* and its precursors represent major steps toward eliminating the de-facto discrimination caused by employers' use of criminal records criteria.[231]

Criminal-record-victims have also started to capitalize upon the relief available under the Civil Rights Acts of 1866 and 1871, now referred to as

223. 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

224. *Id.* at 402-03.

225. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). This case involved 42 U.S.C. §§ 1981, 1983, but it relied heavily upon a Title VII analysis and the decision in *Griggs*.

226. *Id.* at 326.

227. 523 F.2d 1290 (8th Cir. 1975).

228. Green v. Missouri Pacific R.R. Co., 381 F. Supp. 992 (E.D. Mo. 1974).

229. Green v. Missouri Pacific R.R. Co., 523 F.2d 1290, 1296 (8th Cir. 1975).

230. *Id.* at 1298.

231. The important question whether white criminal-record-victims can bring, or benefit from, Title VII suits has not yet been answered. *See* Green v. Missouri Pacific R.R. Co., 523 F.2d 1290, 1299 (8th Cir. 1975).

sections 1981 and 1983.[232] The federal courts of appeals have held that these Acts prohibit racial discrimination in private as well as public employment.[233] Most courts now allow an individual to pursue a claim under these provisions even though he has not pursued his Title VII remedy.[234] Criminal-record-victims recovering under these provisions, though, have generally had to establish the same elements required for a Title VII cause of action.[235]

There seems to be a single test that emerges from these several judicial remedies, regardless of whether a constitutional or statutory cause of action is alleged by the criminal-record-victim. Although the strictness of the test varies, it is basically this: the criminal records employment restriction is unreasonable and illegal unless it bears a "direct relationship" or has a "rational connection" to the job performance. The "business necessity" formula is merely a more rigid expression of the same standard. The criminal-record-victim is really asking for nothing more than this type of fair judgment on the merits.

D. *Legislative Remedies*

Legislative remedies may be the most immediately inaccessible and yet the most eventually beneficial of all relief for criminal-record-victims. Previous sections of this comment have discussed the need for legislative revisions in the areas of record expungement and administrative agencies' organization and powers. This section deals with the need for new legislation to deal with the matter of employer discrimination itself. All of these legislative suggestions are made with a desire to simplify the remedial alternatives available to the criminal-record-victim. Any legislation proposed should be designed to reduce costs to the criminal-record-victim

232. 42 U.S.C. § 1981 (1970), provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983 (1970), provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

233. Young v. International Telephone and Telegraph Co., 438 F.2d 757 (3d Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

234. Dent, *supra* note 221, at 89.

235. *See, e.g.*, Beazer v. New York City Transit Authority, 399 F. Supp. 1032 (S.D.N.Y. 1975). *See also* Paul v. Davis, 44 U.S.L.W. 4337 (U.S. March 23, 1976) where an accused shoplifter, against whom charges had been dismissed, was denied relief under § 1983 against police chiefs who included him in an "active shoplifter" flyer because of his failure to demonstrate resultant employment discrimination.

through more simple, less litigious remedies, and to free the courts from the "legal pollution" of cases without merit.[236] Any legislation passed should generally insure that the criminal-record-victim will have "far greater access to and general use of dispute-resolving mechanisms."[237]

Some state legislatures have recently enacted remedial measures of benefit to the criminal-record-victim. Florida[238] and Illinois[239] were early leaders in the abolition of blanket civil service and licensing restrictions. A conviction in those states may disqualify only if it relates to the position of employment sought or to the specific work for which a license is sought. Twelve other states have now passed similar legislation, removing mandatory employment restrictions barring the entry of criminal-record-victims into licensed occupations and, in most cases, public employment.[240] Hawaii, however, is the only state which has statutorily acted to eliminate unreasonable restrictions on criminal-record-victim employment in both the public and private sectors. In 1974 the state legislature amended its Employment Practices Law to include "arrest and court record(s)" among the other, more traditional elements of unallowable discrimination.[241] The Hawaii statute explicitly prohibits unreasonable discrimination based on criminal records, thereby obviating the necessity for the sometimes strained argument which equates such discrimination with racial discrimination. This has the added advantage of eliminating any question as to what race or color the plaintiff must be. The statute grants enforcement authority to an already existent state administrative agency,[242] thereby

236. Ehrlich, Legal Pollution is Stifling the Court System, The Kansas City Star, February 22, 1976, at 23A.

237. L. Nader and L. Singer, Dispute Resolution in the Future: What are the Choices? 3 (1975) (Paper prepared for a Conference sponsored by the State Bar of California, Sept. 12-14, 1975).

238. FLA. STAT. ANN. § 112.011 (Supp. 1974).

239. ILL. UNIFORM CODE OF CORRECTIONS § 525-5 (1972).

240. Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Minnesota, New Jersey, New Mexico, Oregon, and Washington. National Clearinghouse on Offender Employment Restrictions, 12 OFFENDER EMPLOYMENT REVIEW 1 (1975). Among the strongest of these statutes is CONN. GEN. STAT. ANN. § 4-610 (Supp. 1975), *as amended,* Pub. Act No. 74-265, Conn. Legis. Serv. (1974).

241. HAWAII REV. STAT. § 378-2 (1) (1975 Supp.) provides in part:

> It shall be unlawful employment practice or unlawful discrimination: (1) For an employer to refuse to hire or employ or to bar or discharge from employment, any individual because of his race, sex, age, religion, color, ancestry, physical handicap, or arrest and court record which does not have a substantial relationship to the functions and responsibilities of the prospective or continued employment, provided that an employer may refuse to hire an individual for good cause relating to the ability of the individual to perform the work in question . . . .

The statute also contains a comprehensive definition of the records involved:

> "Arrest and court records" include any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority.

Id. at § 378-1 (6).

242. HAWAII REV. STAT. § 378-3 (1975 Supp.).

making remedies more accessible to indigent criminal-record-victims. It incorporates the "direct relationship-rational connection" test, which is the prevailing constitutional standard.[243] It also reduces the law on criminal records discrimination to simple, understandable provisions. Finally, it seems actually to have resulted in greater respect for the rights of criminal-record-victims and a workable method for vindicating those rights.[244]

There are several model statutes and legislative suggestions that have been published in recent years. The Georgetown University Law Center has drafted a "Model Trade Licensing Statute" dealing with "disqualifications of applicants with criminal records."[245] The proposal would prohibit any automatic "bars,"[246] proscribe consideration of certain criminal records,[247] and mandate a direct relationship test.[248] The Georgetown University Law Center has also drafted a "Model Civil Service Criminal Conviction Statute," which would require both a direct relationship test and the consideration of the criminal-record-victim's "rehabilitation"[249] in civil service employment. The American Law Institute's Model Penal Code proposes a direct relationship test for all job qualifications.[250] Finally, the American

243. *See* notes 173-74 and accompanying text *supra*.

244. Letter from Charles Mitsuyama, Fair Employment Specialist, Enforcement Division, Hawaii Department of Labor and Industrial Relations, to author of this comment, January 16, 1976:

> Since the enactment of the law that makes it unlawful to discriminate in employment on the basis of a person's arrest and court record, 12 complaints have been filed with our agency. Four of the complaints were withdrawn because the complainants were reinstated with back wages and three were closed due to no response by the complainants; one complaint was dismissed as being untimely filed, and four complaints are pending investigation.

245. J. HUNT, J. BOWERS, AND N. MILLER, LAWS, LICENSES, AND THE OFFENDER'S RIGHT TO WORK Appendix B (1974).

246. *Id.* at Appendix B, § 2 (a).

247. *Id.* at Appendix B, § 2 (b):

> The following criminal records shall not be used, distributed or disseminated in connection with an application for a permit, registration, license or certificate: (1) Records of arrest not followed by a valid conviction; (2) Convictions which have been (annulled or expunged); (3) Misdemeanor convictions not involving moral turpitude; and (4) Misdemeanor convictions for which no jail sentence can be imposed.

248. *Id.* at Appendix B, § 3.

249. NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS, EXPANDING GOVERNMENT JOB OPPORTUNITIES FOR EX-OFFENDERS 12 (1973) contains this model statute:

> No person with a criminal conviction record shall be disqualified from taking open competitive examinations to test the relative fitness of applicants for the respective positions. Persons with criminal conviction records shall be entitled to the benefit of all rules and regulations pertaining to the grading and processing of job applications which are accorded to other applicants. In considering persons with criminal conviction records who have applied for employment the hiring official shall consider the following: (a) The nature of the crime and its relationship to the job for which the person has applied; (b) Information pertaining to the degree of rehabilitation of the convicted person; and (c) The time elapsed since the conviction.

250. ALI, MODEL PENAL CODE § 306.1 (1) (1962) provides in part:

> No person shall suffer any legal disqualification or disability because of

Bar Association's National Clearinghouse on Offender Employment Restrictions has issued several important publications outlining the steps to be taken in legislative attacks upon unreasonable employment restrictions confronting criminal-record-victims.[251] Despite the virtues of these various formulations, however, none achieve the same levels of simplicity and comprehensiveness as does the Hawaii statute.

The Missouri General Assembly has recently considered several remedial proposals concerning employment restrictions on criminal-record-victims, but none has been passed. One measure would have required governmental licensing authorities themselves to evaluate the direct relationship and rehabilitation elements:

> The board or other agency may consider the conviction as some evidence of an absence of good moral character, but shall also consider the nature of the crime committed in relation to the license which the applicant seeks, the date of the conviction, the conduct of the applicant since the date of the conviction and other evidence as to the applicant's character.[252]

A more specific bill would have prohibited the Supervisor of Liquor Control from acting adversely upon a license application, suspension, renewal, or revocation solely due to a felony conviction, unless the conviction occurred within the immediately preceding five years.[253] A more general bill would have provided that all of a felon's civil disabilities cease automatically upon his discharge by the Department of Corrections.[254] The Missouri Proposed Criminal Code contains the same comprehensive provision on the direct relationship requirement[255] that was included in the Model Penal Code.[256] The culmination of a licensing study by the Young Lawyers' Section of The Missouri Bar[257] was the introduction of "an act concerning the effect of criminal conviction on eligibility for public em-

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his conviction of a crime or his sentence on such conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is . . . provided by the judgment, order, or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.

251. *See, e.g.*, NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS, REMOVING OFFENDER EMPLOYMENT RESTRICTIONS: A HANDBOOK ON REMEDIAL LEGISLATION AND OTHER TECHNIQUES FOR ALLEVIATING FORMAL EMPLOYMENT RESTRICTIONS CONFRONTING EX-OFFENDERS (2d ed. 1973); NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS, GUIDE TO LEGISLATIVE ACTION: A REVIEW OF STRATEGIES TO REMOVE STATUTORY RESTRICTIONS ON OFFENDER JOB OPPORTUNITIES (undated).

252. H.B. 43, 78th (Mo.) Gen. Assembly, 1st Reg. Sess. (1975).

253. H.B. 52, 78th (Mo.) Gen. Assembly, 1st Reg. Sess. (1975).

254. H.B. 53, 78th (Mo.) Gen. Assembly, 1st Reg. Sess. (1975). *See also* H.B. 990, 78th (Mo.) Gen. Assembly, 2d Reg. Sess. (1976).

255. COMM. TO DRAFT A MODERN CRIMINAL CODE, THE PROPOSED CRIMINAL CODE FOR THE STATE OF MISSOURI § 6.010 (1973). *See* S.B. 735, 78th (Mo.) Gen. Assembly, 2d Reg. Sess. (1976).

256. *See* note 250 and accompanying text *supra*.

257. *See* notes 33-36 and accompanying text *supra*.

ployment or right to obtain business or professional certification, license, permit, or registration."[258] The proposal was basically similar to the Georgetown University Law Center models,[259] and provided in part:

> No person shall be denied public employment nor shall a person be disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely because of a prior conviction of a crime, unless the crime directly relates to the position or occupation sought and the person is unable to show competent evidence of sufficient rehabilitation and present fitness for the position or occupation sought.[260]

The bill specified the evidentiary considerations and the duties of the licensing authority. It would appear to provide much more protection than the Administrative Hearing Commission[261] could for the criminal-record-victim involved with a licensing body.

None of these proposals has yet been passed by the Missouri General Assembly, despite recent, specific encouragement for such action.[262] The state of Hawaii has enacted an exemplary statute with the simplicity and comprehensiveness that can bring justice to the problem considered here. Missouri legislators have rejected several more complex, less sweeping, but still worthy proposals. Until persistent, diligent legislative attention is given to the matter of unreasonable restrictions on criminal-record- victim employment in Missouri, the state's criminal-record-victims will continue to suffer from unemployment and underemployment, and the state's citizenry will continue to suffer from higher crime rates and higher criminal justice costs.

IV. Conclusion

Persons who have acquired a "criminal record" sometime during their lives are being regularly restricted in their search for public and private employment in the state of Missouri. Many of these "criminal-record-victims" are deserving individuals who need jobs desperately if they are to lead crime-free lives. Some of the employment restrictions they encounter are reasonable and fair, but too many are not. Too many do not bear a "direct relationship" or "rational connection" to the work involved; too many are not justified by any "business necessity." Criminal records retention policies and laws in Missouri need to be changed so that criminal-record-victims have at least some chance to avoid the life sentence of a stigmatic record. In the meantime, they should have some means to challenge unreasonable employment restrictions brought on by the existence

258. H.B. 1762, 78th (Mo.) Gen. Assembly, 2d Reg. Sess. (1976).
259. *See* notes 245-49 and accompanying text *supra*.
260. H.B. 1762, 78th (Mo.) Gen. Assembly, 2d Reg. Sess. (1976).
261. *See* notes 128-31 and accompanying text *supra*.
262. *See, e.g.*, Mo. Dept. of Public Safety, Missouri Action Plan for Public Safety 6 (1976):

> [Standard] 2.3 It is recommended that the Missouri General Assembly repeal those statutes . . . which place restrictions on civil liberties, employment and licensing opportunities of ex-offenders.