UNIVERSITY OF PENNSYLVANIA
JOURNAL OF LAW AND SOCIAL CHANGE
Volume 27, Number 2 **2024**

UNIONS, BLACK WORKERS, AND CRIMINAL RECORDS: RECKONING WITH THE LABOR MOVEMENT'S HISTORY OF RACIAL DISCRIMINATION SHOULD LEAD IT INTO THE FUTURE

TY PARKS*

Since the 1970s, the Labor Movement has been debilitated by a dramatic decline in union membership. However, in recent years, public approval of unions and unionization rates have increased, indicating the potential for Labor's resurgence. Ironically, the same demographic of workers that unions have historically excluded are the workers leading these unionization efforts. Labor statistics illustrate that Black and brown workers are predominantly responsible for the current dynamism in the Labor Movement. To capitalize on this resurgence and lead the Labor Movement into the future, this Comment urges Labor to prioritize mobilizing workers of color.

With respect to this charge, this Comment argues that reckoning with the Labor Movement's history of racial discrimination is central to mobilizing Black and brown workers. Presently, millions of Black and brown people, who are disproportionately impacted by the criminal legal system, face barriers to employment because of their criminal records. A case study of Local 542 of the International Union of Operating Engineers reveals circumstantial evidence that Labor played a role—whether intentional or not—in the rise of criminal record exclusion laws. Through reckoning with this history, this Comment urges Labor to advocate against criminal record discrimination, which will pull in the workers that have demonstrated their interest in unionization: Black and brown people.

DOI: https://doi.org/10.58112/jlasc.27-2.2

* J.D. Candidate 2024, University of Pennsylvania Carey Law School; B.A. 2019, Columbia University. This piece is dedicated to my grandmother who was a member of Teamsters Local 115 while she worked as a housekeeper at the University of Pennsylvania until she retired. I'd like to thank Dean Sophia Lee for her guidance in the drafting process and Professor Serena Mayeri for her insightful comments. I'd also like to thank my family and friends for their encouragement to publish this Comment, including Alicia Simba, Robin Kearney, and Michael Sise. Finally, I'd like to thank the editors of the *University of Pennsylvania Journal of Law and Social Change* for their edits and attention to detail. The cause of labor is the hope of the world.

"Labor has not adequately used its great power, its vision, and resources to advance Negro rights. Undeniably, it has done more than other forces in American society to this end. Aid from real friends in labor has often come when the flames of struggle heighten. But Negroes are a solid component within the labor movement and a reliable bulwark for labor's whole program and should expect more from it exactly as a member of a family expects more from his relatives than he expects from his neighbors."

—Martin Luther King Jr., address before the AFL-CIO Fourth Constitutional Convention in Miami Beach, Florida on December 11, 1961.[1]

INTRODUCTION

In his 2023 State of the Union address, President Joe Biden proclaimed to the nation that "workers have a right to form a union."[2] This pronouncement, factually supported by Section 7 of the National Labor Relations Act ("NLRA"),[3] was a nod to the millions of Americans that support labor unions.[4] As of 2022, a Gallup poll found that "seventy-one percent of Americans now approve of labor unions"—an approval rating they have not recorded since 1965.[5] Labor's support from the President

[1] Martin Luther King Jr., *If the Negro Wins, Labor Wins*, Address Before the AFL-CIO Fourth Constitutional Convention (Dec. 11, 1961) *in* ALL LABOR HAS DIGNITY 32, 39–40 (Michael K. Honey ed., 2011).

[2] Address Before a Joint Session of the Congress on the State of the Union, 2023 DAILY COMP. PRES. DOC. 96 (Feb. 7, 2023), https://perma.cc/MG4Z-YMFQ.

[3] *See* 29 U.S.C. § 157.

[4] *See* Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://perma.cc/2JXV-5YSM.

[5] *Id.*

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

and the public coincides with increased unionization efforts.[6, 7] 2022 saw approximately 200,000 workers join the "more than 16 million other workers in the United States represented by a union."[8] The workers who successfully joined unions are only the tip of the iceberg, as polling indicates that there are more than "60 million workers in 2022 [that] wanted to join a union, but couldn't."[9] In the words of the White House, Labor is certainly having a "moment."[10]

Black workers and other workers of color are predominately responsible for this new wave of the Labor Movement. As explained in a report by the Economic Policy Institute, "[t]he entire increase in unionization in 2022 occurred among workers of color—workers of color saw an increase of 231,000 while white workers saw a decrease of 31,000."[11] Of the major racial and ethnic groups, Black workers had the highest unionization rate in 2022, at 12.8%, while white workers had a unionization rate of 11.2%.[12] In addition to maintaining membership numbers, Black workers have been leading efforts to unionize corporate workplaces that have long resisted unionization.[13] In 2022, after a few years of organizing, Christian Smalls, a "working-class Black man," led an election victory to certify the first Amazon union in the United States.[14] Despite Amazon officials dismissing Smalls as "not smart or articulate,"[15] they have failed to overturn his victory despite their continuous challenges.[16] Amazon Labor Union's certification was a significant milestone in recent efforts by the Labor Movement to unionize workers at corporations like Starbucks, Trader Joe's, and Apple.[17] With these efforts on his shoulder, Smalls solidified himself as the "face of America's new labor movement" when he met President Biden at the White House while wearing a jacket embroidered with the words "Eat the

---

[6] Throughout this Comment, I refer to the conglomerate of labor unions that compose the labor movement as "Labor." At various points I also use this term to refer to a specific sector of labor unions, *i.e.*, those located in a particular state, but surrounding context will make this distinction clear.

[7] *See, e.g.*, Heidi Shierholz, et. al, *Unionization increased by 200,000 in 2022*, ECON. POL'Y INST. (Jan. 19, 2023), https://perma.cc/9Y6M-RV3V ("During fiscal year 2022, the NLRB saw a 53% increase in union election petitions. This is the highest number of union election petitions filed since fiscal year 2016."); *see also* Rani Molla, *How unions are winning again, in 4 charts*, VOX (Aug. 30 2022, 6:00 AM), https://perma.cc/P6VR-AHLY ("In total, there were 80 percent more NLRB election wins in 2022 than there were in 2021, and those wins represent more than twice as many workers—43,150—as last year. Unions have won nearly 77 percent of their elections this year, matching the highest rate in the Bloomberg data going back to 2000.").

[8] Shierholz, *supra* note 6.

[9] *Id.*

[10] *The State of Our Unions*, THE WHITE HOUSE (Sept. 5, 2022), https://perma.cc/W235-BTS9.

[11] Shierholz, *supra* note 6.

[12] *See id.*

[13] *See* Anna Gifty Opoku-Agyeman & Katie Camacho Orona, *Amazon Union's Chris Smalls Is Part of the Legacy of Black Labor Organizing*, TEEN VOGUE (Apr. 5, 2022), https://perma.cc/4LF7-Z347.

[14] *Id.*; *see also* Andrea Hsu, *Labor's labors lost? A year after stunning victory at Amazon, unions are stalled*, NPR (Mar. 31, 2023, 5:00 PM), https://perma.cc/UUL6-E66Q; Noam Scheiber & Karen Weise, *Amazon Labor Union, With Renewed Momentum, Faces Next Test*, N.Y. TIMES (Oct. 11, 2022), https://perma.cc/Z8ZR-ECWE.

[15] Opoku-Agyeman & Camacho Orona, *supra* note 13.

[16] *See* Amazon Labor Union (@amazonlabor), X (Apr. 1, 2023, 12:50 PM), https://perma.cc/49DJ-7RLH.

[17] Labor organizers have expressed frustrations organizing these workplaces, or getting companies to bargain with the few successfully unionized stores, because "workers [are] going up against billionaires and billion-dollar companies with an endless amount of resources while [U.S.] labor laws are far too weak. . . [.]" Steven Greenhouse, *'Old-school union busting': how US corporations are quashing the new wave of organizing*, THE GUARDIAN (Feb. 26, 2023, 4:00 AM), https://perma.cc/WWD2-Q9F5.

Rich."[18]

Black workers like Christian Smalls have strong economic incentives to take on this fight for union representation and a collective bargaining agreement. With union membership, Black workers earn higher wages and are more likely to have access to health insurance and retirement benefits than non-unionized Black workers.[19] Black union workers covered by a collective bargaining agreement receive a wage increase of 13.1% from joining the agreement, which is higher than the 10.2% average wage boost for all unionized workers.[20] As a result of this difference, unionization is a powerful tool to help narrow the racial wealth gap between Black and white workers.[21] The narrowing of the Black-white wage gap through unionization began in the 1940s, when there were similar disparities between wage premiums.[22] Subsequently, the decline in unions "played a significant role in the expansion of the Black-white wage gap," leading economists to speculate that "unionization is a crucial step in reversing those trends."[23] Reversing this trend is crucial for Black Americans, who have one-eighth the wealth of white families, experience unemployment rates two times those experienced by white Americans, and whose households earn 62 cents for every dollar earned by white households.[24]

While Black workers have been spearheading the resurgence of unionization, present-day Labor's membership is far from what it was in the last century. Today, only 6.4% of private-sector and 10.5% of workers overall are represented by a union.[25] This is the "lowest percentage in more than a century, and down from 35 percent in the 1950s."[26] Labor powerhouses like United Automobile Workers' membership dwindled from 1.5 million at its peak in 1979 to approximately 400,000 members today.[27] This decline of unions stands on top of Labor's pivotal victories that won workers, unionized or otherwise, "unemployment insurance, old age pensions, government relief for the destitute, and above all new wage levels that meant not mere survival, but a tolerable life."[28] These reforms, outlined by Dr. Martin Luther King Jr., were won through "bold struggles [of] economic and social reform."[29]

---

[18] Shirin Ghaffary, *Amazon fired Chris Smalls. Now the new union leader is one of its biggest problems*, VOX (June 7, 2022, 6:30 AM), https://perma.cc/R8C3-QY57.

[19] *See* Cherrie Bucknor, *Black Workers, Unions, and Inequality*, CTR. FOR ECON. & POL'Y RSCH. (Aug. 29, 2016), https://perma.cc/U55X-WL5Q.

[20] *See Unions help reduce disparities and strengthen our democracy*, ECON. POL'Y INST. (Apr. 23, 2021), https://perma.cc/6QVH-H47Q [hereinafter *Unions reduce disparities*].

[21] *See id.*

[22] *See* STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR 10 (Alfred A. Knopf ed., 2019) ("The decades when unions were strongest—the 1940s through 1970s—were the decades when there was the least income inequality."); *see also Unions reduce disparities*, *supra* note 20.

[23] *Unions reduce disparities*, *supra* note 20 (citing Valeria Wilson & William M. Rodger III, *Black-white wage gaps expand with rising wage inequality*, ECON. POL'Y INST. (Sept. 20, 2016), https://perma.cc/HTP8-THPL).

[24] *See* DON BEYER, JOINT ECONOMIC COMMITTEE DEMOCRATS, THE ECONOMIC STATUS OF BLACK AMERICANS NATIONAL AND STATE LEVEL DATA, 2022 EDITION 3 (2022), https://perma.cc/6SPZ-2YMP.

[25] *See* GREENHOUSE, *supra* note 22 at 9.

[26] *Id.*

[27] *See id.*; David Shepardson, *United Auto Workers union membership rose 3% in 2022 to 383,000*, REUTERS (Apr. 3, 2023), https://perma.cc/8YR6-FQWU.

[28] GREENHOUSE, *supra* note 22, at 10.

[29] *Id.*

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

Scholars disagree on exactly why unions have declined,[30] but this decline clearly correlates with unprecedented concentration of wealth,[31] lower wages,[32] and a declining share of labor income.[33]

Considering the current state of unions, and what was lost because of their decline, Labor must capitalize on this moment of unionization by mobilizing the workers proving most crucial to the current resurgence—workers of color, generally, and Black workers, specifically. Building back Labor's large membership pool is essential to return to achieving broad workplace victories.[34] Therefore, targeted organizing of Black and other workers of color should include unionization campaigns focused on industries and workplaces predominately composed of this demographic,[35] but targeted organizing should not be limited to this strategy. If Labor wants to effectively invest in unionizing workers of color to build its membership, it must invest in efforts to bring in workers of color into the workforce. Simply put, a forward-looking Labor Movement addresses the barriers to employment for workers of color.

The systemic exclusion of workers of color is not an unfamiliar phenomenon to Labor.[36] In 1902, W.E.B. Du Bois wrote in a social study of Black workers, that "[t]he labor unions, with 1,200,000 members have less than 40,000 negroes [sic], mostly in a few unions, and largely semi-skilled laborers, like miners. Color prejudice keeps the mass of negroes [sic] out of many trades."[37] This early account of racial discrimination reflects the status quo for Black workers' relationship with unions, with limited

---

[30] *See, e.g.*, LANE WINDHAM, KNOCKING ON LABOR'S DOOR: UNION ORGANIZING IN THE 1970S AND THE ROOTS OF A NEW ECONOMIC DIVIDE 6 (2017) ("Many historians and journalists blame bureaucratic unions, which they portray as inept and complacent, and a working class that they believe lost interest in organized labor" for the decline of unions); *see also The State of Our Unions*, *supra* note 10 ("Globalization, technological change, and employer concentration are commonly cited as key factors, eroding union power and increasing employers' bargaining position relative to workers."); LAWRENCE MISHEL ET AL., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS, ECON. POL'Y INST. (Nov. 18, 2020), https://perma.cc/M5EB-8X9B ("[B]y the 1970s the law did not effectively protect workers' bargaining power and gave employers a wealth of tools to resist unionization.").

[31] *See Unions reduce disparities*, *supra* note 20 ("[A]s union strength steadily declined—particularly after 1979—income inequality got worse, and it is now at its worst point since the Great Depression."); *see also* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 619 (2019) ("Indeed, the three wealthiest people in the United States now own more wealth than the entire bottom half of the population.").

[32] *See Unions reduce disparities*, *supra* note 20. ("Recent research examining the direct effect on wages of union workers and the spillover effect on wages of nonunion workers has demonstrated that the median worker's wages would have been much higher, and inequality between middle- and high-wage workers much lower, had there not been an erosion of collective bargaining.").

[33] *See The State of Our Unions, supra* note 10 (citing Gene M. Grossman & Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share*,14 ANN. REV. ECON., 93–124 (2022))

[34] Union members are presently contemplating how Labor can become more powerful. *See, e.g.,* Alicia Simba, *re-opening: on unions*, SUBSTACK (Apr. 9, 2023), https://perma.cc/SWE9-NAHZ (questioning, in the context of teachers' unions, what it takes to "strengthen" Labor's power).

[35] *See, e.g.,* Darlene Lombos & Ayanna Pressley, *Economic justice is racial justice*, BOSTON GLOBE (Mar. 7, 2022), https://perma.cc/EZY4-6LE5 (32BJ SEIU organized 10,000 security officers in Boston, who were predominately Black workers). Amazon factories that have been targets of organizing campaigns have large populations of Black workers. *See, e.g.*, Andre Perry et al., *Amazon's union battle in Bessemer, Alabama is about dignity, racial justice, and the future of the American worker*, BROOKINGS INST. (Mar. 16, 2021), https://perma.cc/EZY4-6LE5; Noam Scheiber, *Strains Emerge Inside the Union That Beat Amazon*, N.Y. TIMES (Mar. 21, 2023), https://perma.cc/EF35-5GA4 (quoting Christian Smalls describing the Amazon Labor Union as having many Black workers and a largely Black leadership).

[36] *See infra* notes 90, 92 and accompanying text.

[37] THE NEGRO ARTISAN: A SOCIAL STUDY 188 (W.E.B. Du Bois, ed., 1902).

exceptions,[38] well into the next fifty or so years.[39] In fact, the National Labor Relations Act, regulating labor unions and their relationship with employers, was largely influenced by Southern Democrats' desire to maintain Black subordination in the workplace economy.[40] Enforcement of Title VII of the Civil Rights Act of 1964 turned the tides on Labor's ability to exclude Black workers, as courts found unions liable for racial discrimination and implemented remedies that required integration.[41]

In spite of the protections provided by Title VII, I argue, Labor connected itself to an alternative legal basis to exclude Black and other workers of color: criminal record discrimination. As a case study, this paper focuses on the International Union of Operating Engineers, Local 542 ("Local 542") in Philadelphia, Pennsylvania. Months after a federal court ordered Local 542 to implement an historic plan that required recruitment of more Black workers to their union in 1980,[42] Pennsylvania enacted a statute that permitted employers and the Pennsylvania Board of Licenses to consider criminal records in their hiring and firing determinations.[43] Notably, in 1980, the percentage of Black men with criminal records was more than three-times than the percentage of men overall with one.[44] For Local 542, whose members included workers required to have a license for their trade or who were subject to the preferences of a contractor,[45] de facto racial discrimination through criminal record exclusion could implicate employment.[46] This investigation of Local 542 is suggestive of a history larger than itself—whether intentional or not, the opening up of unions under Title VII for workers of color coincided with the rise of criminal record exclusion laws.

Examining Labor's history, however controversial or damning, is integral for a comprehensive understanding of the present. In reference to histories of white supremacy, Professor Hope Wabuke writes that "without learning [a] history . . . nothing will ever be made right."[47] Labor scholars understand this, as they've called for confronting various aspects of Labor's history to guide the movement's next steps,[48] including its broad history of racial exclusion.[49] However, Labor has yet to

---

[38] *See infra* Section II.A.

[39] *See infra* Section II.A.

[40] *See infra* Section II.A.

[41] *See, e.g.,* United States v. Int'l Union of Elevator Constructors, Loc. Union No. 5, 538 F.2d 1012 (3d Cir. 1976) (affirming the district court's remedy of a 23% Black membership goal and 33% black referral quota during the life of the decree as a remedy to a Title VII violation).

[42] *See infra* Section II.B.ii.

[43] *See infra* Section II.B.iii.

[44] Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1795, 1805 (2017).

[45] *See infra* notes 150, 196 and accompanying text.

[46] *See infra* Section II.B.iv.

[47] Hope Wabuke, *'How the World Is Passed' Teaches the Importance of Reckoning With History*, NPR (June 2, 2021), https://perma.cc/78U8-K2NU.

[48] *See, e.g.,* Jeff Schuhrke, *Reckoning With the AFL-CIO's Imperialist History*, THE JACOBIN (Jan. 9, 2020), https://perma.cc/9YQV-CN3Q ("Wrestling with that history can help ensure that a resurgent US labor movement plays a positive and effective role in building global worker solidarity rather than one that props up an imperialist order that hurts the working class both within the United States and around the world."); Jerome Karabel, *Let's Honor the True Spirit of Labor Day*, N.Y. TIMES (Sept. 5, 2021), https://perma.cc/9CS6-HA2U (explaining that organizers of the present can learn about the what is ahead in their fight against concentrated corporate power from Labor's violent past).

[49] *See infra* Part II; *see also* Marina Multhaup, *Martinez-Cuevas: Reckoning with Labor Law's Racist Roots*, ONLABOR (Aug. 20, 2020),

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

specifically reckon with its connection to criminal record discrimination. This Comment explores this history to contribute to the broader scholarship of Black unionization, which is essential to the work of developing Labor. As *the* advocate for workers, Labor must understand its history of exclusion, then work to undo it by dismantling criminal record discrimination. This is how Labor gets stronger.

In reckoning with this history, it's essential to understand why Black unionization is important to Black communities. As explained, unions are powerful institutions that can directly increase the wealth of individual Black workers. However, Labor also has the potential to economically liberate Black communities from systemic poverty. This opportunity to deconstruct racial subordination is why Black Americans have actively sought access to these institutions.[50] Continuing this effort, my purpose in writing this Comment is the pursuit of Black liberation. Black communities need unions and unions need the Black community.

This Comment proceeds as follows: Part I examines how collateral consequences of a criminal record materialize as de facto racial discrimination, specifically in the employment context. Part II shifts to a focused historical analysis of Labor's connection to criminal record discrimination as de facto racial discrimination.[51] Part III implores Labor to invest in dismantling criminal record discrimination to bolster its strength as a movement.

I. COLLATERAL CONSEQUENCES AS DE FACTO RACIAL DISCRIMINATION

Separate from court-imposed sanctions that are judicially attached to a criminal conviction, like a prison sentence or fine, people convicted of crimes also become subject to a variety of additional societal sanctions, commonly known as "collateral consequences."[52] Varying across federal, state, and local jurisdictions, these collateral consequences include voter disenfranchisement, limited eligibility for public housing and benefits, restrictions in fostering and adoption, narrow access to healthcare, and many other barriers to vital resources and opportunities.[53]

In the employment context, where most collateral consequences are found,[54] barriers to jobs commonly manifest themselves in the following ways: (1) employers' request an applicant's criminal history or run a background check, which then results in discrimination based on the retrieved criminal history;[55] (2) statutory provisions prohibit certain employers from hiring people convicted of particular offenses;[56] or (3) a conviction either disqualifies the person from obtaining an occupational license or

---

https://perma.cc/KW3H-YM9V.

[50] *See infra* Part II.

[51] This section does not set out to prove that Labor participated in criminal record discrimination but rather illuminates Labor's role in creating the opportunity to do so.

[52] MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE 2 (2013 ed., 2013).

[53] *See id.* at § 1:12; *see also* JAMES FOREMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT 174 (2017) ("And a criminal conviction, even for something as minor as small-scale marijuana distribution, can make it even more difficult (or outright impossible) to vote, land a job, find housing or be admitted to college.").

[54] *See* Keri Blakinger, *Banned From Jobs: People Released From Prison Fight Laws That Keep Punishing Them*, THE MARSHALL PROJECT (Dec. 2, 2021), https://perma.cc/W6MS-YQP5.

[55] *See* Ginny Hogan, *What Goes Into A Pre-Employment Background Check?*, FORBES (May 19, 2023), https://perma.cc/263V-D9JC.

[56] *See, e.g.*, 66 PA. CONST. STAT. § 2604.1(b)(5) (prohibiting ride sharing companies, such as Uber or Lyft, from hiring drivers convicted of a sexual offense, a crime of violence, or an act of terror); *see also* 42 U.S.C. § 9858f (prohibiting childcare providers

negatively impacts their opportunity to be approved for an occupational license.[57]

Referencing such practices, Sociologist Devah Pager explains that the "negative credentials associated with a criminal record . . . certifies particular individuals in ways that qualify them for discrimination or social exclusion." As legitimate discrimination of formerly incarcerated people persists, their rate of unemployment is "five times higher than the unemployment rate for the general United States population, and substantially higher than even the worst years of the Great Depression."[58] This exclusion from employment bars people with records from the "surest way" to reduce the probability of reoffending,[59] whereas limited access to employment "increase[s] the likelihood [that] former prisoners fail to find stability and wind up back behind bars."[60] This process, counterproductive to reducing crime, cycles people with criminal records in and out of the criminal legal system. And for those who can exit the cycle and find a job, these jobs are "often temporary, part-time, and low paying, thus lacking in prospects for upward mobility," almost certainly subjecting people with a criminal record to a "lifetime straddling the poverty threshold."[61]

Black people, who are disproportionately represented in the criminal legal system,[62] are more severely affected by the stigma of a criminal record.[63] An employment study found that a criminal record reduced the likelihood of a job call back by nearly two-thirds for Black applicants and only 50% for white applicants.[64] This disparity illustrates how the consideration of criminal records perpetuates racial inequality and racially disproportional unemployment. Civil rights activist Michelle Alexander argues that the impact of a criminal record is a function of a racial caste system instituted through the criminal legal system.[65] She describes the effects of collateral consequences as "more damaging to the

---

from hiring childcare staff members that have been convicted of certain felonies or violent misdemeanors); Blakinger, *supra* note 54.

57 *See, e.g.,* 22 PA. CONST. STAT. § 16(b) (prohibiting the issuance of a private detective, investigator, and security guard license to an applicant who has been convicted of any felony, or of any offense falling within eleven distinct categories.); *see also* LOVE, *supra* note 52 at 50.

58 Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POL'Y INITIATIVE (July 2018), https://www.prisonpolicy.org/reports/outofwork.html.

59 Stephen Slivinski, *TURNING SHACKLES INTO BOOTSTRAPS: Why Occupational Licensing Reform*

Is the Missing Piece of Criminal Justice Reform, CTR. FOR THE STUDY OF ECON. LIBERTY 2 (Nov. 7, 2016), https://perma.cc/8M9P-E2VD.

60 Blakinger, *supra* note 54.

61 Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUSTICE (June 21, 2021), https://perma.cc/5M5E-BHZL.

62 *See Race and ethnicity*, PRISON POLICY INITIATIVE, https://perma.cc/2SXG-EJNW (noting that 13% of the U.S. population are Black people, while 37% of the prison population and 30% of people on probation or parole are Black). The overrepresentation of Black people in the criminal legal system cannot be disconnected from racial disparities in arrest data. For example, "in Washington, D.C., the [B]lack arrest rate for marijuana possession in 2010 was eight times that for whites[.]" JAMES FOREMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 18 (2017).

63 *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 937–75 (2003).

64 *See id.*

65 MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 25–75 (The New Press 1st ed. 2010); *see generally* WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861-1915 (Louisiana State University Press ed. 1991) (describing the development of convict laws as a feature of the Black codes during Reconstruction).

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

African American community than the shame and stigma associated with Jim Crow."[66] This "discrimination," according to Alexander, "send[s] the message that [people with criminal records, but specifically Black people with such records,] are not wanted and not even considered full citizens[.]"[67] Because, as of 2010, nearly three million Black people have criminal records, and are three times more likely to have one than white people, [68] exclusion and subordination of people with criminal records would operate as de facto racial discrimination.

Alexander's description of collateral consequences is analogous to the historical conception of these legal restrictions. Derived from English penal practices that used punishments to "separate [offenders] from society" and "expose [them] to public shame and ridicule," a similarly situated "civil death played a significant role in the [American] Colonies."[69] At its inception, this civil death was a "transitional status because execution generally followed soon after conviction of felony."[70] The law reform movement of the 20th century, recognizing the "archaic" nature of depriving people with criminal records of rights, called for the abolition of this concept.[71] In response, states were "dismantling the statutory apparatus of civil death" near the end of the 1970s.[72] This change in statutory regime halted in the 1980s when public attitudes toward formerly incarcerated people "hardened,"[73] leading elected officials to "appear 'tough on crime' to score political points."[74] As a result, we now have a new civil death that regulates the present system of discrimination described above.

Despite the disparities created by collateral consequences, this legislative regime has "proven extremely resistant to legal challenge."[75] Advocates argue that collateral consequences violate several provisions of the U.S. Constitution. Constitutional provisions "that constrain the state's authority to inflict punishment,"[76] such as the Eighth Amendment's requirement that punishment be proportional, the Fifth Amendment's prohibition of double jeopardy, and Article I's Ex Post Facto Clause, would seemingly implicate collateral consequences.[77] However, courts decline to recognize these consequences as "punishment,"[78] so the protections and limitations provided by these provisions of

---

[66] Alexander, *supra* note 65, at 21.

[67] *Id.* at 197.

[68] Shannon, *supra* note 44.

[69] LOVE, *supra* note 52, at 8–9.

[70] LOVE, *supra* note 52, at 8–9.

[71] *See* LOVE, *supra* note 52, at 8–9.

[72] LOVE, *supra* note 52, at 10–12.

[73] LOVE, *supra* note 52, at 12–14.

[74] Blakinger, *supra* note 54.

[75] Sandra Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 310 (2015).

[76] Mayson, *supra* note 75, at 310.

[77] Because collateral consequences "add to the burden of the offender's sentence," their addition to a sentence that is statutorily "sufficient, but not greater than necessary" would seemingly be a "prima facie violation of the Eighth Amendment requirement of proportionality." Mayson, *supra* note 75, at 310–11 (internal citations omitted). With respect to the Constitution's Ex Posto Facto Clause, prohibiting the passage of laws that "makes more burdensome the punishment for a crime," Beazel v. Ohio, 269 U.S. 167, 169 (1925), the "[m]illions of people [who] are subject to [collateral consequences] that did not exist when they pled guilty or took the chance of going to trial" would consider this clause implicated. Mayson, *supra* note 75, at 311. In a similar line of reasoning, the Double Jeopardy Clause is seemingly violated by collateral consequences, which "are deprivations of liberty imposed in addition to, and independently of, a criminal sentence[.]" Mayson, *supra* note 75, at 311.

[78] *See* Mayson, *supra* note 75, at n.44 (citing numerous Supreme Court and lower court cases that declined to recognize numerous

the Constitution do not apply.[79] Other constitutional challenges question the "broader substantive limits on the state's power to regulate individuals" on the basis of substantive due process and equal protection.[80] Courts have consistently only required rational basis review for such claims and have rarely held collateral consequences unconstitutional under that standard.[81] State constitutional challenges, however, have had limited success using similar substantive and punishment based claims.[82] Of course, these challenges depend on the protections provided by the respective state's constitution, creating variations in how people with criminal records are treated across the country.

Along with state constitutional challenges, Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of such individual's race, color, religion, sex, or national origin,"[83] could be used to limit collateral consequences in the employment context. In 2012, the Equal Employment Opportunity Commission (EEOC) issued guidance alerting employers that their use "of an individual's criminal history in making employment decisions may, in some instances, violate [Title VII]."[84] Because "[a]rrest and incarceration rates are particularly high for African American and Hispanic men," employer criminal record screening policies would "have a disparate impact based on race and national origin," thus violating Title VII if the employer is unable to demonstrate the policy's relation to the position and business necessity.[85] In essence, issuing this guidance over fifty years after Title VII, the EEOC is confirming that criminal record discrimination was used as de facto racial discrimination. Unfortunately, despite some EEOC victories challenging these policies under Title VII,[86] 96% of employers in a survey said they still conduct some kind of criminal background check.[87]

The reality is that criminal record discrimination has persisted for decades and continues to persist today. In the employment context, the implications of this practice are fatally oppressive, potentially leaving masses of people in a state of destitution. Black communities are victimized by the terrors of the police state, traumatized by the criminal legal system, and then barred from pursuing the American dream when they return. As advocates for workers, Labor must intervene.

---

collateral consequences as punishments).

[79] *See* Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (holding that the Double Jeopardy Clause applies only to criminal punishment); Calder v. Bull, 3 U.S. 386 (1798) (holding that the Eighth Amendment's prohibition on cruel and unusual punishment and the Ex Post Facto Clause apply only to criminal punishment).

[80] Mayson, *supra* note 75, at 310.

[81] Mayson, *supra* note 75, at 313–14.

[82] LOVE, *supra* note 52, at 182–228 (exploring numerous substantive and punishment-based challenges on the state level, some of which have been successful); *see, e.g.*, LOVE, *supra* note 52, at 196; LOVE, *supra* note 52, at 203–4 n.11.

[83] 42 U.S.C. § 2000e-2(a)(1).

[84] *See Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,* U.S. EQUAL EMP. OPPORTUNITY COMM'N (2012), https://perma.cc/MG5Z-CPT9.

[85] *See id.*

[86] LOVE, supra note 52, at 353–54 (recounting how the EEOC announced that Pepsi Beverages would pay $3.13 million as part of a settlement to resolve the discrimination charge); *but see* El v. Se. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007) (finding that SEPTA's hiring policy with regards to persons with certain types of criminal convictions did not violate Title VII).

[87] *National Survey: Employers Universally Using Background Checks to Protect Employees, Customers and the Public*, NAT'L ASSOC. OF PROFESSIONAL BACKGROUND SCREENERS 4 (2017).

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

II. LABOR'S ROLE IN CREATING AND PERPETUATING DE FACTO RACIAL DISCRIMINATION

Labor has influenced most, if not all, of the worker economy in some capacity.[88] In light of the systemic de facto racial discrimination caused by criminal record consideration, what part of this phenomenon can be attributed to Labor? This Part examines Labor's history of racial exclusion and the parallel development of the U.S. labor statutory regime to determine the answer. A focus on Labor in Pennsylvania reveals circumstantial evidence of a larger role in the proliferation of criminal record exclusion than understood before.

A. Preserving All-White Unions Into the 1970s

By the late 19th century, the Labor Movement had solidified itself as an organized and powerful force in the U.S. economy—for example, in 1886, there were "fourteen hundred separate strikes affecting 11,562 businesses," which included more than 600,000 workers.[89] This movement of workers, however, generally excluded Black workers from its organizing efforts. In 1902, labor unions had "1,200,000 members [but had] less than 40,000 negroes," according to sociologist W.E.B. Du Bois.[90] These Black workers were "mostly in a few unions, and largely semi-skilled laborers, like miners."[91] Booker T. Washington, a Black intellectual of the time, attributes this small representation of Black workers to "widespread prejudice and distrust of labor unions."[92] Labor's prejudice of Black workers was motivated by white worker's fear of competition from an influx of emancipated slaves.[93]

Some of Labor's leaders feared the long-term implications of excluding Black workers from unions. William H. Slyvis, leader of the National Labor Union, lobbied for the integration of Black workers post-emancipation to develop class solidarity.[94] He warned that if Black workers were not brought into unions, they would instead "take possession of the shops."[95] Some workers in the Antebellum South were in interracial unions, like railroad workers in New Orleans.[96] During the late 19th century, the Knights of Labor organized the "whole class of wage workers," as described by

---

88 *See, e.g.*, GREENHOUSE, *supra* note 22, at 9 (describing the many achievements of Labor for union and nonunionized workers).

89 Richard White, *The Republic for Which It Stands: The United States during Reconstruction and the Gilded Age, 1865-1896, in* THE OXFORD HISTORY OF THE UNITED STATES 518 (2017).

90 W.E.B. DU BOIS, THE NEGRO ARTISAN: REPORT OF A SOCIAL STUDY MADE UNDER THE DIRECTION OF ATLANTA UNIVERSITY 188 (1902)

91 *Id.*

92 Booker T. Washington, *The Negro and Labor Unions*, THE ATLANTIC, June 1913, at 756, 758. Washington's take is consistent with the description of unions from Kelly Miller, founder of Howard University's Sociology Department, in 1906: "The trades unions, either by letter of the law or by the spirit in which it is executed, effectually bar the negro from the more remunerative pursuits of trade and transportation. The negro workman is thus compelled to loiter around the outer edge of industry and to pick up such menial work or odds-and-ends pursuits as white men do not care to undertake." JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 261 n. 46 (2017) (citing Kelly Miller, *The Economic Handicap of the Negro in the North,* 27 ANNALS OF AM. ACAD. POL. SOC. SCI. 81, 81–88 (1906)).

93 *See* Paul Moreno, *Unions and Discrimination*, 70 CATO J. 67, 69–71 (2010).

94 *Id.*

95 *Id.*

96 *See, e.g.,* ERIC ARNESEN, WATERFRONT WORKERS OF NEW ORLEANS: RACE, CLASS, AND POLITICS, 1863–1923 (1991).

communists Friedrich Engels, including Black, women, and unskilled laborers.[97] However, the Knights banned Chinese workers from joining their ranks, describing them as "menace[s] to free labor and free men" because of the low price of their labor.[98] Other unions used similar accusations of undermining white workers' labor efforts to justify excluding Black workers.[99]

Despite not fully embracing all wage workers, Labor continued to become more powerful,[100] leading the U.S. Government to pass "the most radical piece of legislation ever enacted by the United States Congress."[101] The National Labor Relations Act, commonly known as the Wagner Act, was signed into law by Franklin D. Roosevelt in 1935, "giving workers the right to form unions and bargain collectively with their employers."[102]

In a concession to Southern Democrats lobbying for continued exploitation of Black workers, the Wagner Act "effectively excluded roughly two-thirds of the black workforce by denying statutory protection to agricultural and domestic workers."[103] For Black workers in industries covered by the Act, Section 9 gave unions license to disempower Black workers and exclude them from the workplace by (1) establishing a union as the "exclusive" bargaining representative based on a majority vote by the workers and (2) permitting "closed shop" agreements, where the employer agrees to only hire members of said union.[104] The NAACP accused Labor of abusing these agreements to create "a union for all the white workers."[105] With respect to these concerns, the NLRB prohibited "bargaining units defined by race alone,"[106] but still was "unwilling either to decertify unions that excluded [B]lack workers or make

---

[97] WHITE, *supra* note 89, at 519–20.

[98] WHITE, *supra* note 89, at 520–22.

[99] Moreno, *supra* note 93, at 70–71. Interestingly, in the early 20th century, union leadership viewed the Thirteenth Amendment, prohibiting slavery, *see* U.S. CONST. amend. XIII § 1, as a "glorious labor amendment." WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 137 (1991). In their view, injunctions that were being used to break strikes and force laborers back to work, were akin to "compelling [laborers] to accept the shameful garb of slaves." *Id.* at 138. They argued that the Thirteenth Amendment gave workers the right to strike. *See id.*

[100] Some scholars argue that the National Labor Relations Act was a "conservative statute" that "represented an effort to deradicalize an increasingly powerful and militant workers' movement." Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 14–15 (2016).

[101] PAUL FRYMER, BLACK & BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 34 (Princeton University Press 2008); *see also Andrias*, *supra* note 100, at 16 ("On another account, however, the Act was perhaps the most radical piece of legislation ever enacted by the United States Congress.") (internal quotations omitted).

[102] FRYMER, *supra* note 101, at 15. *See also* National Labor Relations Act: Rights of Employees, 29 U.S.C. § 157.

[103] FRYMER, *supra* note 101, at 37. Their exclusion was "met with a virtually total absence of any criticism by non-southern members of Congress." *Id.* at 38 (omitting internal quotations).

[104] *See id.* (citing National Labor Relations Act, 29 U.S.C. § 159).

[105] *See id.*; *see also* James Gray Pope, Ed Bruno & Peter Kellman, *It's Time for Unions To Let Go of Exclusive Representation: Janus calls for a radical rethinking of labor law*, IN THESE TIMES (July 19, 2018), https://perma.cc/SYZ9-8J7R ("When exclusive representation was first proposed back in the 1930s, the ACLU, the NAACP and labor radicals condemned it. They feared it would make unions more unresponsive, exclusionary and conservative . . . Majority-white unions can ignore the interests of workers of color, and majority-male unions those of women workers."); Madelyn C. Squire, *The National Labor Relations Act and Unions' Invidious Discrimination—A Case Review of A Would Be Constitutional Issue*, 30 HOW. L.J. 783 (1987) ("Black leaders warned of the dire consequences the Act's passage would have by legalizing the closed shop and the union's status as exclusive representative. The Urban League and NAACP lobbied for inclusion of a clause that would have made racial discrimination by unions unlawful under the NLRA.").

[106] SOPHIA LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT 41 (Sarah Barrnger Gordon

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

racial discrimination an unfair labor practice."[107] Subsequent amendments to the Act, including the Taft Hartley Act[108] and Landrum-Griffith Act,[109] provided some protections that Black workers could utilize, but nevertheless, racial discrimination by unions persisted.[110]

With respect to legislating away Labor's discriminatory practices, Labor's national leaders had traditionally opposed such efforts.[111] For example, in 1944, the American Federation of Labor (AFL) fought against the Senate's attempt to create a fair employment practice commission.[112] The AFL believed that this type of federal organization would conflict with the "the basic right of freedom of association" and interfere "with the self-government of labor organizations."[113] They feared that "any regulation of unions, even to prevent discrimination," would eventually lead to "broader regulations of unions[.]"[114] The Congress of Industrial Organizations (CIO), however, provided testimony in support of the fair employment commission. [115] This contrast between AFL and CIO resolved when the two unions merged to form AFL-CIO in 1955.[116] The combined organization was receptive to the plight of Black workers.[117] Notably, a 1961 report produced by Herbert Hill, Labor Secretory of the NAACP,

---

et al. eds., 2014).

[107] FRYMER, *supra* note 101, at 40.

[108] Labor Management Relations Act, 1947, 29 U.S.C. § 141. The duty of fair representation, requiring unions to "serve the interests of all members" with "complete good faith and honesty," Vaca v. Sipes, 386 U.S. 171, 177 (1967), existed prior to the Landrum-Griffin Act. *See id.* ("The statutory duty of fair representation was developed over 20 years ago . . . "); Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (established in 1959). However, union members weren't provided a private right of action to sue their union until enactment of Section 301 of the Labor Management Relations Act, *see* 29 U.S.C. § 185., allowing a lawsuit claiming the union violated their duty of fair representation. *See* Bell & Howell Co. v. NLRB, 598 F.2d 136, 147 (D.C. Cir. 1979). "A union violates its duty of fair representation when[, *inter alia*,] it takes advantage of its monopoly position as exclusive bargaining representative to discriminate invidiously against employees or potential employees on the basis of race or sex." *Id.* at 146–47.

[109] Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531. This Act created a "bill of rights" for union members with respect to their union. *Id.* § 411. Union members were granted the right to, *inter alia*, "vote in elections or referendums of the labor organization." *Id.* § 411. In theory, the Act's framework of accountability presented avenues for Black workers to protect themselves.

[110] *See generally* Herbert Hill, *Racism Within Organized Labor: A Report of Five Years of the AFL-CIO, 1955- 1960*, 30 J. NEGRO EDUC. 109, 109–18 (Spring, 1961) [hereinafter *Racism Within Organized Labor*] (discussing the lack of progress within national unions against racial inequity five years after merger of AFL and CIO); *see also infra* Section II.B.ii.

[111] Herbert Hill, *Black Workers, Organized Labor and Title VII of the 1964 Civil Rights Act, Legislative History and Litigation Record*, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 266 (Herbert Hill & James E. Jones, Jr. eds., 1993) [hereinafter *Black Workers*] (describing AFL leadership's opposition to legislation targeting discrimination in organized labor).

[112] *See id.* (describing how the AFL opposed "two bills proposing a federal fair employment practice law").

[113] *Fair Employment Practices Act Hearing S. 2048 Before A Subcomm. of the Comm. on Educ. and Lab.*, 78th Congress, 194–95 (1944) [hereinafter *Fair Employment Practices*].

[114] *Black Workers*, *supra* note 111, at 266 (quoting AFL representative Boris Shishkin's description of the federation's policy at a conference in 1944 entitled, "The Postwar Industrial Outlook for Negroes").

[115] *Fair Employment Practices*, *supra* note 113, at 115.

[116] *See* Keith J. Gross, *Separate to Unite: Will Change to Win Strengthen Organized Labor in America?*, 24 BUFF. PUB. INT. L.J. 75, 98 (2006).

[117] Martin Luther King delivered a speech at the AFL-CIO's Fourth Constitutional Convention, where he urged the union to work with the Civil Rights Movement: "But we know that if we are not simultaneously organizing our strength, we will have no means to move forward." *See* King, *supra* note 1, at 72.

describes numerous discriminatory practices by local unions affiliated with the AFL-CIO.[118]

The AFL-CIO would go on to support Title VII of the Civil Rights Act of 1964, but only after it assured that "seniority" was insulated from claims of discrimination.[119] Seniority is the "length of time that a particular worker has been a union member in a union job," which has been used as a determination of giving "special benefits."[120] Section 703(h) of Title VII, which the AFL-CIO insisted be included, instructed that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system."[121] This provision would "protect the racial status quo of union seniority systems for at least a generation,"[122] allowing "discrimination in the past . . . to inhibit [B]lack progress in a non-discriminatory present."[123] Moreover, after the AFL-CIO negotiated with sponsors of Title VII, an interpretative memorandum was introduced into the Congressional Record that made clear that "Title VII would have no effect on established seniority rights."[124]

The reluctance to completely eradicate racial discrimination through Title VII coincides with Labor's resistance to comply after Title VII was implemented. As a signal to its affiliate and local unions, the AFL-CIO sent out an alert, claiming that Title VII "has nothing to do with the day-to-day operation of business firms or unions[.]"[125] Labor, including the AFL-CIO, believed that Title VII's impact would be similar to identical state equal employment laws, which "posed little or no threat to their traditional practices."[126] However, "[b]etween 1964 and 1985, the AFL-CIO was involved in 296 reported federal court decisions involving union discrimination; the International Brotherhood of Electrical Workers (IBEW) was involved in 44 and the Teamsters in 51 discrimination cases alone."[127] Many of these lawsuits required unions to participate in affirmative action programs that utilized strict quotas, which pushed some unions to the verge of bankruptcy when they resisted because of court-ordered fines and legal fees.[128] And, although Title VII is not regulated by the NLRB, courts and the NLRB brought anti-discrimination measures into labor law after Title VII was enacted.[129]

---

118 *See Racism Within Organized Labor, supra* note 110, at 109–18 (describing racial segregation in union locals, practices of only sending Black union members to "menial" jobs and excluding Black workers from certain unions altogether).

119 *Black Workers*, *supra* note 111, at 269–70.

120 Gregory Hamel, *How Is Seniority Important to a Union?,* CHRON. (May 23, 2019), https://perma.cc/KEA6-DAUN; *see also Seniority Rights in Labor Relations*, 47 YALE L.J. 73, 73–74 (1937) (explaining that seniority rights are "a principle under which length of employment determines the order of lay-offs, rehirings [sic], and advancements").

121 Civil Rights Act of 1964, Pub. L. No. 88-352 (amended as 42 U.S.C. § 2000(e)–2(h)); *see also* THEODORE J. ANTOINE, LABOR UNIONS AND TITLE VII: A BIT PLAYER AT THE CREATION LOOKS BACK, in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY 254 (S. R. Bagenstos & E. D. Katz, eds., 2015) (describing AFL-CIO support for the inclusion of 703(h)).

122 *Black Workers*, *supra* note 111, at 270.

123 Moreno, *supra* note 93, at 78.

124 *Black Workers*, *supra* note 111, at 270; *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 350–51 (1977) (citing 110 Cong. Rec. 7213 (1964)) ("Title VII would have no effect on established seniority rights.").

125 *Black Workers*, *supra* note 111, at 272.

126 *Black Workers*, *supra* note 111, at 274–75.

127 Paul Frymer, *Affirmative Action in American Labor Unions: Necessary but Problematic for the Cause of Civil Rights*, 111 REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES 73, 78–79 (2007).

128 *See id.* at 79–80.

129 *See* NLRB v. Mansion House Ctr. Mgmt. Corp., 473 F.2d 471 (8th Cir. 1973) (holding that the NLRB should consider

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

The strong enforcement of Title VII, in response to decades of Black exclusion, could have contributed to Labor's ultimate decline. Paul Frymer, a professor of politics at Princeton University, argues that the Wagner Act and Title VII "institutionalized the labor-race divide, exacerbating an existing social problem at a time when the government could have worked to bridge the gap," which resulted in conflicts between the goals of Labor and those of civil rights proponents.[130] As Labor defended itself against Title VII claims, employers "seize[d] on the vulnerability of unions to their own advantage, working aggressively to defeat unions in the workplace."[131] Historian Lane Windham describes this period in the 1970s, as one during which "employers squeezed unionized workers[,] increasingly resisted new unionizing, [and broke] labor law more frequently[.]"[132] Unions "had to put more resources into lawsuits and less into organizing," resulting in a "diverse but weakened labor movement."[133]

B. The Rise of Criminal Record Exclusion Laws Coincides with the Opening Up of Unions Under Title VII

For over a century, Labor resisted integration and equal treatment of Black workers, and it actively worked to maintain white supremacist economic structures. It would be naïve to believe that this structural racism dissipated with one piece of legislation. Through a case study of Local 542 in Philadelphia, PA, this Section pieces together information to explore Labor's role in maintaining Black exclusion from and oppression in the workforce. Post-Title VII, criminal record discrimination, as explained in Section I, allowed Labor to utilize de-facto racial discrimination.

i. Labor Discriminated Against Black Workers in Philadelphia

In Philadelphia, commonly referred to as a "union town,"[134] Labor's history of excluding

---

allegations of a union engaging in racial discrimination before it certifies the union as an exclusive bargaining representative and that if the agency concludes that the union engaged in discriminatory practices, then it cannot certify the offending union during representation proceedings); *see also Bekins Moving & Storage Co.*, 211 NLRB No. 7 (1974), *overruled by Handy Andy*, 228 NLRB No. 59 (1977) ("[A]s an arm of the Federal Government, to confer the benefits of a certification upon a labor organization which is shown to be engaging in a pattern and practice of invidious discrimination . . . such action on our part would clearly be anomalous in view of the Federal Government's express policy against such discrimination and the many laws which prohibit it."); *but see* Bell & Howell Co. v. NLRB, 598 F.2d 136, 148 (D.C. Cir. 1979) (holding that "nothing in the LMRA, interpreted in light of the purposes of the Act, requires the NLRB to consider allegations of discrimination prior to certifying a victorious union, at least where the proffered evidence of discrimination relates to past union misconduct outside the bargaining unit that the union seeks to represent").

130 FRYMER, *supra* note 101, at 16.

131 FRYMER, *supra* note 101, at 17.

132 WINDHAM, *supra* note 30, at 8.

133 FRYMER, *supra* note 101, at 16–17. For example, "AFL-CIO budgets show that its litigation costs doubled between 1966 and 1973, doubled again between 1973 and 1979, before further quadrupling between 1979 and 1983." Frymer, *supra* note 127, at 73, 79.

134 *See, e.g.,* Jasmine Payoute, *Union workers at the Philadelphia Art Museum go on 1-day strike*, CBS NEWS PHILA. (Sept. 16, 2022), https://perma.cc/89G9-SU7J (quoting a local resident calling Philadelphia "union town"); Jessica Griffin, Photograph of Anna Durning holding a sign that reads, "Philly is a union town" in Susan Snyder, *Temple undergrads caught in tug-of-war as 1,000 attend afternoon walkout and rally*, PHILA. INQUIRER (Feb. 15, 2023), https://perma.cc/E2ML-8STS; Anna Orso, *Labor was born in Philadelphia: How the city's unions came to power, and how they use it,* WHYY (Sept. 7, 2015), https://perma.cc/H5EV-YH34 ("Philly is

Black workers from its ranks and the workforce runs deep. In the early 1800s, Philadelphia workers established the "first centralized labor organization" in the country, but Black workers were not included.[135] Later, because of an 1835 strike, "Philadelphia workers [won] the right to a 10-hour day," inspiring labor organizers across the country.[136] Very few Black workers participated in the strike or "benefited from the workers' victories."[137]

By 1899, according to a study of Black life in Philadelphia by W.E.B Du Bois, Black Philadelphians became more involved in the labor movement, despite racial discrimination persisting. Black service workers formed their own unions, including, but not limited to, The Caterers' Club, The Private Waiters' Association, and the Coachmen's Association.[138] In the Cigarmakers' Union, Black workers were "largely represented" with white workers with no apparent "friction."[139] Du Bois believed integration in this union could be attributed to "[n]egro labor [being] competent and considerable," as opposed to other trades, like carpentry and masonry, "where good Negro workmen are comparatively scarce."[140] This lack in skilled labor could likely be linked to the trades' "special effort . . . not to train Negroes for [their] industry."[141] Also during this time in Philadelphia, Labor was explicitly listing "white" as a qualification for "entrance into certain trade unions," or "invariably fail[ing] to admit" Black workers on their own accord.[142]

Parallel to labor organizations across the country, these 19th century practices of racial discrimination continued throughout the next century in Philadelphia. At the start of the Great Depression, there were an estimated 5,000 black union members in nationally affiliated labor unions in Philadelphia.[143] While they "were often placed into separate, racially exclusive locals," some unions were integrated, like Local 8 of the Marine Workers Industrial Union.[144] Additionally, municipal workers in Philadelphia, after decades of struggle within their unions, exemplified "interracial working-class solidarity."[145] The building trades unions in Philadelphia, however, have not traditionally demonstrated such racial unity. In 1963, protestors from the NAACP "blocked workers from entering the job site . . . until the city . . . hired Black workers for the project."[146] A few years later, in 1967,

a union town . . . collectively, unions wield a power in Philadelphia seen in few other cities in America[.]").

135 Juliana Feliciano Reyes, *Broken Rung: The building trades first organized in Philadelphia. Black people never got a fair shot at their jobs,* PHILA. INQUIRER (Aug. 30, 2022), https://perma.cc/BL64-6EJK.

136 *Id.*

137 *Id.*

138 *See* W.E.B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY 227 (Univ. of Penn. Press 1996 ed.) [hereinafter THE PHILADELPHIA NEGRO].

139 THE PHILADELPHIA NEGRO, *supra* note 138, at 227–28.

140 THE PHILADELPHIA NEGRO, *supra* note 138, at 128.

141 THE PHILADELPHIA NEGRO, *supra* note 138, at 128.

142 In an interview with Du Bois, a Black carpenter revealed that he attempted to join the Amalgamated Association of Carpenters and Joiners, an affiliate of AFL, but received no answer to his application. When he applied, he was told by an officer of the organization that "they had never *had* a colored man in the [u]nion" so the officer "didn't know whether [he] could join or not." THE PHILADELPHIA NEGRO, *supra* note 138, at 338.

143 FRANCIS RYAN, AFSCME'S PHILADELPHIA STORY: MUNICIPAL WORKERS AND URBAN POWER IN THE TWENTIETH CENTURY 45 (Temple Univ. Press ed. 2011).

144 RYAN, *supra* note 143, at 45–46.

145 RYAN, *supra* note 143, at 5.

146 Reyes, *supra* note 135.

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

President Lyndon B. Johnson had to implement a hiring plan that "required city contractors to make a 'good faith effort' to hire a specific percentage of Black workers on federally funded projects over $500,000."[147] This first-of-its- kind program was known as the Philadelphia Plan. Labor's racial climate, specifically in the Philadelphia trades, warranted these kinds of federal interventions, including through Title VII.

ii. Local 542 Discriminated Against Black Workers

Black workers utilized the courts to force Philadelphia unions to end their discriminatory practices.[148] On November 8, 1971, twelve Black operating engineers, on behalf of a class of minority workers, sued Local 542 of the International Union of Operating Engineers for employment discrimination.[149] Local 542, representing workers who operate construction equipment, was the "exclusive mechanism through which operating engineers were to be employed" because of their bargaining agreements with several contractor associations.[150] The lawsuit alleged that Local 542 was intentionally discriminating against minority workers through acceptance of its members, disparities in wages and hours, and its hiring hall job-referral practices.[151] Plaintiffs were able to present statistical evidence supporting their claims,[152] leading Judge A. Leon Higginbotham Jr. to hold that Local 542 violated Title VII,[153] which was affirmed by the Third Circuit on appeal.[154]

Local 542's leadership and members attempted to thwart the litigation through racist and unconventional measures. In 1972, three Black Local 542 members were beaten by their white peers after giving testimony for the litigation.[155] Two of the victims were beaten in the presence of the union's business agent and twelve to fifteen union members, who offered no assistance.[156] Local 542's leadership, through their counsel, attempted to remove Judge Higginbotham from presiding over the case because he was Black.[157] Judge Higginbotham declined to recuse himself, explaining that because

---

147 *Id.*

148 *See, e.g.,* United States v. Int'l Union of Elevator Constructors, Loc. Union No. 5, 538 F.2d 1012 (3d Cir. 1976).

149 *See* Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs, 347 F. Supp. 268, 272 (E.D. Pa. 1972).

150 *See* Pennsylvania v. Local Union 542, 469 F. Supp. 329 (E.D. Pa.1978).

151 *See id.*; *see also* Jan Schaffer, *Contractors ordered to hire through union*, THE PHILADELPHIA INQUIRER, July 26, 1979, at 3B.

152 *See Loc. Union 542*, 469 F. Supp. 329 (E.D. Pa.1978); *see also Operating Engineers Ruled Guilty of Bias; Big Damages Hinted*, N.Y. TIMES, Jan 4, 1979, at A20. Plaintiff's expert, Dr. Bernard Skin, produced the following statistical results: (1) Black membership of Local 542, 3.9%, was grossly disproportionate to the percentage in the comparative labor pool, 11%; (2) "[W]hites on the average worked 97.5 hours more than minorities in 1972 and earned $749 more."; and (3) Referrals were not being made in correlation with time out-of-work nor skill, but rather in an arbitrary and standardless process, supporting the other statistics that indicate racial discrimination. *Loc. Union 542*, 469 F. Supp. 329*,* 350–57 (E.D. Pa. 1978).

153 *See id.*; *see also Operating Engineers Ruled Guilty of Bias; Big Damages Hinted*, N.Y. TIMES, Jan 4, 1979, at A20. Judge Higginbotham also held that the contractors who the union agreed to send their members to through a hiring hall were liable. *See* Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 329 (E.D. Pa. 1978). The Supreme Court later overruled this portion of his holding. *See* Gen. Bldg. Contractors Ass'n. v. Pennsylvania, 458 U.S. 375 (1982).

154 *See* Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs, 648 F.2d 922 (3d Cir. 1981).

155 Reyes, *supra* note 135.

156 *See* Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs, 347 F. Supp. 268, 275 (E.D. Pa. 1972).

157 *See* Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 163 (E.D. Pa. 1974).

"one is [B]lack does not mean, ipso facto, that he is anti-white[.]"[158] In further defense of his position as a Black Judge, Higginbotham offered Local 542 and future parties the following:

> "White litigants are now going to have to accept the new day where the judiciary will not be entirely white and where some [B]lack judge will adjudicate cases involving race relations . . . [Black judges] should not have to disparage [B]lacks in order to placate whites who otherwise would be fearful of [their] impartiality."[159]

Despite these tactics to maintain racial discrimination within its union, in 1979 Judge Higginbotham issued injunctive relief that would force Local 542 to dramatically change its practices.[160] The decree set goals, requirements, and quotas for Local 542 to comply with within five years.[161] For example, in the first two years, Local 542 were required to admit one minority worker for each white worker until the percentage of minority workers was proportional to the percentage of minorities in that district.[162] With respect to hours, Local 542 had to strive to ensure that the "average number of hours worked by minorities equal[ed] that worked by whites."[163] The court further ordered that the parties publicize the opportunities created by the decree.[164] As a result, information about the decree was published in several local Philadelphia newspapers, informing Black and other minority workers of opportunities "that could result in employment as an operating engineer."[165]

Black workers were eager to take advantage of the decree. According to the answering service that was handling the calls to Local 542, "the phones [were] ringing off the wall."[166] The Philadelphia Tribune reported that membership of minority workers in Local 542 rose in the year following the court's order.[167] In this same reporting, Ralph Kennedy, Local 542's affirmative action agent, said that "99 percent of all minority union members [were] working."[168] With Local 542 seemingly complying with the decree, and minority workers taking advantage of the opportunities, the lawsuit was living up to expectations.[169]

iii. Enactment of the Criminal History Record Information Act

On July 16, 1979, a few months after Judge Higginbotham held that Local 542 violated Title

---

158 *Id.*

159 *Id.* at 177–80.

160 *See* Pennsylvania v. Loc. Union 542, Int'l Union of Operating Eng'rs, 502 F. Supp. 7, 8 (E.D. Pa. 1979).

161 *Id.* at 9–12.

162 *See id.* at 10–11.

163 *Id.* at 10.

164 *Id.* at 16.

165 *Legal Notice*, PHILA. DAILY NEWS, July 30, 1980, at 24; *Legal Notice*, PHILA. INQUIRER, June 29, 1980, at 5-C.

166 Timothy Dougherty, *Job seekers want direct phone line to Local 542*, PHILA. TRIB., July 18, 1980, at 5.

167 *See id.*

168 *Id.*

169 In a letter to the editor printed in the Philadelphia Inquirer, one writer described the court order as one that would "not only help black families but society as a whole." Patricia Webster, *Decisive act*, PHILA. INQUIRER, Nov. 18, 1979, at 6-H. The author also wrote that she "hop[ed] it will become of nationwide significance." *Id.*

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

VII, and a month before he issued the affirmative action decree,[170] Pennsylvania (PA) enacted the Criminal History Record Information Act (CHRIA).[171] The Act, *inter alia*, permitted employers and state licensing agencies to refuse to hire someone or grant them an occupational license because of their criminal record.[172] More specifically, employers could use an "applicant's criminal history . . . for the purpose of deciding whether or not to hire the applicant,"[173] while state licensing agencies "may consider convictions of the applicant[.]"[174] However, the law created some limitations. State agencies were prohibited from considering arrests, expunged convictions, and pardoned convictions.[175] Employers were instructed that felony and misdemeanor convictions and arrests that relate to the "applicant's suitability for . . . the position" could be considered, but misdemeanor convictions and arrests that did not relate could not be considered.[176] Employers were also instructed to provide written notice to applicants that their refusal to hire an applicant was based in whole or part because of their criminal record.[177]

While the bill could be read as one that "restrict[s] public and media access to an individual's past criminal records,"[178] it should instead be interpreted as the State authorizing the use of criminal records to discriminate, however limited.[179] When the State regulates actions, it is essentially putting the approval of the State behind certain forms of that action. Here, the State is telling its agencies and employers that they may create negative inferences from one's interaction with the criminal legal system, and then use that as a justification to deny them access to a position or license.

When the bill containing the Act, PA House Bill 462, was first introduced in the House on March 5, 1979, it made no mention of criminal records, but instead would have only removed antique firearms from regulation by Pennsylvania's criminal firearm laws.[180] The amendments to H.B. 462, adding CHRIA, were introduced on July 2, 1979 by the PA Senate.[181] These amendments substituted and repealed a previous version of CHRIA enacted on November 26th, 1978,[182] and delayed the

---

[170] *See* Pennsylvania v. Loc. Union 542 Int'l Union of Operating Eng'rs, 469 F. Supp. 329 (E.D. Pa. 1978) (decided Nov. 30, 1978); Commonwealth v. Loc. Union 542, Int'l Union of Operating Eng'rs, 502 F. Supp. 7 (E.D. Pa. 1979) (decided Aug. 8, 1979).

[171] Act of July 16, 1979, Pa. Pub. L. 116-47 enacted from H.B. 462, 163rd Gen. Assemb., Reg. Sess., (Pa. 1979), (repealing and replacing Criminal History Record Information Act of 1978, Pa. Pub. Law No. 1274-305), § 2.

[172] *See id.* at § 2 (9124)–(9125).

[173] *Id.* at § 2(9125)(A).

[174] *Id.* at § 2(9124)(A).

[175] *See id.* at § 2(9124)(B).

[176] *See id.* at § 2(9125)(B).

[177] *See* Act of July 16, 1979, Pa. Pub. L. No. 116-47 (1979), (repealing and replacing Pa. Pub. L. No. 1274-305); § 2(9124)(C).

[178] *Solons Go Home For Summer,* THE DAILY NEWS (Huntingdon, Pa.), July 12, 1979, at 1.

[179] *See, e.g., Report on How Our Legislators Voted*, THE GETTYSBURG TIMES, July 19, 1979, at 11 (describing H.B. 462 as one that "gav[e] the media access to criminal records").

[180] H.B. 462, Sess. 1979, Printer's No. 494, § 1.

[181] H.B. 462, Sess. 1979, Printer's No. 1912.

[182] H.B. 2095, Sess. 1978, Printer's No. 3939 (Nov. 26, 1978); H.B. 462, Sess. 1979, P.No. 1912, § 3 ("THE ACT OF NOVEMBER 26, 1978 (P.L.1274, NO.305), KNOWN AS THE "CRIMINAL HISTORY RECORD INFORMATION ACT," IS REPEALED.").

enactment of this version until January 1, 1980.[183] The original bill was largely developed from internal rules utilized by the Pennsylvania State Police.[184]

Officials of the criminal legal system complained that the previous version of CHRIA was "too vague, confusing, and garbled" to interpret who could get access to records.[185] As a result, Allegheny County District Attorney Robert E. Dauer prohibited his office from sharing records with judges, magistrates, bail agencies, police, and other agencies until the law was amended.[186] Dauer restricted access to this information out of fear that his staff would be jailed for releasing records in conflict with the law because the law, as it was originally passed, created a misdemeanor for violations.[187]

By delaying the effect of CHRIA until 1980, the General Assembly had time to make substantive amendments to resolve these issues in another act passed on December 14, 1979. While it is unclear which portions of the Act caused the confusion, the December 1979 amendment clarified that "criminal history record information maintained by a criminal justice agency shall be disseminated to any criminal justice agency" or agencies providing services to a criminal justice agency.[188] The amendment also, *inter alia*, removed the criminal penalties.[189]

Most important to this Comment, the December 1979 amendment made the following changes to the employers' and licensing agencies' access to records: (1) in addition to the other limitations, state agencies could not use convictions that did not "relate to the applicant's suitability for the license";[190] and (2) changing employers restrictions, as "arrests and misdemeanor convictions [could] be considered by the employer only to the extent to which they relate to the applicant's suitability" for the position.[191] Absent from the regulation of employer's use of criminal records are felony convictions, which presumably grants employer the ability to use them without limitation.

iv. Circumvention of Title VII

CHRIA, as amended by HB 830 in December 1979,[192] makes no mention of unions nor labor organizations in the text of the statute. However, the contractual relationship established between unions and employers as it relates to hiring and union membership creates opportunities for discrimination against people with criminal records. Even in situations where no such provision exists in the agreement, criminal record discrimination by State licensing agencies could exclude workers from certain unions. The following scenarios demonstrate how CHRIA could exclude someone from work or union membership:

---

183 H.B. 462, Sess. 1979, Printer's No. 1912, § 4(2).

184 Lt. Gov Kline, *The right to privacy versus the right to know*, PHILA. INQUIRER, Aug. 3, 1979, at 9.

185 Paul Maryniak, *Criminal Record Access Battle Looms in Court*, PITT. PRESS, June 17, 1979, at A-2.

186 *See* Patrick Boyle, *State 'Rap-Sheet' Law Facing 6-Month Delay*, PITT. PRESS, July 6, 1979, at A-1; Paul Maryniak, *Criminal Record Access Battle Looms in Court*, PITT. PRESS, June 17, 1979, at A-2.

187 Paul Maryniak, *Criminal Record Access Battle Looms in Court*, PITT. PRESS, June 17, 1979, at A-2; H.B. 2095, Sess. 1978, Printer's No. 3939 (Nov. 14, 1978) § 902.

188 H.B. 830, Sess. 1980, Printer's No. 2629 (Dec. 14, 1979) § 3(9121)(a).

189 H.B. 830, Sess. 1980, Printer's No. 2629, (Dec. 14, 1979) § 3(9182).

190 H.B. 830, Sess. 1980, P.N. 2629, (Dec. 14, 1979) § 3(9124).

191 H.B. 830, Sess. 1980, P.N. 2629, (Dec. 14, 1979) § 3(9125).

192 *See* 18 PA. CONST. STAT. §§ 9101–83, as amended by 1979, Dec. 14, P.L. 556, No. 127, § 3.

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

1) An employer and union have arranged for the union to operate as a "hiring hall," which contractually requires the employer to "hire exclusively through referrals from [the] union."[193] The employer the union contracted with does not want individuals with certain criminal records employed at their workplace, which is permitted under CHRIA, so the union does not refer a member otherwise qualified for the position because of their criminal record.

2) An employer and union have bargained for a "union shop" arrangement, wherein the worker "must join [the] union within a limited number of days" as a "condition of their continued employment."[194] A qualified worker for an open position submits their application to an employer. The employer runs a background check, discovers a criminal record that they deem disqualifies the worker, and decides not to hire them. The worker has been both excluded from employment and the union because of their criminal record, as authorized by CHRIA.

3) A trade union requires its members to have a specific occupational license from a State licensing agency. The employer that hires workers of this trade, whether union or not, also requires their employees to have this occupational license. An applicant, otherwise qualified for the job, was disapproved for their occupational license because the State licensing agency decided that their criminal record deemed them unfit for the license. CHRIA allowed the State licensing agency to discriminate on the basis of a criminal record, so the applicant could not be employed by that job nor become a member of the union. Further, that worker is categorically barred from working in that occupation under any union or employer.

Local 542 could find themselves discriminating against people with criminal records in situations similar to scenarios 1 and 3 above. Local 542's hiring hall provision in their collective bargaining agreements with various contractor associations put them in scenario 1.[195] As demonstrated in this scenario, the union could discriminate in how it disseminated jobs because of a worker's criminal record. Additionally, Local 542 would find themselves excluding workers in scenario 3 because of the occupational licensing required for the trades of some of its members. For example, Local 542 members that operated cranes and worked as surveyors were required to get licensed,[196] so if the respective State Board denied a worker said license because of their criminal record, they would be excluded from the union and the trade.

By 1980, 1,548,147 people were in prison or on parole, and 4,976,172 had felony records.[197] Black Americans made up 524,810 and 1,310,724 of these respective populations.[198] The completely legal use of the above discriminatory practices for people with criminal records would undoubtedly disproportionately impact Black people, thus constituting de facto racial discrimination when used broadly.

---

193 *Hirings Halls*, N.L.R.B., https://perma.cc/862T-MT9S.

194 *Union shop*, LEGAL INFO. INST., https://perma.cc/8FT4-Q8Z2.

195 *See supra* Section II.B.ii (explaining that Local 542 is the hiring hall for various contractors).

196 Occupational licenses were not required for crane operation until 2010. *See* 2008, Oct. 9, P.L. 1363, No. 100, § 501 (2010). However, Pennsylvania's Department of Labor and Industry had been regulating crane operations when the legislature enacted CHRIA. *See* 34 PA. CONST. STAT. § 25.32 (adopting rules in 1924, and amending them at least once in 1969, that regulate "cranes"). Through CHRIA, the Department of Labor and Industry could presumably consider criminal records in granting "permission to engage in [the] trade." H.B. 462, Sess. 1979, Printer's No. 1912 (July 16, 1979) § 2(9124). Separately, surveyors were required to have a license by the time CHRIA was enacted. *See* 63 PA. CONST. STAT. § 150.

197 Shannon, *supra* note 44, at 1805, 1808.

198 Shannon, *supra* note 44, at 1805, 1808.

v. Circumstantial Evidence of a Contentious Connection

Democratic Chairman of the PA Senate Judiciary Committee Michael A. O'Pake, representing a district in Reading, PA,[199] added the CHRIA amendment to PA House Bill 462 that delayed the previous bill's enactment.[200] Subsequently, O'Pake formed a subcommittee to study CHRIA and "rework it (the law) into a solution to the practical problems."[201] Although O'Pake did not add the December 1979 Amendments, two of the State Senators that he added to the committee submitted the version that was enacted.[202]

A few months after O'Pake pushed HB 462 and set in motion the December 1979 amendments, O'Pake announced his candidacy for PA Attorney General on November 26, 1979.[203] This was the first election for PA Attorney General after constitutional amendments made the position an elected office, which O'Pake had also "helped push."[204] Despite having never hired a Black staffer,[205] and supporting a bill that permitted capital punishment for "use of weapons in a crime,"[206] O'Pake received endorsements from Philadelphia's "Black ward leaders."[207] Nevertheless, the *Philadelphia Tribune*, the "oldest continuously published newspaper serving the African-American reader in the United States,"[208] endorsed O'Pake's Republican opponent, LeRoy Zimmerman, because of his "sensitivity to Black and other minorities."[209]

While there was conflict among the Black community about supporting O'Pake, Labor provided "strong support" behind his candidacy.[210] Labor's support for O'Pake, who was touted as "an ardent advocate of the blue-collar worker,"[211] materialized as endorsements and donations from labor unions.[212] He received at least $10,000 in campaign contributions from various labor unions, including the Pennsylvania State Education Association and the American Federation of State, County and Municipal Employees.[213] O'Pake received numerous endorsements, including from the National Union

---

199 *See* Patrick Boyle, *State 'Rap-Sheet' Law Facing 6-Month Delay*, PITT. PRESS, July 6, 1979, at A-1.

200 H.B. 462, Sess. 1979, Printer's No. 1912, § 2.

201 *See* Patrick Boyle, *State 'Rap-Sheet' Law Facing 6-Month Delay*, PITT. PRESS, July 6, 1979, at A-1.

202 O'Pake "formed a subcommittee to begin a new study of the Criminal History Records Information Law," which included Senators W. Louis Coppersmith, Vincent J. Fumo, and W. Thomas Andrews. *See* Patrick Boyle, *State 'Rap-Sheet' Law Facing 6-Month Delay*, PITT. PRESS, July 6, 1979, at A-1. These same Senators were listed on the bill as the one's who "respectfully submitted" it. H.B. 830, Sess. 1979, Printer's No. 2629.

203 *See* Thomas Ferrick Jr., *O'Pake seeking new point*, PHILA. INQUIRER, Nov. 27, 1979, at 3-BW.

204 *Id.*

205 Ironically, considering his role in establishing CHRIA, O'Pake promised to employ "minorities and people of all walks of life" if elected. *O'Pake gets area backing*, PHILA. TRIBUNE, Oct. 31, 1980, at 28.

206 Ron Suber, *Michael O'Pake*, NEW PITT. COURIER, Oct. 11, 1980, at 13.

207 *O'Pake gets area backing*, PHILA. TRIBUNE, Oct. 31, 1980, at 28.

208 Chanel Hill, *1884: Tribune born in era where Blacks had limited rights, voice*, PHILA. TRIBUNE (Jan. 30, 2015), https://perma.cc/T9FJ-J35E.

209 *Zimmerman for Attorney General*, PHILA. TRIBUNE, Oct. 31, 1980, at 8.

210 Patrick Boyle, *1st Primary For Attorney General In Hands of 'Jury'*, PITT. PRESS, Apr. 13, 1980, at B-5.

211 *O'Pake gets area backing*, PHILA. TRIBUNE, Oct. 31, 1980, at 28.

212 *See, e.g.,* Harold Jamison, *Nicholas' union backs O'Pake for Attorney Gen.*, PHILA. TRIBUNE, Oct. 3, 1980, at 4.

213 *See* Bob Grotevant, *Attorney General Candidate Phillips Top Spender*, PITT. PRESS, Apr. 20, 1980, at B-8.

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

of Hospital and Health Care Employees, District 1199C, which has 13,000 members, District 15 of the United Steel Workers Union, the Iron Workers Local of Pittsburgh, and the Erie Local of the United Auto Workers/Community Action Program.[214] Notably, the AFL-CIO of Pennsylvania endorsed O'Pake; this organization is the umbrella union of the International Union of Operating Engineers, Local 542.[215]

O'Pake would go on to lose the election to Zimmerman by 2.8 percentage points.[216] Nevertheless, Labor's position behind O'Pake's candidacy indicates something more significant than their preferred state Attorney General in 1980. By providing endorsements and campaign contributions to O'Pake, Labor communicated its approval of O'Pake's crucial involvement in CHRIA's enactment, and consequently, CHRIA itself. Support for a candidate does not mean categorical agreement with their entire history. However, as organizations narrowly concerned with worker's terms and conditions of employment,[217] and the proximity of their endorsement to CHRIA's passage and amendment, it is unlikely that Labor did not consider O'Pake's role in passing legislation that regulated the degree of access that workers have to employment opportunities. Moreover, as Labor made no public indication that they disapproved of the portions of CHRIA that related to employers and licensing agencies,[218] their support of O'Pake stands alone as their public position on the legislation.[219] In sum, when Labor endorsed O'Pake's campaign, they endorsed de facto racial discrimination through criminal record discrimination.

For IUOE, specifically Local 542, the timing CHRIA's enactment in HB 462 fuels speculation of a more devious framing of CHRIA. HB 462's version of CHRIA was enacted during the period in between Local 542 being held liable for violating Title VII and the court's decision that ordered the affirmative action plan.[220] As Local 542 would inevitably have to change its discriminatory practices, CHRIA presented a legal avenue to systemically discriminate against a mass of Black workers. Because of the disproportional effect of criminal record discrimination on Black and other workers of color,[221] this new avenue of systemic discrimination would allow Local 542 to continue their tradition of racial discrimination.[222]

---

214 *See* Harold Jamison, *Nicholas' union backs O'Pake for Attorney Gen.*, PHILA. TRIBUNE, Oct. 3, 1980, at 4.

215 *See id.*; *Landfill Is Shut Down By 60 Union Pickets*, EVENING JOURNAL, June 26, 1979, at 27 (writing "AFL-CIO Operating Engineers Local 542" and referencing the workers as "AFL-CIO members").

216 *See* Michael Smerconish, *Head Strong: Can Murphy make history with run for Pennsylvania attorney general?,* PHILA. INQUIRER (May 15, 2011), https://perma.cc/C2JY-TAAY.

217 *See* 29 U.S.C. § 152(5) (defining labor organizations in the Wagner Act).

218 While it is possible that I have missed public opinion from labor organizations at this time on the legislation, my research suggests they did not contribute to the public discourse surrounding various versions and amendments of this Act between 1976 and 1981.

219 My research lacks records from labor organizing conferences and internal meetings. This information could reveal how various labor organizations viewed the legislation if it was discussed. Nevertheless, if these conversations took place, they seemingly have not manifested themselves as official positions from union leadership in public discourse.

220 *See supra* Section II.B.iii.

221 *See supra* Section II.B.iv.

222 After the passage of Title VI, it was common for employers to use inventive methods to exclude Black workers. In *Griggs v. Duke Power Co.*, a North Carolina power company "openly discriminated on the basis of race in the hiring and assigning of employees" prior to July 2, 1965, the effective date of Title VII. 401 U.S. 424, 427 (1971). Then, on the day Title VII went into effect, the company implemented testing and education requirements. *Id.* at 427–28.

When the timing is considered alongside how CHRIA could be used by Local 542, the endorsement by AFL-CIO, Local 542's umbrella union, for O'Pake goes beyond an indication of support. Instead, the culmination of this evidence could lead one to view the endorsement as Local 542 thanking O'Pake for the new discriminatory tool. Even though the first version of CHRIA was enacted prior to the court's holding that Local 542 was liable,[223] O'Pake's crucial role to ensure that it remained a functioning statute during that period would still warrant such a thank you. While it is abundantly clear that this evidence is circumstantial, when considered together, it requires questioning Local 542's intentions.

Decisions made by Local 542's leadership and members years after the affirmative action plan fail to demonstrate that they would *not* have acted deviously in relation to CHRIA. Instead, such actions indicate that there is an "entrenched culture of racism at the union . . . that continues to this day."[224] In 1986, Local 542 submitted an amicus brief in support of another union that was found liable for violating Title VII by "discriminating against nonwhite workers."[225] At a remedial stage, the Supreme Court was deciding whether a district court could order "race-conscious relief that may benefit individuals who are not identified victims of unlawful discrimination."[226] Local 542 argued that these orders would violate Title VII because "Congress expressly determined that courts would not be authorized to order racial quotas[.]"[227] However, the Supreme Court disagreed with Local 542, affirming the use of this injunctive relief.[228]

In addition to this attempt to disempower the anti-discrimination doctrine, Black workers continued to face discrimination in their relationship to Local 542. The membership of workers of color in Local 542 stood at 15.5% in 2017, according to WHYY reporting, which was a "slight improvement over the number in 2009 and a full four points lower than where it stood in 1989[.]"[229] Because Philadelphia is a majority-minority city,[230] this membership is far from proportional to the demographics of the city. And for those workers of color that were able to obtain membership into the union, their experience was tainted by tactics of white supremacy from Local 542's white members. Across multiple decades, including as recent as 2017, there have been various reports of Black Local 542 members encountering nooses, racial slurs, and other white supremacist symbols while on worksites manned by Local 542.[231] Local 542's continued display of racial discrimination, on top of trade union's general practice of excluding Black workers,[232] further implicates their role in the history

---

223 *See supra* Section II.B.iii.

224 Malcolm Burnley, *In 2017, is white supremacy still alive and well in this Philadelphia building trades union?,* WHYY (July 25, 2017), https://perma.cc/5TY8-L6D2.

225 Brief of Loc. 542, Int'l Union of Operating Eng'rs & Loc. 36, Int'l Ass'n of Firefighters, as Amici Curiae in Support of Petitioners, Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*,* 478 U.S. 421 (1986); Loc. 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

226 *Loc. 28 of Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 426.

227 Brief of Loc. 542, Int'l Union of Operating Eng'rs & Loc. 36, Int'l Ass'n of Firefighters, as Amici Curiae in Support of Petitioners at 1, *Loc. 28 of the Sheet Metal Workers' Int'l Ass'n,* 478 U.S. 421.

228 *See Loc. 28 of Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 475.

229 Burnley, *supra* note 224.

230 *See id.*

231 *See id.*

232 "The local building trades have refused to share demographic data on the workers they represent. But the most recent available data from 2012 show that the industry's union workforce was 99% male and 76% white in a city that is nearly 44%

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

of criminal record discrimination in Pennsylvania.

III. ADVOCACY AGAINST CRIMINAL RECORD DISCRIMINATION TO BUILD A STRONGER LABOR MOVEMENT

Reckoning with Local 542's troubled history reveals a suspicious connection between Labor and criminal record discrimination. While the history explored in this Comment is narrow, and support for the connection is circumstantial, this documentation may just be the tip of the iceberg. In other jurisdictions with similar criminal record dissemination laws, Labor could have a similar or an even more damning connection to this regulation. And even if such a connection isn't revealed, union membership and hiring halls were undoubtedly affected by these regulations,[233] whether intentionally facilitated by the union itself or consequential of decisions by other actors. In sum, as organizations deeply intertwined in the workplace economy, Labor is tied to criminal record discrimination in some form.

In this current resurgence of unionization, Labor's relationship to a practice that excludes workers from the workplace is damning for the movement, especially when the practice disproportionately impacts the Black workers and other workers of color driving the resurgence. If Labor wants to capitalize on the energy behind unionization, then it must learn from this history of exclusion and instead make decisions that expand access to the workplace and unions. This work necessitates Labor becoming a zealous advocate for the prohibition of criminal record discrimination.[234]

In Pennsylvania, there already efforts to significantly limit the ability to discriminate against someone with a criminal record through CHRIA. Advocates, like those at Community Legal Services, have lobbied for statutory reforms.[235] These efforts led legislators to enact regulations limiting or pushing back against CHRIA, including a PA statute that limits the use of "old and unrelated criminal convictions" by State agencies,[236] a Philadelphia law that permits employers to do a background check only after making a conditional offer,[237] and a PA statute that automatically seals criminal records from certain offenses after a number of years.[238] Meanwhile in the courts, advocates have attempted to limit CHRIA's scope of how an employer or State agency can consider a criminal record.[239] For example, as

---

Black, and where other major labor unions are predominantly African American. Data from the federal Equal Employment Opportunity Commission show that among 40 Pennsylvania unions that refer workers to contractors, 91% of their more than 39,000 members were white in 2018 and 5% were Black." Reyes, *supra* note 135.

[233] Even if Local 542 did not intentionally support O'Pake because of his role in passing CHRIA, two things remain true: (1) CHRIA had a clear disparate racial impact; and (2) CHRIA's disparate racial impact supported the union's longstanding practice of racial exclusion. *See supra* Section II.B.iv.

[234] This paper does not seek to advocate for one way to do this work, but instead recognizes that there are many possible avenues that Labor could take to limit the ability to discriminate against people with criminal records.

[235] *See, e.g.,* Community Legal Services of Philadelphia (@CLSphila), X (Dec. 6, 2022, 10:29 AM), https://perma.cc/78X3-SVHU (advocating for a bill that would reform criminal record discrimination by State agencies).

[236] *See id.*

[237] *See* Nick Vadala, *Your rights when you're looking for a job and you have a criminal record*, PHILA. INQUIRER (Jan. 11, 2021), https://perma.cc/XQQ7-PV3Y.

[238] *See RELEASE: On Its One Year Anniversary, Pennsylvania's Clean Slate Law Has Cleared Nearly 35 Million Records*, CENTER FOR AMERICAN PROGRESS (June 30, 2020), https://perma.cc/NVG4-42CU.

[239] *See, e.g.,* King v. Bureau of Pro. & Occupational Affs., 195 A.3d 315 (Pa. Commw. Ct. 2018) (limiting the State agency's

a result of one lawsuit against SEPTA, the Philadelphia region's bus service, the organization agreed to give priority hiring to applicants they denied because of a drug conviction and rescind their blanket policy against hiring someone with a drug conviction.[240]

By joining this fight to expand access to the workplace and eliminate criminal record discrimination, Labor would continue its long history of wining major reforms in the workplace. These achievements are not limited to those won in individual bargaining agreements but includes those enforced in all workplaces, whether union or nonunion. Labor "played a pivotal role in winning enactment of the federal minimum wage, Social Security, unemployment insurance, Medicare, [and] occupational safety laws."[241] The power behind Labor's lobbying efforts for such reforms was their ability to "mobilize average Americans to get involved in our democracy and elections, to vote, and to make themselves heard."[242] Dr. Martin Luther King Jr. highlighted Labor's power in a 1965 speech, noting that "[t]he labor movement was the principal force that transformed misery and despair into hope and progress."[243] Labor can transform the landscape of criminal record discrimination into one of equitable workplace access.

This is not to say that Labor has not been a partner in these reform efforts.[244] On the AFL-CIO's website, they explain they are "working toward achieving a reformed criminal justice system that offers formerly imprisoned people an economic path forward and restores voting rights."[245] They have supported federal criminal justice reform legislation, including the First Step Act in 2018.[246] More specific to criminal record discrimination, local unions backed actions to stop the practice.[247] Notably, AFL-CIO PA supported efforts to pass the previously-mentioned law that would automatically seal criminal records under certain conditions.[248] President of the Pennsylvania AFL-CIO Rick Bloomingdale commented that "people deserve a second chance," and that "[i]t's time that we pushed back and say enough is enough."[249] In addition to reforms in the legislature, Pennsylvania unions have also sued employers for considering criminal records in hiring.[250]

---

discretion in how they can use one's criminal record).

[240] *See* Preliminary Approval of Class Action Settlement at 2, Frank Long, v. Se. Pa. Transp. Auth., No. 16-1991 (E.D. Pa. June 1, 2021), ECF No. 88.

[241] GREENHOUSE, *supra* note 22, at 9.

[242] GREENHOUSE, *supra* note 22, at 10.

[243] GREENHOUSE, *supra* note 22, at 10–11.

[244] In Philadelphia, for example, the Laborers District Council of the Metropolitan Area of Philadelphia and Vicinity supported a fundraiser for Philadelphia Lawyers for Social Equity (PLSE), *see* PLSE (@plse_philly), INSTAGRAM (Nov. 3, 2023), https://perma.cc/3D6C-5RBH. PLSE is an organization that helps people get their criminal record expunged or pardoned. *See* PHILA. LAWYERS FOR SOCIAL EQUITY, https://perma.cc/62GA-NRLF.

[245] *Criminal Justice Reform*, AFL-CIO, https://perma.cc/37W4-DVBR.

[246] *Letter in Support of an Act to Reform the Criminal Justice System*, AFL-CIO (Dec. 18, 2018), https://perma.cc/X64K-8PWJ.

[247] *See, e.g., Unions back effort to stop unjust discrimination against applicants with criminal records*, NORTHWEST LAB. PRESS (July 1, 2014), https://perma.cc/669D-VXDA.

[248] *See* Jan Murphy, *Bill giving some criminal offenders a second chance at a 'clean slate' advances*, PENN LIVE (June 18, 2018), https://perma.cc/S3H8-NJ78.

[249] *Id.*

[250] *See, e.g.,* United Union of Roofers, Waterproofers & Allied Workers v. N. Allegheny Sch. Dist., 220 A.3d 709 (Pa. Commw. Ct. 2019) (challenging that roofers should be exempt from school district's policy of background check for employees who had direct contact with children).

https://scholarship.law.upenn.edu/jlasc/vol27/iss2/2
DOI: https://doi.org/10.58112/jlasc.27-2.2

However, Labor can do much more if the goal is to achieve "mass employment, not mass incarceration," as called for by AFL-CIO President Richard Trumika in 2014.[251] Labor can expand upon the work that they have done to eliminate criminal record discrimination by prioritizing this cause in their lobbying efforts, becoming central figures in the public discourse on the issue, and pursuing litigation efforts that challenge the practice. Additionally, a report by the National Employment Law Project highlights some efforts by unions that don't implicate criminal record discrimination laws but directly support workers with criminal records: (1) operation of an educational or vocational training program by unions inside prisons, which would give participants a greater chance of obtaining post-release employment; and (2) providing apprenticeship and training programs specifically for workers recently released from incarceration.[252] The report suggests that these efforts could be scaled nationally.[253] Finally, unions should consider bargaining over provisions that limit their employer's use of criminal records for hiring.

It is clear there is more work that can be done. Labor must be willing to take on this effort if they want to realize a more powerful movement of workers.

CONCLUSION

In his 2022 essay in the *Philadelphia Inquirer*, labor organizer Paul Prescod pointedly asserted that "[t]he labor movement cannot afford to rest on the laurels of past glory days."[254] Instead, Prescod exhorts Labor to place workers of color squarely at the center of its mission: "Unions are at their strongest when they project a broad social vision and seek to be the champions of *all* working people. Philadelphia's labor movement needs to protect the fragile gains it has already made with a diverse workforce. But sometimes the best defense is offense."[255]

Labor's offensive efforts to secure a strong future for workers must include dismantling criminal record discrimination, which operates as de facto racial discrimination given the substantially disproportionate criminalization of Black people. Black workers and other workers of color are demonstrating that they are ready to work collectively against their employers. To capitalize on this energy, nonwhite workers need easier access to the workplace, so that they can join or form a union.

Labor's connection to the history and use of this barrier to the workplace does not detract from their role in the fight. Because Labor is the "watchdog for working people,"[256] its history of racial discrimination, including through criminal record discrimination, underscores the urgency of efforts on their part to undo that work. Legitimate advocacy for workers means advocating for *all* workers.

---

[251] NAT'L EMP. L. PROJ., REENTRY AND EMPLOYMENT FOR THE FORMERLY INCARCERATED AND THE ROLE OF AMERICAN TRADES UNIONS 2 (Apr. 2016).

[252] *See id.* at 2–5.

[253] *See id.* at 4.

[254] Paul Prescod, *A Better Life: The diminishment of unions feels especially bitter in Philadelphia, a labor stronghold since the movement's start*, PHILA. INQUIRER (Aug. 31, 2022), https://perma.cc/B29U-5C7N.

[255] *Id.*

[256] *Advocate for Social and Economic Justice*, AFL-CIO, https://perma.cc/UF23-B2NF (last visited Mar. 19, 2024).