

MASS INCARCERATION, EX-FELON DISCRIMINATION, & BLACK LABOR MARKET DISADVANTAGE

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ABSTRACT

This Article considers the impact of labor market discrimination against ex-felons on both the life chances of individual criminal defendants and the systemically unequal American labor market as a whole. I argue that there is an immediate relationship between employment discrimination against ex-felons and the black-white unemployment gap, and that hiring discrimination on the basis of previous criminal record is a form of racial discrimination—not just because of the overrepresentation of black defendants in the criminal justice system but also because employers systematically disfavor black ex-felons compared to whites with identical criminal records. The Article then considers the limited effectiveness of legal antidiscrimination remedies to the problems posed by ex-felon discrimination, and concludes that a vigorous antidiscrimination regime aimed at promoting the hiring of ex-felons cannot be rooted in either contemporary antidiscrimination jurisprudence or in laws that seek to conceal criminal records from employers. Instead, such an effort would require substantial new legislation, predicated on accommodationist antidiscrimination norm and reflecting a new national consensus about how to weigh the benefits of post-prison social reintegration against the rationality of discrimination against ex-felons.

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INTRODUCTION

Between 1980 and 2008, the country's incarcerated population spiked from around 500,000 to a high of 2.3 million.¹ This incredible growth in the carceral apparatus—which gave the United States the dubious distinction of becoming the world's biggest incarcerator, as well as the only country in the world that imprisons more than 1% of its adult population²—has attracted significant attention from journalists, social scientists, and legal commentators. These observers have paid special attention to the racialized character of the transition to mass incarceration. The ethnic composition of the inmate population in the United States has been inverted in the last half-century, going from about 70% white in 1950 to around 30% white today.³ Though blacks have been overrepresented in American prisons since the federal government began keeping records of admissions to state prisons in 1926,⁴ the extreme overrepresentation that characterizes modern prison demographics is a phenomenon of the last quarter century.⁵ This growth in the black-white inmate gap has occurred despite the arrest rates for whites and blacks remaining stable.

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¹ Bureau of Justice Statistics, Correctional Populations, <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (last visited Feb. 1, 2010). The rate of inmate growth far outstripped population growth; in fact, the number of incarcerated inmates per 100,000 more than tripled between 1980 and 2008. Bureau of Justice Statistics, Incarceration Rate 1980 – 2008, <http://bjs.ojp.usdoj.gov/content/glance/tables/incrttab.cfm> (last visited Feb. 1, 2010).

² See PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008). For more statistics on global incarceration, see ROY WALMSLEY, INT'L CTR. FOR PRISON STUD., WORLD PRISON POPULATION LIST 3 (8th ed. 2008), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf.

³ Loïc Wacquant, *From Slavery to Mass Incarceration*, 13 NEW LEFT REV. 41, 44 (2002).

⁴ Patrick Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666, 666 (1985) (“That year, about one in four persons entering state prisons was black while only one in every eleven persons in the United States was black.”).

⁵ African-American men did not supply the majority of prison entrants until 1988. See Wacquant, *supra* note 3, at 44.

In the age of mass incarceration, the lifetime cumulative probability of spending a period of time in prison is 4% for whites, but a staggering 29% for blacks.⁶ The prison is thus a major social institution, affecting the lives of a large and growing portion of the American population. And it is an expensive institution, in terms of both state spending and the costs it imposes on inmates, correctional workers, and employees. These costs have attracted extensive attention from researchers, on topics ranging from the impact of felon disenfranchisement on American politics to the implications of prison privatization to recidivism rates and chronic offending.⁷

One underattended effect of mass incarceration is its effect on income and lifetime employment outcomes after prison. Stratification research on occupations typically focuses on schools, families, and other institutions as the primary determinants of job-market inequality. But the large and growing influence of the half-million prisoners released from the criminal justice system each year raises obvious questions about the impact of incarceration on labor markets. The lack of attention paid to the link between incarceration and unemployment is explicable when one considers that it has been some time since unemployment has been considered a pressing social problem. Beginning in 1992 and continuing through the end of the decade, the United States experienced a sustained period of declining unemployment, reaching a low of 4.0% in 2000.⁸ But as this Article will show, this upbeat historical unemployment data conceals a chronic gap that has existed between black and white unemployment rates since the 1960s—one

⁶ *Id.*

⁷ For a good summary of this literature, see *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002).

⁸ U.S. BUREAU OF LAB. STAT., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, at tbl.A-1, available at <http://www.bls.gov/webapps/legacy/cpsatab1.htm> (select “seasonally adjusted unemployment rate” and click “Retrieve data”).

that has grown steadily wider since the subprime mortgage crisis began in 2007.⁹ Even research studying this gap, however, has typically paid only passing attention to the role of incarceration.

Discrimination against ex-felons may be mandated by the state—as in laws that restrict ex-felons from public employment or licensed professions—or simply permitted by the state. The impact of state and federal laws imposing collateral job-market consequences on felons has been better-studied, thanks to the vigorous debate over these laws that took place in the 1970s and 1980s.¹⁰ Recently, however, new data have emerged on the impact of felony convictions on employment opportunity in professions not subject to these laws. This Article is an effort to evaluate recent research on the link between employment discrimination against ex-felons and black unemployment. Unlike discrimination on the basis of race, sex, or age, employment discrimination against ex-felons is not typically considered pernicious, given the strong interest employers have in hiring law-abiding employees. But the parameters of contemporary mass incarceration compel the conclusion that employment discrimination against ex-felons in the labor market should be understood as a form of racial discrimination. And not only because blacks represent such a large percentage of the post-prison population: as I discuss in Part III, recent research indicates that the impact of a conviction is much worse for black job-seekers than it is for whites.

In Part I, I summarize the predominant explanations in the social science literature for the durability of the black-white unemployment gap, and propose that ex-felon discrimination may be one mechanism through which racial bias in employment—often believed to be waning or mostly eradicated—is exercised. In Part II, I evaluate sociological investigations of the relationship between prison record and unemployment, first to demonstrate that the failure to

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.

properly account for the evolution of mass incarceration has distorted unemployment statistics and concealed the ruinous impact of incarceration on blacks, and especially black youth, and second to describe the scope and function of racialized ex-felon discrimination. I additionally suggest that the current practice of mass plea-bargaining—whereby the overwhelming majority of criminal cases are resolved with pleas instead of trials—magnifies the discriminatory effects of discrimination against job applicants with criminal records. Finally, in Part III, I consider legal and policy remedies to the problems posed by ex-felon discrimination. I argue first that antidiscrimination law, as currently constituted, is unlikely to help remedy the racially biased nature of ex-felon discrimination, and I consider what an accommodationist ex-felon antidiscrimination program might look like. Second, I argue that certain policy approaches to the problem—in particular, efforts to restrict employer access to criminal records—may have unintended consequences that paradoxically make employers more likely to discriminate on the basis of race.

I. EXPLAINING THE UNEMPLOYMENT GAP

Since the early 1970s the black unemployment rate has remained persistently higher than the white unemployment rate.¹¹ At the low ebb of national unemployment in October 2000, blacks were unemployed at a rate of 7.3%, compared with a white unemployment rate of 3.4%.¹² The gap has widened in periods of recession: in June 2003, after a period of economic contraction following the September 11 attacks, white unemployment peaked at 5.5%, but black

¹¹ See Finis Welch, *The Employment of Black Men*, 8 J. LAB. ECON. 526 (1990).

¹² U.S. BUREAU OF LAB. STAT., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, at tbl.A-2, available at <http://www.bls.gov/webapps/legacy/cpsatab2.htm> (select “seasonally adjusted unemployment rate” for whites and blacks and click “Retrieve data”).

unemployment reached 11.5%.¹³ The recession triggered by the financial crisis has pushed the gap wider: in April 2010, 9.0% of whites were unemployed, but a remarkable 16.5% of blacks were without work.¹⁴ Sociologists and economists in the last quarter-century have worked at length to reconcile the black-white unemployment gap with substantially narrowed gaps in other aspects of socioeconomic life, including education, occupational attainment, and earnings.¹⁵ Three general hypotheses have attracted the most attention from academics.

A first possibility—usually termed “spatial mismatch theory”—is that the discrepancy reflects a shift in the demand for black labor, given the particular demographic characteristics of the black labor pool. This view is most associated with William J. Wilson, who argues that spatial and structural changes in the American economy—particularly a transition away from manufacturing in urban centers and toward service-sector jobs located in suburbs—produced disproportionate joblessness in less-educated workers, especially those without the resources to relocate outside of the ghetto areas of major cities.¹⁶ Douglas Massey and Nancy Denton, in their well-known 1993 monograph *American Apartheid*, offer a dialectical version of this argument, noting that increased joblessness among the black ghetto poor accelerates the flight of employers out of these racially segregated areas even as this flight helps expand the “urban underclass.”¹⁷

Wilson is generally sanguine about the success of antidiscrimination laws in reducing barriers to occupational entry for blacks whose skills match the needs of the new economy. But

¹³ *Id.* The particularly deleterious impact of recessions on African Americans is well-documented in the social science literature. See, e.g., Gerald D. Jaynes, *The Labor Market Status of Black Americans: 1939-1985*, 4 J. ECON. PERSPS. 9 (1990).

¹⁴ *Id.*

¹⁵ See Franklin Wilson, Marta Tienda, & Lawrence Wu, *Race and Unemployment: Labor Market Experiences of Black and White Men, 1968-1988*, 22 WORK & OCCUPATIONS 245, 249 (1995).

¹⁶ WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978); WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* (1987);.. See also SASKIA SASSEN, *CITIES IN A WORLD ECONOMY* (2006).

¹⁷ DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

he has also observed that processes of ghettoization give employers incentive to statistically discriminate against inner-city blacks.¹⁸ Because employers use race as a proxy for a variety of pathologies associated with residents of the inner-city—whom they view as unstable, dishonest, unreliable, undereducated, undermotivated, hostile, and rebellious—they are able to justify race-biased hiring processes on productivity grounds. Discrimination against working-class blacks, Wilson and his adherents argue, is much more difficult to extirpate with conventional antidiscrimination law than discrimination against white-collar, professional, or public employees, and so is a major contributor to the black disadvantage in the labor market.

A second approach, termed the “voluntary withdrawal” thesis, rejects spatial mismatch theory and argues that black workers have been unresponsive to changes in labor demand since the 1970s. By amassing a large amount of data about service-sector work in inner-cities, Lawrence Mead argues that inner-city blacks who did seek and secure jobs in the 1980s experienced rising earnings and stable employment.¹⁹ Mead contends that the main criteria for securing new service-sector jobs were timeliness, appropriate work-related attitudes, and a commitment to work regularly. Mead concludes that the high jobless rate among inner-city blacks reflects voluntary withdrawal, either because of dissatisfaction with these new expectations or because of more attractive alternatives (especially welfare, but also illegal income).²⁰ Roger Waldinger’s controversial monograph *Still the Promised City* is a version of this approach.²¹ Waldinger follows

¹⁸ William J. Wilson, *Studying Inner-City Social Dislocations: The Challenge of Public Agenda Research*, 56 AM. SOC. REV. 1, 10 (1991).

¹⁹ LAWRENCE MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* (1992); see also Welch, *supra* note 11.

²⁰ *But see* Samuel L. Myers, Jr., *How Voluntary Is Black Unemployment and Black Labor Force Withdrawal?*, in *THE QUESTION OF DISCRIMINATION: RACIAL INEQUALITY IN THE U.S. LABOR MARKET* 100, 105-06 (Steven Shulman & William A. Darity eds., 1989) (concluding that “fewer blacks than whites are voluntary withdrawals,” and urging social science research to address the causes of involuntary withdrawal of black men from the labor force). Notably, Lawrence Mead was a significant proponent of welfare reform in the 1990s.

²¹ ROGER WALDINGER, *STILL THE PROMISED CITY* (1997).

Mead and others in arguing that legitimate work in the inner-city is more abundant than spatial mismatch theorists admit. But his argument hinges on expectations and competition rather than attitudes. He contends that urban blacks failed to adjust their wage expectations downward as increasing competition from new immigrants and the rapid decline of the manufacturing sector drove down working-class wages. Finally, some politically conservative commentators have advanced a cultural variant of the voluntary withdrawal thesis, arguing that the fatalism of “ghetto culture” is an important determinant of their problems in the labor market.²²

A third hypothesis—which I will term the intractable discrimination theory—is that the unemployment gap is a product of persistent exclusionary barriers in labor markets.²³ Steven Shulman’s analysis of federal labor statistics demonstrates high relative rates of black unemployment in among all age groups, education levels, and occupational categories, casting doubt on both the spatial mismatch and voluntary withdrawal hypotheses.²⁴ In particular, sociologists have observed that black employment gains have largely been a product of expanded public-sector employment, and that private-sector employment gains resulted from publicly

²² See, e.g., DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 478, 484 (1995) (“The conspicuous pathologies of blacks are the product of catastrophic cultural change . . . Blacks in America seem to have developed what some scholars term an ‘oppositional culture’ which is based on a comprehensive rejection of the white man’s worldview.”). Liberal observers have echoed these culturalist arguments, albeit typically with more sympathy toward those blacks whom they allege to hold economically disadvantageous cultural attitudes. See, e.g., Stephen Petterson, *The Enemy Within: Black-White Differences in Fatalism and Joblessness*, 3 J. POVERTY 1, 1, 26 (1999) (proposing a mild version of this hypothesis, explicitly disclaiming a “strong cultural argument” but finding that a justifiably “fatalistic orientation” to the labor market hobbles black youth); see also ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (2000); MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* 335 (1999) (“[S]ome blacks in the United States detach themselves, especially from education, redefine social norms, and see behaviors such as doing well in school, speaking standard English, and so on as oppositional to their very core identity.”)

²³ Charles Hirschman, *Minorities in the Labor Market*, in *MINORITIES, POVERTY, AND SOCIAL POLICY* (Gary D. Sandefur & Marta Tienda eds., 1988).

²⁴ See, e.g., Steven Shulman, *Discrimination, Human Capital, and Black-White Unemployment: Evidence from Cities*, 22 J. HUM. RESOURCES 361 (1987). In fact, Wilson, Tienda, and Wu found that positive relationship between education and black-white unemployment ratio: the unemployment gap for college-educated black men was higher than it was for those with no high school diploma. Wilson, Tienda, & Wu, *supra* note 15, at 250.

mandated affirmative-action programs.²⁵ As a consequence, black employment levels have been highly sensitive to the shifting political climate: in periods of aggressive civil rights enforcement and high spending on social programs, the unemployment gap has closed somewhat.²⁶ Many observers have taken these findings about the impact of federal intervention on the racial composition of the workforce as evidence that discriminatory barriers to private-sector black employment are mostly to blame for the black-white unemployment gap.²⁷

Much of the literature advocating the intractable discrimination theory has sought to identify more nuanced mechanisms of discrimination than the conventional account of a white racist employer making prejudiced personnel decisions. Richard Freeman predicted as early as 1973 that this sort of overtly bigoted employment discrimination would decrease over time, for three reasons: an increased cost of discrimination due to federal policy, a decline in individual bigotry, and the growth of “relatively nondiscriminatory” sectors of the economy as blacks moved out of agriculture and household labor and into bureaucratic firms or public employment.²⁸ Empirical evidence and historical commonsense confirm the prediction: the naked bigotry in hiring that had characterized the Jim Crow era was rapidly stigmatized after the 1964 Civil Rights Act. Academics seeking to link the enduring black-white unemployment gap to intractable labor

²⁵ See William Darity, *Race and Inequality in the Managerial Age*, in *SOCIAL, POLITICAL, AND ECONOMIC ISSUES IN BLACK AMERICA* (Wornie Reed ed., 1990); Jonathan Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 *J. ECON. PERSPS.* 47 (1990).

²⁶ From 1969 to 1973, for example, the black-white unemployment gap declined to its lowest point since the passage of the 1964 Civil Rights Act, thanks to favorable economic conditions coupled with employment-maximizing public policies. During the 1980s, by contrast, the gap remained high, especially for college-educated black men who were the most likely to suffer from the Reagan-era retreat from civil rights enforcement. See John Bound & Richard Freeman, *Black Economic Progress: Erosion of the Post-1965 Gains in the 1980s?*, in *THE QUESTION OF DISCRIMINATION: RACIAL INEQUALITY IN THE U.S. LABOR MARKET*, supra note 20, at 32.

²⁷ See Wilson, Tienda, & Wu, supra note 15, at 249-63.

²⁸ Richard Freeman, *Changes in the Labor Market for Black Americans, 1948-72*, 4 *BROOKINGS PAPERS ON ECON. ACTIVITY* 67, 68 (1973).

market discrimination have thus sought to identify subtler practices by which contemporary labor market discrimination is realized.²⁹

One example is the realization that the increased mobility of the black middle and upper-middle classes—a key reason Wilson invoked “the declining significance of race”—is more illusory than it first appears. Many successful black professionals and managers occupy a racialized niche in the American corporate apparatus, occupying jobs that are linked to the needs of the black community. As companies increasingly came to associate compliance with antidiscrimination statutes with elaborate institutional structures—affirmative action offices, personnel and public-relations managers, grievance boards, and so forth—a “parallel job ladder” developed in many firms, with black professionals primarily occupying positions within these structures. Marginalization into this niche has had a host of negative consequences for black professionals, since these positions are typically remunerated less, are qualitatively less important to the central work of firms than other positions, and rarely offer promotion opportunities to upper management.³⁰ This employment pattern may contribute to the underemployment of blacks with high levels of human capital, because blacks are considered qualified to fill only this limited subset of positions.

Another example of a subtle discrimination mechanism—one that operates to disfavor working-class blacks—is Wilson, Tienda, and Wu’s discovery that black men are substantially

²⁹ This same conundrum—the need to reconcile durable racial inequality with the apparent decline of bigotry—has motivated a variety of theses with varying degrees of credibility, from Charles Lawrence’s “unconscious racism” to Nicholas Kristof’s “racism without racists.” See Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (criticizing the requirement of purposeful intent that pervades American antidiscrimination law on the grounds that most racism is unconscious); Nicholas D. Kristof, *Racism Without Racists*, N.Y. TIMES, Oct. 4, 2008, at WK10 (arguing that “racial biases are deeply embedded within us” but sounding the hopeful note that “we can overcome unconscious bias” by electing Barack Obama).

³⁰ For a good summary of empirical research into this phenomenon, see JACK NIEMONEN, RACE, CLASS, AND THE STATE IN CONTEMPORARY SOCIOLOGY 109-10 (2002).

more likely to be unemployed because of firings and layoffs than white men.³¹ They pointed to empirical evidence showing that even in employment sectors with a history of black overrepresentation—for instance, in certain public employment and manufacturing positions—blacks were 1.55 times as likely as whites to be unemployed because of dismissals.³² Exaggerating the stratifying effects of dismissals was the tendency of employers to give preferential treatment to white employees in periods of economic contraction. Paul Schervish’s longitudinal study of private-sector employment showed that on average, within the same firm, white employees were more than twice as likely as blacks to be placed on temporary layoff in lieu of being permanently fired, and 1.7 times as likely to be rehired after a period of layoff.³³ These early studies failed to adequately control for human-capital characteristics, and so invited the claim that the discrepancy was the result of the inferior quality of black employees, rather than a form of employment discrimination. The argument was refuted by later studies which showed that, net of human capital and job characteristics, blacks remained twice as likely to be dismissed as whites,³⁴ strongly suggesting that inequalities of the rate of involuntary job terminations reflected employer discrimination.

This research has proved especially useful in explaining why the black-white unemployment gap widens in recessionary periods, and why the black unemployment rate is slower to decline in periods of growth. Critically, this research also complicates the spatial

³¹ Wilson, Tienda, & Wu, *supra* note 15, at 265-66.

³² *Id.* at 252.

³³ PAUL SCHERVISH, *THE STRUCTURAL DETERMINANTS OF UNEMPLOYMENT* (1983).

³⁴ *See, e.g.,* Craig Zwerling & Hillary Silver, *Race and Job Dismissals in a Federal Bureaucracy*, 57 *AM. SOC. REV.* 651, 657-58 (1992) (reporting that black postal workers in a large metropolitan region were more than twice as likely to be fired as white employees with identical work histories and personal characteristics); *see also* Alfred J. Field & William R. Winfrey, *Job Displacement and Reemployment in North Carolina: The Relative Experience of the Black Worker*, 25 *REV. BLACK POL. ECON.* 57 (1997) (examining the unemployment experiences of workers in North Carolina involved in mass layoffs and plant closings and concluding that, relative to their white counterparts, blacks are laid off in numbers disproportionate to their composition in the labor force, are more likely to be repeatedly laid off, and are more likely to return to lower-wage occupations upon reemployment than white workers).

mismatch hypothesis. Though most of the research on layoff and dismissal differentials has been motivated by an effort to dispute spatial mismatch theorists' conjecture that class, not race, is the more salient demographic feature for predicting long-term life chances, the relationship between the two lines of argument is more complicated. Abundant evidence suggests that the black population does suffer from its particular residence and labor market position. Residence in central cities, for instance, raises unemployment for both blacks and whites by approximately the same amount, but blacks are disproportionately concentrated in these areas.³⁵ Similarly, the concentration of blacks into industries and occupations with high rates of unemployment since the 1970s has also contributed to the black-white unemployment gap.³⁶ But William J. Wilson and others may be overhasty in announcing the "declining significance of race" on the basis of these findings. Joblessness and economic exclusion may have "triggered a process of hyperghettoization" that disproportionately impacts blacks, but the consequences of economic transition may be magnified for blacks because they are the first targets of recessionary layoffs and the last candidates for rehiring.³⁷ Moreover, the "asymmetric causality"³⁸ between the general economy and the inner city—that is, the tendency for conditions in the inner city to become dramatically worse in recessionary periods but not to return to normal when the economy improves—may be partially explained by the structural barriers to reemployment that blacks face.

Social scientists have made impressive strides in explaining why blacks face consistently worse outcomes in job markets, despite improvements in black education, the political commitment to affirmative action and antidiscrimination efforts, the movement of blacks into

³⁵ See Franklin D. Wilson & Lawrence Wu, *A Comparative Analysis of the Labor Force Activities of Ethnic Populations*, in U.S. BUREAU OF THE CENSUS, PROCEEDINGS OF THE 1993 ANNUAL RESEARCH CONFERENCE 340 (1993).

³⁶ See Wilson, Tienda, & Wu, *supra* note 15, at 266.

³⁷ Loïc Wacquant & William J. Wilson, *The Costs of Racial and Class Exclusion in the Inner City*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 9 (1989).

³⁸ *Id.* at 24.

occupations with lower turnover rates, and the marginalization of bigotry as an acceptable public attitude. The most persuasive theories have combined social-structural elements—both macroeconomic factors like human capital attainment and spatial factors like neighborhood composition—with evidence of continued employment discrimination, which appears today to operate in subtler or more indirect ways than in the past. In the next Part, I consider the impact of the criminal justice system on black socioeconomic outcomes, and suggest that the detrimental impact of the carceral apparatus on black workers is a product *both* of sociopolitical configuration and simple racial discrimination.

II. THE EFFECT OF INCARCERATION ON ECONOMIC OPPORTUNITY

Research in the 1980s and '90s on the effect of contact with the criminal justice system on economic opportunity showed contradictory results. Analysis of longitudinal survey data—typically the Bureau of Labor Statistics' Current Population Survey—showed that conviction was strongly correlated with reduced income and employment probabilities after release.³⁹

Other analyses, mostly by economists, observed a negligible effect of incarceration in unemployment.⁴⁰ These studies rejected a causal link between incarceration and employment outcomes, and in the absence of any other explanation, attributed the poor outcomes of ex-offenders to preexisting personal traits—like drug and alcohol abuse, behavior and anger problems, poor interpersonal skills, and impulsiveness—that made them both crime-prone and bad employees. Some of these studies seemed to strain credulity. Jeffrey Kling, for instance,

³⁹ See, e.g., Richard Freeman, *The Relation of Criminal Activity to Black Youth Employment*, 16 REV. BLACK POL. ECON. 99 (1987); Daniel Nagin & Joel Waldfogel, *The Effect of Conviction on Income Through the Life Cycle* (Nat'l Bureau of Econ. Research, Working Paper No. 4551, 1993).

⁴⁰ See, e.g., Jeffrey Grogger, *Arrests, Persistent Youth Joblessness, and Black/White Employment Differentials*, 74 REV. ECON. & STAT. 100 (1992); Jeffrey Kling, *The Effect of Prison Sentence Length on the Subsequent Employment and Earnings of Criminal Defendants* (Woodrow Wilson Sch. Discussion Papers in Economics, Working Paper No. 156, 1999).

reported in an unpublished paper that there existed no difference in the impact on future earnings or employment rates between convicts who served long sentences for serious felonies and convicts with shorter sentences.⁴¹

As evidence mounted that criminal convictions had serious long-term economic consequences, the “personal trait” studies came under strenuous methodological attack by economists and sociologists. Many of the personal trait studies were conducted using data that linked from court records to administrative data from state unemployment insurance files. Critics argued, among other things, that relying on these data introduced powerful selection effects, because low-wage and temporary jobs were much less likely than other types of jobs to be compliant with unemployment insurance laws. Compared to results from national longitudinal data, studies using unemployment insurance data appeared to systematically understate the effect of convictions on income and the probability of employment, except for the white-collar workers who were least likely to have been convicted of serious crimes.

In 2000, Western and Pettit published a paper that showed that the black-white unemployment gap was much higher than previously thought.⁴² Western and Pettit observed that the majority of longitudinal data that prior researchers had used to calculate unemployment statistics excluded institutional populations from the sampling frame. By combining data from a variety of sources, including labor force surveys, aggregate incarceration figures, and correctional facilities microdata, Western and Pettit demonstrated that the reported unemployment rate was artificially suppressed by the high incarceration rate. Developing an accurate dataset of the penal population led Western and Pettit to reconsider the findings of prior survey research that had

⁴¹ See Kling, *supra* note 40, at 10-13.

⁴² Bruce Western & Becky Pettit, *Incarceration and Racial Inequality in Men’s Employment*, 54 INDUS. & LAB. REL. REV. 3 (2000).

concluded that the black-white unemployment gap stopped growing in the 1980s. After accurately accounting for the penal population, they concluded that the gap had in fact grown steadily:

In 1982, a young unskilled white man was about 50% more likely to hold a job than a young unskilled black man. By 1996, young white high school dropouts were more than twice as likely to hold jobs as were their African American counterparts.⁴³

These effects were so stark that the across-the-board improvements in the job prospects of young disadvantaged minority men during the economic expansion of the Clinton years was completely overshadowed by the rise in incarceration.

By highlighting the misleading effect of mass incarceration on conventional unemployment statistics, Western and Pettit's study decisively rebuked Pollyannaish research that alleged that racial disparity in employment was declining. But their paper was unable to identify the causes of the persistent racial disparity in labor force participation. Significant racial disparities in rates of contact with the criminal justice system appeared to be a significant factor, and survey researchers proffered a broad array of hypothesis to explain the observed relationship between incarceration and unemployment.⁴⁴ These included the labeling effects of criminal stigma,⁴⁵ the disruption of social and family ties,⁴⁶ injury to preexisting social networks,⁴⁷ human capital loss,⁴⁸ and legal barriers to employment.⁴⁹

In 2003, the sociologist Devah Pager published the results of an audit-pair study of Milwaukee-area employers designed to evaluate whether criminal history influenced the odds of a

⁴³ *Id.* at 9.

⁴⁴ See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 940-41 (2003).

⁴⁵ See Richard Schwartz & Jerome Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROB. 133 (1962).

⁴⁶ See ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* (1993).

⁴⁷ See John Hagan, *The Social Embeddedness of Crime and Unemployment*, 31 CRIMINOLOGY 465 (1993).

⁴⁸ See GARY BECKER, *HUMAN CAPITAL* (1975).

⁴⁹ See Mitchell Dale, *Barriers to the Rehabilitation of Ex-Offenders*, 22 CRIME & DELINQUENCY 322 (1976); *infra* Part III.A.

job applicant receiving a callback from an employer after an initial interview. Pager formed two pairs of auditor teams, one composed of two white students, and the other composed of two black students. The teams were matched on the basis of physical appearance and mode of self-presentation, and were given identical work history and education credentials. The audit pairs were randomly assigned to 15 introductory job interviews each week, drawn from postings for entry-level positions in the local newspaper and online. At any given time, one of the auditors was asked to represent that he or she had been convicted of felony cocaine possession and had served an eighteen-month prison sentence.⁵⁰

Pager discovered that regardless of race, a criminal record drastically reduced the chance of receiving a callback from an employer. A criminal record reduced the likelihood of a callback by fifty percent for whites. Blacks, however, fared much worse; Pager reported that the effect of a criminal record was forty percent larger for blacks than for whites.⁵¹ Pager also collected qualitative evidence to suggest that employers anticipated black criminality. On at least three occasions, black auditors were asked preemptively about their criminal records. No white auditor had the same experience.

Pager's study was the first research project to empirically validate a mechanism linking felon status to reduced job prospects. Her findings strongly support the hypothesis that a direct causal relationship exists between criminal record and unemployment.⁵² Black auditors who represented a criminal record applied to 200 entry-level positions and yet received fewer than ten callbacks (much less outright job offers). And these results were in spite of Pager's use of articulate, well-dressed college students with effective modes of self-presentation.

⁵⁰ Pager, *supra* note 44, at 949.

⁵¹ *Id.* at 959.

⁵² *Id.* at 960.

In addition to illuminating the profound obstacles to employment faced by all ex-felons, Pager's study showed that African Americans are doubly victimized by ex-felon discrimination. In addition to their disproportionate representation in the ranks of the incarcerated, Pager's data indicates that a criminal history has a stronger negative effect on black applicants than it has on white applicants. Ex-felon discrimination thus exaggerates the preexisting structural disadvantage of minority overrepresentation in prisons by making employers more likely to make racially biased hiring decisions. Given this double discrimination, mass incarceration helps explain the puzzle of the high rate of involuntary employment and labor force withdrawal among working- and middle-class blacks.⁵³

The extraordinarily high incidence of plea bargaining in the American criminal justice system exacerbates the racially discriminatory function of ex-felon discrimination. American criminal sentencing is predicated upon laws that are "draconian on the books but mitigated in practice, largely through the practice of plea bargaining."⁵⁴ It is well established that there exists a substantial "trial penalty," in the form of longer sentences, for the five percent of American criminal defendants who pursue their cases to jury trial in lieu of pleading guilty.⁵⁵ And the

⁵³ See generally Myers, Jr., *supra* note 20. Harry J. Holzer and others have shown that ex-offenders have a human-capital deficit compared to the nonoffending population. Combined with the well-known employer preference for applicants without criminal histories, black male job seekers in particular may either assume job seeking is hopeless or grow discouraged quickly. See Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 2005-06* (Mary Pattillo, David F. Weiman & Bruce Western eds., 2004).

⁵⁴ McCoy, *supra* note 55, at 92. In the U.S. federal sentencing guidelines and many state sentencing statutes, discounts are awarded to criminal defendants for pleading guilty at any stage in the process, with deeper discounts available for guilty pleas that obviate the time and expense of trial preparation. See *id.* at 100 n.46; Nancy J. King, David A. Soulé, Sara Steen, & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973-75 (2005) (surveying data from five states to demonstrate that sentences negotiated in plea bargains are significantly lower than sentences for the same crime assigned after bench or jury trials).

⁵⁵ See, e.g., Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 89 (2005) (finding, via a controlled analysis based on data from the State Court Processing Statistics dataset, that sentences after jury trial "were about nine times more severe than guilty plea sentences"). For an excellent journalistic account of how the trial penalty operates to generate a high rate of

coercive power of the trial penalty makes more defendants plead guilty: as early as 1975, researchers observed that the plea bargaining system serves to increase the number of defendants who emerge from the criminal justice system bearing a felony record.⁵⁶

Plea bargaining is in the short-term interest of criminal defendants because it yields substantially lower sentences than sentences that follow jury trials. But by increasing the proportion of criminal defendants who end up with criminal records, the plea system amplifies the long-term collateral consequences of an encounter with the criminal justice system on life chances—and especially on employability. And the burden is likely to be particularly heavy for minority defendants, for three reasons. First, they represent a disproportionately large percentage of all criminal defendants, so any process that makes defendants more likely to emerge from encounters with the courts bearing criminal records will adversely impact minority defendants who seek jobs after serving their sentences.⁵⁷ Second, blacks fare worse at trial than whites and are more likely to be incarcerated following a trial—a fact that many black defendants surely recognize.⁵⁸ It follows that it is rational for black defendants to negotiate reduces sentences via a plea arrangement, even when it would be irrational for a similarly situated white defendant to do so. Finally, minority defendants are more likely to be impoverished and unable to post bail. One

guilty pleas, see generally STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* (2005).

⁵⁶ Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 293 (1975) (concluding that more than two-thirds of “marginal” plea-bargain defendants would be acquitted or dismissed if they contested their cases at trial).

⁵⁷ See Langan, *supra* note 4.

⁵⁸ See Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC’Y REV. 733, 761 (2001) (finding that in Maryland, a state with determinate sentencing guidelines, African-Americans received 20% longer sentences than whites on average); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?*, 65 AM. SOC. REV. 705, 724-25 (2000) (finding that in federal criminal cases, black and Hispanic defendants fare worse in terms of both imprisonment and term-length decisions than whites).

major incentive to plea bargain for defendants who cannot post bail is that it can result in a faster release from incarceration.⁵⁹

The large-scale plea bargaining that is the norm in the American criminal justice system results in a larger proportion of the defendants who pass through the country's courtrooms leaving with criminal records. This is especially the case for minority defendants, a racial disparity that aggravates the racially disparate impact of the pernicious, long-term collateral consequences of a criminal record.

Many questions remain about how discrimination against ex-felons operates in practice. In particular, it is not known whether employers categorically disfavor applicants with criminal records, or whether certain crimes are associated with better or worse hiring outcomes. However, it is clear that ex-felon discrimination is a form of racial discrimination with profound implications for black unemployment. In the next Part, I consider the adequacy of contemporary antidiscrimination law for addressing this racially disparate impact.

III. REMEDIAL APPROACHES: ANTIDISCRIMINATION LAW AND SOCIAL POLICY

A. Statutory Limitations on Ex-Felon Unemployment

In many states, discrimination against ex-felons is mandated by law. In the 1980s, the popularity of tough-on-crime policies resulted in a wave of new laws restricting the ability of felons to seek public employment.⁶⁰ Today, all fifty states restrict felons from public employment to some degree. Some states narrowly apply the restrictions to ex-felons who commit certain types of crimes (such as Delaware's limitation of the public employment ban to felons convicted

⁵⁹ DAVID W. NEUBAUER, *AMERICA'S COURTS & THE CRIMINAL JUSTICE SYSTEM* 282 (1988).

⁶⁰ Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 280 (2004).

for an “infamous crime”), or make public employment rights restorable after a period of time, but seven states have a blanket lifetime ban on ex-felons working in the public sector.⁶¹ Only six states require there exist a relationship between the character of the criminal conduct and the job sought; the majority of states treat “felons” as an undifferentiated group for the purposes of restricting access to unemployment.⁶² Most ex-felons are also barred from military employment without a special waiver.⁶³

In the private sector, occupational licensing restrictions that apply to ex-felons nationwide constitute de facto bars to entry in many instances. Professional licensing is a primary method for ensuring uniformity of service and regulatory control over qualifications and occupational entry in the modern workforce. Licensing requirements exist in occupations at all wage levels: among many others, attorneys, accountants, general contractors, barbers, and gas station operators are subject to licensing requirements.⁶⁴ Ex-felons are barred from more than 800 discrete occupations by laws regulating public-employment hiring or licensing.⁶⁵ Parolees and ex-felons are routinely excluded from these jobs because of federal, state, and municipal laws that exclude ex-felons from regulated occupations, either directly or via “good moral character” requirements or their

⁶¹ The seven states are Alabama, Arkansas, Indiana, Iowa, Nevada, Ohio, and South Carolina. See BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., STATE COURT ORGANIZATION 2004, at tbl.47 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/scoo4.pdf>.

⁶² *Id.* States that have attempted to fashion more specific requirements have occasionally produced peculiar results. California, for instance, prohibits all parolees from working in real estate. I note in passing the irony of keeping drug users out of the ranks of real estate agents at a moment when the state of the housing market surely makes chemical escape particularly appealing for realtors.

⁶³ See DEP’T OF THE ARMY, ARMY REG. 601-210, at ch. 4-7 (2007) (“A waiver is required for any applicant who has received a conviction or other adverse disposition for a serious criminal misconduct offense.”). The military’s recruiting difficulties since the start of the Iraq War has led to these waivers being more frequently granted. See Bryan Bender, *More Entering Army with Criminal Records*, BOSTON GLOBE, July 13, 2007, at A1.

⁶⁴ See Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities*, 71 N.D. L. REV. 187, 193 (1995).

⁶⁵ PAUL F. CROMWELL, LEANNE FIFTAL ALARID & ROLANDO V. DEL CARMEN, COMMUNITY-BASED CORRECTIONS (2004).

equivalents.⁶⁶ Good moral character requirements pose a special problem for ex-felons seeking to obtain an occupational license. Unlike specific statutory restrictions on ex-felon entry into regulated occupations, which typically are limited to a subset of offenses relevant to the position and are sometimes limited to recent convictions, statutes rarely define “good moral character,” giving licensing boards broad latitude in defining the term.⁶⁷ In some cases, then, any felony conviction can constitute a bar to employment, regardless of the nature of the conduct or the date of the offense.

Plaintiffs have had some success challenging statutory barriers to employment for ex-felons on equal protection grounds. This long line of jurisprudence dates to 1898, when the Supreme Court decided *Hawker v. New York*.⁶⁸ Hawker was a physician and ex-convict who sued to invalidate a New York statute that criminalized the practice of medicine by anyone with a felony conviction. Hawker’s theory was predicated on the Ex Post Facto Clause of the Constitution, which he argued prevented the state of New York from imposing the additional punishment of the loss of his medical license after he had served his sentence. The Court disagreed, holding that the state police power was sufficient authority to impose a character requirement on physicians, and that the state legislature had plenary power to define the content of this requirement. The Court also suggested that New York’s licensing rules were good public policy, because “[i]t is not, as a rule, the good people who commit crime.”⁶⁹

Over time, the rule in *Hawker* has evolved into a simple Fourteenth Amendment principle that occupational restrictions on felons must bear a rational relationship to the state’s legitimate

⁶⁶ *Id.* at 193-94.

⁶⁷ See generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

⁶⁸ 170 U.S. 189 (1898).

⁶⁹ *Id.* at 197.

regulatory interests.⁷⁰ (Courts have universally refused to apply strict scrutiny or heightened scrutiny to classifications based on criminal record.⁷¹) In practice, this has meant that the majority of statutory employment discrimination against ex-felons has survived constitutional scrutiny, even in cases where the link between the criminal conviction and the employment was highly attenuated. In *Schanuel v. Anderson*,⁷² for instance, the Seventh Circuit upheld an Illinois law denying ex-felons employment as private investigators and detectives. The court noted that the “legislature has broad latitude, particularly where matters of social and moral welfare are involved,” and held that “[d]etective agency employees perform the potentially sensitive tasks of guarding persons and property.”⁷³ “It is not unreasonable,” the court concluded, “to suppose that the public trust might be undermined by assigning such tasks to ex-offenders.”⁷⁴

If the Seventh Circuit could conclude that the job of private detective is a locus of public trust, it is not surprising that most challenges to employment restrictions on ex-felons have been unsuccessful. Nevertheless, there have been exceptions. Courts have been especially skeptical of sweeping statutes that exclude felons as a class from an entire occupational niche. In *Kindem v. Alameda*,⁷⁵ for instance, the court ruled that a plaintiff’s ten-year-old juvenile felony conviction had “little if any bearing on his ability to perform as a janitor for the City,” and concluded that a

⁷⁰ See, e.g., *De Veau v. Braistead*, 363 U.S. 144 (1960) (upholding a New York law prohibiting ex-felons from collecting dues on behalf of a longshoreman’s union because of the state’s legitimate interest in addressing corruption among organized labor); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (holding that Communist Party membership, use of aliases, and arrest record without convictions is insufficient grounds to exclude the plaintiff from the state bar, on the grounds that a state “cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment”).

⁷¹ See, e.g., *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Korematsu v. United States*, 323 U.S. 214, (1944).

⁷² 708 F.2d 316 (7th Cir. 1983).

⁷³ *Id.* at 319-20.

⁷⁴ *Id.* at 319.

⁷⁵ 502 F. Supp. 1108 (N.D. Cal. 1980). See also, e.g., *People v. Lindner*, 535 N.E. 2d 829 (Ill. 1989) (striking down an Illinois state law revoking driver licenses from sex offenders on the grounds that no rational relationship exists between sex offenses and good driving).

generalized distinction between felons and non-felons “is not rationally related to any legitimate state interests.”⁷⁶

Viewed as a whole, the striking feature of this line of jurisprudence is its inconsistency. To take one example, six years before the Seventh Circuit’s opinion in *Schanuel*, a district court in Connecticut faced precisely the same facts in *Smith v. Fussenich*, but decided the case the opposite way.⁷⁷ There, the plaintiff challenged Connecticut General Statute § 29-156a(c), which barred felony offenders from employment with licensed private detective and security guard agencies. The state made the same argument as the defendants in *Kindem*: that the law was a justifiable effort to sequester “the criminal element from a business that affects public welfare, morals and safety.”⁷⁸ This court, however, wasn’t buying; it struck down the law on the grounds that it “fail[ed] to recognize the obvious differences in the fitness and character of those persons with felony records.”⁷⁹ The court maintained further that “positions of private investigators and security guards . . . require little skill and responsibility,” and there was no evidence that “criminality was a serious problem” among security guards and private investigators.⁸⁰

The incoherency of this line of cases gives courts the power to generate idiosyncratic conclusions about laws restricting ex-felon employment on a case-by-case basis. Plaintiff-friendly courts can manipulate three factors to produce desirable outcomes: they can emphasize the tenuous relationship between a given plaintiff’s past criminal conduct and the job he is seeking (as the *Kindem* court did); they can focus on the injustice of clustering all felons into a single generic category (as the *Fussenich* court did); or they can broadly deny the legitimacy of the

⁷⁶ *Kindem*, F. Supp. at 1112.

⁷⁷ *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977).

⁷⁸ *Id.* at 1080.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1081.

state's interest in regulating a particular occupation (as few courts have been willing to do). Defendant-friendly courts have often arrived at starkly opposite conclusions when considering the same factors. In *Hill v. Gill*, the Rhode Island district court noted that “the law in this circuit . . . recognizes a state's right to disqualify convicted felons, *as a class*, from employment in positions of public trust.”⁸¹

Despite its inchoate application to this line of cases, rational basis review is, by its nature, deferential to state prerogative. Even courts that have been aggressively skeptical toward overbroad exclusionary statutes have deferred to more narrowly tailored legislation. And the situation is unlikely to change: lawmakers today are more savvy about articulating convincing state interests behind employment regulations, and better at designing laws that appear at least minimally tailored to those interests. Indeed, the jurisprudence appears to be at a standstill. In the 1960s and '70s, the number of state laws imposing collateral employment sanctions on felons declined, and successful equal protection challenges to such laws peaked, especially in more progressive jurisdictions.⁸² A comprehensive review of all state statutes in 1986 concluded that “states generally are becoming less restrictive of depriving civil rights of offenders.”⁸³ But just as the criminal justice system generally became more punitive in the 1980s and '90s, the popularity of collateral employment sanctions increased rapidly in this period, and courts made no move to stem the tide. Today, there is no sign that lawsuits will be an effective vehicle for reform.

Collateral consequences for ex-felons are preconditions for a system of punitive segregation with no remedy in equal protection or antidiscrimination jurisprudence. The large and growing population of ex-felons—today more than 12 million people, representing 8% of the

⁸¹ *Hill v. Gill*, 703 F. Supp. 1034, 1038 (D.R.I. 1989) (emphasis added).

⁸² Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT*, supra note 7, at 15.

⁸³ *Id.* at 21.

working-age population⁸⁴—constitutes a marked caste, subject to diminished life chances and discrimination mandated by statute. These laws are a powerful driver of class and racial stratification. Laws preventing felons from seeking public employment are especially hard on blacks because the ratio of employment in the public sector to employment in the private sector is much higher for blacks than for other groups.⁸⁵ In inner cities, in particular, public employment is often the best available employment. Statutory limitations on ex-felon employment therefore exert a disparate impact on black Americans even net of their representation in the population of ex-felons.

B. Criminal Record Discrimination

Statutory discrimination against ex-felons affects only public employment and those jobs that are subject to licensing requirements. Discrimination against ex-felons of the form that Devah Pager observed in her audit-pair study—employers systematically disfavoring applicants with criminal records—exists across occupations. Efforts to remedy the disparate racial impact of ex-felon discrimination via conventional antidiscrimination law has produced mixed, but mostly poor, results.

Title VII does not categorically prohibit employers from using criminal records as a basis for hiring decisions.⁸⁶ To win an antidiscrimination suit against an employer for using criminal records in hiring, a plaintiff must either demonstrate that the employer was intentionally using criminal records as a proxy for race or that the employer's practice had a disparate impact on a

⁸⁴ See Christopher Uggen, Melissa Thompson & Jeff Manza, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281 (2006).

⁸⁵ See generally Darity, *supra* note 25.

⁸⁶ 42 U.S.C. § 2000e-2 (2004).

class of persons protected under the statute. Employers may defeat the latter argument with a showing of business necessity.

Disparate-impact litigation with ex-felon plaintiffs faced enormous obstacles from the start. Title VII's "business necessity" defense means that even disparate impact analysis operates in service of the law's broader goal of eradicating only *irrational* discrimination. The Supreme Court has indulged employer defenses of racially disparate hiring practices on safety and efficiency grounds, and a criminal record, to the minds of most judges, implicates both.⁸⁷ Nonetheless, plaintiffs alleging criminal record discrimination found some early success. In the 1970s, two federal courts invalidated hiring practices that automatically disqualified candidates with criminal records. In the more notable of the two cases, *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit sustained a disparate impact suit against Missouri Pacific Railroad, whose felon-disqualification program rejected 2.5 black applicants for every white applicant it rejected.⁸⁸ The court in *Green* expressed considerable doubt that a criminal record was a useful predictor of a prospective employee's quality. Unfortunately, the court failed to rigorously interrogate the circumstances in which a criminal record would or would not convey meaningful data to a potential employer. Instead, the court settled for the gnostic declaration that a "sweeping disqualification for employment resting solely on past behavior . . . rests upon a tenuous and insubstantial basis."⁸⁹

The Supreme Court's 1979 decision in *New York City Transit Authority v. Beazar* put a hasty stop to the progress of ex-felon discrimination cases litigated under Title VII.⁹⁰ In *Beazar*,

⁸⁷ See *N.Y.C. Trans. Auth. v. Beazer*, 440 U.S. 568, 584 (1979) (acknowledging the "legitimate employment goals of safety and efficiency" in assessing job-relatedness).

⁸⁸ *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975); see also *Gregory v. Litton Sys., Inc.*, 472 F.2d 631 (9th Cir. 1972).

⁸⁹ *Green*, 523 F.2d at 1296.

⁹⁰ 440 U.S. 568 (1979).

the Court upheld the Transit Authority's policy of refusing to employ methadone users, despite the policy's disparate impact on African Americans and Latinos. The Court's invocation of the Transit Authority's "legitimate employment goals of safety and efficiency" became a touchstone of subsequent disparate impact litigation, and later courts were substantially more receptive to employers who could proffer a public safety rationale for their discriminatory practice.⁹¹ Justice White's plaintive dissent in *Beazar* noted that the sudden emphasis on safety was rooted more in intuition than empirical fact: the petitioners, he wrote, "[p]resented nothing to negative the employability of successfully maintained methadone users as distinguished from those who were unsuccessful."⁹²

The paucity of empirical evidence linking drug use or criminal records to poor job performance did not stop the logic of *Beazar* from being rapidly institutionalized. In fact, after *Beazar*, courts became more and more conclusory in asserting the "common-sense" presumption that employers had legitimate rationality and safety reasons to discriminate against ex-felons. In *Williams v. Scott*, for instance, an Illinois district court resolved the issue in a single sentence: "[T]he question of placement of the burden of persuasion does not at all affect the situation here, where there is no basis whatever for drawing a rational inference that the absence of a felony record is *not* 'job related for the position in question and consistent with business necessity.'"⁹³

Even if they were required to mount a more persuasive empirical case that there exists a legitimate business reason for discriminating against applicants with criminal records, contemporary employers could easily make the case that the practice of ex-felon discrimination is justified by business necessity thanks to the emergence of the law of negligent hiring.

⁹¹ *Id.* at 587.

⁹² *Id.* at 605 (White, J., dissenting).

⁹³ No. 92 C 5747, 1992 U.S. Dist. LEXIS 13643, at *9 (N.D. Ill. Sept. 3, 1992) (emphasis in original).

Discrimination against ex-felons has become inherently rational, because ex-felon labor creates higher costs for employers. Because employees that expose an employer to risk are inherently more expensive than identical employees who do not invite that risk, employers bear this cost regardless of whether the ex-felons they hire provoke lawsuits. The relationship between negligent hiring and disparate impact law reflects what Lauren Edelman has called the “endogeneity” of law.⁹⁴ Like *Beazar*, negligent hiring presumes that past behavior is an accurate indicator of future action. This presumption reinforces its own market rationality. As this view of human nature is institutionalized in the doctrine of negligent hiring, employers adopt compliance strategies that not only symbolize a commitment to finding safe employees, but actually *are* market-rational, because they reduce the threat of litigation. Coming full circle, this rationality then becomes legitimate grounds for defeating disparate impact cases.

As virtually any law review article on the subject published in the last decade will tell you, disparate impact litigation has limited doctrinal vitality. A vigorous antidiscrimination regime aimed at promoting the hiring of ex-felons is possible, but would require extensive new legislation. One model might be state efforts. Eight states—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New York, Pennsylvania, and Wisconsin—have attempted to limit by statute the extent to which employers can rely on criminal records to make hiring and firing decisions. New York’s effort is the most progressive, as well as the one most squarely positioned within the framework of antidiscrimination law. Article 23A permits employers to deny employment as the result of a criminal conviction only when there is a direct relationship between the past conviction and the duties of employment or where the employee’s criminal

⁹⁴ See Lauren Edelman, Christopher Uggen & Howard Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999).

history indicates that employing her would pose an “unreasonable risk” to public safety.⁹⁵ Despite its use of the language and logic of federal antidiscrimination jurisprudence, Article 23A represents an improvement because it signifies the New York legislature’s effort to more rigorously question assumptions about behavior, rationality, and business necessity. Article 23A explicitly discourages the automatic assumption that ex-felons lack good moral character, and requires employers to consider eight factors when hiring:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more of such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.⁹⁶

These factors are among the ones that federal courts could have considered, but opted not to, in developing an ex-felon discrimination jurisprudence. The racial bias that ineluctably attends

⁹⁵ N.Y. CORRECT. LAW §§ 750-755 (McKinney 2005).

⁹⁶ N.Y. CORRECT. LAW § 753(1) (McKinney 2005).

discrimination against job candidates with criminal records demands, at the very least, that courts consider these questions thoroughly, with proper attention to empirical research.

This has not been the case in New York, despite Article 23A's best intentions. New York State courts have inconsistently enforced the requirement that employers consider the statutory factors when hiring. They have also allowed city agencies and other employers to stretch the limits of the statutory language by affirming tangential relationships between certain crimes and certain jobs.⁹⁷ In *Al Turi Landfill Inc. v. New York State Department of Environmental Conservation*, for instance, the New York Court of Appeals upheld the denial of a license to expand a landfill based on the applicant's prior conviction for federal tax fraud.⁹⁸ The court found that the "dishonesty" inherent in tax crimes was anathema to the duties of the license, which included "accurate record keeping" and "effective self-policing."⁹⁹ Decisions like these show that Article 23A suffers from the same malady as federal ex-felon antidiscrimination jurisprudence. It gives employers virtually unconstrained leeway to reject applicants, provided they can articulate a creative account of how the plaintiff's offense revealed a character flaw. Because most felonies do involve generic malfeasance of some kind—"dishonesty," "self-dealing," "untrustworthiness," "peevisishness," and so forth (felonies are called "malum in se" for a reason)—a criminal record will always be legitimate grounds for disqualifying an applicant if "good character" is treated as a de facto requirement of all jobs. When the requisite nexus between the criminal act and the character of the employment is sufficiently loose, laws like Article 23A become impossible to distinguish from the generic and infinitely pliable "good moral character" requirements employed

⁹⁷ See generally Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, pt. III (2006).

⁹⁸ 751 N.Y.S.2d 827 (N.Y. 2002).

⁹⁹ *Id.* at 829.

by many professional licensing boards. it is not surprising, then, that one Legal Aid attorney has concluded of the New York law, “[T]hese rights are often very hollow and rarely enforced.”¹⁰⁰

Laws like Article 23A tend over time to be vitiated by the same process that made federal antidiscrimination law an inadequate vehicle for addressing the disparate impact of criminal-record discrimination: the legal ratification of abstract relationships between bad character (of which a criminal record is purportedly indicative) and inadequacy as a candidate for employment. What, then, is the alternative?

One option would be to treat criminal record discrimination as a problem that requires a jurisprudence of accommodation. In her analysis of Article 23A, Jocelyn Simonson advocates a rethinking of the concept of “rationality” as it relates to ex-felon discrimination.¹⁰¹ She proposes that judges shift the focus of the discussion away from the impact of ex-felon discrimination on marginal productivity or individual employers’ exposure to litigation risk. Instead, she proposes that judges be “instructed to think of the effect that the repeated denial of jobs to people with criminal records has on society *as a whole*.”¹⁰² Stated in other terms, Simonson’s proposal can be understood as a demand that employers be required to “accommodate” job applicants with criminal records by treating them on equal footing as applicants without criminal records, regardless of whether hiring the employee with the criminal record would result in increased costs.

Advocates of imposing accommodation requirements on employers emphasize that antidiscrimination law is properly aimed not at extirpating acts of private animus but at addressing a “pattern of social and economic subordination that has intolerable effects on our

¹⁰⁰ Simonson, *supra* note 97, at 297 n.83.

¹⁰¹ *Id.* at 307.

¹⁰² *Id.* (emphasis in original).

society.”¹⁰³ The collateral consequences of a criminal conviction entail massive and largely unacknowledged racial inequality. Ex-felon discrimination impairs the integration of large numbers of Americans, especially black men, back into civic life. And it is uniquely difficult to address through conventional antidiscrimination approaches, because discrimination against ex-felons is typically market-rational. These factors may justify reorienting efforts to curb criminal record discrimination toward an accommodation standard.

One obvious objection is that ex-criminals are morally culpable in a way that other groups that employers are obligated to accommodate, like the disabled, are not. But moral desert is of no particular moment to the accommodation standard in federal disability law, which requires employers to accommodate disabilities even when they stem from iniquitous behavior.¹⁰⁴ Whether one finds the argument for civic integration of ex-offenders as persuasive as the parallel argument for the civic integration of the disabled depends on one’s belief in the possibility of rehabilitation. The material, social, and political consequences of mass incarceration without a concomitant commitment to reintegration are well documented.¹⁰⁵ But even those strongly opposed to requiring employers to bear costs that stem from the applicants’ past misdeeds must acknowledge that the special toll of ex-felon discrimination on blacks makes reducing labor-market discrimination against erstwhile criminals a greater moral imperative.

This uncertainty about the proper role of antidiscrimination law is exacerbated by the absence of any principled national consensus on the proper balance between competing societal commitments to rehabilitation, deterrence, and crime prevention. The failure of consensus about

¹⁰³ Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837 (2003).

¹⁰⁴ See generally Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 840-54 (2001).

¹⁰⁵ See, e.g., R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 594-99 (2003) (detailing the social harms of incarceration).

the goals of incarceration surely contributes to the country's inconsistent and myopic prison policy. But it is a debate that an accommodationist ex-felon antidiscrimination model would have to confront head-on to be successful. The Americans with Disabilities Act requires judges to strike a seemingly simple balance between two competing considerations, inclusion and cost. An ex-felon accommodation regime would be much more complicated. The cost to individual employers—including the risk of employees committing crimes in the workplace—would have to be directly balanced against the social costs of ex-felon exclusion, rather than considered in a vacuum as they are at present. The legitimacy of other reasons employers offer for refusing to hire felons would have to be evaluated and similarly balanced against the benefits of reintegration. Collateral consequences for ex-offenders would have to be standardized and reduced to narrowly address the real short-term risk of recidivism. And most importantly, federal lawmakers would have to develop specific national standards to distinguish between illegitimate ex-felon discrimination and discrimination that is clearly justified by criminological data (for instance, discrimination against sex offenders for positions involving exposure to children). Such an antidiscrimination regime would be orders of magnitude more difficult to properly administer than the ADA.

To the extent that antidiscrimination law is the appropriate vehicle for remedying employment barriers faced by ex-felons, the emphasis should be on the consequences of those barriers to racial minorities. The diffuse social impact of a large post-prison population is a serious concern whatever its racial composition. But if the collateral consequences of mass incarceration did weigh so heavily on black men, their consequences would be better addressed with political and structural reform of the criminal justice system. The racial inequity of criminal record discrimination, however, aggravates the black-white unemployment gap, excludes willing black workers from the labor force, and vitiates our society's commitment to liberal

antidiscrimination norms. Put another way, the problem of mass incarceration is the problem of the color line. For this reason, antidiscrimination law may be the best vehicle for addressing the needs of ex-felons.

C. Policy Reform: Race, Privacy, and Statistical Discrimination

Part of the reform effort of the 1970s and '80s to reduce collateral consequences of convictions centered on the privacy rights of ex-offenders.¹⁰⁶ In 1976, however, the Supreme Court ruled in *Paul v. Davis* that arrest records were public information. But individual states were allowed to set their own standards about access to central repositories of criminal records, and search and retrieval of records was cumbersome in the pre-digital era.¹⁰⁷ Noncriminal access by employers or others was relatively rare. Today, the rapid decline in the costs of criminal record checks thanks to the transition to digital repositories makes discrimination on the basis of criminal record easier than ever before, and raises an obvious question: can we prevent employers from discriminating against ex-felons by limiting employers' access to those records?

Compelling recent research suggests that efforts to limit employer access to criminal records may make things worse for black male job seekers by leading employers to statistically discriminate against black men. Holzer, Raphael, and Stoll tested the statistical discrimination hypothesis by surveying a sample of employers to determine each firm's willingness to hire employees with criminal records.¹⁰⁸ They also asked about their most recent hire for a position with no higher education requirement.

¹⁰⁶ See Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276, 285 (2004).

¹⁰⁷ *Id.* at 286.

¹⁰⁸ Harry Holzer, Steven Raphael & Michael Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 451-52 (2006).

The findings of the study showed that statistical discrimination against black males is commonplace. Employers who conducted criminal background checks were a startling fifty percent more likely to hire black employees than employers who didn't.¹⁰⁹ And the effect was much stronger for employers who claimed to be unwilling to hire ex-offenders. Consistent with the statistical discrimination hypothesis, the effects for black males were much larger than the effects for black females. Given that an earlier survey by Holzer had shown that more than sixty-five percent of employers would not knowingly hire an ex-offender,¹¹⁰ the researchers concluded that in the absence of criminal records, the use of race (and gender) as a proxy for criminality is pervasive. They additionally argued that easy access to background checks was a net positive for African American job applicants:

This positive net effect indicates that the adverse consequences of employer-initiated background checks on the likelihood of hiring African Americans is more than offset by the positive effect of eliminating statistical discrimination.¹¹¹

Holzer, Raphael, and Stoll's results suggest that a policy of concealing accurate criminal records would both offer little benefit to African Americans with criminal records and needlessly punish law-abiding African Americans.¹¹²

The results of the Holzer, Raphael, and Stoll study are grim news for the great desideratum of the American rehabilitative ideal: the clean slate. For what they truly reflect is the extent to which race and criminality are intertwined in the era of mass incarceration. When a black male has a 29% chance of spending time in prison over the course of his life, race and crime become mutually constitutive. As R. Richard Banks has argued, incarceration rates have "made

¹⁰⁹ *Id.* at 464.

¹¹⁰ HARRY HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS (1996).

¹¹¹ Holzer et al., *supra* note 108, at 473.

¹¹² Interestingly, the results of Pager's audit-pair study may support Holzer's statistical discrimination hypothesis. Pager eliminated as candidates for her study any employer that said that a criminal background check was conducted as part of the job application. Her sample of employers is thus composed of precisely the sort of employer Holzer predicts will be most prone to statistically discriminate: those who care about criminal records, but do not conduct background checks.

the image of black criminality less an ungrounded stereotype and more a social reality.”¹¹³ Given this, blaming employers for tending to statistically discriminate misses the point. Racialized mass incarceration compels statistical discrimination. The stigma of prison affixes itself to all black men.

What, then, is a policy alternative to heightened privacy regulations? One alternative to a more aggressive accommodationist antidiscrimination regime might be direct subsidies to employers who hire ex-felons.¹¹⁴ These subsidies could come in the form of tax credits or transfers to institutions that hire ex-felons, or in the form of government programs that insure employers against a variety of losses associated with ex-felon employees—exposure to tort risk, on-the-job crime, and so forth. And because the government could condition receipt of subsidies on racially equitable hiring, a subsidy program would reduce the racially discriminatory impact of ex-felon discrimination. Such a program would have the added benefit of transferring the costs of reintegration to taxpayers as a whole. The savings from decreased recidivism and higher workforce utilization would likely defray a substantial portion of these costs.

CONCLUSION

Criminal record discrimination is just one contributing factor to black labor market disadvantage, but there is reason to believe it is a serious one. And with the prison population remaining and its current high levels—and the ranks of ex-felons growing by more than a half-million Americans each year—its effects will likely be magnified in years to come. Evidence on ex-felon discrimination complicates longstanding debates about whether it is “racism” or “social

¹¹³ Banks, *supra* note 105, at 598.

¹¹⁴ See, e.g., Lior Jacob Strahilevitz, *Privacy versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 379 (2008).

structure” that most contributes to enduring racial stratification. As studies by Pager and other show, it is both. Discrimination against ex-felons hurts blacks both because of their status as the most heavily incarcerated social group, and because the stigmatic harms of a prison sentence are magnified by skin color. To properly address this subtle form of discrimination, antidiscrimination law would have to be dramatically reconceived—a development that seems unlikely at best.

Ultimately, though, race-biased ex-felon discrimination is epiphenomenal to the modern carceral apparatus, and only unraveling that apparatus offers a permanent solution. The continued growth of the prison population is almost certainly socially and fiscally untenable.¹¹⁵ Proposals for criminal justice reform are beyond the scope of this Article, but the war on drugs is one obvious place to begin. Between 1990 and 2000, drug offenders accounted for a greater proportion of prison population growth among black inmates than among any other racial group.¹¹⁶ A national commitment to the eradication of urban poverty and the destratification of American inner cities would have a similarly large effect. As long as the black underclass is vituperated as indolent and criminal, harassed by fruitless police drug interdictions, and cast into prison in crippling numbers, employment discrimination against ex-felons will remain a major driver of black unemployment and racial stratification.

¹¹⁵ Consider that for the first time in its history, the state of California will spend more on prisons in the 2012-2013 fiscal year than on higher education, at a time when its budget deficit stands at \$16 billion (incidentally, \$16 billion is approximately what the state will spend on prisons in 2012). See Evan Halper, *California's Budget Gap at \$16 Billion*, L.A. TIMES, Feb. 21, 2008, at A1; Maya Harris, *Prison vs. Education Spending Reveals California's Priorities*, S.F. CHRON., May 29, 2007, at B5.

¹¹⁶ Banks, *supra* note 105, at 595.