

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

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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 one percent 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 seventy percent white in 1950 to around thirty percent 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.

In the age of mass incarceration, the lifetime cumulative probability of spending a period of time in prison is six percent for white men, but a staggering thirty-two percent for black men.⁶ 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

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¹ *Correctional Populations*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (jail plus prison) (last visited Jan. 6, 2011). 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. *Incarceration Rate 1980-2008*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/tables/incrttab.cfm> (last visited Jan. 6, 2011).

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, *WORLD PRISON POPULATION LIST 3* (8th ed. 2008), http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf.

³ Loïc Wacquant, *From Slavery to Mass Incarceration*, *NEW LEFT REV.*, Jan.-Feb. 2002, at 41, 43.

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 43.

⁶ THOMAS P. BONCZAR, U.S. BUREAU OF JUSTICE STATISTICS, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001* (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf> (assuming that the incarceration rate remains at its 2001 level).

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 under-analyzed effect of mass incarceration is its effect on income and lifetime employment outcomes after prison. Stratification research on occupation 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 understandable 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 four percent 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 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 state-mandated—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 has 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 one should understand employment discrimination against ex-felons in the labor market 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 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

⁷ See *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002) (summarizing the research on the consequences of incarceration).

⁸ *Labor Force Statistics*, BUREAU OF LABOR STATISTICS tbl.A-1, <http://www.bls.gov/webapps/legacy/cpsatab1.htm> (last modified Feb. 5, 2010) (select “Unemployment Rate: Seasonally adjusted”; then click “Retrieve data”).

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.

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 inequitable effects of discrimination against job applicants with criminal records. Finally, in Part III, I consider legal and legislative 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 legislative 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 1940s, 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 unemployment reached 11.5%.¹³ The recession that the financial crisis triggered has pushed the gap wider: in September 2010, 8.7% of whites were unemployed, but a remarkable 16.1% 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 the substantially narrower gaps in other aspects of socioeconomic life, including education, occupational attainment, and earnings.¹⁵ Three general hypotheses have attracted the most attention from academics.

¹¹ See Finis Welch, *The Employment of Black Men*, 8 J. LAB. ECON. S26, S32 (1990) (showing a persistent gap that widened significantly in the 1970s).

¹² *Labor Force Statistics*, *supra* note 8, at tbl. A-2.

¹³ *Id.* The particularly deleterious impact of recessions on African Americans is well documented in the social science literature. See, e.g., PROSPERITY FOR ALL?: THE ECONOMIC BOOM AND AFRICAN AMERICANS 190-198 (Robert Cherry & William M. Rodgers III eds., 2000) (arguing that the African American jobless rate is slower to fall than the white jobless rate during periods of economic growth following recessions); Scott Cummings, *Vulnerability to the Effects of Recession: Minority and Female Workers*, 65 Soc. Forces 834, 852-55 (1987) (observing, on the basis of data from the 1974-75 global recession, that minority workers “report rates of labor market disruption significantly higher than those of their majority counterparts, irrespective of occupational status or gender,” and that disruptions such as firings “consistently exceed,” for minority workers, “statistical norms within and between industrial sectors”). The effects of the Great Recession of 2008 on African Americans are only now beginning to be measured, but the sociologist William J. Wilson told *The Atlantic* in March 2010 that “we should brace ourselves” for the recession to have profound negative consequences for inner-city blacks in particular. See Don Peck, *How a New Jobless Era Will Transform America*, THE ATLANTIC, March 2010, at 49. Early evidence suggests he is right: since 2008, the unemployment rate has increased at a faster annual rate for African Americans and Hispanics than other groups, and the median household income of black households fell at triple the rate of white households from 2000 to 2008. See Luke Reidenbach & Christian E. Weller, *The State of Minorities in the Economy*, CENTER FOR AMERICAN PROGRESS (Jan. 15, 2010), http://www.americanprogress.org/issues/2010/01/state_of_minorities.html.

¹⁴ See *Labor Force Statistics*, *supra* note 8, at tbl.A-2.

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

A first possibility—usually termed “spatial mismatch theory”¹⁶—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.¹⁷ 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.”¹⁸

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 the processes of ghettoization that he describes give employers incentive to statistically discriminate against inner-city blacks, as well as prospective black workers who do not live in the urban core.¹⁹ 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, under-motivated, hostile, and rebellious—they are able to justify race-biased hiring processes on

¹⁶ John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q.J. ECON. 175, 183 (1968) (proposing spatial mismatch for the first time: “Since Negroes typically have less skill and less education than whites, an unequal spatial distribution of skill requirements might lead to results like those obtained for Detroit and Chicago, if the average skill level requirement of jobs increased with distance from the ghetto.”).

¹⁷ See generally WILLIAM J. WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996); WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* 95-104 (1987). Wilson’s work identified a black “underclass” in inner-city ghettos and attributes its persistent problems to the sharp decline in the number of entry-level jobs located in inner cities caused by a variety of structural forces, including deindustrialization, global economic restructuring, and a host of federal and state policies that disfavored urban areas. *Id.* Other representative works by both sociologists and economists are legion. See John F. Kain, *A Pioneer’s Perspective on the Spatial Mismatch Literature*, 41 URB. STUD. 7 (2004) (summarizing forty years of literature).

¹⁸ DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 6-15 (1993). Like Wilson, Massey and Denton locate the origins of the “underclass” in a complex interplay of macroeconomic factors and neighborhood environmental factors. They put greater explanatory emphasis than Wilson on cultural factors in explaining the persistence of the “underclass,” such as the “ghetto linguistic patterns” and “oppositional attitudes” that purportedly impede gainful employment and social progress, *id.* at 162-68. Massey and Denton also place a much greater emphasis than Wilson on ongoing racial discrimination, arguing that residential segregation can only be explained as a product of ongoing racial animus—an argument that is obviously connected to Massey and Denton’s insistence that the “underclass” is culturally and behaviorally alien to the American mainstream. *Id.* at 17-55, 118-125 (“Concentrated poverty is created by a pernicious interaction between a group’s overall rate of poverty and its degree of segregation in society.”).

¹⁹ Joleen Kirschenman & Kathryn M. Neckerman, “We’d Love to Hire Them, But . . .”: *The Meaning of Race for Employers*, in *THE URBAN UNDERCLASS* 204, 204-13 (Christopher Jencks & Paul E. Peterson eds., 1991) (noting the “subjective importance” of the urban underclass “in the discourse of Chicago employers” and the ubiquity of statistical discrimination against black job applicants linked to employer preconceptions about the personal characteristics of inner-city dwellers); see also FARRELL E. BLOCH, *ANTIDISCRIMINATION LAW AND MINORITY EMPLOYMENT* 35 (1994) (“These employer perceptions emphasize the major unfortunate implication of statistical discrimination: Hard-working, capable blacks and other minorities often will not even be considered for employment, let alone recruited aggressively, if they are members of groups not generally highly regarded by employers. The effect on minority job seekers is similar no matter whether a given employer decision reflects blatant prejudice or statistical discrimination that employers believe is efficient and serves them well by tending to cull our job seekers with below-average ability.”).

productivity grounds. A strong implication of Wilson's work and other research like it is that discrimination against working-class blacks may be much more difficult to extirpate with conventional antidiscrimination law than discrimination against white-collar, professional, or public employees, meaning that type of working-class discrimination is a major contributor to the black disadvantage in the labor market.²⁰

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.²¹ 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).²² Roger Waldinger's controversial monograph *Still the Promised City* is a version of Mead's approach.²³ Waldinger follows Mead and others in arguing that legitimate work in the inner city is more abundant than spatial mismatch theorists admit.²⁴ 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.²⁵ 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 the problems of minorities in the labor market.²⁶

²⁰ See William J. Wilson, *Race-Specific Policies and the Truly Disadvantaged*, 2 YALE L. & POL'Y REV. 272, 275 (1984) ("[T]he factors associated with the growing woes of low-income blacks are exceedingly complex and go beyond the narrow issue of contemporary discrimination. Indeed, it would not be unreasonable to contend that the race-specific policies emanating from the civil rights revolution, although beneficial to the more advantaged blacks (i.e., those with higher income, greater education and training, and more prestigious occupations), do little for those who are truly disadvantaged, such as the ghetto underclass."). In fact, Wilson argues that the housing and employment antidiscrimination laws of the 1960s worsened the prospects of those black Americans who were not properly situated to take advantage of them: by facilitating the outmigration of moderate and middle-income blacks from the inner city and into improved employments, these laws inadvertently deprived lower-income neighborhoods of their most productive and civically engaged residents. See WILSON, TRULY DISADVANTAGED, *supra* note 17, at 50-57.

²¹ See LAWRENCE MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 85-110 (1992); Lawrence Mead, *Policy Research: The Field Dimension*, 33 POL'Y STUD. J. 535, 545-46 (emphasizing a paucity of "clear evidence that jobs were lacking in the inner city" in the 1980s and arguing that "[f]or the native-born poor, basic work discipline, not jobs, is what appears to be lacking"); see also Welch, *supra* note 11.

²² 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.

²³ See ROGER WALDINGER, STILL THE PROMISED CITY (1997).

²⁴ *Id.* at 13.

²⁵ *Id.* at 3-4.

²⁶ 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

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.²⁷ 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.²⁸ 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 mandated affirmative-action programs.²⁹ 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.³⁰ 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.³¹

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

sympathy toward those blacks whom they allege 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.”).

²⁷ Charles Hirschman, *Minorities in the Labor Market*, in *DIVIDED OPPORTUNITIES: MINORITIES, POVERTY, AND SOCIAL POLICY* (Gary D. Sandefur & Marta Tienda eds., 1988).

²⁸ *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 also identified a 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.

²⁹ *See* John F. Zipp, *Government Employment and Black-White Earnings Inequality, 1980-1990*, 41 SOC. PROBS. 363, 363 (1994) (“[M]uch of the recent growth in high-paying jobs for blacks has occurred in the government, with two major consequences: (1) black-white wage ratios are substantially higher in the public than in the private sector; and (2) blacks receive a sizeable financial benefit from working for the government. These findings are widely accepted and have been used to underscore the degree to which black economic success has depended on the active intervention of the public sector.”); *see also* Sharon M. Collins, *The Making of the Black Middle Class*, 30 SOC. PROBS. 369, 370-75 (1983) (arguing that “[e]nhanced job opportunity for middle-class blacks is the product of legislation and government subsidized organizations created in response to black demands for increased resources,” and that as a result black economic opportunity precariously depends on an ongoing political commitment to minority advancement and antidiscrimination).

³⁰ 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, in contrast, the gap increased and 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 22, at 32.

³¹ *See* Wilson, Tienda & Wu, *supra* note 15, at 249-63.

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.³² 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 market discrimination have thus sought to identify subtler practices by which contemporary labor market discrimination is realized.³³

One finding is that the increased mobility of the black middle and upper-middle classes—a key reason Wilson explored “the declining significance of race”—is more illusory than it first appeared. 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.³⁴ 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.³⁵ 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.³⁶ 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 more likely to be unemployed because of firings and layoffs than white men.³⁷ They point 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.³⁸ 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

³² Richard Freeman, *Changes in the Labor Market for Black Americans, 1948-72*, 4 BROOKINGS PAPERS ON ECON. ACTIVITY 67, 68 (1973).

³³ 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” enough to elect Barack Obama).

³⁴ See JACK NIEMONEN, RACE, CLASS, AND THE STATE IN CONTEMPORARY SOCIOLOGY 109-10 (2002).

³⁵ *Id.*

³⁶ *Id.* at 110-11.

³⁷ Wilson, Tienda & Wu, *supra* note 15, at 265-66.

³⁸ *Id.* at 252.

of being permanently fired and 1.7 times as likely to be rehired after a period of layoff.³⁹ 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. Later studies refuted that argument, showing that, even controlling for human capital and job characteristics, blacks remained twice as likely to be dismissed as whites,⁴⁰ strongly suggesting that inequalities in 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 mismatch hypothesis. Though an effort to dispute the conjecture that class, not race, is the more salient demographic feature for predicting long-term life chances has motivated much of the research on the differential experience of blacks and whites in similar labor sectors and occupations,⁴¹ the relationship between the two lines of argument is more complicated. Abundant evidence suggests that the black population does suffer from particular residential and labor market positions. 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.⁴² 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.⁴³ But William J. Wilson and others may be overhasty in announcing the “declining significance of race” on the basis of these findings.⁴⁴ 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.⁴⁵ Moreover, the “asymmetric

³⁹ Paul G. Schervish, *The Structure of Employment and Unemployment*, in SOCIOLOGICAL

PERSPECTIVES ON LABOR MARKETS 153, 170-86 (Ivar E. Berg ed., 1981); see also Lori G. Kletzer, *Job Displacement*, 12 J. ECON. PERSP. 115, 120 (1998) (arguing that black workers were substantially more likely to be displaced as a result of macrostructural factors in the 1980s, though noting that blacks fared better during the recessions of the 1990s).

⁴⁰ See, e.g., Craig Zwerling & Hilary 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).

⁴¹ See, e.g., George Wilson, *Payoffs to Power Among Males in the Middle Class: Has Race Declined in Its Significance?*, 38 SOC. Q. 607, 608 (1997) (criticizing the “declining significance of race” thesis on the basis of evidence that substantial interracial differentials exist in job authority that are not attributable to the distribution of human capital endowments).

⁴² 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).

⁴³ See Wilson, Tienda & Wu, *supra* note 15, at 266.

⁴⁴ See WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1980) (arguing that class is becoming comparatively more important than race in determining the life chances of African Americans).

⁴⁵ Loic J. D. Wacquant & William J. Wilson, *The Costs of Racial and Class Exclusion in the Inner City*,

causality”⁴⁶ 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 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 1990s 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.⁴⁷

Other analyses, mostly by economists, observed a small or negligible effect of incarceration in unemployment.⁴⁸ 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.⁴⁹ Some of these studies seemed to strain credulity. Jeffrey Kling, for instance, 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.⁵⁰

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

501 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 9 (1989).

⁴⁶ *Id.* at 24.

⁴⁷ 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).

⁴⁸ See, e.g., Jeffrey Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 Q.J. ECON. 51 (1995) (analyzing unemployment insurance records to conclude that eighteen months after a jail term, employment rates were only about four percentage points lower than the sample mean, and finding essentially no effect after eighteen months); 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).

⁴⁹ See Kling, *supra* note 48, at 10-13.

⁵⁰ *Id.*

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.⁵¹ 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.⁵² 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 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.⁵³

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 overly optimistic 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 hypotheses to explain the observed relationship between incarceration and unemployment.⁵⁴ These included the labeling effects of criminal stigma,⁵⁵ the disruption of social and family ties,⁵⁶ the injury to preexisting social networks,⁵⁷

⁵¹ See Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration* 19 (Princeton Univ. Industrial Relations Section, Working Paper No. 450, 2001) ("[T]he two main data sources for studying ex-inmates—survey data and administrative data—may be subject to severe nonresponse bias. Evidence for this bias in administrative data is provided by large discrepancies between the earnings of young male ex-offenders in [unemployment insurance] data and self-reported earnings in surveys.")

⁵² Bruce Western & Becky Pettit, *Incarceration and Racial Inequality in Men's Employment*, 54 *INDUS. & LAB. REL. REV.* 3 (2000).

⁵³ *Id.* at 9.

⁵⁴ See Devah Pager, *The Mark of a Criminal Record*, 108 *AM. J. SOC.* 937, 940-41 (2003).

⁵⁵ See Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 *SOC. PROB.* 133 (1962) (finding, in an experiment in which unskilled workers who have been acquitted or convicted of an assault were presented to employers, both groups were seen negatively by employers, while doctors who were sued for malpractice suffered no

human capital loss,⁵⁸ and legal barriers to employment.⁵⁹

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 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.⁶⁰

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.⁶¹ 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.⁶² Black auditors who represented a criminal record applied to two hundred 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.

In addition to illuminating the profound obstacles to employment that all ex-felons face, 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

negative results).

⁵⁶ See ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* (1993) (examining different factors in childhood that lead to crime).

⁵⁷ See John Hagan, *The Social Embeddedness of Crime and Unemployment*, 31 *CRIMINOLOGY* 465 (1993) (arguing that early embeddedness among delinquent friends and parental criminality are factors that can lead to adult unemployment and delinquency).

⁵⁸ See GARY BECKER, *HUMAN CAPITAL* (1975) (exploring the effect of investments in schooling, training, medical care and migration on earnings and consumption).

⁵⁹ See Mitchell W. Dale, *Barriers to the Rehabilitation of Ex-Offenders*, 22 *CRIME & DELINQUENCY* 322 (1976); *infra* Part III.A (discussing the legal barriers to employment that ex-offenders face).

⁶⁰ Pager, *supra* note 54, at 949.

⁶¹ *Id.* at 959.

⁶² *Id.* at 960.

and middle-class blacks.⁶³

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.”⁶⁴ 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.⁶⁵ And the 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.⁶⁶

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.⁶⁷ 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.⁶⁸ It follows that it is rational for black defendants to negotiate reduces sentences via a

⁶³ See generally Myers, Jr., *supra* note 22. Harry J. Holzer and others have shown that ex-offenders have a human-capital deficit compared to the non-offending 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 205-06* (Mary Pattillo, David F. Weiman & Bruce Western eds., 2004).

⁶⁴ Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 *CRIM. L.Q.* 67, 92 (2005). 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. *Id.* at 100 n.46; Nancy J. King et al., *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 assigned after bench or jury trials for the same crime).

⁶⁵ See, e.g., McCoy, *supra* note 64, at 89 (finding, via a controlled analysis based on data from the State Court Processing Statistics dataset, that sentences after jury trials “were about nine times more severe than guilty plea sentences”). See generally STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* (2005) (providing an excellent journalistic account of how the trial penalty operates to generate a high rate of guilty pleas).

⁶⁶ 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).

⁶⁷ See Langan, *supra* note 4.

⁶⁸ 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 twenty percent 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

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 major incentive to plea-bargain for defendants who cannot post bail is that it can result in a faster release from incarceration.⁶⁹

The large-scale plea-bargaining that is the norm in the American criminal justice system results in a larger proportion of defendants who leave the country's courtrooms 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.⁷⁰ 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 legally mandated. 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.⁷¹ 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 of 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.⁷² Only six states require a relationship to exist 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.⁷³ Most ex-felons are also barred from military employment without a special waiver.⁷⁴

fare worse in terms of both imprisonment and term-length decisions than whites).

⁶⁹ DAVID W. NEUBAUER, *AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 282 (1988).

⁷⁰ Though recall the experiment conducted by Schwartz & Skolnick on the difference in the impact of assault and medical malpractice on hiring. Schwartz & Skolnick, *supra* note 55. See also John R. Lott, *Do We Punish High Income Criminals Too Heavily?*, 30 *ECON. INQUIRY* 583, 590-608 (1992) (finding no significant relationship between prison sentence length and change in income before and after drug convictions); John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty From Drug Convictions: The Importance of an Individual's Reputation*, 21 *J. LEGAL STUD.* 159 (1992) (finding fraud and embezzlement offenses has a very large effect on earnings).

⁷¹ Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 *B.C. L. REV.* 255, 280 (2004).

⁷² 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 260 tbl.47 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>.

⁷³ *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.

⁷⁴ See DEP'T OF THE ARMY, ACTIVE AND RESERVE COMPONENTS ENLISTMENT PROGRAM 34 (2007) ("A waiver is required for any applicant who has received a conviction or other adverse disposition for a serious criminal

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 of 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.⁷⁵ Ex-felons are barred from more than eight hundred discrete occupations by laws regulating public-employment hiring or licensing.⁷⁶ 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 equivalents.⁷⁷ 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.⁷⁸ 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*.⁷⁹ 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.”⁸⁰

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 regulatory interests.⁸¹ In practice, this has meant that the majority of statutory

misconduct offense.”). All branches of the military employ the waiver system, though what offenses require waiver and how frequently they are granted varies between the branches. See Lolita Baldor, *New Rules for Recruits with Criminal Records?*, NAVY TIMES (Nov. 7, 2007), http://www.navytimes.com/news/2007/11/ap_recruitwaivers_071106/ (“[M]any waiver requirements differ from service to service, and some officials and recruiters say the policies should be more uniform. The starkest difference involves Marines and drug use. The Marines require a waiver for one-time marijuana use, while the other services don’t, and 69 percent of conduct waivers for Marines who joined from October 2006 to June 2007 were for previous drug use. It was 12 percent for the Army.”) The military’s recruiting difficulties since the start of the Iraq War have led the military to grant these waivers more frequently. See Bryan Bender, *More Entering Army with Criminal Records*, BOSTON GLOBE, July 13, 2007, at A1.

⁷⁵ 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).

⁷⁶ PAUL F. CROMWELL ET AL., *COMMUNITY-BASED CORRECTIONS* (2004).

⁷⁷ *Id.* at 193-94.

⁷⁸ See generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

⁷⁹ *Hawker v. New York*, 170 U.S. 189 (1898).

⁸⁰ *Id.* at 197.

⁸¹ See, e.g., *De Veau v. Braistead*, 363 U.S. 144 (1960) (upholding a New York law prohibiting ex-felons

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*,⁸² 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.”⁸³ “It is not unreasonable,” the court concluded, “to suppose that the public trust might be undermined by assigning such tasks to ex-offenders.”⁸⁴

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*,⁸⁵ 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 generalized distinction between felons and non-felons “is not rationally related to any legitimate state interests.”⁸⁶

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.⁸⁷ 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.”⁸⁸ 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.”⁸⁹ 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.⁹⁰

The incoherency of this line of cases gives courts the power to generate idiosyncratic

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, 238-39 (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 or Equal Protection Clause of the Fourteenth Amendment”).

⁸² *Schanuel v. Anderson*, 708 F.2d 316 (7th Cir. 1983).

⁸³ *Id.* at 319-20.

⁸⁴ *Id.* at 319.

⁸⁵ *Kindem v. City of Alameda*, 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).

⁸⁶ *Kindem*, 502 F. Supp. at 1112.

⁸⁷ *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977).

⁸⁸ *Id.* at 1080.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1081.

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 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."⁹¹

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.⁹² And the situation is unlikely to change: lawmakers today are surely 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 1970s, 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.⁹³ A comprehensive review of all state statutes in 1986 concluded that "states generally are becoming less restrictive of depriving civil rights of offenders."⁹⁴ But just as the criminal justice system generally became more punitive in the 1980s and 1990s, the popularity of collateral employment sanctions increased rapidly in this period, and courts made no move to stem the tide.⁹⁵ Today, there is no sign that litigation 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—as of 2004 more than 11.7 million people, representing more than five percent of the adult population⁹⁶—constitutes a marked caste, subject to diminished life chances and legally mandated discrimination. 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.⁹⁷ In inner cities, in particular,

⁹¹ *Hill v. Gill*, 703 F. Supp. 1034, 1038 (D.R.I. 1989) (emphasis added).

⁹² *See, e.g., Doe v. Edgar*, 721 F.2d 619, 622-24 (upholding a statute that denied drivers' license reinstatement for five years to persons convicted of at least two driving under the influence offenses, despite the fact that the legislation did not apply to motorists who committed other serious motor-vehicle offenses, because "the Secretary could rationally find a twice-convicted DUI offender more dangerous to the public welfare than he would an individual who has two manslaughter driving convictions even though in this case the underlying causal situation might be more than egregious error of judgment which would justify other procedures leading to license revocation").

⁹³ Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT*, *supra* note 7, at 15.

⁹⁴ *Id.* at 21.

⁹⁵ *See generally* *INVISIBLE PUNISHMENT*, *supra* note 7 (comprehensively detailing the growth of collateral consequences to criminal convictions in this period).

⁹⁶ *See* Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 *ANNALS AM. ACAD. POL. & SOC. SCI.* 281, 288 (2006).

⁹⁷ *See generally* Zipp, *supra* note 29.

public employment is often the best available employment.⁹⁸ 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 in the manner that Devah Pager observed in her audit-pair study—employers systematically disfavoring applicants with criminal records—can exist in any sector. Efforts to use conventional antidiscrimination law to remedy the disparate impact of ex-felon discrimination on minorities have produced mixed, but mostly poor, results.

Title VII does not categorically prohibit employers from using criminal records as a basis for hiring decisions.⁹⁹ 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 class of persons protected under the statute. Employers may defeat the latter argument with a showing of business necessity.¹⁰⁰

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, in the minds of most judges, implicates both.¹⁰¹ 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.¹⁰² 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 sweeping declaration that "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense . . . in the permanent ranks of the unemployed."¹⁰³

The Supreme Court's 1979 decision in *New York City Transit Authority v. Beazer* put a

⁹⁸ For an early statement of the crucial role of public employment in urban areas, see BENNETT HARRISON, URBAN INSTITUTE, PUBLIC EMPLOYMENT AND URBAN POVERTY 2 (1973) (noting that the "relative importance of government employment is even greater in the nation's cities").

⁹⁹ 42 U.S.C. § 2000e-2(1)(A)(i) (2004).

¹⁰⁰ *Id.*

¹⁰¹ See *N.Y.C. Trans. Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979) (acknowledging the "legitimate employment goals of safety and efficiency" in assessing job-relatedness).

¹⁰² *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).

¹⁰³ *Green*, 523 F.2d at 1298.

hasty stop to the progress of ex-felon discrimination cases litigated under Title VII.¹⁰⁴ In *Beazar*, 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.¹⁰⁵ 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."¹⁰⁶

The paucity of empirical evidence linking drug use or criminal records to poor job performance did not stop the courts from rapidly institutionalizing the logic of *Beazar*. 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.'"¹⁰⁷

Even if they were required to mount a more persuasive empirical case that a legitimate business reason exists for discriminating against applicants with criminal records, in the future, contemporary employers could use the emergence of the law of negligent hiring to make the case that ex-felon discrimination is a business necessity. 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.¹⁰⁸ 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.¹⁰⁹ A vigorous antidiscrimination

¹⁰⁴ New York City Transit Auth. v. Beazar, 440 U.S. 568 (1979).

¹⁰⁵ *Id.* at 587.

¹⁰⁶ *Id.* at 605 (White, J., dissenting).

¹⁰⁷ *Williams v. Scott*, No. 92 C 5747, 1992 U.S. Dist. LEXIS 13643, at *9 (N.D. Ill. Sept. 3, 1992) (emphasis in original).

¹⁰⁸ See Lauren Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999).

¹⁰⁹ See, e.g., Michael J. Songer, Note, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 Mich. J. Race & L. 247 (2005) (observing precisely what the title suggests).

regime aimed at promoting the hiring of ex-felons is possible, but would require extensive new legislation. State efforts provide one potential model. Eight states—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New York, North Dakota, Pennsylvania, Washington, and Wisconsin¹¹⁰—have attempted to statutorily limit the extent to which employers can rely on records of criminal convictions to make hiring and firing decisions.¹¹¹ 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 history indicates that employing her would pose an “unreasonable risk” to public safety.¹¹² 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 or held by the person.
- (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.

¹¹⁰ CONN. GEN. STAT. § 46a-80 (2010); HAW. REV. STAT. § 378-2.5 (2010); 775 ILL. COMP. STAT. 5/2-103 (2010); MASS. GEN. LAWS ch. 151B §4(9) (2010); MINN. STAT. § 364.01-03 (2010); N.Y. CORRECT. LAW §§ 750-755 (2010); N.D. CENT. CODE § 12-60-16.6 (2009); 18 PA. CONS. STAT. § 9125 (2010); WASH. REV. CODE ANN. § 9.94A.640(3) (2010); WIS. STAT. § 111.335 (2010).

¹¹¹ A large number of states limit the extent to which employers can inquire about arrests that did not result in a conviction. *See, e.g.*, CAL. LAB. CODE § 432.7 (2009) (providing that employers may not ask about an arrest that did not lead to conviction and may not ask about pretrial or post-trial diversion program).

¹¹² N.Y. CORRECT. LAW §§ 750-755 (McKinney 2005).

(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.¹¹³

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 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.¹¹⁴ 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.¹¹⁵ 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."¹¹⁶ 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," "peevishness," 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 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."¹¹⁷

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.¹¹⁸ 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

¹¹³ N.Y. CORRECT. LAW § 753(1) (McKinney 2005).

¹¹⁴ See generally Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, pt. III (2006).

¹¹⁵ *Al Turi Landfill, Inc. v. N.Y. State Dep't of Env't Conservation*, 751 N.Y.S.2d 827 (N.Y. 2002).

¹¹⁶ *Id.* at 829.

¹¹⁷ Simonson, *supra* note 114, at 297 n.83.

¹¹⁸ *Id.* at 307.

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*.”¹¹⁹ Stated in other terms, Simonson’s proposal can be understood as a demand that employers “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 society.”¹²⁰ 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.¹²¹ 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 concomitant efforts towards reintegration are well documented.¹²² 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.

The absence of any principled national consensus on the proper balance of competing societal commitments to rehabilitation, deterrence, and crime prevention exacerbates the uncertainty about the proper role of antidiscrimination law.¹²³ Furthermore, the lack of consensus about the goals of incarceration contributes to the country’s inconsistent and myopic prison policy. The competing perspectives on these issues form a debate that a successful accommodationist ex-felon antidiscrimination model would have to confront head-on. The public accommodation provisions of Title III of 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

¹¹⁹ *Id.* (emphasis in original).

¹²⁰ Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837 (2003).

¹²¹ See generally Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 840-54 (2001). For instance, HIV infection is a “disability” under section 12101 of the ADA, even though infection might have been the result of intravenous drug use. See *Bragdon v. Abbott*, 524 U.S. 624 (1998) (so holding).

¹²² 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).

¹²³ See, e.g., MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 181-210 (1995) (advocating a comprehensive recalibration of our criminal justice policies around a revived commitment to rehabilitation and prevention).

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 criminological data clearly justifies (for instance, discrimination against sex offenders for positions involving exposure to children). The magnitude of such an antidiscrimination regime would be more difficult to properly administer than the ADA.

To the extent that antidiscrimination law is the appropriate vehicle for remedying employment barriers that ex-felons face, 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 not 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 1980s to reduce collateral consequences of convictions centered on the privacy rights of ex-offenders.¹²⁴ In 1976, however, the Supreme Court ruled in *Paul v. Davis* that arrest records were public information.¹²⁵ However, 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.¹²⁶ 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,¹²⁷ 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.¹²⁸ They also asked about their most recent hire for a position

¹²⁴ See Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276, 285 (2004).

¹²⁵ *Paul v. Davis*, 424 U.S. 693, 713 (1976).

¹²⁶ See Bushway, *supra* note 124, at 286.

¹²⁷ See Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. Times, Oct. 17, 2006, at A1 (describing the rapid growth of and problems associated with internet-based criminal background check services).

¹²⁸ Harry Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 451-52 (2006).

with no higher education requirement.

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.¹²⁹ 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 only thirty-five percent of employers would knowingly hire an ex-offender,¹³⁰ 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.¹³¹

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.¹³²

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 thirty-two percent chance of spending time in prison over the course of his life,¹³³ race and crime become mutually constitutive. As R. Richard Banks has argued, incarceration rates have "made the image of black criminality less an ungrounded stereotype and more a social reality."¹³⁴ 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 is a program that provides direct subsidies to employers who hire ex-felons.¹³⁵ 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

¹²⁹ *Id.* at 464.

¹³⁰ HARRY HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS (1996).

¹³¹ Holzer et al., *supra* note 128, at 473.

¹³² 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.

¹³³ *See supra* note 6.

¹³⁴ Banks, *supra* note 122, at 598.

¹³⁵ *See, e.g.,* Lior Jacob Strahilevitz, *Privacy versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 379 (2008).

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.

IV. 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 at 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 structure” that most contributes to enduring racial stratification. As studies show, it is both. Discrimination against ex-felons hurts blacks both because of their status as the most heavily incarcerated social group, and because skin color magnifies the stigmatic harms of a prison sentence. To properly address this subtle form of discrimination, one would need to dramatically reinterpret antidiscrimination law—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.¹³⁶ 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.¹³⁷ A national commitment to the eradication of urban poverty and the de-stratification 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.

¹³⁶ 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 sixteen billion dollars (incidentally, sixteen billion dollars 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.

¹³⁷ Banks, *supra* note 122, at 595.