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Rethinking Rational Discrimination against Ex-Offenders

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ARTICLE

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I. EMPLOYMENT DISCRIMINATION AGAINST EX-OFFENDERS

In January 2004, George W. Bush slipped an unexpected sidenote into his State of the Union address. Introducing his last proposal of the evening, he stated, "This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison."[1] Bush's statement and accompanying proposal for a $300 million prisoner reentry initiative[2] signaled a new era of bipartisan recognition for the need to provide support to the hundreds of thousands of prisoners released into United States communities each year.[3]

Despite this apparent support for policies facilitating the reentry of ex-prisoners into mainstream society, finding employment as an individual with a criminal history remains exceedingly difficult in today's job market.[4] Not only does America's population of ex-offenders already lag behind the general population in traditional qualifications of employment (*e.g.*, education, work experience),[5] but criminal records themselves also restrict opportunities for employment—first through licensing statutes that formally exclude individuals

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1. George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.

2. *Id.*

3. More than 630,000 people are released from United States prisons each year; this is more than four times the number released 25 years ago. AMY L. SOLOMON, KELLY JOHNSON, JEREMY TRAVIS & ELIZABETH C. MCBRIDE, THE URBAN INSTITUTE, FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY 1 (2004).

4. *See generally* RICHARD B. FREEDMAN, THE URBAN INSTITUTE, CAN WE CLOSE THE REVOLVING DOOR? RECIDIVISM V. EMPLOYMENT OF EX-OFFENDERS IN THE U.S. 9-11 (2003), *available at* http://www.urban.org/url.cfm?ID=410857.

5. Harry J. Holzer, Steven Raphael and 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 (Mary Pattillo, David F. Weiman, & Bruce Western, eds., 2004).

with certain types of convictions,[6] and second through the hiring preferences of most employers for individuals without criminal records.[7] A recent survey of employers in four major metropolitan areas reveals that employers are highly averse to hiring ex-offenders; only 12.5% of employers said that they would definitely accept an application from an individual with a criminal record, and 25.9% said that they probably would.[8] These employer preferences seem "rational" in that they flow from a reasoned assumption that individuals who have committed crimes in the past are more likely to pose risks in the workplace. However, the discrimination resulting from such "rational" assumptions runs counter to society's interest in allowing ex-offenders to become full, legal members of their communities.

President Bush's emphasis on preventing recidivism is one of the strongest justifications for policies that seek to promote the hiring of individuals with criminal records. This public safety explanation emphasizes the risks to society's general welfare that emerge when former offenders are released into communities without the financial support and social stability that flow from permanent employment. A number of studies establish a link between unemployment and recidivism, finding that ex-offenders who are unable to secure jobs upon release are much more likely to re-offend than those who are employed.[9] In addition, although absent from President Bush's speech, at the outset it is worth noting two other strong arguments in support of policies that seek to reduce barriers to employment for ex-offenders.

The first centers on the staggering effects of employment discrimination against ex-offenders on African Americans and Latinos. Because two-thirds of inmates in United States prisons are African American or Latino,[10] the widespread denial of jobs to individuals with criminal records disproportionately affects these minority groups. This contributes to the high rates of unemployment within African-American and Latino communities and furthers the association in

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6. *See* Bruce May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 188-93 (1995).

7. *See generally* Devah Pager, *Double Jeopardy: Race, Crime and Getting a Job*, 2005 WISC. L. REV. 617, 622-27, 640-44 (2005).

8. Holzer et al., *supra* note 5, at 210. This number is especially significant when compared to employer reactions to other stigmatized groups: 92% of employers would be willing to hire an applicant who is a former or current welfare recipient, 96% would be willing to hire applicants with GEDs instead of high school diplomas, 59% would be willing to hire applicants with a spotty employment history, and 83% would be willing to hire individuals who have been unemployed for a year or more. *Id.*

9. *See generally* JARED BERNSTEIN & ELLEN HOUSTON, ECONOMIC POLICY INSTITUTE, CRIME AND WORK: WHAT WE CAN LEARN FROM THE LOW-WAGE LABOR MARKET (2000); Bruce Western and Becky Petit, *Incarceration and Racial Inequality in Men's Employment*, 54 INDUS. & LAB. REL. REV. 3 (2000); May, *Real World Reflection, supra* note 6; *Christopher* Uggen and Melissa Thompson, *The Socioeconomic Determinants of Ill-Gotten Gains: Within-Person Changes in Drug Use and Illegal Earnings*, 109 AM. J. SOC. 146 (2003); ROBERT SAMPSON AND JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (1993).

10. MARC MAUER, RACE TO INCARCERATE 124-26 (1999).

the public mind of the menacing ex-felon with a face of color.[11] Indeed, a recent study of employment practices in New York City by Devah Pager and Bruce Western found that a criminal record has more severe consequences for African Americans applying for jobs than for white applicants.[12] The study followed pairs of job applicants with identical resumes and found that while white ex-offenders received a call-back from an employer two-thirds as often as equally qualified white non-offenders, black offenders received a positive response from the employer less than half as often as black non-offenders.[13] As Pager and Western conclude, these results "suggest[] that race and criminal status interact to intensify the stigma of official criminality."[14]

Second, the accumulation of civil sanctions upon release from prison serves to exclude ex-offenders from full participation in the social contract,[15] and employment restrictions remain one of the most visible of these barriers to full participation in mainstream society. Scholars and activists in recent years have questioned the attachment of increasingly numerous civil (or "collateral") consequences to criminal convictions.[16] From restrictions on welfare benefits to limited access to housing to the employment barriers discussed in this Article, these legal constraints are classified as civil sanctions rather than criminal punishments.[17] Denying a job to an individual because of a conviction for which she has already served her time arguably punishes her beyond the appropriate extent of the law.[18] Further, the attachment of civil consequences to criminal convictions has profound effects upon the communities into which ex-offenders return upon their release. With employment, for example, the difficulties faced by individuals with criminal records in their searches for legitimate employment affect not only those job applicants, but also the children, families and

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11. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 136 (2001); RANDALL KENNEDY, RACE, CRIME AND THE LAW 136-67 (1997) (discussing the use of "color as a proxy for dangerousness.")

12. Devah Pager and Bruce Western, Barriers to Employment Facing Young Black and White Men with Criminal Records (2005) (unpublished manuscript, *available at* www.princeton.edu/pager/auditnyc_offenders_draft.pdf).

13. *Id.* The positive response rates for white non-offenders, white ex-offenders, black non-offenders, and black ex-offenders were: 20.7%, 13.9%, 20.9%, and 9%, respectively.

14. *Id.* at 6. *See also* Pager, *supra* note 7 at 645 (finding similar results based on a study of employer callback rates in Milwaukee, Wisconsin).

15. *See* Loïc Wacquant, *Deadly Symbiosis When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 119-21 (2005).

16. *See generally* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT 15 (Marc Mauer and Meda Chesney-Lind eds., 2002).

17. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).

18. *See, e.g.*, Gabriel Chin, *Race, the War on Drugs and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002) (stating, "The real sentence comes like a ton of bricks in the form of a series of statutes denying convicted felons a variety of rights . . . . The ton of bricks is invisible.").

communities who depend on them for financial support.[19]

Nevertheless, the laws of the vast majority of states are silent when it comes to employment discrimination against individuals with criminal records. In forty-two states, the sole restriction on the extent to which employers can take criminal records into account when making employment decisions is found in Title VII of the Civil Rights Act, which forbids employment practices that have a disparate impact on a group of a specific race, religion, sex, or national origin when those practices are not "job related for the position in question and consistent with business necessity."[20] A number of challenges to employment practices related to ex-offenders under a disparate impact theory have argued that the denial of employment opportunities to individuals with criminal records has a disparate impact on African Americans and Latinos.[21] However, successful disparate impact challenges relating to criminal records and employment are exceedingly rare today; there has not been one upheld by a Federal Appeals Court since 1975.[22]

Currently, one can find the most meaningful legal protections for ex-offenders in the job market in the laws of the eight states that explicitly restrict the extent to which employers can use criminal records in decision-making.[23] The most progressive of these laws is New York State's Article 23A, passed in 1976, under which an employer may only deny an employment opportunity as a result of a criminal conviction when (1) there is a "direct relationship" between the past conviction and the duties of employment or (2) the applicant's criminal history indicates that employing him or her would constitute an "unreasonable risk" to public safety. An employer considering an applicant's criminal record is required to take into account a series of factors, including the individual circumstances surrounding the conviction and any evidence of rehabilitation, before applying either of the exceptions above.[24]

However, as I demonstrate below, New York State courts have diluted the language of Article 23A mandating fair consideration of ex-offenders by consistently deferring to employer decisions to turn away applicants with

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19. *See* Bruce Western, Becky Pettit and Josh Guetzkow, *Black Economic Progress in the Era of Mass Imprisonment*, *in* INVISIBLE PUNISHMENT 165 (Marc Mauer and Meda Chesney-Lind eds., 2002); *see also* Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 259-62 (2004).

20. 42 U.S.C. §§ 2000e-2000e-17 (2005).

21. *See* Green v. Missouri Pacific Railroad Company, 523 F.2d 1290, 1295-98 (8th Cir. 1975) (upholding claim of disparate impact on African-Americans of employment policy that excluded from consideration all applicants with criminal convictions other than traffic offenses).

22. *See* Part II.B, *infra.*

23. The eight states are Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New York, Pennsylvania, and Wisconsin. *See* CONN. GEN. STAT. § 46a-80 (2005); HAW. REV. STAT. § 378-2.5 (2003); 775 ILL. COMP. STAT. 5/2-103 (2005); MASS. GEN. LAWS Ch. 151B, § 4(9) (2005); MINN STAT. § 364.03 (2005); N.Y. CORRECT. LAW §§ 750-755 (McKinney 2005); 18 PA. CONS. STAT. §9125 (2005); WISC. STAT. §111.335 (2005).

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

criminal records.[25] The New York State Court of Appeals has allowed employers to connect tangential elements of a crime (*e.g.*, dishonesty) to general requirements of employment (*e.g.*, self-control) in finding a direct relationship between a past crime and an employment opportunity,[26] and has given employers virtually limitless discretion in deciding that hiring an ex-offender would pose an "unreasonable risk" to public safety.[27] The Court's interpretations of Article 23A are inconsistent with the plain meaning of the statute, reflecting an unwillingness to endorse the hiring of ex-offenders when faced with employers making seemingly understandable—or "rational"—decisions. In applying Article 23A to individual employment situations, the New York State Court of Appeals has focused on the rationality of individual decisions as they relate to limited notions of the amount of "risk" and "cost" borne by employers rather than on the risks and costs to society as a whole of failing to encourage, within reason, the employment of ex-offenders. The Court of Appeals decided the key cases interpreting Article 23A between the years 1988 and 2002, a period that directly coincided with the sharpest increase in rates of incarceration in American history.[28] As David Garland has observed, this prison boom was partially a result of criminal justice policies that rejected the penal-welfarism[29] of the mid-20th century in favor of an "economic" style of reasoning, in which the language of risks and costs was used to justify increasingly punitive sentences.[30] Garland has argued that, "This increasingly influential rationality . . . helped to change how the system thinks about crime and criminals—encouraging a more costed conception of social harm and a conception of the offender that emphasizes rational choice and calculation."[31] By deferring to employers in their rejection of job applicants with criminal records, the Court's decisions reflect the political landscape of the late 20th century.

Ultimately, the history of federal employment discrimination law demonstrates that, if statutory reforms are to be successful, they must provide a "rational" justification for the protections they offer and a normative basis upon which courts can feel comfortable relying.[32] In this paper, I argue that in order to promote the employment of ex-offenders under anti-discrimination legislation on the state level (and specifically in New York), it is necessary both to rethink the

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25. *See* Part III, *infra*.

26. *See* Al Turi Landfill, Inc. v. New York State Dep't of Envtl. Conservation, 751 N.Y.S.2d 827, 829 (N.Y. 2002).

27. *See, e.g.*, Arrocha v. Bd. of Educ. of the City of New York, 93 N.Y.2d 361, 365 (N.Y. 1999).

28. MAUER, *supra* note 10, at 20.

29. Garland defines penal-welfarism as a conception that "combin[es] the liberal legalism of the due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare and criminological expertise." GARLAND, *supra* note 11, at 27.

30. *See id.* at 166-92. Garland writes, "[P]oliticians often speak the language of risk only to bowdlerize its terms and confound its logic. If it relates to the release of a convicted offender, then any level of risk is unacceptable." *Id.* at 192.

31. *Id.*

32. *See* Parts III and IV, *infra*.

concept of "rationality" as it relates to the employment of ex-offenders and to extend reforms to include efforts to change normative perceptions of the role of ex-offenders in mainstream society. President Bush's 2004 State of the Union address indicates a real possibility that, as hundreds of thousands of additional ex-offenders rejoin their communities each year, we can hope to see political, economic, and cultural shifts in the attitudes of Americans towards individuals with criminal records. Statutory reforms should seek to reinforce these shifts by underscoring the overall benefit to society and to the economy when the law assists ex-offenders in becoming healthy and productive members of society.

In Part II, I present an analysis of the concept of "rationality" in federal employment discrimination law, specifically focusing on the implications of the concept of rational discrimination on efforts to increase employment opportunities for ex-offenders. Part III then presents a case study of New York's Article 23A and suggests that statutory language alone is not enough to protect ex-offenders from employment discrimination. Even in New York, where the state legislature explicitly instructed employers to hire individuals with criminal records when such employment decisions are consistent with public safety, the state's courts have bowed to a limited conception of rational decision-making and virtually negated the impact of the law. Based on these phenomena, Part IV suggests a model for reform that seeks to rethink the reigning models of rationality and morality as they relate to the employment of ex-offenders in America.

II. RATIONALITY AND MORALITY IN FEDERAL EMPLOYMENT DISCRIMINATION LAW

A. Rational v. Irrational Discrimination

An examination of the how the concept of "rational discrimination" operates in federal antidiscrimination law underscores the challenges faced by any legal scheme designed to protect ex-offenders from discrimination in the workplace. The reigning legal standards of employment discrimination rest on a difference between decisions based on assumptions about individuals because of their membership in protected groups, and "rational" discrimination, or behavior on the part of employers that seems justified because of real or perceived differences between individuals in the labor market. This distinction is guided by an interest in minimizing costs; when bias towards a protected group causes an employer to act against its economic self-interest, then antidiscrimination law intervenes.[33] A focus on eliminating only "irrational" employment decisions becomes especially problematic for policies aimed at protecting ex-offenders. In the context of criminal records, to which an acknowledged association with "risk" attaches at

33. *But see* RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 20-58 (1992) (arguing that free market forces should eliminate most inefficient discrimination without the help of antidiscrimination laws).

the point of conviction,[34] courts are hesitant to discredit employer defenses that rely on traditional notions of cost and efficiency.

For example, one can locate the equation of irrational discrimination with inefficient employment practices in the justifications for and judicial enforcement of the Age Discrimination in Employment Act (ADEA).[35] Upon the passage of the ADEA in 1967, President Johnson noted, "Hundreds of thousands of not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination . . . . In economic terms, this is a serious—and senseless—loss to a nation on the move."[36] A central underlying rationale for the ADEA is thus an interest in maximizing economic opportunity.

The Supreme Court seized upon this notion of rationality in its interpretation of the ADEA. In *Hazen Paper Co. v. Biggins*, the Court considered a claim that Hazen Paper had violated the ADEA by firing the plaintiff in order to prevent his pension benefits from vesting.[37] Justice O'Connor's majority opinion locates the purpose of the ADEA as the prevention of decisions based on incorrect assumptions regarding "productivity and competence," stating that the action of firing an employee because their pension will soon vest, "would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee—that he indeed is 'close to vesting.'"[38] By separating pension status from age,[39] O'Connor is able to validate an employer policy motivated by a rational interest in saving money. As Parts II.B and II.C below will demonstrate, this focus on protecting efficient business practices is equally present in the Court's treatment of disparate impact doctrine and its interpretation of the Americans with Disabilities Act.

Considerations of rationality depend upon a court's willingness to acknowledge the risks posed by the hiring of members from a range of protected groups. Michael Stein has envisioned a "continuum of perceived biological difference" in antidiscrimination law, in which courts are less willing to acknowledge differences between different races than between genders, and between genders than with respect to the disabled.[40] The result is that courts are more likely to recognize the economic justifications of employer practices when it comes to groups, like the disabled, at the far end of this continuum.[41] With race, courts are

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34. The formal stigma following a criminal conviction begins with the presumption that an individual has displayed a disregard for the law and an inability to follow rules.

35. 29 U.S.C. §§ 621-634 (2005).

36. 113 CONG. REC. 1089-90 (daily ed. Jan. 23, 1967) (statement of Pres. Lyndon Johnson, *Aid for the Aged*).

37. 507 U.S. 604 (1993).

38. *Id.* at 612.

39. O'Connor writes, "[A]n employee's age is analytically distinct from his years of service." *Id.* at 611.

40. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PENN. L. REV. 579, 622 (2004).

41. For a discussion of the concept of "irrational discrimination" as it relates to the Americans with Disabilities Act, *see* Part II.C, *infra*.

justifiably hesitant to openly acknowledge any difference at all. The only defense available to employers in relation to racial groups under the individual and disparate treatment doctrines is to rebut the plaintiff's alleged evidence of discriminatory intent.[42] In contrast, under § 703(e) of Title VII, the defense of "Bona Fide Occupational Qualification" is available to employers for the categories of religion, sex and national origin. In *Dothard v. Rawlinson*, for example, the Supreme Court cited differences between genders in upholding an Alabama rule requiring prison guards to be the same gender as prisoners.[43] The Court stated, "A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood."[44] Age falls even further along this spectrum; the ADEA allows for two additional defenses to practices that discriminate based on age—(1) for "good cause" and (2) for "reasonable factors other than age."[45]

If race is at one end of the spectrum, representing an immutable characteristic that employers may not legally consider as a proxy for other qualifications, then a criminal record lies at the other end of that continuum. Many view a criminal record as a result of choice, reflecting incompetence and immorality.[46] This distinguishes ex-offenders from groups representing immutable characteristics such as race, gender, and age. One commentator has argued that statutes like Article 23A that provide legal protections for ex-offenders in the workplace "protect[] a class unworthy of being rewarded with such extra protection."[47] There is therefore a sense that laws which restrict the freedom of employers to reject applicants with criminal records favor individuals who have made bad choices over employers who are making sensible judgments based on those past bad acts. Accordingly, employment decisions that exclude ex-offenders from the workplace are seen as "rational" and morally appropriate despite any impact they may have on other protected groups.

B. Rationality in Disparate Impact: Why a Race-Based Claim Fails in the Context of Criminal Convictions

Employment discrimination claims based upon the disparate impact on racial minorities of employment policies that discriminate against ex-offenders face similar "rationality" roadblocks in federal court. While disparate impact doctrine focuses on the inadvertent effects of employer policies rather than on intent, the doctrine nevertheless reflects an underlying interest in eliminating irrational

42. *See* 42 U.S.C.S. §§ 2000e-2000e-17 (2003).
43. 433 U.S. 321 (1977).
44. *Id.* at 336.
45. 29 U.S.C.S. §623(f)(3) (2005), §§4(f)(1) and 4(f)(3).
46. *See, e.g.*, Thomas M. Hruz, Comment, *The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of a Conviction Records*, 85 MARQ. L. REV. 779 (2002).
47. *Id.* at 820.

discrimination and protecting rational employment practices. An employer's available affirmative defense to a claim of disparate impact under Title VII—that of "business necessity" and "job relatedness"—indicates that the purpose of the doctrine is to force an employer to make changes to its hiring policies only when such changes are also in the employer's economic self-interest. In addressing disparate impact claims, the Supreme Court has been swayed by concerns with safety, efficiency, and reasonableness, all of which have been found to trump impact.[48] The Court has also displayed a willingness to defer to employer practices that single out "risky" populations, like ex-addicts and ex-offenders, when the court sees membership in excluded groups as reflective of immoral choices.[49] Thus, although employment discrimination against ex-offenders disproportionately affects African American and Latino job applicants, the rational and moral concerns underlying Title VII's disparate impact doctrine make impact claims exceedingly difficult to win in the context of criminal convictions.

Successful disparate impact claims on behalf of ex-offenders are not impossible. In the 1970s, at least two federal appeals courts ruled that employee practices that automatically eliminate candidates based on the existence of a criminal record are unconstitutional when those practices have a disparate impact on African Americans.[50] In *Green v. Missouri Pacific Railroad Company*, the Eight Circuit upheld a disparate impact claim against Missouri Pacific, which followed a policy of denying employment to all applicants who had ever been convicted of a crime other than a traffic offense.[51] The court held that such a policy was too broad to justify its effects on African American applicants, who were rejected at a rate 2.5 times that of White applicants.[52] The majority wrote,

> "[A] sweeping disqualification for employment resting solely on past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis . . . To deny job opportunities to these individuals because of some conduct which may be remote in time or does not substantially bear upon the particular job requirements is an unnecessarily harsh and unjust burden."[53]

The Eighth Circuit thus connects its finding of disparate impact to a normative argument relying on the injustice of excluding ex-offenders from job opportunities without considering the individual qualifications of each applicant.

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48. *See* New York City Transit Authority v. Beazer, 440 U.S. 568, 584 (1979) (acknowledging the "legitimate employment goals of safety and efficiency" in assessing job-relatedness).

49. *See* Parts II.B and II.C., *infra.*

50. Green v. Missouri Pacific Railroad Company, 523 F.2d 1290 (8th Cir. 1975); Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972).

51. 523 F.2d 1290 (8th Cir. 1975).

52. *Id.* at 1295.

53. *Id.* 1296-98.

While *Green* still stands as good law (and notably echoes the language of Article 23A, passed one year later in New York), the Supreme Court's 1978 decision in *New York City Transit Authority v. Beazer* signaled a significant setback for any disparate impact claim on behalf of ex-offenders in federal court.[54] In *Beazer*, the Court held that a Transit Authority (TA) policy generally denying employment to methadone users did not violate Title VII even though the policy resulted in the exclusion of significantly more African American and Latino applicants than white applicants.[55] In addition to holding that the plaintiffs had not met the statistical burden required to make out a case of disparate impact, the *Beazer* court noted in dicta that the TA's case would have also stood up under a defense of job-relatedness given the public safety requirements of the job, saying, "TA's legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics . . . and of a majority of all methadone users."[56] The Court had no problem recognizing a business necessity defense when the employer cited its rational interest in protecting public safety. Indeed, courts have tended to defer to employers when public safety is cited as a consideration in decision-making. In *Lanning v. Southeastern Pennsylvania Transportation Authority*, the Supreme Court, referring to the Tenth Circuit's 1972 decision in *Spurlock v. United Airlines, Inc.*, stated that, "the [business necessity] standard itself takes public safety into consideration . . . . [A] showing [that not considering the criterion in question significantly jeopardizes public safety] would be relevant to determine if that [criterion] is necessary for the successful performance of the job."[57]

The decision in *Beazer* also belies the Supreme Court's resistance to applying Title VII's protections to the benefit of former drug addicts. The majority's opinion focuses on the statistical burden of proof, finding that the plaintiff's demonstration—that 81% of employees referred for suspect violations of TA's narcotics rule and 63% of people receiving methadone maintenance treatment in public programs in New York City were African American or Latino—was not enough to prove the disparate impact of TA's policies.[58] Underlying the Court's rejection of such strong evidence one senses a manifest unwillingness to believe that the law should require employers to treat ex-addicts as they would other potential employees. Justice White argues in the *Beazer* dissent that plaintiffs clearly made out a prima facie case of disparate impact; he also notes that "[p]etitioners had every opportunity, but presented nothing to negative the employability of successfully maintained methadone users as distinguished from those who were unsuccessful. Instead, petitioners, like the Court, dwell on the methadone failures—those who quit the programs or who remain but turn to

54. 440 U.S. 568 (1979).
55. *Id.* at 584.
56. *Id.* at 587.
57. 181 F.3d 478, 483 (1999), *citing* 475 F.2d 216 (10th Cir. 1972).
58. *Beazer*, 440 U.S. at 569.

illicit drug use."[59] White's dissent recognizes the unfairness of calculations of risk based only on past illicit conduct. White implies that in making its statistical assessments, the majority also reflected its assumptions about the "rational" nature of excluding ex-addicts from employment opportunities. The *Beazer* decision thus validates precisely what the *Green* court condemned as unjust in the context of criminal convictions: the automatic elimination of an application for employment based on the applicant's past conduct and without considering her other qualifications.

Since the time of the Court's decision in *Beazer*, and despite the passage of the Civil Rights Act of 1991, the strength of disparate impact doctrine has significantly diminished.[60] While the doctrine is still alive,[61] the Court's deference to employer practices seen as safe and efficient, especially in the context of past illegal behavior, indicates that a challenge to employer practices that take criminal convictions into account under Title VII's disparate impact doctrine would not hold much promise in a court today. This is true despite the fact that African Americans are represented in the ex-offender population even more disproportionately than they were when *Green* was decided in 1975.[62]

While disparate impact may not prove immediately useful in an effort to improve opportunities for ex-offenders, the Supreme Court's treatment of public safety considerations in the disparate impact context remains relevant to a strategy of reducing discrimination against ex-offenders through statutory reform at any level. Decisions such as *Beazer* highlight attitudes regarding the relationship between past drug use and future public safety that cannot be ignored if one hopes to promote the hiring of individuals with criminal records. Indeed, the success of future reforms depends the ability of reformers to undermine "rational" arguments like those found in the *Beazer* majority by raising the awareness of the importance of providing individuals released from prison with adequate support. Nor should reform strategies ignore the fact that the faces of these individuals tend to be African American and Latino. Instead, normative justifications for proposed reforms should emphasize the impact that current policies have on minority communities.[63]

C. Rationality in Disparate Treatment: The Example of the ADA

Judicial interpretation of the Americans with Disabilities Act of 1990 (ADA) over the past fifteen years further underscores the insistence of courts on

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59. *Id.* at 1376 (discussing plaintiff's equal protection claims).

60. *See* Nicole J. DeSario, Note, *Reconceptualizing Meritocracy: The Decline of Disparate Impact*, 38 HARV. C.R.-C.L. L. REV. 479, 493-500 (2003) (describing the decline of disparate impact after *Beazer*).

61. *See* Smith v. City of Jackson, 544 U.S. 228 (2005) (upholding disparate impact under the ADEA).

62. *See* MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA 49 (1995).

63. *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (arguing that policies that increase stigmas associated with marginalized racial groups should be challenged for the disparate impact that they have on minorities).

deferring to employer practices that seem justified by economic considerations. By requiring employers to provide "reasonable accommodations" to disabled employees,[64] the ADA is the first federal antidiscrimination statute to explicitly limit behavior considered "rational." Under the ADA, it is not enough for employers to treat individuals with disabilities as they would other employees; if disabled employees require reasonable accommodations to perform their jobs, employers must treat them differently. Underlying the ADA mandate of "reasonable accommodation" is a sense that the purpose of the statute is to eliminate costly discrimination against individuals with disabilities—costly both to those discriminated against and to the United States government, which must otherwise provide for those individuals when they are unemployed. The ADA's remedy is to shift these costs to the employer.[65] A number of scholars have argued that this emphasis on limiting "rational" discrimination by moving people into the workforce who would not be there if employers were allowed to act in their own self-interests has led federal courts to severely restrict the coverage of the ADA.[66] For example, Linda Kreiger has argued that the narrow coverage of the ADA as interpreted by the courts can be partially attributed to the fact that "large segments of the public, including many judges and media programmers, completely fail to understand . . . that the ADA . . . is an anti-discrimination statute, not a social welfare benefits program."[67]

One can see this resistance to the limits that the ADA places on the ability of employers to act "rationally" in the Supreme Court's interpretation of the statute's "reasonable accommodation" requirement. In *U.S. Airways v. Barnett*, the Court held that a plaintiff's request to remain in the mailroom because of his injured back did not constitute a "reasonable accommodation" when his employer was trying to adhere to its seniority system.[68] Justice Breyer's majority opinion states that in rebutting a plaintiff's claim that a requested accommodation is reasonable, "the employer's showing of a violation of the rules of a seniority system is by itself ordinarily sufficient."[69] While the Court's holding in *Barnett* is restricted to seniority systems, Breyer's opinion limits the meaning of "reasonable accommodations" in all circumstances by deferring to what the Court sees as an efficient business model. Breyer writes that the purpose of "reasonable accommodations" is to help "those with disabilities to obtain the same workplace

64. 42 U.S.C. 12112(b)(5)(A) (2005).

65. For a critique of the rationality of this remedy, *see* Scott A. Moss and Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197 (1998).

66. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643 (2001); Stein, *supra* note 40; Sam Bagenstos, *The Americans with Disabilities Act as Welfare Reform*. 44 WM. & MARY L. REV. 921 (2003).

67. Linda Kreiger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 516 (2000).

68. 535 U.S. 391 (2002).

69. *Id.* at 403.

opportunities that those without disabilities automatically enjoy."[70] The implication is that the ADA should promote equal, but not preferential, treatment of the disabled. When requests for accommodation from disabled employees clash with profit-maximizing business practices, those "rational" practices triumph.

Federal courts have also displayed opposition to the ADA's limitations on "rational" discrimination in their limited interpretation of the definition of "disability" under the statute. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, decided the same year as *Barnett*, the Supreme Court held that in determining the definition of "major life activity"[71] under the ADA, "the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."[72] In holding that an individual whose work injuries resulted in an inability to lift heavy objects or engage in repetitive manual labor was not covered by this definition,[73] the Court displayed an interest in limiting the coverage of the ADA to protections for the severely disabled. This exceedingly narrow definition of disability is also reflected in the treatment by federal courts of the ADA's exclusion of people "currently engag[ing] in the illegal use of drugs."[74] In *Zenor v. El Paso Healthcare System, Ltd.*, the Fifth Circuit held that the employer acted legally when it terminated the plaintiff for his use of drugs despite a promise that he could keep his job if he completed a rehabilitation program.[75] In holding that the definition of "current" drug user extends to an individual using drugs at the time when an employer begins to consider termination rather than on the date she is fired, the court stated, "Columbia was carrying out its *rational* and legally sound decision not to employ illegal cocaine users in its hospital pharmacy."[76]

In short, the limits that federal courts have placed on the applicability of the ADA can be attributed to an overarching conception, despite statutory language to the contrary, of a law whose purpose is to protect "irrational" discrimination. This focus on irrationality is equally troublesome when one turns to statutes aimed at improving employment opportunities for ex-offenders. Many individual decisions to pass over ex-offenders in favor of employing people without criminal records *are* based on reasonable fears of risks to workplace safety and to employer liability. Individuals with criminal records do commit new crimes at higher rates than individuals without records,[77] and employers are often held

70. *Id.* at 397.

71. Section 3(2) of the ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of . . . [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C.S. § 12102(2) (2005).

72. 534 U.S. 182 (2002).

73. *Id.*

74. 42 U.S.C. § 12104 (2005).

75. 176 F.3d 847 (5th Cir. 1999).

76. *Id.* (emphasis added).

77. PATRICK LANGAN & DAVID LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDVISM OF PRISONERS RELEASED IN 1994, NCJ 193427 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf.

liable when their employees commit crimes while on the job.[78] The thinking of the Fifth Circuit in *Zenor* reflects the resulting hesitancy to question employer decisions related to criminal activity, as do the decisions by the New York State Court of Appeals granting employers broad discretion under Article 23A. As long as this limited conception of rationality guides the decisions of employers and the judgments of courts, reducing barriers to employment for ex-offenders will remain an unrealistic goal of antidiscrimination law.

Decisions limiting the coverage of the ADA reflect an additional obstacle faced by statutes intended to promote the hiring of ex-offenders—that of convincing judges and the public that individuals with criminal records *deserve* full consideration in employment decisions. In addition to an insistence on deferring to efficiency and rationality, federal courts interpreting the ADA have displayed an interest in distinguishing between individuals with disabilities seen as worthy of protection and those seen as undeserving. In *Despears v. Milwaukee County*, the Seventh Circuit held that discharging an employee for actions related to alcoholism does not constitute unlawful discrimination under the ADA.[79] Judge Posner wrote for the court that ruling otherwise "would give alcoholics and other diseased or disabled persons a privilege to avoid some of the normal sanctions for criminal activity."[80] *Despears* reflects a resistance to extending the protections of the ADA to individuals whose choices have contributed to their disabilities. Because employers and the public often view a criminal record as reflective of immoral choices—and by extension deserving of discrimination—reforms aimed at increasing employment opportunities for ex-offenders must seek to transform *both* the "rational" and the moral dimensions of judicial decision-making.

III. NEW YORK'S ARTICLE 23A

A. The Law in Detail

The New York State Legislature passed Article 23A in 1976, partly in recognition of the limits of federal antidiscrimination law in protecting ex-offenders from discrimination.[81] The first statute of its kind—and to this day the most progressive[82]—Article 23A forbids employers from imposing blanket

78. *See* Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 83 U.S.F. L. REV. 193 (2004).

79. 63 F.3d 635 (7th Cir. 1995).

80. *Id.*

81. Michael Meltsner and others drafted a model act in the early 1970s, and thanks to work of the Legal Action Center and the fortuitous sponsorship of the bill by a Republican State Senator from Long Island, the state legislature passed the law in 1976. For an early version of the bill, *see* Michael Meltsner, Marc Caplan, & William C. Lane, *An Act to Promote the Rehabilitation of Criminal Offenders in the State of New York*, 24 SYRACUSE L. REV. 885 (1973). *See* Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 611 (N.Y. 1988), *citing* Meltsner et al., *supra*, and 1976 N.Y. LEGIS. ANN., at 50.

82. Only seven other states have laws prohibiting employment discrimination based on conviction records. Of these, a number of scholars point to New York's law as the most effective at increasing

rejections of individuals with criminal records and requires employment decisions based on all of an applicant's qualifications. However, Article 23A has met the same fate as the ADA on the federal level: despite strong statutory language to the contrary, New York courts have repeatedly deferred to what they see as "rational" preferences of individual employers.[83] An examination of the statutory language and the ways it has been interpreted in the thirty years of the law's existence provide a potent example of the ways in which courts can interpret laws to conform to their own limited conceptions of "rationality."

On its face, Article 23A encourages employers to hire individuals with criminal records. According to the language of the law, rather than assume that applicants with criminal records "lack . . . good moral character" and are therefore unemployable, employers must engage in a contextual evaluation of the impact of an applicant's criminal history on her ability to perform a specific job and any risk she may pose to others in performing that job.[84] An employer may only deny an application for license or employment based on a criminal conviction when (1) there is a direct relationship between the criminal conviction and the duties of employment *or* (2) the applicant's criminal history indicates that employing her "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."[85]

Correction Law § 753(1) requires employers to consider the following eight factors surrounding a conviction when applying the exceptions above:

> (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
>
> (b) The specific duties and responsibilities necessarily related to the license or employment sought.
>
> (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more of such duties or responsibilities.
>
> (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
>
> (e) The age of the person at the time of occurrence of the criminal offense or offenses.

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employment opportunities for ex-offenders. *See, e.g.*, Clark, *supra* note 78, at 208-10; Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests In the Employment of Criminal Offenders*, 24 CONN. L. REV. 1281 (2002).

83. I am certainly not the first person to recognize the limited impact of Article 23A on ex-offenders seeking employment in New York. As one Legal Aid attorney has written of the protections of Article 23A, "[T]hese rights are often very hollow and rarely enforced." Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL'Y & L. 135, 140 (2002).

84. N.Y. CORRECT. LAW § 752 (McKinney 2005).

85. *Id.*

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.[86]

Section 753(2) states that, in making a determination under § 752, an employer or agency "shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."[87] Article 23A thus seeks to balance the interest of employers in creating a safe workplace with a public policy encouraging the hiring of ex-offenders. The law requires a contextual evaluation of an individual's qualifications for the position in question and ability to perform the duties of employment without exposing others to undue risk in the workplace.

B. The Law in Context

New York is one of only eight states with a law explicitly limiting the extent to which employers can consider criminal convictions in making employment decisions.[88] Of the seven other states, only the laws of Hawaii, Illinois, Pennsylvania and Wisconsin apply to all convictions and all forms of employment.[89] Article 23A differs from the other state laws in two significant ways: (1) it is the only state law to require that employers explicitly consider a list of factors that place a conviction in an individualized context, and (2) it is the only law to provide a public safety exception, allowing employers to reject an applicant not only when there is a "direct relationship" between the offense and the job, but also when her criminal record indicates that she would present an "unreasonable" public safety risk.[90]

While this second difference affords employers in New York more discretion

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

87. N.Y. CORRECT. LAW § 753(2) (McKinney 2005). Any individual denied employment or a license as a result of a criminal conviction has a right to request a written statement setting forth the reasons for the denial, and the employer or agency must provide such a statement within thirty days of the request. N.Y. CORRECT. LAW § 754 (McKinney 2005). While there is no right to a public hearing, an individual wishing to appeal a denial of employment based on her criminal record may do so through the State Division of Human Rights if the action was by a private employer, and through an Article 78 proceeding if the action was by a public agency. N.Y. CORRECT. LAW § 755 (McKinney 2005).

88. *See* note 23, *supra*, and accompanying text.

89. HAW. REV. STAT. § 378-2.5 (2003); 775 ILL. COMP. STAT. 5/2-103 (2005); 18 PA. CONS. STAT. § 9125 (2005); WISC. STAT. § 111.335 (2005). Connecticut and Minnesota's laws refer only to public employers, and Massachusetts' law applies only to convictions for misdemeanors. CONN. GEN. STAT. § 46a-80 (2005); MASS. GEN. LAWS Ch. 151B, § 4(9) (2005); MINN STAT. § 364.03 (2005).

90. N.Y. CORRECT. LAW §752.

in denying employment opportunities to ex-offenders,[91] it is the "factor-based" approach that makes Article 23A a uniquely progressive law. Article 23A requires an employer considering an applicant's criminal record to take into account a series of factors, including the individual circumstances surrounding the conviction, before denying an application under either the "direct relationship" or "unreasonable risk" exceptions.[92] This approach renders Article 23A exceptional when compared to other state laws, under which employers simply compare the type of conviction to the duties of employment. This difference is best illustrated by the approach taken in Wisconsin, where the Wisconsin Supreme Court has interpreted the state's comparable "substantial relation" test to forbid "a detailed inquiry into the facts of the offense and the job,"[93] and the Wisconsin Labor and Industry Review Commission has held that mitigating circumstances, evidence of rehabilitation, formal pardons and the amount of time elapsed since a conviction (all relevant factors under § 753 of New York's Article 23A) are irrelevant to an employer's finding of a substantial relationship between a conviction and the duties of a job.[94]

Unlike other states, however, New York has no mechanism for the elimination of an individual's criminal record as a consideration in employment decisions. For example, in Hawaii no employer can consider a conviction that is more than ten years old.[95] New York has no time beyond which employers cannot consider a conviction, although employers must take into account "the time which has elapsed since the occurrence of the criminal offense" as one of the factors in any decision to deny an employment opportunity.[96] Moreover, in New York there is no means for a fully rehabilitated ex-offender to ensure that her conviction will not present a barrier to an employment position for which she is otherwise qualified. In Illinois, employers cannot use sealed or expunged records in employment decisions.[97] New Yorkers have no way of sealing records from employers; instead, individuals can apply for certificates of rehabilitation that, as detailed below, do not have much legal bite in the context of hiring decisions.[98]

In addition to these differences in statutory language, New York courts interpreting Article 23A in the past thirty years have significantly weakened the impact of the law's existing language, with the effect that some discrimination

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91. *See* Part III.B, *infra.*

92. *See* N.Y. CORRECT. LAW §§ 750-755.

93. County of Milwaukee v. Labor and Indus. Review Comm'n, 407 N.W.2d 908, 915 (Wis. 1987),

94. *See, e.g.,* Nelson v. Prudential Ins. Co., ERD Case No. 9401290 (LIRC May 17, 1996). *See also* Hruz, *supra* note 46, at 794-797.

95. HAW. REV. STAT. § 378-2.5 (2003).

96. N.Y. CORRECT. LAW § 753(1)(d). Notably, New York's model act prohibited the consideration of all felony convictions older than seven years, and all misdemeanor convictions older than three. Meltsner et. al., *supra* note 77 at 906. *See also* Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 611 (N.Y. 1988) (citing the statute and accompanying article written by Meltsner et. al. as an indication of the New York legislature's intent in passing the law).

97. 775 ILL. COMP. STAT. 5/2-103 (2005).

98. *See* Part III.C, *infra.*

against ex-offenders in the employment context remains legal in New York. Like federal courts, the New York State Court of Appeals and the state's lower courts have deferred to a concept of rationality that contradicts the mandates of the Act. Rather than adhere to the specific balancing tests articulated by the law, New York's courts have allowed employers to craft their own definitions of "unreasonable risk" and "direct relationship." These standards conform to pre-existing assumptions about the risks posed by individuals with criminal records, regardless of evidence of rehabilitation or other indications to the contrary, and legitimate short-sighted decision-making that undermines the state's interest in promoting the employment of ex-offenders.

C. New York State Courts and Article 23A

1. Direct Relationship

The New York State Court of Appeals interprets Article 23A's "direct relationship" exception very broadly, allowing employers to draw tangential connections between convictions and the duties of employment. Section 750 of the law defines a "direct relationship" as a situation in which "the nature of criminal conduct for which the person was convicted has a *direct bearing* on his fitness or ability to perform one or more of the duties or responsibilities *necessarily related* to the license or employment sought."[99] The Court of Appeals interprets this to mean that a direct relationship can exist not only when the offense in question is clearly related to the industry or occupation at issue, but also when the elements inherent in the nature of the offense are tangentially related to the duties of the license or employment sought.[100] In *Al Turi Landfill, Inc. v. New York State Department of Environmental Conservation*, the Court of Appeals upheld the denial of a license to expand a landfill based on the applicant's prior convictions for federal tax-related crimes.[101] The court concluded that the agency's decision was "rational," using the word four times in less than two pages.[102] The court found that "dishonesty, lack of integrity in conducting business, and . . . willingness to mislead the government" were inherent in the convictions of the tax-related crimes and therefore directly related to the duties of the license such as "accurate record keeping" and "effective self-policing."[103]

Such an interpretation gives employers broad leeway to reject applicants. It is hard to imagine a criminal offense for which an argument could not be made that the offender displayed a "lack of integrity," and a job for which "effective self-policing" is not a necessary requirement. The drafters of New York's model

99. N.Y. CORRECT. LAW §750 (emphasis added).

100. Al Turi Landfill, Inc. v. New York State Dep't of Envtl. Conservation, 751 N.Y.S.2d 827, 829 (N.Y. 2002).

101. *Id.* at 828.

102. *Id.* at 828-29.

103. *Id.* at 829.

act recommended that the direct relationship test "require[] a substantial and immediate connection between the crime and the functions and responsibilities which pertain to the particular right or opportunity."[104] While the "direct relationship" standard articulated by the New York State Court of Appeals mirrors those found in other states with similar statutes,[105] it is nevertheless excessively broad given the ease with which one can draw connections between the elements of a crime—*e.g.*, "dishonesty" or "untrustworthiness"—and the requirements of most types of employment.[106] The New York State Court of Appeals' standard reverts the law back to where it began before the passage of Article 23A: a blanket assumption that a criminal conviction is the mark of a weak candidate for employment.

2. Unreasonable Risk

Similarly, the New York State Court of Appeals has deferred to employers' conceptions of rational decision-making in interpreting the "unreasonable risk" prong of the statute. The court has held that employers must explicitly take into account each of the eight factors listed in § 753 when determining that granting an offer of employment or a license would present "an unreasonable risk to property or to the safety or welfare of specific individuals or the general public" under § 753(2).[107] However, in practice, New York courts grant employers a large

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104. Meltsner et al., *supra* note 81, at 903.

105. Article 23A's "direct relationship" test mirrors the language found in the statutes of Wisconsin, Hawaii, and Pennsylvania, which provide that a criminal conviction can only bar an individual from employment when that conviction has a "rational" (Hawaii) or "substantial" (Wisconsin) relationship to the duties of employment. N.Y. CORRECT. LAW § 752 (McKinney 2005); HAW. REV. STAT. § 378-2.5 (2003); WISC. STAT. § 111.335 (2005); 18 PA. CONS. STAT. ANN. § 9125. The Wisconsin Supreme Court has held that employers can meet the state's "substantial relation" test by "ascertaining relevant, general, character-related circumstances of the offense or job." County of Milwaukee v. Labor and Indus. Review Comm'n, 407 N.W.2d 908, 916 (Wis. 1987).

106. Despite this expansive interpretation, New York courts do prohibit the denial of an employment opportunity under the "direct relationship" test when there are clearly no elements of a conviction that can be said to relate to the duties of employment. For example, the Southern District of New York has held that there is not a direct relationship between maintenance work in public housing developments and a prior manslaughter conviction because the nature and duties of the job would not require an employee to confront violent situations. Soto-Lopez v. New York City Civil Serv. Comm'n, 713 F. Supp 677, 678 (S.D.N.Y. 1989). And, when an employer or agency finds that a direct relationship does exist between the conviction and the employment sought, the employer must still consider each of the factors listed in §753 and determine whether, at its discretion, the license or employment should be issued. Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 613 (N.Y. 1988).

107. *Bonacorsa*, 71 N.Y.2d at 613. In *Bonacorsa*, the Court of Appeals held that the New York State Racing and Wagering Board did not abuse its discretion in denying petitioner's application for a new license as an owner-trainer-driver of harness race horses based on the "direct relationship" prong of Article 23A even though petitioner had a certificate of good conduct from the State Board of Parole and other significant evidence of rehabilitation. The Court permitted the denial of the license because the Board had, at its discretion, balanced the factors in the petitioner's favor against those weighing the other way—the maturity at the time of the offense, the serious nature of the crimes, and the interest of the State in protecting the integrity of its sole form of legal gambling. *Id.* at 612, 615.

amount of discretion in applying the "unreasonable risk" prong of § 752. The New York State Court of Appeals has held that a determination of "unreasonable risk" will stand up to judicial review as long as there is evidence that the employer balanced the § 753 factors in the applicant's favor alongside those against her.[108] In *Arrocha v. Board of Educ. of the City of New York*, an applicant for a license to teach high school Spanish provided the Board of Education with his Certificate of Relief from Disabilities following a ten-year-old conviction for the sale of a ten-dollar bag of cocaine.[109] Despite the presumption of rehabilitation created by this certificate and evidence of the applicant's significant academic and professional accomplishments since his conviction, the Board of Education denied Arrocha the license.[110] A lower court ruled this rejection to be arbitrary and capricious, stating, "Although the Board ostensibly reviewed the eight factors set forth in Correction Law § 753(1), . . . the Board virtually ignored the petitioner's extensive and unblemished record as a student tutor."[111] However, the Court of Appeals reversed, holding that Article 23A entitled the Board to a subjective analysis of the eight factors in § 753 and that, as long as it considered those factors, the Board could find an unreasonable risk to its schoolchildren if it hired the applicant.[112] It thus appears that what a lower court considered to be mere lip service to the balancing test required by § 753 can be a valid exercise of an agency's discretion.

Thus, the New York State Court of Appeals' current interpretation of the "unreasonable risk" prong of § 752 leaves employers with a troubling amount of discretion. Under the current test, employers can point to a vast majority of convictions as posing public safety risks, as in *Arrocha*, where the conviction in question was a ten-year-old sale of a bag of cocaine worth ten dollars.[113] This definition of "unreasonable risk" is exceedingly broad. All an employer must do is tip her hat in acknowledgment to the balancing test in § 753 before rejecting an applicant under the "unreasonable risk" prong. By failing to delineate limited circumstances and conditions under which employers can find the existence of such a risk, New York State courts have crafted a standard so vague that it has ceased to be useful.

3. Removal of Disabilities

New York State courts have similarly failed to recognize the law's requirement that employers take into account certificates of relief from disabilities and other evidence of rehabilitation. The language of Article 23A points to an intent on the

108. Arrocha v. Bd. of Educ. of the City of New York, 93 N.Y.2d 361, 365 (N.Y. 1999).
109. *Id.* at 363.
110. *Id.*
111. Arrocha v. Bd. of Educ. of the City of New York, 677 N.Y.S.2d 584, 585 (N.Y. App. Div. 1998).
112. *Arrocha*, 93 N.Y.2d at 365.
113. *Id.*

part of the New York State Legislature to ensure that certificates of relief from disabilities issued by the State play a significant role in the decisions of employers. In addition to § 753(1)(g), which requires that an employer or agency consider any evidence of rehabilitation as one of the eight factors in § 753(1), § 753(2) provides that an employer or agency "shall *also*" take into account an applicant's certificate of relief from disabilities,[114] which "shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."[115] However, the New York State Court of Appeals has held that this presumption of rehabilitation does not provide a prima facie entitlement to the employment or license, and the agency or employer maintains the discretion to deny the application after weighing the eight factors found in § 753(1), regardless of any presumption resulting from § 753(2).[116] In *Arrocha*, the Board of Education did not have to rebut the presumption of rehabilitation that came from Arrocha's certificate of relief from disabilities; the Board simply had to show that it was aware of the presumption of rehabilitation when finding the existence of unreasonable risk.[117] A certificate of relief from disabilities may remain an important tool with which an applicant can improve her chances under a balancing of the eight factors in § 753(1). However, the court's interpretation of § 753(2) has diluted the impact of a certificate the very purpose of which is to remove "any bar to . . . employment" caused by a prior conviction.[118]

It is worth noting that while there are no other formal mechanisms in New York prohibiting the consideration of criminal convictions when those convictions are very old or when there is evidence of rehabilitation, some New York courts recognize the fallibility of taking convictions into account after a certain amount of time. In *Ford v. Gilden*, the First Department held that a landlord could not be held liable for sexual abuses committed by an employee convicted of manslaughter twenty-seven years earlier.[119] The First Department noted that the imposition of liability would have "an unacceptably chilling effect on society's efforts to reintegrate ex-offenders into mainstream society, contrary to precedent and the explicitly stated public policy of the State."[120] While the court in *Ford v. Gilden* was not interpreting Article 23A, the case nevertheless supports an argument that New York State courts should interpret state law so as to provide a mechanism through which old convictions can be eliminated from consideration in employ-

114. The State Board of Parole can issue a certificate of relief from disabilities when the Board has determined that (a) the applicant is an ex-offender convicted of not more than one felony, (b) the relief granted is consistent with the rehabilitation of the applicant, and (c) the relief granted is consistent with the public interest. N.Y. CORRECT. LAW § 703(3) (McKinney 2005). A certificate of relief from disabilities removes, "any bar to his employment automatically imposed by law by reason of his conviction of the crime or of the offense specified therein." N.Y. CORRECT. LAW § 701(1) (McKinney 2005).

115. N.Y. CORRECT. LAW § 753 (emphasis added).

116. Arrocha v. Bd. of Educ. of the City of New York, 93 N.Y.2d 361, 365 (N.Y. 1999).

117. *Id.*

118. N.Y. CORRECT. LAW § 701(1) (McKinney 2005).

119. 200 A.D.2d 224 (N.Y. App. Div. 1994).

120. *Id.* at 229-230.

ment-related decisions.

4. Administrative Review of § 753's Balancing Test

New York State courts have been inconsistent in their enforcement of the requirement that agencies consider the series of factors listed in § 753. While the New York State Court of Appeals has held that for a decision to pass administrative review, an agency must acknowledge the § 753 factors, at least one lower court has granted agencies the discretion to deny employment opportunities to ex-offenders *without* evidence that they considered the necessary factors. In *Arrocha*, the Court of Appeals held that in order to pass the arbitrary and capricious test,[121] an employer or agency must show that they have taken into account the eight factors listed in § 753.[122] However, in *Bevacqua v. Sobol*, the Third Department affirmed a denial of a medical license by the New York Committee on the Profession because of an applicant's past conviction for receiving child pornography.[123] There was no explicit weighing of the § 753 factors in the Committee's written determination; the court held that although the agency, "do[es] not state in [its] . . . written determinations that they considered and evaluated each of those factors, it must be presumed, absent record evidence to the contrary, that they did indeed do so."[124] It is therefore possible for a court to uphold a denial of license or employment without an explicit reference on the part of the employer to the statutory requirement that it consider the factors listed in § 753.

In contrast, a pair of recent decisions demonstrates that some lower courts are not afraid to overturn an agency's denial of an employment opportunity if the agency has not considered evidence of an individual's rehabilitation or other positive factors. This promising trend is exemplified by *La Cloche v. Daniels*, in which a lower court reversed an administrative law judge's refusal to grant a barber apprentice certificate of registration to an individual solely because of a conviction of first degree robbery ten years earlier.[125] The court held that while Article 28, governing the issuance of barber certificates, allows the agency to take into account an individual's moral character, Article 23A forbids them to base such a determination on a prior conviction without taking into account evidence of rehabilitation or any of the other factors under § 753.[126] Petitioner La Cloche had trained to be barber in a vocational program while incarcerated at Clinton

121. New York State administrative law holds that, if an agency determination is either administrative in nature or the result of a hearing not required by law, "the courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'" Matter of Pell v. Bd. of Educ. of Union Free School Dist., 34 N.Y.2d 222, 231 (N.Y. 1974).

122. *See* Arrocha v. Bd. of Educ. of the City of New York, 93 N.Y.2d 361, 365 (N.Y. 1999).

123. 579 N.Y.S.2d 243, 245 (N.Y. App. Div. 1992).

124. *Id.* at 5.

125. 755 N.Y.S.2d 827, 829 (N.Y. Sup. Ct. 2003).

126. *Id.* at 828, citing N.Y. GEN. BUS. LAW § 430 (McKinney 2003).

Correctional Facility, and the court further noted that a denial of a barber certificate based on his criminal record would undermine the very purpose of offering such a program in prison.[127]

In *Davis-Elliott v. New York City Department of Education*, the New York County Supreme Court similarly reversed a denial of employment as a parent coordinator with the Department of Education, citing the failure of the Department to consider all eight factors in § 753 when making their determination.[128] Petitioner Davis-Elliott had been employed with the Department of Education for two years when she applied for a promotion. Though the Department initially promoted Davis-Elliot, the Department rescinded its offer when it learned that she had been convicted of five misdemeanors related to shoplifting.[129] Davis-Elliott was otherwise qualified—the offenses occurred twelve years earlier, she had successfully worked for the Department for two years, and she had received favorable reviews from supervisors. The court held that because the letter from the Department to Davis-Elliott explaining its decision failed to address these qualifications or the other factors from § 753 that would have weighed in Davis-Elliott's favor, the decision was reversible as arbitrary and capricious.[130] Both *Davis-Elliott* and *La Cloche* underscore the importance that Article 23A maintains today as a protection against an administrative denial of employment based on an unrelated past conviction when that denial does not pay heed to the factors listed in § 753.

The New York State Court of Appeals has indicated that employers and agencies must show that they have considered all relevant factors listed in § 753 that weigh in an applicant's favor before denying that applicant a license or employment opportunity for interpretation of § 753.[131] In practice, the uneven application of the balancing test laid out in § 753 results in a system in which the state fails to consistently hold employers and agencies accountable for the employment decisions they make. Without the regular application of § 753's balancing test, New York's law ceases to be the distinctive model of progressive legislation to which scholars point as the most effective state statute at increasing employment opportunities for ex-offenders.[132]

5. The Need for Reform

The limited conception of rational employment decisions displayed by New York state courts suggests a need for statutory reform if Article 23A is to reflect a real state policy promoting the hiring of ex-offenders. The law does maintain an

127. *Id.* at 829.
128. 10/21/2004 N.Y.L.J. 18 (col. 1).
129. *Id.*
130. *Id.*
131. *See, e.g.*, Arrocha v. Bd. of Educ. of the City of New York, 93 N.Y.2d 361, 364 (N.Y. 1999).
132. *See, e.g.*, Clark, *supra* note 78.

important position as a formal statement of such a policy—even in *Bonacorsa v. Van Lindt*, the first New York Court of Appeals case to diminish the strength of Article 23A's language, the court cited the original model act by Meltsner et al. and wrote of the law's history,

> Studies established that the bias against employing or licensing ex-offenders was not only widespread but particularly unfair and counterproductive .... Failure to find employment not only resulted in personal frustration but also injured society as a whole by contributing to a high rate of recidivism .... Article 23-A sought to remove this obstacle to employment by imposing an obligation on employers and public agencies to deal equitably with ex-offenders while also protecting society's interest in assuring performance by reliable and trustworthy persons.[133]

This statement reflects a crucial awareness on the part of the judiciary of the many obstacles, legal and otherwise, faced by ex-offenders seeking employment. That ten years later the First Department could discuss the state's "public policy that prohibits discrimination in hiring on the basis of a criminal record,"[134] and that in 2004 the New York County Supreme Court could cite this public policy in reversing the Department of Education's denial of a job solely because of a prior conviction[135] reveal that an awareness of Article 23A's underlying philosophy remains.

Yet even as they recognize the statute's underlying policy, New York courts interpreting Article 23A have undermined that very policy by allowing agencies and employers to stretch the limits of the statutory language. Article 23A can and should do a better job of limiting the instances in which employers and agencies can base employment decisions on criminal records. To begin with, technical changes to the law might help courts realize that the purpose of the statute is thwarted by an interpretation that allows employers to discriminate against individuals with criminal records as long as they can articulate a reason for doing so. Based on the case law analyzed above, changes to the statutory language might:

(1) Limit the application of the "direct relationship" test to instances in which an element of the crime itself directly parallels a duty or potential risk of the employment or license sought;

(2) Reduce employer discretion under the second exception of Article 23A, the "unreasonable risk" test;

(3) Institute a formal mechanism through which individuals with evidence of

133. Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 611 (N.Y. 1988), *citing* Meltsner et al., *supra* note 81, and 1976 N.Y. LEGIS. ANN., at 50.

134. Givens v. New York City Hous. Auth., 671 N.Y.S.2d 479, 479.

135. Davis-Elliott v. New York City Dep't of Educ., 10/21/2004 N.Y.L.J. 18 (col. 1).

rehabilitation can remove their criminal records from consideration in employment decisions; and

(4) Insist that agencies and employers explicitly balance the eight individualized factors required by the law.

Such changes would increase the accountability of agencies and employers and underscore the individualized, factor-based approach that makes Article 23A unique. Given the large numbers of New Yorkers released from prisons each year and the state's recent focus on the re-integration of ex-offenders into society, there is some hope that the reform of Article 23A will present a politically viable way of increasing employment opportunities for ex-offenders. However, changes to the statutory language of the law will not by themselves be enough.

IV. A ROADMAP FOR CHANGE

A. Towards a New Rationality

In order to overcome fully the legal barriers to the successful protection of ex-offenders from employment discrimination, it is first necessary to rethink the prevailing concept of "rationality" as it relates to discrimination against individuals with criminal records. Changes to Article 23A's statutory language, while necessary, will not on their own prevent courts from continuing to validate the seemingly rational decisions of employers turning away ex-offenders. What if, rather than thinking of the consequences of each hiring decision on the individual employer, judges were instructed to think of the effect that the repeated denial of jobs to people with criminal records has on society *as a whole*? Viewed in this light, the purpose of encouraging the hiring of ex-offenders through legal restrictions such as those in Article 23A becomes to reduce recidivism and facilitate the reentry of ex-offenders into their communities, thereby reducing the costs to society imposed by concentrated incidents of crime. Such a vision does not depend upon sympathy for ex-offenders, but rather on the assumption, argued above, that the best way to reduce public safety risks (or "unreasonable risk," in the words of Article 23A) is to employ people coming out of jails and prisons so that they commit fewer crimes and can become healthy, productive members of society.[136] Indeed, traditional notions of cost and risk lose their grip when they fail to acknowledge the effect that the exclusion of ex-offenders from mainstream society has on public safety and the economy.

Here, Sam Bagenstos' critique of the divide between "rational" and "irrational" discrimination as it relates to the ADA proves useful. Bagenstos argues that "antidiscrimination law aims at wholesale, not retail, injustice"; he contends that the purpose of antidiscrimination laws, both those seen as forbidding irrational

136. *See* Part I, *supra*.

discrimination and those that impose constraints on rational behavior, is not to "enforce a uniform norm of ethical conduct on individual employers," but rather "to overcome systematic patterns of stigma and subordination by targeting a practice of occupational segregation that undergirds those patterns."[137] For Bagenstos, the value of antidiscrimination laws such as the ADA is that they seek to combat the social and economic exclusion of marginalized groups. Taking this view, it does not matter how "rational" an individual employer's decision is. Instead, the focus becomes the extent to which laws are successful at remedying targeted inequalities when balanced against the costs to employers of following those laws. Viewed through such a framework, laws which encourage the hiring of ex-offenders—even in situations where not hiring an individual with a criminal record would be otherwise understandable given concerns over safety—begin to makes sense.

Bagenstos' focus on combating "systematic patterns of stigma and subordination" is certainly relevant to the obstacles faced by individuals with criminal convictions in America. He describes members of excluded groups as those who "are stigmatized as less than full citizens"[138]—this has been an accurate description of ex-offenders since prisons were first substituted for traditional shaming punishments in the early 19th century.[139] Such stigmatization has only increased with the escalation of the collateral consequences of criminal convictions in the last quarter of the 20th century.[140] Indeed, the concept of "systemic . . . subordination" can be and is often applied to the criminalization of African Americans in contemporary society; employment discrimination against ex-offenders fits into a pattern of legal mechanisms that facilitate the social and economic exclusion of minorities in America.[141]

In addition, unlike with the requirements of "reasonable accommodation" under the ADA, one *can* present a cost-based efficiency argument in favor of employing ex-offenders. To begin with, one can point to the $40 billion that the nation spends each year on incarcerating Americans, many of who are repeat

137. Sam Bagenstos, *"Rational Discrimination," Accomodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837 (2003).

138. *Id.* at 842. Bagenstos could be talking about the labeling theory of criminology when he writes that, when social groups are excluded from employment opportunities, "The result may be a vicious cycle of exclusion, in which members of subordinated groups rationally respond to exclusion by failing to develop their human capital, and employers, rationally believing that members of those groups are less likely to have developed their human capital, discriminate even more." *Id.* at 843. For an overview of labeling theory, *see* HOWARD S. BECKER, THE OUTSIDERS (1963). "The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label." *Id.* at 8.

139. *See* KAI T. ERIKSON, WAYWARD PURITANS 15 (1966).

140. *See* Travis, *supra* note 16, at 19 (arguing that collateral consequences of criminal convictions "create a permanent diminution in social status of convicted offenders, a distancing between 'us' and 'them.' ")

141. *See* Wacquant, *supra* note 15, at 119-121 (describing the "civic death" of African American ex-offenders as a result of the collateral consequences of criminal convictions.)

offenders.[142] When those fiscal costs are combined with the human costs of releasing individuals from prison without adequate job prospects and into already marginalized communities, one is left with a powerful argument in favor of legal rules that encourage employers to hire those individuals. As President Bush noted, we can no longer afford to ignore the more than 600,000 new ex-offenders re-entering society each year. A new concept of rationality should recognize this fact, targeting policies that reinforce the exclusion of individuals with criminal records from the labor force, and, by extension, challenging a system of stigmatization that encourages recidivism.

Reformers pursuing such a rethinking of the concept of "rationality" in employment discrimination should endeavor to infuse such language into existing statutory schemes. In New York, for example, reforms aimed at increasing the effectiveness of Article 23A should consider not only changes in the technical language of the statute, but also the addition of statutory preambles and/or mandates within the legislation that explicitly recognize the savings in costs to society that the law seeks to achieve. In addition, as I argue below, statutory reforms should be accompanied by efforts to influence public perceptions of the role of ex-offenders in society.

B. Preventing Backlash through Normative Change

In addition to pursuing a shift in the rhetoric of rationality surrounding the employment of ex-offenders, efforts at reform should attempt to influence public perceptions of the position of former prisoners in American communities. Linda Kreiger has connected normative perceptions of marginalized groups to the success of legal protections aimed at those groups.[143] In the context of the ADA, Kreiger has argued that "[b]acklash tends to emerge when the application of a transformative legal regime generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious allegiance."[144] This occurred with the ADA when Congress pursued a normative shift in the treatment of individuals with disabilities for which society was not prepared. Kreiger writes, "We can expect hindsight bias of this sort to operate even more powerfully where a specific type of risk is associated in popular myth or stereotype with members of a stigmatized group."[145] This connection between entrenched normative views and legal backlash is important to keep in mind when pursuing changes in the legal barriers faced by ex-offenders, who have been powerfully associated with risk in the public mind since (if not before) the much-publicized recidivism of Willie

142. MAUER, *supra* note 10, at 81.
143. Kreiger, *supra* note 67, at 476.
144. *Id.* at 477.
145. *Id.* at 482.

Horton during the 1988 presidential campaign.[146]

The New York State Court of Appeals' interpretation of Article 23A fits into Kreiger's theory of how judicial bias emerges in response to public resentment towards protected groups. Kreiger sounds like she could be describing the case law surrounding Article 23A rather than the backlash against the ADA when she writes, "Entrenched norms and institutionalized practices, operating as taken-for-granted background rules, systematically skew the interpretations of transformative legal rules so that those rules increasingly come to resemble the normative and institutional systems they were intended to displace."[147] Such is the case with the judicial enforcement of Article 23A, through which New York State courts have legitimized the assumption that excluding individuals from employment is rational when those individuals possess criminal records. If there has not been an obvious "backlash" against Article 23A in the way that there was against the ADA, it is because the law has *never* been interpreted expansively; rather, beginning with *Bonacorsa* in 1988 (coincidentally, the same year as the Willie Horton advertisements), the Court of Appeals set about restricting the meaning of the law to fit into a perceived sense of reason and rationality in relation to the criminality of ex-offenders.[148]

Similarly, judicial interpretations of Article 23A have validated the underlying normative assumption that individuals with criminal records are not deserving of special protections. In reviewing decisions of employers and agencies, New York courts have focused on the moral failures of individuals as evidenced by their past convictions rather than on the Act's mandate to weigh an individual's positive qualifications and evidence of rehabilitation against the risks to public safety.[149] By zeroing in on the past moral indiscretions of individual candidates for employment, such reasoning ignores the moral implications of policies that hold individuals accountable for crimes years after they have completed their criminal sanctions and release ex-offenders into communities—mostly minority communities—in which the likelihood that they will be able to procure a legitimate source of income is slim.

Efforts to increase the strength of statutes like Article 23A should therefore focus not only on legislative reform, but also on engaging the public in a campaign aimed at changing attitudes towards ex-offenders. In New York, the

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146. *See* Lenhardt, *supra* note 63, at 860. ("The Willie Horton ad shown during President George W. H. Bush's 1988 presidential campaign to enhance perceptions of Bush's stance on crime . . . . was nothing if not an effort to inflame white fear of black criminality and sexual deviance through the use of the black brute stereotype.") For additional analysis of the effects of the advertisement, which described how Willie Horton had raped and murdered a woman while on weekend release under a program signed into law by Governor Michael Dukakis, *see* Richard Dvorak, *Cracking the Code: "De-coding" Racial Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 626-27 (2000).

147. Kreiger, *supra* note 67, at 486.

148. Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 613 (N.Y. 1988).

149. *See, e.g.*, Al Turi Landfill, Inc. v. New York State Dep't of Envtl. Conservation, 751 N.Y.S.2d 827, 828-39 (N.Y. 2002); Bevacqua v. Sobol, 579 N.Y.S.2d 243, 245 (N.Y. App. Div. 1992).

potential of such a campaign can already be seen in the successful efforts of a coalition of reformers to seek changes to the state's draconian drug laws, which were modestly amended by the state legislature in December of 2004.[150] Public campaigns should not be afraid to specify strategies—such as promoting the employment of ex-offenders—that can ease the burdens faced by individuals released from prison while simultaneously improving the social and economic conditions of communities. Kreiger warns that, "Vulnerability to backlash increases . . . if a transformative legal regime is normatively ambiguous or opaque."[151] Public campaign strategies should therefore wed a focus on the plight of ex-offenders entering underserved communities with the strong normative argument that the denial of employment opportunities to ex-offenders runs counter to the goal of a just society.

CONCLUSION

A focus on the economic and public safety benefits of proposed legal reforms can go hand in hand with efforts to change the image of ex-offenders from the undeserving to the competent; indeed, they can and should reinforce each other. As Stein has observed, "[p]erhaps the most expedient way to transform social norms is through increasing society's familiarity with a previously unknown group that it perceives, in sociological terms, as 'other.'"[152] It is my hope that in the wake of the 20th century's focus on mass incarceration, Americans will come to recognize that the growing numbers of ex-offenders entering their communities each year need the support of society and of its laws in order to succeed. In turn, this support leads to safer and more inclusive communities. If this realization is to occur on a large scale, we must maintain an emphasis within both statutory reforms and public campaigns on the notion that encouraging the employment of ex-offenders is both morally appropriate and rational for society as a whole.

150. The efforts of a coalition of reformers centered on demonstrating the effects of the drug laws on families of the incarcerated and their communities. *See, e.g.*, the "Drop the Rock" campaign organized by the Correctional Association of New York, *at* http://www.droptherock.org.

151. Kreiger, *supra* note 67, at 486.

152. Stein, *supra* note 40, at 671.