

SHOULD CRIMINAL HISTORY RECORDS BE UNIVERSALLY AVAILABLE?

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At current incarceration rates, roughly 9% of all males born today will serve time in prison at some point in their lives. By race and ethnicity, the comparable figures are 4% for white males, 16% for Hispanic males, and 28% for black males (U.S. Bureau of Justice Statistics, 1997). Ample research now documents that having spent time in prison worsens one's employment prospects through several potential channels. First, employers are strongly averse to hiring ex-offenders, a finding that has been born out in both audit studies (Pager, 2003) as well as employer interviews (Holzer et al., 2004). Second, spending time in prison may prohibit the accumulation of valuable work experience and even erode one's labor market skills. In conjunction with the large increases in U.S. incarceration rates in recent decades, these facts suggest that criminal history records represent an increasingly important barrier to employment for young, less-skilled men. Moreover, given racial disparities in incarceration rates, the increasing salience of this characteristic is likely to exacerbate racial inequality in employment and earnings.

In their provocative analysis, Kurlychek et al. (2006) raise the important question of whether unfettered employer access can be justified by the legitimate concerns of employers. More specifically, they assess whether the rate at which young offenders desist from offending with time since the last offense merits limiting employer access to arrest and conviction information for sufficiently distant past offenses. This question is important and timely given the large increase in the pool of ex-offenders (by some estimates nearly 5% of the adult male population). Moreover, as policies governing access have liberalized and information systems have advanced to the point where now several private firms offer cheap and quick criminal background checks, employers are checking the criminal history records of applicants at rates that are historically unprecedented (Holzer et al., 2004).

Kurlychek et al. (2006) demonstrate that for a cohort of young men in Philadelphia the likelihood of a repeat offense declines precipitously with the time that has elapsed since the last offense. This pattern is consistent with both a causal effect of staying clean as well as a remaining population of former offenders that becomes increasingly selected with time since the

last offense (to be specific, selection toward a low propensity to offend). For policy purposes, the exact source of this pattern is irrelevant. The data tell us that the likelihood of a subsequent offense declines with time since the last offense. Based on this pattern, Kurlychek et al. argue that limiting employer access to criminal history records beyond a certain time period may effectively limit the collateral consequences of prison while not necessarily exposing employers to sufficiently higher risk.

I concur with the need to limit the negative effects of prior incarceration on the labor market outcomes of former inmates. Clearly, being able to procure and retain gainful employment is practically a necessary condition for the successful reintegration of former inmates into non-institutionalized society. Moreover, the prospect of having one's record wiped clean after a given period of desistance may actually engender a positive behavioral response from former offenders, because there would be the incentive to desist in order to have one's prior offenses purged.

That being said, however, the proposed salutary effects of limiting access may have unintended consequences to the extent that employers care about prior criminal activity and engage in indirect and imperfect screening practices. In other words, limiting an employer's ability to access criminal history records or to ask about prior criminal convictions may not preclude employers from using potential signals of prior run-ins with the law in making hiring and promotion decisions. At a minimum, employers may be able to effectively identify ex-offenders via such signals as education, where one comes from, or through unaccounted-for gaps in one's employment history. At worst, employers may systematically discriminate against workers from groups that they *perceive* to have a high propensity to offend. This important issue of how employers may respond to limits on access is key to designing a policy that both allows employers to take into account aspects of an individual's history that are legitimately related to assessing potential job performance, while protecting those who, through the passage of time, have demonstrated the irrelevance of their past infractions to their future performance.

WHY DO EMPLOYERS CHECK CRIMINAL HISTORY RECORDS?

There are several reasons why the criminal past of a job applicant may provide relevant information to a potential employer. For starters, for many jobs it is impossible to perfectly monitor the performance of an employee and thus one would expect employers to screen out applicants that cannot be trusted. In addition, many jobs in the low-wage labor market involve direct interaction with customers, whether one-on-one interaction in a store setting or direct interaction with customers in their homes.

To maintain one's customer base, employers will place some emphasis on the "soft-skills," e.g., general presentability and oral communication skills, of their employees and, to the extent that ex-offenders do not possess these skills, may screen accordingly. Moreover, employers are likely to be concerned for the safety of their customers, because repeat business will clearly depend on this factor and employers may be held liable for any harm committed by an improperly screened employee.

Given these considerations, it is not surprising that when asked employers of low-skilled workers express a strong reluctance to hire ex-offenders. For example, in an analysis of interviews of employers conducted during the early 1990s, Holzer et al. (2006) found that over 60% of employers indicate that they probably would not or definitely would not hire an ex-offender. Moreover, this reluctance is far greater than employer reluctance to hire other groups of commonly stigmatized workers (including welfare recipients, applicants with unexplained gaps in their work histories, and applicants who have been unemployed for a year or more). Moreover, this reluctance is greatest among employers whose workers interact directly with customers. In a later survey of employers in the Los Angeles area, Holzer et al. (2004) also found that employers who hire workers into positions that involve handling cash or interacting with children were particularly averse to hiring workers with criminal history records.

On the positive side, this research on Los Angeles revealed a considerable amount of nuance on the part of employers in evaluating the relevance of one's criminal history record. In particular, in a series of more detailed questions pertaining to the types of applicants that employers might consider hiring, employers revealed a tendency to be more averse to hiring recently released inmates and applicants with a violent felony on their record [incidentally, preferences that conform with the general higher propensity to offend among those with prior violent offense demonstrated by Kurlychek et al. (2006)]. Thus, although in general employers do not like to hire ex-offenders, employers do exhibit flexibility and the capacity to consider mitigating factors.

The extent to which limiting access to criminal history records would actually improve the employment prospects of ex-offenders will depend on how strong is the employer aversion to hiring ex-offenders. Moreover, limiting access may induce employers to engage in more informal and indirect screening practices intended to weed out former offenders, a factor that would directly contradict the effects of limiting access.

LIMITING ACCESS AND THE INCENTIVE TO STATISTICALLY DISCRIMINATE

The presumption that limiting employer access to criminal history records will improve the job prospects of ex-offenders depends critically on the unstated presumption that in the absence of the ability to formally screen such records employers will not engage in indirect screening. Basic reasoning as well as existing research suggests that this latter condition is not the case. Employers as well as others are likely to form expectations regarding who has a criminal past and who does not. To the extent that employer access to official records is limited, employers desiring to screen out ex-offenders will do so based on the *perceived* correlates of prior criminality. For example, employers may believe that young black men are more likely to have been involved in criminal activity than young black women or young white men. As another example, employers may perceive that prior receipt of public assistance, low educational attainment, or gaps in one's work history may positively predict prior criminal behavior.

Given these expectations, employers may engage in statistical discrimination, which is defined as attributing the perceived attributes of one's readily definable group to the individual and making decisions accordingly, in order to minimize the risk of hiring an ex-offender. For example, if an employer believes that young black men have a high likelihood of previous criminal activity, he may simply refuse to hire young black men. This shot-gun approach to employee screening excludes both ex-offenders that fall within the targeted category as well as applicants with clean records from demographic groups with high perceived offending rates. Moreover, to the extent that such discrimination worsens the employment prospects of those who would otherwise not offend, criminal activity may become relatively more attractive. This result, in turn, may increase the overall level of offending among high-offense rate groups.

Several studies indicate that employers do indeed engage in such statistical discrimination in an attempt to screen out ex-offenders. For example, in my research with Harry Holzer and Michael Stoll (Holzer et al., 2006), we found that employers that do not check criminal backgrounds are the least likely to hire black workers. Moreover, the positive effect of checking on the likelihood of hiring blacks is greatest among firms that have the strongest self-stated aversion to hiring ex-offenders. Bushway (2004) analyzes the relationship between the degree of openness of a state's criminal history repository and the average wages of black workers relative to white workers and finds evidence that relative black wages are higher in states with more open systems. Indirect evidence of such discrimination is provided by Pager (2003). In an audit study of employers where auditors were sent in to apply for a job, one with a prison training program listed

on his resume and one without, Pager finds a strong negative effect of having been to prison on the likelihood of receiving a call back within both the black auditing teams as well as the white auditing teams. More interestingly, the black auditors without a signaled spell in prison had lower call-back rates than white auditors with the prison training program on their resumes. Although this pattern is consistent with employer discrimination against African-Americans based on racial animus, this is also consistent with employers inferring that the black applicant without a signaled criminal past indeed had past unreported run-ins with the law.

Such statistical discrimination complicates the policy proposal investigated by Kurlychek et al. (2006). If restricting employer access to criminal history records induces employers to rely on informal perceived signals of past criminality, then the policy may not necessarily alleviate the collateral penalty associated with a criminal past. Moreover, sealing records may have the unintended consequence of punishing those individuals with clean records that happen to have the misfortune of being perceived as coming from a high-offending group. Clearly, such behavior and the process by which employer expectations are formed must be taken into account when thinking about a specific policy proposal.

POTENTIAL POLICY DESIGN ISSUES

Kurlychek et al. (2006) implicitly highlight several key choice variables that should be considered in designing a policy that balances both the ability of employers to access relevant information about applicants as well as the interests of former offenders who have managed to stay out of trouble. First and foremost among these choice variables is the length of the time limit placed on criminal history inquiries. If the limit is set too short, employers will not have confidence in formal checks and thus will conduct informal screens as a supplement, undoing much of the potential benefit to ex-offenders from suppressing such information in the first place. To the extent that the limit is too long, few offenders will benefit and there will be little added incentive to stay clean with an eye on the prospect of an expunged record. Kurlychek et al. (2006) focus on the seven-year limit set in the federal statute pertaining to the trucking industry. Clearly, more research on employer hiring practices with a focus on this specific question would greatly inform this choice.

A second choice variable concerns the starting point for the time period framing the criminal history record. Kurlychek et al. (2006) implicitly advocate for a start date corresponding to the date of the most recent conviction, arguing that because few employers have access to incarceration information, time since incarceration is irrelevant. However, one can imagine that, with the knowledge that records are purged after seven

years, employers may still downgrade the applications from young men who they suspect have served some time. Starting the clock at the date of the most recent release from prison is likely to convey a greater amount of information to employers. Knowing that a clean criminal history record check is consistent with either (1) never having offended or (2) having offended and potentially served time but no contact with the criminal justice system for the past seven years provides considerably more information than the alternative ignoring incarceration.

A third important choice variable concerns whether some offenses should never be purged. One might make the argument that someone who has served time for a felony sex offense should never work with children, or that workers with prior serious violent offenses should not be placed in jobs involving security. Again, a better understanding of how employers consider such mitigating factors would provide useful information for forming a viable policy prescription.

Regardless, the growing, predominantly male population of non-institutionalized felons raises important policy questions regarding reintegration and manners in which society can ease and facilitate the transition of former offenders into productive and stable lives. Stable employment is clearly key, and to the extent that we can improve the prospects of former offenders without substantially harming the interests of employers, we should do so. The analysis of Kurlychek et al. (2006) provides an excellent departure point for this discussion, one that I hope will be taken-up promptly by researchers and policy makers.

REFERENCES

- Bushway, Shawn D.
 2004 Labor market effects of permitting employer access to criminal history records. *Journal of Contemporary Criminal Justice* 20:276–291.
- Holzer, Harry J., Steven Raphael, and Michael A. Stoll
 2004 The effect of an applicant's criminal history on employer hiring decisions and screening practices: Evidence from Los Angeles. National Poverty Center Working Paper Series #04-15, University of Michigan.
 2006 Perceived criminality, criminal background checks, and the racial hiring practices of employers. *Journal of Law and Economics*.
- Kurlychek, Megan C., Robert Brame, and Shawn D. Bushway
 Scarlet letters and recidivism: Does an old criminal record predict future offending? *Criminology & Public Policy*. This issue.
- Pager, Devah
 2003 The mark of a criminal record. *American Journal of Sociology* 108:937–975.
- U.S. Bureau of Justice Statistics
 1997 Lifetime Likelihood of Going to State or Federal Prison. Bureau of Justice Statistics Special Report, NCJ-160092.

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