Labor Market Effects of Permitting Employer Access to Criminal History Records
Shawn D. Bushway
Journal of Contemporary Criminal Justice 2004 20: 276
DOI: 10.1177/1043986204266890

The online version of this article can be found at:
http://ccj.sagepub.com/content/20/3/276

Published by:
http://www.sagepublications.com

Additional services and information for Journal of Contemporary Criminal Justice can be found at:

Email Alerts: http://ccj.sagepub.com/cgi/alerts
Subscriptions: http://ccj.sagepub.com/subscriptions
Reprints: http://www.sagepub.com/journalsReprints.nav
Permissions: http://www.sagepub.com/journalsPermissions.nav
Citations: http://ccj.sagepub.com/content/20/3/276.refs.html

>> Version of Record - Aug 1, 2004

What is This?
Labor Market Effects of Permitting Employer Access to Criminal History Records

SHAWN D. BUSHWAY
University of Maryland

There is an ongoing debate about the wisdom of allowing employers to use criminal history records in the employment screening process. The debate typically places the rights of individuals with criminal history records against the rights of employers concerned about hiring workers who might be inclined to commit crime in the workplace. The author argues that such a characterization of the debate is too narrow. In particular, this article uses a simple economic analysis to argue that employer access to criminal history records might actually increase the wages of individuals without criminal history records and may, moreover, increase average market wages for groups of individuals with large number of convicted individuals, such as Black males. This theory is tested by exploiting cross-state variation in policies governing employer access to criminal history records.

Keywords: criminal records; employment; offenders; statistical discrimination

The current U.S. imprisonment rate (prisoners per capita) is more than triple the rate in 1975. This unprecedented growth in the prison population also means there is a tremendous increase in the number of people reentering communities after completing their incarceration sentence. These individuals are also significantly more likely to have an unstable work career and low earnings potential due, in part, to the stigmatizing impact of a criminal history record. Attempts to measure the negative impact on employment outcomes associated with having a criminal record have consistently shown that contact with the criminal justice system leads to greater job instability and an average decline in income (Bushway, 1998; Freeman, 1991; Grogger, 1995;)

I wish to thank Lowell Taylor and Phil Cook for their helpful comments, and Harry Holzer and Sheila Barton for their assistance with the data. I also wish to thank Shauna Briggs for helpful research assistance. All errors remain my own.

Journal of Contemporary Criminal Justice, Vol. 20 No. 3, August 2004 276-291
DOI: 10.1177/1043986204266890
© 2004 Sage Publications
Lott, 1992; Nagin & Waldfogel, 1995; Waldfogel, 1994;), and this income gap grows with each subsequent conviction (Waldfogel, 1994).

Perhaps these findings for employment outcomes are not surprising given that employers have many incentives to screen applicants for criminal history records. Some employers believe the existence of a criminal history record is indicative of a lack of trustworthiness (Hulsey, 1990), whereas others are worried about their liability for the actions of their employees. Under the legal theory of negligent hiring, employers who know, or should have known, that an employee has had a history of criminal activity may be liable for the employee’s criminal or tortious acts. In addition, most states require an ever-expanding list of employers to check the criminal history records of applicants and refuse employment to anyone convicted of a crime. This is especially true of jobs in which work includes caring for children or vulnerable adults. Moreover, after the attack on the World Trade Center in 2001, there is evidence that employers have increased their reliance on background checks (Pager, 2003).

Direct evidence also exists to show that employers use criminal history records to screen employees. Perhaps the most well-known study was conducted by Schwartz and Skolnick (1962) in the early 1960s. They circulated job applications varying only in the amount of information given about an assault charge. Applicants whose applications indicated a conviction related to the assault charge faced a statistically significant lower probability of generating a positive response from employers than did the applications of nonoffenders. More recently, an employer survey by Holzer (1996) found that 65% of all employers would not knowingly hire an ex-offender, and between 30% and 40% of all employers actually checked the criminal history records of their most recently hired employees. Pager (2003) used a matched-pair audit study to understand whether criminal history plays a role in getting a callback from an employer. The study showed that Whites with a criminal history record had a 50% reduction in the probability of a callback compared to their matched partner without a criminal history record, whereas Blacks had a 64% reduction in the probability of a callback. The finding that ex-offenders are one half to one third as likely to be considered by employers suggests that having a criminal record represents a major barrier to employment (Pager, 2003).

These types of findings lead to a real concern among policy makers that ex-offenders who are restricted from jobs based on criminal history records might be forced to resort to further criminal activity. This concern is well expressed by a California magistrate:

The most frightening thing about state and federal [criminal history] systems is that they are incredibly difficult to protect from non-criminal justice
use. The situation in California, where so much of the rap sheet [arrest records] information is really used to keep people unemployed, and hence inherently criminally prone, is absolutely frightening and outrageous. (Laudon, 1986, p. 208)

This concern is supported by research in the academic literature that finds that employment is at least moderately helpful in curbing ex-offenders’ return to crime (see Bushway & Reuter, 2002; Fagan & Freeman, 1999; Sampson & Laub, 1993). Given this backdrop, it is not surprising to find that there has been a long history of support for some restrictions on the use of criminal history records from academics and policy makers concerned about reentry. In contrast, employers are usually opposed to restrictions on their access to criminal history records.

But this debate should not be limited to the differing interests of employers and ex-offenders. Bushway (1996) used a simple economic model to point out that policies governing employer access to criminal history records might also affect individuals without criminal history records, especially Black workers without criminal history records. If employers cannot access criminal history records, yet believe that such records are important, an employer might statistically discriminate against all Black males by discounting the wage based on the proportion of individuals in that group who have criminal history records. Such discrimination will essentially redistribute wages from those individuals without criminal history records to those with criminal history records. Bushway also showed that if employers incur turnover costs, the loss to the workers without criminal history records will be greater than the gain of the workers with criminal history records. Recent empirical evidence from Holzer, Raphael, and Stoll (in press) and Pager (2003), reviewed below, suggests there is some reason to be concerned about this type of statistical discrimination. In this article, I review the issues and then make use of the statewide variation in employer access to criminal history records to explore whether there is any evidence that these issues might be reflected in observed racial differences in employment outcomes between Black and White men.

BACKGROUND

Bushway (1996) specified a formal economic model of statistical discrimination (Aigner & Cain, 1977) to study the impact of criminal history record policy on participants of the labor market. Yet the formal model is somewhat artificial, and not strictly necessary to make the point. The key assumptions are that criminal history record information is an imperfect signal about an individual’s criminal involvement and that some known fraction of a popula-
tion group has a criminal history record. A population group in this framework is made up of individuals who share similar observable characteristics such as age, race, and sex. The assumption that criminal history records are correlated with a lack of productivity may be somewhat controversial. After all, ex-offenders have served their time and deserve a chance. But the facts say that more than 60% of all prisoners will be rearrested within 3 years of release from prison (Langan & Levin, 2002). This high recidivism may be partly a reflection of poor job opportunities rather than poor skills or lasting criminal intent, but it seems unreasonable to assume that recidivism is completely endogenous. Studies have shown that many offenders make what appears to be logical trade-offs between returns from crime and returns from the legal labor market based on their low human capital and poor employment records (Bushway & Reuter, 2002; Williams & Sickles, 2002). Therefore, it is reasonable to assume that some ex-offenders have a productivity problem that worries potential employers.

Bushway (1996) also assumes that there are turnover costs associated with firing unproductive workers and that when employers cannot get access to criminal history records (a closed-records system), employers do know the proportion of a population group who have criminal history records. In this situation, Bushway’s simple economic model predicts that the risk-neutral employer will offer all qualified job applicants from a given racial group a job with a wage that is discounted for the proportion of people who have a criminal history record. If that discount places the wage below the minimum wage, then the firm will not offer a job to members of that group. When employers do have access to the criminal history records (open records), firms would offer nonoffenders a nondiscounted, market-clearing wage and ex-offenders a lower wage discounted for the probability of being a false positive (a productive ex-offender). Again, if this wage is lower than the minimum wage, the firm will not offer ex-offenders a job. All ex-offenders are better off in the closed-record situation, but nonoffenders, especially nonoffenders in groups with high proportions of ex-offenders, are worse off than they would be in an open-records case.

Identifiable population groups who have some unproductive workers in their group will have a lower average wage under the closed-records system than under an open-record system. So not only are there different winners and losers under each system, there is a dead-weight loss associated with a movement to a closed-record system that is nonrecoverable. This dead-weight loss gets smaller as the proportion of ex-offenders who are actually productive grows larger. It is impossible to know what proportion of ex-offenders are productive, so it is at least possible that there is no average gain from an open-record policy.
There are two reasons to think that in most cases, however, there might still be an efficiency gain from an open-record policy. First, the likelihood of an efficiency gain from an open-record policy is negatively related to the proportion of people who are false positives (productive ex-offenders). As an example, suppose that 4% of all American men in the workforce have criminal history records (roughly the correct number), and 30% of these workers are productive. The percentage of false positives in the labor market is then only 1.2%. As long as the proportion of false positives is small, open-record policies should provide an efficiency gain.

The second reason for thinking that an efficiency gain exists involves the nature of the labor market. In reality, the labor market is not uniform as in the simple model. There are many labor market sectors, and the labor supply and demand is different in each one. In some markets, firms will be able to hire individuals with criminal history records, and in others, firms will not. Employers in low-skill labor markets are good candidates to hire individuals with criminal history records both because turnover costs are low and the ability of ex-offenders to be productive (false positive) is higher than average. Work by Holzer et al. (in press) has in fact shown that low-skill firms in fields with little interaction between customers and workers are much more willing to hire ex-offenders than other more high-skill companies. As long as employers in some sectors refuse to not hire individuals with criminal history records, there will be a net efficiency gain in the overall market.

The key insight from Bushway’s (1996) modeling exercise is that different demographic groups that experience significant numbers of arrests and convictions, such as young Black men, will have higher average wages under an open-record policy than under a closed-record policy. In contrast, groups that have little contact with the criminal justice system (e.g., women or older workers) will be little affected by the policy choice. As a result, a closed-record policy should have a larger negative impact on law-abiding Black men than on law-abiding members of other groups.

The story is not unambiguously in favor of an open-record system. There are some clear losers under an open-records system, namely, productive ex-offenders. Bushway’s model provides a way to think about this important group. When criminal history records are perfectly correlated with productivity (no false positives), an open-record policy reduces the wages of nonproductive workers while increasing the wages of productive workers. This redistribution seems fundamentally fair (although still controversial) because it rewards individuals who make an effort to become productive rather than participating in crime or other nonproductive activity.

But when some ex-offenders are productive, the equity of the redistribution is no longer as clear-cut. Individuals with criminal history records who are nonetheless productive members of society will be offered wages that are
lower than their marginal product (if they are offered any job at all). The result might be an enhanced incentive to return to crime, which has both personal and social costs. This is an important equity issue that needs more attention in future research. It can be partly addressed by realizing that not all criminal history records are equally predictive of future criminal activity. Although researchers cannot perfectly predict recidivism, factors such as age and criminal history record have been shown to be strong predictors of recidivism among people with criminal history records. Time since last offense has also been shown to be an excellent predictor of staying straight. For example, people who do not commit crimes for 3 years after their release from prison have a very low rate of rearrest (Langan & Levin, 2002), suggesting that other factors besides the criminal record provide credible information about a person’s criminality and productivity. And employer surveys show that employers can and do differentiate between different kinds of ex-offenders (Holzer, 1996). Perhaps if more is learned about the process by which people desist, employers and workforce agents can be more discriminating when they make use of information in the criminal history record.

Legal requirements already exist that share this logic. For example, the Equal Employment Opportunity Commission issued a policy statement in September 1990 explicitly disallowing the “blanket exclusion” of individuals with criminal records but allowing the use of an arrest or conviction record as evidence in an employment decision provided the employer considers the nature and gravity of the offense, the time that has passed since the arrest, and the nature of the job held or sought. This type of nuanced use of the criminal history record seems like an appropriate way to help avoid overly punishing ex-offenders who are making an attempt to “go straight.”

It also makes sense to protect productive ex-offenders from discrimination. Therefore, it is wise to recommend that any open-record policy be accompanied by rigorous attempts to assure data quality in the criminal history record system. Efforts to ensure this data quality include, but are not limited to, eliminating administrative errors, improving disposition reporting (what happens to the case after an arrest), and developing mechanisms through which criminal history records can be purged or sealed after a significant time has passed without subsequent contact with the criminal justice system by the individual.

Of course, this concern about a link between open-record policy and data quality is not unique to this article. In general, repository administrators have seen to it that as access to the repositories has increased, efforts to improve data quality have also increased. Regular, detailed surveys of the state repositories reveal that criminal history record repositories increasingly monitor data quality through audits, and as a general rule, repositories limit employer access to ambiguous, nonconviction information. Besides the obvious ethi-
cal reasons for such policies directed at improving data quality, the economic
model itself predicts that even the beneficial effects of employer access on
individuals without criminal history records will be maximized with more
accurate records.

Yet employers are not limited to official repositories in their search for
information on applicants. Private agencies have developed databases based
in large part on court records. The use of these sources appears to be wide-
spread. For example, Briggs, Thanner, Bushway, Taxman, and Van Brakle
(2004) found 472 companies that claim to provide information about contact
with the criminal justice system for the entire United States. Although the use
of these records might in fact benefit Black men without criminal history
records, as predicted by the theory, the accuracy of these private record sys-
tems has not been explored. It seems clear, though, that these systems will not
be as accurate as the official systems if only because the court records often
lack disposition data, and will not be linked to fingerprint files. From a policy
perspective, therefore, official and unofficial records should not be viewed as
interchangeable. It is perhaps ironic that the desire of record repositories to
restrict employer access in order to protect ex-offenders has led to wide-
spread use of private systems, which are less accurate and more likely to
cause the very types of problems that the repositories would like to avoid.
Further study on the accuracy and nature of the data in the private databases is
clearly warranted.

Of course, not everyone would agree that open records with restrictions is
the appropriate policy choice for either private or public databases. Pager
(2003) weighs the evidence and decides that the costs of allowing employers
access to open records outweighs the potential benefits. The simple fact is
that there is very little evidence in favor of the statistical discrimination story,
yet there is substantial evidence that ex-offenders suffer discrimination in the
labor market. In the next section, I review the evidence that does exist to sup-
port the statistical discrimination hypothesis.

EXISTING EMPIRICAL EVIDENCE FOR THE
STATISTICAL DISCRIMINATION STORY

Bushway (1996) looked at the correlation between automation rates in
public repositories of criminal history records run by the state and employ-
ment outcomes for different demographic groups. Automation rates were
used as a proxy for ease of access to criminal history records. He found that
states with more automated records had higher wages for Blacks, holding
constant other apparent predictors of wages. This is consistent with the statis-
tical discrimination model. He found no impact for automation on employ-
ment and variation in wages, which is not consistent with the theory. In gen-
eral, this evidence must be taken as very weak evidence for the theory of statistical discrimination, in large part because the proxy for record openness, record automation, is questionable at best.

A much stronger case is made in Holzer et al. (in press). They make use of a series of employer surveys conducted during the 1990s to explore the hiring practices of employers for entry-level jobs that did not require a college degree. Employers were asked whether they would be willing to hire ex-offenders and whether they checked criminal history records. Ex-offenders were by far the least desirable employees, ranking well below welfare recipients in terms of desirability. Sixty percent of employers say they would definitely not or probably not hire ex-offenders, and there was significant and substantial variation in the type of companies that would hire ex-offenders. This is to be expected if productivity losses and turnover costs vary across companies. They found that smaller, nonmanufacturing firms whose employees interact with customers are the most averse to hiring ex-offenders. Size appears to matter because of the lack of a formal human resources department with sophisticated screening and concerns about liability. Interaction with customers and human capital are also important determinants of whether a company is willing to hire ex-offenders.

But not all the firms that do not want to hire ex-offenders check criminal history records. Only 49% of the employers sometimes or always check criminal history records, and only 56% of the firms that say they would definitely not hire someone with a criminal history record always check criminal history records. There is a direct relationship between size and the use of background checks—fully 45% of the companies that are not willing to hire ex-offenders and do not check backgrounds have fewer than 20 employees. The more formal the human resource system, the more likely the company is to run background checks and other formal screens such as drug and aptitude tests.

Which raises a question: If a firm cares about not hiring ex-offenders but finds it either too cumbersome or expensive to check criminal history records, do they engage in the type of statistical discrimination suggested above? Holzer et al. (in press) find that these employers are more likely to exclude applicants who have characteristics that are correlated with criminal history records, such as an uneven work record, than are employers who check backgrounds. Companies who do not check criminal history records but are concerned about criminal histories are also less likely to use informal recruiting tools, such as walk-ins and posting help-wanted ads, less likely to accept referrals from state and community agencies, and less likely to use affirmative action in hiring.

Holzer et al. also asked about the race of the most recent hire. Among those firms that check records, approximately 24% of the most recent hires were
Black, with virtually no difference between firms that do and do not care about criminal history records. However, among firms that do not check but are not willing to hire ex-offenders, only 14.8% of the most recent hires were Black. On average, employers that check criminal history records hire Blacks more than 50% more often (8.4 percentage points) than those employers who do not do background checks.

These results are the first real empirical evidence that employers might make use of observable group characteristics (such as race) that are correlated with the group prevalence of criminal history records when they do not check criminal histories but still want to avoid individuals with criminal backgrounds. In contrast, firms who check criminal histories are more likely to hire Blacks. Clearly, Holzer et al.’s results suggest that criminal history records checks give some employers the confidence to hire minorities and other individuals whom they would otherwise not hire.

But these results must be interpreted with caution. The entire test for the statistical discrimination hypothesis rests on two Likert scale questions about an employer’s self-reported hiring practices in a survey conducted in four cities in the mid-1990s. Although suggestive, the evidence is not particularly convincing, especially in light of the overwhelming evidence in the same study that ex-offenders face huge barriers to employment. Pager (2003) is well within her rights to conclude that the evidence in favor of closing records is stronger than the evidence in favor of a more open-record policy.

Ironically, her study may provide the strongest evidence yet in favor of the statistical discrimination hypothesis. To understand why, it is important to understand the sampling frame of her matched-pair audit study in Milwaukee. She specifically eliminated any job announcement that said that a criminal background check was conducted as part of the job application, and also avoided jobs in the health care industry that have explicit restrictions against hiring ex-offenders. Most of the employers (74%) asked about criminal history records on the application, but few appeared to conduct any formal background check (at most, 24% conducted a formal background check). This means her sample is not a representative sample of employers who hire low-skilled workers, like the Holzer employer survey, but rather a sample of employers who do not conduct background checks yet care about criminal history records.

In this sample, she found striking evidence that employers do not want to hire ex-offenders. Among the White audit pairs, 34% of the nonoffender applications resulted in a callback, but only 17% of the ex-offender applications resulted in a callback, representing a 50% reduction in the probability of a callback. Among the Black audit pairs, 14% of the nonoffender applications resulted in a callback, but only 5% of the ex-offender applications resulted in a callback, representing a 64% reduction in the probability of a
callback. Pager reaches two main conclusions. First, employers discriminate against ex-offenders, and that discrimination is more prominent among Blacks. Second, there is strong racial discrimination in hiring, independent of the ex-offender issue.

The second conclusion is not completely supported by evidence, however. The sample is all employers who advertise in the paper for jobs and do not explicitly check for criminal history records, but nonetheless care about criminal history records. According to the theory of statistical discrimination, this is exactly the group of employers we would expect to discriminate on the basis of race. In my opinion, the most striking finding is not the difference between the audit pairs but the fact that the Black nonoffender receives fewer callbacks than the White offender. Pager interprets this result to mean that Blacks are perceived to be more criminal even when they do not have criminal history records. An alternative interpretation that I favor is that employers do not find self-reported “clean” records to be credible. Milwaukee has a high incarceration rate for Blacks relative to Whites, and a rational, although not legal, reaction by employers who are concerned about criminal actions on the job but cannot check records is to avoid hiring Blacks.

Therefore, Pager’s (2003) recommendation that records be closed might actually lead to more discrimination against Blacks, not less. A closed-record policy would have the effect of drawing the two members of the audit pair closer together, but there is no reason to suppose that the racial differences would be ameliorated. Holzer et al’s (in press) evidence suggests that employers who can credibly determine a lack of criminal history would be more likely to hire a Black, effectively increasing the employment rate of the Black non-ex-offender. In other words, although the Black ex-offender would still suffer a lower callback rate, it is likely that the callback rate of the Black nonoffender would increase relative to the callback rate of the White nonoffender in the presence of credible information about an individual’s lack of involvement in the criminal justice system.

At this point, it is not possible to make anything other than a wild guess about the magnitude of any difference, but I view this interpretation of Pager’s results to be strong encouragement for more empirical work on the statistical discrimination hypothesis. In the next section, I present a framework for an approach to study this question in more detail at the aggregate level.

SOME EMPIRICAL EVIDENCE

During the 1970s, legal efforts to reduce the collateral consequences of criminal history records in the legal labor market centered on the privacy rights of the individual ex-offender. Yet, in 1976 the Supreme Court decision
Paul v. Davis ruled that even arrest records were public information because the initial source of the information, police blotters and court records, were public records. Despite this ruling, individual states were still allowed to set their own standards about access to centralized repositories of criminal history record information. In 1975, the U.S. Department of Justice’s Law Enforcement Assistance Administration issued comprehensive information systems regulations that provide that noncriminal justice access and use of criminal history records maintained by the states is permitted if “authorized by statute, ordinance, executive order or court rule, decision or order as construed by the appropriate state or local officials or agencies” [§ 20.21 (b) (2)]. The net result has been a great diversity of statutory schemes in the states, although the national trend is for a steadily increasing volume of authorized noncriminal justice use (SEARCH, Inc., 2000). A recent report on state variation from the Legal Action Center (LAC) also found a great deal of state variation in state laws regarding the ability to expunge or seal records after a certain period of time (LAC, 2004).

Holzer’s (1996) survey of employers in four cities also provides some evidence that employers do vary in their use of criminal history records by state. He interviewed approximately 800 employers each in Los Angeles, Boston, Detroit, and Atlanta. Employers in Atlanta asked for criminal record checks 55.5% of the time followed by Detroit at 53.9% of the time, Los Angeles at 46.58% of the time, and, finally, Boston at 37.8% of the time. This relative rank ordering of cities corresponds to the LAC report’s rank order of record access.

In fact, the LAC’s (2004) recent report is the first attempt of which I am aware to compile a comprehensive measure of record access by state. Rather than rely solely on statutes, the LAC report combines statutes with information about whether the state allows Internet access to the state repository information to noncriminal justice users to create a score for each state. This combined measure is clearly a better and more direct measure of record access than the automation measure used by Bushway (1996). They also code separately the explicit employment barriers facing ex-offenders in the legal labor market. Each state is scored from 0 to 10, with 10 meaning that there are almost no restrictions to information and 0 meaning there are many restrictions to information access. In response to an anonymous reviewer’s concerns about my measure of record access, I have turned to the LAC report card as a more accurate measure of record access. Due to time constraints, I offer here only a modest attempt at an analysis. Future work could easily extend this analysis in a number of interesting directions.

I take wage data from the 2000 and 2001 Current Population Survey (CPS) extract from the National Bureau of Economic Research (http://www.nber.org/data/morg.html). This extract includes employment data from
the individuals in the outgoing rotations of the panel. Two years of data are used to obtain sufficient evidence for Blacks in states with small minority populations. The wage variable was calculated as the ratio of the median hourly wage rate for Black and White men aged 19-60. Hispanics were considered as a separate group. The average employment was calculated as the ratio of the employment rates for these two sets of workers. The analysis is limited to the 36 states that have at least 30 Black men in the CPS who report a positive wage. I have also eliminated the state of Nebraska because the wage ratio for Blacks to Whites was substantially above 1, and residual analysis consistently showed that Nebraska was driving the significant results. I also include the race ratio of age, educational attainment, and marital status in the model, along with the total criminal justice supervision rate (per 100,000 people) and controls for four regions based on the census codes for regions. The summary statistics are given in Table 1.

Table 2 provides two basic regressions. The first column uses the Black to White ratio of hourly wages as the dependent variable. Despite the relative simplicity of the model, the $R^2$ is still quite good, suggesting that age and education can explain a good portion of the difference between Black and White wage rates. As predicted by the statistical discrimination model, access to criminal history records leads to a reduction in the difference between Black and White wages, although in this model the difference is small in magnitude and insignificant. A movement from no access to unlimited access on the LAC report card would only increase the ratio by .05, approximately 6.5%.

Column 2 reports the similar regression for the Black to White ratio in employment. The $R^2$ for model fit is again respectable, despite the model simplicity. The coefficients on the control variable are in the expected direction, but not significant. And the coefficient on access is negative, as predicted by the discrimination model—there are more Black ex-offenders, so more access leads to less employment for Blacks relative to Whites. Like the coefficient in the wage equation, the magnitude is extremely small and insignificant.

The only responsible conclusion at this stage of the analysis is that there is no strong correlation between aggregate employment differences between Whites and Blacks and state policies about employer access to criminal history records. Yet this analysis is rudimentary at best. A more detailed analysis would use individual-level data from the CPS to look at the impact of state policies on individual outcomes, rather than average outcomes for the group. This can be done by regressing individual wages and unemployment on a measure of record openness. This approach has the added benefit of allowing direct comparisons between the impact of record openness on the wages of different population groups with observably different levels of criminal history records. The impact of record openness should be larger for young Black
men than for older Black men, or White men, for example. The analysis can also be repeated with measures of employment restrictions on ex-offenders, which, although not directly related to record access, should have similar affects on employment outcomes for ex-offenders.

**CONCLUSION**

Employer access to criminal history records raises a legitimate concern about the fairness of a policy that in effect punishes individuals outside of the criminal justice system. Although in no way denying the importance of this concern, this article points out that a policy that denies employers access to criminal history records could also lead to equally troubling statistical discrimination against all members of particularly vulnerable demographic groups (i.e., Black men). This result makes the choice more difficult, although there is limited empirical evidence supporting the statistical discrimination approach. In this article, I identify a recently available report by the LAC (2004) that tries for the first time to assign a cumulative score assessing the ease of employer access to criminal history records in the criminal justice system. A very simple analysis shows small, insignificant correlations
in the expected directions between the wages and employment outcomes for White and Black men and this measure of employer access to criminal history records. A more detailed analysis with individual-level data from the CPS would be both more justifiable and more credible. Ideally, data on ex-offenders from a number of different states would be utilized. Information on the number of ex-offenders in each state would allow for a more rigorous causal analysis of the hypothesis that the size of the wage effect will depend on the relative difference in criminal background by race.

### NOTES

1. Criminal history records are “cumulative, name-indexed histories of an individual’s involvement in the criminal justice system” that generally include conviction information and nonconviction information such as arrests (Belair, 1989).
2. Negligent hiring actions are now recognized in most states (Scott, 1987).
4. The assumption that ex-offenders are simply unproductive may be conservative. Negligent hiring lawsuits can lead to large liability costs that may make it costly to hire an active criminal.
5. Pager (2003) does not report the callback rates separately by race for those firms that ask about criminal history records on the application and those who do not, but she does report the overall callback rates in an appendix. Among those firms that ask about record, 35% offered callbacks for the clean individual and only 12% offered a callback to the ex-offender. The difference was much smaller among firms that did not ask about criminal history record on the application (33% vs. 25%). I suspect that the racial difference would be even larger among the firms that appear to care about criminal history records by virtue of their asking on the application.

REFERENCES


Shawn D. Bushway is an assistant professor of criminology in the Department of Criminology and Criminal Justice at the University of Maryland and a fellow with the National Consortium of Violence Research. He received his Ph.D. in public policy analysis and political economy in 1996 from the H. John Heinz III School of Public Policy and Management at Carnegie Mellon University. His current research focuses on understanding the process of desistance and disparity in sentencing outcomes.