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Criminal Record Questions, Statistical Discrimination, and Equity in a "Ban the Box" Era

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In the United States, the mark of a criminal record follows a person long after he or she has served a prison sentence or paid a fine (Pager, 2007). Individuals with criminal records are excluded and disqualified from an array of social and civil areas, including voting, public benefits, and occupational licensing (Jacobs, 2015; Travis, 2002). Employment is one critical domain, where people with criminal records have a much lower chance of receiving a callback for a job (Pager, 2003; Pager, Western, Bonikowski, 2009). Employers have the right to consider a person's criminal record in their hiring decisions; however, a concern is that by disclosing a record on a job application—at the first entry point for hiring—an employer will immediately screen out jobseekers with a criminal past without considering their other assets. For all jobseekers, personal contact with the employer during the hiring process improves callback rates (Uggen et al., 2014), and for jobseekers with criminal records, the opportunity to build rapport with an employer reduces the effect of a criminal record by approximately 15 percent (Pager, Western, and Sugie, 2009). Removing initial questions about criminal records from job applications (i.e., Banning the Box) reduces the likelihood that jobseekers with criminal histories will be evaluated and excluded based on their criminal records alone.

Despite widespread research and policy attention to this issue, we actually know very little about criminal record questions on job applications. The article by Mike Vuolo, Sarah Lageson, and Christopher Uggen (2017, this issue) provides a rare look at the types of questions asked by employers at

this first point of entry in the hiring process. Vuolo et al. find that there is a wide range in the types of questions that are asked, and that a substantial group of employers (over 20 percent) does not ask any criminal record question. They show that certain types of employers, such as those hiring for hotel and warehouse positions or those that are located in the least and most advantaged neighborhoods, are most likely to include criminal record questions on job applications. Moreover, firms with employees of color are much more likely to ask about criminal records, as opposed to those without any observed employees of color. In the final part of their analysis, Vuolo et al. present callback rates for applicants without records, distinguishing rates by type of application question. They cautiously suggest that the pattern of callbacks for black applicants is consistent with statistical discrimination (a point that I will address later); however, they rightly recommend that these findings by themselves should not be used as evidence of statistical discrimination.

Vuolo et al. (2017) conclude by making two main recommendations. First, employers should delay questions about records until later stages of the hiring process, consistent with Ban the Box policies. Second, for employers that choose to include questions on job applications, questions should be limited in scope, to: a) distinguish between adult and juvenile records (and ask adult applicants about adult records only), b) restrict questions to records that occurred within a recent time span, c) exclude less serious offenses and those not directly related to job duties, and d) limit

questions to convictions as opposed to arrests or behaviors that have not led to conviction. Vuolo et al. provide brief justifications for each of their recommendations, but their points are broadly in line with evidence regarding decreasing risk of recidivism over time and with Equal Employment Opportunity Commission (EEOC) guidelines (U.S. EEOC, 2012).

Guidance on Criminal Record Questions

To my knowledge, Vuolo et al.'s (2017) article is the first to provide employers with concrete guidelines for the wording of criminal record questions on job applications. The heterogeneity of job application questions that Vuolo et al. document shows that employers currently lack guidance in this area. Although I agree with the spirit of their recommendations, which attempt to restrict questions to convictions for serious offenses that have occurred in the recent past, there are unresolved questions about the specific details in some of Vuolo et al.'s points.

One basic question concerns the idea that certain offenses are "job related" and others are not. In the United States, employers have a right to consider an applicant's criminal record in hiring decisions when it is "job related for the position in question and consistent with business necessity" (42 U.S.C. § 2000e-2(k)(1)(A)(i)). In some cases, relevant offenses may be fairly straightforward—for example, offenses related to child-related crimes for jobs involving children or offenses related to traffic violations for driving jobs (as illustrated by two of the questions in Table 1 of Vuolo et al., 2017).

However, in most cases, this is a gray area, which lacks empirical evidence and relies on each individual employer's discretion.

Another question relates to time restrictions. Vuolo et al. (2017) find that most employers do not limit their questions to specific time frames. Among those that do, there is a range of time periods—from the past 15 years to the past 24 months. How should employers choose between these ranges? Is an applicant whose conviction was 7 years ago sufficiently less risky, from a recidivism perspective, compared to an applicant whose conviction was 5 years ago? Research on time to "redemption," or the point at which recidivism rates look similar to offending rates in non-offender samples, suggest that relevant time frames are approximately 6 to 7 years (Kurlychek, Brame, and Bushway, 2006; 2007). However, these estimates reflect age-specific risk rates and are based on younger offenders, whom have different levels of risk compared to older applicants (Bushway, Nieuwbeerta, and Blokland, 2011). These estimates are also based on older cohorts that predate the incarceration boom (Kurlychek et al., 2006; 2007), and they consider offender samples that may or may not be employed. For employers deciding on whether to hire an applicant, the most relevant consideration is how likely the applicant is to recidivate as an employed person. Although the redemption research provides clear evidence that employers should account for time since conviction, the specific timeframe that employers should consider is not obvious.

A third question is whether to encourage job application questions that are standardized across employers or that are specific to the job in question. Vuolo et al. (2017) find that employers ask a range of different types of questions, which results in uneven evaluation (and potentially, disqualification) of the same applicant across employers. This description of uneven evaluation might lead readers to conclude that criminal record questions should be standardized across employers. However, the EEOC Enforcement Guidance steers employers toward specificity in evaluation and encourages the use of individualized assessments (U.S. EEOC, 2012). The EEOC suggests that employers use targeted screening questions about criminal conduct relevant to the job and consistent with business necessity in order to avoid Title VII liability and blanket exclusions based on criminal record.

In general, movement towards job-related specificity, whether by limiting the scope of questions or by interpreting information purposefully, is a recommendation that is consistent with the EEOC. This applies to the front end—e.g., questions on job applications—as well as the back end of criminal record background checks. Although not the focus of Vuolo et al.(2017) or this policy essay, many of their recommendations extend to the use of background checks. Similar to the front end of criminal record questions on job applications, we know surprisingly little about the back end of background checks and in particular, the accuracy, consistency, and completeness of information purchased from commercial information

vendors (Bushway et al., 2007; Jacobs, 2015) and how employers use this information in their hiring decisions. Social science researchers could do more to fill this gap in knowledge.

Until researchers are able to provide more specific guidance related to these recommendations, many employers will be hesitant to change their current practices. The recommendations put forth by Vuolo et al. (2017) are a good start to a conversation that will entail more research and dialogue with employers.

Ban the Box and Statistical Discrimination

The recommendations of Vuolo et al.(2017), the Ban the Box movement, and the EEOC guidelines all promote restrictions on criminal record information to employers at various stages of hiring. One of the most concerning findings of the Vuolo et al. article relates to statistical discrimination, or the use of easily identifiable traits like race, gender, and age to infer the likelihood of criminal behavior in the face of limited information (Aigner and Cain, 1977; Pager and Shepherd, 2008; Phelps, 1972). Vuolo et al. document a pattern of results for black job applicants without records that are consistent with predictions of statistical discrimination—e.g., black applicants with clean records have the lowest callback rates among employers that do not ask criminal record questions and the highest among those that ask about lesser offenses. The authors are appropriately cautious about their findings for several reasons. The differences are small, not statistically significant, and based on simple

comparisons without controls for compositional differences that may affect

the likelihood of both asking criminal record questions and hiring black

jobseekers. The results also reflect experiences of applicants in one city,

prior to the implementation of Ban the Box.

I agree with this assessment and would add sample selection as

another reason to be cautious. The sample excludes employers that used

on-site (computerized) applications or did not allow testers to take

applications offsite. Some rough estimates comparing callback rates

reported here and those reported for the full sample (Uggen et al., 2014)

indicate that the excluded employers responded much more positively to

black applicants without records.[1] This difference is large enough to

potentially change the callback patterns.

Even if the results of Vuolo et al. (2017) are interpreted cautiously,

there are recent studies that offer more compelling evidence that statistical

discrimination is an unintended consequence of Ban the Box policies among

some employers (Agan and Starr, 2016; Doleac and Hansen, 2016; but see,

Shoag and Veuger, 2016). These findings join other work on criminal

background checks, which also suggest that employers use statistical

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[1] The callback rate for black applicants with no record among the full sample
is 27.5 (Uggen Vuolo, Lageson, Ruhland, and Whitham, 2014) compared to
roughly 22 percent for the restricted sample. 22 percent is calculated by
multiplying the callback rates for black applicants without records for no
question, felony, and lesser offense (Figure 5, Vuolo et al., 2017) with the
percent of firms that asked no questions, felony, and lesser offense (Table 1,
Vuolo et al., 2017).

discrimination when information on applicants is limited (Bushway, 2004; Finlay, 2009; Holzer et al., 2006).

Methodologically, the most persuasive study of Ban the Box and statistical discrimination is an audit study of online job applications, where fictitious white and black jobseekers applied to entry-level jobs before and after Ban the Box policies. Testers submitted approximately 15,000 online applications to employers in New Jersey and New York City (Agan and Starr, 2016). Agan and Starr find that a minority of applications (37 percent) includes a criminal record question prior to Ban the Box (although this does not mean that the employer does not ultimately vet applicants using background checks). This estimate contrasts with Vuolo et al.'s finding that the majority of applications asked about records and it most probably reflects differences in the sample composition of firms that use online versus paper applications. Agan and Starr find that before Ban the Box, white and black applicants received similar callback rates from employers who asked about criminal records on job applications. After Ban the Box, black applicants had lower callback rates and white applicants had higher callback rates among those employers who previously asked about records (11 percent compared to 15 percent). Although the study is not a true experiment—employers who chose to ask the question prior to Ban the Box are coded as the "treated" group and employers who chose not to ask the question prior to the policy are coded as the "control"—they use a triple-

differences design to provide compelling evidence of statistical discrimination among this subset of employers.

The Agan and Starr article tells us that Ban the Box has prompted some employers to statistically discriminate at the front end of the hiring process. This finding suggests that, on aggregate, the gains to black applicants with records as a result of Ban the Box might be outweighed by the losses to similar black applicants without records. Although audit studies are better able to isolate a causal mechanism compared to observational studies, they cannot tell us about the actual impact of Ban the Box on hiring for real jobseekers. Audit studies report results for a random sample of entry-level positions, as opposed to distinguishing employers that are most likely to receive applications from young black and white male jobseekers. They consider callbacks, rather than hiring outcomes (which would incorporate decisions based on background checks). They also restrict the relevant universe of "winners" and "losers" to young male applicants with and without records. This latter point is particularly important, since some research suggests that Ban the Box increases employment among older low skilled black men and highly-educated black women (Doleac and Hansen, 2016). To avoid applicants with criminal records, employers may be looking to other groups that they perceive to be less risky applicants, which intersect with race, age, and gender. All of these factors suggest that the actual impact of Ban the Box for different groups of workers is a complex empirical question.

Moreover, the advantages of Ban the Box to jobseekers with criminal records remains to be seen. On the one hand, people with criminal records may benefit from getting a foot in the door, to be considered on their assets apart from their record (Pager et al., 2009). They may be encouraged to apply to jobs they otherwise would have avoided because of the job application question (Hlavka et al., 2015). On the other hand, jobseekers with criminal records are often disadvantaged in the labor market for a variety of reasons, where their record is one factor among many obstacles. People with records, and particularly those with recent criminal histories, often struggle with issues of addiction and mental health, in addition to sporadic work experience. As others have already suggested, Ban the Box will only be helpful to people who are job ready (Henry and Jacobs, 2007; Stoll and Bushway, 2008; Western, 2008).

Ban the Box, Statistical Discrimination, and Equity

In light of statistical discrimination and potentially limited benefits to those with records, some are questioning whether we need to rethink Ban the Box policies. I think these types of suggestions are premature for two reasons. First, we need more research on the impacts of Ban the Box for actual jobseekers on the ground. We should consider effects for different regional markets, for broader swaths of the labor market, and for jobseekers with records. We should also consider the potential long-term consequences of Ban the Box. The hope is that employers who give "second chances" to jobseekers with criminal records and have good experiences with those

choices may be more inclined to continue to do so, and employers that overestimate the prevalence of black applicants with criminal records may eventually correct their behavior (but, see Doleac and Hansen, 2016).

Second, there is something deeply fatalistic about wavering on Ban the Box policies because of statistical discrimination. Statistical discrimination is described as a rational response of employers who have limited information, and this mechanism of rationality is contrasted with employers who discriminate based on racial animus (Pager and Shepherd, 2008). Whatever the mechanism, whether it is a rational response or irrational distaste, discrimination based on race, color, sex, age, religion, or national origin is illegal. Instead of wavering on Ban the Box policies because of resulting racial discrimination by some employers, shouldn't we advocate strategies that address both of these forms of discrimination (Zatz 2016)? If statistical discrimination is found to alter the employment chances of young black men, we should look towards policies that combat racial discrimination. These include more active enforcement of discrimination law or perhaps, even asking employers to solicit initials of applicants rather than full names, which often indicate applicant race. Clearly, these suggestions are not easy to enact; however, the point is that there are multiple ways to respond to statistical discrimination that results from Ban the Box policies. If policymakers are aiming to improve racial equity in hiring, pursuing policies that limit discrimination—whether it results from criminal records or statistical discrimination—seems like the better option than engaging in

discussions that pit the consequences of Ban the Box against those of statistical discrimination.

These conversations will continue to evolve as more cities and states support Ban the Box policies and as more research is conducted in those areas. Audit studies and field experiments are often considered the gold standard in social science research because they most effectively confirm causality. Although these are necessary and important, audit studies cannot comment on the actual impacts of Ban the Box policies on real-world jobseekers. Instead, studies based on observational data can better illuminate on-the-ground consequences (e.g., Doleac and Hansen, 2016; Shoag and Veuger, 2016). Vuolo et al.'s (2017) article provides a useful descriptive middle ground, by providing insight on criminal record questions through the vehicle of an audit study. As we move forward, we must draw on a range of methodological approaches— from descriptive studies to longitudinal analyses to quasi-experiments to audit studies—and value the unique contributions of each of these methods to comprehensively understand the array of consequences related to employer discrimination, criminal record stigma, and Ban the Box policies.

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