

# Why Do Employers Discriminate Against People With Records? Stigma and the Case for Ban the Box

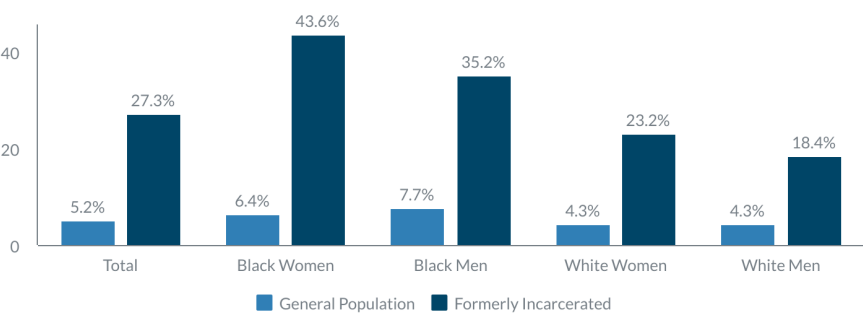
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This brief summarizes, contextualizes, and addresses the policy implications of research reported in “Employer Aversion to Criminal Records: An Experimental Study of Mechanisms,” by N. F. Sugie, N. D. Zatz, and D. Augustine, *Criminology*, 58(1). © 2020 American Society of Criminology.

People with criminal records face high barriers to employment, and people with incarceration histories are four to six times more likely to be unemployed than peers without a record (see Figure 1). Employers’ aversion to hiring applicants with a record is one such barrier. Today, more people than ever before have some form of criminal record, and electronic databases make them readily accessible. However, the criminal record is not a neutral source of information about past conduct. Even though illicit behaviors like drug use cut across sociodemographic lines, people of color—especially Black and Latinx communities living in low-income areas—are disproportionately subject to law enforcement actions, such as arrest, prosecution, and incarceration. As a result, the poor and people of color are overrepresented in the criminal justice system, compounding the sociodemographic impacts of justice involvement on employment for already disadvantaged populations (see Figures 2 and 3). Thus, employers’ aversion to hiring people with records reinforces socioeconomic disadvantages along racial lines.

Figure 1: Unemployment After Prison



Note. Unemployment rates refer to working-age individuals (25–44 years old). Adapted from *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, by L. Couloute and D. Kopf, July 2018, Prison Policy Initiative (<https://www.prisonpolicy.org/reports/outofwork.html>).

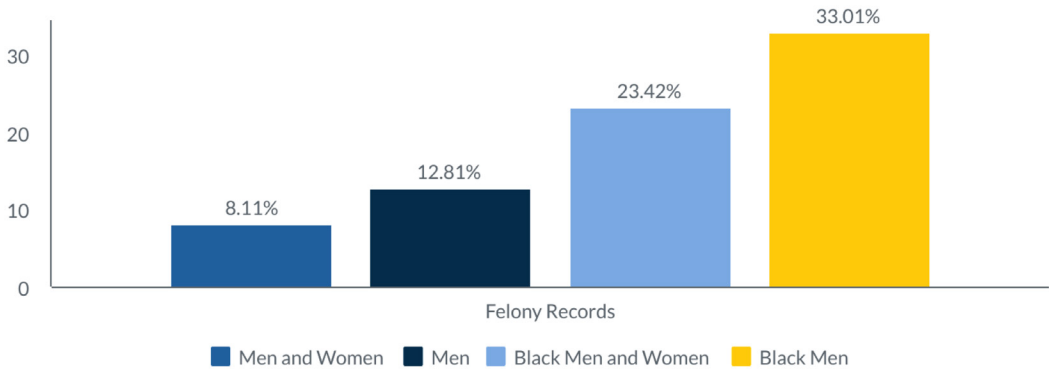
The UCLA Institute for Research on Labor and Employment supports faculty and graduate student research on employment and labor topics in a variety of academic disciplines.

The institute also sponsors colloquia, conferences, and other public programming, houses the Labor Studies undergraduate major, and conducts educational outreach on workplace issues to constituencies outside the university.

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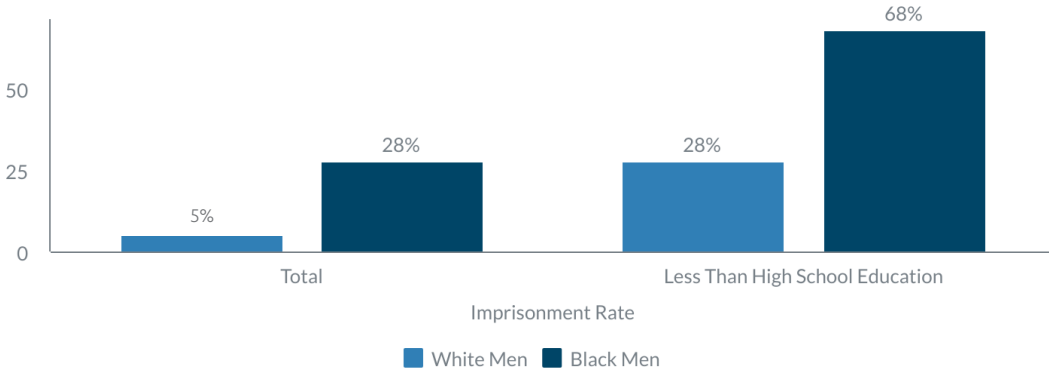


**Figure 2: U.S. Adult Population With Felony Records in 2010**



Note. Felony record rates refer to the adult population (at least 18 years old). Adapted from “The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010,” by S. K. Shannon, C. Uggen, J. Schnittker, M. Thompson, S. Wakefield, and M. Massoglia, 2017, *Demography*, 54(5), 1808.

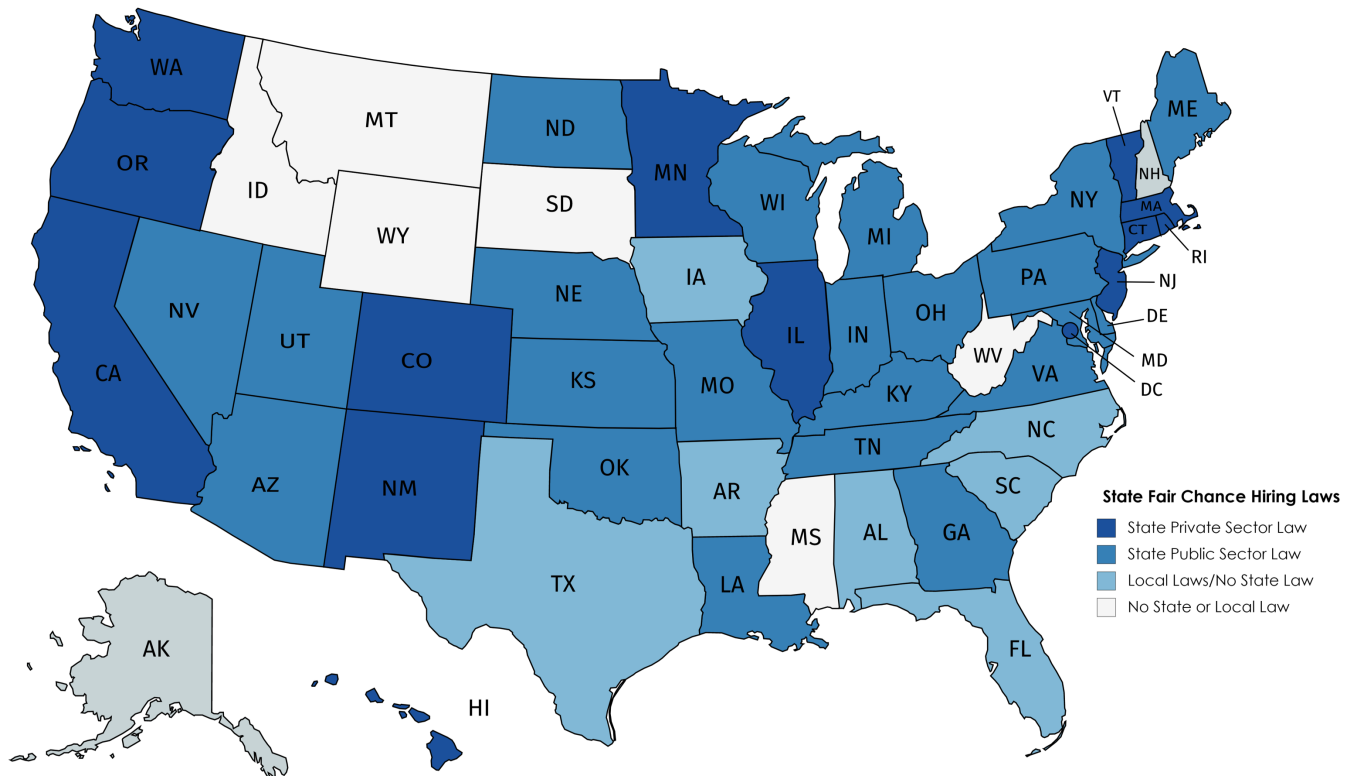
**Figure 3: Imprisonment Rates by Race and Educational Attainment**



Note. Rates refer to the estimated prevalence of incarceration by ages 30–34 for non-Hispanic men. Adapted from *Invisible Men: Mass Incarceration and the Myth of Black Progress*, by B. Pettit, 2012, Russell Sage Foundation, 17.

“Ban the Box” or “Fair Chance” hiring policies attempt to lower these barriers to employment by limiting employer access to criminal background information early in the hiring process, such as immediately after the submission of an initial job application or prior to a conditional offer of employment. These policies sometimes also determine on what grounds employers can deny employment based on a criminal record. Through these policies, lawmakers and advocates hope to mitigate the stigma associated with a criminal record, by requiring employers to consider applicants’ full range of qualifications before weighing the relevance of a record. At this time, 35 states and 150 cities and counties have some form of Ban the Box policy coverage (see Figure 4) (National Employment Law Project, n.d.).

**Figure 4: Ban the Box and Fair Chance Policies Across the United States**



Note: From *Ensuring People With Convictions Have a Fair Chance to Work*, National Employment Law Project, n.d. (<https://www.nelp.org/campaign/ensuring-fair-chance-to-work/>). Reprinted with permission.

Proponents of criminal record screening argue that criminal background checks give employers information that enables rational hiring decisions around risk management. Following this logic, employers use background checks to predict applicants' future behavior that could harm the firms' business through workplace violence, drug use, theft, or other disruptive conduct. The underlying presumption is that "past behavior is usually a good predictor of future behavior" (Jacobs, 2015, p. 304). Laws that regulate criminal record screening likewise rely on this rationale to identify when employers may justifiably make decisions based on criminal background information. For example, a theft offense is more concerning for a truck driver with unmonitored access to valuable cargo than it is for a telemarketer (U.S. Equal Employment Opportunities Commission, 2012), and an embezzlement offense is more relevant for a financial adviser than a bus driver (Jacobs, 2015). This widespread focus on the nexus (Elmore, 2015) between the prior offense and future job duties reflects the idea that the relevance of a prior offense lies in its ability to predict similar future conduct, what we term *repetition risk*. A variation on this argument invokes employers' concerns about vulnerability to *negligent hiring* litigation. Were a future employee to injure someone on the job, a jury could hold the employer liable for hiring an applicant with a criminal record that signaled a risk of future similar conduct.

A contrasting and less deferential explanation of employer decision-making draws on the sociological idea of *stigma*: the general labeling, stereotyping, separation, status loss, and discrimination that accompanies a criminal record (Link & Phelan, 2001). Part of stigma is the stereotyping that connects criminal records to a range of undesirable characteristics associated with the criminal justice system. These characteristics—such as dangerousness and untrustworthiness—are broadly negative rather than specific to the illegal conduct that prompted criminal justice involvement (Becker, 1991/1963; Denver, Pickett, & Bushway, 2017). For example, someone with a conviction for a nonviolent offense like fraud may be perceived as potentially physically violent. Employers driven by stigma would be less concerned with past conduct specifically related to the open job; instead, a criminal record would signal general undesirability that would cut across a variety of positions.

In light of these arguments, whether employer screening merits regulation depends on how employers use criminal history information. Are employers using criminal records as a valuable source of information that enables rational risk management? Or are advocates of Ban the Box policies correct that employers have a general bias against or stigma associated with a criminal record?

To answer these questions, we conducted an experimental study of employer decision-making. We found that employer aversion to hiring people with criminal records was driven in part by concerns with future criminal behavior or other associated risks but also in significant part by the stigma that accompanies a criminal record. This finding supports policies that aim to improve hiring outcomes for people with records by limiting how employers can access and use criminal history information in their hiring processes.

## The Study: Why Don't Employers Hire People with Criminal Records?

Based on the policy considerations discussed above, we designed our study to assess whether employer responses to an applicant's criminal record were based on their assessment of *repetition risk* or the *stigma* associated with a criminal history. We tested how employer responses changed with different sources of information about past conduct and with respect to different types of jobs. We also discuss the variation on repetition risk that involves employer concerns about negligent hiring liability.

On the one hand, employers concerned with **repetition risk** will use criminal records as one potential source of information about applicants' past behavior, which in turn predicts similar future behavior in the workplace. Because the fundamental concern is with the repetition of problematic past conduct, if employers learn about the same past behaviors some other way, those should trigger the same concerns about future behavior.

On the other hand, if employer aversion is driven by **stigma**, criminal records themselves, regardless of the conduct indicated by the convictions, make employers unwilling to hire the record-holders. Because the fundamental concern is with the criminal record itself, if employers learn about the same past behaviors some other way, those should trigger a different response.

We tested whether employers respond to a criminal record differently than they respond to a different source of information about the same illegal conduct. The study provided 2,841 hiring decision makers with job applications with varying signals of prior illegal drug use.<sup>1</sup> We then examined differences in employer perceptions of the applicants' suitability for hire. Survey respondents evaluated one of three randomly selected versions of otherwise identical job application materials: (1) one with no indication of prior drug use and a background report showing no criminal record (control group); (2) one with a social media signal of past drug addiction through a Facebook page and a background report showing no criminal record; and (3) one with the same social media signal of past drug addiction plus a background report showing a corresponding drug possession arrest and conviction.<sup>2</sup>

## Results: Stigma Influences Employer Decision-Making

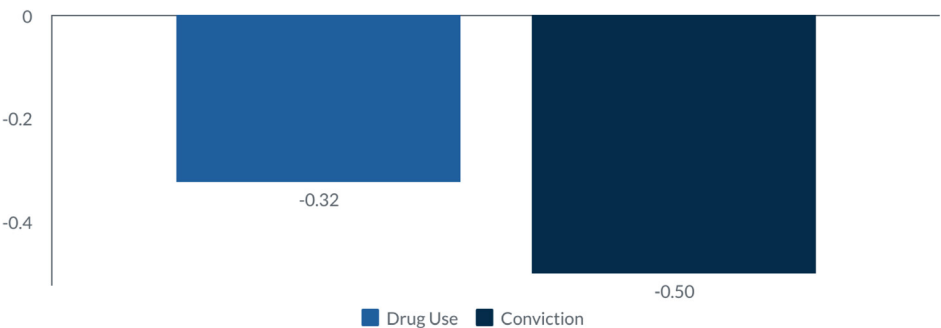
Our four main results all indicate that employer aversion to hiring people with records is not explained by repetition risk alone and that the additional negative influence is attributable to stigma.<sup>3</sup>

### 1. In hiring decisions, employers view criminal records more negatively than other evidence of the same illegal conduct.

When asked whether they would hire the hypothetical applicant, employers were most likely to hire applicants from the control group with no indicator of drug use, somewhat less likely to hire applicants with the social media signal, and least likely to hire applicants with a conviction (see Figure 5). If employers were concerned that past drug use indicated risk of future illicit behavior, we would expect them to respond similarly to the two applicant groups with

evidence of past drug use. Instead, employers were less likely to hire applicants with convictions than applicants with the social media signal of the same underlying behavior; so repetition risk cannot fully explain these hiring decisions. Conceivably, employers might believe a conviction indicates more frequent or problematic prior drug use and, therefore, is more likely to indicate future use than the social media signal alone. To test this, we asked all employers about the likelihood that applicants would be under the influence of drugs or alcohol at work. Employers’ greater aversion to applicants with criminal records held up whether or not employers believed that applicants would engage in future drug use. Thus, contrary to what a repetition risk framework would predict, employer unwillingness to hire applicants with convictions was not driven entirely by expectations of drug-related workplace problems.

**Figure 5: Difference Between Employer Evaluations of Likely to Hire, by Applicant Group**

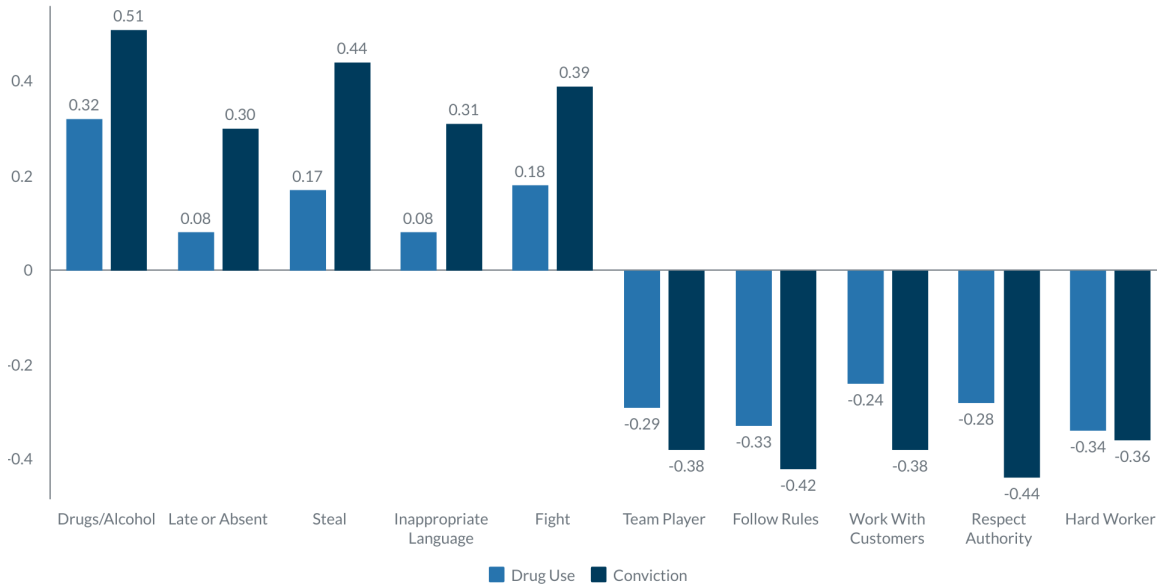


Note. The differences between the drug use and conviction groups, as compared to the control group, are significant at the  $p < .001$  level based on two-tailed tests. The difference between the conviction group and the drug use group is significant at the  $p < .05$  level.

## 2. Employers expect applicants with criminal records to engage in many undesirable behaviors on the job, even ones unrelated to the conduct indicated by the record.

We also asked employers about future workplace conduct they might expect from the applicants. Respondents reported the likelihood that applicants would engage in certain positive behaviors (be a team player, follow workplace rules, be a hard worker, work well with customers, and be respectful of workplace authority) as well as negative behaviors (be late or absent often, steal from the workplace, use inappropriate language, and get into a fight). Again, employers evaluated the control group most favorably, the applicants with the social media drug use signal somewhat less favorably, and the applicants with the convictions least favorably (see Figure 6). Moreover, because drug use is the only behavior directly signaled in the application materials, employers focused on repetition risk should expect the applicant with a conviction to be more likely to be under the influence of drugs at work but not to have unrelated problem behaviors like not being a team player or using inappropriate language. Instead, employers predicted that applicants with criminal records would be more likely to engage in a range of additional undesirable behaviors—from stealing and getting into fights to not working well with customers or respecting workplace authority—as compared to both the control group and the applicants with only the social media signal of past drug use. The breadth of anticipated problem behaviors is not only inconsistent with a specific focus on repetition risk but also consistent with the influence of generalized stigma.

**Figure 6: Difference Between Employer Evaluations of Expected Workplace Conduct by Applicant Group**

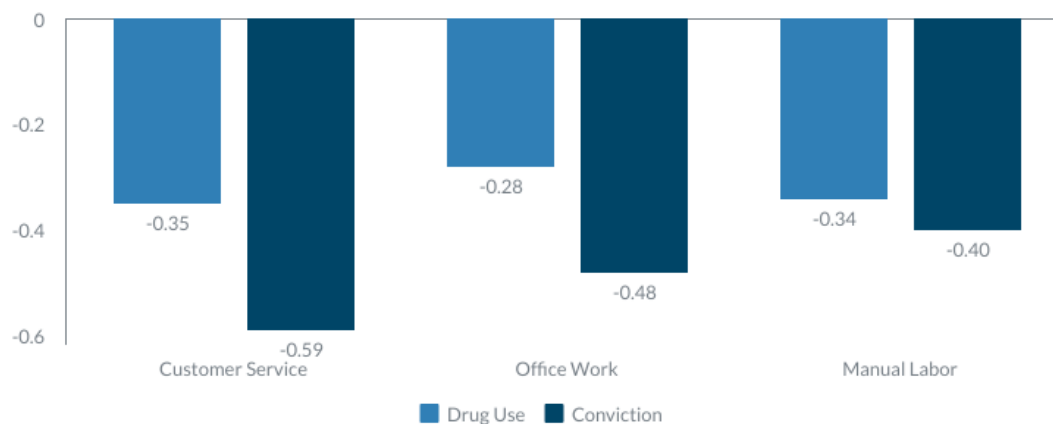


Note: The differences between the drug use and conviction groups, as compared to the control group, are statistically significant ( $p < .05$ ) with the exception of the “late or absent” and “inappropriate language” attributes for the applicants with drug use.

### 3. Employers penalize applicants with criminal records most in hiring decisions for higher status job positions.

We looked at employers’ willingness to hire across three job types: customer service, office work, and manual labor. Employers were most averse to hiring applicants with a record for customer service or office work. In contrast, for manual labor positions, applicants were evaluated similarly, regardless of whether past drug use was signaled by social media alone or also by a criminal record (see Figure 7). The increased aversion for applicants with records for higher status positions (customer service or office work) aligns with stigma explanations. Prior research also has shown that people with records are generally barred from higher status positions (Western, 2002; Sabol, 2007) but may be perceived as appropriate for lower status positions (Bumiller, 2015).

**Figure 7: Difference Between Employer Evaluations of Likely to Hire by Applicant Group and by Job Positions Requiring Customer Service, Office Work, and Manual Labor**



Note. The differences between the drug use and conviction groups are significant at the  $p < .01$  level for the positions requiring customer service and office work only. The difference between the drug use and conviction groups for positions that require manual labor is not statistically significant.

#### **4. Employers' aversion to hiring applicants with criminal records is not greater for customer service positions, where negligent hiring should be the biggest concern.**

We also considered a prominent variation on repetition risk explanations, which posits that employers fear hiring people with records because of the vulnerability to negligent hiring lawsuits if a worker injures someone on the job (Agan, 2017; Doleac, 2016). Such employers should respond negatively to criminal records rather than to other sources of information about past conduct, such as social media. One weakness with this explanation is that employers can be held liable for negligent hiring based on any information—not just criminal records—that should have alerted them to an elevated risk of harmful employee conduct (that is, repetition risk). Nonetheless, juries might prioritize criminal records specifically and anticipating this, employers would be most averse to hiring people with criminal records for positions where the risk of negligent hiring litigation is greatest. Because negligent hiring lawsuits can be brought only by customers or other third parties and not by coworkers, who are banned by workers compensation laws from suing their employers for negligence, any aversion based on negligent hiring concerns should be concentrated in positions involving customer service, rather than positions like office work that primarily involve interaction with coworkers.

Although we found that employers are less likely to hire people with records for customer service than for manual labor jobs, we find similar aversion in both customer service and office work positions. This similarity across positions of similar status but different negligent hiring exposure undermines negligent hiring explanations and supports a stigma framework. Likewise, a negligent hiring explanation—which focuses only on employers' vulnerability to lawsuits—does not account for employers' anticipation of a wide range of undesirable behavior from applicants with records.

Thus, our several findings, in combination, consistently imply that stigma plays an important role in employer aversion to hiring people with criminal records. Neither the employers' own concerns about repetition risk nor their projection of similar concerns onto potential juries in negligent hiring litigation can explain the pattern.

#### **Policy Recommendation: Limit Employer Access to Criminal Record Information**

Our findings indicate that employer aversion to hiring people with records reflects the stigma associated with criminal justice contact. Repetition risk alone cannot explain employer behavior. Consequently, permitting decision makers unrestricted access to and use of criminal records allows for forms of exclusion that are based, at least in part, on stigma and stereotypes associated with contact with the criminal justice system rather than purely practical business concerns.

The logical legal response is to limit employer use of background checks to those legitimately based on repetition risk, which is precisely what Ban the Box policies and its variants do. For instance, the most stringent laws allow employers to screen for records only after they have made a conditional offer of hire. If the employer then retracts the offer, the employer must directly connect the prior criminal conduct to the specific job position and must consider evidence of rehabilitation that makes reoffending (repetition) unlikely. This requirement permits screening that enables rational risk management addressing repetition risk, but it prohibits unrestrained access to records that allows stigma-driven hiring decisions, especially across-the-board discriminatory exclusions for all people with records.

Our findings also support other ways of limiting employer access to criminal record information. One approach would eliminate public availability of criminal history information in the first place, such as through the sealing or expungement of underlying court records. Recently, Pennsylvania instituted an automatic record sealing process under the Clean Slate bill that automatically renders criminal history information for some offenses inaccessible during background screenings, without requiring offenders to file petitions or pay fees.

Our findings also bear indirectly on the argument that limiting employer access to criminal history information will backfire by prompting intensified racial discrimination. The theory is that employers seeking to exclude people with records but deprived of individualized criminal history information will engage in broad-brush discrimination against groups among whom criminal records are more common, especially Black applicants (Agan & Starr, 2017; Doleac, 2016; Doleac & Hansen, 2016). Our findings do not address that empirical prediction, but they may influence its public policy significance. For instance, the same fear of perverse consequences would also support permitting pregnancy discrimination, assuming that a prohibition would prompt employers to discriminate against women generally to avoid the costs of potential pregnancy-related leave (Strahilevitz, 2008).

Even if employers are using criminal history information for rational risk management, criminal records are not a neutral source of information about past conduct. Criminal justice contact disproportionately impacts the poor, racial/ethnic minorities, and those who live in areas of concentrated disadvantage, through mechanisms such as racial profiling, prosecutorial bias, and sentencing discrimination. The result is that whether illegal conduct leads to a criminal record itself varies by socioeconomic status, leaving already marginalized groups to bear the brunt of criminal record stigma.

The combination of employer hiring decisions driven by stigma and the underlying sociodemographic bias in criminal record distribution strengthen the case for limiting employer access to criminal background information. Unfettered access to criminal records—among employers as well as other decision makers, such as landlords and colleges—may exacerbate long-term joblessness, low earnings, housing instability, and other inequalities among already disadvantaged groups disproportionately impacted by criminal justice contact (Desmond, 2012; Lageson, 2016; Wakefield & Uggen, 2010; Western, 2002). Unrestricted access also leads decision makers to overlook otherwise qualified individuals, the consequences of which increase as the number of people with records continues to grow. Regulating employers' access to and use of criminal history information can both combat hiring discrimination and advance broader socioeconomic equality.

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## Endnotes

- 1 We utilized a felony cocaine possession offense because drug possession has been the focal offense for landmark audit studies on employer response to criminal records (Pager, 2003; Pager et al., 2009). Second, using a relatively minor felony that can (but need not) result in incarceration helps to disentangle employer aversion to the criminal record from concerns about the effects of serving time in prison. Prior drug use also lends itself to credible signaling via social media.
- 2 We also presented respondents with a scenario involving arrest but not conviction; those results are reported in the full article and generally fall in between those with no criminal record and those with a conviction. We further varied the applicant groups by race but did not find significant differences between groups (Sugie, Zatz, & Augustine, 2020).
- 3 We assessed a number of alternative explanations in our analyses that are not included in this brief; see the full article for details. For instance, our results were robust after excluding decision makers who believed they were prohibited from hiring applicants with a criminal record and after controlling for firm policies about hiring applicants with convictions (Sugie, Zatz, & Augustine, 2020).