

# Legal Ambiguity in Managerial Assessments of Criminal Records

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*In an age of widespread background checks, we ask how managers in different organizational contexts navigate legal ambiguity in assessing applicants' criminal history information, based on interview data obtained in a recent field experiment. The study builds on institutional analyses of the social sources of workplace legality to describe how employers consider applicants with criminal histories. We find that some organizations set explicit standards to guide hiring decisions, providing concrete policies on how to treat applicants with records. Where such procedural mandates are lacking, however, hiring managers turn to a micro-rational decision process to evaluate potential risk and liability. These individualized approaches create inconsistencies in how the law is interpreted and applied across organizations, as evidenced by actual hiring behavior in the field experiment.*

Law and social science scholars have long noted the broad and ambiguous principles that guide laws regulating employment (Edelman 1992; Bybee 2000). Under such conditions, managers and organizations have had wide latitude to interpret and construct the meaning of legal compliance with antidiscrimination law. Today, perhaps the area of greatest uncertainty concerns the use of criminal history information. In 2012, the US Equal Employment Opportunity Commission was moved to issue a lengthy enforcement guidance document designed to clarify standards and provide “best practices” on how employers may check criminal backgrounds without violating prohibitions against employment discrimination under Title VII of the 1964 Civil Rights Act (EEOC 2012a). Although this guidance instructs employers to assess criminal records on an individualized basis, considering such factors as the nature of the crime, the time elapsed since it was committed, and the nature of the job, the extent to which these policies are adopted by hiring managers is unclear.

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Sparked partially by a nationwide “ban-the-box” movement—the “box” referring to the criminal history question on job applications—new court challenges are contesting the use of records, particularly nonconviction records, in employment decisions (Goode 2011). Moreover, state laws are also changing rapidly (NELP 2013), such that employers are taking disparate approaches in determining how and when to apply antidiscrimination law to the rapidly expanding class of workers with criminal records. State legal variation creates particular ambiguity for national firms, which may conform to the most stringent restrictions to ensure that all sites are in compliance (Watstein 2009).

It is now estimated that 12.8 percent of adult males have been convicted of felonies (Uggen, Manza, and Thompson 2006), with rates much higher among recent cohorts of African American men (Western 2006). Yet, the information yielded in routine criminal background checks extends well beyond felonies to include misdemeanor convictions, as well as arrests that never led to conviction. While 1.6 million persons were held in US prisons in 2010, there were more than eight times that number of arrests in that year—about 13.1 million (US Department of Justice 2011). With the advent of inexpensive Internet searches, most employers now routinely check applicant backgrounds (Bushway, Stoll, and Weiman 2007). Some firms formally discriminate against former criminal offenders, particularly for positions involving interactions with customers, confidential information, money, or children (Holzer, Raphael, and Stoll 2007; Society for Human Resources Management 2012). Many others, however, ask their managers to weigh the sort of mitigating factors identified by the EEOC carefully, including the type of offense committed and the time since it occurred (Holzer, Raphael, and Stoll 2007).

Building on this literature, this study seeks to understand whether managers do, in fact, have latitude in hiring decisions and, if so, how they decide to exercise it. Specifically, we ask how managers apply company policy when making individual hiring decisions about applicants with criminal records. We investigate this question at the individual level of analysis based on interviews with hiring managers that touch on organizational-level issues of hiring policy and broader societal-level trends, such as the expanding accessibility of criminal background information. Using a mixed-methods approach, we compare these self-reported accounts to their actual hiring behavior, as observed in an experimental field audit of the same workplaces. Our analysis thus speaks to this emerging legal debate on the use of criminal background checks by employers.

Despite great policy and public interest, however, there is little qualitative and contextual evidence regarding how employers actually interpret criminal histories in making hiring decisions. In particular, few studies have examined the effect of *organizational policies* on the everyday, individual-level decision-making process of hiring managers. Although survey research suggests that hiring authorities retain some flexibility in making evaluations about applicants, such designs are not well suited for situating these decision makers within the structure of their organizations or for detailing the processes underlying their decisions. Our approach therefore fills a gap in research on how employers think about, screen, and consider applicants with criminal records. We use in-depth interviews with hiring managers to learn how they navigate the competing dictates of civil rights protection and organizational prerogatives and compare these results with a subsample of our experimental data. We then describe

which organizational settings are more likely to grant “second chances” for applicants with criminal records. Finally, we conclude with a discussion of policy and practice.

## HIRING WITHIN THE LEGAL ENVIRONMENT OF ORGANIZATIONS

In contrast to conventional jurisprudence, law and society scholarship depicts the law-in-action as a culturally and structurally embedded social institution (Suchman and Edelman 1996). This approach emphasizes and highlights how formal legal principles are “altered, manipulated, elaborated, or ignored” by the social actors who confront them (Suchman and Edelman 1996, 907). While organizations have always been embedded in a broader legal, social, and economic environment, the increased legalization of the workplace in the late 1960s and early 1970s encouraged greater formalization of many managerial practices (Selznick 1969; Sutton et al. 1994; Sutton and Dobbin 1996). Neoinstitutional approaches to law and organizations posit that firms actively construct the meaning of legal compliance, engaging in deliberation and collective sense making as they struggle to find rational modes of response to complex and ambiguous law (Edelman and Talesh 2011, 106). Organizations are thus social actors, influenced by institutionalized beliefs about the legality and rationality of policies. As social actors, so too are they influenced by the particular stigma that attaches to criminal conduct and prevailing moral judgments that link criminal records to traits such as honesty and trustworthiness.

Organizations have responded to antidiscrimination law by constructing visible symbols of compliance, such as grievance procedures, equal employment offices (Edelman 1992), and “rational myths” about the appropriate response to law that have, in turn, been supported in court (Edelman, Uggen, and Erlanger 1999; Edelman et al. 2011). Employers’ perceived liability is similarly constructed, such that the *constructed* threat of liability often exceeds the *actual* legal threat. These perceptions of compliance and liability are then incorporated into organizational practices (Edelman, Erlanger, and Abraham 1992). Overall, such studies show a reciprocal or endogenous relationship between law and organizational practice (Macaulay 1963; Edelman, Uggen, and Erlanger 1999).

Today, there is far less legal ambiguity regarding discrimination on the basis of race and gender, but great confusion regarding use of criminal records (EEOC 2012b). This is partly the result of rapid legal change. As of July 2013, ten states and fifty-two municipalities had enacted ban-the-box legislation, many in the past five years.<sup>1</sup> To navigate such uncertainty, Frank Dobbin et al. (1988) identified three basic perspectives on the development of workplace legal protocols. In the first, a *rational systems* approach to legality is characterized by increased formalization, specialization, and bureaucratization to develop functional solutions in increasingly complex organizations. In the second, a *natural systems* perspective points to how firms manage risk as a means of survival and self-interest, leading to decision making as a method of control.

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1. These states include California, Colorado, Connecticut, New Mexico, Illinois, Hawaii, Maryland, Massachusetts, Minnesota (as of 2014), and Rhode Island (Harliss 2013; NELP 2013).

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Finally, an *open systems* approach focuses on the diffusion of new technologies or administrative procedures across organizations, as structured by the external context and environment (Dobbin et al. 1993). As Dobbin et al. (1988) point out, these perspectives are not necessarily inconsistent, though each calls attention to different processes in the emergence of workplace policies.

We here apply these perspectives to describe organizational responses to an environment characterized by three types of change: (1) an increasing number of applicants with criminal histories; (2) greater access to their criminal histories; and (3) shifting legal conceptions of the relevance and appropriateness of using these histories to make employment decisions. The rational systems approach exemplifies those firms that have constructed a formal organizational policy regarding the types of criminal records (if any) that disqualify employees. In these organizations, employers rely on formal hiring procedures rather than micro-rational, or individual-level, evaluations of risk. In contrast, hiring managers at organizations that more closely match a natural system do not have an organizational mandate on which to rely. Instead, they must individually assess risk and exercise discretion over the types of criminal histories they are willing to consider. In this perspective, managers—as social actors—must work to maximize their own best interests. Finally, the open systems approach directs attention to the macro-level processes guiding the diffusion and regulation of technologies for screening applicants. The large-scale blurring of public and private information brought on by technology brings new urgency to devising fair and effective practices, particularly as these practices are either formalized (in the rational systems view) or left to the discretion of individual hiring managers making daily assessments of risk (in the natural systems view).

To an even greater extent than in other areas of employment law, there is currently an absence of consistent, standardized legal rules governing the use of criminal records, particularly in the gray areas of low-level criminal records, nonconviction records, and the rights of private companies to screen applicants (EEOC 2012a; NELP 2013). Instead of attempting to characterize organizations within a legal compliance-noncompliance dichotomy, it is more advantageous in such cases to examine how they interpret and construct meanings of law and compliance within a broader institutional context (Sutton et al. 1994; Edelman and Talesh 2011). Consistent with this approach, we ask how employers construct meaning around the criminal offenses on applicant records and determine whether to hire those applicants, based on standing organizational policy, managerial decision-making processes, and secular technological developments. As employers encounter criminal records with increasing frequency, workplaces must consider the implementation of new workplace norms on how to process these criminal records and, in some organizations, transform these norms into formal policies. Before examining these policies, however, we review the current landscape regarding criminal background checks and the employability of those with records.

### CRIMINAL BACKGROUND CHECKS

By all accounts, conducting criminal background checks has become a standard personnel practice in many organizations. Estimates of the proportion of employers

conducting criminal background checks range from 45 to 87 percent (Holzer, Raphael, and Stoll 2004, 2007; SHRM 2012). One survey of California employers found that 60 percent reported that they always check criminal histories and an additional 12 percent indicated they sometimes check (Raphael 2011). A survey of 406 randomly selected human resources professionals puts the figure even higher, with 69 percent reporting that they check for all positions and 18 percent reporting that they check for selected positions (SHRM 2012). Apart from longstanding distrust of those with criminal records, the forces driving this trend appear to be the availability of records via technological advances, the increasing openness of state criminal history repositories, fears of liability, concerns for employee safety, and a desire to comply with state laws that may require checks for particular positions (Bushway, Stoll, and Weiman 2007; Bushway et al. 2007; Finlay 2008; Raphael 2011; SHRM 2012).

Legal ambiguity and complexity characterizes the practice of checking criminal records, as the law and practice varies significantly across states. On the one hand, legal barriers to employment for those with criminal records have risen sharply since the 1970s, when an initial survey by Hunt, Bowers, and Miller (1973) identified nearly 2,000 occupational bars or restrictions for applicants with arrest or conviction records. Since then, the number has risen so rapidly that the restrictions are rendered uncountable (May 1995; Clark 2005; Harris and Keller 2005), which would lead employers toward understanding legal compliance in ways that restrict applicants with records. On the other hand, any prohibitions against hiring such applicants must also comply with Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin—all factors associated with criminal histories to a greater or lesser extent. Occupational restrictions relating to criminal records are found at both the state and federal level (Ewald and Uggen 2012), with state and local laws preempted by Title VII if they require or permit “any act which would be an unlawful employment practice” under Title VII (EEOC 2012a). Therefore, if an employer’s exclusionary policy (such as a “blanket ban” for any criminal record) is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local restriction does not shield the employer from Title VII liability.

Further complicating employers’ understandings of legal compliance, the negligent hiring protections afforded when employees commit workplace crime also vary by state. For instance, in some states, certain evidence cannot be used in a suit against an employer if the employee’s prior crimes do not directly relate to the current crime. There are also incentives in some states to hire people with criminal records through insurance or bonding programs (Legal Action Center 2009). In Minnesota, the site of our investigation, the 2012 Statutes Index provides 143 separate links regarding background checks, addressing licensure for nursing homes, mortgage originators, limousine services, and other employers.<sup>2</sup> “Ban the box” has been implemented since 2009 for public-sector employees only (M.S. § 364.021) and expanded to all employers in 2014. Minnesota’s Department of Human Rights also warns employers that their hiring policy regarding criminal convictions may be discriminatory if a minority-group

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2. See <https://www.revisor.mn.gov/topics/?type=statute&id=S4357325&year=2012> and <https://www.revisor.mn.gov/statutes/?id=363A.08>.

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member's criminal conviction record is an absolute bar to employment, based on a 2012 statute (M.S. § 363A.08).

Historically, criminal background checks involved a material process of obtaining a paper record from the state or county. Today, however, most employers rely on a computerized private industry to obtain criminal histories: nearly 80 percent of employers in one survey were outsourcing record checks to a security establishment (Raphael 2011). The risks of not checking, compounded by the ease of checking, offer strong incentives for employers to investigate the backgrounds of applicants.<sup>3</sup> Nevertheless, even those who use official state repositories are likely to obtain inconsistent information. States' criminal history information varies widely, including which less serious crimes are counted and the length of time between the offense and its inclusion in the database (SEARCH Group 2001). More generally, the accuracy and completeness of records is consistently identified as the most serious problem in such databases (Harris and Keller 2005).

Recent advances in criminological research also have direct bearing on the relative risk of hiring people with criminal records. In particular, rates of reoffending decline precipitously with time, until the risk of new crimes among former offenders is statistically indistinguishable from that of the general population (Kurlycheck, Brame, and Bushway 2006; Blumstein and Nakamura 2009). While the time since the last offense is given some consideration by employers (SHRM 2012), the permanence of electronic criminal records likely exerts long-term effects on applicants' job prospects (Western 2006).

### EFFECTS OF CRIMINAL RECORDS ON HIRING

In addition to their powerful impact on social identity (Goffman 1963; Myrick 2013), criminal records are consequential for employment outcomes. There are now several strong experimental audit studies that test the likelihood that an employer will hire an applicant with a criminal record over a matched applicant without such a record. Most notably, Devah Pager has tested the effect of a felony record on employment in Milwaukee and New York City, providing convincing evidence that a serious criminal record significantly reduces the odds of employment—particularly for African American men (Pager 2003, 2007; Pager, Western, and Bonikowski 2009). These studies reveal that employers view minority applicants without records as essentially equivalent to whites just out of prison, while African Americans with records are all but disqualified from consideration.

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3. There is no federal oversight to ensure the accuracy of records, but there are federal regulations regarding permission to conduct various types of background checks, including criminal histories. Private background check companies are regulated by the Fair Credit Reporting Act, unless the background check is conducted directly with a state's department of public safety, which is not considered a consumer reporting agency under the FCRA. This includes all private companies that furnish background reports, such as credit, driving, and criminal histories. Thus, when employers acquire a criminal history report, the employer must disclose to the applicant that they are obtaining a consumer report and must obtain written permission from the applicant. This does not guarantee the accuracy of obtained records, but merely mandates applicants' consent.

Of central relevance to the current study, Pager and Quillian (2005) conducted a telephone survey followup with the employers Pager audited in Milwaukee. This made it possible to compare employer beliefs to actual hiring decisions in the field experiment. They found a clear discrepancy: employers who indicated a greater likelihood of hiring ex-offenders in the survey were no more likely to hire an ex-offender in the audit. In addition, whereas the survey showed no racial discrimination in hiring preferences, the audit data revealed a stark racial divide. In short, employer statements about their hiring clearly differed from their actual behavior. The authors conclude that employer surveys, even after making adjustments for social desirability biases, are insufficient for understanding the depths of employment discrimination.

As noted above, large-scale surveys have yielded important information on the rate at which employers conduct background checks (Holzer, Raphael, and Stoll 2004, 2007). Such methods can also assess how employer characteristics and preferences affect their likelihood of hiring those with criminal records. Stoll and Bushway (2007) analyzed a survey of 619 establishments in Los Angeles, finding that employers who initiated criminal background checks were less likely to hire people with criminal records. Raphael (2011) similarly links background checks to employers' stated preferences: 33 percent of employers who report that they would definitely accept a worker with a criminal history indicate that they always check criminal backgrounds, compared to 70 percent of employers who report that they would definitely *not* hire such a worker (Raphael 2011).

Large-scale employer surveys, audit studies, and interviews are all critical to understanding employment policies. Survey and audit research is particularly valuable for linking workplace characteristics to hiring practices. Such methods are limited, however, in their ability to speak to the processes or mechanisms that drive hiring decisions. Discrimination, a notoriously difficult phenomenon to measure (Pager and Quillian 2005), is especially problematic for hiring managers concerned with compliance with complex and ambiguous law. Though closed-ended survey questions can provide information on hiring processes, it is difficult to assess the extent to which the responses of managers are colored by social desirability bias. In this study, we analyze in-depth interviews in which hiring authorities provide fine-grained descriptions of their decision-making processes and examples that help contextualize their approach, as well as a direct comparison to experimental data.

## METHODOLOGY

We interviewed employers during the course of a study modeled after Pager's (2003) Milwaukee audit study. In our audit, we sent same-race pairs to 605 randomly selected establishments in the Twin Cities metropolitan area, with one applicant reporting no criminal history and the other reporting a low-level misdemeanor record (for a detailed discussion of the audit design and method, see Uggen et al. 2009). For the experimental audit portion of the study, young male "testers" applied for entry-level jobs using fictitious identities. All entry-level advertisements were selected, so long as they required no special skills or licenses, instructed applicants to apply in person, and were located in the seven-county Twin Cities metropolitan area. The eight testers were

grouped into pairs by race (with two pairs for each race), selected on the basis of shared physical and personal characteristics. Each week from August 2007 to June 2008, one tester in each pair was assigned to the treatment condition: a single misdemeanor disorderly conduct offense. Over the course of eight months, each pair submitted close to 300 applications at 150 job sites, with each tester assigned to the treatment condition for half the audits. Our primary dependent variable was an employer “callback,” measured by an offer of employment or an invitation for a second interview (whether in person or through email or voicemail).

We then conducted one-on-one interviews with a subsample of the audited hiring authorities. These employment sites were randomly selected from the sample of workplaces we audited and were thus all located in the Twin Cities metropolitan area and subject to Minnesota state employment law. Appendix 2 shows sample characteristics of the 600 audited workplaces from which the interview sample was drawn, as well as those of the subsample itself.<sup>4</sup> Hiring authorities were not informed that they were part of the original audit; rather, they were invited by telephone to be interviewed about their hiring and screening process for a university research project. In total, we conducted forty-eight in-person interviews with these hiring authorities.<sup>5</sup>

Interviews were conducted with the person at the firm identified as the “hiring manager,” so that we could assess the gate-keeping process of selecting applicants to move forward to interviewing and eventual hiring (at which point human resources personnel often become involved). This allowed the interview to focus on the *application* of company policies, rather than their origins. By comparing the name and physical description of the manager recorded in the tester response form (completed immediately after each audit) to that of the interviewed manager (using the demographics supplied by the interviewee), we found that thirty-six of the forty-eight interviewees were the same manager observed in the field experiment. For the remaining tests, four employment sites did not have a manager on site during the audit, seven sites managed hiring through a team of shift managers (typically a corporate-owned chain restaurant or hotel), and in a single case there was a new manager hired after the audit was completed, but before the interview was conducted.

The thirty- to forty-five-minute recorded interviews included structured questions about the hiring process, workplace culture, and experiences with hiring employees in the past. These carefully structured questions, including those that allowed us to categorize the organizational environment, were paired with open-ended probe questions to allow interviewees to expand on their responses and introduce new concepts to

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4. The subsample is similar to the full sample with regard to industry, perhaps with a slight overrepresentation of warehouse/labor and underrepresentation of retail. The callback rate to the tester with the criminal record was also similar to the full sample (though the callback rate to the no-record tester was slightly higher among the interviewed subsample).

5. The 48 percent response rate in our subsample is similar to other interview-based studies of organizations, particularly Pager and Quillian (2005), who reported 58 percent in a similarly designed study. Among those fifty-two nonresponders, 61 percent never returned our several requests for an interview. Of the remaining who outright refused, only four did so on grounds of restrictions at the corporate level. It should be noted that several corporations are included in our interviewed subsample, such that our results are likely not biased by this form of refusal. The nonresponders were similar to responders on key characteristics. For example, the nonresponders were similarly distributed among the three largest industry categories of restaurant (26%), warehouse/labor (22%), and retail (18%).

the interview guide. Interviews also included a set of fixed-choice questions in which interviewees reported their level of concern about factors such as the time since an offense occurred, the type and level of offense, and case disposition.

We began interviews by asking employers to describe their organization and their role within it. Employers were asked about their hiring process for all applicants and, specifically, whether part of this process included criminal background checks. We then asked them to rank and discuss the severity of various types of criminal records and to share examples of when they confronted such records and how they reacted. In addition, they were asked about other characteristics of applicants and how this information was used in the context of making hiring decisions.

Interviews were recorded and fully transcribed and all qualitative analysis was conducted blindly. That is, coders were unaware of the tester's race in the audit, the specific name of the employment site, and all outcomes and covariates, including whether the employer called back either tester in the audit. Utilizing a grounded theory approach (Glaser and Strauss 1967), the first author and two research assistants initially coded data according to themes outlined in our interview guide. After completing the first round of coding, the team reviewed each transcript, looking for common themes and coding like categories of data together. Each coder placed conceptual labels on the events, experiences, and feelings reported in the interviews, which resulted in a set of axial codes. Coder-specific axial codes were combined thematically into a master list of major codes and subthemes. The first author and research assistants then reread each transcript and labeled passages with names denoting the themes present within each. The major codes and axial codes were the following: reasons for checking/not checking (subthemes: information seeking, assessing trust, cost, liability), reading records (subthemes: understanding information, clarifying questions, assessing severity), hiring applicants (subthemes: discretion, company policies, hiring experience), mitigating factors (subthemes: type of offense, time since offense, in-person contact, giving second chances), and excluding factors (subthemes: workplace harm, personal liability).

The first author then reread all forty-eight transcripts to select quotes for publication, ensuring that chosen excerpts accurately reflected the interview sample as a whole. Selected quotes were representative of the broader theme in which they were categorized, with a particular focus on themes reflecting our research questions: how managers assess applicants with criminal records and make callback decisions based on this information. All dichotomous and Likert scale question responses, including evaluations of the sample criminal record profiles, were analyzed quantitatively. Finally, we directly compared the results of the broader experimental audit with interview responses, linking employer policies to the probability of calling back testers with and without criminal records.

As shown in Appendix 1, interviewees were mostly white and male, composing about 94 percent and 63 percent of the employer pool, respectively. Most had worked as a hiring manager for over three years (83 percent) and had completed college-level coursework (65 percent). Their firms represented a wide range of industries, with restaurants (31 percent), warehouse/distribution companies (33 percent), and hotels (10 percent) being most common. All names referenced below are pseudonyms to protect the confidentiality of respondents.

## RESULTS

We begin by asking how entry-level employers understand the current context of criminal background checks. This “open systems” examination allows us to engage the general diffusion of criminal record questions on applications, as well as that of formal criminal background checks. We then categorize the employment sites in our sample according to the level of discretion granted to the hiring authority, such that some sites adhere to a rational system and others to a natural system. Next, we examine employer callback behavior in the audit study, both in relation to these categorizations and to their expressed willingness to hire in the interview. Finally, we identify several reasons why hiring managers are willing to overlook the stigma of a criminal record and grant such applicants a second chance.

### Acquiring and Interpreting Criminal Records

#### *Decisions to Ask: Why Ask?*

Two-thirds of employers in the sample reported they conduct formal background checks. Nearly half of those who check use a private company, while a few others used public sources, such as the local police or county and state records. Their first point of contact with criminal records, however, is often a simple question on the job application form. Eighty-five percent of employers in this sample said they ask about criminal records on job applications. We analyzed the nearly 600 job applications collected in the experimental audit portion of this study, finding surprising diversity in how they inquired about criminal records. Nearly 34 percent of those who did inquire asked about felonies only (40 percent in the interviewed subsample), while approximately 19 percent asked about felonies and misdemeanors specifically (20 percent in the subsample), and another 44 percent asked about any criminal conviction (40 percent in the subsample). Three percent of employers asked about *any* contact with the criminal justice system, including arrests or jail time (2 percent in the subsample).

Regardless of their own discretion in hiring applicants with records, the three most cited reasons for conducting background checks were: (1) to check for job-related offenses; (2) to assess applicant honesty; and (3) to protect themselves and their company. For all these reasons, the criminal record often served a gate-keeping function, immediately removing a class of applicants from the pool. The most “common-sense” reason to check, according to employers, was to determine whether the offense would directly affect the applicant’s ability to work. According to Megan,<sup>6</sup> a site manager at a chain hotel:

You kind of go with if it’s job related or not, how long ago it was, and if they disclose something on the application that would make a difference. . . . So there is not strict policies I would say, but it seems common sense and if it’s job related or not.

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6. Refer to Appendix 1 for a table providing descriptive information on each respondent.

Some employers compared responses on job applications against data obtained from their formal background checks, attributing any discrepancies to applicant dishonesty. Connie and Ted, hiring managers at a manufacturing and distribution warehouse who were interviewed together, told us: “Well you know I’m just going to say from previous experience about 50/50 are honest and I’ll say about 50 percent gloss over it in some manner.” Connie then added:

Honesty goes a long way and I do have some individuals that come in with a very bad record and they’re very honest with explaining what has happened . . . and then I have applicants that have glossed over it or have lied in the interview about a record. So there is that concern about their trustworthiness.

Criminal records were thus used, in part, as a means to assess honesty and moral character—“moral” in the sense of conforming to right or virtuous standards of conduct. An accurately reported record, as well as the absence of a record, gave managers greater faith in an applicant’s integrity and trustworthiness. Olivia, a supervisor at a nursing home, also said she compares the self-reported criminal history on the application against a formal background check, which often backfires for applicants:

I find that a lot say they haven’t done anything and their record comes back serious—even though during the interview I tell them that our company conducts a thorough background check, they don’t take it seriously. Those that are honest have a better chance.

These employers tended to accept the background check information at face value, despite research suggesting inaccuracies in criminal history databases (Harris and Keller 2005). Some employers retain criminal background information as a form of insurance or self-protection in case they need to take legal action against the employee in the future. Shirley, a manager at a country club, explained, “I’ve got a little piece on there that frees us up if we ever needed to do anything legal. An attorney put it together.” Don, the plant manager at a warehouse, said:

They have to sign a consent form for their background and that has to go through HR. That isn’t really a decision maker; it is just something to have. We never really judge anybody if they have a criminal background. It is just something to have [for] referencing. You never know who you are hiring. It may justify something major if he is getting in a fight with somebody in his first week here, if he has got a bad criminal history.

For these employers, asking about criminal records on applications functioned more as an information-gathering or protective strategy, as opposed to an immediate bar to employment. For managers who were allowed personal discretion in hiring, however, asking about records was not always an important step in the hiring process.

### ***Decisions to Ask: Why Not Ask?***

Asking about criminal records and formally conducting background checks was unimportant to some employers: 15 percent did not ask on the application, and about

a third never conducted formal checks. There were pragmatic and philosophical reasons for this decision. First, some found the information from background checks uninformative or irrelevant to their hiring process. Second, some found it too costly. Third—and most frequently for these employers who do not check—the managers indicated that their own experience and sophistication in evaluating applicants was simply more helpful to them in the decision-making process.

Several employers in the sample spoke to a combination of these factors. Justin, the kitchen manager for a chain restaurant, explained the organization's decision not to check:

I've never done an official background check for as far as someone with a criminal record and everything, so I don't know what kind of details they're giving. . . . And the fact that it costs money, I would never bother with it. If it concerned me that much I just wouldn't be hiring that person if it cost me money to look into their background.

Ryan, the general manager at an independently owned restaurant, provided reflective responses to this and other questions. He maintained that his managerial experience could provide a better assessment of a good applicant than a criminal background check—a theme that arose repeatedly across interviews. As Ryan described his process:

You know I don't do any kind of formal background check . . . to be honest with you, I do more, I mean personally I can get more out of figuring out somebody and what they're made of by talking to them better than I can what somebody else is trying to tell me about them. . . . If someone has gotten in trouble in the past it's not always going to be an accurate reflection of who they are now.

For the minority of employers in our sample who did not check backgrounds, the added step of conducting a background check simply did not enhance their existing processes. As described next, this lack of added value is often due to the difficulty of understanding criminal records.

### *Understanding Criminal Records*

The sheer increase in the prevalence of employers who conduct background checks has been aided by the technological ease of obtaining them. This broad macrostructural trend is perhaps best explained by “open systems” perspectives on the interaction of organizations and their environments, here focusing on the diffusion of technologies and administrative procedures across organizations (Dobbin et al. 1993). Many employers expressed satisfaction with the services they used to conduct background checks. Bill, a manager at a car dealer who told us he was satisfied with his service, said, “I would say pretty good because I would say we're shocked sometimes . . . with what they haven't told us. Or even on the other note how truthful they were.” When asked whether he thought he was getting all the information he needed, Bill said:

I don't know if we are or not, there's really no way to know for sure. But then again we're not hiring someone to watch over Fort Knox either, you've got to

understand. Again we'll look at their past, their history, and their patterns, that's what we really look at. Trust me, if the guy or the gal was in there for any major criminal problems it's going to be on there.

For this manager's purposes, the service provided information sufficient to meet his needs. Some employers, however, did not always understand the information they were provided by background check companies. For instance, Megan, a chain hotel manager, said she had difficulties interpreting the records: "You always have some sort of: 'what does this mean?' At my previous job I did a lot more of the background checks and sometimes I'd have to look things up and you wish you could just ask them: 'what does that mean?'" Megan also told us her company struggled with choosing a vendor for the background checks:

We were concerned if it was catching things or not, so we ended up changing companies—we ended up changing if it was doing a nation-wide search or if it was doing background checks on certain counties you put in . . . so, OK they said they've lived in these counties, we'll do background checks on those counties. Let's say something happened elsewhere, you would not know. So it is always kind of in the back of your head, am I really getting everything on this person? And how are you ever going to be sure you catch everything without spending thousands of dollars on a background check?

Connie, who oversees hiring at a manufacturing plant, told us she has had to call her vendor for an explanation of what the criminal background report meant:

Occasionally I have to call them to get clarification. Part of that is how our legal system classifies criminal charges. Sometimes there might be something unusual. I'll give you an example. I have seen somebody being charged with a misdemeanor for playing a game of chance. And I contacted them, I said, "what does this mean?" So there are some times it's more of not knowing how the legal system and their jargon . . . you read some of the descriptions and you don't understand what exactly it is. What this person was accused of may be abbreviated, and you go, "well what does all this mean?" Sometimes you'd like someone there to give you more information about it . . . you're kind of guessing sometimes. It might be missing dates. It's like, well how do you make the decision? Sometimes it's not real thorough. So it's like, well, you make the decision based on what you do know I guess.

Consistent with an open systems approach, new technologies and services for conducting criminal record checks have rapidly diffused across employers sharing similar problems of legal compliance. In this case, technological shifts have helped create an emerging workplace norm of checking backgrounds, even for non-work-related offenses. Our interviews, however, reveal that the utility of these checks is not always apparent, particularly when managers encounter difficulties in understanding criminal history reports or obtain contradictory information from different private vendors. Although a broader open systems trend is clearly evident, there is nevertheless variation across firms in how that information is gathered, utilized, and interpreted. And even with a wealth of information available to them, managers still rely heavily on

their own subjective, personal interactions with applicants, though the ability to use such information is directly tied to the amount of discretion afforded to managers within the organizational context.

## Discretion in Hiring

### *Natural Versus Rational Approaches to Hiring*

We categorized workplaces according to the processes they used to assess applicants with criminal records, distinguishing between those that allow managers to exercise personal discretion and those that must follow a company policy that dictates which (if any) criminal records are permissible. For this categorization, we rely on two indicators of an organization's response to the legal ambiguity surrounding criminal records: (1) whether the firm established formal policies guiding consideration of such records—indicating a “rational systems” approach—and (2) the degree of discretion hiring managers may exercise in assessing applicants with records, with high-discretion workplaces indicating a “natural systems” approach to hiring. These categorizations are based on self-reported hiring practices in response to the interview question: “What are the company's current policies for hiring those with a criminal record?” This question was followed by one of two follow-up probe questions: “Is there anything formally written down regarding this—could I see this?” (for companies indicating there were policies), or: “So, is it largely discretionary or up to you to decide?” (for companies lacking formal policies).

When we put these questions directly to the hiring managers in our sample, thirteen of the forty-eight participants reported there were formal company policies that dictated their responses to applicants with criminal records, exemplifying a rational systems approach. In contrast, thirty-five of the forty-eight participants reported that they had great individual discretion in hiring, indicative of a natural systems approach. Although these labels reflect the decision-making style of hiring managers, they also describe the organizational constraints under which such managers work. Hiring authorities explained whether and how they could use discretion in handling criminal records, based on the amount of independence the organization allowed. Although managers may draw on some of the same managerial skills in both rational and natural systems (i.e., using a criminal record as a proxy measure for applicant honesty), the distinction between these categories falls directly into the discretionary power of a manager to *actually hire* an applicant with a criminal record. In a rational systems approach, company policy dictates which criminal records (if any) are permissible. In a natural systems approach, a lack of company policy leaves managers to assess the relative severity of particular records and to make hiring decisions based on their own discretionary process.

### *No Discretion: A Rational Systems Approach*

Some companies had formal dictates on hiring those with criminal records, affording the hiring manager no discretion in such consideration in hiring. At one

end of the extreme, several companies in the sample were simply not permitted to hire applicants with any form of criminal record. This automatic disqualification from the applicant pool was most apparent in nursing or personal care settings, or in corporate settings. For instance, Debbie, the human resources manager at a disabled adults care center, told us, somewhat apologetically: “Because we are licensed by the county and the state, our hands are kind of tied when it comes to those rules—and that’s just the way it is.” Patty, a manager at a different nursing home, had a less sympathetic view on the issue, saying, “Basically, we’re not going to put the fox in the chicken coop. . . . I heard that way back from an HR mentor about twenty-five years ago.” In some instances, company policies directed hiring managers to disqualify applicants based on certain terms, such as type of offense or time since offense, as discussed in detail below.

The most prevalent practice in this organizational context is for a hiring manager to submit a background check to a corporate office and then simply wait for a yes or no, without receiving any other contextual information. Mark, the manager at a distribution company, learns whether he can hire applicants through such a process: “I’ve never seen [the criminal history report]. When I talk to the guy in HR it’s pretty simple, he doesn’t get really specific, he’s pretty general, because all we’re looking for is a yes or no, can we hire him or not. . . . I don’t make that decision; I don’t see that end of it. That’s decided before it gets to me.” In these settings, the hiring managers’ interpretation of the criminal record is not a necessary component to the hiring process. These organizations represent the strictest version of the rational systems spectrum in terms of providing hiring managers with explicit “yes or no” direction in how to manage applicants with criminal records. The meaning of compliance with ambiguous legal dictates is thus decided by a specialized personnel professional as part of a formal bureaucratized decision-making process.

### ***Discretionary Consideration: Natural Systems Approach***

For those managers with the discretion to hire applicants with records, the process of calculating the risk of hiring someone with a criminal record is more complicated. The level of discretion for individual managers maps closely onto the organizational structure. Managers at firms with codified policies rely less on their own calculations of risk, whereas natural systems organizations that lack official policy are entirely dependent on the discretion, experience, and perception of managers. Mike, who manages an upscale chain restaurant, explained his approach to this process: “I have never turned anyone away because of their record. It has always been because of their record and other things.” Though many of the employers in this position were satisfied with having this power, new considerations arose, particularly concerns of liability and disruption to the company.

Liability was a central issue for those employers with high levels of personal discretion, where the weight of the decision would rest heavily on their individual choices rather than on official company policy. These discussions touched on concerns about both personal and professional liability in a “litigious society.” Jessica, the manager of an upscale chain hotel, expressed this anxiety:

Well, certainly in the world of HR, negligent hiring and negligent retention certainly weighs heavily on our minds. We live in a very litigious society and I know that if I were to hire a committed sex offender, for example, and he were to be found lurking in the [pool] where we have children, I'd be in big, big trouble. I mean above and beyond personally I couldn't do that, but professionally it could be very difficult for the company.

Some managers were more risk averse and attempted to protect themselves by avoiding applicants with criminal records. Gary, the general sales manager at a car dealership, told us simply: "Do I think they deserve a second chance? Oh, sure. I'm just not the one that's gonna risk millions of dollars on them." Lisa, a manager at a retail clothing store told us: "Overall I am a really skittish person I guess. I'm a scaredy-cat. I'm very protective about this store and my employees, because if anything happens it essentially falls on my shoulders so I have to take a lot of things into account when I hire people."

This sense of personal liability also translated into concern that hiring someone with a criminal record would disrupt the company or put other employees in danger. These were central concerns for Matt, a hiring manager at an independently owned restaurant: "Well, employee safety for one. And all around reputation of the store, I wouldn't want to jeopardize the little family we've got here." Losing customers was never far from their minds, especially for those in noncorporate or smaller settings. For example, Dwight, operations manager for a delivery company that deals with many different clients, said, "I don't ever want to be in a position where the decision I have made has negatively impacted the customer. Because they may not be a customer again." With these views on discretion in mind, we next consider how this ambiguity translates into practice through a comparison of the audit outcomes.

### *Discretion in Practice: Audit Versus Interviews*

We next compare these self-reported organizational categorizations to the experimental data collected in the audit. When directly asked whether they would hire an applicant with a criminal record, over half the rational systems employers (54 percent, or seven of thirteen sites) responded yes. Among natural systems employers, 83 percent (twenty-nine of the thirty-five sites) reported yes. Thus, in the interviews, managers with high levels of personal discretion reported a willingness to consider other qualities of the applicant and overlook the criminal record, based on their own individualized assessment.

Based on their hiring behavior in the experiment, we label employers who called back only the no-record tester as the "stigma" group, and those who called back the tester reporting the record (or both testers) as the "second chance" group. Table 1 cross-classifies the callbacks by the rational and natural organizational approaches. For rational organizations, there was consensus on the applicants, regardless of criminal record: in each test, rational organizations (those where managers rely on policies) called back either both ( $N = 4$ ) or neither ( $N = 9$ ) testers, showing no preference on the basis of the low-level criminal record. Thus, the dictates of the organization appear to

**TABLE 1.**  
**Comparison of Audits to Interviews**

Audit Result	Natural Organizations (Discretion)		Rational Organizations (Policy)	
Called back neither tester	18	51%	9	69%
“Stigma” (only tester <i>without</i> criminal record)	10	29%	0	0%
“Second chance” ( <i>both</i> testers/ <i>only</i> tester <i>with</i> criminal record)	7	20%	4	31%
Total	N = 35		N = 13	

**TABLE 2.**  
**Comparison of Stated and Observed Hiring Decisions**

	Stated Preference	
	Not Willing to Hire	Willing to Hire
<i>Observed Audit</i>		
No callback	9 (75%)	28 (78%)
Callback	3 (25%)	8 (22%)

put both equally qualified applicants on exactly the same footing, with no applicants in the “stigma” group. In contrast, natural organizations (those where managers have discretion) showed a preference for testers without a criminal record ( $N = 10$ ), compared to only the tester with a criminal record ( $N = 3$ ) or both testers ( $N = 4$ ). Why might we observe these differences?

Given the small sample size, these results must be interpreted with caution. Nevertheless, the pattern suggests that the high level of discretion afforded managers in firms with natural systems processes may lead them to be concerned with personal liability, as our quotes indicated. This leaves these managers in a vulnerable position if a hiring decision results in a negative outcome. In contrast, rational systems processes provide managers with the “cover” to discount low-level records. Relying on company policy, they are less personally liable for hiring decisions. Instead, formal policies provide consistent direction to managers, dictating whether and how criminal records are permissible for new employees, as reflected in our callback results for this group. Yet, without the formal dictates concerning criminal records, those with discretion appear to err on the side of caution. For instance, for the self-professed “scaredy-cat” Lisa, the decision to hire “essentially falls on [her] shoulders” in the high-discretion, natural systems workplace she manages.

Table 2 cross-tabulates an employer’s stated willingness to hire an applicant with a criminal record with its observed callback behavior.<sup>7</sup> The results show little association,

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7. We also disaggregated these results by the race of the tester (not shown, available from authors). Although the overall callback rate is lower for African Americans than for whites, the race-specific patterns

suggesting that it is the workplace environment that drives hiring behavior in the audit, rather than the stated individual preferences of the manager. Moreover, the expressed willingness to hire applicants with records is not matched by observed behavior. These results confirm Pager and Quillian's (2005) finding that employers who indicated a greater likelihood of hiring ex-offenders in a telephone survey were no more likely to do so in a paired field experiment. We highlight this discrepancy to foreshadow our next set of interview results, as many managers provided rich descriptions for why they *would* hire an applicant with a record, yet neglected actually to do so in our audit.

### **Providing a Second Chance: Why Hire Some Applicants with Criminal Records?**

Three central themes emerged in employer accounts of hiring applicants with criminal records. First, experience and sophistication again plays a key role in how managers consider these applicants. Second, applicants themselves can compensate for their criminal records based on their personality and ability to make in-person contact with hiring authorities. Third, particular details about the offense (e.g., its timing, severity, legal outcomes) and applicant characteristics help guide hiring decisions by providing important context. These bits of information clearly affected a firm's willingness to hire applicants with records, particularly in natural systems or discretionary organizations, elucidating why employers might grant applicants with records a second chance.

#### *Employer Experience*

Some employers told us they draw on their hiring experience and sophistication in evaluating candidates based on little information—relying, for instance, on personal interactions and initial impressions, rather than a background check form to learn about an applicant's honesty. Janet, who runs a warehouse that distributes health products, told us, "I think there is a lot of other factors that you look at as far as their experience, what is your pool of other candidates; you know, there is so many other things you factor into that." Julie, who works for a local chain dry cleaner, emphasized the discretionary nature of this process: "I can't say that there is a magical formula. I think that you get a sense for somebody when you sit down and talk to someone."

The hiring managers also described a practical need to see beyond the record to obtain and keep dependable employees in entry-level and low-wage positions. Plant manager Don told us he enjoyed having the discretion to hire applicants with criminal records because "I would hate to not get a good person because of a record." Later in the interview, he summarized this process:

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parallel those shown in Tables 1 and 2. In particular, we find similar callback rates in natural organizations in which managers are afforded discretion (see Table 1) and similar callback rates among managers expressing a willingness to hire (Table 2). In light of the small numbers when cross-classified by race and our primary focus on criminal records, we present pooled rather than race-specific results.

If you try to never hire anybody with a record you have a harder time finding employees. Plus people who make mistakes got to give people a second chance. Like some . . . thing[s]—they are years ago.

For Don, and many other hiring authorities, information and context are key currency in determining an applicant's employability—and they got the best sense of this information in their personal interactions with applicants.

### *Applicant Characteristics and Personal Contact*

When an offense was reported on a job application, hiring managers often described seeking other traits to balance it against, or even using the criminal record as a barometer of the candidate's honesty and humility in making a mistake in the past. The criminal record thus functioned as another piece of information used in their calculations of risk. Justin, a restaurant manager, told us that he preferred it when candidates were candid about their criminal record on the job application itself, prior to any background checks: "if anything, people writing it down and telling me what they [pause]—admitting it to me before being questioned. A little more on the honest side almost helps them out a little." In these situations, how the candidate relayed the record to the employer took on greater importance in assessments of character and honesty than the existence of the record itself. Zach, manager of a Mexican restaurant, referred to "personality and experience":

It's on a case by case basis. If the person has a good personality and I can read the person well and I feel that they are an honest person and they had an honest mistake in their past, [then] it's a mistake that they had in their past and I'm willing to move on from that. That doesn't affect my decision-making process as much as other elements . . . like personality, experience.

Don also emphasized honesty:

What I do like in the application is that people do put that on there: "Yes but it was fifteen years ago, I was a stupid kid." People do write that stuff down on our applications. Which is actually nice. They don't have to. It is nice that they are being honest and up front sharing that information.

Personal contact is key in this process of information gathering. Warehouse manager Mark, for example, wanted to look applicants "in the eye":

The thing about filling out an application and doing background checks is: it's all paper. I actually talk to the person. If they get to the point in our company where we're doing a background check, I've talked to them. So I at least, I've looked [him] in the eye, he's answered some questions, I watch the way he reacts, I watch his mannerisms. Do I understand people totally? No. But at least I've seen this individual once. All they've seen is a piece of paper . . . [some hiring managers are] going off of black and white and maybe that's the way it should be because feelings aren't involved, but I don't think it's right all the time.

When asked whether there was anything in particular that compensated for an applicant's criminal record, restaurant owner Cindy cited the following: "In-person interactions. We hired someone with a felony conviction of armed robbery, solid kid about 18 years old, he worked for us for 7 years—eventually became a manager. He was just really upfront about his regrets. Seemed genuine." In contextualizing the criminal record, the employers referred less to formal credentials that might offset the record (e.g., an advanced degree) than to judgments about personality or character. While the personal attributes of the applicant are clearly important to managers who exercise discretion in hiring, attributes of the criminal offense also guide individual decisions and company policies. In particular, perceptions of offense severity shape both the codified rules of rational systems and individual judgments in natural systems.

### *Context of Offense*

Three attributes of the criminal record helped guide employer decisions: the severity of offense, the time since the offense, and the legal outcome of the offense. To measure this, hiring managers were asked to compare various criminal offenses and rank their severity. Sixty percent of the hiring managers said they make a distinction between felonies and misdemeanors and, overall, employers rated the seriousness of a misdemeanor at 4.2 on our ten-point severity scale, with a standard deviation of 2.5. Felonies, on the other hand, were ranked at a mean of 8.2 with a standard deviation of 2. Nancy, the owner of a sports bar, joked: "You can get a misdemeanor for just about anything," and Megan, who managed a chain hotel, said, "I think the distinction between the two is big, especially if it's job-related. Felonies are obviously bigger crimes, so you look at those more carefully. But if they just have a misdemeanor and it's not really job-related, I think we kind of overlook that."

Of course, not everyone overlooked misdemeanors. Rebecca, general manager at a chain hotel, disagreed: "I guess I just really wouldn't see a distinction between the two. If you check the 'yes' box on the application to begin with . . . I guess I mean I make a judgment at the beginning. I don't really see that much of a difference between a misdemeanor and a felony; I just see that . . . they have a record."

Some managers consider the time since offense as important as the type of offense. Janet explained to us: "Patterns are important. I think you can't ignore those, especially if the charges ride right up to the current year. I think it's different if someone had some issues and this was back five, ten [years ago] . . . if there is a pattern of poor choices let's say then that leads you to the belief that, boy, I'm not sure whether or not . . . you want this kind of person working here." Figure 1 shows how the type and timing of the offense interact, such that employers ranked a misdemeanor last year at the same level of severity as a felony ten or more years ago. This response comports with research showing a sharp drop in the likelihood of recidivism after approximately seven years of crime-free behavior, at which point an applicant with a criminal record poses no greater risk of offending than the general population (Blumstein and Nakamura 2009; Kurlycheck, Brame, and Bushway 2006).



**FIGURE 1.**  
**Manager Assessment of Offense Severity (ranked from 1-10, 10 as the most severe)**

Lastly, 63 percent of employers also said they considered the legal outcome of an offense, specifically distinguishing between dismissed and convicted offenses. Employers ranked the severity of a dismissed offense at a mean of 3.5 (s.d. = 2.6) where a convicted offense was ranked at a mean of 7.5 (s.d. = 2.4). Dwight, the operations manager at a delivery company, made this distinction: “Well I guess if it was dismissed I would definitely look upon that more favorably then if they were convicted. Anybody can be accused of a crime.” Upscale hotel manager Jessica told us: “If they were dismissed or found not guilty, these are irrelevant. Anyone can be accused of something, but that doesn’t make them guilty.” Chris, the manager of a local chain pizza company, explained their policy of deferring to the rulings of the justice system:

Well we like to rely on our judicial system, hoping that of course if someone is innocent that they truly are innocent and if someone is truly guilty they are truly guilty. So with a situation like that if something was brought up and they were found innocent we take the court’s decision and of course we like to get a little background from the individual as well, you know understanding the situation. Maybe it was false allegations, wrong place wrong time, you know it’s definitely an innocent situation if they were falsely accused and then found innocent. We tend to forget about the situation to some degree; let the innocent be innocent and the guilty be guilty. Again relying on the judicial system with that decision, we do follow suit with them and base judgment upon the situation.

Yet, the stigma of an arrest that never led to a conviction remained in the minds of some hiring managers. Lisa, the self-proclaimed “scaredy-cat” from a retail clothing store, speculated, “I mean if it’s dismissed you still have to take into account why were they there in the first place . . . but at the same time it’s really none of my business I guess.” Again, with a lack of codified direction in how to respond to these “gray areas” in assessing criminal records, employers turned to more subjective decision-making processes.

## DISCUSSION

This study provides qualitative, contextual evidence for how employers navigate legal ambiguity and construct compliance in making decisions about applicants with criminal histories in a rapidly changing environment. Our results suggest that an applicant with a low-level criminal history may be more likely to find employment in a workplace that has formally assessed the risks and legality associated with hiring an applicant with a record, as opposed to a firm where hiring managers make largely discretionary hiring decisions, personally carrying the burden of liability.

Institutional theory helps explain the acquisition, interpretation, and utility of criminal records among employers. First, an *open systems* approach describes the recent broad-scale diffusion of background checks, particularly as electronic technologies ease this process. Two-thirds of the employers we studied did indeed conduct checks—even though the information they received was at times confusing, incomplete, or irrelevant to the position. Second, in light of the diffusion of this legal workplace practice, organizations either adopted a *natural systems* approach or a *rational systems* approach to legal compliance. Hiring managers in *natural systems* settings individually assessed the weight of a criminal history in making employment decisions. In contrast, hiring managers in *rational systems* settings relied less on discretionary processes and more on formal rules and bureaucratized procedures.

Experimental field data on the interviewed employment sites supports these findings, as managers in natural systems settings were more likely to call back applicants without criminal records when given a choice between two equally capable candidates. In contrast, managers in rational systems turned to internal policies and showed consistent selection of either both or neither testers, indicating that the presence of the low-level criminal record in the audit was not the determining factor in the decision to continue the hiring process. We find, in summary, that when allowed high levels of discretion, some employers use this same discretionary power to protect themselves in their hiring decisions.

In situating this study alongside similar research, Pager and Quillian (2005) did not find this level of concern in their telephone interviews with hiring authorities. While we are hesitant to generalize too strongly from our small sample, this discrepancy between our study and previous studies may be partially attributable to differences in method, such that our probing via in-person interviews yielded a willingness to express concerns that may be difficult to obtain over the phone. In both our sample and the Pager and Quillian study, however, employers' stated willingness to consider applicants with criminal records was not matched by their observed hiring behavior in the audit.

Our interviews cannot speak directly to whether managers' decisions regarding criminal records parallel their decisions about other applicant characteristics, such as experience and personality. Nevertheless, the rapid changes in both technology and employment protections may render much of what we presented as distinctive to criminal records. Since the 1964 Civil Rights Act, employment protections have gradually evolved to encompass new classes of workers (Wakefield and Uggen 2004). Though we do not dispute their continued use in hiring decisions, there is considerably less legal ambiguity today surrounding ascribed characteristics such as race, gender, and age. Human capital differences among applicants, such as education and employment

history, also present less legal ambiguity to employers, as these are not protected classes. On the other hand, we speculate that this process may be similar in other areas characterized by high legal uncertainty, rapid technological diffusion of information, and high potential risk.<sup>8</sup> Yet, the character assessment that stems from a criminal record also makes this piece of information distinctive, though this depends on organizational context. Where company policy serves as a guide, managers evaluate criminal records dispassionately, just as they would evaluate applicant work histories, credentials, or other characteristics. In the absence of such a guide, however, they appear to use the record (and its accurate reporting on an application form) as a generalized indicator of character and trustworthiness.

Technology has made criminal history information ever more accessible to employers, prompting the EEOC to reconsider and update its policy statement on the “Consideration of Arrest and Conviction Records Decisions Under Title VII” (EEOC 2012b). This response came on the heels of a 2007 Third Circuit Court of Appeals decision (*El v. Southeastern Pennsylvania Transportation Authority*) that asked the Commission to provide in-depth legal analysis and updated research on this issue (EEOC 2012b). As noted above, the EEOC issued updated enforcement guidance in 2012 on employer use of arrest and conviction records. The EEOC is also a member of the federal interagency Reentry Council, which works to reduce barriers to employment for those with a criminal history.

Today, the Commission cautions that a violation may occur when an employer treats criminal history information differently for different applicants or employees based on their race or national origin. Use of criminal records should be “job related and consistent with business necessity” and clearly distinguish between nonconviction arrest records and conviction records. The EEOC also recommends employers use individualized assessments in evaluations of criminal records, including number of convictions and time since last conviction, for a more contextualized approach to each applicant. In June 2013, the EEOC brought two criminal background check lawsuits under Title VII on the basis of disparate impact against African Americans (EEOC 2013).

Workplaces, then, have multiple reasons to develop formalized workplace policies on how to assess criminal records on employment applications. Yet, the EEOC guidelines recommend that employers seek an individualized approach to each applicant, as opposed to relying solely on a criminal background check. How then should employers reconcile the need for formal workplace policies with individualized consideration of applicants? We recommend that workplaces develop formal policies that exempt some low-level criminal records so that hiring managers can instead focus on the individual work-related characteristics of potential employees, and not only their criminal history. Technological advances mean that many firms now obtain an unprecedented amount of information about job applicants’ criminal histories, often

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8. For example, immigration status is an area in which we might expect similar hiring decision-making processes. When left to the discretion of a hiring manager, the continual change in immigration laws could cause uncertainty in the interpretation of immigration status. At the same time, technology has improved the ease with which such statuses may be checked. As with criminal records, the perceived risk of hiring an employee of illegal status may outweigh the expected benefit, such that employers err on the side of caution.

including arrests that were never charged. In work environments that have yet to establish clear policies regarding which records are disqualifying and which are permissible for hiring, managers assess applicants using diverse criteria, such as the applicants' perceived honesty and the context of the offense. Yet, the hiring manager carries the weight of personal and professional liability for hiring applicants with criminal histories. Our interview findings illustrate the difficulties managers face when searching for a "good" employee and the calculations they make in hiring decisions. In the context of legal ambiguity and, in some workplaces, a lack of formal policies, managers construct compliance based on their own understandings of morality, law, and risk. These managers, in particular, use criminal records to make moral and practical decisions regarding an applicant's honesty, trustworthiness, and work ethic. As managers negotiate these situations, they are constrained by the workplace structure and culture, as well as by their own subjective assessments of the risk associated with particular candidates.

We recognize the limitations inherent in drawing inferences from a small sample, as well as the potential for these hiring managers to offer guarded accounts of the processes they follow in evaluating applicants. Nevertheless, several policy considerations follow. As both criminal background checking and the number of job seekers with criminal histories continue to rise, it is essential to develop policy directives and organizational protocols that will allow for fair evaluation rather than categorical exclusion. Improving data quality is an obvious first step, as is the removal of information regarding nonconvictions and trivial offenses. Narrowing the scope and improving the accuracy of the remaining records would likely benefit both applicants and employers.

Providing organizational support and education to hiring managers may also be beneficial, particularly regarding applicants with low-level criminal records, offenses that may be decades old, and nonconviction offenses that show up on reports. Reasonable guidelines offer protections for managers charged with evaluating criminal records, providing some measure of organizational rather than personal responsibility in hiring applicants with varying criminal histories. With complete discretion and lack of organizational "cover," however, managers may be so risk averse that they disqualify applicants on the basis of even low-level criminal records.

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Unfair Discrimination Practices Relating to Employment or Unfair Employment Practice. M.S. § 363A.08.

## APPENDIX 1: INTERVIEWEES

Name	Firm Type	Title	Educ.	Race	Yrs. Exp.	Crim. Check	Org. Type	Callbacks	
								Record	No Record
Angela	country club	H. R. Dir.	Coll.	White	10	Yes	Rational	No	No
Anshul	rest. (indep., ethnic)	Owner	Coll.	Other	1	No	Natural	No	No
Bill	car dealer		Coll.	White	6	Yes	Natural	No	No
Carl	labor (job placement)	Mgr.	Coll.	White		Yes	Natural	No	Yes
Chris	rest. (local chain, pizza)		H. S.	White	12	Yes	Rational	No	No
Cindy	rest. (indep., Am.)	Co-Owner	Grad.	White	20	Yes	Natural	No	No
Connie	manufacturing/dist.		Coll.	White	11	Yes	Natural	Yes	Yes
Dale	retail (specialty)	Mgr.	Coll.	White	10	Yes	Natural	No	Yes
Dan	security	Mgr.	Coll.	White	>1	Yes	Rational	Yes	Yes
Debbie	nursing/PCA	H. R. Dir.	Coll.	White	6	Yes	Rational	Yes	Yes
Don	warehouse	Plant Mgr.	H. S.	White	9	Yes	Natural	No	Yes
Dwight	delivery	Ops. Mgr.	H. S.	White	30	Yes	Natural	No	Yes
Dylan	auto service center	Owner	Coll.	Other	6	Yes	Natural	Yes	No
Eric	delivery (water)	Mgr.	H. S.	White	6	Yes	Natural	No	No
Gary	car dealer/auto shop	Sales Mgr.	Coll.	White	16	Yes	Natural	No	No
George	hotel (chain, budget)	Mgr.	H. S.	White	15	Yes	Rational	No	No
Janet	warehouse/beauty prod.	H. R. Dir.	Coll.	White	15	Yes	Rational	No	No
Jason	country club		Coll.	White		No	Natural	Yes	No
Jean	nursing home/PCA	H. R. Rectr.	H. S.	White		Yes	Rational	No	No
Jessica	hotel (chain, upscale)	H. R. Dir.	Coll.	White	15	Yes	Natural	No	Yes
Joe	manufacturing/dist.	District Mgr.	Coll.	White	23	No	Natural	No	No
Josh	rest. (private, upscale)	Mgr.	Coll.	White	21	No	Natural	No	No
Joyce	direct mail, supply	Str. H. R. Prof.	Coll.	White	13	Yes	Natural	No	No
Julie	dry cleaners (chain)		H. S.	White	21	No	Natural	No	No

Justin	rest. (local chain, Am.)	Sous Chef Mgr.	H. S.	White			No	Natural	No	Yes
Keith	rest. (indep., Am.)	Mgr.	Coll.	White	13		No	Natural	No	No
Larry	bookstore	Mgr.	Coll.	White	12		No	Natural	No	No
Lisa	retail (men's clothing)		Coll.	White	1		No	Natural	Yes	Yes
Liz	cleaning service	Ops. Mgr.	Coll.	White			Yes	Rational	No	No
Luke	dry cleaners	Owner	Coll.	White			No	Natural	No	No
Marilyn/ Cheryl	library		Coll.	White	10		Yes	Rational	No	No
Mark	dist./warehouse/driving		H. S.	White			Yes	Rational	Yes	Yes
Matt	rest. (indep., Am.)	Mgr.	H. S.	White	9		No	Natural	Yes	No
Megan	hotel (chain)	Site Mgr.	Coll.	White	5		Yes	Natural	No	No
Mike	rest. (chain, upscale)	Asst. Gen. Mgr.	H. S.	White	7		Yes	Natural	No	No
Nancy	rest. (indep., sports bar)	Owner	H. S.	White			No	Natural	No	Yes
Olivia	nursing home	Dining Supv.	H. S.	Black	6		Yes	Rational	Yes	Yes
Patty	nursing home	Kitchen Mgr.	Coll.	White	23		Yes	Rational	No	No
Rebecca	hotel (chain)	Gen. Mgr.	Coll.	White			No	Rational	No	No
Rob	warehouse	Mgr.	H. S.	White	4		No	Natural	No	No
Roger	car dealer	Gen. Mgr.	Coll.	White			Yes	Natural	Yes	Yes
Ryan	rest. (indep., Am.)	Gen. Mgr.	Coll.	White	6		No	Natural	No	No
Shirley	country club		Coll.	White			Yes	Natural	No	Yes
Stephanie	hotel (chain)	Mgr.	H. S.	White			Yes	Natural	No	Yes
Steve	car dealer	Mgr.	Coll.	White	28		Yes	Natural	No	No
Tim	labor (window co)	Sales Mgr.	Coll.	White	6		No	Natural	Yes	Yes
Willie	liquor store (municipal)	Mgr.	H. S.	White	35		Yes	Natural	No	No
Zachary	rest. (indep., ethnic)	Mgr.	Coll.	White			Yes	Natural	No	Yes

**APPENDIX 2: DESCRIPTIVE STATISTICS FOR AUDITED  
WORKPLACES**

	Full Sample	Interviewed Subsample
Callback to record	25%	23%
Callback to no record	29%	38%
<i>Industry</i>		
Office work	7%	4%
Retail	19%	13%
Restaurant	36%	31%
Warehouse/labor	20%	33%
Hotel	11%	10%
Other	8%	8%
<i>N</i>	605	48