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DOUBLE JEOPARDY: RACE, CRIME, AND GETTING A JOB

DEVAH PAGER*

INTRODUCTION

Incarceration is intended to serve as punishment for individuals who have broken the law. And yet, there is reason to believe that the punishing effects of prison do not end upon an inmate's release. Rather, prospective employers, landlords, and creditors are able to access information about an individual's experience with the criminal justice system, implicating those with criminal records within a broad class of corruption. To the extent that this information results in the exclusion of ex-offenders from valuable social and economic opportunities, individuals face what is akin to the legal concept of double jeopardy: being punished more than once for the same crime.

This Article focuses on the consequences of incarceration for the employment outcomes of black and white men. As the more than half a million individuals being released each year attempt to make the transition from prison to work, the barriers to employment for ex-offenders have become painfully clear. Unemployment rates for ex-offenders range from 25% to 40%; only a fraction of ex-offenders are able to find jobs paying a living wage.¹ Examining the role of incarceration in shaping these poor employment outcomes has become of critical importance.

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1. PETER FINN, U.S. DEP'T OF JUSTICE, SUCCESSFUL JOB PLACEMENT FOR EX-OFFENDERS: THE CENTER FOR EMPLOYMENT OPPORTUNITIES 4 (1998); JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31–32 (2001).

The fundamental question one needs to ask in assessing the relationship between incarceration and employment is a question of causality. To what extent can the poor employment outcomes of ex-offenders be explained by the direct influence of the incarceration experience, relative to their own predispositions toward unstable work patterns? The previous research in this area, relying largely on survey data, has not been able to provide a definitive answer to this question, leaving open the possibility that incarceration itself does little to contribute to the already bleak employment prospects of those who wind up in prison.

In the present study, I adopt an experimental design that allows me to effectively isolate the causal influence of a criminal record. By using matched pairs of individuals to apply for real entry-level jobs, it becomes possible to directly measure the extent to which a criminal record—in the absence of other disqualifying characteristics—serves as a barrier to employment among equally qualified applicants. Further, by varying the race of the tester pairs, we can assess the ways in which the effects of race and a criminal record interact to produce new forms of labor market inequalities. This approach offers conclusive evidence for the role of incarceration in shaping labor market outcomes, with the mark of a criminal record resulting in closed doors and lost opportunities.

I. TRENDS IN INCARCERATION

Over the past three decades, the number of prison inmates has increased by more than 600%, leaving the United States as the country with the highest incarceration rate in the world.² During this time, incarceration has changed from a punishment reserved primarily for the most heinous offenders, to one extended to a much greater range of crimes and a much larger segment of the population. Recent trends in crime policy have led to the imposition of harsher sentences for a wider range of offenses, thus casting an ever-widening net of penal intervention.³

2. GORDON BARCLAY ET AL., INTERNATIONAL COMPARISONS OF CRIMINAL JUSTICE STATISTICS 1999 (2001); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2002), available at <http://www.albany.edu/sourcebook/>.

3. For example, before their recent abrogation by various court decisions, the adoption of mandatory sentencing laws, which were most often used for drug offenses, removed discretion from the sentencing judge to consider the range of factors pertaining to both the individual and the offense that would normally have been taken into account. As a result, the chances of receiving a state prison term after being arrested for a drug offense rose by more than 500% between 1980 and 1992. ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP'T OF JUSTICE, PRISONERS IN 1994, at 13 (1995).

While the recent “tough on crime” policies may be effective in getting criminals off the streets, little provision has been made for when they get back out. Of the nearly two million individuals currently incarcerated, roughly 95% will be released, with more than half a million being released each year.⁴ According to one estimate, there are currently over twelve million ex-felons in the United States, representing roughly 8% of the working-age population.⁵ Of those recently released, nearly two-thirds will be charged with new crimes, and over 40% will return to prison within three years.⁶ Certainly, some of these outcomes are the result of desolate opportunities and deeply ingrained dispositions, grown out of broken families, poor neighborhoods, and little social control.⁷ But, net of these contributing factors, there is evidence that experience with the criminal justice system in itself has adverse consequences for subsequent opportunities. In particular, incarceration is associated with limited future employment opportunities and earning potential,⁸ which are themselves among the strongest predictors of desistance from crime.⁹

The expansion of the prison population has been particularly consequential for blacks. The incarceration rate for young black men in the year 2000 was nearly 10%, compared to just over 1% for white men in the same age group.¹⁰ Young black men today have a 28% likelihood of incarceration during their lifetime,¹¹ a figure which rises above 60%

4. Peter Slevin, *Life After Prison: Lack of Services Has High Price*, WASH. POST, Apr. 24, 2000, at A1.

5. Christopher Uggen et al., *Crime, Class, and Reintegration: The Socioeconomic, Familial, and Civic Lives of Offenders*, Paper Presented at American Society of Criminology Meetings, (Nov. 18, 2000).

6. Bureau of Justice Statistics, U.S. Dep’t of Justice, *Key Facts at a Glance: Number of Persons in Custody of State Correctional Authorities by Most Serious Offense 1980–2001*, at <http://www.ojp.usdoj.gov/bjs/glance/tables/corrtyptab.htm> (last modified June 27, 2003).

7. See ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* 18, 65–70 (1993); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 52, 62–65 (1996).

8. Richard B. Freeman, *The Relation of Criminal Activity to Black Youth Employment*, 16 REV. BLACK POL. ECON. 99, 105 (1987); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 541 (2002).

9. See SAMPSON & LAUB, *supra* note 7, 218–19; NEIL SHOVER, *GREAT PRETENDERS: PURSUITS AND CAREERS OF PERSISTENT THIEVES* 126–27, 139 (1996); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 542–43 (2000).

10. ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2000*, at 13 (2001).

11. THOMAS P. BONCZAR & ALLEN J. BECK, U.S. DEP’T OF JUSTICE, *LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON* 1 (1997).

among young black high school dropouts.¹² These vast numbers of inmates translate into a large and increasing population of black ex-offenders returning to communities and searching for work. The barriers these men face in reaching economic self-sufficiency are compounded by the stigma of minority status and criminal record. The consequences of such trends for widening racial disparities are potentially profound.¹³

II. THE CREDENTIALING OF STIGMA

The unique characteristic of punishment as a source of social marginality lies in its official status and legitimacy. Unlike other sources of social stigma—those physical or cultural traits that evoke unfavorable treatment in social settings—criminal stigma has the added dimension of formalized legal status. Offenders are processed through official institutional channels, evaluated by representatives of the state (judges, prosecutors, and juries), and branded by the marker of their criminal conviction. It is this official certification of criminal status that differentiates it from conventional sources of discrimination.

Social distinctions based on race, gender, national origin, or other ascribed characteristics have grown increasingly controversial in recent years.¹⁴ While to be sure, prejudice and discrimination persist along each of these dimensions, public displays of hostility toward such groups are subject to widespread disapproval, and instances of unfavorable treatment are proscribed by law.¹⁵ Indeed, the social and political legitimacy of conventional sources of social stigma has largely eroded.¹⁶

This is not the case for criminal stigma; in fact, it is quite the opposite. Individuals are routinely—and legally—denied access to jobs, housing, educational loans, welfare benefits, political participation, and

12. Becky Pettit & Bruce Western, *Inequality in Lifetime Risks of Imprisonment*, Paper Presented at the Annual Meeting of the American Sociological Association 23 (2001), available at <http://www.princeton.edu/~western/life7.pdf>.

13. See BRUCE WESTERN & BECKY PETTIT, *BLACK-WHITE EARNINGS INEQUALITY, EMPLOYMENT RATES, AND INCARCERATION* 29 (Nat'l Sci. Found., Working Paper No. 150, 1999), at <http://www.princeton.edu/~western/rubin09.pdf>; Richard B. Freeman & Harry J. Holzer, *The Black Youth Employment Crisis: Summary of Findings*, in *THE BLACK YOUTH EMPLOYMENT CRISIS* 3, 3, 17–18 (Richard B. Freeman & Harry J. Holzer eds., 1986).

14. See, e.g., TOM W. SMITH, *AM. JEWISH COMM., INTERGROUP RELATIONS IN A DIVERSE AMERICA: DATA FROM THE 2000 GENERAL SOCIAL SURVEY* (2001), available at <http://www.ajc.org/upload/pdf/IntergroupRelations.pdf>.

15. See generally MEASURING RACIAL DISCRIMINATION 23–70 (Rebecca M. Blank et al. eds., 2004).

16. See generally HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (Rev. ed. 2004) (presenting a study on the development of social norms and attitudes about race and discrimination).

other key social goods solely on the basis of their criminal background.¹⁷ While rules vary across states as to when and where such restrictions apply,¹⁸ it is clear that the range of opportunities that become off limits to those with criminal records enables a powerful form of social disenfranchisement.

The official status of the criminal credential, and its use in the regulation of social positioning, is unique in neither form nor function. As a society, we are moving toward a stratification regime whereby key opportunities and resources are increasingly allocated on the basis of formally designated status positions. Instead of relying on ascribed markers to determine social ranking, individuals are increasingly sorted by formal institutions and the credentials they bestow. In his seminal book, *The Credential Society*, Randall Collins discussed the movement toward the credentialization of status positions, with higher education, occupational licensure, and professional membership increasingly regulating access to privileged positions.¹⁹ Growing numbers of jobs require a college degree or higher; doctors require a medical license; lawyers require induction into the state bar association; plumbers and electricians must be certified by state boards. These credentials that are assumed to provide standardized information about the abilities and dispositions of their holders are used as the formal basis for authorizing membership within a particular occupational class. Stratification based on formal credentials, in contrast to ascribed social markers, tends to have high legitimacy, because credentials are viewed as more objective, reasoned bases for allocating social rewards.

We tend to think of the credentialing process only in its positive form, as a formal status that enables access and upward mobility. What the case of the criminal record brings into bold relief, however, is that the credentialization of status positions can likewise take place in the opposite direction. Negative credentials represent those official markers that restrict access and opportunity rather than enabling them. A criminal record is the archetypal example of a negative credential.²⁰ With a criminal record comes official state certification of an individual's criminal transgressions, placing a wide range of social,

17. See generally JEREMY TRAVIS ET AL., *URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* (2001), available at http://www.urban.org/UploadedPDF/from_prison_to_home.pdf.

18. See Legal Action Ctr., *After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records* (2004), at <http://www.lac.org/lac/index.php>

19. RANDALL COLLINS, *THE CREDENTIAL SOCIETY: AN HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION passim* (1979).

20. Other negative credentials that an individual may possess include whether the individual is a welfare recipient, received a dishonorable discharge from the military, or is an illegal immigrant.

economic, and political privileges off-limits. Further, just as positive credentials offer the informal rewards of social status and generalized assumptions of competence, negative credentials confer the inverse: social stigma and generalized assumptions of untrustworthiness or undesirability.

The power of the credential, then, lies in its recognition as an official and legitimate means of evaluating and classifying individuals. The negative credential of a criminal record represents one such tool, offering formal certification of the offenders among us. To fully understand the impact of this negative credential, however, we must rely on more than speculation as to when and how these official labels are invoked as the basis for enabling or denying opportunity. Because official credentials are often highly correlated with other markers of social status or stigma, it remains an important objective to examine their direct and independent impact. Particularly in the case of negative credentials—the inverse of the conventional (positive) credential form—we know virtually nothing about how these markers come into play.²¹ As increasing numbers of young men are being marked by their contact with the criminal justice system, it becomes a critical priority to understand the costs and consequences of this now prevalent form of negative credential.

III. PRIOR RESEARCH

While little research to date has focused on the consequences of criminal sanctions, a small and growing body of evidence suggests that contact with the criminal justice system can lead to a substantial reduction in economic opportunities. Using longitudinal survey data, researchers have studied the employment probabilities and income of individuals after release from prison, finding a strong and consistent negative effect of incarceration.²²

21. Note that the literature on labeling provides a parallel approach to viewing the potentially stigmatizing effect of official labeling (for example, juvenile delinquent, mentally ill, homosexual, drug user, and so on). See, e.g., GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION* (1975); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963). Critics of this theoretical approach, however, note that the relevant empirical tests at times make circular, unfalsifiable claims. See, e.g., FLORENCE V. RIDLON, *A FALLEN ANGEL: THE STATUS INSULARITY OF THE FEMALE ALCOHOLIC* 55–56 (1988).

22. See DANIEL NAGIN & JOEL WALDFOGEL, *THE EFFECT OF CONVICTION ON INCOME THROUGH THE LIFE CYCLE* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 4551, 1993), at <http://www.nber.org/papers/w4551.pdf>; Freeman, *supra* note 8, at 105; Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1049–52 (1999).

This existing research has been instrumental in demonstrating the possible aggregate effects of incarceration on labor market outcomes. Unfortunately, however, there are several fundamental limitations of survey data that leave the conclusions of this research vulnerable to harsh criticism. First, it is difficult to use survey data to rule out the possibility that unmeasured differences between those who are and those who are not convicted of crimes may drive the observed results. In studying the relationship between incarceration and employment, researchers often make an assumption of causality: a criminal record reduces employment opportunities.

But, what evidence can we offer in support of this causal effect? We know that the population of inmates is not a random sample of the overall population.²³ What if, then, the poor outcomes of ex-offenders are merely the result of preexisting traits which make them bad employees in the first place? For example, individuals with drug or alcohol addictions, behavioral problems, and poor interpersonal skills are more likely to experience both incarceration and poor employment outcomes. It remains possible, therefore, that the relationship between incarceration and employment is entirely spurious, created only by a third set of variables shared in common.²⁴ Consistent with this perspective, Professors Jeffrey Kling,²⁵ Jeffrey Grogger,²⁶ and Karen Needels²⁷ have each argued that the effect of incarceration on employment is negligible at an estimated 0% to 4%. Using administrative data from unemployment insurance files matched with records from various departments of corrections, these authors contend that the observed association is instead largely determined by unmeasured individual characteristics.²⁸ The findings of these authors stand in stark contrast to the majority of literature asserting a strong link

23. See generally AMY L. SOLOMON ET AL., URBAN INST., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY: A REPORT OF THE REENTRY ROUNDTABLE 8-14 (2004) (presenting a demographic overview of the American prison population), available at http://www.urbaninstitute.org/UploadedPDF/411097_From_Prison_to_Work.pdf.

24. The variables identified here are just a few of the many potential sources of spuriousness that are virtually untestable using survey data.

25. JEFFREY R. KLING, INCARCERATION LENGTH, EMPLOYMENT, AND EARNINGS 30 (Princeton Univ & Nat'l Bureau of Econ. Research, Working Paper No. 494, 2004), available at <http://www.irs.princeton.edu/pubs/pdfs/494.pdf>.

26. Jeffrey Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 Q.J. ECON. 51, 60-61, 70 (1995).

27. Karen E. Needels, *Go Directly to Jail and Do Not Collect? A Long-Term Study of Recidivism, Employment, and Earnings Patterns Among Prison Releasees*, 33 J. RES. CRIME & DELINQ. 471, 491 (1996).

28. Professor Jeffrey Kling used data from the Florida state system and federal inmates in California. KLING, *supra* note 25, at 30. Professor Jeffrey Grogger used data from state arrestees in California. Grogger, *supra* note 26, at 52. Professor Karen Needels used data from state inmates in Georgia. Needels, *supra* note 27, at 474.

between incarceration and employment.²⁹ While it remains an open question as to whether and to what extent incarceration causes employment difficulties, survey research is poorly equipped to offer a definitive answer. The Achilles' heel of the survey methodology is its inability to escape from the glaring problems of selection which plague research in this field.³⁰

A second, related limitation of survey research is its inability to formally identify mechanisms. From aggregate effects, we can infer plausible causal processes, but these are only indirectly supported by the data. Because numerous mechanisms could lead to the same set of

29. See SAMPSON & LAUB, *supra* note 7, at 166-67; Shawn D. Bushway, *The Impact of an Arrest on the Job Stability of Young White American Men*, 35 J. RES. CRIME & DELINQ. 454, 475-77 (1998); Freeman, *supra* note 8, at 105; Jeff Grogger, *Arrests, Persistent Youth Joblessness, and Black/White Employment Differentials*, 74 REV. ECON. & STAT. 100, 105 (1992); Western & Beckett, *supra* note 22, at 1052.

30. See James Heckman et al., *Characterizing Selection Bias Using Experimental Data*, 66 ECONOMETRICA 1017, 1018 (1998); Donald B. Rubin, *Formal Modes of Statistical Inference for Causal Effects*, 25 J. STAT. PLAN. & INFERENCE 279, 280 (1990); Christopher Winship & Stephen L. Morgan, *The Estimation of Causal Effects from Observational Data*, 25 ANN. REV. SOC. 659, 660 (1999).

Researchers have employed creative techniques for addressing these issues. For example, some look at preincarceration and postincarceration outcomes for the same individuals. See, e.g., RICHARD FREEMAN, *CRIME AND THE EMPLOYMENT PROBLEMS OF DISADVANTAGED YOUTHS* 14 (Nat'l Bureau of Econ. Research, Working Paper No. 3875, 1991), at <http://www.nber.org/papers/w3875.pdf>; Grogger, *supra* note 29, at 101. Other researchers compare ex-offenders to future offenders. See, e.g., Grogger, *supra* note 26, at 53-57; Joel Waldfogel, *Does Conviction Have a Persistent Effect on Income and Employment?*, 1994 INT'L REV. L. & ECON. 103, 105. Another group of researchers estimate fixed-effects and random-effects models. See, e.g., Western, *supra* note 8, at 533. A final group of researchers use instrumental variables approaches to correct for unmeasured heterogeneity. See, e.g., RICHARD B. FREEMAN, *CRIME AND THE JOB MARKET* 9 (Nat'l Bureau of Econ. Research, Working Paper No. 4910, 1994), available at <http://www.nber.org/papers/w4910.pdf>. There remains little consensus, however, over the degree to which these techniques effectively account for the problems of selection endemic to this type of research.

Studies using administrative data have the advantage of analyzing large samples of ex-offenders over extended periods of time, both before and after incarceration. However, this line of research also suffers from several serious limitations. First, unemployment insurance employment and wage data are available only for those jobs covered by, and in compliance with, unemployment insurance laws, thus excluding many temporary, contingent, or "grey-market" jobs which may be more likely held by ex-offenders. See Robert Kornfeld & Howard S. Bloom, *Measuring Program Impacts on Earnings and Employment: Do Unemployment Insurance Wage Reports from Employers Agree with Surveys of Individuals?*, 17 J. LAB. ECON. 168, 184-85 (1999). Second, administrative data are typically limited to one state or jurisdiction; individuals who move to other states during the period of observation are, thus, mistakenly coded as unemployed or as zero-earners. See *id.* And finally, missing social security numbers or difficulties in matching records often result in fairly substantial reductions in sample representativeness. See *id.* For an in-depth discussion of these issues, see *id.* at 184-94.

outcomes, we are left unable to assess the substantive contribution of any given causal process. Survey researchers have offered numerous hypotheses regarding the mechanisms which may produce the observed relationship between incarceration and employment. These include the labeling effects of criminal stigma,³¹ the disruption of social and familial ties,³² the influence on social networks,³³ the loss of human capital,³⁴ institutional trauma,³⁵ legal barriers to employment,³⁶ and, of course, the possibility that incarceration effects may be entirely spurious.³⁷ Without direct measures of these variables, it is difficult using survey data to discern which, if any, of these causal explanations may be at work.

The uncertainty surrounding these mechanisms motivates the current project. Before addressing some of the larger consequences of incarceration, it is essential to first establish conclusively the mechanism—or at least one of the mechanisms—driving these results. In the present study, I focus on the effect of a *criminal record* on employment opportunities. This emphasis directs our attention to the stigma associated with criminal justice intervention, and to the ways in which employers respond to this stigma in considering applicants. While certainly there are additional ways in which incarceration may affect subsequent employment, this focus allows us to separate the institutional effect from the individual (or from the interaction of the two) and to directly assess one of the most widely discussed—but rarely measured—mechanisms of carceral channeling.³⁸

In order to investigate this question, I have chosen an experimental approach to the problem, a methodology best suited to isolating causal mechanisms. There have, in the past, been a limited number of studies which have adopted an experimental approach to the study of criminal stigma. These studies have relied on a “correspondence test” approach, whereby applications are submitted by mail with no in-person contact. The most notable in this line of research is a classic study by Professors Richard Schwartz and Jerome Skolnick in which the researchers prepared four sets of résumés to be sent to prospective employers,

31. Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 133–38 (1962).

32. SAMPSON & LAUB, *supra* note 7, at 65, 122.

33. John Hagan, *The Social Embeddedness of Crime and Unemployment*, 31 CRIMINOLOGY 465, 469 (1993).

34. See generally BECKER, *supra* note 21.

35. See generally CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* (1999).

36. Mitchell W. Dale, *Barriers to the Rehabilitation of Ex-Offenders*, 22 CRIME & DELINQ. 322, 322 (1976).

37. Grogger, *supra* note 26, at 51; Needels, *supra* note 27, at 471. See generally KLING, *supra* note 25.

38. See, e.g., Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh and Merge*, 3 PUNISH. & SOC'Y 95 (2001).

varying the criminal record of applicants.³⁹ In each condition, employers were less likely to consider applicants who had any prior contact with the criminal justice system.⁴⁰ Several later studies have verified these findings, varying the types of crimes committed by the hypothetical applicant⁴¹ or the national context.⁴² Each of these studies reports the similar finding that, all else equal, contact with the criminal justice system leads to worse employment opportunities.

Unfortunately, the research design of Schwartz and Skolnick and others using this approach has several limitations. First, Schwartz and Skolnick's study, while clearly demonstrating the substantial effect of criminal stigma, is limited to one job type only (an unskilled hotel job).⁴³ It remains uncertain how these effects generalize to the overall population of entry-level jobs. Ex-offenders face a diverse set of job openings, some of which may be more or less restricted to applicants with criminal records.

Second, correspondence tests are poorly equipped to address the issue of race. While it is possible to designate national origin using ethnic names,⁴⁴ it is much more difficult to clearly distinguish black and white applicants on paper.⁴⁵ Given the high rates of incarceration among blacks and the pervasive media images of black criminals, there is good reason to suspect that employers may respond differently to

39. Schwartz & Skolnick, *supra* note 31, at 134–35.

40. The four conditions included: (1) an applicant who had been convicted and sentenced for assault; (2) an applicant who had been tried for assault but acquitted; (3) an applicant who had been tried for assault, acquitted, *and* had a letter from the judge certifying the applicant's acquittal and emphasizing the presumption of innocence; and (4) an applicant who had no criminal record. *Id.* In all three criminal conditions—even with a letter from the judge—applicants were less likely to be considered by employers relative to the noncriminal control. *Id.*

41. See, e.g., Dov Cohen & Richard E. Nisbett, *Field Experiments Examining the Culture of Honor: The Role of Institutions in Perpetuating Norms About Violence*, 23 PERS. & SOC. PSYCHOL. BULL. 1188 (1997); R.H. Finn & Patricia A. Fontaine, *The Association Between Selected Characteristics and Perceived Employability of Offenders*, 12 CRIM. JUST. & BEHAV. 353, 354–55 (1985).

42. See, e.g., Roger Boshier & Derek Johnson, *Does Conviction Affect Employment Opportunities?*, 14 BRIT. J. CRIMINOLOGY 264 (1974); Wouter Buikhuisen & Fokke P.H. Dijksterhuis, *Delinquency and Stigmatisation*, 11 BRIT. J. CRIMINOLOGY 185, 186 (1971).

43. Schwartz & Skolnick, *supra* note 31, at 134.

44. See, e.g., Peter A. Riach & Judith Rich, *Measuring Discrimination by Direct Experimentation Methods: Seeking Gunsmoke*, 14 J. POST KEYNESIAN ECON. 143, 145–46 (1991).

45. For an excellent exception, see MARIANNE BERTRAND & SENDHIL MULLAINATHAN, ARE EMILY AND GREG MORE EMPLOYABLE THAN LAKISHA AND JAMAL? A FIELD EXPERIMENT ON LABOR MARKET DISCRIMINATION (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873>.

applicants with criminal records depending on their race.⁴⁶ Prior research using correspondence tests to study the effect of criminal records, however, has not attempted to include race as a variable.

Finally, the type of application procedure used in correspondence tests—sending résumés by mail—is typically reserved for studies of administrative, clerical, and higher-level occupations.⁴⁷ The types of job openings ex-offenders are most likely to apply for, by contrast, typically request in-person applications, and a mailed résumé would therefore appear out of place.

The present study extends the work of Schwartz and Skolnick to include a more comprehensive assessment of the hiring process of ex-offenders across a full range of entry-level employment. By using an experimental audit design, this study effectively isolates the effect of a criminal record, while observing employer behavior in real-life employment settings. Further, by using in-person application procedures, it becomes possible to simulate the process most often followed for entry-level positions, as well as to provide a more direct test of the effects of race on hiring outcomes.

IV. RESEARCH QUESTIONS

I seek to address three primary questions with the present study. First, in discussing the main effect of a criminal record, I ask whether and to what extent employers use information about criminal histories to make hiring decisions. Implicit in the criticism of survey research in this area is the assumption that the signal of a criminal record is not a determining factor. Rather, employers use information about the interactional styles of applicants, or other observed characteristics—which may be correlated with criminal records—and this explains the differential outcomes we observe. In this view, a criminal record does not represent a meaningful signal to employers on its own. This study formally tests the degree to which employers use information about criminal histories in the absence of corroborating evidence. It is essential that we conclusively document this effect before making larger claims about the aggregate consequences of incarceration.

Second, this study investigates the extent to which race continues to serve as a major barrier to employment. While race has undoubtedly played a central role in shaping the employment opportunities of African Americans over the past century, recent arguments have questioned the continuing significance of race, arguing instead that other factors—such as spatial location, soft skills, social capital, or cognitive ability—can

46. See *infra* Part V–VIII.

47. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 943 (2003).

explain most or all of the contemporary racial differentials we observe.⁴⁸ This study provides a comparison of the experiences of equally qualified black and white applicants, allowing us to assess the extent to which direct racial discrimination persists in employment interactions.

The third objective of this study is to assess whether the effect of a criminal record differs for black and white applicants. Most research investigating the differential impact of incarceration on blacks has focused on the differential *rates* of incarceration, and how those rates translate into widening racial disparities. In addition to disparities in the rate of incarceration, however, it is also important to consider possible racial differences in the *effects* of incarceration. Almost none of the existing literature to date has explored this issue, and the theoretical arguments remain divided as to what we might expect.

On one hand, there is reason to believe that the signal of a criminal record should be less consequential for blacks. Research on racial stereotypes tells us that Americans hold strong and persistent negative stereotypes about blacks,⁴⁹ with one of the most readily invoked contemporary stereotypes relating to perceptions of violent and criminal dispositions.⁵⁰ If it is the case that employers view all blacks as potential criminals, they are likely to differentiate less among those with official criminal records and those without. Actual confirmation of criminal involvement will then provide only redundant information, while evidence against it will be discounted. In this case, the outcomes for all blacks should be worse, with less differentiation between those with criminal records and those without.

On the other hand, the effect of a criminal record may be worse for blacks if employers, already wary of black applicants, are more "gunshy" when it comes to taking risks on black applicants with proven criminal tendencies. The literature on racial stereotypes also tells us that stereotypes are most likely to be activated and reinforced when a target

48. See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); Glenn C. Loury, *A Dynamic Theory of Racial Income Differences*, in *WOMEN, MINORITIES, AND EMPLOYMENT DISCRIMINATION* 153 (Phyllis A. Wallace & Annette M. LaMond eds., 1977); Philip Moss & Chris Tilly, "Soft Skills" and Race: An Investigation of Black Men's Employment Problems, 23 *WORK & OCCUPATIONS* 252 (1996); Derek A. Neal & William R. Johnson, *The Role of Premarket Factors in Black-White Wage Differences*, 104 *J. POL. ECON.* 869 (1996).

49. Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading?* *The Princeton Trilogy Revisited*, 21 *PERS. & SOC. PSYCHOL. BULL.* 1139, 1139 (1995).

50. PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 43-46 (1993). See generally TOM W. SMITH, *WHAT AMERICANS SAY ABOUT JEWS* (1991); Devine & Elliot, *supra* note 49.

matches on more than one dimension of the stereotype.⁵¹ While employers may have learned to keep their racial attributions in check through years of heightened sensitivity around employment discrimination, when combined with knowledge of a criminal history, negative attributions are likely to intensify.

A third possibility, of course, is that a criminal record affects black and white applicants equally. The results of this audit study will help to adjudicate between these competing predictions.

A. *The Audit Methodology*

The U.S. Department of Housing and Urban Development pioneered the method of audit studies in the 1970s with a series of housing audits.⁵² Nearly twenty years later, researchers at the Urban Institute modified and applied this initial model to the employment context.⁵³ The basic design of an employment audit involves sending matched pairs of individuals (called testers) to apply for real job openings to see whether employers respond differently to applicants on the basis of selected characteristics.

The appeal of the audit methodology lies in its ability to combine experimental methods with real-life contexts. This combination allows for greater generalizability than a lab experiment, and a better grasp of the causal mechanisms than what we can normally obtain from observational data. The audit methodology is particularly valuable for those with an interest in discrimination. Typically, researchers are forced to infer discrimination indirectly, often attributing the residual from a statistical model—which is essentially all that is not directly explained—to discrimination. This convention is rather unsatisfying to researchers who seek empirical documentation for important social

51. See Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 *AM. J. SOC.* 717, 723 (2001); see also John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 *J. PERSONAL. & SOC. PSYCH.* 20 (1983); Susan Fiske & Steven Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 23, 25–26 (Mark Zanna ed., 1990).

52. See, e.g., JON HAKKEN, *DISCRIMINATION AGAINST CHICANOS IN THE DALLAS RENTAL HOUSING MARKET: AN EXPERIMENTAL EXTENSION OF THE HOUSING MARKET PRACTICES SURVEY* (1979); RONALD E. WIENK ET AL., *U.S. DEP'T OF HOUSING AND URBAN DEV., MEASURING DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY* (1979).

53. HARRY CROSS ET AL., *EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS* 7–9 (1990); MARGERY AUSTIN TURNER ET AL., *OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING* 1–2 (1991).

processes. The audit methodology, therefore, provides a valuable tool for this research.⁵⁴

Audit studies have primarily been used to study those characteristics protected under Title VII of the Civil Rights Act of 1964, such as race, gender, and age.⁵⁵ The employment of ex-offenders, of course, has not traditionally been thought of as a civil rights issue, but with the rapid expansion of the criminal justice system over the past three decades, there has been heightened concern over the growing population of men with criminal records. Recognizing the increasing importance of this issue, several states, including Wisconsin, have passed legislation expanding the fair employment laws to protect individuals with criminal records from discrimination by employers.⁵⁶ The law cautions employers that crimes may be considered only if they closely relate to the specific duties required of the job, however "shocking" the crime may have been.⁵⁷ If anything, then, this study represents a strong test of the effect of a criminal record. We might expect the effect to be larger in states where no such legal protection is in place.⁵⁸

54. While the findings from audit studies have produced some of the most convincing evidence of discrimination available from social science research, there are specific criticisms of this approach that warrant consideration. Professors James Heckman and Peter Siegelman identify five major threats to the validity of results from audit studies: (1) problems in effective matching, (2) the use of "overqualified" testers, (3) limited sampling frame for the selection of firms and jobs to be audited, (4) experimenter effects, and (5) the ethics of audit research. James J. Heckman & Peter Siegelman, *The Urban Institute Audit Studies: Their Methods and Findings*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 187, 188, 212-17 (Michael Fix & Raymond J. Struyk eds., 1993) [hereinafter CLEAR AND CONVINCING EVIDENCE]. For a useful discussion of these concerns, see generally the series of essays published in CLEAR AND CONVINCING EVIDENCE, *supra*. See *infra* app. A for a discussion of how these issues were addressed in the present study.

55. See, e.g., CROSS ET AL., *supra* note 53; TURNER ET AL., *supra* note 53; Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995); Marc Bendick, Jr., *Adding Testing to the Nation's Portfolio of Information on Employment Testing*, in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING (Michael Fix & Margery Austin Turner eds., 1999); Marc Bendick, Jr. et al., *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. BLACK POL. ECON. 25 (1994) [hereinafter Bendick, Jr. et al., *Measuring Employment Discrimination*]; Marc Bendick, Jr. et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, 10 J. AGING & SOC. POL'Y 5 (1999) [hereinafter Bendick, Jr. et al., *No Foot in the Door*]; David Neumark et al., *Sex Discrimination in Restaurant Hiring: An Audit Study*, 20 Q.J. ECON. 915 (1996).

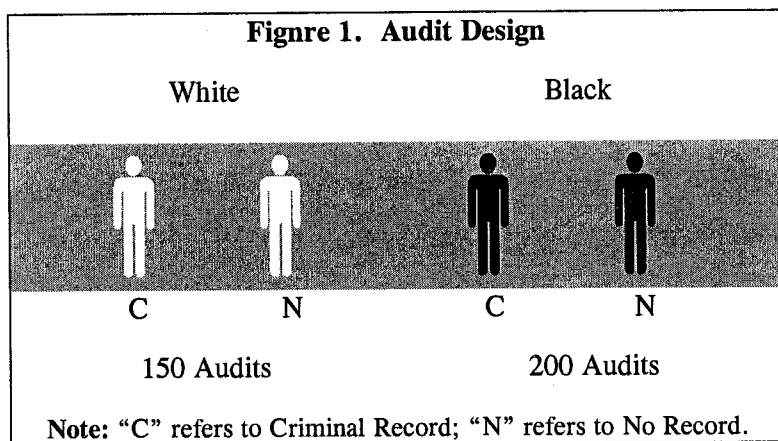
56. WIS. STAT. §§ 111.325, .335(1) (2003-2004).

57. *Id.*

58. Indeed, in a survey of employer attitudes, Professors Harry Holzer, Steven Raphael, and Michael Stoll found that Milwaukee employers were significantly more likely to consider hiring ex-offenders than were employers in Boston, Atlanta, Los Angeles, or Detroit, suggesting that Wisconsin may represent a best-case scenario for

B. Study Design

The basic design of this study involved the use of four male testers, two blacks and two whites. The testers were paired by race; that is, unlike in the original Urban Institute audit studies, the two black testers formed one team, and the two white testers formed the second team (see Figure 1).⁵⁹ The testers were twenty-three-year-old college students from Milwaukee who were matched on the basis of physical appearance and general style of self-presentation. Objective characteristics that were not already identical between pairs—such as educational attainment and work experience—were made similar for the purpose of the applications. Within each team, one auditor was randomly assigned a “criminal record” for the first week; the pair then rotated which member presented himself as the ex-offender for each successive week of employment searches, such that each tester served in the criminal record condition for an equal number of cases. By varying which member of the pair presented himself as having a criminal record, unobserved differences within the pairs of applicants were effectively controlled. No significant differences were found for the outcomes of individual testers or by month of testing.



the employment outcomes of ex-offenders relative to other major cities. See Harry J. Holzer et al., *Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles*, Paper Presented at the Association of Public Policy and Management Conference (2003); see also HARRY HOLZER & MICHAEL A. STOLL, *EMPLOYERS AND WELFARE RECIPIENTS: THE EFFECTS OF WELFARE REFORM IN THE WORKPLACE*, at vi–vii (2001).

59. The primary goal of this study was to measure the effect of a criminal record, and thus it was important for this characteristic to be measured as a within-pair effect. While it would have been ideal for all four testers to have visited the same employers, this would have likely aroused suspicion. The testers were, thus, divided into separate teams by race and assigned to two randomly selected sets of employers.

Job openings for entry-level positions (defined as jobs requiring no previous experience and no education greater than high school) were identified from the Sunday classified advertisement section of the *Milwaukee Journal Sentinel*.⁶⁰ In addition, a supplemental sample was drawn from Jobnet,⁶¹ a state-sponsored website of employment listings which was developed in connection with Wisconsin's W-2 Welfare-to-Work initiatives.⁶²

The audit pairs were randomly assigned fifteen job openings each week. The white pair and the black pair were assigned separate sets of jobs, with the same-race testers applying to the same jobs. One member of the pair applied first, with the second applying one day later (randomly varying whether the ex-offender was first or second). A total of 350 employers were audited during the course of this study: 150 by the white pair and 200 by the black pair. Additional tests were performed by the black pair because black testers received fewer callbacks on average, and there were thus fewer data points with which to draw comparisons. A larger sample size enables calculation of more precise estimates of the effects under investigation.

Immediately following the completion of each job application, testers filled out a six-page response form which coded relevant information from the test. Important variables included type of occupation, metropolitan status, wage, size of establishment, and race and sex of the employer. Additionally, testers wrote narratives describing the overall interaction, and any comments made by employers (or included on applications) specifically related to race or criminal records.

One key feature of this audit study is that it focuses only on the first stage of the employment process. Testers visited employers, filled out applications, and proceeded as far as they could during the course of one visit. If testers were asked to interview on the spot, they did so, but they did not return to the employer for a second visit. The primary dependent variable, then, is the proportion of applications which elicited callbacks from employers. Individual voice mail boxes were set up for each tester to record employer responses. If a tester was offered the job

60. See JSONLINE: MILWAUKEE J. SENTINEL [hereinafter MILWAUKEE J. SENTINEL], at <http://www.jsonline.com>. Occupations with legal restrictions on ex-offenders were excluded from the sample. These include jobs in the health care industry, jobs involving children and the elderly, jobs requiring the handling of firearms (that is, security guards), and jobs in the public sector. An estimate of the collateral consequences of incarceration would also need to take account of the wide range of employment fully off-limits to individuals with prior felony convictions.

61. See Jobnet, at <http://www.jobnet.com>.

62. Employment services like Jobnet have become a much more common method of finding employment in recent years, particularly for difficult-to-employ populations such as welfare recipients and ex-offenders.

on the spot, this was also coded as a positive response.⁶³ Focus was placed only on this initial stage of the employment process because this stage is likely to be most affected by the barrier of a criminal record. In an audit study of age discrimination, for example, Dr. Marc Bendick, Jr., and his colleagues found that 76% of the measured differential treatment occurred at this initial stage of the employment process.⁶⁴ Given that a criminal record, like age, is a highly salient characteristic, it is likely that as much, if not more, of the treatment effect will be detected at this stage.

C. Tester Profiles

In developing the tester profiles, emphasis was placed on adopting characteristics that were both numerically representative and substantively important. In the present study, the criminal record consisted of a felony drug conviction (possession with intent to distribute cocaine) and eighteen months of served prison time. A drug crime (as opposed to a violent or property crime) was chosen because of its prevalence, its policy salience, and its connection to racial disparities in incarceration.⁶⁵ It is important to acknowledge that the effects reported here may differ depending on the type of offense.⁶⁶

63. In cases where testers were offered jobs on the spot, they were instructed to tell the employer that they were still waiting to hear back from another job they had interviewed for earlier. The tester then called the employer back at the end of the same day to let him or her know that the other job had come through, and he was therefore no longer available.

64. See generally Bendick, Jr. et al., *No Foot in the Door*, *supra* note 55.

65. Over the past two decades, drug crimes were the fastest growing class of offenses. See BECK & HARRISON, *supra* note 10, at 12. In 1980, roughly one out of every sixteen inmates was incarcerated for a drug crime; by 1999, this figure had jumped to one out of every five. See Bureau of Justice Statistics, *supra* note 6. In federal prisons, nearly three out of every five inmates are incarcerated for a drug crime. See BECK & HARRISON, *supra* note 10, at 12. A significant portion of this increase can be attributed to changing policies concerning drug enforcement. By 2000, virtually every state in the country had adopted some form of truth in sentencing laws that impose mandatory sentencing minimums for a range of offenses. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 2 tbl.1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf>. These laws have been applied most frequently to drug crimes, leading to more than a fourfold rise in the number of drug arrests that result in incarceration and a doubling of the average length of sentences for drug convictions. See MARC MAUER, RACE TO INCARCERATE 32-37 (1999); Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, in PRISONS 17, 54-55 (Michael Tonry & J. Petersilia eds., 1999). While the steep rise in drug enforcement has been felt across the population, this "war on drugs" has had a disproportionate impact on blacks. Between 1990 and 1997, the number of black inmates serving time for drug offenses increased by 60%, compared to a 46% increase in the number of whites. BECK & GILLIARD, *supra* note 3. In 1999, 27% of all black

The educational and work histories assigned to the testers represented a compromise between representing the modal group of offenders and providing some room for variation in the outcome of the audits. Most audit studies of employment have created tester profiles which include some college experience, so that testers will be highly competitive applicants for entry-level jobs, and so that the contrast between treatment and control group is made clear.⁶⁷ In the present study, however, postsecondary schooling experience would detract from the representativeness of the results. More than 70% of federal and nearly 90% of state prisoners have no more than a high school degree or the equivalent. The education level of testers in this study, therefore, was chosen to represent the modal category of offenders. That is, they were assigned a high school diploma.⁶⁸

There is little systematic evidence concerning the work histories of inmates prior to incarceration. Overall, 77.4% of federal and 67.4% of state inmates were employed prior to incarceration.⁶⁹ There is, however, a substantial degree of heterogeneity in the quality and consistency of work experience during this time.⁷⁰ In the present study, testers were assigned favorable work histories in that they reported steady work experience in entry-level jobs and nearly continual employment until incarceration. In the job prior to incarceration and, for the control group, prior to the last short-term job, testers reported having worked their way from an entry-level position to a supervisory role.⁷¹

state inmates were incarcerated for drug offenses, relative to less than half that proportion of whites. See BECK & HARRISON, *supra* note 10, at 12.

66. Survey results indicate that employers are substantially more averse to applicants convicted of violent crimes or property crimes, relative to those convicted of drug crimes. Holzer et al., *supra* note 48, at 21; Pager, *supra* note 47, at 955-62.

67. See CROSS ET AL., DIFFERENTIAL TREATMENT BETWEEN HISPANIC AND ANGLO JOBSEEKERS: A STUDY OF HIRING PRACTICES IN TWO CITIES, app. B (1989).

68. Forty-four percent of federal inmates and 43.6% of state inmates had a high school degree, or the equivalent, in 1997. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997, at 48 tbl.4.1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus97.pdf>.

69. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, COMPARING FEDERAL AND STATE PRISON INMATES 1991, at 2 tbl.2 (1994).

70. See generally Devah Pager, Criminal Careers: The Consequences of Incarceration for Occupational Attainment, Paper Presented at the Annual Meetings of the American Sociological Association (2001).

71. Testers reported working either as an assistant manager at a national restaurant chain or as a supervisor at a national home retail store. While it is unlikely that the modal occupational attainment for high school graduates (with or without criminal records) would be a supervisory position, this feature was added to the tester profiles in order to make them more competitive applicants. The solid job histories of these applicants should affect the results in a conservative direction, offering cues about the tester's reliability and competence, which may offset some of the negative associations with a criminal background.

D. Design Issues⁷²

There are a number of complexities involved in the design and implementation of an audit study. Apart from the standard complications of carrying out a field experiment, there were several specific dilemmas posed in the development of the current study that required substantial deliberation. First, in standard audit studies of race or gender, it is possible to construct work histories for test partners in such a way that the amount of work experience reported by each tester is identical. By contrast, the present study compares the outcome of one applicant who has spent eighteen months in prison. It was therefore necessary to manipulate the work histories of both applicants so that this labor market absence did not bias the results.⁷³ The solution I opted for here was for the ex-offender to report six months of work experience gained while in prison (preceded by twelve months out of the labor force, representing the remainder of the total prison time). The nonoffender, on the other hand, reported graduating from high school one year later (thereby accounting for twelve months) and, concurrent to his partner's six months of prison work time, working for a temporary agency doing a similar kind of low-skill work. Thus, the actual amount of work experience was equivalent for both testers. The effect of having the noncriminal graduate from high school one year later should impose a conservative bias, as graduating from high school late may indicate less motivation or ability.

A second major difference between audit studies of race or gender and the present study is that criminal status is not something that can be immediately discerned by the employer. The information had to be explicitly conveyed, therefore, for the interaction to become a "test." In most cases, the tester was given the opportunity to communicate the necessary information on the application form provided, in answer to the question: "have you ever been convicted of a crime?"⁷⁴ However, in the 26% of cases where the application form did not include a question about criminal history, it was necessary to provide an alternate means of conveying this information. In the present study, testers provided two indirect sources of information about their prior criminal involvement.

72. See *infra* app. A for a discussion of additional methodological concerns.

73. Although time out of the labor market is, in fact, one component of the total impact of incarceration, this study sought to isolate the effect of criminal stigma from other potential consequences of incarceration. Again, an estimate of the total effect of incarceration would also need to take into account employment difficulties resulting from a prolonged labor market absence.

74. To the extent that real ex-offenders lie about their criminal record on application forms, this approach may lead to an overestimate of the effect of a criminal record. See *infra* app. A for a lengthy discussion of this issue.

First, as mentioned above, the tester in the criminal record condition reported work experience obtained while in the correctional facility. Second, the tester listed his parole officer as a reference (calls to whom were recorded by a voice mail box). These two pieces of evidence provided explicit clues to employers that the applicant had spent time in prison; both of these strategies are used by real ex-offenders who seek to account for empty time by reporting work experience in prison, or who wish to have their parole officer vouch for their successful rehabilitation.⁷⁵ Pilot tests with employers in a neighboring city suggested that this strategy was an effective means of conveying the criminal record condition without arousing suspicion.

E. Study Context and Descriptives

The fieldwork for this project took place in Milwaukee between June and December of 2001. During this time, the economic condition of the metropolitan area remained moderately strong, with unemployment rates ranging from a high of 5.4% in June to a low of 4% in September.⁷⁶ It is important to note that the results of this study are specific to the economic conditions of this period. It has been well documented in previous research that the level of employment discrimination corresponds closely with the tightness of the labor market.⁷⁷ Certainly, the economic climate was a salient factor in the minds of these employers. During a pilot interview, for example, an employer mentioned that, a year ago, she would have received three applications for an entry-level opening; today she receives 150.⁷⁸ Another employer mentioned that previously, their janitorial service had been so short of staff that they had to interview virtually everyone who applied. The current conditions, by contrast, allowed them to be far

75. This approach was developed in discussion with several Milwaukee employment counselors and parole officers, and is based on a composite profile of résumés belonging to real ex-offenders.

76. Monthly unemployment rates followed a U-shaped pattern, with higher levels of unemployment in the first and last months of the study. Specifically: June (5.4%), July (5.1%), August (4.8%), September (4.4%), October (4.7%), November (5.0%), December (4.7%). Bureau of Labor Statistics, Local Area Unemployment Statistics, at <http://www.bls.gov/data/home.htm>. National unemployment rates were nearly a point lower in June (4.8%), but rose above Milwaukee's unemployment rate to a high of 5.1% in December. *Id.*

77. See generally RICHARD B. FREEMAN & WILLIAM M. RODGERS III, AREA ECONOMIC CONDITIONS AND THE LABOR MARKET OUTCOMES OF YOUNG MEN IN THE 1990s EXPANSION (Nat'l Bureau of Econ. Research, Working Paper No. 7073, 1999).

78. Based on the author's conversation with a Milwaukee employer on April 1, 2004. The unemployment rate in Milwaukee had been as low as 2.9% in September of 1999. Bureau of Labor Statistics, U.S. Dep't of Labor, Local Area Unemployment Statistics, at <http://data.bls.gov/cgi-bin/surveymost?la+55> (last visited June 20, 2005).

more selective. Since the completion of this study, the unemployment rate has continued to rise. It is likely, therefore, that the effects reported here may understate the impact of race and a criminal record in the context of an economic recession.

As mentioned earlier, the job openings for this study were selected from the Sunday classified section of the *Milwaukee Journal Sentinel*⁷⁹ and from Jobnet, a state-sponsored Internet job service.⁸⁰ All job openings within a twenty-five mile radius of downtown Milwaukee were included, with 61% of the resulting sample located in the suburbs or surrounding counties relative to only 39% in the city of Milwaukee. Because a limited boundary was covered by this project, the distribution of jobs does not accurately represent the extent to which job growth has been concentrated in wider suburban areas. According to a recent study of job growth in Milwaukee, nearly 90% of entry-level job openings were located in the outlying counties and the Milwaukee County suburbs, with only 4% of full-time openings located in the central city.⁸¹

The average distance from downtown in the present sample was twelve miles, with a substantial number of job openings located far from reach by public transportation. Again, testers in this study represented a best-case scenario: all testers had their own reliable transportation, allowing them access to a wide range of employment opportunities. For the average entry-level job seeker, by contrast, the suburbanization of low-wage work can, in itself, represent a major barrier to employment.⁸²

Similar to other metropolitan labor markets, the service industry has been the fastest growing sector in Milwaukee, followed by retail, wholesale trade, and manufacturing.⁸³ Likewise, the sample of jobs in this study reflects similar concentrations, although quite a range of job titles were included overall (Table 1).

79. MILWAUKEE J. SENTINEL, *supra* note 60.

80. Jobnet, *supra* note 61.

81. John Pawasarat & Lois M. Quinn, Survey of Job Openings in the Milwaukee Metropolitan Area: Week of May 15, 2000 (Employment & Training Inst., Univ. of Wis.-Milwaukee, 2000), at <http://www.uwm.edu/Dept/ETI/openings/jobm2000.htm>.

82. WILSON, *supra* note 7, at 37-42, 54.

83. Pawasarat & Quinn, *supra* note 81.

Table 1. Occupational Distribution

Job Title	%	Job Title	%
Waitstaff	18	Delivery Driver	9
Laborer or Warehouse	17	Cashier	7
Production or Operators	12	Cook or Kitchen Staff	3
Service	11	Clerical	5
Sales	11	Managerial	2

Note: an excluded "other" category combines the remaining 3% of job titles.

The most common job types were restaurant workers (18%), laborers or warehouse workers (17%), and production workers or operators (12%).⁸⁴ Although white-collar positions were less common among the entry-level listings, a fair number of customer service (11%), sales (11%), clerical (5%), and even a handful of managerial positions (2%) were included.⁸⁵

Figure 2 presents some information on the ways employers obtain background information on applicants.⁸⁶ In this sample, roughly 75% of employers asked explicit questions on their application forms about the applicant's criminal history. Generally, this was a standard question: "[H]ave you ever been convicted of a crime? If yes, please explain."⁸⁷ Even though, in most cases, employers are not allowed to use criminal background information to make hiring decisions,⁸⁸ a vast majority of employers nevertheless request the information.

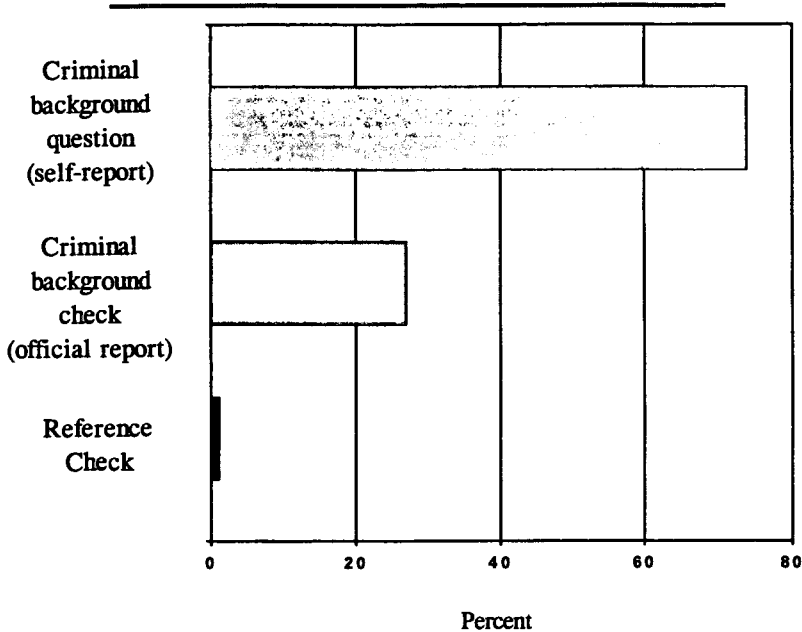
84. Pager, *supra* note 47, at 954.

85. As noted above, this sample excludes health care workers—which represented the largest category of entry-level job openings—and other occupations with legal restrictions on ex-felons. *See infra* app. A.

86. These are nonexclusive categories, and are thus not meant to sum to 100%.

87. An overwhelming proportion of employers used generic questions about criminal backgrounds (with the only major source of variation stemming from an emphasis on all prior convictions versus felonies only). A handful of large national companies, however, used questions which reflected a more nuanced understanding of the law. One company, for example, instructed applicants *not* to answer the question if they were a resident of certain specified states; another asked only about prior convictions for theft and burglary, ignoring all other possible offenses.

88. WIS. STAT. §§ 111.325, .335(1).

Figure 2. Background Checks

A much smaller proportion of employers actually perform an official background check. In my sample, 27% of employers indicated that they would perform a background check on all applicants.⁸⁹ This figure likely represents a lower-bound estimate, given that employers are not required to disclose their intentions to do background checks. According to a national survey by Professor Holzer, 30% to 40% of employers perform official background checks on applicants for noncollege jobs.⁹⁰ The point remains, however, that fewer than half of all employers check criminal background information through official sources.⁹¹

89. The issue of official background checks raises some concern as to the validity of the experimental condition, given that the information provided by testers can be confirmed or refuted on the basis of other sources of information available to employers. In cases where employers in this study did perform background checks on testers, the check would come back clean (none of the testers in this study actually had criminal records). It is my expectation that because employers would not expect someone to lie about *having* a criminal record, and because employers know that criminal history databases are fraught with errors, they would be inclined to believe the worst-case scenario—in this case, the self-report.

90. HARRY J. HOLZER, *WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS* 55 (1996).

91. There is some indication that the frequency of criminal background checks has increased since September 11, 2001. First Response Security, Inc., for example,

Finally, reference checks were included as an outcome in this study with the belief that, for applicants with criminal records, having former employers or a parole officer willing to vouch for the reliability and competence of the individual would be critical. Additional voice mail boxes were set up for references, such that each application could provide numbers for two functioning references. As it turns out, however, employers seemed to pay virtually no attention to references whatsoever. Over the course of the 350 audits completed, only four separate employers checked references.⁹² Employers would frequently tell testers, "I'll just check your references and then give you a call," or leave messages saying, "I'm going to call your references, and then I'd like you to come in for a training," and yet no calls were registered.⁹³

This finding emphasizes the point that employers do not go out of their way to solicit nuanced information about applicants for entry-level jobs. Rather, it is up to the applicant to convey the important information on the written application or during a brief interview. It is possible that a larger number of employers check references at a later stage of the employment process.⁹⁴ By this point, however, the employer has likely already weeded the ex-offender out of the pool under consideration.

The question now becomes: to what extent are applicants with criminal records weeded out of the process at this initial stage? To answer this question, I turn to the results of the audit study.

V. THE EFFECT OF A CRIMINAL RECORD FOR WHITES

White noncriminals can serve as the baseline in the following comparisons, representing a presumptively nonstigmatized group relative to blacks and those with criminal records. Given that all testers presented roughly identical credentials, the differences experienced among groups of testers can be attributed fully to the effects of race or criminal status.

saw a 25% increase in employers conducting background checks since that time. Averyl Hill, *Background Checks: What Job Seekers Should Know*, Road Runner of Maine: Around Town (Oct. 30, 2001), at http://www.maine.rr.com/Around_Town/features2001/jobsinme/11_01/default.asp.

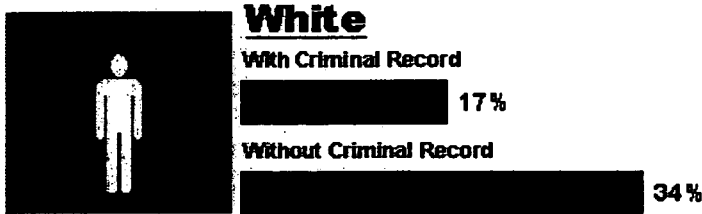
92. Two additional employers made calls to the numbers listed for the parole officer on the testers' applications. These calls, however, were not for the purpose of obtaining additional background information about the candidate. Rather, in both cases, employers had made several calls to the tester about the job opening and, reaching only his voice mail, were thus looking for an alternative way to track down the applicant.

93. The voice mail system was set up in such a way that even hang-ups could be detected.

94. Pager, *supra* note 70, at 146.

Figure 3 shows the percentage of applications submitted by white testers that elicited callbacks from employers, by criminal status.

Figure 3. Callback Rates for White Job Applicants



The effect of a criminal record is statistically significant ($p < .01$).

As illustrated above, there is a large and significant effect of a criminal record, with 34% of whites without criminal records receiving callbacks relative to only 17% of whites with criminal records. A criminal record, therefore, reduces the likelihood of a callback by 50%.⁹⁵

There were some fairly obvious examples documented by testers that illustrate the strong reaction among employers to the signal of a criminal record. In one case, a white tester in the criminal record condition went to a trucking service to apply for a job as a dispatcher. The tester was given a long application, including a complex math test, which took nearly forty-five minutes to fill out. During the course of this process, there were several details about the application and the job that needed clarification, some of which involved checking with the supervisor about how to proceed. No concerns were raised about his candidacy at this stage. When the tester turned the application in, the secretary brought it into a back office for the supervisor to look over, and perhaps to conduct an interview. When the secretary came back out, presumably after the supervisor had a chance to look over the application more thoroughly, he was told that the position had already been filled. While, of course, isolated incidents like this are not conclusive, this was not an infrequent occurrence. Often testers reported seeing employers' levels of responsiveness change dramatically once they had glanced down at the criminal record question.

Clearly, the results here demonstrate that criminal records close doors in employment situations. Many employers seem to use the information as a screening mechanism, without attempting to probe deeper into the possible context or complexities of the situation. As we

95. See *infra* app. B for coefficients from the logistic regression model.

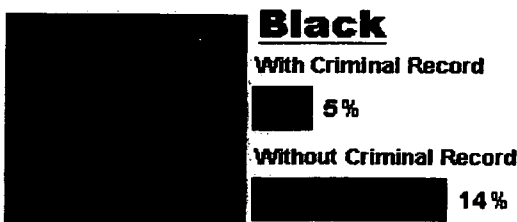
can see here, in 50% of cases, employers were unwilling to consider equally qualified applicants on the basis of their criminal record.

Of course, this trend is not true among all employers, in all situations. There were, in fact, some employers who seemed to prefer workers who had been recently released from prison. One owner told a white tester in the criminal record condition that he "like[d] hiring people who ha[d] just come out of prison because they tend to be more motivated, and are more likely to be hard workers" not wanting to return to prison. Another employer attempted to dissuade the white noncriminal tester from applying to his cleaning company because the job involved "a great deal of dirty work." On the other hand, he offered the job to the tester with the criminal record on the spot. A criminal record is, thus, not an obstacle in all cases, but on average, as we see above, it reduces employment opportunities substantially.

VI. THE EFFECT OF A CRIMINAL RECORD FOR BLACKS

The prior results document the clear impact of a criminal record on employment opportunities for white job applicants. A second question of this study was to assess how this effect may differ depending on the race of the applicant. Figure 4 presents the callback rates for black testers by criminal status. As shown in this figure, the effect for blacks is largely consistent with that for whites. There is some indication, though, that the magnitude of the criminal record effect may be even larger for blacks. While the interaction between race and criminal record is not statistically significant, the substantive difference is worth noting. While the ratio of callbacks for nonoffenders relative to offenders for whites was two to one, this same ratio for blacks is close to three to one.

Figure 4. Callback Rates for Black Job Applicants



The effect of a criminal record is statistically significant ($p < .01$).

This evidence is suggestive of the way in which associations between race and crime affect interpersonal evaluations. Employers, already reluctant to hire blacks, are even more wary of blacks with proven criminal involvement. These testers were bright, articulate college students with effective styles of self-presentation. The cursory review of entry-level applicants, however, leaves little room for these qualities to be noticed. Instead, the employment barriers of minority status and criminal record are compounded, intensifying the stigma toward this group. Employers appear to be conveying the message that with “two strikes, you’re out.”

The strong association between race and crime in the minds of employers provides some indication that the “true effect” of a criminal record for blacks may be even larger than what is measured here. If, for example, the outcomes for black testers *without* criminal records were deflated, in part, because employers feared that they might nevertheless have criminal tendencies, then the contrast between blacks with and without criminal records would be suppressed. Evidence for this type of statistical discrimination can be found in the work of Professor Shawn Bushway,⁹⁶ and Professors Holzer, Steven Raphael, and Stoll.⁹⁷

The salience of employers’ sensitivity toward criminal involvement among blacks was highlighted in several interactions documented by testers. On three separate occasions, for example, employers personally asked black testers, before receiving their applications, whether they had a prior criminal history. None of the white testers were asked about their criminal histories up front.

These two main findings—that a criminal record has a large effect on employment opportunities, and that this effect is greater for blacks—provides important new information to our understanding of the consequences of criminal justice intervention. First, the main effect provides conclusive evidence that a criminal record—in the absence of other disqualifying characteristics—severely limits future employment opportunities. Arguments that survey results cannot control for the many individual characteristics affecting employment can be neatly addressed in this research design, which fully controls for individual differences, through matching and random assignment, to directly measure the effect of a criminal record. Second, the finding that the effect may be larger for blacks reveals a new source of racial disparities not previously documented in the research literature. Not only are

96. Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276, 278, 288 (2004).

97. HARRY J. HOLZER ET AL., PERCEIVED CRIMINALITY, CRIMINAL BACKGROUND CHECKS, AND THE RACIAL HIRING PRACTICES OF EMPLOYERS (Inst. for Research on Poverty, Discussion Paper No. 1254-02, 2002).

blacks disproportionately affected by the much higher *rate* of incarceration, they may also be substantially more disadvantaged by its *effect*. These two findings together provide strong evidence of this important mechanism of stratification. A criminal record presents a major barrier to employment, with important implications for racial disparities.

VII. THE EFFECT OF RACE

While the main focus of this study was to investigate the effects of a criminal record, the profound effects of race cannot be ignored. Blacks continue to suffer from lower rates of employment relative to whites, but there is tremendous disagreement over the source of these disparities.⁹⁸ The idea that race itself—apart from other correlated characteristics—continues to play a major role in shaping employment opportunities has come under question in recent years.⁹⁹ The audit methodology is uniquely suited to address this question. While the present study design does not provide the kind of cross-race matched-pair tests that earlier audit studies of racial discrimination have used, the between-group comparisons (white pair versus black pair) can nevertheless offer an unbiased estimate of the effect of race on employment opportunities.¹⁰⁰

Figure 5 places the outcomes of the black and white tester teams on a common scale, revealing an enormous main effect of race. Among

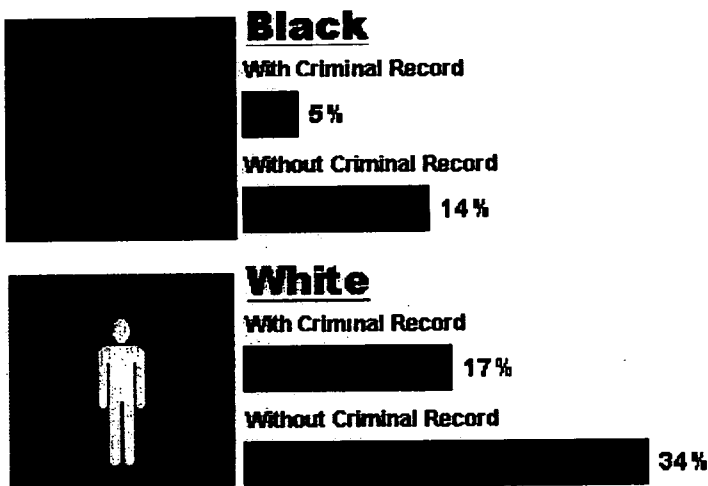
98. See generally Symposium, *Discrimination in Product, Credit and Labor Markets*, 12 J. ECON. PERSP. 23 (1998).

99. See, e.g., DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 276-79 (1995); SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 168-75 (1991).

100. Between-pair comparisons provide less efficient estimators, but they are nevertheless unbiased provided that there are no systematic differences between the sample of jobs assigned to each pair, or between the observed characteristics of the black and white pair (apart from race). WILLIAM R. SHADISH ET AL., *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR GENERALIZED CAUSAL INFERENCE* 109 n.2 (2002). In this study, jobs were randomly assigned to tester pairs to prevent systematic differences. Of course, it is impossible, even in an experimental design, to rule out the possibility that unmeasured differences between the black testers and the white testers systematically bias the results. See Heckman & Siegelman, *supra* note 54, at 188. This problem is one of the key limitations of the audit design. *Id.* In the present study, several attempts were made to minimize this source of bias. First, testers were chosen based on similar physical and dispositional characteristics to minimize differences from the outscut. Second, testers participated in an extensive training, including numerous role-plays, in which they learned to approach employers in similar ways. Third, testers used identical sets of resumes to ensure their comparability on objective dimensions. Finally, the fact that this study tests only the first stage of the employment process means that testers had little opportunity to engage in the kind of extensive interaction that might elicit systematic differences in treatment, based on factors other than race.

blacks without criminal records, only 14% received callbacks relative to 34% of white noncriminals ($p < .01$). In fact, even whites *with* criminal records received more favorable treatment (17%) than blacks *without* criminal records (14%).¹⁰¹ The rank ordering of groups in this graph is painfully revealing of employer preferences: race continues to play a dominant role in shaping employment opportunities, equal to or greater than the impact of a criminal record.

Figure 5. Callback Rates by Race and Criminal Status



The effects of race and criminal record are statistically significant ($p < .01$).

The interaction between the two is not significant in the full sample.¹⁰²

The magnitude of the race effect found here corresponds closely to those found in previous audit studies directly measuring racial discrimination. Professors Bendick, Charles Jackson, and Victor Reinoso, for example,

101. This difference is not significantly different from zero. Given, however, that we would expect black noncriminals to be *avored* (rather than equal) relative to criminals of any race, the relevant null hypothesis should be positive rather than zero, thus generating an even larger contrast.

102. This interaction between race and criminal record becomes significant when estimated among particular subsamples (namely, suburban employers and employers with whom the testers had personal contact). For a discussion of these results, see Pager, *supra* note 70, at 57-59.

found that blacks were twenty-four percentage points less likely to receive a job offer relative to their white counterparts, a finding strikingly similar to the 20% difference (between white and black nonoffenders) found here.¹⁰³ Thus, in the eight years since the last major employment audit of race was conducted, very little has changed in the reaction of employers to minority applicants. Despite the many rhetorical arguments used to suggest that direct racial discrimination is no longer a major barrier to opportunity,¹⁰⁴ as we can see here, employers, at least in Milwaukee, continue to use race as a major factor in hiring decisions.

VIII. DISCUSSION

There is serious disagreement among academics, policymakers, and practitioners over the extent to which contact with the criminal justice system—in itself—leads to harmful consequences for employment.¹⁰⁵ The present study takes a strong stand in this debate by offering direct evidence of the causal relationship between a criminal record and employment outcomes. While survey research has produced noisy and indirect estimates of this effect,¹⁰⁶ the current research design offers a direct measure of a criminal record as a mechanism producing employment disparities. Using matched pairs and an experimentally assigned criminal record, this estimate is unaffected by the problems of selection which plague observational data. While there are certainly additional ways in which incarceration may affect employment outcomes, this finding provides conclusive evidence that mere contact with the criminal justice system, in the absence of any transformative or selective effects, severely limits subsequent employment opportunities.¹⁰⁷

103. Bendick, Jr. et al., *Measuring Employment Discrimination*, *supra* note 55, at 29, 31. Note also that this study included an assessment of the full hiring process, from application to job offer. *Id.* at 31. The fact that the racial disparities reported here (at the first stage of the employment process) closely mirror those from more comprehensive studies provides further reassurance that this design is capturing a majority of the discrimination which takes place in the hiring process.

104. See, e.g., D'SOUZA, *supra* note 99, at 278-79; STEELE, *supra* note 99, at 172-75.

105. See generally KLING, *supra* note 25, at 30; Grogger, *supra* note 26, at 60-61, 70; Stephen C. Richards & Richard S. Jones, *Beating the Perpetual Incarceration Machine: Overcoming Structural Impediments to Re-entry*, in AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 201 (Shadd Maruna & Russ Immarigeon eds., 2004).

106. See generally Freeman, *supra* note 8; Western & Beckett, *supra* note 22.

107. Incarceration may also affect inmates' subsequent employment outcomes as a result of exposure to sustained physical or psychological trauma, a transformation of social networks, prolonged labor market absence, criminogenic influences, legal restrictions on employment or licensure, and other forms of major life disruption.

And while the audit study investigates employment barriers to ex-offenders from a micro perspective, the implications are far-reaching. The finding that ex-offenders are one-half to one-third as likely to be considered by employers suggests that a criminal record indeed presents a major barrier to employment. With over two million people currently behind bars, and over twelve million people having prior felony convictions, the consequences for labor market inequalities are potentially profound.

Second, the persistent effect of race on employment opportunities is painfully clear in these results. Blacks are less than half as likely to receive consideration by employers relative to their white counterparts, and black nonoffenders fall behind even whites with prior felony convictions. The powerful effects of race thus continue to direct employment decisions in ways that contribute to persisting racial inequality. In light of these findings, current public opinion seems largely misinformed: according to a recent survey of residents in Los Angeles, Boston, Detroit, and Atlanta, just over a quarter of whites believe there to be "a lot" of discrimination against blacks, compared to nearly two-thirds of black respondents.¹⁰⁸ Over the past decade, affirmative action has come under attack across the country based on the argument that direct racial discrimination is no longer a major barrier to opportunity.¹⁰⁹ According to this study, however, employers, at least in Milwaukee, continue to use race as a major factor in their hiring decisions. When we combine the effects of race and criminal record, the problem grows more intense. Not only are blacks much more likely to be incarcerated than whites; based on the findings presented here, they may also be more strongly affected by the impact of a criminal record. Previous estimates of the aggregate consequences of incarceration may therefore underestimate the impact on racial disparities.

Finally, in terms of policy implications, this research has troubling conclusions. In our frenzy to lock people up, our "crime control" policies may in fact exacerbate the very conditions that lead to crime in the first place. Research consistently shows that finding quality steady employment is one of the strongest predictors of desistance from crime.¹¹⁰ The fact that a criminal record severely limits employment

Estimates of the true collateral consequences of incarceration must take each of these possible influences into account.

108. James R. Kluegel & Lawrence D. Bobo, *Perceived Group Discrimination and Policy Attitudes: The Sources and Consequences of the Race and Gender Gaps*, in *URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES* 163, 165-66 (Alice O'Connor et al. eds., 2001).

109. See sources cited *supra* note 104.

110. SAMPSON & LAUB, *supra* note 7, at 169-70, 178; SHOVER, *supra* note 9, at 127, 138, 140; Uggen, *supra* note 9, at 542-43.

opportunities—particularly among blacks—suggests that these individuals are left with few viable alternatives.¹¹¹

As more and more young men enter the labor force from prison, it becomes increasingly important to consider the impact of incarceration on the job prospects of those coming out. No longer a peripheral institution, the criminal justice system has become a dominant presence in the lives of young disadvantaged men, playing a key role in the sorting and stratifying of labor market opportunities. The “criminal credential” now represents a common marker among young disadvantaged men, allowing for the easy identification and exclusion of those with a prior arrest or conviction. Further, because blacks are so strongly associated with the population under correctional supervision, it becomes common to assume that any given young black man is likely to have—or to be on his way to acquiring—a criminal record.

At this point in history, it is impossible to tell whether the massive presence of incarceration in today’s stratification system represents a unique anomaly of the late twentieth century, or is part of a larger movement toward a system of stratification based on the official certification of individual character and competence. Whether this process of negative credentialing will continue to form the basis of emerging social cleavages remains to be seen.

111. There are two primary policy recommendations implied by these results. First and foremost, the widespread use of incarceration, particularly for nonviolent drug crimes, has serious, long-term consequences for the employment problems of young men; the substitution of alternatives to incarceration, therefore, such as drug treatment programs or community supervision, may serve to better promote the well-being of individual offenders, as well as to improve public safety more generally through the potential reduction of recidivism. Second, additional thought should be given to the widespread availability of criminal background information. As criminal record databases become increasingly easy to access, this information may be more often used as the basis for rejecting otherwise qualified applicants. If, instead, criminal history information were suppressed—except in cases that were clearly relevant to a particular kind of job assignment—ex-offenders with appropriate credentials might be better able to secure legitimate employment. While there is some indication that the absence of official criminal background information may lead to a greater incidence of statistical discrimination against blacks, the net benefits of this policy change may, in fact, outweigh the potential drawbacks. See HOLZER ET AL., *supra* note 97; Bushway, *supra* note 96, at 278.

APPENDIX A: METHODOLOGICAL CONCERNS

Below I discuss some of the limitations of the audit methodology and ways in which findings from an experimental design may conflict with real-life contexts.

I. LIMITS TO GENERALIZABILITY

A. *The Reporting of Criminal Backgrounds*

In the present study, testers in the criminal record condition were instructed to provide an affirmative answer to any question about criminal background posed on the application form or in person. Employers were thus given full information about the (fictional) criminal record of the applicant. But how often do real ex-offenders offer such complete and honest information? To the extent that ex-offenders lie about their criminal background in employment settings, the results of this study may overestimate the effect of having a criminal record. If employers do not know about it, then surely a criminal record can have no influence on their hiring decisions.

Before starting this project, I conducted a number of interviews with parolees and men with criminal records. When asked how they handled application forms, the majority of these men claimed to report their criminal record up front. There are a number of reasons motivating this seemingly irrational behavior. First, most men with criminal records believe that the chances of being caught by a criminal background check are much higher than they actually are. While a majority of employers do not perform background checks on all applicants, there is the perception that this practice is widespread. Second, most men coming out of prison have a parole officer monitoring their reintegration. One of the most effective mechanisms of surveillance for parole officers is to call employers to make sure their parolees have been showing up for work. If the individual has not reported his criminal history, therefore, it may soon be revealed.¹¹² There is, thus, a strong incentive for parolees to be forthcoming in their reporting.

A second source of information on this issue comes from interviews with employers. In the second stage of this project, the same sample of employers were interviewed about their hiring practices and experiences.¹¹³ During these conversations, the employers were asked

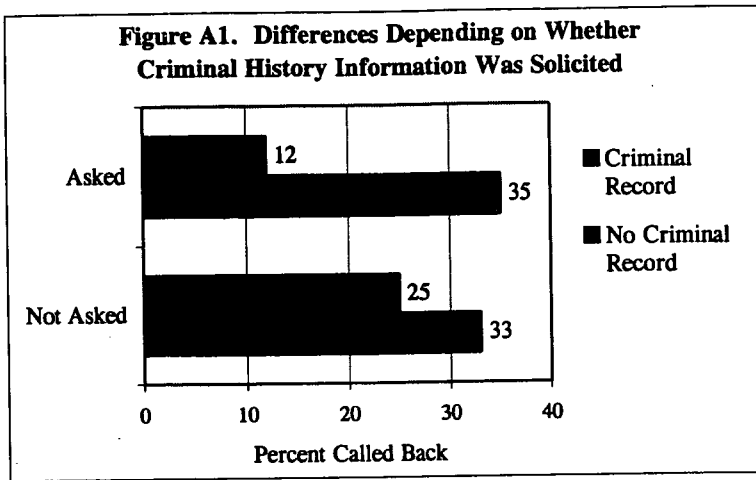
112. This is particularly consequential for employees in states such as Wisconsin where employers are not allowed to fire someone for *having* a criminal record, but they are allowed to fire him for *lying* about his record. WIS. STAT. §§ 111.321, .322(1).

113. Pager, *supra* note 70, at 100-01.

to report what percent of applicants over the past year had reported a prior conviction; and, among those employers who performed official criminal background checks, what percent were found to have criminal records. According to the employers, roughly 12% of applicants over the past year reported having a prior record on their application form. Of those employers who perform official background checks, an average of 14% of applicants were found to have criminal records. The disparity between self-reports and official records, therefore, is a minimal 2%. In fact, one manager of a national restaurant chain mentioned that sometimes applicants report *more* information than they need to: while the question on the application form asked about only felony convictions from the past year, this employer revealed that some applicants report misdemeanors or felony convictions from several years back. Whatever the reason, there seems to be evidence that far more ex-offenders report their prior convictions than “rational actor” models might predict. While surely some ex-offenders do lie on their applications, there is reason to believe this is far from the norm.

A related issue of study design concerns the reporting of criminal background information even when not solicited by the employer. Recall that roughly one-quarter of employers did not ask explicit questions on their application forms about an applicant’s criminal history. In order to make sure that all employers knew of the experimental condition, testers also reported work experience in the correctional facility and listed their parole officers as a reference. While this strategy was based on a composite profile of a number of real ex-offenders, by no way does it represent a modal application procedure. In most cases, if employers do not ask about (or check) criminal histories, they will never know. It is possible that in conveying the information artificially, the level of measured discrimination is inflated. To address this concern, a direct test is possible. Figure A1 presents the callback rate for employers who did and did not solicit information about prior convictions.¹¹⁴

114. Figure A1 presents the results for white testers only. Similar patterns are found for black testers, but are not shown here.



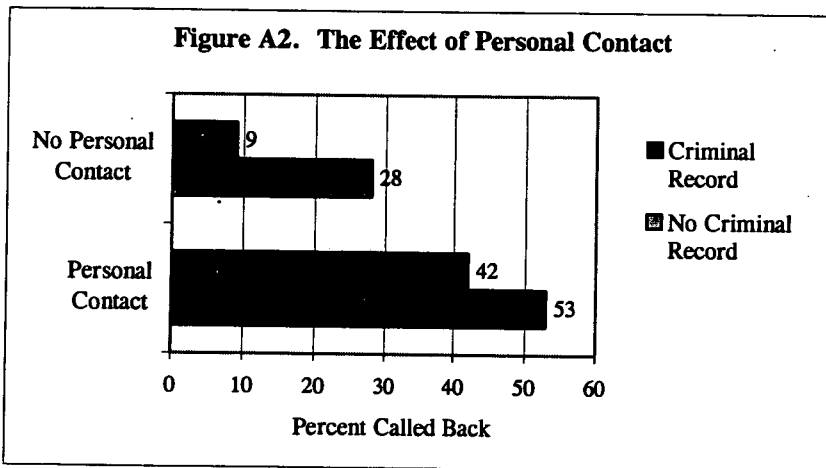
As is clear from this graph, employers who did not solicit information about criminal histories were much less likely to use the information in their hiring decisions. The disparity in treatment of ex-offenders relative to nonoffenders among employers who did request the information (12% versus 35%) is more than twice as large as that among employers who did not ask (25% versus 33%), a difference that is statistically significant. Therefore, in terms of its correspondence to the “real world,” providing unsolicited information about criminal backgrounds did little to affect employer responses.

B. The Representativeness of Testers

Testers in this study were bright, articulate college students with effective styles of self-presentation. The interpersonal skills of the average inmate, by contrast, are likely to be substantially less appealing to employers. The choice of testers in this respect was deliberate, as a means of fully separating the signal of a criminal record from other correlated attributes to which employers may also respond. It is nevertheless important to consider the extent to which these testers can be considered accurate representatives of the ex-offender experience. On one hand, it may be the case that the testers in this study represent a best-case scenario. Because their interactional style does not correspond to that of a stereotypical criminal, employers may be more willing to consider them as viable candidates despite their criminal background. In this case, the present study design would underestimate the true effect of a criminal record. On the other hand, for individuals with poor interpersonal skills, a criminal record may represent just one additional—but less consequential—handicap to the already

disadvantaged candidate. If this is the case, the testers in the present study may overestimate the effect of a criminal record.

One approach to investigating this problem is to analyze those applications submitted with no personal contact with the employer.¹¹⁵ In these cases, the interpersonal skills of the testers should have no influence on the employer's consideration of the applicant. In the analysis reported in Figure A2, I find that the effect of a criminal record is even greater in the absence of personal contact relative to the overall findings reported earlier.¹¹⁶ Personal contact appears to mediate the effect of a criminal record, reducing its negative impact. These results support the former hypothesis: the interpersonal skills of testers in the present study, to the extent that employers notice them, serve to weaken the effect of a criminal record. The estimates reported here, therefore, likely represent a lower-bound estimate of the true effect of a criminal record.



C. The Problems of Effective Matching

The validity of an audit study relies on its success in presenting two otherwise equally qualified job applicants who differ only by race or criminality. Given the vast number of characteristics that can influence an employer's evaluation, however, it is difficult to assure that all such dimensions have been effectively controlled. In testing for the effect of a criminal record, or other nonembodied characteristics (for example, those that can be randomly assigned to testers), these concerns are less relevant. Because testers are able to alternate serving in the criminal

115. Roughly 75% of applications were submitted with no personal contact with the employer.

116. Figure A2 presents the callback rates for white testers only.

record condition, any remaining differences between the tester pairs effectively cancels out over the duration of the study. By contrast, race is not something that can be experimentally assigned. We must believe, then, that audit researchers have been successful in identifying and matching all relevant characteristics—something that, according to Professor James Heckman, a vocal critic of the audit methodology, leaves substantial room for bias.¹¹⁷ Heckman and his colleagues' primary critique focuses on the problem of unobservables—those characteristics “unobservable to the audit study, but . . . at least somewhat visible to the prospective employer and acted on in hiring . . . decisions.”¹¹⁸ According to Heckman, blacks and whites (at the population level) may differ on average or in the distribution of important characteristics.¹¹⁹ For example, consider a hypothetical case in which whites on average have a faster response time in interview interactions than blacks. That is to say, the delay in seconds between a question posed by an interviewer and the initiation of response is shorter on average for whites than for blacks. To be sure, response times are just one potential example, and I emphasize that it is an example that, to my knowledge, has no empirical basis. Heckman himself does not suggest any concrete examples of potentially relevant unobservables that could affect hiring outcomes;¹²⁰ but certainly it is constructive to consider a concrete hypothetical case for the purpose of clarity. Because any difference in response time would be extremely subtle, it may not be immediately recognizable to researchers, and may even register for employers only at a subliminal level. Nevertheless, if this trait produces an incremental advantage for the individual with a faster response time—because he is perceived as sharper or more engaged—we may mistake the employer's response for discrimination when in fact nonracial evaluations are driving the differential response.

A related problem emerges if blacks and whites differ on key characteristics, not on average, but in the level of dispersion. To continue with the same example, imagine a case in which blacks and whites each have a mean response time of one-half second, but blacks demonstrate greater heterogeneity along this dimension than whites. Differential results may then be observed depending on the overall qualifications of the testers relative to the requirements of the job. If testers are highly qualified relative to the positions they apply for (which tends to be the case in audit studies), differential dispersion on any key variable will favor the group with lower dispersion because a smaller

117. James J. Heckman, *Detecting Discrimination*, 12 J. ECON. PERSPS. 101, 101-16 (1998).

118. Heckman et al., *supra* note 30, at 107-11.

119. Heckman, *supra* note 117, at 108-11.

120. *See generally id.*

proportion of applicants in this group will be at the low end of the tail relative to a high-dispersion group. Thus, if whites have less variation in response time than blacks, then even if the black and white testers have an equally high *average* response time, whites will more often perform above the required threshold.

According to Heckman, the problem of unobservables becomes even more pronounced as a result of the matching process.¹²¹ Precisely because testers have been matched according to the most important criteria (educational attainment, work experience, and so on), employers must resort to more subtle cues to select among applicants.

By taking out the common components that are most easily measured, differences in hiring rates as monitored by audits arise from the idiosyncratic factors, and not the main factors, that drive actual labor markets. These examples highlight the fragility of the audit method to untested and unverifiable assumptions about the distributions of unobservables.¹²²

Even among nondiscriminating employers, then, differential treatment may be recorded as the result of these small remaining differences between test partners that may be systematically correlated with race.

Heckman's critique raises some important considerations, and surely encourages a more rigorous scrutiny of the audit methodology. The primary limitation of this critique, however, is its focus on the potential for population differences rather than individual ones. Heckman's concern is that if, on average, blacks and whites differ in the mean or variance on any unobserved productivity-related variable, estimates from matched-pair studies will be biased by design.¹²³ If auditors were randomly drawn from the population and matched on a rote basis according to readily measurable characteristics, this critique would surely be valid. It is a mistake, however, to assume that the researcher is at a disadvantage relative to the employer in identifying the wide range of both measurable and subtle productivity-related characteristics.

In fact, the researcher *is* him or herself an employer through the course of the audit study. Hiring for the job of a tester is not easy. The job requires solid writing skills (for the written narratives that follow each audit), good communication skills (to communicate the necessary information in an interview and to make a good impression on the employer), high levels of motivation (to keep up day after day), reliability (to accurately conduct and report each test), navigation skills

121. *Id.* at 110-11

122. Heckman et al., *supra* note 30, at 111.

123. Heckman, *supra* note 117, at 110-11.

(to find locations throughout the city), and an endless number of other qualifications. Thus, apart from the more explicit traits of height, weight, race, and age, researchers must search for testers who can perform well in an intensely demanding position. Researchers carefully scrutinize tester applicants for the subtle cues that indicate motivation and competence.

Typically, researchers screen between 50 and 100 applicants (already selected on age, race, and gender) before finding a single matched pair. In the case of the present study, testers were first screened on the phone, then interviewed in person, and then, depending on their fit with other potential testers, brought back for a second extensive evaluation. In the course of these in-depth reviews, it is not the case that testers were being evaluated only according to those characteristics that could be objectively measured and matched. Rather, a qualitative sense of "How competent does this individual seem?" or "How attractive is this individual as a job candidate?" were equally important characteristics. Further, for the sake of erring on the safe side, any remaining imbalances were always in favor of the black testers. If one was going to be slightly more qualified, slightly more attractive, or slightly more capable, it was always the black tester.

The drawback of this elaborate matching process is that it is not easily subject to verification or replication. Clearly, some level of confidence must be placed in the researchers—confidence in their ability to notice and interpret subtle signals, and in their ability to identify comparable matches according to both particularistic and holistic criteria. It is a mistake, though, to assume that employers are more likely to notice and evaluate applicants on the basis of subtle characteristics that are unobservable to the researcher. The hours of time spent screening and training each tester allow for far more information than an employer can hope to gather in the course of a typical fifteen-minute interview. In fact, in the present study, where roughly 75% of applications were completed with little or no in-person contact with the person in charge of hiring, there was very little opportunity for the subtle characteristics of testers to be noticed.

Finally, recall that the present study tests only the callback stage of employment. This means that employers are not restricted to a single candidate, but rather typically invite between five and eight applicants for an interview. Given that testers were generally better qualified than the average applicant, even subtle differences in certain characteristics should still leave both testers well above the threshold for this first stage of selection. Thus, rather than forcing employers to differentiate among applicants on the basis of some characteristic of lesser importance (because testers are equivalent on the most important dimensions),

nondiscriminating employers have the option of selecting both candidates for this initial round of review.

D. *The Case of Milwaukee*

One key limitation of the audit study design is its concentration on a single metropolitan area. The degree to which the findings of each study can be generalized to the broader population, therefore, remains in question. In the present study, Milwaukee was chosen for having a profile common to many major American cities, with respect to population size, racial composition, and unemployment rate.¹²⁴ There are, however, two unique features of Milwaukee that limit its representativeness of other parts of the country. First, Milwaukee is the second most segregated city in the country, implying great social distance between blacks and whites, with possible implications for the results of the audit study.¹²⁵ If race relations are more strained in Milwaukee than in other parts of the country, then the effects of race presented in this study may be larger than what would be found in other urban areas. Second, Wisconsin had the third largest growth in incarceration rates in the country,¹²⁶ and currently has the highest rate of incarceration for blacks in the country.¹²⁷ If the statewide incarceration rates are reflective of an especially punitive approach to crime, this could also affect the degree to which a criminal record is condemned by employers, particularly among black applicants.

Of course, the only way to directly address these issues is through replication in additional areas. With respect to the main effect of race, previous audit studies have been conducted in Washington, D.C., Chicago, and New Jersey, confirming the basic magnitude of the effects reported here.¹²⁸ Although the last major audit study of race was conducted over eight years ago,¹²⁹ these results provide some indication

124. Ctr. on Wis. Strategy, *Milwaukee Area Regional Economic Analysis* (1996); Marc V. Levine & Sandra J. Callaghan, Ctr. for Econ. Dev., *The Economic State of Milwaukee: The City and the Region* (May 1998), at <http://www.uwm.edu/Dept/CED/publications.html>.

125. See PAUL JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 49–58 (1997).

126. JENNI GAINSBOROUGH & MARC MAUER, *DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s*, at 7–8 (2000).

127. BECK & HARRISON, *supra* note 10.

128. TURNER ET AL., *supra* note 53; Bendick, Jr. et al., *Measuring Employment Discrimination*, *supra* note 55; Jerome Culp & Bruce Dunson, *Brothers of a Different Color: A Preliminary Look at Employer Treatment of White and Black Youth*, in *THE BLACK YOUTH EMPLOYMENT CRISIS* 233 (Richard B. Freeman & Harry J. Holzer eds., 1986).

129. Bendick, Jr. et al., *Measuring Employment Discrimination*, *supra* note 55, at 31.

that Milwaukee is not a major outlier in its level of racial discrimination in hiring.

In the case of the criminal record effect, only future studies can confirm or contradict the results presented here. As the first study of its kind, it is impossible to assess the degree to which these results will generalize to other cities. Looking to existing survey research, however, we can gain some leverage on this issue. According to a recent survey conducted by Holzer and Stoll, employers in Milwaukee reported substantially greater openness to considering applicants with criminal records than do their counterparts in Chicago, Los Angeles, and Cleveland.¹³⁰ If these self-reports accurately reflect employers' relative hiring tendencies, then we would expect the results of this audit study to provide conservative estimates of the barriers to employment faced by ex-offenders in other metropolitan areas.

E. Sample Restrictions

The present study was intended to assess the effect of a criminal record on employment in entry-level jobs. In order to obtain a sample of such positions for use in this study, however, it was necessary to impose certain sample restrictions on the categories of entry-level employment to be included. The degree to which these restrictions affect the generalizability of these findings to real employment searches, therefore, warrants careful consideration.

Virtually all employment audits have relied on samples of job openings identified through ads in metropolitan newspapers. Although want ads provide an easily accessible listing of job vacancies, research on actual job search behavior demonstrates that only a minority of jobs are found through this source.¹³¹ Holzer estimates that roughly 20% to 25% of search time is spent on contacts generated by newspaper advertising, with friends and relatives and direct contact of firms by applicants representing much more common sources of new employment.¹³²

Although it would be preferable to include job vacancies derived from representative sources, it is difficult, if not impossible, to map the network of informal contacts that lead to most job opportunities. Instead, researchers have relied upon sources which allow for systematic and consistent sampling schemes, despite the reduction in representativeness.¹³³ Following previous research, the present study

130. HOLZER & STOLL, *supra* note 46, at 17, 20.

131. Harry J. Holzer, *Search Method Use by Unemployed Youth*, 6 J. LAB. ECON. 1, 10 (1988).

132. *Id.*

133. See Heckman & Siegelman, *supra* note 54, at 213-15.

relies upon a random sample of job openings from advertised sources (the *Milwaukee Journal Sentinel* and Jobnet).¹³⁴ Fortunately, there is compelling research to suggest that the restricted sample provides a more conservative estimate of racial discrimination.¹³⁵ Firms who wish to discriminate, commentators argue, are more likely to advertise job openings through more restrictive channels than the metropolitan newspaper, such as through referrals, employment agencies, or more selective publications.¹³⁶ Indeed, this argument is indirectly supported by research showing that minorities are more successful in job searches generated by general newspaper ads than through other means.¹³⁷ Further, pilot audits conducted by the Fair Employment Council in Washington, D.C., also indicate lower rates of discrimination against minorities in jobs advertised in metropolitan newspapers than those advertised in suburban newspapers or through employment agencies.¹³⁸

In the case of ex-offenders, personal networks may represent a more important source of employment. Although there have been few systematic investigations of the search methods of individuals coming out of prison, small-scale case studies indicate that personal referrals can be extremely important for the job placement of this population.¹³⁹ Because of the pervasive discrimination faced by ex-offenders in the labor market as a whole, personal networks can direct individuals to specific employers who are willing to hire individuals with criminal records.¹⁴⁰ In this case, ex-offenders may be likely to queue for lower-quality jobs that accept applicants with criminal histories, rather than applying for the wider range of (higher-quality) employment among which they are likely to face more severe discrimination. If this is the case, incarceration effects would be more likely to show up in estimates of earnings and job security, rather than employment probabilities, as measured here. Future research mapping the search patterns of ex-offenders would provide useful information with which to evaluate the types of jobs in which ex-offenders are most at-risk of discrimination.

134. See MILWAUKEE J. SENTINEL, *supra* note 60; Jobnet, *supra* note 61.

135. See, e.g., Michael Fix et al., *An Overview of Auditing for Discrimination*, in CLEAR AND CONVINCING EVIDENCE 1, 32 (Michael Fix & Raymond J. Struyk eds., 1993).

136. *Id.*

137. Harry J. Holzer, *Informal Job Search and Black Youth Unemployment*, 77 AM. ECON. REV. 446, 446-47 (1987).

138. Marc Bendick, Jr. et al., *Discrimination Against Latino Job Applicants: A Controlled Experiment*, 30 HUM. RESOURCE MGMT. 469, 478 (1991); Bendick, Jr. et al., *Measuring Employment Discrimination*, *supra* note 55, at 37-38.

139. See generally MARTA NELSON ET AL., THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY (1999); MERCER L. SULLIVAN, "GETTING PAID": YOUTH CRIME AND WORK IN THE INNER CITY (1989).

140. See NELSON ET AL., *supra* note 139.

It is important to note, however, that the importance of social networks for ex-offenders seeking employment may differ across racial groups. Professor Mercer Sullivan, for example, reports that, among juvenile delinquents, whites and Hispanics were readily placed in employment by relatives or extended networks following release from incarceration; blacks, by contrast, benefited much less from social networks in finding work.¹⁴¹ These informal methods of job search behavior, therefore, may in fact result in greater evidence of racial disparities in employment following incarceration than what is reported here.

Prior to sampling, the following additional restrictions were imposed (for reasons discussed below):

- Not hiring through an employment agency;
- No more than a high school degree required;
- No public sector positions;
- No health care positions;
- No jobs related to the care of children or the elderly; and,
- No jobs whose announcements explicitly stated security clearance required.

The restrictions with the largest effect on my sample are those related to employment agencies and the health care industry. Employment agencies are becoming increasingly dominant in regulating the market for entry-level labor.¹⁴² Based on my own calculations, between 35% and 40% of jobs advertised through Jobnet were temporary-to-permanent positions through an employment agency. There exists quite a bit of literature on the quality of temporary employment and the treatment of workers hired through employment agencies.¹⁴³ An audit of employment agencies, however, warrants an independent study given the very different hiring processes operating in such establishments.

The elimination of health care positions from my sample was due to the extensive legal restrictions in this sector barring the employment of individuals with criminal records.¹⁴⁴ This sample constraint eliminated a huge number of jobs otherwise available to entry-level job seekers

141. See generally SULLIVAN, *supra* note 139, at 103-05.

142. Francoise Carre & Chris Tilly, *Part-Time and Temporary Work: Flexibility for Whom?*, DOLLARS & SENSE, Jan. 1998, at 22, 22-25.

143. See, e.g., KEVIN D. HENSON, *JUST A TEMP* (1996).

144. WIS. ADMIN. CODE § HFS 12.06. Such restrictions also apply to occupations involving care for children or the elderly and many public sector positions. Kathleen Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROBATION, Sept. 1996, 10, 10-17.

without criminal records. The health services sector represents 8.3% of total employment,¹⁴⁵ and a much larger share of new employment. Hospitals alone were the fourth largest employers in the Milwaukee region in 1995.¹⁴⁶ These are some of the highest-wage jobs in the service sector.¹⁴⁷

Other occupations were likewise eliminated from the sample, not because of blanket legal restrictions, but because their job announcements explicitly stated that applicants must pass a criminal background check or that security clearance was required. While it is not clear that blanket exclusion of all criminal convictions in these cases was defensible under the law, the employers' policies were made explicit. While one cannot always assume that stated policies will be enforced, in the case of criminal records, these jobs are unlikely to demonstrate much variance.

A true estimate of the collateral consequences of a criminal record on employment opportunities would take into account the large number of jobs formally closed to ex-offenders (rather than just those demonstrating a preference for or against applicants with criminal records). The estimates produced from the audits, therefore, represent only part of the total effect of a criminal record of the likelihood of finding employment.

F. Experimenter Effects

One potential weakness of the audit study methodology is that the expectations or behaviors of testers can influence the outcome of results in nonrandom ways. In the course of this research, it became apparent that testers may, in fact, (unconsciously) behave differently depending on the experimental condition. With respect to the criminal record condition, several testers commented that they felt irrationally bad about themselves when presenting themselves as ex-offenders. If it is the case that these feelings made them more self-conscious, more reticent, or nervous when speaking with employers, then this behavior in itself may lead to spurious outcomes. These psychological reactions may be even more pronounced in the case of black testers. One tester, early on, reported feelings of discouragement and frustration that he had very few responses from employers. As a successful, bright college student, the change in status to a young black criminal was extreme, and the difference in treatment he received seemed to take a toll. Fortunately, after gaining more experience with the project, this tester (and others)

145. Ctr. on Wis. Strategy, Milwaukee Area Regional Economic Analysis (1996), at <http://www.cows.org>.

146. *Id.*

147. *Id.*

seemed to feel more comfortable in their interactions and better able to perform in their assigned roles.

It is certainly the case that the psychological experiences of testers can influence the outcome of audit studies in nontrivial ways. It is unlikely, however, that these internal dynamics are the driving force behind the results reported from this study. As noted earlier, in a vast majority of cases, testers have little, if any, contact with employers. Given that a majority of callbacks were made on the basis of applications submitted with little or no personal contact, the internal disposition of the tester is unlikely to exert much influence. The finding that personal contact actually served to weaken the effect of a criminal record¹⁴⁸ provides further evidence that the friendly, appealing qualities of the testers were apparent to employers, even among applicants in the criminal record condition.

148. See *supra* fig.A2.

**APPENDIX B: LOGISTIC REGRESSION OF THE EFFECTS OF
CRIMINAL RECORD AND RACE ON APPLICANTS'
LIKELIHOOD OF RECEIVING A CALLBACK**

	Coefficient	Robust Standard Error	
Criminal Record	-0.99	0.24	***
Black	-1.25	0.28	***
Criminal Record x Black	-0.29	0.38	

Note: Standard errors are corrected for clustering on employer ID in order to account for the fact that these data contain two records per employer (that is, criminal record versus no criminal record). This model also controls for location (city versus suburb) and contact with the employer, variables which mediate the relationship between race, crime, and employer responses.