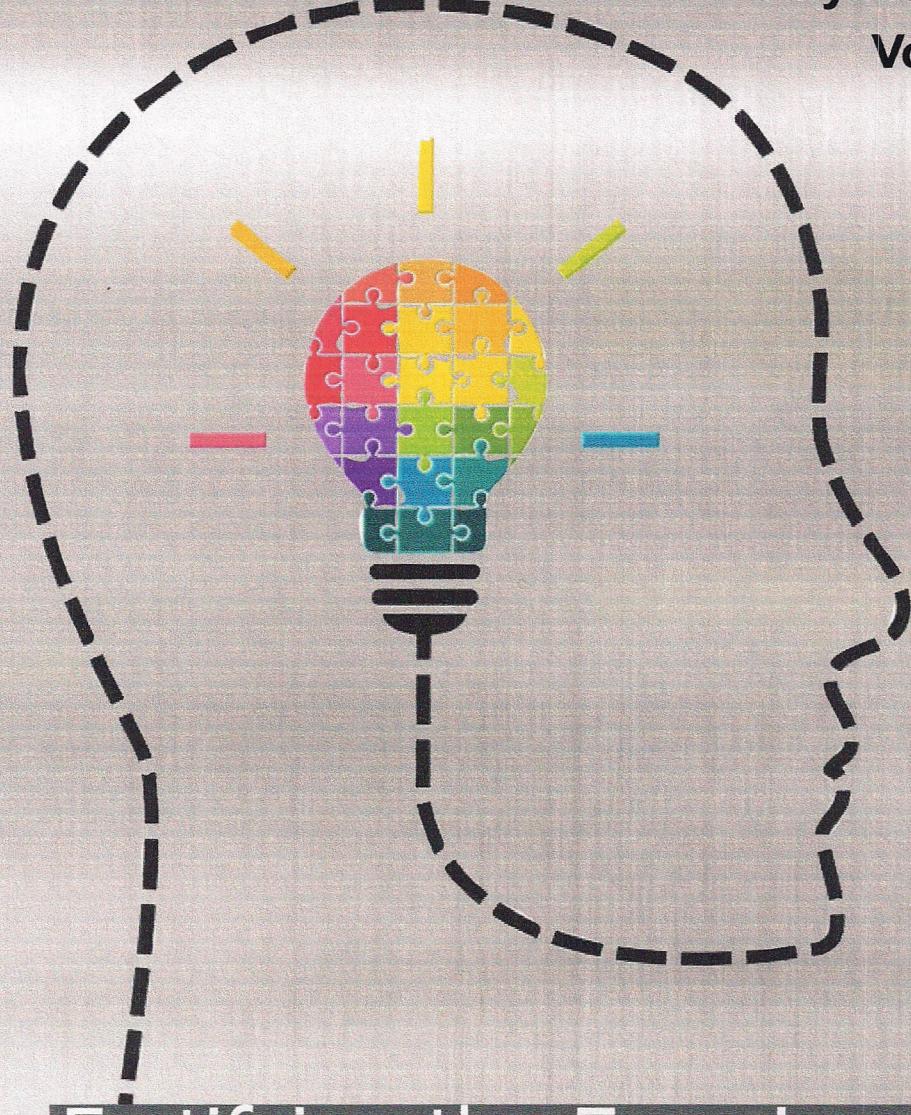


# APA MAGAZINE

The Magazine for the Polygraph Professional

July/August 2016

Volume 49,4



**Fortifying the Examiner**

51<sup>st</sup> Annual Seminar

American Polygraph Association

## NEW RESEARCH CONTRADICTS BASIS FOR BAN-THE-BOX

A review of *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, Agan, A. and Starr, S. in the University of Michigan **MICHIGAN LAW**, No. 16-012, June, 2016.

Stanley M. Slowik\*

As detailed in American Polygraph Association publications over the last several years (Slowik, 2012, 2015, 2016), Ban-the-Box (BTB) is the practice that prohibits employers from seeking recent, work related information about job applicants' criminal history and activity, in most cases, until after Conditional Offer of Employment (COE). Currently, 23 states and over 100 other government agencies have endorsed the restrictions, most recently, the Office of Personnel Management (OPM), which, on the basis of a new Executive Order, has now extended the ban to all federal employers (*ibid*, 2016). The original contention by BTB initiators that the significant statistical gender and racial disparities in criminal conviction rates was somehow the result of systemic sexism and racism within law enforcement and the criminal justice system is unsupported by any credible research. More importantly, the federal courts have recently concluded that the Equal Employment Opportunity Commissions position that sexism and racism account for the statistical disparities in criminal activity to be "laughable, distorted, cherry-picked, worthless and an egregious example of scientific dishonesty". Now, a new study conducted at Princeton University and the University of Michigan with contributions from some of the most respected American research universities, finds the basic premise that delaying access to job applicant criminal conviction records improves employment chances to be false. In fact, the study found precisely the opposite: employers with open record access have a significantly lower racial disparity in positive call backs to submitted job applications. **NOTE:** Because the study used the appellations white and black, those terms are used in this review.

*Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* used an experimental setting and a randomized design to eliminate non-racial variables that might influence results of 15,000 on-line job applications for fictitious white and black male candidates so identified by using first and last names historically documented to be used by white and black males born 21 to 22 years previously. The applications were all submitted to actual, for profit, private employers in New Jersey and the City of New York before and after those governments enacted BTB laws. The researchers then studied the call back rates, defined as requests for the applicant to contact the employer or schedule a pre-employment interview, between whites and blacks, before and after BTB. Contrary to BTB advocate claims, the study found that prior to BTB, black applicants with felony conviction records actually had a slightly better call back rate (10.2%) than white applicants with felony conviction records (8.4%) but after BTB, the direction of disparity reversed and the significance of disparity had a dramatic, negative effect on black applicants with felony conviction records with the whites receiving 7% more call backs, increasing the racial gap to 45%, whites over blacks, with BTB in place.

\*Stanley M. Slowik is licensed as a polygraph examiner, instructor and Intern Supervisor and is a frequent contributor to APA and other professional publications.

There are several important study design choices that should be mentioned before discussing the speculated causes for the negative effect of BTB on black applicants with felony conviction records.

First, this is an experimental study using fictitious job applicants, albeit, applying to real employers. However, the positions being sought were all low wage, unskilled, entry level jobs with no or minimal educational and experiential requirements. All the applications were made to private sector employers in New Jersey or New York City, primarily in the retail industries (fast food, service stations, etc.) with the exception of the motel/hotel industry. As the authors themselves report, nearly all BTB laws exclusively effect only public employers and even those few private sector jobs that are exempt from the Employee Polygraph Protection Act have some meaningful job requirements. Most incredibly, the study report notes that they were surprised to discover that over 60% of the employers they choose for the study never requested information about criminal conduct before or after BTB laws were enacted. While this lack of concern about criminal activity may be true for the low skill retail jobs, it is not true for low skill motel/hotel jobs. Within the latter employment sector can be found some of the most notorious precedent setting Negligent Hiring case law concluding that employers need criminal record checks and more to reduce liability. The researchers justify this study design choice by maintaining that they wanted to select jobs that were already well populated by black males in order to eliminate unknown non-racial effects.

Secondly, the researchers choose to limit the criminal convictions to only “minor” felonies, further limited to minor property crimes (shoplifting, not carjacking) and minor drug offenses (possession, not sale or distribution). In addition, the researchers further qualified their “felonies” to single offenses for which the applicant did no time. These are hardly the kinds of crimes with which employers who conduct evaluations of criminal behavior, are concerned. Notably absent from consideration are felony convictions for crimes of violence: sexual assaults, armed robbery, domestic violence, etc.).

Third, there appears to be a profound liberal bias in both the terms used to discuss issues and issues that are omitted from discussion. For example, the report refers to “statistical discrimination on the basis of race” and “racial discrimination” when referring to what is normally (and legally) called a statistical disparity or disparate impact. Criminal records are referred to as “major barriers to employment” or “an obstacle to employment” as if the evaluation of work related criminal activity was a contrivance for racial discrimination and not of Business Necessity. Female job applicants are completely omitted from the study though not from the BTB laws even though gender disparities with regard to felony conviction records are much greater and insidious than racial disparities, albeit in the wrong politically correct direction.

Fourth, the psychological theory behind BTB, that employers will not disqualify applicants with work related criminal histories after the Conditional Offer because “Rejection is harder once a personal relationship has been formed” (Love, 2004) lacks any support in reality, assumes employers will ignore their own hiring standards and contradicts numerous federal and state employment laws mandating consistent, equal treatment and practice. The only group of applicants likely to benefit from this highly subjective approach might be confidence men with work related felony records who can talk their way past the hiring decision maker.

Fifth, the assumption that employers will know the race of the applicant from the name or even bother to look at the name, is tenuous at best. As the researchers themselves note, only 50% of male names have a statistically significant difference. Further, many online applications, particularly those used by larger, multi-location employers of the type selected in the study, use computer analysis and are not reviewed by an actual person. The researchers noted that some of their applications were rejected because the employer's computer programs spotted the fake Social Security numbers used in the submissions. Finally, for the applications that were actually reviewed by a person, the reviewers' race is unknown as is the reviewers' predisposition toward racism.

Essentially, the researchers maintain that all of their study design choices were intended to isolate non-racial influences on results, in-effect, to enhance the benefits of BTB on black, male applicants with felony conviction records. What appears to be completely lacking in both the study design and discussion is the reason why both public and private employers feel the need to evaluate criminal activity or why so many federal and state licensing agencies require a criminal record check as a prerequisite to obtaining a government issued license sometimes required for employment. Rather than a pretext for gender and racial discrimination, evaluation of past criminal activity attempts to predict what an applicant will do, particularly with regard to work place violence and integrity related issues that affect organization operations, productivity, reputation and the safety of its employees and customers. Criminal record checking is but a small part of the process and not as effective as information developed from interviews and pre-employment polygraph examinations focused on criminal commissions, not just convictions. Criminal conviction records require that the applicant first have been caught then have the committed crime minimized through the process of charge and plea bargaining. Predictions of future work related conduct are far more accurate when based on what the applicant actually did, not what the record indicates was pled. There is no mention in the study of how BTB laws that delay evaluation of criminal activities until after the Conditional Offer of Employment are in direct opposition of the federal Buchanan and Leonel decisions (Buchanan, 1996; Leonel, 2005). Further, the researchers fail to mention how dragging out the process effects selection opportunities when competing with organizations who do not have to comply with BTB laws.

Unfortunately, the issues created by the study design selections clearly make generalizations to public sector jobs with meaningful qualification standards very difficult particularly for jobs where integrity, work place violence, safety and productivity effected by substance abuse are relevant.

#### Speculated Causes for Results

The researchers speculate that the most likely cause for the study results – that black male job applicants with minor felony records have a significantly reduced chance of getting a job because of BTB than their white counterparts – is based on racial stereotyping. Specifically, since the employers might be able to deduce the applicant's race from their name but would not have any information about felony convictions, they would assume probabilities about serious, felony criminal activities based upon negative group stereotypes, in this case, regarding black males. The researchers correctly point out that while such probability stereotyping is illegal, it is virtually impossible to prove. In short, the researchers point out that in the open record (before BTB) situation, employers could see the felony and make a

determination of relevance whereas, after BTB, they presumed that black males are more likely to have a felony conviction record and that the felony is both serious and relevant to employment. The report notes that although illegal, criminal record stereotyping is rational since all criminal justice data bases clearly show this significant statistical racial disparity. What the report fails to mention, however, is that the same data shows even greater statistical disparities in favor of women and that, in reality, males and specifically black male are convicted of serious felonies, particularly crimes of violence, far more often than any other group. As discussed in previous APA articles, the gender disparities appear to have a physiological basis: testosterone. Recent empirical research correlates risk taking with testosterone and, by extension, concludes that criminal activity, particularly involving violence, being risky, has a clear and demonstrable male bias. All of the theories attempting to explain the statistical racial disparities among males have either been disproven (racism, socio-economic motives) or lack support (the fatherless family, lead poisoning, etc.). Nevertheless, because black males commit felony crimes (both minor and serious) more often than any group, they wind up being convicted more than any other group. If BTB advocates truly want to improve employment opportunities for black males, finding solutions to reduce the criminal commission rate for black males rather than falsely attributing it to systemic racism might provide relief. The researchers, however, propose a very different solution: prohibit employers from obtaining the name of the applicant. Under these conditions, employment evaluations of all applicants, not just the 50% of applicants whose race might be inferred by their name and the number of actually reviewed by a person, would find that verification of their employment histories, motor vehicle records, I-9 citizenship and work permit requirements, etc. much more difficult, if not impossible. Finally, since employers who consider the evaluation of recent, work related criminal activities relevant and reward applicants not engaged in criminal activities by considering them further for employment, BTB sends the message that non-criminal behavior is not valued. Worst of all, assuming the same hiring standards are applied to all applicants for the same job – without regard to race or gender – BTB only gives applicants who do not meet the standards false hope since they will still be disqualified when the employer is eventually allowed to evaluate work related criminal conduct.

#### REFERENCES

Agan, A., Starr, S., *Ban The Box, Criminal Records, and Statistical Discrimination: A Field Experiment*,  
<http://ssrn.com/abstract=2795795>

Buchanan v. City of San Antonio, 85F.3d 196, 199, 5<sup>th</sup> Cir., 1996

Leonel v. American Airlines, Inc., U.S. Court of Appeals, 9<sup>th</sup> Cir., No. 03-15890, 2005

Love, M., *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, Howard Law Journal, 54(3).p.753-793, 2004

Slowik, S., *Criminal and Credit Records and Pre-employment Background Investigations*, Polygraph Magazine, 45(2), p.22-23, 2012

Slowik, S., *EEOC Enforcement Guidance On Arrest and Conviction Records in Employment Decisions Under Title VII*, Polygraph Magazine, 45(4), p.40-47, 2012

Slowik, S., *Compliance Update: Employment Practices and Procedures*, APA Magazine, 48(1), p.51-56, 2015

Slowik, S., *Disparate Impact and EEOC v. Freeman*, 2015, APA Magazine, 48(3), p.103-108, 2015

Slowik, S., *New Federal Ban-The-Box Mandate*, APA Magazine, 49(3), 2016