

Effect of Online Court Records

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On my honor as a University Student, I have neither given nor received
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Introduction

Every day tens of thousands of terabytes are uploaded to the internet, most of which people are happy to share. What is shared ranges from Facebook birthday posts to an Instagram photo of food they ate at the latest trendy restaurant. However, not all information is shared willingly. The states and the federal government routinely publish court records exposing people's criminal records and other unflattering information. These court records serve a purpose of informing the public and increasing government transparency and accountability. However, this comes with the cost to people's personal privacy, and could cause them to wear a scarlet letter. The primary goal of this STS thesis is to conduct a cost-benefit analysis of having court records, and thereby criminal records, publicly available online.

Background

At the moment, federal court cases are presumed available to the public unless the case is sealed or held public due to federal rule (Judicial, 2001). This ability to see court records has been ruled to be a right enshrined by common law by the Supreme court. The Supreme Court has stated that people had the right "to inspect and copy public records and documents, including judicial records and documents". However, the court ruled that this right is not absolute and has limits and the courts can limit the disclosure of court files that "might have become a vehicle for improper purposes" (Nixon v. Warner Communications, Inc., 1978). Currently, anyone can access federal court records using Public Access to Public Court Records (PACER), an online database where people can access records for a small fee. This is a much more convenient way to access records than in the past. For example, in 1853 Congress set the price to copy a court

record at 10 cents per page or 2 dollars in today's money. In addition, an individual would have to go to a court to request these records (United States, 2004). Each state also has their own online database or databases that provide a similar role to PACER.

These court records can contain various sensitive data, from arrest, convictions, and lawsuits even those settled out of court. For example, if an employee sued their employer for workplace discrimination the employee must fill out a civil complaint detailing the alleged discrimination. In response to the suit the employer would write refutes to the allegations, and possibly bring counterclaims against the employee. Then during the pre-trial discovery, both lawyers can request evidence from opposing and third parties. At this point the case might be settled out of court. Even if this settlement is reached and the lawsuit never went to court, the corresponding evidence found and complaints from the employer/employee would be in the court records online for anyone to view (Conley et. al, 2012). These records could contain potentially damaging material to both parties, and are not fully representative of the whole story. However, it could be argued that the records possibly serve the public good by warning about future work with either employer or employee depending on the evidence.

This relatively new ability to easily access court records online has led to regular criminal background checks to become more affordable and accessible to the public. Landlords, employers and others in positions of power often make decisions based on results from criminal background checks, making it difficult for those with criminal backgrounds to successfully find safe places to live or work (Lageson, 2016). However, public safety must also be considered. People with a criminal record are more likely to commit another crime than the general population (United States, 2013). Another benefit of greater access to court records is allowing people to hold the government accountable over criminal justice issues and other political issues.

In many states, people elect local judges, and those voters should be able to assess how their elected officials perform their jobs. These issues will be further evaluated and examined in this STS thesis.

For the methodology of this study, I will primarily be using prior research to aid in the exploration. However, the study will focus on a few key areas. First, I will look at prior research that examines the difficulties that someone with a publicly available criminal record faces. I will then compare these difficulties to those whose criminal records are concealed to the public. This will give a good comparison and remove many confounding variables by looking at similar populations with one of the few differences between the groups being the availability of their criminal records. Second, I will explore prior research comparing the frequency of criminal background checks in both the pre-internet age workforce and current industry. Thirdly, I will look at prior research detailing how easily accessed criminal records increase individual and public safety. Lastly, I will look at how public court records are used to hold governmental officials accountable by the electorate.

SCOT

I will be using the Social Construct of Technology (SCOT) theory during the analysis of the STS thesis. SCOT is the theory that a variety of social factors shape technological advancement and development. The theory also has a few key features through a focus on relevant social groups, interpretive flexibility, closure and stability. Interpretive flexibility is the belief that various relevant social groups can have different views on the same technology. SCOT also stresses closure, or the actions of social groups to exclude others from different privileges and benefits while including those from within their social group. Lastly SCOT emphasizes stabilization, the act in which social groups coalesce around a technology that is

beneficial to them ("Social Construction of Technology", 2020). Through this viewpoint I will see how various social groups have been affected by online court records and how interactions between these groups gave rise to the current state of the technology. As for which social groups to use, I plan on focusing on those with criminal records, those in the general public, policy makers, those in positions of power (employers, landlords, etc.).

Criminal Records and employment

With the proliferation of online criminal background checks has made it easy to find out if someone has been convicted of a crime. For example, the National Association of Professional Background Screeners found that 89% of employers conduct county/statewide criminal searches while 84% conduct national database searches. In addition, 86% of employers conduct some sort of background check on all full-time employees (National Association of Professional Background Screeners, 2018). The rate of these checks has greatly increased over the past few decades. In the UK, for instance, the number of disclosed employer criminal background checks per year has grown from 100,000 in 1985 to 2 million in 2002, a trend that is mirrored in the U.S. (Thomas 2007). This poses a challenge to the millions of Americans with easily accessible criminal records. A 2012 governmental survey determined that there were 94,434,600 automated criminal records in state and U.S. territory databases (although, some criminal records may be duplicates from other state). It has also been estimated that more Americans have a criminal record than a Bachelor's degree. The high rate of background checks directly impacts the job prospects of these citizens. It is difficult to gauge how severely criminal background checks affect someone's employment prospects since those with criminal records could be less employable for reasons besides a criminal record. However, by looking at those with a criminal record expunged we can estimate the cost of a public criminal record. In a study at the University

of Michigan, found that a year after someone’s criminal record was expunged, they had 13% greater chance at being employed, and were 23% more likely to be making at least \$100 per week after adjusting for an individual’s prior employment and wage history, as well as broader changes in the economy. There is the caveat though that individuals seeking to have their criminal expunged were motivated to better their lives and this motivation led to the increase in income (Prescott & Starr, 2020).

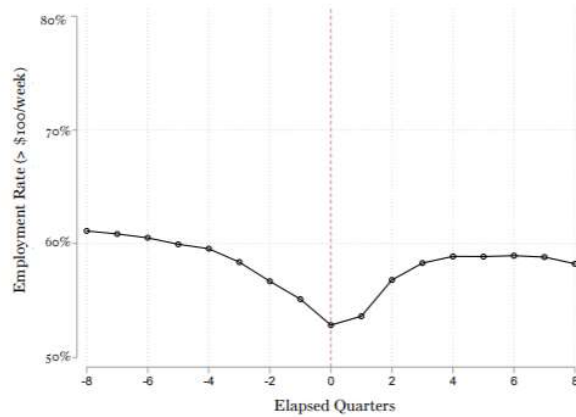


Fig 1. EMPLOYMENT RATE (> \$100/WEEK) BEFORE AND AFTER EXPUNGEMENT

Despite the fact that removal of public criminal records may benefit those with a criminal record it could hurt those without one. A study by Agan and Starr (2016) looked at the effect of state-wide “ban the box” legislation. This type of legislation prevents employers from asking if a job applicant has a criminal record on job applications. These policies have often been promoted by those who want to help those previously incarcerated reenter society. However, the study found that if employers could not easily discriminate by criminal record resorted to other means. For example, the study created job applications and resumes to send out to employers prior to and after “ban the box” legislation in New Jersey and New York City came into effect. They found that although the callback rate for applications with a criminal was lower than those without prior to the ban the box legislation, after the legislation went into effect call back rates

went lowered for some marginalized groups. Black applications without a criminal background had a callback rate of 12.7% prior to ban the box legislation. After the laws went into effect the callback rate for black applications dropped to 11.0%.

Employers have a variety of reasons for why they might want to conduct a criminal background check. In a 2018 National Association of Professional Background Screeners survey they found that 86% of employers said they conducted background checks to protect other employees and customers. Additionally, 52% of respondents believed that background checks allowed them to increase the quality of new hires. The safety concerns are well founded. Ex-offenders have a high rate of committing another crime. A recent study following 392,000 released federal inmates has found that 37% are rearrested within 3 years and that 23% are arrested within a year of release (Yukhnenko, et.al, 2018). An employer looking at these statistics could make the logical conclusion that hiring people with a criminal background would lead to a less stable workforce, and could potentially lead to crime in the workplace. In addition, criminal background can also protect vulnerable populations. Federal law requires that childcare providers must run a comprehensive criminal background check with fingerprint check using the FBI database (childcare.gov, 2020). Many states also require criminal background checks for those who work in long term care facilities.

Despite the fact that not hiring someone with criminal record may increase the safety in a specific workplace it might decrease the overall safety of society. Studies have found that people who have a criminal record that are employed are less likely to commit additional crimes (Siwach, 2017). Thus, by preventing those with a criminal record from working again could lead to higher overall recidivism rates and make it harder for them to reenter and contribute to society. Due to these problems criminal justice reform advocates have been pushing to lessen

legal requirements for background checks or prevent employers from asking about criminal records on job applications. Reformers advocate for laws or regulations that would treat someone's criminal history like someone's familial status or religion. Employers are not allowed to inquire about these facts to prevent discrimination.

Housing

Not only are there challenges to obtaining employment for those who have a criminal record, but there are also challenges to finding housing. After release, most individuals do not have the money for private accommodations so many resort to either living with family or public housing. However, many local housing authorities have blanket bans on those with a criminal record that can be traced back to the 1980's when criminal record databases were first being created and crime was high. This is done ostensibly to reduce drug related and criminal behavior. However, some studies refute that this behavior would increase by allowing those with criminal records to live in public housing. For example, one study found that those with an extensive criminal history were able to retain housing at the same rate as those without a criminal record. Instead, the ability to retain housing more so correlated with age and substance abuse (Schneider, 2017).

Private landlords are also using criminal background checks at an ever-increasing rate. A National Multi-Housing Council in 2005 found that 80% of landlords screened potential tenants for criminal records, a number that has most likely increased since then. Websites that cater to mom and pop landlords such as Zillow even have criminal background checks as a benefit for using their platform to list one's property. This is popular for landlords to do since many landlords believe that tenants with a criminal background are less stable than those without and are more likely to damage the property or not pay rent. In addition, some landlords are afraid that

they would be held liable if one tenant hurt another tenant. Many landlords have been sued successfully for crime that happened on their properties and they believe the best defense against a lawsuit is by conducting criminal background checks (Thatcher, 2008). Although, discriminating based on criminal history may be beneficial to a landlord and to the safety of other tenants some are concerned about the societal impacts of barring those with a criminal record. Many advocates worry that these types of policies might lead to an increase in homelessness in those with criminal records. It is estimated that people with a criminal record are ten times more likely to be homeless than those without. Although, the cause of this problem is multifactorial criminal background checks likely play a part in causing this disparity. This has led the cities of Oakland and Berkeley to ban the use in criminal background checks (Ravani, 2020).

Transparency

Although the rise of online court records has given raise to the abundance of criminal background checks that is seen today, it has also allowed for citizens to gain unprecedented transparency in how the judicial branch is run. The benefits of an open judiciary are plentiful. These court records help ensure that witnesses are honest, judges are fair, and the government does not engage in unjust prosecution. One example, of this is in UVA's Law School. Where researchers are looking over Virginia's court records to try to determine if there are discrepancies between the sentencing of minority criminal defendants versus that of white defendants. Additionally, online access to court records help increase the publics understanding and predictability of courts. If citizens are able to see court outcomes, they will be able to understand how punishment is administered. Without this transparency, there could be grave consequences. For example, in Kenya, the judiciary was closed to the citizenry until 2011. During this time

activists were routinely jailed for months without trial, and judges were often corrupt. There was even a common saying among Kenyans “Why hire an attorney when you can buy a judge?” (Von Wiegen, Lisa, & Oltmann, 2020).

Conclusion

The rise of online criminal records has altered society. Although the records allowed for an unprecedented increase in the transparency of the judiciary, it also led to widespread discrimination against those who have a criminal record in order to increase safety. Although there has been some pushback against the widespread use of criminal background checks by those who have a criminal record and their advocates, it is unlikely completely the U.S. reverts to limited use. The desire for personal safety often outweighs one’s concern for others. Employers, landlords, and people in general want to protect themselves, their workers, and property. This desire will most likely continue to push those with a criminal record further to the edge of society.

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