

## Privacy versus Antidiscrimination

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### INTRODUCTION

Thanks to the adoption of Megan's Laws in all fifty states<sup>1</sup> and the rise of a large background check industry that caters to employers, landlords, lenders, and other important decisionmakers, information about criminal histories is becoming more accessible than ever before. The same is true of financial information, such as bankruptcy records, credit records, and other evidence of past financial distress. Google and other search engines have made it easier for decisionmakers to locate other information about individuals that may have some bearing on their fitness for a job, an apartment, a loan, or another opportunity.<sup>2</sup> For the most part, information privacy scholars have bemoaned these developments.<sup>3</sup> Privacy critics have responded by suggesting that the availability of this information results in more accurate decisions about hiring and that efforts to use privacy law to block the dissemination of this information will compromise economic efficiency.

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<sup>1</sup> See Linda Greenhouse, *Justices Reject Challenges to Megan's Laws*, NY Times A29 (Mar 6, 2003) (providing general background to Megan's Laws, now promulgated in all fifty states, "which impose registration restrictions on tens of thousands of [sex offenders]").

<sup>2</sup> See, for example, Alan Finder, *When a Risky Online Persona Undermines a Chance for a Job*, NY Times sec 1 at 1 (June 11, 2006) ("Many companies that recruit on college campuses have been using search engines like Google and Yahoo to conduct background checks on seniors looking for their first job.").

<sup>3</sup> For some examples of work in this vein, see generally Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale 2007); Oscar H. Gandy, Jr., *Quixotics Unite! Engaging the Pragmatists on Rational Discrimination*, in David Lyon, ed, *Theorizing Surveillance: The Panopticon and Beyond* 318 (Willan 2006); Daniel J. Solove, *The Digital Person: Technology and Privacy in the Information Age* (NYU 2004); Stan Karas, *Privacy, Identity, Databases*, 52 Am U L Rev 393 (2002); A. Michael Froomkin, *The Death of Privacy?*, 52 Stan L Rev 1461 (2000); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan L Rev 1373 (2000). For a more optimistic take, see David Brin, *The Transparent Society: Will Technology Force Us to Choose between Privacy and Freedom?* 13 (Addison-Wesley 1998).

This essay seeks to add one important argument to the debate over the proliferation of information about individuals' involvement in the criminal justice system, financial distress, or other embarrassing activities.<sup>4</sup> It suggests that by increasing the availability of information about individuals, we can reduce decisionmakers' reliance on information about groups. Put another way, there is often an essential conflict between information privacy protections and antidiscrimination principles, such that reducing privacy protections will reduce the prevalence of distasteful statistical discrimination. The essay draws heavily on a series of recent economic papers finding that in the absence of accurate information about individuals' criminal histories, employers who are interested in weeding out those with criminal records will rely instead on racial and gender proxies.

In framing this project, it is worth identifying my priors at the outset. I care about information privacy protections. But I care more about antidiscrimination protections. Were it possible to sacrifice information privacy interests to reduce the prevalence of racial discrimination or other forms of unlawful discrimination, that is a trade-off that I would be willing to make, particularly where the information privacy interests at stake implicate neither intimate association nor political association. Some readers may not share that hierarchy of interests, but my goal in this project is to help advocates of greater information privacy protections recognize all the collateral consequences of those policies.

## I. THE TRADEOFF BETWEEN PRIVACY AND ANTIDISCRIMINATION

Newspaper reporters have recently noticed the difficulties that African-American professionals in big cities encounter when trying to hire a nanny. Young couples expressed frustration that among nannies, African-American clients were widely seen as being too demanding, living in unsafe neighborhoods, or unable to pay as much as white couples.<sup>5</sup> Perhaps most frustrating of all: these stereotypes seemed to be shared by nannies of all backgrounds, including African Americans and Caribbeans.<sup>6</sup> Similar phenomena have been used to explain the difficulties that African-American professionals have hailing cabs successfully—African-American riders are viewed as less-safe passengers

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<sup>4</sup> I develop a more comprehensive theory of the relationship between information privacy and competing policy interests in Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 *Nw U L Rev* (forthcoming 2008). That article also elaborates on some of the arguments that I introduce in this symposium contribution.

<sup>5</sup> Jodi Kantor, *Nanny Hunt Can Be a "Slap in the Face for Blacks"*, *NY Times A1* (Dec 26, 2006).

<sup>6</sup> *Id.*

and poorer tippers.<sup>7</sup> Waiters similarly perceive African Americans as poor tippers, an expectation that becomes a self-fulfilling prophecy if African Americans receive less attentive service as a result.<sup>8</sup>

Racial animus explains some of this behavior, but in the standard narrative, statistical discrimination is doing most of the work.<sup>9</sup> That is, nannies are looking for good employers and associate race with employer quality. After all, if African-American nannies are reluctant to work for African-American parents, it is hard to construct a compelling animus-based story about why that would be so. Along the same lines, cab drivers are looking for good tippers and reliable payers, and believe that passenger race predicts these behaviors. Statistical discrimination is based, not on irrational animus, but on the use of heuristics by decisionmakers who believe—correctly or not—that observable hallmarks of membership in a group correlate with some undesirable characteristic. One premise of this paper is that in modern America, statistical discrimination is more prevalent than animus-based racism.<sup>10</sup> It is in many ways a more tempting form of discriminatory behavior, since, unlike animus-based discrimination, it will often be rational.

To illustrate how statistical discrimination plays out in contemporary society, suppose a person charged with hiring a sales clerk wants to avoid employing someone with a criminal background. A majority of employers evidently refuse to hire ex-convicts, and this reluctance stands in sharp contrast to their widespread willingness to hire members of other stigmatized groups, such as welfare recipients, GED holders, and applicants who had been unemployed for a year or longer.<sup>11</sup> We can tell a number of stories about why this particular

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<sup>7</sup> See Ian Ayres, Fredrick E. Vars, and Nasser Zakariya, *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 *Yale L J* 1613, 1648–53 (2005).

<sup>8</sup> Michael Lynn, *Ethnic Differences in Tipping: A Matter of Familiarity with Tipping Norms*, 45 *Cornell Hotel & Restaurant Admin Q* 12, 12 (2004).

<sup>9</sup> On statistical discrimination, see David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *Georgetown L J* 1619, 1622–24, 1626–30, 1639–43 (1991); Stewart Schwab, *Is Statistical Discrimination Efficient?*, 76 *Am Econ Rev* 228, 229 (1986). See also Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias*, 94 *Cal L Rev* 969, 974–75 (2006) (describing implicit bias as a problematic decisionmaking heuristic).

<sup>10</sup> For a discussion of the decline of overt discrimination and the rise of statistical discrimination and implicit bias, see generally Rachel F. Moran, *Whatever Happened to Racism?*, 79 *St John's L Rev* 899 (2005).

<sup>11</sup> Harry J. Holzer, Steven Raphael, and Michael A. Stoll, *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in Mary Pattillo, David Weiman, and Bruce Western, eds, *Imprisoning America: The Social Effects of Mass Incarceration* 205, 210–11 (Russell Sage 2004):

Approximately 92 percent of employers indicated that they would definitely or probably hire former or current welfare recipients, 96 percent indicated that they would probably or definitely hire workers with a GED in lieu of a high school diploma, 59 percent indicated that they would hire workers with a spotty employment history, and 83 percent indicated

aversion to hiring ex-offenders is rational.<sup>12</sup> Someone with a criminal conviction in his past could be less trustworthy than someone without such a conviction. Hiring someone with a criminal background could expose an employer to vicarious liability under a variety of theories, and in some job sectors it is unlawful to hire someone with a felony conviction.<sup>13</sup> In any event, assuming the decisionmaker lacks reliable access to information about applicants' criminal records, he might choose to hire a Caucasian female over an equally qualified African-American male, based on the relatively high percentage of African-American males and the relatively low percentage of Caucasian females who are involved in the criminal justice system.<sup>14</sup> This decision-making process will impose a distasteful form of collective punishment on African-American males who have had no run-ins with the law, penalizing them for crimes that others have committed. Because many decisionmakers may exercise the same decisionmaking criteria, a law-abiding African-American male may face repeated rejection and economic marginalization.<sup>15</sup> For these reasons, antidiscrimination law prohibits the use of these race or gender proxies even where race or gender might correlate with some relevant qualification.<sup>16</sup>

Policing statistical discrimination has proved difficult: many victims of this sort of discrimination never bring suit, many nonvictims do bring suit, and enforcement of the laws by the Justice Department and state attorneys general has been sporadic.<sup>17</sup> Concerned about an avalanche of claims, a number of appellate courts have imposed substantial burdens on plaintiffs seeking to enforce antidiscrimination

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that they would probably or definitely consider an application from an individual who has been unemployed for a year or more. In contrast, only 38 percent of employers said that they definitely or probably would accept an application from an [sic] former offender.

<sup>12</sup> For an illuminating discussion of the legal and moral issues implicated by this sort, and other sorts, of profiling, see Frederick Schauer, *Profiles, Probabilities and Stereotypes* 16–17, 155–223 (Belknap 2003).

<sup>13</sup> Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J Contemp Crim Just 276, 277 (2004).

<sup>14</sup> See Kathleen Daly and Michael Tonry, *Gender, Race, and Sentencing*, 22 Crime & Just 201, 201–03 (1997).

<sup>15</sup> See Strauss, 79 Georgetown L J at 1626–29 (cited in note 9).

<sup>16</sup> See *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v Norris*, 463 US 1073, 1085 n 15 (1983) (“Title VII clearly would not permit use of race . . . as a proxy for such an employment qualification, regardless of whether a statistical correlation could be established.”).

<sup>17</sup> Francis Carleton and Jennifer Nutt Carleton, *An Ethic of Care Applied: A Critical Analysis of Affirmative Action Jurisprudence*, 8 Temple Polit & Civ Rts L Rev 87, 109–10 (1998); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L Rev 1401, 1429–30 (1998).

laws, often hamstringing discovery, interpreting statutes of limitations aggressively, or hastening resolution of claims on summary judgment.<sup>18</sup>

#### A. Empirical Evidence of Statistical Discrimination

A fascinating recent paper in the *Journal of Law and Economics* by Holzer, Raphael, and Stoll illustrates the prevalence of statistical discrimination and the failure of antidiscrimination laws to curtail it.<sup>19</sup> The paper began by noting that 28 percent of African-American males, 16 percent of Hispanic males, and 4 percent of white males would be incarcerated at some point in their lives, and that the median prison sentence was less than two years.<sup>20</sup> As a result, Holzer and his co-authors observed that a sizable minority of the male labor pool in the United States consists of people with criminal records.<sup>21</sup> The study then surveyed employers about their most recent hire for a position that did not require a college degree.<sup>22</sup> The authors collected demographic information about each firm's most recent hire and information about the firm's willingness to hire employees with criminal records generally.

The findings of the study suggested that statistical discrimination against African-American males is widespread and that employers were using race as a proxy for involvement in the criminal justice system. Employers who conducted criminal background checks on applicants were more than 50 percent more likely to hire African Americans than employers who did not (24 percent versus 14.8 percent, respectively).<sup>23</sup> Consistent with the statistical discrimination hypothesis, the effect was highly significant for employers who expressed unwillingness to hire ex-offenders (10.7 percent greater likelihood) and only

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<sup>18</sup> See, for example, *Ledbetter v Goodyear Tire & Rubber Co, Inc*, 127 S Ct 2162, 2165 (2007), (construing the time limit for filing employment discrimination claims with the EEOC narrowly); *Brown v City of Oneonta*, 221 F3d 329, 338–39 (2d Cir 2000) (holding that despite potential disparate impact, the law enforcement's stopping of suspects on the basis of gender and race did not violate equal protection absent evidence of discriminatory racial animus). See also Matt Graves, Note, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 Mich J Race & L 159, 185 (2001) (discussing how many judges have viewed certain anti-discrimination suits "with a presumption of frivolousness"), citing Judith Olans Brown, Stephen N. Subrin, and Phyllis Tropper Baumann, *Some Thoughts about Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 Emory L J 1487, 1489–90 (1997).

<sup>19</sup> Harry J. Holzer, Steven Raphael, and Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J L & Econ 451, 452 (2006).

<sup>20</sup> *Id.* at 451.

<sup>21</sup> *Id.* See also Devah Pager, *The Mark of a Criminal Record*, 108 Am J Soc 937, 938 (2003) (noting that approximately 8 percent of the working-age population of the United States are ex-felons).

<sup>22</sup> Holzer, Raphael, and Stoll, 49 J L & Econ at 464 (cited in note 19).

<sup>23</sup> *Id.*

marginally significant for employers who stated their willingness to hire ex-offenders (4.8 percent greater likelihood).<sup>24</sup> The effects for African-American males were far greater than the effects for African-American females,<sup>25</sup> which is consistent with the statistical discrimination hypothesis and hard to square with a racial animus hypothesis. Further, the study found the same effects even after controlling for differences in the racial composition of the applicant pool.<sup>26</sup> The study also found evidence that surveyed employers who do not conduct criminal background checks used other proxies for criminal convictions as well, including spotty work history and being unemployed for more than a year, and that those employers who expressed unwillingness to hire ex-offenders were significantly less likely to hire members of these stigmatized groups.<sup>27</sup>

Surveying their results, the study authors reached the following conclusion about the effects of statistical discrimination on African-American job applicants:

[T]he empirical estimates indicate that employers who perform criminal background checks are more likely to hire black applicants than employers that do not. . . . [T]his positive net effect indicates that the adverse consequences of employer-initiated background checks on the likelihood of hiring African Americans is more than offset by the positive effect of eliminating statistical discrimination.

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In addition, we find that the positive effect of criminal background checks on the likelihood that an employer hires a black applicant is larger among firms that are unwilling to hire ex-offenders. This pattern is consistent with the proposition that employers with a particularly strong aversion to ex-offenders may be more likely to overestimate the relationship between criminality and race and hence hire too few African Americans as a result.<sup>28</sup>

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<sup>24</sup> Id at 464–65.

<sup>25</sup> Id at 465–66, 470–71.

<sup>26</sup> Id at 473.

<sup>27</sup> Id at 472.

<sup>28</sup> Id at 473. One of the authors of this study recently hedged this conclusion somewhat, noting that the desirability of promoting access to criminal records would depend on the amount of time for which a prior conviction would act as a reliable proxy for future conduct and the degree of nuance in employer reactions to prior convictions. See Steven Raphael, *Should Criminal History Records Be Universally Available?*, 5 *Criminol & Pub Policy* 515, 516–17, 519–20 (2006).

The implications of the study and of similar studies on the employment market by the same authors are horrifying, but they should not be surprising. Many employers wish to avoid hiring ex-offenders. Employers who expend resources on criminal background checks will be able to sort effectively among those African Americans who have had run-ins with law enforcement and those who have not, but other employers will rely on race as a proxy for criminality, imposing a distasteful sanction on law-abiding African-American males. According to the Holzer et al study, information privacy protections for ex-cons seem likely to harm African-American males as a whole because they thwart employers' ability to sort between those African-American males who have criminal records and those who do not.<sup>29</sup>

The Holzer et al papers comprise the most technically impressive approach to this particular issue, but they are not the only scholars to examine these questions. A handful of other papers have examined the effects of increased automation of criminal history records on the aggregate employment of ex-offenders and racial minorities, and they reached divergent conclusions. Keith Finlay, while a graduate student in economics at UC Irvine, concluded in an unpublished paper that the automation of criminal history records and their availability on the internet in some states was associated with a decrease in the employment of young African-American males of slightly more than 2 percent.<sup>30</sup> These results were statistically significant. By contrast, Shawn Bushway, a Professor of Criminology at SUNY-Albany, used essentially the same data set<sup>31</sup> and found that African Americans have *higher* wages in those states that have automated access to criminal history records to the greatest degree, and he attributes this finding to statistical discrimination in those states that have not automated access.<sup>32</sup> Unlike Finlay, Bushway found that access to criminal history

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<sup>29</sup> Holzer, Raphael, and Stoll, 49 J L & Econ at 473 (cited in note 19) ("The results of this study suggest that curtailing access to criminal history records may actually harm more people than it helps and aggravate racial differences in labor market outcomes.").

<sup>30</sup> Keith Finlay, *Employer Access to Criminal History Data and the Employment of Young Black Men* 22 (unpublished paper, Sept 2006), online at <http://www.economics.uci.edu/docs/colloppapers/f06/grad/Finlay.pdf> (visited Jan 12, 2008) (finding that access to criminal history records was associated with a 2.34 percent decrease in the relative employment of young black men).

<sup>31</sup> Finlay and Bushway both used employment data from the Current Population Survey, though the years they selected differed, and a ranking of internet accessibility of criminal history records prepared by the Legal Action Center in 2004. Finlay used the Legal Action Center's rankings as a starting point and supplemented them with his own estimates of when the publication of criminal history information began. Although the Legal Action Center's ratings attempted to report the relative degree of accessibility, Finlay appears to have transformed accessibility into a binary choice. See *id.* at 30 nn a-b. Bushway, by contrast, did not modify the Legal Action Center's rankings. See Bushway, 20 J Contemp Crim Just at 286 (cited in note 13).

<sup>32</sup> Bushway, 20 J Contemp Crim Just at 280 (cited in note 13).

records did reduce the differential between whites' and blacks' wages and the differential between whites' and blacks' employment levels, but the results were not statistically significant.<sup>33</sup> There were minor methodological differences between the two papers that probably explain the differing results.<sup>34</sup> More puzzling is a follow-up unpublished paper that Finlay recently posted on the internet, which finds that wages for ex-offenders are significantly lower in states with more accessible criminal records,<sup>35</sup> that the wages of black male non-offenders are lower in states with more accessible criminal records,<sup>36</sup> and that "non-offenders from groups with higher predicted probabilities [of offending] have better employment outcomes in states with more open criminal history records. This is consistent with employer statistical discrimination in the absence of readily available criminal background checks."<sup>37</sup> Finlay's most recent paper forthrightly concludes that it is hard to know what to make of statistical discrimination in employment in light of the inconsistent nature of his findings and incompleteness of the data.<sup>38</sup>

Reflecting on the Finlay and Bushway research, I suspect that neither author's work sheds much light on the subject because both authors are using a noisy data set, and one that is difficult to replicate.<sup>39</sup> Finlay and Bushway both emphasize the differences among jurisdictions in the availability of criminal history information. But because a large number of proprietary firms make national criminal record searches available for a small fee, it is not clear how much of a difference actually exists between the open-records and closed-records states that those scholars identify. Indeed, open records does not mean free access. Washington state, characterized by Finlay as an open-records jurisdiction, does make criminal history records available over the internet, but at a cost of \$10 per search.<sup>40</sup> It is plausible that most Washington-based employers would prefer to pay a commercial data broker \$30 or \$40 to search criminal records nationally,

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<sup>33</sup> Id at 287.

<sup>34</sup> In addition to the differences mentioned in note 31, Bushway focused on African-American employment generally and Finlay focused on young African-American males.

<sup>35</sup> Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-offenders and Non-offenders* 14 (unpublished manuscript, Apr 16, 2007), online at <http://client.norc.org/jole/SOLEweb/7348.pdf> (visited Jan 12, 2008).

<sup>36</sup> Id at 16 (noting that the wages of black male non-offenders were about 9 percent lower in states with open records).

<sup>37</sup> Id at 18.

<sup>38</sup> Id at 19.

<sup>39</sup> The Legal Action Center index of internet availability that both authors use is no longer available on the Center's website.

<sup>40</sup> See Washington State Patrol, WATCH: Washington Access to Criminal History, <https://watch.wsp.wa.gov> (visited Jan 12, 2008).



as opposed to \$10 to search records in one state. If that is the case, then the difference between open-records and closed-records jurisdictions will be too noisy a variable.

To sum up the available data, then, the Holzer et al research is the best information we have, and it suggests that employer access to criminal history information displaces statistical discrimination against African-American males. There is noisier research out there, which tries to determine what effects interstate variation in the availability of criminal history records has on employment, but the results are preliminary, ambiguous, and many of them have not yet survived peer review. It therefore seems appropriate to tentatively accept the findings of Holzer and his co-authors as the current state of the art, while recognizing that future economic research will shed more light on this important question and could prompt reconsideration.

#### B. Government Information Policy as a Supplement to Antidiscrimination Law

Given the deleterious consequences of the employer behavior that Holzer and his co-authors find, it is worth examining the possible avenues, other than *ex post* litigation, for the state to prevent statistical discrimination. One way to protect African Americans and other disadvantaged groups would be to make them appear indistinguishable from whites. Indeed, some efforts to reform antidiscrimination law have suggested that statistical discrimination can be mitigated if the relevant decisionmakers are deprived of information about a candidate's race, religion, or gender.<sup>41</sup> With less information, decisionmakers presumably will focus more on the black and white of a job applicant's resume and less on the black or white of a job applicant's skin. Related efforts, such as the Racial Privacy Initiative that was defeated at the polls in California in 2003, ostensibly sought to decrease racial discrimination by prohibiting the government from collecting information about individuals' race so that the government could not disseminate that information at a later date or act upon it.<sup>42</sup>

In the information age, we should consider approaching the statistical discrimination problem from the opposite direction: using the

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<sup>41</sup> See, for example, Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 Cal L Rev 1, 14–16 (2000) (discussing orchestral auditions, in which a screen separates the judges from the auditioning musician). But see Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L J 1344, 1350–52 (2007) (proposing that the government try to limit landlords' access to information regarding tenants' prior involvement in landlord-tenant litigation).

<sup>42</sup> For an interesting discussion and critique of this initiative, see Anita L. Allen, *Race, Face, and Rawls*, 72 Fordham L Rev 1677, 1686–96 (2004).

government to help provide decisionmakers with something that approximates complete information about each applicant, so that readily discernable facts like race or gender will not be overemphasized and more obscure but relevant facts, like past job performance and social capital, will loom larger.

For example, the government might subsidize the creation of information clearinghouses, so that employee evaluations from prior employers can be aggregated in one place; it might use tax incentives to encourage the collection of 360-degree feedback about employees within firms so that one boss's negative opinion of a former employee is not given too much weight; the state might publish information about all individuals' involvement (or lack thereof) in the criminal justice or bankruptcy systems; it might publish military records that document individuals' performance and conduct while in the service; or it might verify and vouch for applicants' educational credentials.<sup>43</sup>

On this theory, a major factor driving unlawful discrimination on the basis of race, ethnic status, gender, or religion is a lack of verifiable information about the individual seeking a job, home, or service. By making the publication of criminal histories tortious,<sup>44</sup> restricting the ability of information data brokers to disseminate information about individuals,<sup>45</sup> or raising the media's costs of obtaining aggregated

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<sup>43</sup> Richard Epstein notes in passing the desirability of such efforts and complains that antidiscrimination law sometimes thwarts them. Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* 40 (Harvard 1992):

The strategy of the law should be to encourage employers to obtain as much individual information as possible about workers so that they can, *pro tanto*, place less reliance on broad statistical judgments. To the extent, therefore, that the present antidiscrimination law imposes enormous restrictions on the use of testing, interviews, and indeed any information that does not *perfectly* individuate workers, then by indirection it encourages the very sorts of discrimination that the law seeks to oppose.

But see Strauss, 79 Georgetown L J at 1641–42 (cited in note 9) (“[S]tatistical discrimination can be reduced if employers are provided with reliable information about employees. This should be a principal objective of any regulatory regime in this area. Ordinarily, one excellent way to learn about an employee’s qualifications is to hire him or her.”).

<sup>44</sup> See, for example, *Briscoe v Reader’s Digest Association, Inc.*, 483 P2d 34, 43–44 (Cal 1971); *Melvin v Reid*, 297 P 91, 93–94 (Cal App 1931).

<sup>45</sup> This was one result of the FTC’s actions following the ChoicePoint data privacy breach. ChoicePoint got into hot water after identity thieves signed up as its customers and obtained a wealth of financial data concerning individuals. Pursuant to a consent decree, ChoicePoint agreed to begin checking the credentials of its customers, visiting their places of business, and auditing their practices. See Order, *United States v ChoicePoint Inc.*, \*5–17 (ND Ga 2006), available online at <http://www.ftc.gov/os/caselist/choicepoint/0523069stip.pdf> (visited Jan 12, 2008) (detailing the “reasonable procedures” under statute that ChoicePoint had failed to use to limit consumer reports to those authorized to receive them, and outlining an information security program that ChoicePoint would adhere to in the future). Subsequently, ChoicePoint stopped doing business with small companies and began doing business exclusively with large firms. See

criminal history information that is already in the government's hands,<sup>46</sup> information privacy protections undermine antidiscrimination principles. The tradeoff makes privacy law and institutional arrangements that obscure information about individual's reputations far more problematic than courts and theorists presently suppose.

## II. PRAGMATIC CONCERNS

Governmental disclosures of previously private information will substantially enhance antidiscrimination strategies when two basic conditions are satisfied. First, statistical discriminators must significantly outnumber animus-based discriminators. Second, the information that the government is disseminating must be relatively accurate.

### A. Animus-based Discriminators

The problem of pretext is daunting in the antidiscrimination context. A decisionmaker adopts a policy because it has a discriminatory effect, and then insists that the policy is actually motivated by benign considerations. Sorting among the pretextual and legitimate justifications for such a policy is one of the more difficult tasks faced by courts adjudicating discrimination claims.<sup>47</sup> But there are limits on the extent to which an intentional discriminator can hide behind a nondiscriminatory rationale.

Information constraints provide one such limit. If the only thing a decisionmaker knows about a job or apartment applicant is his race, then it is quite difficult to identify a nondiscriminatory basis for excluding him. If, on the other hand, the decisionmaker has a wealth of information about an applicant, then it will be easier to identify some seemingly neutral characteristic that formed the basis for exclusion. As long as the decisionmaker can remember to exclude contemporaneous applicants who have that same characteristic, the decisionmaker likely will be able to convince the court that there was a nonpretextual basis for exclusion.

Recall that this essay is premised on the idea that animus-based discrimination is less prevalent than statistical discrimination. Yet there are surely still many decisionmakers who are motivated by animus, and it is possible that this form of discrimination remains more

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Avivah Litan, *Case Study: ChoicePoint Incident Leads to Improved Security, Others Must Follow* 2 (Gartner RAS Core Research Note, Sept 19, 2006).

<sup>46</sup> See, for example, *DOJ v Reporters Committee for Freedom of the Press*, 489 US 749, 780 (1989) (holding that criminal rap sheets are exempt from disclosure under the Freedom of Information Act because their dissemination would constitute an unwarranted invasion of personal privacy).

<sup>47</sup> See, for example, Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 *Notre Dame L Rev* 447, 503 (1996).

prevalent in some contexts.<sup>48</sup> Where animus-based discrimination predominates, a government strategy to provide decisionmakers with more previously private information about job applicants, apartment seekers, jurors, or students will make it easier for decisionmakers to rebut allegations of pretext. In those settings, the gains from decreased statistical discrimination often would be exceeded by the losses associated with easier animus-based discrimination.<sup>49</sup>

#### B. The Effectiveness of Traditional Antidiscrimination Enforcement

Information-based antidiscrimination policies will be most effective at combating statistical discrimination when traditional enforcement methods are least effective. The explanation is straightforward. A decisionmaker that wants to screen out ex-offenders might engage in statistical discrimination against African-American males, but if the expected legal sanction from engaging in this statistical discrimination is high enough, then the law will shift the decisionmaker away from screening altogether. Put another way, we can think of three groups of decisionmakers: *A*, those engaged in unlawful statistical discrimination on the basis of a protected classification; *B*, those engaged in lawful statistical discrimination on the basis of a nonprotected classification; and *C*, those refusing to engage in statistical discrimination. By providing previously unavailable information about the identities of ex-offenders, the state could thus prompt some decisionmakers to shift from group *A* to group *B*, while also prompting other decisionmakers to shift from group *C* to group *B*. Where traditional antidiscrimination law enforcement is effective, the expected sanction against statistical discriminators is high, and we can expect group *C* to be large and group *A* to be small. But if traditional antidiscrimination law enforcement is ineffective, and sanctions against statistical discriminators are low, we can expect group *A* to be large and group *C* to be small. Shifting decisionmakers from group *A* to group *B* is an unambiguous improvement on social welfare and justice grounds, but the consequences of prompting decisionmakers to shift from group *C* to group *B* are contestable. The aggregate benefits of information-based antidiscrimination strategies

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<sup>48</sup> The issue of implicit bias adds further complexity, as a decisionmaker may be acting on the basis of animus but not realize he is doing so. See Moran, 79 *St John's L Rev* at 907–10 (cited in note 10). For the purposes of this paper, conscious animus-based racism and implicit bias should be grouped together.

<sup>49</sup> I use the word “often” here, rather than “invariably,” because of the possibility that increased reliance on reputational information will facilitate automated decisionmaking, which could in turn employ algorithms that draw decisionmakers away from the influences of animus. This argument is made in Tal Z. Zarsky, “*Mine Your Own Business!*”: *Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 *Yale J L & Tech* 1, 22–35 (2003).

thus depend on the extent to which we believe current antidiscrimination enforcement prompts decisionmakers to join group *C*. The literature cited in this paper suggests that statistical discrimination on the basis of race is still quite prevalent, making the information-based antidiscrimination strategies look appealing.

### C. False Information

Efforts to combat statistical discrimination via government information policy will only accomplish laudable objectives to the extent that the information disseminated is accurate. Some of the information discussed herein—military records, records of criminal convictions, bankruptcy records, immigration and naturalization documents, and the like—will not pose unmanageable accuracy problems. To be sure, any system that relies on the government to produce accurate information will produce errors, but perhaps the best way to detect and correct those errors will be to make the information available to the privacy subjects, as the European Union has done,<sup>50</sup> so that the subjects of the information can dispute inaccuracies. To the extent that more stubborn errors occur, they will often resolve around cases of mistaken identity, where someone sharing the same name as another person with an undesirable characteristic is thereby penalized.<sup>51</sup> These problems can be ameliorated through the use of supplemental identifiers other than names, such as birthdates, birthplaces, and partial social security numbers. And the related problem of identity theft can be addressed through a combination of criminal enforcement and increased reliance on photographs, fingerprints, retinal scans, and other verification technologies. These tradeoffs are familiar: decreased privacy buys us a reduction in individuals being subjected to inappropriate treatment.

## III. NORMATIVE CONSIDERATIONS

In this Part I will touch upon some of the normative decisions that will help determine at what point society should embrace the

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<sup>50</sup> See, for example, Council Directive 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 38 Off J Eur Communities (L 281) 31 (Nov 23, 1995).

<sup>51</sup> This is a recurring problem with the Department of Homeland Security's no-fly and restricted lists. See, for example, Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, NY Times A1 (Aug 20, 2004) (explaining that airline agents attempted to block Senator Edward M. Kennedy from boarding airplanes on five separate occasions over the course of seven days because his name resembled the alias of a suspected terrorist). See also Kleysteuber, 116 Yale L J at 1358–59 (cited in note 41) (discussing this problem in the context of tenant information databases).

sorts of policy options developed herein. As the reader will quickly discern, this Part takes the objectives of existing antidiscrimination law as a given and asks what information dissemination policies should follow from that premise.

A. When Is Government Publicity for Previously Private Information Desirable?

The preceding discussion suggests that it may be desirable for the government to facilitate the availability of previously private information about individuals so as to prevent statistical discrimination on the basis of suspect classifications. The implicit normative assumption is that if decisionmakers are going to try to exclude people with undesirable characteristics—criminal records, say—it is better that they identify those with criminal records using accurate criminal history information than via a less reliable and more troubling proxy for criminal backgrounds, such as race or gender. Employment discrimination against those with criminal records may have social costs, but it has social benefits as well, and the decision to tolerate such discrimination, be it in housing, employment, or educational settings, presently commands broad societal support.

There will be other “undesirable” but unobservable characteristics where the social consensus is quite different. Take, for example, HIV-positive status.<sup>52</sup> HIV-positive individuals are protected against discriminatory treatment by antidiscrimination laws. Yet some employers may still prefer to keep HIV-positive individuals out of their workplaces for reasons rational (for example, concerns about rising group health insurance premiums) or irrational (stubborn concerns about the possibility of HIV transmission via casual contact). In the United States, the HIV virus historically has been disproportionately prevalent among homosexual men, with male-to-male sexual contact remaining the predominant method by which HIV-positive Americans contracted the disease.<sup>53</sup> In recent years, infection rates have risen particularly sharply among African Americans.<sup>54</sup>

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<sup>52</sup> The normative dimensions of another example, racial profiling in law enforcement, are provocatively discussed in Peter H. Schuck, *Meditations of a Militant Moderate: Cool Views on Hot Topics* 142–44 (Rowan & Littlefield 2006).

<sup>53</sup> See Centers for Disease Control and Prevention (CDC), *Cases of HIV Infection in the United States and Dependent Areas*, 2005, Commentary (June 2007), online at <http://www.cdc.gov/hiv/topics/surveillance/resources/reports/2005report/commentary.htm> (visited Jan 12, 2008) (estimating that 44.4 percent of those within the United States who are living with HIV/AIDS were infected through male-to-male sexual contact).

<sup>54</sup> See CDC, *Fighting HIV among African Americans: A Heightened National Response* 1 (Mar 2007), online at [http://www.cdc.gov/hiv/topics/aa/resources/factsheets/pdf/AA\\_response\\_media\\_fact.pdf](http://www.cdc.gov/hiv/topics/aa/resources/factsheets/pdf/AA_response_media_fact.pdf) (visited Jan 12, 2008) (reporting that African Americans made up 51 percent of

Given the substantial stigma associated with HIV and the relatively high costs of providing health insurance for HIV-positive employees, it is likely that homosexual men and African Americans generally are victimized by statistical discrimination designed to keep HIV-positive individuals out of the workplace. One possible strategy for combating this statistical discrimination would be to publicize the HIV status of every American. That would be a bad idea. As demonstrated by the Americans with Disabilities Act,<sup>55</sup> and a number of common law decisions treating HIV status as a “private fact” whose disclosure is highly offensive to a reasonable person,<sup>56</sup> Americans have decided that HIV status itself ought to be a protected classification, and decisions classifying individuals on the basis of HIV status may be as bad, or nearly as bad, as decisions classifying them on the basis of race. Indeed, the current absence of antidiscrimination protections for homosexuals (at least under federal law) suggests that disclosing HIV status to prevent statistical discrimination against gays would be perceived as swallowing the spider to catch the fly. Involvement in the criminal justice system is a very different attribute than HIV status, and courts recently have become less sympathetic to privacy claims involving the dissemination of the plaintiff’s criminal history.<sup>57</sup>

In short, when existing laws and norms tolerate the publication of information about an individual’s attributes, and when in the absence of such information decisionmakers may statistically discriminate using a legally suspect classification system, the government should publish the information in question or facilitate its widespread availability. But the government should not publish information showing who is a member of a protected class, such as HIV patients, pregnant women, Mormons, and the like, even if the resulting statistical discrimination reduces the opportunities available to HIV-negative homosexual men, nonpregnant women, or non-Mormon residents of Utah.

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HIV diagnoses between 2001 and 2005, with the rate of HIV diagnoses among black men nearly seven times higher than that of white men).

<sup>55</sup> Pub L No 101-336, 104 Stat 327 (1990), codified as amended at 42 USC § 12101 et seq (2000).

<sup>56</sup> See, for example, *Multimedia WMAZ, Inc v Kubach*, 443 SE2d 491, 493 (Ga App 1994); *Hillman v Columbia County*, 474 NW2d 913, 922–23 (Wis App 1991).

<sup>57</sup> See, for example, *Gates v Discovery Communications, Inc*, 101 P3d 552, 562 (Cal 2004); Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, In Need of a Rule*, 64 Md L Rev 755, 762–63 (2005). But see *Norris v King*, 355 S2d 21, 23–25 (La App 1978) (reaching a contrary result, but relying on a California precedent that *Gates* overruled). The Supreme Court held decades ago that it was not unconstitutional for the government to disseminate information about a shoplifter’s prior arrests. See *Paul v Davis*, 424 US 693, 713 (1976).

## B. How Should Society Promote Second Chances?

The discussion so far has been premised on the idea that it is desirable to help law-abiding African-American males at the expense of African-American males with criminal records. To defend that proposition, it is worth exploring the counterarguments—namely, why someone might want to make it more difficult for private decisionmakers to sort among those with criminal records and those without criminal records. There are several possible justifications for this approach. First, we might expect that those with criminal records will be harmed more than those without criminal records will be helped. Accordingly, facilitating effective private sorting will make job applicants as a whole worse off. Second, we might believe that there are powerful policy justifications for preventing sorting, perhaps because we believe that criminals who have served their time deserve a clean slate. Third, we might believe that the criminal justice system is essentially corrupt; in which case facilitating sorting merely enhances the unjust penalties meted out by an arbitrary government apparatus. Of these three arguments, only the last one has significant force. I will consider them in turn.

First, the best available empirical evidence suggests that African-American males are more likely to be hired by firms that conduct criminal background checks than by similarly situated firms that do not. Recall that Holzer and his co-authors found that those responsible for hiring appeared to overestimate the propensity of African-American males to have criminal records, and hire too few African Americans as a consequence.<sup>58</sup> Publicizing accurate information about individuals' involvement in the criminal justice system should only adversely affect a group's available opportunities to the extent that decisionmakers (a) underestimate the prevalence of criminal records among members of a particular group, or (b) are effectively prevented from engaging in statistical discrimination to sort out those with criminal records. The Holzer et al study undercuts both claims, though some of Finlay's unpublished research supports the former claim.

Alternatively, we might think that private sorting creates negative externalities, and justify keeping criminal histories obscure for that reason. For example, we might believe on policy grounds that the availability of employment opportunities for ex-cons will discourage recidivism. Alternatively, we might have an abstract ideological commitment to the proposition that "everyone deserves a second chance,"

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<sup>58</sup> Holzer, Raphael, and Stoll, 49 *J L & Econ* at 473 (cited in note 19). See also Holzer, Raphael, and Stoll, *Will Employers Hire Former Offenders?* at 227 (cited in note 11) ("[E]mployers may overestimate the average incidence of prior conviction among blacks, owing to prejudice or a general lack of experience with black employees.").



or, more narrowly, that “someone who has served his time has repaid his debt to society and should be able to start off with a clean slate.” These sorts of arguments sometimes find their way into the information privacy case law and academic literature.<sup>59</sup> In this case, the appropriate question to ask is: what is the optimal strategy for preventing these negative externalities? We can answer this question by drawing on the tools of optimal redistribution analysis.

The appropriate way to facilitate the hiring of ex-cons who deserve a second chance is through direct subsidies to employers who hire them. Such programs have been implemented, with the discontinued federal Targeted Jobs Tax Credit providing one example<sup>60</sup> and the current federal tax code’s Work Opportunity Credit providing another.<sup>61</sup> Implicit tax subsidies to organizations whose missions involve reintegrating ex-offenders back into the social and economic mainstream would work similarly well.<sup>62</sup> Alternatively, we can envision government programs to insure employers against the possible downsides of hiring ex-offenders. Because it is inexpensive for the government to identify ex-cons, the government can efficiently ensure that only genuine ex-cons benefit from the subsidized second chances. And since the tax subsidy or insurance programs would be funded out of general tax revenues, the costs of promoting second chances is borne by taxpayers as a whole. Compare that regime to the status quo. We try to facilitate the hiring of ex-cons by raising private decisionmakers’ costs of sorting between ex-cons and those with no criminal records. As a result, many employers evidently use statistical discrimination tools to penalize non-ex-cons, and the ex-cons who do get hired are likely to be members of groups whose baseline offending rates are low—white males, and females of all races. Under the present system, only some of the beneficiaries of the existing “promote second chances through

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<sup>59</sup> See, for example, *Briscoe v Reader's Digest*, 483 P2d 34, 41 (Cal 1971) (“In return for becoming a ‘new man,’ [the rehabilitated offender] is allowed to melt into the shadows of obscurity.”); *Melvin v Reid*, 297 P 91, 93 (Cal App 1931) (“Where a person has by his own efforts rehabilitated himself, we . . . should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime.”); Megan C. Kurlychek, Robert Brame, and Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminol & Pub Policy* 483, 498–99 (2006); James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 *U St Thomas L J* 387, 406–12 (2006).

<sup>60</sup> See George K. Yin, et al, *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program*, 11 *Am J Tax Policy* 225, 291–92 (1994).

<sup>61</sup> See 26 USC § 51(d)(1)(C) (2000); 26 USC § 51(d)(4) (2000) (defining a “qualified ex-felon” for purposes of the Work Opportunity Credit).

<sup>62</sup> The Delancey Street Foundation is a particularly successful example of this type of organization. See [http://www.eisenhowerfoundation.org/grassroots/SanFrancisco\\_CA.html](http://www.eisenhowerfoundation.org/grassroots/SanFrancisco_CA.html) (visited Jan 12, 2008) (describing the Delancey Street Foundation’s as “the most acclaimed educational and rehabilitative institution for ex-offenders in the world”).

information obscurity” program are actually ex-cons, and the costs of this policy fall heavily on a group that includes other ex-cons and innocent people who share demographic characteristics with ex-cons. From an optimal redistribution perspective, no one should prefer our present approach to a tax credit.<sup>63</sup>

CONCLUSION, OR: HOW I LEARNED TO STOP WORRYING  
AND LOVE MEGAN’S LAW

This paper reflects a shift in my thinking about government information policy. I began as a skeptic of Megan’s Law, the computerization of bankruptcy records, and other policies whereby the government made previously private information freely available to the public. But I have increasingly begun to appreciate the potential for these sorts of policies to further social welfare and combat morally problematic statistical discrimination. Employers, by and large, are not going to want to hire sex offenders, and banks, by and large, are not going to want to lend to people with bad credit (at least not without charging sub prime rates). If the government fails to provide employers and lenders with information that will enable them to sort out the sex offenders and the bankruptcy filers, then these employers and lenders will be tempted to rely on unlawful, but difficult to detect, statistical discrimination techniques to screen out the undesirables. Such subtle statistical discrimination is often more troubling than overt discrimination on the basis of criminal or bankruptcy history, and this analysis shows a myriad of related government strategies for stomping it out. In short, government information policy stands as a useful, and perhaps even necessary, supplement to the antidiscrimination laws’ attack on statistical discrimination.

The problem, then, with Megan’s Law and internet availability of bankruptcy filings, is not that they reveal too much, but that they reveal too little. Such online resources should be expanded to include all criminal convictions of adults, as Colorado, Florida, and a handful of other states have done,<sup>64</sup> and more documents pertaining to individuals’ financial distress. Indeed, much of the information in the federal government’s National Crime Information Center’s (NCIC) database could be brought online and made available to the general public free

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<sup>63</sup> Notably, this sort of analysis is absent from Steven Raphael’s recent essay on the subject. See generally Raphael, 5 *Criminol & Pub Policy* 515 (cited in note 28).

<sup>64</sup> See Jacobs, 3 *U St Thomas L J* at 399–400 (cited in note 59) (noting that Colorado allows anyone to do a criminal records search over the internet for a small fee and that Florida provides online access to a directory of current and past state prisoners).

2008]

*Privacy versus Antidiscrimination*

381

of charge.<sup>65</sup> If positive spillovers result from the reintegration of ex-offenders or ex-insolvents into the nation's economic and social life, and I suspect they do, then direct subsidies or insurance programs, not information privacy protections, are the appropriate policy lever for facilitating that reintegration.

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<sup>65</sup> Selective access to the NCIC database currently presents problems. See Shaun B. Spencer, *Security vs. Privacy: Reframing the Debate*, 79 *Denver U L Rev* 519, 520–21 (2002) (describing what he sees as the inadequate safeguards to prevent data breaches from insiders at the NCIC and other government repositories of information).