

## The Unintended Consequences of Putting Family Off-Limits in Job Searches

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Joni Hersch & Jennifer Bennett Shinall, *Something to Talk About: Information Exchange Under Employment Law*, 165 **U. Pa. L. Rev.** (forthcoming 2017), available at [SSRN](#).

Being finicky by nature, I sometimes take issue with those who claim that certain questions in the interview process are illegal. While that's true for questions about disability under the ADA and genetic information under GINA, I've long resisted the conventional wisdom that asking a female applicant about her marital status or her plans for having children is illegal. I agree that, even putting aside all sorts of other reasons why raising such personal topics may not be a good idea, there are legal risks in such inquiries. But at most it would be illegal to ask only women the questions, and even that is incorrect. A violation of Title VII requires an adverse employment action, and such questions by themselves don't count.

At this point I can hear a chorus of voices objecting that, while that's technically true, such questions hand a rejected applicant a case on a silver platter: they indicate that the employer thinks gender is relevant to the hiring decision, and the failure to hire is the adverse employment action. Plus, given Title VII's motivating factor liability, an employer might find itself in violation of the law even if it would have made the same decision in any event. So it's risky to start down this road from a legal perspective and, given societal norms, it seems a bad idea from any number of other perspectives – although there are those who see such questions as valuable for employers in a variety of ways, such as signaling family-friendliness or allowing the employer to tout the advantages of its environment, such as good schools.

All of which is why Joni Hersch and Jennifer Bennett Shinall's recent posting on [SSRN](#), forthcoming in the University of Pennsylvania Law Review, is so interesting. *Something to Talk About: Information Exchange Under Employment Law* explores the phenomenon of "little or no information about family status being provided in pre-employment interviews," reaching the counterintuitive conclusion that the result is reduced opportunities for women.

Now, I'm not so sure this problem is solvable. As the authors document, putting such topics off-limits is deeply woven into our culture, whether or not the impetus arose from legal sources such as EEOC guidance. And, absent the creation of some kind of privilege, management attorneys are never going to advise clients to raise such issues. Maybe more to the point, interviewers will be discouraged from discussing these questions even if the applicant is the one to raise them, which is one suggestion the authors make. Thus, while the pedant in me applauds the demonstration that these kinds of questions are not per se illegal, even when asked only of women, where we go with that observation is another issue.

Nevertheless, Hersch and Shinall's piece provides a great read along two axes. The first is its empirical demonstration that "information exchange" is a good thing even on sensitive topics, and the second is its intriguing hypothesis of why that might be.

As to the former, the empirical piece is aimed at one aspect of the phenomenon the authors address, how to deal with career "pauses" or "breaks" due to child rearing. With 3000 subjects participating in a vignette study, the authors found that "otherwise identical applicants with a substantial gap in their work history who do not explain the personal family circumstances for their job search are far less likely to be hired than those who do." This finding, assuming its accuracy, doesn't reach the broader situations that I raised at the outset – discussions about marriage and family

plans for those first entering the workforce – but their theoretical explanation suggests application to that setting also.

As to that theory, Hersch and Shinall argue that their findings are consistent with “the behavioral economics theory of ambiguity aversion (or the Ellsberg Paradox), which finds that individuals prefer known risks over unknown risks.” I’d be tempted to call it “the devil you know” phenomenon, but, by whatever name, it seems well established.

The piece, then, is somewhat in the vein of another counterintuitive article finding that employers who conduct criminal background checks are more likely to hire black applicants than employers that do not.<sup>1</sup> In that research, the potential adverse consequence of such checks in terms of the likelihood of hiring African Americans are more than offset by the positive effect of eliminating “statistical discrimination.”

Although the theoretical explanations for the counterintuitive findings in both studies are framed somewhat differently, they are not inconsistent, and both suggest that more information will yield fairer results in terms of race or gender in hiring. Both are grounded in the notion that, absent fuller information, humans are likely to act in ways that will be disadvantageous to minorities and women. That means that both raise real questions about the unintended consequences of attempting to limit information flow in labor markets. If Hersch and Shinall are correct, a number of proposals – such as restricting employer use of credit information or limiting employer internet searches about applicants – might be counterproductive.

Given that this is Jotwell, it’s inappropriate to stir in too much criticism with praise for something I like a lot, but I’m not so sure about everything in the article: for example, the broad statement that the “dominant theoretical explanation for inferior labor market treatment of historically disadvantaged workers is statistical discrimination,” although maybe that’s because we have a somewhat different view of what “statistical discrimination” means.

Perhaps more seriously, I wonder about the consistency of one of the study’s findings with its prescriptions. The vignette study showed that those who provide some explanation for their “break” do better than those who don’t, but it also showed that those who provide a “financial” reason for their return to the labor market (divorce) do far better than those who say that they have been raising children. That would suggest that the “open and honest” conversations that the authors would encourage at the interview stage are not the optimal solution to the plight of women who are seeking reentry after pausing to raise children.

None of which should undercut the important contribution of the article in calling attention to psychological processes that can undercut even the best-intentioned of reforms. It truly is a careful and thought-provoking piece, which is all one can ask of scholarship.

Finally, I should also thank Steve Willborn, with whom I have been discussing the information question, on and off, for years, and who kindly offered some thoughts on this post.

1. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 *J.L. & Econ.* 451 (2006). [?]

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