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August 30, 2013

Mr. Martin Kennedy  
Director, Division Continuing Care Providers  
Survey and Certification Group  
Center for Clinical Standards and Quality  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, Maryland 21244

Re: Report of the Centers for Medicare & Medicaid Services, National Background  
Check Program, Long Term Care Criminal Convictions Work Group

Via Email: [background\\_checks@cms.hhs.gov](mailto:background_checks@cms.hhs.gov)

Dear Mr. Kennedy:

I write on behalf of the Consumer Data Industry Association ("CDIA") to offer comments on the report by the Long Term Care Criminal Convictions Work Group relative to the establishment of a National Background Check Program.<sup>1</sup> Founded in 1906, CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services.

This comment offers four points. First, reliance on a clear "redemption period" is misplaced as there may not be such a thing as a point of redemption, and if there one, that redemption period may extend to 15 years or more. Second, we encourage the Department of

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<sup>1</sup> Centers for Medicare & Medicaid Services, National Background Check Program, Long Term Care Criminal Convictions Work Group, Report, available at <http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-13-24-Attachment-.pdf> ("Work Group Report").

Health and Human Services (“HHS” or “Department”) to look not just to FBI information, but to more reliable information from the private sector. Third, criminal history background checks, when done by the private sector, have robust consumer protections. Fourth, it is already illegal to discriminate on the basis of race or ethnic origin in criminal background checks.

The Department is right to be concerned about crimes against those being served by long-term care.<sup>2</sup> As the Department knows all too well, “[o]lder adults are particularly attractive targets for financial exploitation by unscrupulous individuals.”<sup>3</sup> The U.S. Department of Justice noted that “[e]lder abuse and neglect is an understudied problem in the United States[,]” but, according to the GAO, the “number of elder abuse reports and investigations in their states have been increasing steadily over the past few years.”<sup>4</sup>

Those in long-term care are among the most vulnerable of populations. As long-term care recipients are emotionally and physically fragile, the Department must exercise extreme caution in allowing those with criminal histories to provide care for those in need. The Department must avoid being lulled in to the theory of a magic “redemption period” where, at some arbitrary point in time, an ex-convict is suddenly moved to being considered a threat risk equal to that of someone who has never offended before.

**1. Reliance on a clear “redemption period” is misplaced as there may not be such a thing as a point of redemption and if there is, that redemption period may extend to 15 years or more.**

As appendices to this comment, I submit two papers produced by Dr. Jeffrey L. Sedgwick that the HHS must consider in its review of the use of criminal histories for employment decisions.<sup>5</sup>

The first paper, *Overview of Selected Current Research on Employment and Crime and on the Causes of Reoffending*, addresses the criticism made that if an employer just gives a former convict a job, that former convict will be fully integrated in to American society. However, Dr. Sedgwick’s paper highlights two facts that are often ignored:

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<sup>2</sup> The *Work Group Report* is an outgrowth of a March 2011 Office of Inspector General Report citing the prevalence of former convicts in the nation’s nursing facilities. *Nursing Facilities Employment of Individuals with Criminal Convictions*, OEI-07-09-00110, March 2011 (“OIG Report”).

<sup>3</sup> General Accounting Office, *Elder Justice: National Strategy Needed to Effectively Combat Elder Financial Exploitation*, GAO-13-110 (Nov. 2012).

<sup>4</sup> General Accountability Office, *Elder Justice: Stronger Federal Leadership Could Enhance National Response to Elder Abuse*, GAO 11-208 (March 2011).

<sup>5</sup> Dr. Jeffrey L. Sedgwick served as Assistant Attorney General for the Office of Justice Programs from Oct. 2008 to Jan. 2009. Prior to that appointment, Dr. Sedgwick served from Jan. 2006 to Oct. 2008 as director of the Bureau of Justice Statistics. Prior to his appointments, Dr. Sedgwick taught for 30 years at the University of Massachusetts-Amherst. He is currently Professor Emeritus of Political Science at the university.

(1) that the relationship between employment and crime is not causal, simple, or straightforward; and (2) that there is no predominant cause of reoffending. A number of non-employment related factors are as or more determinative of whether a person will transgress a second time as employment.

The second paper is *Overview of Selected Current Research on the Usefulness of Criminal Background Check Information*. Here, Dr. Sedgwick reminds readers that critics of employer use of criminal background checks in hiring decisions may be relying on an article by Alfred Blumstein and Kiminori Nakamura and on a second article by Megan C. Kurlychek, Robert Brame and Shawn D. Bushway. However, Dr. Sedgwick reviews these studies and shows why these two papers must be viewed more critically before basing any legal or public policy decisions on them.

Even when HHS considers Profs. Blumstein and Nakamura's latest findings, as was the case with their 2009 study<sup>6</sup>, their 2012 report remains incomplete and "some important next steps should still be pursued."<sup>7</sup> No matter how much research is undertaken, the search for a single bright redemption line is likely doomed to fail. Not only do the authors concede "[t]hose with no prior record . . . are inherently less risky than those with a prior record,"<sup>8</sup> but separately, Prof. Blumstein himself has acknowledged the overwhelming difficulties facing those trying to predict and compare future criminal behavior by ex-offenders and non-offenders:

[A]n individual with a prior violent conviction who has been crime-free in the community for twenty years is less likely to commit a future crime than one who has been crime-free in the community for only ten years. But neither of these individuals can be judged to be less or equally likely to commit a future violent act than comparable individuals who have no prior violent history. It is possible that those differences might be small, but making such predictions of comparable low-probability events is extremely

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<sup>6</sup> Blumstein, A. & Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. *Criminology*, 47(2) ("Blumstein & Nakamura, 2009").

<sup>7</sup> Alfred Blumstein and Kiminori Nakamura, Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences, Oct. 2012, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf> ("Blumstein & Nakamura, 2012"), 90. For example, the authors acknowledge that:

The estimates of redemption shown in this report are based on the length of time since the *first* arrest or conviction. In this sense, we only address redemption for first-time offenders. Although such *first-time* offenders can be viewed as most deserving of redemption, it is possible to extend the concept of redemption to people with more than one prior criminal event. Employers also routinely receive applications from individuals with multiple arrests or convictions who have stayed clean a reasonable length of time. How do the redemption estimates vary with the number of prior crime events?"

*Id.*, 90-91 (emphasis original).

<sup>8</sup> *Id.*, 90.

difficult, and the criminological discipline provides no good basis for making such predictions with any assurance that they will be correct.<sup>9</sup>

Since even the latest research from Profs. Blumstein and Nakamura has been criticized, HHS cannot assume an arbitrary ten-year, five-year, or other bright-line redemption period. A redemption period may not exist and, in any event, it may be impossible to predict.

It may be hard to explain to the family of a long-term care resident who was victimized by a caregiver when it turned out that the caregiver was a former convict. There was probably some explaining in Florida as a result of a report by the Fort Lauderdale *Sentinel* when

[m]ore than 8,700 people initially barred from being caregivers due to criminal records have been granted special permission by the state to work with children, the elderly and the infirm, a recent investigation found [but a]bout 1,800 -- or one in five -- were arrested again, some within days of the determination that they were of 'good moral character' and could be trusted to care for the state's most vulnerable residents.<sup>10</sup>

## **2. The Department of Health and Human Services should look not just to FBI information, but to more reliable information from the private sector.**

Recently, the reliability of criminal history information from the FBI has been challenged.<sup>11</sup> While FBI criminal history information may be a helpful resource to the Department, it should not be the only source of information. The private sector, which unlike the FBI, is regulated by the Federal Fair Credit Reporting Act ("FCRA")<sup>12</sup>, provides criminal background information that is often more robust and more reliable than that data provided by the FBI.

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<sup>9</sup> *El v. SEPTA*, 479 F.3d 232, 246 (3d Cir. 2007) (citing expert testimony of Dr. Alfred Blumstien. App. 953) (internal citations omitted in original) (emphasis added).

<sup>10</sup> Peter Franceschina, Sally Kestin and John Maines, Trust Betrayed: Exemptions let felons watch over vulnerable, Fort Lauderdale *Sun Sentinel*, available at <http://www.orlandosentinel.com/features/orl-felon-caregivers-exemptions-092909,0,5736409.story>. One of the many examples cited by the *Sun Sentinel* in its *exposé* was the case of

Lucia Rivera, then 44, pleaded guilty in 1999 to aggravated assault and other charges for beating the girlfriend of her estranged husband and encouraging an accomplice to slice the woman's face with a knife. In 2005, she applied for -- and received -- an exemption from the state's Agency for Health Care Administration. In 2008, while working as the business manager at Avante in St. Cloud, Rivera was charged with stealing more than \$36,000 from dozens of patient accounts. "Most of those people were bedridden, comatose," said Kathy Foust, a guardian for several victims.

<sup>11</sup> Ylan O. Mui, Growing use of FBI screens raises concerns about accuracy, racial bias, *Washington Post*, July 29, 2013, available at [http://www.washingtonpost.com/business/economy/growing-use-of-fbi-screens-raises-concerns-over-accuracy-racial-bias/2013/07/29/d201ecda-f49f-11e2-aa2e-4088616498b4\\_story.html](http://www.washingtonpost.com/business/economy/growing-use-of-fbi-screens-raises-concerns-over-accuracy-racial-bias/2013/07/29/d201ecda-f49f-11e2-aa2e-4088616498b4_story.html).

<sup>12</sup> 15 U.S.C. § 1681 *et seq.*

Private sector information generally assists governments in many ways. For example, the FBI testified before Congress that it uses commercial information providers

to obtain public source information regarding individuals, businesses, and organizations that are subjects of investigations[, which, in 1999,] assisted in the arrests of 393 fugitives, the identification of more than \$37 million in seizable assets, the locating of 1,966 individuals wanted by law enforcement, and the locating of 3,209 witnesses wanted for questioning.”<sup>13</sup>

In another example, the Association for Children for Enforcement of Support reported that public record information provided through commercial vendors helped locate over 75 percent of the “deadbeat parents” they sought.<sup>14</sup>

Criminal background information obtained by long-term care providers can often be more comprehensive and obtained more quickly when that information is being provided by a private employment screening company.

### **3. Criminal history background checks, when done by the private sector, have robust consumer protections.**

The Work Group Report noted the ability of employees to appeal fitness determinations.<sup>15</sup> Unlike criminal background checks conducted by the federal government, such checks made by the private sector come with extensive protections for job applicants.

#### ***A. General protections***

The FCRA governs consumer reports, regulates consumer reporting agencies, and protects consumers. Consumer reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy.<sup>16</sup> There are many other consumer protections as well. For example:

- Those that furnish data to consumer reporting agencies cannot furnish data that they know or have reasonable cause to believe is inaccurate, and they have a duty to correct and update information.<sup>17</sup>
- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies or lenders and the law requires dispute resolution within

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<sup>13</sup>13 *Hearing before the Senate Comm. on Appropriations Subcomm. for the Departments of Commerce, Justice, and State, and the Judiciary and Related Agencies, March 24, 1999 (Statement of Louis J. Freeh, Director of the Federal Bureau of Investigation).*

<sup>14</sup>14 *Information Privacy Act, Hearings before the Comm. on Banking and Financial Services, House of Representatives, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (July, 28, 1998) (statement of Robert Glass).*

<sup>15</sup>15 *Work Group Report*, 61.

<sup>16</sup>16 *Id.*, § 1681e(b).

<sup>17</sup>17 *Id.*, § 1681s-2(a)(1)-(2).

30 days (45 days in certain circumstances). If a dispute cannot be verified, the information subject to the dispute must be removed.<sup>18</sup>

- A consumer reporting agency that violates federal law is subject to private rights of action, enforcement by the Federal Trade Commission (“FTC”), and state attorneys general.<sup>19</sup>

### ***B. Protections specific to employment screening***

In addition to the general protections above, there are protections specific to the use of consumer reports for employment purposes. The FCRA allows employers to review the criminal histories of prospective and existing employees.<sup>20</sup> However, this legal privilege comes with certain obligations. In short, under § 1681b(b) of the FCRA:

- An employer must certify to the consumer reporting agency that the employer has and will comply with the employment screening provisions of the FCRA, and that the information from the consumer report will not be used in violation of any applicable federal or state EEO laws or regulations.
- Prior to requesting a consumer report, an employer must provide to the prospective employee a written disclosure that a consumer report may be obtained for employment purposes and the consumer must authorize the employer’s use of a consumer report. The disclosure document provided to the consumer must contain only the disclosure.

## **4. Discrimination in criminal background checks should not be a concern since it is already illegal to discriminate on the basis of race or ethnic origin in criminal background checks.**

The Work Group Report correctly highlighted the tension in “balancing employee opportunities with the safety of residents and beneficiaries...”<sup>21</sup> This is an all-too-common catch-22 for employers. Employers want to both protect their workplaces and prevent unlawful discrimination where

[e]mployers..., fearing liability for failing to properly screen out applicants for employment, while, at the same time, endeavoring to avoid running afoul of the...laws that govern the manner in which background information may be procured and to what extent it may be considered in making selection decisions.<sup>22</sup>

The Report is right to note that it is already unlawful for an employer to use criminal histories to discriminate against protected classes.<sup>23</sup> Putting additional limits on access to or use

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<sup>18</sup> *Id.*, § 1681i(a)(1), (5).

<sup>19</sup> *Id.*, § 1681n, 1681o, 1681s.

<sup>20</sup> *Id.*, § 1681b(a)(3)(B).

<sup>21</sup> *Work Group Report*, 61.

<sup>22</sup> *Conducting Background Checks in the Hiring Process: A Catch-22*, Daily Lab. Rep. (BNA) No. 58, at I-1, (March 25, 2011)

<sup>23</sup> *Work Group Report*, 32.

of criminal histories does not offer any additional discrimination protection than is already afforded by the law.

CDIA shares a core value with most Americans: employers should be able to hire the best people for the jobs available, and job applicants should not fear unlawful discrimination. In a climate of economic uncertainty it is critical that employers be vigilant about protecting their businesses and their customers while preventing unlawful hiring practices. Fair and appropriate uses of criminal histories offer one important tool among many for employers to protect themselves, their other employees, and their customers.

Employers must be able to conduct non-discriminatory criminal background checks to protect the personal safety of their other workers and their customers. Employers must be able to protect their corporate or non-profit assets and the property of their other workers and customers.

## **5. Conclusion**

As the Department continues its review of the Work Group Report, it should keep in mind four key points. First, reliance on a clear “redemption period” is misplaced as there may not be such a thing as a point of redemption. If there is a redemption period that period may extend to 15 years or more. Second, the Department should look not just to FBI information, but to more reliable information from the private sector. Third, criminal history background checks, when done by the private sector, have robust consumer protections. Fourth, it is already illegal to discriminate on the basis of race or ethnic origin in criminal background checks; additional limits on criminal history would offer no additional discrimination protection.

I hope these comments are helpful to you. Please let me know if we can provide additional information or answer any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. J. Ellman', with a long horizontal flourish extending to the right.

Eric J. Ellman  
Senior Vice President, Public Policy and Legal Affairs

## Appendix A

*Overview of Selected Current Research on Employment and Crime and on the Causes of Reoffending*



# KESWICK ADVISORS

## Overview of Selected Current Research on Employment and Crime and on the Causes of Reoffending Prepared for the Consumer Data Industry Association (CDIA)

by  
Jeffrey Leigh Sedgwick, Ph.D.

Some criticism of the use of criminal backgrounds for employment screening is predicated on the assumption that employer use of those background checks on Blacks and Hispanics, given their records of incarceration, is a fundamental, even dominant cause of the difficulties they face in re-entering the job market and readjusting to post-incarceration life. Although successful re-integration through employment is important and cannot be wholly discounted in this context, reliance on this single factor is excessive and overly simplistic. This paper highlights two facts that are often ignored: (1) that the relationship between employment and crime is not causal, simple, or straightforward; and (2) that there is no predominant cause of reoffending. A number of non-employment related factors are as or more determinative of whether a person will transgress a second time as employment.

**The relationship between unemployment and criminal conduct is not one of cause and effect.** This is demonstrated by several facts commonly known in the social science community, such as:

- *Two-thirds of inmates in State prisons were employed during the month before they were arrested for their current offense; over half were employed full time.*<sup>1</sup>
- *From 1979 to 1997, the property and violent crime rates (adjusted for changes in demographic characteristics) increased by 21% and 35%, respectively, in the United States despite no change in the long term unemployment rate;*<sup>2</sup> and
- *Decreasing wage trends for low skill workers account for over 50% of the increase in both the property and violent crime indices during the same period. A sustained long-term decrease in crime rates thus depends on whether the wages of less skilled men improve.*<sup>3</sup>

<sup>1</sup> Department of Justice, *Survey of State Prison Inmates, 1991*. (Washington, DC: Bureau of Justice Statistics, 1993) 3. See also, Department of Justice, *Mental Health and Treatment of Inmates and Probationers*. (Washington, DC: Bureau of Justice Statistics, 1991)

<sup>2</sup> Eric D. Gould et al, "Crime Rates and Local Labor Market Opportunities in the United States: 1979-1997," *The Review of Economics and Statistics* 84, no. 1 (2002): 57-8.

<sup>3</sup> *Ibid.*, 58.

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The mere presence of employment does not provide a pathway to successful reentry into legitimate society as much as having the job skills that allow access to better-paying jobs.

**Successful reentry to legitimate society is shaped as much or more by factors that have nothing to do with employment.**<sup>4</sup> These factors include not only the individual's characteristics, but also offending and substance abuse histories, family relationships, community contexts, and State policies. Discouraging the use of background checks will not automatically enhance re-integration into society. It will certainly, however, expose employers and the public to the harm of re-offense due to factors that have nothing to do with the regular presence of a paycheck. The following characteristics of state inmates make clear that their problems upon re-entry extend far beyond issues related to background checks. Consider the following facts<sup>5</sup>:

- ***Over 60% of inmates had been incarcerated in the past.*** A Department of Justice study of 272,111 inmates released from prison in 1994 found that they had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release.<sup>6</sup> *This is an average of 17.9 charges each.* The number of times a prisoner has been arrested in the past is a good predictor of whether that prisoner will continue to commit crimes after being released.<sup>7</sup>
- ***Substance abuse is a significant contributing factor to the likelihood of incarceration.*** *Thirty-one percent of inmates committed their offense under the influence of drugs, and 17% committed their offense to get money for drugs. Thirty-two percent of inmates committed their offense under the influence of alcohol having consumed on average the equivalent of three six-packs of beer or two quarts of wine. Half of these had been drinking for six hours or more before their offense.* Studies of released prisoners report that their success or failure to confront their substance abuse problem often emerges as a *primary factor* in their post-prison adjustment.<sup>8</sup>
- ***The presence of stable marital and family relationships greatly reduces the likelihood that an offender will re-offend.*** *Fifty-five percent of inmates had never married, while 27% were widowed, divorced or separated; yet 43% of female inmates and 32% of male inmates had 2 or more children under age 18.* Although the day-to-day role of husband or parent and reintegration into a family are not social roles that ex-offenders (particularly men) necessarily adopt immediately upon release, acceptance of that role is highly significant in the transformation toward law-abiding citizen after release. Indeed, interpersonal conflict with heterosexual partners is mentioned by recidivists as a common problem leading to failure *second only to problems involving substance abuse.* In an inmate's early life, it is well-known that the absence of such stable relationships can serve as a harbinger of trouble to

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<sup>4</sup> Christy A. Visher and Jeremy Travis, "Transitions from Prison to Community: Understanding Individual Pathways," *Annual Review of Sociology* 29 (2003): 91.

<sup>5</sup> *Survey of State Prison Inmates, 1991.*

<sup>6</sup> Department of Justice, *Recidivism of Prisoners Released in 1994.* (Washington, DC: Bureau of Justice Statistics, 2002) 1.

<sup>7</sup> Visher and Travis, p. 95.

<sup>8</sup> *Ibid.*

come.<sup>9</sup> Most inmates did not live with both parents while growing up; over 25% had parents who abused drugs or alcohol; and 37% had an immediate family member with a jail or prison record.

- **Lack of educational advancement leads to enhanced risks of incarceration.** Thirty-four percent of inmates had completed high school while another quarter had gotten a general equivalency degree (GED). Limited education often translates into poor job skills, creating diminished prospects for stable employment and decent wages upon release.

*Jeffrey L. Sedgwick was appointed on January 2008 by President George W. Bush to serve as Assistant Attorney General for the Office of Justice Programs; he was confirmed by the Senate of the United States in October 2008 and served until January 2009. Mr. Sedgwick also served until October 2008 as director of the Bureau of Justice Statistics, the statistical agency of the Department of Justice, a position to which he was appointed by President George W. Bush in January 2006. Prior to his appointments, Dr. Sedgwick taught for 30 years at the University of Massachusetts - Amherst. He is currently Professor Emeritus of Political Science at the University.*

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<sup>9</sup> Visher and Travis, p. 99.

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## Appendix B

*Overview of Selected Current Research on the Usefulness of Criminal Background Check Information*



# KESWICK ADVISORS

## Overview of Selected Current Research on the Usefulness of Criminal Background Check Information

Prepared for the Consumer Data Industry Association (CDIA)  
by  
Jeffrey Leigh Sedgwick, Ph.D.

Critics of employer use of criminal background checks in hiring decisions are increasingly relying on a recent article by Alfred Blumstein and Kiminori Nakamura to support their view that such checks adversely affect the employment prospects of certain minority groups.<sup>1</sup> In particular, these critics cite this article for the proposition that there is a so-called “point of redemption”—when an ex-offender is no more likely to engage in criminal conduct in the future than an individual of the same age with no prior criminal record. Building on this proposition, they argue that as a matter of public policy, the use of criminal history information in employment-related background screening beyond this point of redemption should be prohibited.

This preliminary study, however, should not be the basis for policy decisions that restrict the ability of employers and volunteer organizations, to, among other things:

- identify those individuals who may commit criminal acts in the workplace;
- minimize loss and legal liability for negligent hiring that could result from such acts;
- comply with laws that require background checks for job positions that involve vulnerable populations (such as children and the elderly);
- assess character flaws such as lack of honesty and trustworthiness; and
- comply with occupational licensing laws that require “good moral character.”

Several key points militate against use of Blumstein & Nakamura as a basis for public policy decision-making.<sup>2</sup>

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<sup>1</sup> Alfred Blumstein and Kiminori Nakamura, “Redemption in the Presence of Widespread Criminal Background Checks,” *Criminology* 47: 327-359.

<sup>2</sup> Several of these criticisms are similarly applicable to another study sometimes cited by those who argue that there is a specific point of redemption and that criminal history information beyond that point should not be contained in background

- **Prior offenders are at a higher risk of continued contact with the criminal justice system.** As Blumstein and Nakamura concede, “[t]hose with no prior record are inherently less risky than those with a prior record.”<sup>3</sup> Individuals with a prior arrest or juvenile contact with police always pose a risk of arrest that is statistically significantly higher than those without prior police contact or arrest. Kurlychek, et al., estimate that an individual with a prior arrest at age 18 and no offenses for the following seven years is twice as likely at age 25 to be arrested within the next four months as an individual with no prior arrests. If we estimate the risk of rearrest over the next two years (ages 25 and 26), then the ex-offender is five and one-half times more likely to be arrested.
- **The authors themselves concede that their work is “preliminary.”**<sup>4</sup> Consequently, the time frame they suggest for redemption is, at best, tentative and cannot be the primary basis for the bright, firm “redemption” line that critics of background checks frequently ask policymakers to adopt.
- **The quest for such a single bright “redemption” line is doomed, in any event, because there is no magic point of redemption.** Simply put, no single estimate of time “clean” or “straight” applies to all ex-offenders specifying when their risk of re-offending is no greater than the general population. Neither Blumstein & Nakamura nor any other researcher can discern a single, specific point of redemption, and Blumstein & Nakamura admit as much. Their work on this point reflects a general social science consensus: the risk of recidivism varies by age and crime at the time of first arrest; it also varies by the birth year of the offender (due to variations in crime rates over time).

Moreover, Blumstein himself has acknowledged the overwhelming difficulties facing those trying to predict and compare future criminal behavior by ex-offenders and non-offenders:

[A]n individual with a prior violent conviction who has been crime-free in the community for twenty years is less likely to commit a future crime than one who has been crime-free in the community for only ten years. But neither of these individuals can be judged to be *less or equally likely* to commit a future violent act than comparable individuals who have no prior violent history. It is possible that those differences might be small, but making such predictions of comparable low-probability events is extremely difficult, and the criminological discipline provides no good basis for making such predictions with any assurance that they will be correct. *Douglas El v. SEPTA*, 479 F.3d 232, 246 (2007).

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checks: Megan Kurlychek, Robert Brame, and Shawn Bushway, “Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?” *Journal of Criminology and Public Policy* 5: 1101-1118.

<sup>3</sup> Blumstein, *supra* at 333.

<sup>4</sup> The Kurlychek study is also subject to this same limitation. Megan Kurlychek, Robert Brame, and Shawn Bushway, *supra* note 2 at 1118. (“We must note that these findings are but a first look at this important question. ... Clearly, there is much more work to be done on this topic.”)

Turning to the specifics of the Blumstein & Nakamura article, it is obvious that its various shortcomings render it of little or no use to policymakers. Much like the proverbial blind man who feels the elephant's trunk and believes it to be a snake, reliance on the limited nature of the data set that Blumstein and Nakamura use may lead to policy conclusions that are completely and dangerously wrong. To wit:

- **Given the variability of crime and arrest rates over time, across regions and across offense types, there is no reason to believe that the limited scope of their study is representative of the nation (or even a single state) as a whole.** The authors rely solely on a limited data set from single jurisdiction and focus on very few offense types (robbery, burglary and aggravated assault). In order to form the basis for responsible policy, studies would need to be replicated in different jurisdictions at different times and with a much wider set of offenses (including homicide, rape, auto theft and drug offenses) in order to establish the validity of their findings.
- **The failure of Blumstein & Nakamura to account for either offenses or arrests that may have occurred outside the jurisdiction studied likely renders their recidivism rate artificially low.** According to the most recent Department of Justice study, almost 8 percent of all released prisoners were rearrested for a new crime in a state other than the one that released them. These alleged offenders were charged with committing 55,760 new crimes in states other than the imprisoning state within the three-year period following their release. This omission undermines confidence in the reliability and validity of the authors' findings.<sup>5</sup>
- **Reliance on arrest records as an indicator of potential re-offense is inherently unreliable.** Blumstein & Nakamura rely solely on arrest records rather than conviction records in support of their conclusions. Using arrest data to determine recidivism rates dramatically overstates the number of individuals whose records might affect their employment prospects, considering that very few employers take into consideration arrest records, while understating the recidivism risk for persons not wrongfully arrested.
- **Although acknowledging that the attributes of particular jobs and particular employers are highly significant in determining the risk of hiring ex-offenders, Blumstein & Nakamura's "time of redemption" does not account for them.** Employment in certain types of jobs (such as an embezzler as an accountant) poses risks of harm and probabilities of re-offense that other jobs do not. Blumstein & Nakamura (and Kurlychek et al.) themselves concede that the determination of time "clean" or "straight" that renders an ex-offender employable depends not just on the offender but also on specific attributes of the employer or job, such as:
  - anticipated length of exposure to the individual;
  - ability to monitor the individual;

<sup>5</sup> <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=516>.

- amount of potential harm that can be inflicted by the individual not only in monetary or physical, but also in reputational terms; and
- available employment alternatives or job competitors.

*Jeffrey L. Sedgwick was appointed on January 2008 by President George W. Bush to serve as Assistant Attorney General for the Office of Justice Programs; he was confirmed by the Senate of the United States in October 2008 and served until January 2009. Mr. Sedgwick also served until October 2008 as director of the Bureau of Justice Statistics, the statistical agency of the Department of Justice, a position to which he was appointed by President George W. Bush in January 2006. Prior to his appointments, Dr. Sedgwick taught for 30 years at the University of Massachusetts - Amherst. He is currently Professor Emeritus of Political Science at the University.*