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Comments on the topic, "Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy on the Employment of Black and Hispanic Workers," before the U.S. Commission on Civil Rights

By
Jeffrey Leigh Sedgwick, Ph.D.
Managing Partner & Co-founder
Keswick Advisors, LLC
7 December 2012

On April 24 of this year, the Equal Employment Opportunity Commission (EEOC) issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964." This Enforcement Guidance builds on longstanding court decisions and policy documents that were issued over twenty years ago. In light of employers' increased access to criminal history information, case law analyzing Title VII requirements for criminal record exclusions, and other developments, the Commission updated and consolidated in this document all of its prior policy statements about Title VII and the use of criminal records in employment decisions.

Prior to issuing its updated Enforcement Guidance, the EEOC held two public hearings: *Employment Discrimination Faced by Individuals with Arrest and Conviction Records* on 20 November 2008; and *Arrest and Conviction Records as a Barrier to Employment* on 26 July 2011. At each of these meetings, selected individuals representing parts of the research, legal and advocacy communities offered statements concerning the potential impact of criminal histories on the employment prospects of job applicants.

According to many advocates and researchers, the increased interest in and attention to criminal history background checks is attributable to the increasing number of individuals with criminal histories[1] and to the increasing ease of access to such histories by employers concerned about negligent hiring liability.[2] This presumes that the increased supply of criminal histories drives demand for their use. However, there are significant factors independently creating employer demand for criminal history background checks including:

- The reality of recidivism.
- The prevalence of violent and/or theft-related offenses among inmates.
- OSHA rules that require employers to provide a safe workplace.
- Federal, state and local laws and licensing requirements that restrict individuals with certain convictions from employment in selected occupations.
- State laws that put employers at risk for hiring mistakes.
- Employer desire to protect business assets.

[1] See for example, Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million "NEED NOT APPLY": The Case for Reforming Criminal Background Checks for Employment*. New York: The National Employment Law Project, March 2011.
[2] See for example Alfred Blumstein and Kiminori Nakamura, "Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences." Final Report Submitted to the National Institute of Justice Grant No. 2009-IJ-CX-0008: October 2012. Pp. 1, 4-5.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

In the brief summary that follows, I will make four points: (a) that the EEOC in its Guidance and supporting documentation misrepresents contemporary social science research on the disparate impact of criminal justice policies resulting in criminal history records ; (b) that the EEOC misunderstands the difference between correlation and causation in social science research; (c) that the EEOC in its Guidance and supporting documentation misrepresents contemporary social science research on employer behavior and predicting criminal behavior; and (d) that the revised Guidance issued by the EEOC offers no "safe harbor" for employers even if they follow scrupulously the EEOC's own list of Employer Best Practices.

A. Social Science Research and the Disparate Impact of Criminal Justice Policy

Beginning in the Introduction to its updated Guidance, the EEOC notes that there has been a significant increase in the number of Americans who have had contact with the criminal justice system and, concomitantly, a major increase in the number of people with criminal records in the working-age population – indicative, perhaps, of a growing crisis or gathering storm.[3] The EEOC citations included to support this observation of a growing crisis are meant to emphasize the rapid growth in convictions and correctional populations (suggesting, perhaps, a "hyperactive" criminal justice system sweeping increasing numbers of citizens into its net). However, the EEOC ignores the fact that the average annual increase in the population of adults under correctional supervision has been *declining* since 1980 and has, indeed, been *negative* for the past two years.[4] This means that even were we to do nothing in terms of changes in incarceration policy over the next several years, the prison population would fall as smaller and smaller cohorts are convicted and admitted to prison and larger cohorts are released.

The fact that smaller cohorts are being admitted reflects declining rates for imprisonable crimes since the peak in 1992, while the larger release cohorts reflect the increasing violent crime rates between 1960 and 1992. According to the FBI's Uniform Crime Report, between 1960 and 1992, the number of violent crimes in the United States increased nearly sevenfold, from approximately 288,000 to more than 1.9 million, and the violent crime rate increased nearly fivefold from 160.9 to 757.7 per 100,000 population. According to FBI Uniform Crime Report data, the rate of all seven index offenses (homicide, rape, robbery, aggravated assault, burglary, larceny and auto theft) declined significantly over the 1990s, with the aggregate declines ranging from 23% to 44%. For five of the seven offenses (homicide, rape, robbery, burglary and auto theft), the declines are of a similar magnitude: about 40%. Two crimes (aggravated assault and larceny) dropped by a lesser amount: about 23% to 24%.

If we look at *National Crime Victimization Survey* (NCVS) data, the crime declines estimated from the household survey are equal to or greater than the FBI/police statistics in all six crime categories (the NCVS does not measure homicide), with the survey showing much larger declines in larceny, assault and rape. The victim survey not only confirms the trends found in the police data, but also moves the larceny and assault declines much closer to the average declines for the other index crimes than do the police statistics. The violent victimization rate in the United States has fallen 67% since its peak in 1994 and now equals the lowest rate measured in the thirty-six year history of the NCVS. In short, the trends in arrests, convictions, and incarcerations are now not indicative of a growing crisis.

The EEOC Guidance quickly shifts from emphasizing the growth in the number of those with criminal histories to emphasizing the disparate impact of such records: "Arrest and incarceration rates are particularly high for African American and Hispanic men. African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population."[5] Here the EEOC argument is misleading and its citation[6] irrelevant since both suggest that the appropriate denominator for calculating arrest and incarceration rates is a protected groups' proportion of the general population. Since offenders are not a protected class under Title VII of the Civil Rights Act, EEOC has no jurisdiction in employment decisions

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[3] Equal Employment Opportunity Commission, "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq*." No. 915-002, 25 April 2012, 3.

[4] Department of Justice, *Correctional Population in the United States, 2010.* (Washington, DC: Bureau of Justice Statistics, 2011), 1 Figure 1, http:// http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf and Franklin E. Zimring, *The Great American Crime Decline.* (New York: Oxford University Press, 2007), 3-8.

[5] EEOC, "Enforcement Guidance," 3.

[6] PEW CTR. ON THE STATES, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 6 (2010), http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653 at 8, Figure 2.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

pertaining to offenders unless it can be shown that their criminal record itself is the result of unlawful discrimination. But on this precise point, EEOC overlooks a very large body of social science research dating back a number of years.

Michael Hindelang compared the demographic characteristics of persons the police arrested with the characteristics of offenders crime victims reported. The results showed a very consistent relationship between the racial distribution reported in police arrest statistics and that reported by victims of robbery, rape, and assault (where there was direct contact with the offender) when they were interviewed in the 1974 Victimization Survey.[7] Patrick Langan's study[8], comparing the race composition of crime victims' recounting of the identity of their offender to the race composition of prison admissions confirms that of Alfred Blumstein[9] who, in a pioneering study using police arrest statistics to investigate one-day prison populations, also concluded that differential involvement, not racial discrimination, accounts for 80% of the disproportionality be-tween black and white incarceration rates in the United States. And Robert Sampson and Janet Lauritsen[10] reviewed the massive literature on charging and sentencing. They concluded that "large racial differences in criminal offending," not racism, explained why more blacks were in prison proportionately than whites and for longer terms.

Somewhat later in its updated Guidance, the EEOC returned to this theme of racially-biased criminal justice policy in observing that "[i]n 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population. Moreover, African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites."[11] Pointing to drug usage statistics is misleading in this context since it is *dealing* rather than *usage* that drives arrests, convictions and incarcerations (indeed, many convictions for use are the result of plea bargaining the arrest charge down from dealing).

The focus on dealing is reasonable since some illicit drug markets are violent, particularly those organized around a physical place as opposed to virtual markets embedded within social networks. Business arrangements involving illegal drug distribution cannot be enforced by law. Thus we should expect drug dealers to be more commonly and more heavily armed than entrepreneurs and employees in other lines of work, and indeed they seem to be better armed than other perpetrators of deadly violence. While the presence of guns deters violent encounters, it tends to raise the lethality of incidents that do take place.[12] Large areas of flagrant drug dealing – either in the open or in dedicated locations such as crack houses – constitute serious problems for the neighborhoods where they exist. Violence and theft by and against both users and dealers can make flagrant market areas into hot spots for non-drug crime. One reason that urban police continue to pursue the Sisyphean task of locking up drug dealers one by one, only to have them replaced by others, is that the neighbors demand it. The same community leadership that criticizes the police for overly aggressive and impolite enforcement activity often also complains about the failure of the police to stop a set of illegal activities that stand out in plain view.

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[7] Michael Hindelang, "Race and Involvement in Common Law Personal Crimes," *American Sociological Review* 43 (1978), 93- 109; and Michael J. Hindelang, *Analysis of Victimization Survey Results from the Eight Impact Cities*. (Washington : Dept. of Justice, Law Enforcement Assistance Administration, 1976)

[8] Patrick A. Langan, "Racism on Trial," *The Journal of Criminal Law and Criminology* 76 (Autumn 1985) 666-683.

[9] Alfred Blumstein, "On the Racial Disproportionality of United States' Prison Populations," *The Journal of Criminal Law and Criminology* 73 (Autumn, 1982), 1259-1281.

[10] Robert J. Sampson and Janet L. Lauritsen, "Racial and Ethnic Disparities in Crime and Criminal Justice in the United States, *Crime and Justice* 21 (1997), 311-374.

[11] EEOC, "Enforcement Guidance," 9.

[12] On the importance of differences between drug markets and their intersection with violence, see David A. Boyum, Jonathan P. Caulkins & Mark A. R. Kleiman, "Drugs, Crime and Public Policy," in *Crime and Public Policy*. Ed. James Q. Wilson and Joan Petersilia. (New York: Oxford University Press, 2011), 368-410; Paul J. Goldstein and Henry H. Browstein, *Drug Related Crime Analysis: Homicide.* Report to the National Institute of Justice Drugs, Alcohol, and Crime Program. (Washington, DC: United States Department of Justice, July 1987); Alfred Blumstein and Dan Cork, "Linking Gun Availability to Youth Gun Violence," *Law and Contemporary Problems*59 (1996), 5-24; Joseph F. Sheley and James D. Wright, *Gun Acquisition and Possession in Selected Juvenile Samples.* National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, Research in Brief. (Washington, DC: U.S. Department of Justice, December 1993); and David M. Kennedy, "Can We Keep Guns Away from Kids?" *The American Prospect* 5 (1994), 74-80.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

B. Correlation and Causation in Social Science Research

Much of the testimony offered to the Commission in its two hearings on criminal history background checks asserted, strongly suggested or implied that the current level of unemployment in the Black community constitutes a threat to public safety. The unspoken assumption is that the lack of legitimate earning opportunities leads to higher crime rates. But the relationship between unemployment and criminal conduct is not one of simple 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.*[13]

- *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.*[14] 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.*[15]

Successful reentry to legitimate society is shaped by factors that have nothing to do with employment but may, in fact, affect employment prospects *as well as* successful desistance from crime.[16] These factors include not only the individual's characteristics, but also offending and substance abuse histories, family relationships, community contexts, and State policies offering supportive re-entry services. Discouraging the use of background checks will not by itself enhance re-integration into society, especially if it diverts attention from the provision of adequate supportive re-entry services. 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[17]:

- *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.[18] *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.[19]

- *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

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[13] 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)

[14] 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. In this context, it is interesting to note that according to the FBI's Preliminary Annual Uniform Crime Report on 2010, property and violent crime rates in the United States have fallen each year since 2006, despite rising unemployment and the large number of inmates released back into the community annually during that same period.

[15] Ibid., 58.

[16] Christy A. Visher and Jeremy Travis, "Transitions from Prison to Community: Understanding Individual Pathways," *Annual Review of Sociology* 29 (2003): 91.

[17] *Survey of State Prison Inmates, 1991*.

[18] Department of Justice, *Recidivism of Prisoners Released in 1994*. (Washington, DC: Bureau of Justice Statistics, 2002) 1.

[19] Visher and Travis, p. 95.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

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.[20]

- *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 come.[21] 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.

The EEOC's confusion between correlation with causation appears in the Guidance on page 8 where the following quote appears: "A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity." The Guidance then cites *Griggs v. Duke Power Company*[22] to support this position. However, recent scholarship has called into question the viability of the *Griggs* reasoning. A recent law review article is worth quoting at length here:

> In the interim since *Griggs*, social scientists have generated a substantial body of research designed to help employers comply with the mandates of the doctrine. This evidence has undermined two key elements of *Griggs* that have informed the application of the disparate impact rule more generally. First, *Griggs* and its progeny rest on the implicit assumption that fair and valid staffing practices will result in workers from each race being hired or promoted in rough proportion to their numbers in the background population or in an otherwise appropriately defined pool of candidates. The so-called four-fifths rule, under which an employer is presumptively liable if the rate of hiring for minority workers is less than 80 percent of the rate for the majority white population, reflects this assumption. Second, the Court in *Griggs* noted the absence of evidence that the screening criteria in that case--a high school diploma and scores on a "professionally prepared aptitude test"--were related to subsequent performance of the service jobs at issue, and expressed doubt about the existence of such a relationship.
>
> Social science research casts doubt on both of these aspects of *Griggs*. First, research in industrial and organizational psychology (IOP) has repeatedly documented that, despite their imperfections, tests and criteria such as those at issue in *Griggs* (which are heavily "g"-loaded and thus dependent on cognitive ability) remain the best predictors of performance for jobs at all levels of complexity. Second, work in psychometrics, educational demography, and labor economics indicates that blacks, and to a lesser extent Hispanics, currently lag behind whites both in cognitive ability test performance and in the skills needed for success on the job. These gaps are reflected in lower scores on the types of g-loaded job screens that best predict job success.
>
> The combination of well-documented racial differences in cognitive ability and the consistent link between ability and job performance generates a pattern that experts term the "validity-diversity tradeoff": the most effective job selection criteria consistently generate the smallest number of minority hires. Indeed, the evidence indicates that

[20] Ibid.
[21] Visher and Travis, p. 99.
[22] 401 U.S. 424, 431–32 (1971).

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

most valid screening devices will have a significant adverse impact on blacks and will also violate the four-fifths rule under the law of disparate impact.

In sum, the IOP literature demonstrates that the empirical and demographic premises behind the disparate impact rule do not match reality and have turned out to be myths. As a consequence, most legitimate job selection practices, including those that predict productivity better than alternatives, will routinely trigger liability under the current rule.

Although the Supreme Court in *Griggs* and subsequent cases has repeatedly stated that disparate impact doctrine is consistent with a rigorously competitive meritocracy, employers seeking to maintain such a meritocracy among a diverse population will run a high risk of being sued for violations of the rule. Such lawsuits will put employers to the onerous, uncertain, and sometimes impossible task of justifying their job selection practices. This may result in unwarranted liability or induce undesirable, self-protective strategies. Even in the absence of those consequences, a proper application of the doctrine is unlikely to change the racial composition of the workplace or to increase demographic diversity. The best explanation for current workforce imbalances is the existence of real average group differences in knowledge, skills, and abilities. These human capital disparities, and not the use of non-merit-related selection or the erection of arbitrary barriers, best explain observed employment patterns. And given the present magnitude of skill differences and the shortage of qualified minority workers, the correct application of the disparate impact rule will not increase workforce diversity and could well make some jobs less diverse.[23]

The EEOC Guidance also ignores recent research and court decisions on the use of social framework analysis (e.g. disparate impact analysis) in arguing discrimination cases. For example, in discussing determining the disparate impact of policies or practices that screen individuals based on records of criminal conduct (page 9), the Guidance notes that "African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.) is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged. This rate climbs to 1 in 6 (or 17.2%) for Hispanic men. For African American men, the rate of expected incarceration rises to 1 in 3 (or 32.2%). Based on a state-by-state examination of incarceration rates in 2005, African Americans were incarcerated at a rate 5.6 times higher than Whites, and 7 states had a Black-to-White ratio of incarceration that was 10 to1. In 2010, Black men had an imprisonment rate that was nearly 7 times higher than White men and almost 3 times higher than Hispanic men."

This establishes a framework for analysis of employment screens that makes consideration of incarceration inherently discriminatory (unless the employer can conclusively demonstrate that the policy or practice is job related for the position in question and consistent with business necessity – more on that in a moment!). Yet this use of social frameworks is far from uncontroversial or uncontested. Consider the following:

Since it was first introduced in court by Louis Brandeis over a century ago, evidence drawn from social science research has played an important role in many forms of litigation. Perhaps the most prominent current use of social science evidence occurs in employment discrimination class actions, where the plaintiffs often rely on the testimony of an expert to identify factors within the defendant organization that social science studies suggest could pose a common risk of harm to all class members. The prototypical example is found in *Dukes v. Wal-Mart*, a gender discrimination class action involving over 1.5 million women, in which a sociology expert reviewed the case record on Wal-Mart's employment practices ―in light of what social science research shows to be factors that create and sustain bias and those that minimize bias and concluded that Wal-Mart's practices contribute to disparities between men and women in their compensation and career trajectories at the company.

The approach the expert used in the *Dukes* case has come to be known as social framework analysis - so called because an expert uses social science research as a framework for analyzing the facts of a particular case. In this approach, the expert uses her judgment rather than traditional empirical methods to link social science propositions to a particular case. For instance, the expert in *Dukes* conducted no observational, statistical or experimental tests to

[23] Wax, Amy L. "Disparate Impact Realism," *William and Mary Law Review* (November 2011), 621-711.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

> determine that any particular employment practice of Wal-Mart actually contributed to any sex disparities in pay; he simply reviewed discovery materials and judged Wal-Mart's practices to contain features that social science studies suggest can be associated with intergroup bias. This method has been developed by experts exclusively for use in litigation. Or, as the expert for the *Dukes* plaintiffs testified in a subsequent case, *social framework analysis is a legal term and not a scientific term. It's a label that's been applied to what social scientists do when they come into a litigation context. Issues of causality in the social sciences have a long and rich methodological tradition that has nothing to do with social framework analysis*.
>
> In stark contrast to those experts who engage in conjectural social framework analysis, other experts *do* use traditional social scientific techniques to assess conditions directly relevant to the case at hand. For instance, a psychologist may conduct an experiment to determine whether a photo lineup suggested the defendant as the perpetrator, or an economist may estimate the impact of alleged monopolist practices on consumer prices using econometric analyses of market data. In these instances, the expert applies scientific principles and methods to case-specific data in the same way that the expert would use scientific principles and methods to analyze data outside the litigation context. When social scientific principles and methods are used to develop opinions about the parties, practices, or behaviors involved in a particular case, [we refer] to such evidence as social facts.
>
> We conclude that social fact studies are feasible for both plaintiffs and defendants, with or without special access to the parties involved in a case, and provide much sounder conclusions about the relevance of social science to a litigated case than does social framework analysis.[24]

Significantly, in *Dukes v. Wal-Mart* the Supreme Court overturned the Ninth Circuit Court of Appeals and found for the Defendant, Wal-Mart, citing the authors of the above passage.[25] At the very least, this indicates that the Supreme Court does not look favorably on challenges to neutral employment policies and/or practices that are based on non-case specific invocations of social science theories of disparate impact.

C. Misuse/misunderstanding of Contemporary Social Science Research on Employer Behavior and Predicting Criminal Behavior

Social Science research is often complex and presented in specialized professional jargon that makes it challenging for the layperson to understand. However, it is disconcerting to see misuse or misrepresentation of such research in a government document. On page 6 of the Guidance, for example, we find the following statement: "there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record." The statement is supported by a citation to a peer-reviewed and published social science research study.[26] The study cited makes the point that race continues to play a dominant role in shaping employment opportunities, *equal to or greater than the impact of a criminal record* [emphasis added] producing a result where whites *with* criminal records received more favorable treatment (17%) than blacks *without* criminal records (14%).[27] This alone would suggest that the employment difficulties faced by black ex-offenders will not be materially improved simply by prohibiting use of criminal history background checks.

However, the EEOC failed to disclose what it knew to be true about disparate treatment versus disparate impact in this passage since the author of the study in question testified before the Commission in November 2008 on a more recent study

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[24] Gregory Mitchell, Laurens Walker, and John Monahan, "Beyond Context: Social Facts as Case-Specific Evidence." Public Law and Legal Theory Research Paper Series No. 2010-14 (University of Virginia School of Law: March 2010), http://ssrn.com/abstract=1564724. See also John Monahan, Laurens Walker & Gregory Mitchell, *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY & RISK 307, 311-14 (2009).

[25] John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA L. REV. 1705, 1742-48 (2008).

[26] Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958, Figure 6 (2003), www.princeton.edu/~pager/pager_ajs.pdf.

[27] Where favorable treatment is defined as being offered a job interview after submission of a written job application.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

that showed a rather different result.[28] Pager's 2009 research demonstrated a large negative effect of a criminal record on employment outcomes (i.e. being offered a job), and one which appeared substantially larger for African-Americans. Pager's research design involved matched pairs of job applicants for entry-level, low paying jobs in New York City. The only difference between the members of the pairs was the indication on one resume of having been arrested, convicted and incarcerated for drug possession with intent to distribute. Two pairs of applicants, one white and one black, were sent in response to 250 job advertisements randomly selected from the classified sections of four newspapers and Craigslist.

Black applicants were less often invited to interview for jobs, thereby providing fewer opportunities to establish rapport with the employer. However, the sequencing of events involved in employer decision-making is important in this study. Pager noted that employers did not know of the presence or absence of a criminal record at the time they made the decision whether or not to meet face-to-face with the job applicant for an interview. Yet black applicants were offered interview opportunities roughly two-thirds as often as white applicants, again suggesting that race is a larger factor in obtaining an interview and subsequent job offer than presence or absence of a criminal history. Given the importance of an interview in establishing rapport between the employer and the job applicant, this initial decision whether or not to interview is crucial; *and yet it is not affected by the presence or absence of a criminal record.* Indeed, Pager conceded that "the effect of a criminal record has no discernible impact on the likelihood of interaction [i.e. interview]."[29]

Equally important is the fact that once an interview is granted, there is no statistically significant difference between blacks and whites whether the employer expresses sympathy with an applicant's criminal background, expresses disapproval of it, or gives an ambiguous response. Thus it is hard to see how the criminal record plays an independent role in burdening a black job applicant more than a white job applicant. The answer may lie in a number of the anecdotes Pager offered, however. She presented several cases where employers overcome whatever qualms they may have about hiring an ex-offender based on "ethnic solidarity." But this would suggest *that the differential outcome in hiring outcomes for white and black applicants with a criminal record may be the product of the paucity of black employers capable of feeling "ethnic solidarity" with black applicants having a criminal record.* This interpretation is supported by the fact that *there is no statistically significant difference in the likelihood of a positive response to a job application [i.e., a hiring offer] between blacks and whites for employers either sympathetic to applicants with a criminal history or hostile to such applicants.* The entire difference in positive hiring outcomes, by Pager's own data, is attributable to employers who grant an interview during which they express no opinion on an applicant's criminal history or express an ambiguous opinion, thus giving the applicant no opportunity to address employer qualms or to offer mitigating or offsetting personal qualities.

In sum, the EEOC Guidance placing limits on the use of criminal history background checks as a means of reducing discrimination against a class protected under Title VII of the Civil Rights Act of 1964 seems to miss the larger problem, overt racism in hiring facilitated by the paucity of minority hiring officials, and focuses too narrowly on the lesser problem of disparate incidence of criminal histories.

In section A. above, I reviewed the way in which the EEOC Guidance seeks to establish that *any* use of criminal history background checks in an employment setting has a disparate impact on classes protected by Title VII of the Civil Rights Act of 1964 and is thus suspect. The Guidance does allow that there may be limited circumstances under which background checks may be permissible; these fall into two categories: employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations[30]; or the employer demonstrates that the criminal record screening policy or practice is job related for the positions in question and consistent with business necessity. According to the EEOC, to establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, the employer needs

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[28] Devah Pager, Bruce Western and Naomi Sugie, "Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records," *The Annals of the American Academy of Political and Social Science* (May 2009) 623: 195-213.

[29] Ibid., p. 201.

[30] It should be noted that according to current estimates of the Department of Justice-funded *National Study on the Collateral Consequences of Criminal Convictions*, there are over 38,000 federal, state and local statutes that impose collateral consequences on individuals convicted of crimes including employment and occupational licensing exclusions. (See http://isrweb.isr.temple.edu/projects/accproject)

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

In its 1975 ruling in the case of *Green v. Missouri Pacific Railroad*, the Eight Circuit Court of Appeals identified three factors (the "*Green* factors") that are relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity: the nature and gravity of the offense or conduct; the time that has passed since the offense or conduct and/or completion of the sentence; and the nature of the job held or sought. The Guidance makes reference to four studies on "redemption" or the point in time during which a released offender has avoided further contact with the criminal justice system that renders his or her criminal record essentially useless in predicting the risk of reoffending.[31] It is striking that only one of the four studies cited by the EEOC in this context uses national conviction data rather than arrest data (which the EEOC itself discounts as unreliable and insufficient as evidence of guilt. Cf. section V.B.2 of the Guidance) in estimating the optimal exclusion period. And this one study (Soothill &Francis) is based on data from England and Wales. But England and Wales have a considerably different mix of criminal offending than does the United States, calling into question whether an optimal period of exclusion calculated on their data is appropriate for use in the United States where violent crime rates are significantly higher and property crime rates (especially burglary) significantly lower.[32]

The main points that I would make about these "redemption" studies are as follows:

- *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.* Bushway et al estimates that an individual with a prior arrest at age 18 and no offenses for the following seven years is *twice* as likely 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* as likely to be arrested.
- 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). Consequently, *there is no single estimate of time "clean" or "straight" that applies to all ex-offenders specifying when their risk of re-offending is no greater than the general population.*
- These research articles note that the determination of time "clean" or "straight" that renders an ex-offender employable *depends on specific attributes of the employer or job*. And none offers any helpful insight on these attributes.

It is most unfortunate that, despite the above, these articles have been misinterpreted and used to claim, quite prematurely, that criminal records become "stale" and useless as guides to risk assessment after a very short time – as little as three to seven years. Blumstein and Nakamura conclude their article with a list of issues still to be addressed, underlining the preliminary and incomplete character of their current findings. While their article demonstrates that in theory one could define the time "clean" or "straight" at which an ex-offender faces an equal risk (or "sufficiently close") of arrest as the general population of the same age (or non-offenders of the same age) given sufficient information on birth year, age at first offense, and first arrest offense replicated for more jurisdictions, more offense types and more birth years, the gap between theory and practice still yawns before us. In addition to the still incomplete research agenda mentioned by Blumstein et al,, one would also want to correct for the problem of out-of-jurisdiction arrests and for time incarcerated/incapacitated. As well, when determining when comparative risks are "sufficiently close," one would need information on the distribution and variation in risk preference among employers and the characteristics of jobs especially suited for re-entering offenders. In short, there is much more research to be done on these questions.

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[31] Keith Soothill & Brian Francis, "When do Ex-Offenders Become Like Non-Offenders?", 48 *Howard Journal of Criminal Justice*, 373, 380–81 (2009); Alfred Blumstein & Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," 47 *Criminology* 327 (2009); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, "Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement," 53 *Crime & Delinquency* 64 (2007); and Megan C. Kurlychek et al., "Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?", 5 *Criminology & Public Policy* 483 (2006).

[32] See James P. Lynch and William Alex Pridemore, "Crime In International Perspective," in *Crime and Public Policy*. Ed. James Q. Wilson and Joan Petersilia. (New York: Oxford University Press, 2011), 5-52.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

But it is important to note that even when this more extensive research agenda is completed, the result will not be a single estimate of the time since last contact with the criminal justice system at which a criminal record becomes "stale" and unpredictive, but rather a very large number of such estimates, each tailored to the unique circumstances of particular offenders including their age at first offense, nature of most recent offense, and current age (to mention just of few). What we won't get is a single estimate on which a regulatory standard or administrative "bright line" sealing past criminal records can be anchored. The fruits of this particular line of research are more relevant to the employers' assessment of the comparative risk of individual job applicants than to the articulation of administrative or regulatory guidances or rules uniformly applied.

While witnesses have over interpreted the preliminary literature on redemption, it is quite striking that they have been reticent to engage a similarly preliminary body of research demonstrating that criminal history background checks *reduce* employment discrimination against Blacks. This is, of course, the literature on statistical discrimination by scholars such as Harry J. Holzer[33] and Lior Jacob Strahilevitz.[34] Holzer et al found that employers who conducted criminal background checks on applicants were more than 50% more likely to hire African Americans than employers who did not (24% versus 14.8%, respectively).[35] Interestingly, Shawn Bushway has 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.[36] Bushway also found that access to criminal history records reduced the differential between whites' wages and blacks' wages and the differential between whites and black employment levels (but the results were not statistically significant). At this early stage of the research on statistical discrimination, the policy conclusion reached by Strahilevitz is quite striking: we should "provide decision makers 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."[37] This recommendation points in exactly the opposite direction as those recommending curtailing access to criminal histories through background checks; indeed, it suggests that such limits on access to information will make racial discrimination *worse*.

D. Revised Guidance issued by the EEOC offers no "safe harbor" for employers even if they follow scrupulously the EEOC's own list of Employer Best Practices.

On page 14 of the current Guidance, EEOC offers its opinion that it believes employers will consistently meet the "job related and consistent with business necessity" defense for using employment screens (such as criminal history background checks) that have a disparate impact if: the employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures standards; or the employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

Having offered the appearance of a "safe harbor" to employers, the Guidance quickly casts doubt on the reality of any such safe harbor. First, on the matter of validation of any criminal conduct employment screen, the Guidance notes that "Although there may be social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting."[38] It is rather astonishing that EEOC would admit that there is insufficient social science evidence pertaining to whether convictions are linked to future behaviors, traits or conduct with workplace ramifications to meet their own requirement that employment screens be validated. Second, item V.C. (page 20) of the Guidance bluntly

[33] Harry J. Holzer, Steven Raphael and Michael A. Stoll, "Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers," *Journal of Law & Economics* 49 (2006): 451-80.
[34] Lior Jacob Strahilevitz, "Privacy Versus AntiDiscrimination," John M. Olin Law & Economics Working Paper No. 349, The University of Chicago, July 2007.
[35] Holzer et al. at 464.
[36] Shawn D. Bushway, "Labor Market Effects of Permitting Employer Access to Criminal History Records," *Journal of Contemporary Criminal. Justice* 20 (2004): 282.
[37] Strahilevitz at 10.
[38] EEOC, "Enforcement Guidance," 15.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM

states that “If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that serves the employer’s legitimate goals as effectively as the challenged practice but that the employer refused to adopt.” Of course, it is the EEOC who will make the determination of what practice is less discriminatory and what are an employer’s legitimate goals using its own judgment.

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.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER
JEFFREY.SEDGWICK@KESWICKADVISORS.COM
(804) 560-6816 (413) 627-5785

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MANAGING PARTNER & CO-FOUNDER
ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
(413) 627-5785

10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
KESWICKADVISORS.COM