



Writer's Direct Dial: 202.408.7407

Writer's email: cellman@cdiaonline.org

June 15, 2017

Mr. Mauro Albert Morales
Staff Director
United States Commission on Civil Rights
1331 Pennsylvania Ave., NW
Suite 1150
Washington, DC 20425

Via email: reentry@usccr.gov

Re: Comment for the record on the Commission's Public Briefing on *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*

Dear Mr. Morales:

I write on behalf of the Consumer Data Industry Association ("CDIA") to provide additional comments for the record in connection with the U.S. Commission on Civil Rights' ("USCCR" or "Commission") May 19, [Public Briefing](#) on *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* ("Public Briefing").

CDIA is an international trade association, founded in 1906, of more than 130 corporate members. 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.

As the USCCR discusses the collateral consequences of criminal histories and the use of criminal background checks in the workplace and in volunteer communities, we encourage the Commissioners and staff to keep in mind several important points: (1) Criminal background checks for work, residential, and volunteer settings are critical to

protect public safety; (2) The Federal Fair Credit Reporting Act establishes protections for consumers, accuracy obligations on consumer reporting agencies, and enforcement regimes should there be conflicts; (3) Criminal background checks are reliable; (4) Employers, landlords, and volunteer organizations use criminal history checks in a responsible and focused manner; (5) Critical criminological information must be considered that shows the importance of criminal history checks; (6) Reducing the availability of criminal background checks is not the solution to reintegrating ex-prisoners in to society; and (7) There are ways to efficiently help reintroducing former prisoners in to the workforce without limiting the reliable criminal background checks employers need to protect their businesses, customers, and other employees.

1. The need to conduct criminal background checks for workers and volunteers

When a person enters a workplace (which can sometimes be a home) they want to feel safe and secure. Imagine how unsettling it would be for a 29-year old woman in Fairfax County, Virginia to fear that she could be victimized in her own apartment by her apartment building's leasing agent? How safe would an Albuquerque family feel riding in a car that later turned out to have pieced together by an unscrupulous car dealer who should not have been allowed to sell cars? In addition to the stress that comes with being admitted to a hospital, how would a patient feel knowing that a nurse on the floor was charged with using blank prescriptions for personal use? Or had a drug possession history? These examples are not hypothetical theories.¹ These are but

¹ Genevieve "Gini" Orange, 29, was raped and murdered in her [northern-Virginia] apartment in 2008 [by the leasing agent of the apartment building]. [Washington Post Crime Scene, Feb. 9, 2011](#) (last visited March 24, 2011). In 2011, a jury convicted Mark E. Lawlor, 45, of capital murder for which he was later sentenced to death. [Washington Post Crime Scene, Feb. 22, 2011](#) (March 24, 2011). "Lawlor, 45, was the leasing agent for the Prestwick Apartments . . . at 6166 Leesburg Pike in the Seven Corners area [of Fairfax County]. He lived on the ground floor, and Orange lived on the first floor. [Lawlor] "used a key to break into Orange's studio apartment, fatally beat her in the head with a hammer, and then sexually assaulted her." [Washington Post Crime Scene, Feb. 17, 2011](#) (last visited March 24, 2011). While on probation in New Jersey for an earlier crime

Lawlor moved to southern Virginia. But at 18, he drunkenly stole a truck, rolled it over and killed a friend. He went to prison for the first time. . . In 1998, while Lawlor was living in Northern Virginia, he began stalking an ex-fiancée in Great Falls. One night, he snatched her from her car by smashing her windshield and swiping the keys. He did another five-year prison stretch.

Tom Jackman, *Lawlor gets death sentence in 2008 Fairfax slaying*, Wash. Post, March 16, 2011.

In Sept. 1997, Bernard Edward "Eddie" Clayton sold a Ford truck that was "sandwiched in an accident". Clayton was indicted in August 1998 in an Arizona court

a few real-world incidents that are tragically typical of situations where employees have a prior criminal record and commit offenses on the job having been employed either without a criminal history check or without a thorough criminal history check. In short, “people should know that the person coming to your door won’t harm you.”²

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

on 39 felony counts -- 22 of those fraud and forgery charges for allegedly piecing together salvaged vehicles, forging information on their paperwork and selling the vehicles as undamaged used cars and trucks.

State officials say he had a prior, car-related felony conviction that could have prevented him from getting a dealer license long before the pickup sale or other allegedly fraudulent sales charged in the indictment took place.

Guillermo Contreras, *Car Dealer Crackdown*, Albuquerque Journal, August 24, 1998.

In June 2011, Cannon Tubb was arrested in Texas on a fugitive warrant issued at the request of prosecutors in Adams County, Colorado. Mr. Tubb was a nurse who worked in at least five hospitals in the Denver-area. In Colorado, he was arrested on 90 felony charges because he was alleged to have “improperly accessed patient files to steal Social Security numbers and other sensitive information, and opened credit cards in patients’ names to make purchases.” Two years earlier, Tubb

was formally charged with improperly using blank prescription forms for his own use. Because his alleged misconduct did not rise to the level that would prompt automatic action, it did not appear in a national database until January 2011 when Texas regulators suspended his license. By that time, Colorado authorities allege, he had already committed more than 90 felonies in this state.

Nurse accused of stealing identities of hospital patients, available at, <http://www.9news.com/news/article/203400/207/Nurse-accused-of-stealing-identities-of-hospital-patients>, June 14, 2011.

In March 2007, Alma Delia-Campos Rice was a licensed nurse practicing at the Regional Medical Center in Memphis, Tennessee. While working at the hospital, Ms. Rice was convicted of four felony counts of drug possession for narcotics she obtained at the hospital. Four months later, in July 2007, Ms. Rice had relocated to North Carolina where she was working at the Duke Raleigh Hospital in North Carolina in Wake County. There, she was convicted of drug possession and theft of drugs associated from the hospital. <http://www.propublica.org/documents/item/nursing-board-complaints-re-nurses-compact#document/p30>.

² Carol Morello, *Census Bureau adopts strict jobs screening after incidents*, Wash. Post, May 27, 2010, quoting Robert M. Groves, director of the Census Bureau.

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.

2. Criminal background checks are legally protected; Consumers are provided with substantial protections and means of enforcement.

Since 1971, the federal Fair Credit Reporting Act (FCRA) has served employers and applicants alike by acknowledging vibrant and lawful use of criminal history information, requiring reasonable procedures to ensure maximum possible accuracy, and requiring substantial systems to correct any inaccuracies that occur. The FCRA is “an intricate statute that strikes a fine-tuned balance between privacy and the use of consumer information.”³ Many states have their own state FCRA laws.⁴

A. General protections

The FCRA governs consumer reports, regulates consumer reporting agencies, and protects consumers. The law requires consumer reporting agencies to maintain reasonable procedures to assure maximum possible accuracy of the data they report.⁵ The law also provides 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.⁶
- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies and the law requires dispute resolution within 30 days (45 days in certain circumstances). If a dispute cannot be verified, the information subject to the dispute must be removed.⁷
- A consumer reporting agency that violates federal law is subject to private lawsuits and enforcement by the Federal Trade Commission (“FTC”), Consumer Financial Protection Bureau (“CFPB”), and state attorneys general.⁸

³ Remarks of FTC Chairman Tim Muris, October 4, 2001 before the Privacy 2001 conference in Cleveland, Ohio.

⁴ *E.g.*, Cal. Civ. Code § 1785 *et seq.*; N.Y. Gen. Bus. L. § 380 *et seq.*

⁵ *Id.*, § 1681e(b).

⁶ *Id.*, § 1681s-2(a)(1)-(2).

⁷ *Id.*, § 1681i(a)(1), (5).

⁸ *Id.*, § 1681n, 1681o, 1681s.

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.

For example, under § 1681k of the FCRA, a consumer reporting agency which “furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer’s ability to obtain employment,” such as criminal record information, must either

- notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the employer to whom such information is being reported; or
- “maintain strict procedures designed to insure” that the information being reported is complete and up to date, and such information “shall be considered up to date if the current public record status of the item at the time of the report is reported.”

As a result of these requirements, consumer reporting agencies that include adverse criminal record information in an employment report either notify the consumer of that fact or access directly the most up-to-date information.

Although the FCRA allows employers to review the criminal histories of prospective and existing employees,⁹ this review comes with certain obligations. Under § 1681b(b) of the FCRA:

- Before ordering a consumer report for employment purposes, 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.
- Before requesting a consumer report, an employer must give the prospective employee a written disclosure that a consumer report may be obtained for employment purposes and get the consumer’s authorization to obtain a consumer report for employment purposes. The disclosure document provided to the consumer must be clear and conspicuous and contain only the disclosure.
- Before taking an adverse action based on a consumer report, the employer must provide to the consumer a copy of the report and a written summary of rights

⁹ *Id.*, § 1681b(a)(3)(B).

mandated by the CFPB. This notice gives the employee an opportunity to dispute the report.

- The employer must provide a second adverse action notice if an adverse action is actually taken.

3. Criminal background checks are reliable

In 2014, the Consumer Data Industry Association (CDIA) asked the four largest criminal background check companies in the United States to examine the error rate of criminal background checks. These four companies looked at several million criminal background checks provided to employers in the first three quarters of 2014. On average 0.3% (1/3rd of one percent) of criminal checks furnished to employers about job applicants resulted in a dispute by an applicant. Another CDIA member, LeasingDesk, looked at its records and found that 99.2% of all criminal screens it conducts are reliable. “‘Thus the number of disputes we receive is extremely low compared to the millions of screens we perform,’ said RealPage (part of the LeasingDesk family) spokesperson Andrea Massey.”¹⁰

These high rates of reliability are consistent with the findings of several federal courts. For example, in a case involving a criminal background check company, LexisNexis (a member of CDIA), the U.S. Court of Appeals for the 6th Circuit found: “Lexis’s data shows that 99.8% of its reports are never disputed, which means that the dispute rate is only .2%. This .2% rate includes database searches like the one Lexis conducted on Smith for Great Lakes.”¹¹ In another case involving the reliability of criminal background checks, “First Advantage prepared 3,554,163 background reports between 2010 and 2013 containing public record information on a nationwide basis. Of those approximately 3.5 million reports”, the dispute rate was 0.49%, or one-half of one percent. Of those reports that were disputed, 14,346 reports resulted in a correction. This is an error rate of 0.40%, or two-fifths of one percent.¹²

Criminal background check providers deliver reliable, prompt, and easy to use criminal history reports despite significant limits in the accuracy of criminal history data maintained by state criminal justice repositories.

¹⁰ John Marshall, *Inaccurate background checks pose problems for renters*, KHOU (Houston), <http://www.khou.com/amp/news/investigations/inaccurate-background-checks-pose-problems-for-renters/345225426>.

¹¹ *Smith v. LexisNexis Screening Solutions*, 15-2329/2330 (U.S.C.A. 6th Cir., Sept. 13, 2016), 3.

¹² *Williams v. First Advantage*, U.S. Dist. Ct. (N.D. Fla.) No. 1:13cv222-MW/GRJ (March 2, 2017) (Order, 6-7).

The Department of Justice biannually documents the delays and incompleteness in the criminal history records in each state agency. In a 2014 *Survey of State Criminal History Information Systems*, the Justice Department found that, among other things:

(The survey is available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf>.) Summarizing this report, criminal records system expert Mike Sankey found:

- 8 states report 25% or more of all dispositions received could NOT be linked to the arrest/charge information in the state criminal record database. 14 states don't know how many dispositions they have that cannot be linked. (Table 8a)
- 20 states have over 3 million unprocessed or partially processed court dispositions, ranging from 200 in Michigan and North Dakota to over 1 million in Nevada. (Table 14)
- 11 states report at least a 50 day backlog between the time when a felony case is decided and when the record is entered in that state's criminal history database. 18 states do not know how long the delay is. (Table 14)¹³

Rather than rely on state criminal justice agencies alone, criminal background check providers and their users may go directly to the courts, police, and county criminal repositories in order to assemble a broader history of an applicant.

Another limitation which criminal background check providers surmount in order to deliver reliable criminal history reports is the increasing practice by courts and criminal justice agencies alike to redact key identifying information – Dates of Birth, Addresses, and Social Security Numbers - from public records. These valuable identifiers are regularly found in credit history data but today are significantly redacted in most public criminal records. As a result, conclusive matching of a criminal record to an individual is an increasingly complex undertaking that has required criminal background check providers to innovate.

4. Employers use criminal record checks in a responsible and focused manner

In January 2010, the Society for Human Resources Management (“SHRM”) released a study on employer use of criminal histories. Of the 73% of employers that do conduct a criminal background check on employees, SHRM reported 78% consider criminal histories because the position requires a fiduciary duty or financial responsibility; 68% consider them for positions where there is access to highly confidential employee salary, benefits, or personal information; 60% will review a

¹³ U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems*, 2014, <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf>. See, also, <http://www.criminalrecordsources.com/documents/CrimReposit.pdf>.

criminal history for positions with access to corporate or personal property, including technology; 55% of employers will consider criminal histories for senior executive positions; and 48% for safety-sensitive positions, like transportation and the operation of heavy equipment. The SHRM study shows that employers weigh different offenses differently, consider the severity of the crime, and examine the distance in time between an offense and the job application.¹⁴ In short, employers use criminal background checks in a responsible and focused manner.

5. Critical criminological information must be considered that shows the importance of criminal history checks

As appendices, CDIA has submitted two papers produced by Dr. Jeffrey L. Sedgwick that the Commission must consider in its review of the use of criminal histories for employment decisions.¹⁵

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:

(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 highly preliminary studies and shows why these two papers must be viewed more critically before basing any legal or public policy decisions on them.

¹⁴ Background Checking: Conducting Criminal Background Checks SHRM Poll, Jan. 22, 2011, <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx> (last visited July 5, 2011).

¹⁵ 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.

Limiting criminal background checks because there may be a mythical point of redemption lacks the foundation in science. No matter how much research is undertaken, the search for a single bright redemption line is likely doomed to fail. Even the leading authors on papers seeking a redemption date find false hope. Professors Alfred Blumstein and Kiminori Nakamura readily concede that “[t]hose with no prior record . . . are inherently less risky than those with a prior record.”¹⁶

6. Reducing the availability of criminal background checks is not the solution to reintegrating ex-prisoners in to society

Businesses want to meet the needs and expectations of their customers and other employees by making homes, volunteer environments, and workplaces safe, especially when that workplace is a person’s home. Blinding employers to past criminal acts of job applicants does not do any good to protect the public. Employers need to make hiring decisions based on all the information available on an applicant. The information must be full and the decision must be legal. CDIA supports second chances. Employers should be encouraged to hire and train workers with criminal records, but blinding them to the past does not mean a good future.

7. There are ways to efficiently help reintroduce former prisoners to the workforce without limiting the reliability of criminal background checks employers need to protect their businesses, customers, and other employees

Every new worker poses some degree of risk to a business, but those risks will vary depending on the work done, the location of the work done, and the person doing the work. Criminal background checks are what allow employers to trust strangers and make fair and reliable decisions. We support finding new ways to help reintroduce ex-offenders in to the workplace. For example, state professional and occupational licensing bodies must show a strong connection – more so than private employers – between the license sought, the crime committed, and the time between the two. Vague standards of “crimes of dishonesty” or flat bans on all felony convictions do nothing but keep people from the opportunity to compete for a license.

State laws should offer employers and landlords immunity from negligent hiring or screening lawsuits for those that bring ex-offenders in to the workplace or rental

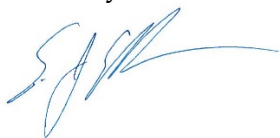
¹⁶ Alfred Blumstein and Kiminori Nakamura, *Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences*, Oct. 2012, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf> (“Blumstein & Nakamura, 2012”), 90.

housing.¹⁷ States should consider offering certificates of rehabilitation for ex-offenders and make these certificates available via online searching of a name, SSN, and a full date of birth. Employers should be able to avoid liability for negligent hire when hiring persons with these certificates. Government should extend the Work Opportunity Tax Credit (WOTC) to broader categories of ex-offenders. A WOTC is available for hiring ex-offenders only of that person has been convicted of a felony and has a hiring date that is not more than one year after the conviction or release from prison. Reintegration of ex-offenders would be increased with a broader application of the tax credit.

Conclusion

Thank you for the opportunity to provide a comment to the Commission on the collateral consequences of criminal histories and the use of criminal background checks in the workplace and in volunteer communities. We encourage the Commissioners and staff to keep in mind several important points: (1) Criminal background checks for work and volunteer settings are critical to protect public safety; (2) The Federal Fair Credit Reporting Act establishes protections for consumers, accuracy obligations on consumer reporting agencies, and enforcement regimes should there be conflicts; (3) Criminal background checks are reliable; (4) Employers, landlords, and volunteer agencies use criminal history checks in a responsible and focused manner; (5) Critical criminological information must be considered that shows the importance of criminal history checks; (6) Reducing the availability of criminal background checks is not the solution to reintegrating ex-prisoners in to society; and (7) There are ways to efficiently help reintroducing former prisoners in to the workforce without limiting the reliable criminal background checks employers need to protect their businesses, customers, and other employees.

Sincerely,



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

¹⁷ In Georgia, an employer or landlord who hires or rents an ex-offender with a Program and Treatment Completion Certificate by the Department of Corrections is provided with a “presumption of due care”. Ga. Code § 51-1-54(b). See, also, Tex. Civ. Penalties & Remedies, § 142.002.



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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.*¹
- *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;*² 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.*³

¹ 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)

² 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.

³ *Ibid.*, 58.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER

 JEFFREY.SEDGWICK@KESWICKADVISORS.COM
 (804) 560-6816  (413) 627-5785

 ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
 (413) 627-5785

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

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.⁴ 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 facts⁵:

- **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.⁶ *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.⁷
- **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.⁸
- **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

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

⁵ *Survey of State Prison Inmates, 1991.*

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

⁷ Visher and Travis, p. 95.

⁸ *Ibid.*

come.⁹ 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.

⁹ Visher and Travis, p. 99.

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



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.

In the following pages, we review two widely cited current articles challenging the usefulness of criminal background check information in employment decisions. The articles are Megan C. Kurlychek, Robert Brame and Shawn D. Bushway, “Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?” *Criminology & Public Policy* 5: 483-504 and Alfred Blumstein and Kiminori Nakamura, “Redemption in the Presence of Widespread Criminal Background Checks,” *Criminology* 47: 327-359. A quick check of Google indicates 960 current cites of the Kurlychek et al article and 5830 current cites of the Blumstein and Nakamura article; plainly, both are in wide circulation and shaping the debate on access to and dissemination of criminal history information to employers, landlords, issuers of occupational licenses et cetera.

The main points that we make about these two 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.* One of these studies 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.*
- Both 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 neither article offers any data on these attributes.

I. Kurlychek, Brame and Bushway on Scarlet Letters

Kurlychek et al note, “Knowledge of an offender’s prior record is ... used as a general indicator of dangerousness and propensity to re-offend at all key decision-making points in the criminal justice process from the police decision to arrest, to the prosecutor’s charging decision, to the final sentence handed down by the criminal court judge.” This practice is based on a very large body of research data on recidivism, criminal careers, and the prediction of crime.

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER

 JEFFREY.SEDGWICK@KESWICKADVISORS.COM
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 ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
 (413) 627-5785

 10220 UPPINGHAM COURT, RICHMOND, VA 23235-1135
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The questions at the heart of the research are as follows: if an offender survives an immediate or short follow-up period without a new criminal event, does this imply continued success as a law-abiding citizen in the future; and if the ex-offender survives without a new offense for a given time period, does his/her risk of re-offending ever become similar or equal to the risk for someone who has never offended at all?

On the question, “If an offender survives an immediate or short follow-up period without a new criminal event, does this imply continued success as a law-abiding citizen in the future?”, the answer from this study is “no.” As the authors note, the four month rearrest rate at age 25 for an individual with a single arrest at age 18 and no subsequent criminal justice involvement is 2%; if the reference period is extended to twenty-four months, then the failure rate rises to 7.2%. And these are the *lowest* failure rates for any of the groups with criminal justice contact prior to age 25.

On the question, “If the ex-offender survives without a new offense for a given time period, does his/her risk of re-offending ever become similar or equal to the risk for someone who has never offended at all?”, again the answer from this study is (in the case of “equal”), “no.” Those without prior contact with the criminal justice system always have a hazard rate and a conditional probability of arrest that is lower than those with prior contact, and the difference in rates or probabilities is statistically significant. If we address ourselves to whether or not the hazard rates and conditional probabilities are “similar” between non-offenders and prior offenders, then the current study yields no answer, since “similarity” would depend on the risk preference of the decision-maker as the authors, themselves, correctly note.

The reliability and validity of these findings, and therefore their usefulness in policy discussions, depends a great deal on the quality of the data analyzed. It is an open question whether the 13,160 males born in Philadelphia in 1958 (and thus entering adulthood in 1976) and their experiences with the criminal justice system are representative of males born in different years and different places. Given the variability of crime and arrest rates over time (periodicity) and across regions, there is no reason to believe that they are representative. Thus, this particular study would need to be replicated in multiple different places and at many different times in order to establish the validity of the findings presented here.

Further, the fact that no attempt is made to account either for offenses or arrests that may have occurred outside Philadelphia’s jurisdiction undermines confidence in the reliability and validity of this study’s findings. After all, Philadelphia is just a short hop across the Delaware River from New Jersey. And the failure to account for time incarcerated/incapacitated similarly requires one to treat these findings as preliminary and tentative.

As indicated above, whether or not two hazard rates or conditional probabilities of arrest are sufficiently similar that they can be treated as the same depends on data or evidence not included in this study. How

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER

 JEFFREY.SEDGWICK@KESWICKADVISORS.COM
 (804) 560-6816  (413) 627-5785

 ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
 (413) 627-5785

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



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much additional risk an employer, landlord, parole board or occupational licensing board may be willing to accept depends on a variety of factors, some of which the authors of this study outline: anticipated length of exposure to the individual, ability to monitor the individual, amount of potential harm that can be inflicted by the individual not only in monetary or physical but also in reputational terms, and available alternatives or competitors. Given the interplay of all of these variables, there is no single, universal specification of the amount of difference in hazard rates or conditional probabilities of arrest that renders two individual applicants similar.

II. Blumstein and Nakamura on Redemption

This study is motivated by concern for the religious concept of redemption as it applies to those with criminal records. Put succinctly, redemption is defined by the authors as “the process of ‘going straight’ and being released from bearing the mark of crime.” The possibility of or opportunity for redemption is said to be increasingly put at risk by two developments: (1) the increasing demand for background checks for a wide variety of purposes, most importantly for employment assessment; and (2) a growing number of individual criminal records have accumulated and are becoming easily accessible.

Blumstein and Nakamura cite studies that show either “employers show considerable reluctance to hire individuals with criminal records” [notice that this doesn’t mean old or “stale” criminal records are overshadowing “a law abiding life since”] or “others have shown the relationship between criminal records and poorer employment prospects” [again, this doesn’t speak to the characterization of old or “stale” criminal records outweighing a law abiding life since]. But they do this after themselves enumerating several very good reasons why employers might legitimately check criminal backgrounds:

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

Blumstein and Nakamura pose the following three research questions: how long does it take for an individual with a prior criminal record and no subsequent criminal involvement to be of no greater risk than persons of the same age in the general population?; how does an individual with a prior record compare with individuals with no prior record?; and how do these risks vary with the characteristics of the prior record, such as the crime type and age at the prior arrest?

They find that hazard rate, or risk of recidivism, varies by age and crime at the time of first arrest. Hazard rates differ primarily in the first ten years, with robbery having the highest conditional re-arrest

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER

 JEFFREY.SEDGWICK@KESWICKADVISORS.COM
 (804) 560-6816  (413) 627-5785

 ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
 (413) 627-5785

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



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probability, while burglary and aggravated assault have very similar rates. Further, hazard rates differ again depending on age at first arrest with earlier age at first arrest generating higher risk or rearrest. Interestingly, Blumstein and Nakamura do not comment on what is obvious from their Figure 1a: while those who offend first at age 16 are higher risks than those who offend first at ages 18 or 20 (and this difference between 16 and 18 year old first offenders persists for at least 13 years), those who offend first at age 20 offer significantly lower risk of reoffending compared to either 16 or 18 year old first offenders *for at least sixteen years*. Earlier onset of offending adds a significant increment to risk; late onset diminishes risk.

The times at which the rates of rearrest for a first time offender at ages 16, 18 and 20 equal that of the general population of the same age vary between a low of 3.2 years for an individual who committed his first arrest offense (burglary) at age 20 and a high of 8.5 years for an individual who committed his first arrest offense (robbery) at age 16. This means if an employer were to choose randomly among all 23 year olds in the population, he would face the same risk as in knowingly hiring an individual who committed his first arrest offense (burglary) at age 20. This is because the general population contains not only people who have never offended, but people who have offended once, and people who have offended multiple times.

For all age/offense groups considered in this study, the probability of a new arrest at the time “clean” or “straight” when their risk of rearrest is equal to the risk of arrest of the general population is 0.10 or 10%. But consider what that means: an employer who hires a 24 year old who committed a robbery at age 16 (eight years earlier) and has remained clean since faces a one in ten chance that the employee will be arrested on a new offense before the year is out. That might well give many an employer reasonable cause for concern.

In determining the length of time “clean” needed to make the risk of rearrest for an ex-offender equivalent to the risk of first arrest for a non-offender of the same age, the analysis is more complicated since “Because the risk of rearrest for a redemption candidate might be expected to approach, but not cross, the risk of arrest for the never arrested, it becomes a matter of having to assess when the two curves are “close enough.” In other words, Blumstein and Nakamura concede what Kurlychek, Brame and Bushway found: that the hazard rate for non-offenders is always lower than the hazard rate for an equivalent age person with at least one prior criminal justice contact and that the difference is always statistically significant.

If we seek the length of time “clean” at which the hazard rate for an 18 year old first arrestee, whether convicted of a violent or property offense, approximates the hazard rate for an individual of the same age never arrested, then Figure 4 suggests that we would have to wait at least 23 years after the initial arrest, during which time the ex-offender would have had to remain free of contact with the criminal justice system. Put in other words, our eighteen year old first time offender would have to wait until he

JEFFREY LEIGH SEDGWICK, PH.D.
MANAGING PARTNER & CO-FOUNDER

ALEXANDER YOUNG SEDGWICK
MANAGING PARTNER & CO-FOUNDER

 JEFFREY.SEDGWICK@KESWICKADVISORS.COM
 (804) 560-6816  (413) 627-5785

 ALEXANDER.SEDGWICK@KESWICKADVISORS.COM
 (413) 627-5785

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



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was 41 years old, remaining “straight” the whole time, until he became as safe an employment risk as a 41 year old who had never committed a criminal offense.

This returns the authors to their consideration of “close enough.” What follows is a hypothetical discussion of risk preference on the part of the employer. Blumstein and Nakamura suggest that if an employer were willing to accept a 5% risk premium on a prior offender as compared to a non offender of the same age, then the one-time only offender who remained “straight” for 4.8 years (in the case of an 18 year old first time property offender) and 8.0 years (in the case of an 18 year old first time violent offender) would be equivalently risky as hiring a non-offender of the same age.

But this argument seems a bit of a carnival shell game. One might well ask why an employer would knowingly accept a 5% higher risk that his employee would be arrested in the coming year? One could argue that 5% is a low probability, but this is not really the point. What multiple of the non-offender’s hazard rate does this 5% risk increment represent? And why should the employer be expected to accept that increment? Should the expectation extend to all employers? What about those who serve vulnerable populations? And how much do we know about the risk preferences of employers at the present time? Are they risk preferrers or risk avoiders? How does their risk preference vary across industries? The article in question can’t help us on that, and so it can’t help us on the definition of “close enough.”

Indeed, Blumstein himself conceded just this point in court testimony:

It is also the case that an individual's propensity to commit a future violent crime decreases as that individual's crime-free duration increases. That is, an 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.¹

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. Certainly their article has demonstrated that conceptually 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

¹ Douglas El v. SEPTA, 479 F.3d 232; 2007 U.S. App. LEXIS 6297(2007).



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replicated for more jurisdictions, more offense types and more birth years. In doing so, one would also want to correct for the problem of out-of-jurisdiction arrests and for time incarcerated/incapacitated. When determining when comparative risks are “sufficiently close,” one would also need information on the distribution and variation in risk preference among employers. In short, there is much more research to be done on these questions.

But we can go further: based on the authors’ own arguments in this article, one can question whether what is needed is less information in the hands of employers or more. Consider this: Blumstein and Nakamura’s own data shows that it takes a very, very long time for the hazard rate of one-time offenders to approach the hazard rate for age-equivalent non-offenders. Indeed, their Figure 4 suggests that it might be on the order of 23 years.

But they themselves note that employers are seldom presented with a pool of applicants all the same age; often they are choosing among applicants of different ages. And since we know that the arrest rate, even for non-offenders, peaks at a comparatively young age (in the early twenties) and then declines, enhancing the employment prospects of candidates for redemption would be better served by giving employers not only criminal records, but also (as a matter of routine) the hazard or arrest rate by age of each job applicant, ex-offenders and non-offenders alike. It may well be that our 41 year old applicant who committed a single offense at age 18, while he is more risky than a non-offender of his same age, is less risky than a non-offending 18 or 19 year old. But knowing that entails having access to more information, not less.

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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 KESWICKADVISORS.COM