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July 22, 2011

Equal Employment Opportunity Commission
131 M St., NE
Washington, DC 20507

Re: Arrest and Conviction Records as a Barrier to Employment

To the Equal Employment Opportunity Commission:

I write on behalf of the Consumer Data Industry Association ("CDIA") to offer our perspective on the use of criminal histories by employers to minimize risk and promote safety. Although the upcoming EEOC meeting is entitled "arrest and conviction records as a barrier to employment", the meeting should not lose sight of the use criminal histories to as a means to protect the safety of the workplace.

You may recall that CDIA filed a comment in October 2010 on the use of credit histories by employers. Since our members offer a variety of risk management tools to employers for a variety of uses, we also have an interest in protecting workplace safety through the use of criminal history background screening. Protecting the safety of the workplace is a critical focus for employers and our members help them do just that.

By way of background, CDIA was founded in 1906 and is the international trade association that represents approximately 200 consumer data companies. 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.

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 a few real-world incidents that are tragically typical of

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

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.

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 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.

As the EEOC discusses the use of criminal histories, we encourage the Commissioners and staff to keep in mind several important points: (1) criminal history reviews 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) employers, Congress, and state legislators see substantial value in requiring criminal background checks for selected employment situations; (4) employers 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) employers have come to rely on long-standing and workable EEOC guidance and court decisions; and (7) reducing the availability of criminal background checks is not the solution to reintegrating ex-prisoners in to society.

1. Criminal history reviews are critical to protect public safety

According to the Occupational Safety and Health Administration (“OSHA”), “[v]iolence in the workplace is a serious safety and health issue. Its most extreme form, homicide, is the fourth-leading cause of fatal occupational injury in the United States.”³ The General Duty Clause of the Occupational Safety and Health Act requires employers to “furnish to each of his

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 (last visited June 28, 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> (last visited March 25, 2011).

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.

³ OSHA Workplace Violence, <http://www.osha.gov/SLTC/workplaceviolence/index.html> (last visited, July 7, 2011).

employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees".⁴ OSHA provides useful guidance on compliance and prevention. The issue is serious enough that the FBI provides helpful information to the extent an organization is able to create "threat assessment teams" for workplace and school violence prevention.⁵

In order to protect places of work, including private homes, employers have turned to criminal history searches. Nursing is just one area where criminal history checks have shown to be lacking and where, when done, can have a positive impact for hospital patients. According to a report by the U.S. Department of Health and Human Services' Inspector General, 92% of all nursing homes employ at least one worker with a criminal conviction.⁶ From those employed in nursing homes with criminal convictions, 44% had a criminal history for property crimes, 20% had a DUI history, 16% were for drug-related offenses, and 13% were for crimes against persons.⁷ Of the 16% of employees who had their last conviction after they were hired, almost half (49%) of those had those convictions occur within two years of hire and another 23% had their last conviction occur between two and five years after the date of hire.⁸

Even as criminal history reviews become more commonplace, minority hiring increases. In 2010, the EEOC posted 11 new aggregate data sets from the most recent edition of its report Job Patterns for Minorities and Women in Private Industry, commonly known as the EEO-1 survey, on www.data.gov. The most recent data sets contain comprehensive labor force profiles of race, gender and ethnicity divided by various job categories. According to the 2008 EEO-1 survey and historical data, of the approximately 62 million private sector employees nationwide covered by the 2008 survey, about 30 million (48%) were women and 21 million (34%) were minorities; the rate of minority employment tripled between 1966 and 2008 from 11% to 34%; among the four minority groups continuously measured, the employment rate for Black or African Americans increased steadily from 8% in 1966 to 14% in 2008; and Hispanics or Latinos had the fastest growth rate in the private sector, increasing from 2.5% to over 13% between 1966 and 2008.⁹

⁴ 29 U.S.C. § 654(a)(1).

⁵ Steve Albrecht, D.B.A., *Workplace and School Violence Prevention*, Feb. 2010, available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/february-2010/threat-assessment-teams> (last visited July 5, 2011).

⁶ Nursing Facilities Employment of Individuals with Criminal Convictions, U.S. Dep't. of Health & Human Services, March 2011, OEI-07-0900110, 11 <http://oig.hhs.gov/oei/reports/oei-07-09-00110.pdf>.

⁷ *Id.*, 12.

⁸ *Id.*, 14-15.

⁹ <http://www.eeoc.gov/eeoc/newsroom/release/2-5-10.cfm> (last visited April 9, 2010). See also, Weldon Latham, *Are Criminal Background Checks Discriminatory?*, Feb. 23, 2011, Diversity, Inc. <http://diversityinc.com/article/8221/Are-CriminalBackground-Checks-Discriminatory/> (last visited June 28, 2011).

2. Consumer reports for employment purposes are legally protected; Consumers are provided with substantial protections and means of enforcement.

A. General protections

The federal Fair Credit Reporting Act (“FCRA”),¹⁰ governs consumer reports, regulates consumer reporting agencies, and protects consumers. Consumer reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy.¹¹ There are many other consumer protections as well. For example:

- Those that furnish data to consumer reporting agencies cannot furnish data that they know or have reasonable cause to believe is inaccurate, and they have a duty to correct and update information.¹²
- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies or lenders 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.¹³
- A consumer reporting agency that violates federal law is subject to private rights of action, enforcement by the Federal Trade Commission (“FTC”), and state attorneys general.¹⁴

B. Protections specific to employment screening

In addition to the general protections above, there are protections specific to the use of consumer reports for employment purposes. The FCRA allows employers to review the criminal histories of prospective and existing employees.¹⁵ However, this legal privilege comes with certain obligations. In short, under § 1681b(b) of the FCRA:

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

¹⁰ 15 U.S.C. § 1681 *et seq.*

¹¹ *Id.*, § 1681e(b).

¹² *Id.*, § 1681s-2(a)(1)-(2).

¹³ *Id.*, § 1681i(a)(1), (5).

¹⁴ *Id.*, § 1681n, 1681o, 1681s.

¹⁵ *Id.*, § 1681b(a)(3)(B).

- Prior to taking an adverse action, the employer must provide to the consumer a copy of the consumer report and the summary of rights mandated by the FTC. The employer must provide a second adverse action notice if an adverse action is actually taken.

3. Employers, Congress, and state legislators see a need to conduct criminal checks

Federal law requires criminal background checks for many employment situations, including for employment benefits administration,¹⁶ drivers of hazardous materials,¹⁷ child care workers,¹⁸ and bank employees.¹⁹ Criminal history checks may also apply to EEOC employees and those who secure the EEOC buildings. The Office of Personnel Management (“OPM”) provides its Standard Form 85P for federal government job applicants for public trust positions. Question 20 on this form asks applicants to provide a list of any arrests, charges, or convictions that have occurred in the previous seven years. Standard Form 85 for “non-sensitive” positions does not ask a question like that noted on the Form 85P, however, the Form 85, like form 85P, contains a release whereby the applicant authorizes a search for any criminal record.²⁰

The federal government regularly encourages states to conduct more criminal background checks. For example, in 2010, Connecticut “received \$1.9 million from the U.S. Department of Health and Human Services to help establish a comprehensive, statewide background check program for employees of long-term care facilities.”²¹ The grant referenced above was provided by the HHS Centers for Medicare & Medicaid Services (CMS) to “combat[] abuse and neglect in the nation’s long-term care facilities.” Six states (Alaska, Connecticut, Delaware, Florida, Missouri, and Rhode Island) were awarded \$13 million so that they could

design comprehensive applicant criminal background check programs for jobs involving direct patient care.

Created by the Affordable Care Act, the new National Background Check Program will help identify ‘best practices’ for long-term care providers to determine whether a job seeker has any kind of criminal history or other disqualifying information that could make him or her unsuitable to work directly with residents.

¹⁶ 29 U.S.C. § 1111 (placing a prohibition on persons “convicted of... robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving [drugs], murder, rape, kidnaping, perjury, assault with intent to kill...”)

¹⁷ 51 U.S.C. § 5103.

¹⁸ 42 U.S.C. § 13041.

¹⁹ 12 U.S.C. § 1829.

²⁰ OPM Standard Form 85P, available at http://www.opm.gov/forms/pdf_fill/sf85p.pdf, and Standard Form 85, available at http://www.opm.gov/forms/pdf_fill/SF85.pdf, (last visited May 25, 2011).

²¹ Amanda Cuba, *Experts: Theft emphasizes need for background checks*, Conn. News Times, April 29, 2011.

The new law set aside \$160 million for the program, which is to run through September 2012, an amount sufficient to enable all states to participate.²²

Like the federal government, states require criminal background checks in many employment situations, including for loan originators, mortgage brokers, and mortgage lenders,²³ dental hygienists,²⁴ massage therapists,²⁵ psychologists,²⁶ tow truck drivers,²⁷ and funeral directors.²⁸ In the last few years, many bills have been introduced in state legislatures to permit or require criminal background checks for a wide array of professions and occupations, including full-time faculty or staff members at colleges and universities;²⁹ student teachers;³⁰ destination resort license holders;³¹ bounty hunters;³² fire investigators, rescue squad personnel, firefighters, and EMTs;³³ home care aides and assisted living facilities;³⁴ hotel employees with room key access;³⁵ HVAC licensees;³⁶ taxi license holders and non-emergency Medicaid transport vehicle drivers;³⁷ bank officers;³⁸ workers in a state office of vital statistics;³⁹ state government contractors with access to confidential information;⁴⁰ owners of appraisal management companies;⁴¹ employees with a state higher education services corporation;⁴² and workers on ice cream trucks.⁴³ Many bills requiring criminal background checks have also been introduced at the federal level.⁴⁴ These are just a representative sample of many more bills in the states designed to protect workplaces.

²² U.S. Department of Health & Human Services media release “New resources available to improve patient safety and combat abuse in long-term care facilities”

<http://www.hhs.gov/news/press/2010pres/10/20101006a.html> (last visited, July 5, 2011).

²³ FLA. STAT. § 494.0011(2)(c).

²⁴ PA. CONS. STAT. § 124.1.

²⁵ OHIO REV. CODE ANN. § 4731.15.

²⁶ MD. CODE ANN. HEALTH OCC. § 18-302.1.

²⁷ CAL. VEH. CODE § 2431.

²⁸ TEX. OCC. CODE ANN. § 651.259(e).

²⁹ H.B. 45 (Pa. 2011).

³⁰ S.B. 245 (Del. 2010).

³¹ S.B. 2050 (Fla. 2011).

³² H.B. 837 (Tenn. 2011).

³³ H.B. 2436 (Ariz. 2011); A.B. 163 (Cal. 2011); H.B. 726 (Tenn. 2011).

³⁴ S.B. 411 (Cal. 2011), S.B. 1458 (Fla. 2011); H.B. 45 (Pa. 2011).

³⁵ S.B. 297 (Pa. 2011).

³⁶ S.B. 6439 (Md. 2007).

³⁷ H.B. 1112, and 1198 (Colo. 2011).

³⁸ H.B. 1613 (N.H. 2010).

³⁹ H.B. 2454 (Kan. 2010).

⁴⁰ S. S. 5129/A. 6023 (N.Y. 2011).

⁴¹ H.B. 3040 (Wash. 2010).

⁴² A. 8159/S. 3987 (N.Y. 2011).

⁴³ H.B. 2480 (Tenn. 2010).

⁴⁴ *E.g.*, Child Care Protection Act of 2011, H.R. 1726 (112th Cong.) (2011), a bill by Rep. Dutch Ruppersberger to require criminal background checks for child care providers; and Safety for Our School Children Act of 2011, S. 124 (112th Cong.) (2011) by Sen. David Vitter “to require all public school

It is a great irony in the state legislative debate to limit the use of criminal histories in employment that for every one bill introduced to limit the use of criminal history checks there have been many more to require criminal history checks. An article in the *New York Times* in May 2011 highlighted this irony. The story notes how “lawmakers from around the country are pushing for online registries, like those used for sex offenders, to track the whereabouts of people convicted of a wide variety of crimes, from arson and drunken driving to methamphetamine manufacturing and animal abuse.”⁴⁵

Legislation often arises from or is impacted by anecdote. Cited in support for S.B. 3 in Connecticut, a bill to enhance background checks for employees of home-maker companion and home health agencies, was a story of a Bridgeport, Connecticut woman who was arrested in April 2011 for allegedly stealing cash from the 93-year-old Wilton, Connecticut woman she was working for in late-2010. Alima Kamil, aka Carolyn Wynter, Carolyn Womack and Carolyn Griffiths, was hired by Home Choice Senior Care in September 2010, but it turned out that she has 23 arrests spanning two decades.⁴⁶

The benefits of a criminal history check are most often seen after the fact – that is after crime of violence, theft, or fraud has come to light. For example, “convicted embezzler Richard Short obtained a \$9.1-million [Michigan] state tax break” so that he could “spend \$18.5 million to convert a former automotive plant in Flint to manufacture portable renewable energy equipment”. At some point after the tax break was granted Short “was arrested at his home...on a parole violation charge...” Short, who “owed \$96,000 in restitution for past crimes . . . was convicted in 2002 of embezzling more than \$20,000 from a company in Norton Shores. He was previously convicted for crimes related to a mortgage loan scam at a Birmingham bank.”⁴⁷

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 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

employees and those employed in connection with a public school to receive FBI background checks prior to being hired, and for other purposes.”

⁴⁵ Erica Goode, *States Seeking New Registries for Criminals*, *New York Times*, May 20, 2011.

⁴⁶ John Nickerson, *Wilton Home Aide Charged with Ripping Off 93-Year-Old Woman*, *Conn. Post*, April 29, 2011.

⁴⁷ Chris Christoff, *Lawmakers plan hearings over embezzler’s tax break*, *Detroit Free Press*, March 18, 2010,

offenses differently, consider the severity of the crime, and examine the distance in time between an offense and the job application.⁴⁸ In short, employers use credit 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 EEOC must consider in its review of the use of criminal histories for employment decisions.⁴⁹

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.

Here are but three examples supporting Dr. Sedgwick's points: First, in the early morning hours of Saturday, March 12, 2011, a tour bus "barreling south for Manhattan overturned at high speed on a highway in the Bronx...and was sliced open by a sign stanchion in a shriek of rending metal that hurled riders about like rag dolls."⁵⁰ Fifteen people were ultimately killed and 18 more were injured in the crash. Behind the wheel was Ophadell Williams. According to the New York Times, "[o]f Mr. Williams's nine arrests, the last was on

⁴⁸ 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).

⁴⁹ 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.

⁵⁰ Robert McFadden, *Carnage on I-95 After Crash Rips Bus*, N.Y. Times, March 13, 2011; Joseph Goldstein, *For Driver in Bronx Crash, Fight That Led to a Killing*, N.Y. Times, March 16, 2011.

the suspended license charge in 2003, suggesting that he had succeeded to some degree in turning his life around.”⁵¹ However, Mr. Williams survived the crash that turned the lives of many others upside down.

Second, according to the Washington Post, Barry Minkow, was “a wunderkind business sensation of the 1980s [until he] was exposed as a con man and spent years in prison[. He] later built a new life as a pastor and celebrated fraud-buster [for the FBI, SEC, and IRS].” Time and the law caught up to Minkow, however. In early-2011, “Minkow...agreed to plead guilty to the charge [of securities fraud] and will ‘take responsibility for what he did,’ said Alvin Entin, his attorney.” Among other things, a court found in 2011 that “Minkow admitted that he had used funds from the San Diego Community Bible Church to pay a business expense.”⁵²

Third, in 2010, following a domestic altercation in Alcoa, Tennessee, police arrested John Keith Poindexter. Police “said they found a loaded Glock .40-caliber pistol in the van [and charged Poindexter in Blount County General Sessions Court] with possession of a handgun while intoxicated and aggravated domestic assault.” The following year, while on probation for the earlier weapons charge, Poindexter was removed from his position as an air traffic controller after he “allegedly slept for most of five hours while on duty in [at the McGhee Tyson Airport in Knoxville].”⁵³

6. Employers have come to rely on long-standing, and workable EEOC Policy Statement and court decisions.

In 1987, the EEOC issued a Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1982). (2/4/87) (“Policy Statement”). This Policy Statement reflects the analysis in *Green v. Missouri Pac. R.R.*⁵⁴ In that case, the court stated: “We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”⁵⁵ The trial court stated in its injunction order, “nothing herein shall prevent the defendant from considering an applicants’ prior criminal record as a factor in making individual hiring decisions so long as defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of [the] sentence, and the nature of the job for which the applicant has applied.”⁵⁶

It is unclear why the EEOC now wishes to revisit – and possibly rewrite – its Policy Guidance. It is certainly possible that the EEOC wishes to build a more complete record in light

⁵¹ *Id.*

⁵² David S. Hilzenrath, *Con Man-Turned-Pastor Barry Minkow Accused of Securities Fraud*, Wash. Post, March 24, 2011.

⁵³ Ashley Halsey III, *Tennessee air traffic controller on probation for gun incident*, Wash. Post, April 11, 2011.

⁵⁴ 523 F.2d 1290 (8th Cir. 1975).

⁵⁵ *Id.*, 1298.

⁵⁶ *Green*, 549 F.2d 1158, 1160 (8th Cir. 1977), quoting the trial court’s injunctive order.

of the Third Circuit's decision to give the EEOC's Policy little deference in endorsing an employer's right and duty to conduct criminal background checks in appropriate circumstances.⁵⁷ In that case, the Third Circuit affirmed the trial court's ruling for SEPTA, and articulated the following standard by which to evaluate an employer's criminal background check procedures:

Considering the dearth of authority directly on point, we believe that our standards... namely that discriminatory hiring policies accurately but not perfectly distinguish between applicants' ability to perform successfully the job in question – can be adapted to fit the context of criminal conviction policies. In a broad sense, hiring policies, such as the one at issue here, ultimately concern the management of risk. . . . [I]t is impossible to measure the risk perfectly, and in both cases Title VII does not ask the impossible. It does, however, as in the case of performance-related policies, require that the policy under review accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.⁵⁸

In approving SEPTA's criminal background check policy, the court held as follows:

Title VII, however, does not measure care in formulating hiring policies; rather, it requires that an employer be able to show that its policy is consistent with business necessity when challenged. Granted, the two will typically go hand-in-hand. Here, ... [SEPTA] produced credible expert testimony that its policy accurately screened out applicants too likely to commit acts of violence against paratransit passengers. [The plaintiff's] evidence (that SEPTA took little care in formulating its hiring policy), though troubling, does not directly answer SEPTA's (that the policy, however little care went into formulating it, is accurate because those who have committed a violent crime, no matter how long ago, are more likely than the members of the general population to commit a future violent act).⁵⁹

It is also possible that the EEOC is ready to dramatically change its policy and adopt the view of the plaintiffs - including the EEOC as *amicus curiae* -that was rejected in *Green* by the Eighth Circuit over 25 years ago. That rejected approach is that employers must measure the disparate impact of any use of criminal background information and then validate the use of the information under the Uniform Guidelines on Employee Selection Procedures ("UGESP").

The EEOC acted appropriately in its Policy Statement. The Policy Statement properly contemplates that the use of criminal background information may have a disparate impact against certain groups. However, employers, as well as the employers' customers and the public, have a significant interest in not being exposed to the risks that a person will repeat their

⁵⁷ *El v. SEPTA*, 479 F.3d 232 (3d Cir. 2007).

⁵⁸ *Id.*, 244-245.

⁵⁹ *Id.*, 248.

criminal conduct in the course of performing work duties. The *El* court cited with favor SEPTA's expert - a noted authority on recidivism – who stated:

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 prediction with any assurance that they will be correct.⁶⁰

As long as the employer uses individualized analysis, it must be allowed to take into account an employees' criminal conduct. The employer and its customers should not have to take on significant risk of violence or theft. The United States Supreme Court ruled in *NASA v. Nelson*⁶¹ that it is reasonable and proper for the federal government to perform background checks on federal contractors. The government as an employer has a legitimate interest in employing a competent, reliable workforce.⁶² It likewise has an interest in "separating strong candidates from weak ones."⁶³ Similarly, private sector employers have the right to use background checks to ensure that its workforce perform efficiently and safely. Employers want to both protect their workplaces and prevent unlawful discrimination, yet

[e]mployers now find themselves in a catch-22, fearing liability for failing to properly screen out applicants for employment, while, at the same time, endeavoring to avoid running afoul of the...laws that govern the manner in which background information may be procured and to what extent it may be considered in making selection decisions.⁶⁴

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

⁶⁰ *Id.*, 246.

⁶¹ 131 S. Ct. 746, 758 (U.S. 2011).

⁶² *Id.*, 761.

⁶³ *Id.*, 750.

⁶⁴ *Conducting Background Checks in the Hiring Process: A Catch-22*, Daily Lab. Rep. (BNA) No. 58, at I-1, (March 25, 2011)

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

CDIA understands the strong desire to reintegrate former prisoners into American society. However, attempts to ease unemployment frustration or reentry desires should not come at the expense of keeping people and businesses safe from physical or financial harm. Opening the prison doors so someone can walk right in to a job is not safe. A coordinated effort from many sources is the best way to reintegrate former prisoners in to society. This support includes job training, family counseling, substance abuse counseling, financial management, educational advancement, housing assistance, and tax credits and bonding for employers who hire those with criminal histories.⁶⁵

Conclusion

The EEOC has begun an important discussion regarding the use of criminal histories for employment screening. We encourage the commissioners and staff to keep in mind several important points, as shown above: (1) criminal history reviews are critical to protect public safety; (2) the FCRA establishes protections for consumers, accuracy obligations on consumer reporting agencies, and enforcement regimes should there be conflicts; (3) employers, Congress, and state legislators see substantial value in requiring criminal background checks for selected employment situations; (4) employers 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) employers have come to rely on long-standing, and workable EEOC guidance and court decisions; and (7) reducing the availability of criminal background checks is not the solution to reintegrating ex-prisoners in to society. CDIA hopes that this information is helpful to the EEOC as continues the discussion of criminal history use as an employment screening tool.

Sincerely,



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

⁶⁵ Eg., U.S. Dep't. of Labor, Employment and Training Administration, *The Reintegration of Ex-Offenders - Adult Program*, <http://www.doleta.gov/RExO/aboutRExO.cfm> (last visited July 13, 2011); Jesse Jannetta, Hannah Dodd, Brian Elderbroom, *The Elected Officials Toolkit for Jail Reentry*, Urban Institute Policy Center, U.S. Dep't. of Justice Bureau of Justice Assistance, <http://www.urban.org/UploadedPDF/412287-Elected-Officials-Reentry-Toolkit.pdf> (last visited July 13, 2011).

Appendix I



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A D V I S O R S

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.

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

Successful reentry to legitimate society is shaped as much or more by factors that have nothing to do with employment.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.

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⁹ Visher and Travis, p. 99.

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Appendix II



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Overview of Selected Current Research on the Usefulness of Criminal Background Check Information Prepared for the Consumer Data Industry Association (CDIA)

by
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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.

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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

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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

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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

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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.

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