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 that 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 that 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

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[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.

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