Redemption Research and Offender Employability

By Marilyn C. Moses

Douglas El was 15 years old when he was convicted of second-degree murder. He served a three-and-a-half-year sentence as a juvenile. As a teenager, he was given the opportunity to turn his life around, and he did so. Four decades later, after living a life free of further criminal involvement, it did not occur to El that society would demand further payment for the egregious mistake that he made as a youth.

In 2000, El was in search of a job and discovered that King Paratransit Services Inc., was hiring. King had entered into a contract with Southeastern Pennsylvania Transportation Authority (SEPTA) to provide transportation for disabled individuals. A provision of this agreement was that King not hire individuals with a criminal record. El applied to King for a job as a van driver. He was truthful and indicated on his job application that he had a criminal history. El was hired on a conditional basis; contingent on whether everything on his application "checked out."

El had been working for several weeks when King received the criminal background report it had requested on him. The transportation company had originally overlooked El's admission of his criminal past on his job application. El was fired as a result of the background check. El, believing he had been unlawfully terminated, filed a claim with the Equal Opportunity Commission (EEOC). This claim ultimately resulted in a lawsuit litigated in the federal courts.[1]

El's lawsuit ultimately failed, partly because he could not provide empirical evidence that his 40-year-old criminal record was "stale," and that four decades of lawful conduct meant that he had been "redeemed" and was unlikely to break the law again. Alfred Blumstein, the eminent criminologist, testifying for SEPTA offered the following testimony:

> 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 20 years is less likely to commit a future crime than one who has been crime-free in the community for only 10 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.[2]

Redemption Research

As a scientific discipline, at that point, criminology had not yet generated reliable knowledge or evidence to enable it to provide actuarially-based judgments as to when individuals with a criminal background, with varying amounts of time clean, pose no significant likelihood of committing a new crime. With funding from the National Institute of Justice (NIJ), U.S. Department of Justice, Kiminori Nakamura and Alfred Blumstein have worked to advance the field of criminology and have begun to fill the research void highlighted in *El v. SEPTA*. Their work has impacted state, local, and national policy and practice.[3]

Nakamura and Blumstein asked the following research question: "Can empirical evidence be generated to assess the probability of 'redemption,' and if so, could this method be used to provide actuarially-sound guidance to employers and others?" In other words, is there some point in time when a person with an old criminal record who has remained free of further contact with the criminal justice system is of no greater risk than a crime-free counterpart to commit a crime? They found that a point in time after which an individual has remained crime-free, or a "redemption" time, can be calculated with relative precision for first-time arrestees. They are now involved in further studies to extend their work beyond first-time arrestees to a large sample of prison releasees.

While largely generated from the research deficit identified in El's lawsuit against SEPTA and King, this social science research came too late for him. Circuit Judge Thomas L. Ambro of the U.S. District Court of Appeals for the Third Circuit, who wrote the appellate decision in *El v. SEPTA*, suggested that, "Had El produced evidence rebutting SEPTA's experts, this would be a different case. Had he, for example, hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person, then there would be a factual question for the jury to resolve."[4]

Waldon and Britton

Like El, eight years later and 430 miles from Philadelphia, Gregory Waldon and Eartha Britton also lost their jobs. They had collectively invested 48 years of their lives in the Cincinnati Public School System (CPS). Both received positive performance reviews

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during the years, were successful in their jobs and were dedicated employees. Waldon was a systems monitor at CPS' central monitoring office. Britton worked as an instructional assistant for 18 years. Both lost their jobs in 2008.

In the year before they left CPS, the state of Ohio enacted House Bill 190 (HB 190).[5] This legislation mandated that criminal background checks be conducted on all current and prospective nonlicensed public school employees, regardless of the duty performed or the degree of contact with children. Initially, any person found to have been convicted of a number of crimes including certain drug offenses, violent crimes or theft were deemed unfit for employment. An offer of employment was not to be extended to an applicant, or an employee found to have a criminal record was to be terminated.

About 30 years earlier, in 1977, when Waldon was 18 years old, he was charged with felonious assault. Waldon was offered an opportunity to plead to a misdemeanor. Determined to prove his innocence, he declined the plea deal and his case went to trial. Waldon was found guilty and was incarcerated for almost two years. Since his release, he has lived a crime-free life and was gainfully employed by CPS. After HB 190 was enacted, CPS advised Waldon that he would be terminated. While not financially able to quit work, he chose to retire rather than be fired.

Like Waldon, Britton was also advised that she too would be terminated. Britton was convicted 24 years earlier for acting as a go-between in the purchase and sale of $5 of marijuana. Seven years prior to this termination, Britton had this conviction expunged from her record.[6] After CPS notified her of its decision to terminate her, she provided them with the documentation indicating that her record had been expunged. This was to no avail; CPS did not rescind its decision.

Shortly after this legislation was enacted, the statute was amended to permit an individual convicted of one or more listed disqualifying offenses to work for a school district if he or she could satisfy certain rehabilitation standards set by the Ohio Department of Education.[7] CPS later revised its standards to comport with the legislative changes. At that point, however, Waldon and Britton were no longer employed by CPS, and CPS did not offer either one the opportunity to return to work and resume their careers. Like El, Britton and Waldon are currently pursuing legal recourse in the federal district court (*Waldon et al. v. CPS)*.

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While not produced in time for El, redemption research is now available, and Kiminori Nakamura, as expert witnesses for the plaintiffs, will offer this evidence in the pending employment discrimination case against CPS.[8] "Redemption research provides scientific support for the fact that people can be rehabilitated and that there is no need to permanently exclude people with criminal records from the workforce," said Johnathan Smith, an attorney with the National Association for the Advancement of Colored People Legal Defense and Educational Fund, working on the Waldon case. [9]

Conclusion

"Social science research is tremendously important in civil rights litigation, and we regularly rely on social science research and testimony in our cases," Smith said.[10] With the Waldon case still in the early stages of litigation, it is difficult to predict the outcome of the case or the importance that "redemption" research will play in the ultimate decision. However, it is possible that this social science research will have a significant impact on employment discrimination against ex-offenders moving forward.

ENDNOTES

[1] *El v. SEPTA*, 479 F3d 232 (2007).

[2] Ibid.

[3] Alfred Blumstein and Kiminori Nakamura's "redemption" research has been relied upon by the Equal Employment Opportunity Commission in its revised guidance to employers on the use of criminal records in hiring and retention decisions. Further, it has been relied upon in other state and local legislative efforts such as "Ban the Box" and efforts to shield employers from negligent hiring litigation. To view the final reports from the first two studies, visit https://www.ncjrs.gov/pdffiles1/nij/grants/232358.pdf; and https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf.

[4] *El v. SEPTA*, 470 F.3d at 247.

[5] See Ohio Revised Code § 3319.39.

[6] This conviction was expunged in 2000 pursuant to Ohio Revised Code § 2953.32.

[7] See Ohio Revised Code § 3319.391.

[8] *Waldon, et al v. Cincinnati Public Schools,* 1:12cv677 (U.S. District Court-Ohio Southern). Note: this case is still being litigated at the trial court level.

[9] Smith, J. April 21, 2014. Personal email communication.

[10] Ibid.

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