Expert Rebuttal Report of Dr. Kiminori Nakamura

In

Houser et al. v. Blank

(SD NY Case No. 10-cv-3105)

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Statement of Qualifications

I am an Assistant Professor of Criminology and Criminal Justice at the University of Maryland. My research spans the issues related to corrections, prisoner reentry, and collateral consequences of criminal-history records, research on criminal career, and quantitative methodology. My research has focuses on the issue of “redemption” for those with stale criminal-history records, which is when risk of recidivism declines to a level of appropriate benchmarks so that it is no longer necessary for an employer to be concerned about a criminal offense in a prospective employee’s past. Together with Alfred Blumstein, I have published my initial work on redemption in *Criminology*, the flagship journal of American Society of Criminology (ASC), and in the National Institute of Justice Journal. My research on redemption has been funded by the National Institute of Justice, and my related papers on redemption have been published as the technical final report for the National Institute of Justice and are under review for journal publication. I have also presented my research findings at various conferences and meetings, including ASC’s annual meetings, a conference by the American Bar Association’s Commission on Effective Criminal Sanctions, American Correctional Association’s annual conference, the conferences organized by the NY Division of Criminal Justice Services, the National Association of Criminal Defense Lawyers, and the National Employment Law Project and the Community Legal Services. My research on redemption is cited in the Equal Employment Opportunity Commission’s recent revised guideline regarding the use of criminal-history records in employment. With Alfred Blumstein, In January, 2012, the *New York Times* published our Op-Ed article on redemption, titled “Paying a Price, Long After the Crime”. I received my Ph.D. in Public Policy and Management from Carnegie Mellon University, and my M.A. in Demographic & Social Analysis in 2005 and B.A. in Criminology, Law & Society both from the University of California, Irvine.

This report was prepared in response to a request from Outten & Golden LLP for the case of *Houser at al v. Blank*, No. 10-cv-3105. I am being compensated $250.00 per hour for my work in preparing this report.

Introduction and Conclusions

I have been requested by plaintiffs’ counsel to respond to Dr. Shawn D. Bushway’s analysis regarding the probability of having an arrest record broken down by race/ethnicity. I have also been asked by plaintiffs’ counsel to respond to the claim that the race information indicated on the rap sheets is unreliable.

Based on a review of the research studies on the topic of self-report and official record of arrests, I conclude that there is considerable concern that the validity of self-reported arrests differs by race. Research shows that African Americans are more like than whites to underreport arrests. This race-differentiated validity of self-report arrest data undermines the credibility of arrest
probabilities by race that are presented by Dr. Bushway. Given that Dr. Bushway’s conclusions relied on a dataset in which the arrests were self-reported, those conclusions are not reliable.

Based on my review of criminological studies that cover a wide range of topics, I conclude that there is no universally-acknowledged systematic bias in the race classification that is generated by the criminal justice system, including rap sheets. In fact, racial classification on rap sheets has been used by a long line of criminology research, both government agencies and academic researchers, and was used properly by Dr. Bendick in this case.

**Background**

In almost any population under the U.S. criminal justice system, racial/ethnic minorities, especially African Americans, are disproportionately represented in arrests, probation, prison, and death row. During the last four decades when the system shifted toward harsher sanctions with less discretion, African Americans’ and Hispanics’ risk of contact with the criminal justice system has increased. For nearly all crime types, the arrest rate for blacks is higher than the arrest rate for whites (Snyder, 2011). For drugs, in particular, in the late 1970s, the black arrest rate was about twice the white rate, but in the next three decades, the black rate increased to three to four times higher than the white rate (Snyder, 2011; Tonry, 2011). The racial disparity is also clearly evident in incarceration rates. Blacks and Hispanics are incarcerated at higher rates than whites for all ages for both men and women: the black man’s incarceration rate is five to seven times the white man’s rate, the Hispanics man’s rate is two to three times the while men’s rate, black women’s rate is two to three times the white woman’s rate, and the Hispanic woman’s rate is one to three times the white woman’s rate (Carson and Sabol, 2012). The arrest rates and incarceration rates provide a snapshot of racial disparity in the contact with the criminal justice system. Another way to examine such racial disparity is through the calculation of cumulative, lifetime risk of criminal justice system contact. It has been estimated that across different datasets and methods, the black man’s cumulative risk of imprisonment by their mid-thirties is about 20 percent, roughly six times higher than the white man’s cumulative risk of imprisonment (Bonczar and Beck, 1997; Pettit and Western, 2004; Western, 2006). For the prevalence of ex-felon (those convicted of a felony regardless of imprisonment), nearly one-third of adult male African Americans are ex-felons, roughly four times the prevalence among the overall adult U.S. population (Shannon et al., 2011).

**Dr. Bushway’s estimates of cumulative risk of having an arrest record**

Based on the National Longitudinal Survey of Youth, 1997 (NLSY97) and methodology used by Brame et al. (2012), Dr. Bushway estimates the cumulative prevalence of those with at least one arrest broken down by race (white, black, Hispanic) and gender. The main conclusion from his analysis is that for men, blacks have higher arrest prevalence than whites, but there is no statistically discernable difference between Hispanics and whites; and for women, there is no difference in arrest prevalence between any of the racial/ethnic groups.
The NLSY97 is a longitudinal dataset that tracks a cohort of a nationally representative sample of youth (ages 12-16) from 1997.1 The NLSY97 contains a sample of youths who have no prior arrest record at the time of baseline data collection, which allows one to examine their lifetime risk of arrest prospectively. There are several characteristics of the NLSY97 that undermine Dr. Bushway’s conclusion in important ways. First, as fairly common in longitudinal cohort data, attrition and non-response issues are problematic and can diminish the certainty of the conclusion. Second, it is important to recognize that arrests in the NLSY97 are based completely on self-reports that are not verified, thus the arrest prevalence estimates are vulnerable to misreporting (intentional or otherwise) by the respondents. Furthermore, what’s more troubling is that there is some evidence that the rate of misreporting is likely to systematically vary across racial/ethnic groups. Each of these is discussed further below.

First, attrition and non-responses can limit the certainty of the arrest prevalence estimates by race. Because the arrest question in the NYSY97 interviews is whether the study participants had been arrested since the last interview, one non-response could potentially change the status of “never arrested” to “arrested”, and the arrest prevalence estimates are sensitive to these non-response rates. Dr. Bushway presents that 10.5% of the cases in the data cannot be categorized as either “never arrested” or “arrested”. Given that there is evidence that elusive or “difficult to track” individuals in panel studies are more likely to engage in delinquency (Thornberry et al., 1993), whether the non-response cases are systematically involved in crime, and thus are more likely to have an arrest record, needs to be examined. Without such examination, Dr. Bushway’s prevalence estimates remain uncertain. In footnote 18, Dr. Bushway considers different assumptions about non-response patterns and their impact on the prevalence estimates. He essentially interprets overlapping confidence intervals of prevalence estimates for African-American and non-African Americans as evidence that it is possible that the prevalence rates of both groups are not different. This is a questionable practice because wide confidence intervals (i.e. large uncertainty) are partially a result of non-response cases, and data limitations should not be used to prove that there are no racial differences.

Second, although there is no doubt that self-report offending and delinquency data contributed greatly to criminology research, the issue at hand is not about etiology of delinquency or criminal offending, but whether official arrest records are disproportionally present among certain demographic groups. Without verifying the self-report data with official records, the true prevalence of arrests cannot be reliably estimated with self-report data. There are reasons why self-reported arrests should not be equated with official arrest records. In general, it has been documented that there are varying degrees of inconsistency between official records and self-reports. For example, Huizinga and Elliott (1986) find that between 22% and 32% of official arrest records in the National Youth Survey (NYS) were not represented in self-report data.

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1 It is important to note that some of those who have an arrest in the NLSY97 only have juvenile arrest records. If the Census Bureau did not consider juvenile arrest records in deciding who to send the 30-day letter, then those with only juvenile arrest records are irrelevant.
Maxfield et al. (2000) find that 73% of respondents with an official arrest record had a self-reported arrest record, and 21% of respondents without an official arrest record had a self-reported arrest record.

While the estimate of the percentage of respondents who can accurately report arrest is certainly a consideration, what is of particular concern is whether there are any systematic factors that characterize those who inaccurately report arrest. The most salient factor in the research literature and in the current case is the race of the respondent. There are several studies using different datasets concluding that African Americans are more likely to underreport arrests (Hindelang et al., 1981; Kirk, 2006; Krohn et al., 2012; Maxfield et al., 2000; Weis, 1986). In fact, Weis (1986:8) states that “[o]fficial data historically have implied that blacks are ‘more criminal’ than whites simply by virtue of their overrepresentation in the criminal justice system and official records. Self-reports, on the other hand, suggest that there is less difference in both prevalence and incidence of crime.” There are multiple datasets where both self-report arrest and official arrest records are collected so that self-report arrest can be verified against official records. Hindelang et al. (1981) found that white males failed to report 24% of the times when they were picked up by police, while black males failed to report 50%; for white females, 48%; and for black females, 70%. With the Rochester Youth Development Study data, whites are more likely than blacks to overreport arrests while blacks are more likely to underreport arrests (Krohn et al., 2012). With data from the Project on Human Development in Chicago Neighborhoods, Kirk (2006) also found that African Americans are more likely to underreport arrests. It is notable that a paper by Dr. Bushway excluded African Americans from his analysis of the NYS data, due to the concern that “African American man apparently underreport arrests by a factor of three in the NYS” (Bushway, 1998:462), and his paper notes that a similar concern exists for the early cohort of the NLSY data as well (see Grogger, 1992).

The African Americans’ tendency to underreport arrests could also further compound the non-response problem discussed earlier because it makes the non-missing, non-arrest responses by blacks in the NLSY97 less certain. Because African Americans' non-arrest response is more likely to be false when compared to whites, this would also make the racial disparity in the NLSY97 an underestimate.

As Dr. Bushway points out, the more recent NLSY97 cohort data he uses have may have improved the validity of self-report arrest data as a result of improvements in the interview process (e.g., CAPI: Computer-Assisted Personal Interview and ACASI: Audio Computer-Assisted Personal Interview, which allows respondents to answer sensitive questions without interacting with interviewers). However, it remains the case that the arrest information in the NLSY97 relies solely on self-reports without verification with official records, and the research literature is reasonably consistent that self-report arrest data are biased for racial/ethnic groups.

**Rap sheet race classification**
To be clear, there is no perfectly reliable, objective definition of race categories. It has been documented that racial self-identification can be highly variable across time and context. For example, racial/ethnic composition of school peers (Vaquera and Kao, 2006), neighborhood (Xie and Goyette, 1997), the question’s wording and what categorical options are given (Farley 2002, Snipp 2003), and an involvement in the criminal justice system (Saperstein and Penner, 2010), all influence racial self-identification.

A long line of criminology and criminal justice research, from recidivism, criminal career, to effects of incarceration, correctional programs, and parole release, has relied on the official criminal history records from state repositories and FBI (i.e., rap sheets) (e.g., Berg and Huebner, 2011; Blumstein and Cohen, 1979; Blumstein et al., 1986; Blumstein and Nakamura, 2009; Kubrin and Stewart, 2006; Kurlychek and Kempinen, 2006; Maltz, 1984; Nagin and Snodgrass, 2013; Osterman, 2012), and many of the studies have used racial classification in those official criminal history records that are generated by the criminal justice system (e.g., Blumstein and Cohen, 1979; Christensen, 1967; Geerken, 1994; Golub et al., 2007; Langan and Levin, 2002). Given that racial classification on official criminal records has been used extensively by academic researchers as well as government agencies, and considered reliable by them, and there is no more reliable and stable racial identification that can be used to evaluate the validity of official records’ racial classification, it is appropriate to rely on racial classification of rap sheets. It is therefore my opinion that Dr. Bendick’s use of the racial classifications on rap sheets was the best possible source of available information and proper use of information in this case.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed this 19th day of December 2013.

Kiminori Nakamura, Ph.D.
References


