Comments on ACLI's Jan Graeber April 25 SCORI Life Workstream
Presentation on Use of Criminal Records in Life Insurance
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I have worked over 30 years helping people with criminal records obtain employment. While I am not an expert in insurance, I can speak to issues such as disparate impact based on race, predictions of recidivism risk, specifics of the criminal justice system, and many more related topics.

Let me begin with two top-line points.

- Black and Hispanic Americans are overrepresented in the criminal justice system. According to the Equal Employment Opportunity Commission (EEOC):

    African Americans and Hispanics[11] are arrested at a rate that is 2 to 3 times their proportion of the general population.[12] Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison during their lifetime;[13] by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men.[14]

    Thus, decisions that disqualify people for insurance that are based on criminal records will have a racially disparate impact, making consideration of a criminal record a proxy for race. Extreme care must be taken to ensure that this racially disparate impact is limited by narrowly tailored, evidence-based use of criminal record information.

- As will be seen by the comments below, appropriate consideration of criminal records is a very complex undertaking. For instance, a criminal history alone does not predict risk over a person's entire life. Nor are criminal records inevitability accurate. Indeed, criminal records were not created for use in civil contexts, and when they are used without full understanding of the criminal justice system, the results are often problematic.

With these points in mind, here are my reactions to Jan Graeber's presentation.

1. What are the studies/sources of the data that are relied upon for the correlation between having a criminal record and mortality/morbidity (M/M)?

    - It appears that the relevant studies concerning health impacts are mostly tied to the period of incarceration and very recent release from incarceration (even the first few weeks after community reentry). Is there support for the proposition that the risk of M/M is ongoing after incarceration has ended? Or might the risk decrease and level off after release from incarceration, as a person's life stabilizes (which is what research shows for risk of recidivism)?
    - Why is previous incarceration even relevant, rather than having the health conditions which might have developed? That is to say, if one is more likely to develop high blood pressure

because of incarceration, why isn't knowing whether a person has HBP enough for the actuarial model? That way, you don't consider medical conditions that might have improved or ended after confinement.

- Ms. Graeber indicated that applications generally ask whether a person has been convicted of a felony. A felony conviction does not mean that a person has been incarcerated; in a significant number of cases there is no incarceration. So a felony conviction is not an appropriate proxy for incarceration. Does the industry distinguish felonies that did not involve incarceration in its analysis?
- Moreover, states vary widely in their classification of certain conduct as a felony or misdemeanor. For instance, in Pennsylvania, simple assault is a misdemeanor, while in other states the same conduct can be a felony. As a result, the focus on felonies can lead to disparate results for insurance applicants, depending entirely on the state in which they were convicted. It is hard to imagine that such classification bears a real relationship to M/M.

2. How does time passed since criminal justice involvement factor into underwriting analysis? Passage of time is a particularly important factor for evaluating the appropriateness of collateral consequences, as shown, for instance, in EEOC's guidance on employer evaluation of arrest and conviction records.

- Does the research/data indicate that any increased M/M persists after the person is several years removed from incarceration? If no, then the passage of time after incarceration should be factored in. However, in my experience, it is quite difficult to get information on release from incarceration; it does not show up in commercial background checks.
- "Desistence" research has found that the recidivism risk of those with a prior criminal record falls below the risk of arrest for the general population approximately after four to seven years for violent offenders, four years for drug offenders, and three to four years for property offenders (see attachment). This research stands for the proposition that lifetime bans based on convictions are not supported by evidence of risk. Is this research factored into underwriting, especially given the relatively short time frames in which former offenders "redeem" themselves by desisting from crime?
- It was said that lookback is limited to 7 years for certain types of offenses. Which offenses are those? Who has distinguished cases that are considered for 7 years from those considered forever, and what bases did they use?

3. What felonies are considered by insurers and deemed disqualifying? There appeared to be some inconsistency in the testimony between whether only violent crimes are disqualifying, or also drug and property felonies.

- How do you know that this proposition is so? Are there data sources for this representation?
- What do insurers consider a "violent" crime?
- Would a former drug offender be disqualified? What if he was 19 years old when he sold marijuana and now is a middle aged and employed parent?

4. What methodologies are used to conduct the analysis in the underwriting process?

   - Do actuaries have any training in the different crimes and data relevant to whether they are correlated with these risks?
   - We recently worked with an industrial-occupational psychologist to determine what crimes are directly related to licensed occupations. She told us that a supportable methodology includes not just the views of people in the licensed professions, but consideration of information from criminal justice experts like criminologists who study desistence from recidivism and criminal lawyers who understand the elements of crimes. Does the insurance industry's evaluation of criminal history include criminal justice experts like these?

5. What records do you use when evaluating an individual's criminal history?

   - It was said that the insurance industry relies on the US court system for objective assessment of a person's background and risks. But the court system is not doing your work; they are adjudicating criminal offenses. Criminal records were not created for civil purposes, and certainly never intended for the evaluation of insurance risk.
   - Moreover, what exactly is the "risk" that the courts' data is deemed to address? It's hard to imagine that conviction data is relevant to risk of M/M. It is relevant to risk of recidivism, but as noted above, that risk exists solely for 4-7 years after conviction.
   - What is the source of the records? Commercial background screeners? Their product is known for its inaccuracies, with lots of litigation under the Fair Credit Reporting Act. Do you give your applicants a copy of the report to allow them to challenge inaccuracies and to provide mitigating information?
   - Do actuaries know that *arrest* records do not prove that an individual engaged in criminal conduct?
   - How do insurers consider records that state policy and the criminal justice system have sealed or expunged? Do they go beyond information provided by commercial background screeners, which often do not update their databases to eliminate sealed or expunged information, a frequent source of litigation?

6. Are life insurers tracking the risk of unfair and potentially illegal discrimination in their evaluations?

   - Surely all would agree that insurance cannot be denied based directly on race, implicating state unfair insurance practices acts. Where overbroad denials based on criminal records is a proxy for race (given the racially disparate impact), the same concerns apply.
   - Given what is well known about discriminatory impact against Black and Brown people throughout the criminal justice system, do insurers perform any kind of analysis to protect against disparate impact?

People with Criminal Records Are "Redeemed" after Short Waiting Periods

While our society treats people with past criminal records as if they will always be at a higher risk for future contact with the criminal system, research tells a different story. After between 3 and 7 years without a subsequent offense, people with records are **no more likely** than the general population to be rearrested.

A landmark 2009 study ([Alfred Blumstein & Kiminori Nakamura, *Criminology*, 2009, Volume 47 Number 2](#)), updated by the authors in 2012 ([Alfred Blumstein & Kiminori Nakamura, *Final Report Submitted to the National Institute of Justice*](#)) used data to empirically estimate the point of "redemption" for people with records, or the number of years in which the risk of rearrest intersects with the risk of arrest for the general population of the same age.

The study found the point of "redemption," depending on the type of offense, to be:

- 4 years for drug offenses.
- 3 – 4 years for property offenses.
- 4 – 7 years for violent offenses.

Thus, these offenses should no longer be considered for civil purposes after the passage of such periods. Certainly, they should not operate as though people's risk continues throughout their entire lifetimes.