How to Deal with Stale Criminal-History Records

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Criminal-History (CH) Records Are Ubiquitous

• Criminal Records Exist on ~100 Million Individuals
• 10 Million Criminal Records per Year
  • Arrest, Conviction, Probation, Parole, Incarceration
• Probability of a Male Being Arrested Some Time in His Life for a Non-Traffic Offense ~ 60%
  • Christensen – estimated 50% in 1967
• Criminal Records Are Now Long-Lasting and Computerized, Readily Available
CH Records Used for Employment Decisions

• Employers often seek criminal-record information on job candidates
  • Effort at Risk Aversion
    • Liability risk from clients, customers
    • Risk of theft of employer’s assets

• Record May Be “Stale” with Information No Longer Relevant
  • Some statutes or job requirements apply “Forever”
  • Recidivism declines with time clean
  • Criminal activity peaks at age 17-21 and declines after that

• Employers rarely understand the true risks in a CH Record
  • Mostly tend to exaggerate the risks
Many Efforts to Counter Inappropriate Punitive Uses of Criminal Records

• EEOC challenges inappropriate and discriminatory uses
  • Particularly Stale Records
  • Job necessity
• “Ban the Box” Rule
  • Prohibit “Have You Ever Been Arrested/Convicted” query on job applications
  • Government uses, encourage others, especially government contractors
• Civic Organizations
  • Safer Foundation in Chicago
  • Legal services organizations
• Clear need for methods to address the trade-off between employer risk and employee opportunity
Need empirical approach and estimates

• Lack of empirical evidence leaves employers to set their own arbitrary cut-off points
  • 5 or 10 or 15 years (nice round numbers)
  • 7 years (Biblical origins?)
  • 15 years (conservative)
  • Forever (usually unreasonable)

• Employers vary in level of concern
  • Dealing with vulnerable populations (elderly, children)
  • Bank teller
  • National security
  • Construction worker
Possible Research Approaches

- Recidivism studies (e.g., BJS, 1997, 2002)
  - Usually involve short observation period
  - Most recidivism studies wait only 3-5 years

- Birth Cohort studies (e.g., Kurlychek, Brame, & Bushway, 2006, 2007)
  - Limited sample size and short follow-up

- Need long-term follow-up

- All based on CH records from state repositories
  - Can provide rich samples with rich demographic and crime-type disaggregation and long-term follow-up
  - Provide no information about the never-arrested, out-of-state arrests, period effects
Approaches to Redemption Balancing the Risks

• Redemption from Negative Effects of Stale CH Record
  • Must accommodate reasonable concern re employer risks
    • Risk declines with “time clean”
  • Estimate when recidivism risk has dropped low enough for “redemption”
    • When risk is comparable to that of the general population
    • When risk is within a tolerance level of the never-arrested
    • That is the “Redemption Time”
Review of Some Research Results

• Redemption Research to estimate “redemption times”
  • Blumstein and Nakamura in *Criminology* 2009 and later
  • Sample of 88,000 First-Time Arrestees in 1980 in NY State
  • Used “Hazard Function” to Track Recidivism
    • Track over time the Probability of a *First* Recidivist Arrest
    • High initially and declines steadily
Probability(t) of a *First* New Arrest = Hazard (C₁=Burglary; A₁=18,20)
Choice of Redemption Time

• Compare Hazard to Arrest Rate of General Population
  • Age-Crime Curve = Arrests of Age a/Population of Age a
  • Hazard declines faster than Age-Crime Curve
  • Redemption time is when hazard crosses the Age-Crime Curve

• Redemption should occur when recidivism hazard drops below arrest rate of the general population of same age (i.e., the A-C Curve)

• Greater challenge if arrestees compared to the never-arrested
  • Choose a reasonable tolerable risk level (.05, .01, etc.)
Hazard vs. Age-Crime Curve
(A1=20 and C1=Agg Assault)

\[ T^{*} \sim 5, \ P \sim 0.06 \]
Additional Concerns to Be Addressed

• Concern that hazard is based on arrest records, not conviction
  • Arrest records vs conviction records
  • Analyzed a sub-sample of those reported to be convicted

• Concern re C2 – crime type of recidivism
  • Different employers will have different concerns re recidivist crime type
    • One-on-one home counselor vs bank teller vs construction worker

• Concern over arrests outside NY State

• Concern that applicant pool is largely “never-arrested”
  • Age-crime curve not indicative of their risk profiles

• Concern about robustness of findings: 1980!, just NY!
Conviction vs. Arrest

• In many hiring situations, employers are prohibited from asking about an arrest record without a following conviction
  • Those convicted are a subset of those merely arrested

A₁ = 19-20
C₁ = Violent
Concern over $C_2$ – The Next Crime

- Employers differ in the crime types they care about
  - Shop owners or banks care about property crimes
  - Those dealing with vulnerable populations care about violence
- EEOC requires employers to demonstrate “business necessity” to justify the use of criminal records
  - Invoking the prior record should be for job-related reasons
- Develop a “crime-switch matrix”
  - Probability of going from a first crime-type $i$ to a second crime-type $j$
- Analyze crime-type-specific hazards
  - Risk of re-arrest for a particular second crime
$C_2$ -Specific Hazard  \hspace{1cm} (A_1 = 19-20, \hspace{0.1cm} C_2 = \text{Violent})

C1:
- Violent
- Property
- Drugs

Prob of Rearrest for Violent

Years Since First Arrest

![Graph showing the probability of rearrest for violent offenses over years since first arrest.](image-url)
Crime-Type Redemption Times for C2 (P=.01)

- Initial crime type is an indication of recidivism crime type
  - This is especially true for violence
    - Prior violence indicates higher risk of violence in C2

<table>
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<th>C₂</th>
<th>C₁</th>
<th>A₁ 19-20</th>
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<td>Drugs</td>
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</table>
For low risk tolerance – compare to the never-arrested

• Employers differ in their risk tolerance
  • Depends on the risk vulnerability of the position
  • Much depends on the applicant pool and their history

• Fore the Never-Arrested, their Hazard not expected to cross the ACC
  • The large initial difference diminishes over time
  • Difference likely to be very small after hazard drops to ~1.5-2.0

• Could examine confidence interval around hazard
  • Sensitive to small sample size remaining at large time
    • Confidence interval gets wider as N declines over T

• Could establish a reasonable risk tolerance level (.01?)
  • Redemption when the hazard crosses that level – or if
Concern for Arrests Outside NY

- Those who appear clean in NY might have been arrested elsewhere
- We obtained FBI national criminal records for our sample of 1980 NY arrestees with no re-arrest in NY (40%)
  - About 23% of them were found to have arrests elsewhere
- Adjustment of recidivism risk for out-of-state arrests is appropriate
Concerns about Robustness

• Estimates of redemption times are based on 1980 first-time arrestees in NY
• How reliable are our estimates for use at different times or in different places?
• We test the robustness of estimates to:
  • Different States (Florida, Illinois in 1980)
  • Different Sampling years (‘85, ‘90 from NY)
• State results are different in about the first 5-10 years
  • But very close after 5-10 years
Robustness to Sampling Years

C₁ = Violent

C₁ = Property
Conclusions

• Recidivism risk declines with time clean
  • Important consideration to employers and government regulators
• Redemption times identify key time points when the criminal record loses its value in predicting risk
  • We have reasonable empirical estimates of redemption times
    • Based on a large set of official data
    • Tested for robustness over time and across states
    • Other researchers have produced similar estimates
• Prior crime type provides an indication of future crime type, especially for violence
• Our analyses provide a basis for responding to user needs
  • Redemption times can be estimated based on user specs for $A_1$, $C_1$, $C_2$, risk tolerance, etc.
    • Can avoid wrongly denying jobs to people with stale records
• Redemption times are consistently less than 20 years
  • Heavy burden on using CH older than 20 years
Balancing the Risks

• Time clean is important in assessing risk of future offending
  • Risk declines with time clean
• Not intended for people to be held in limbo until they reach what we call redemption times
  • Employment should be facilitated as soon as possible, especially with employment situations that are risk tolerant
• Other information should be used to encourage employment
  • Positive work history
  • Family structure – especially marriage
  • Experience with training and placement agencies
Potential Policy Approaches

• Inform appeals boards considering pardons
• Inform employers of the low relevance of events older than T* if clean since then
• Protect employers from “due-diligence liability” claims if last arrest is older than T*
• Seal recorded events if last is older than T*
  • Can re-open with sufficient provocation
  • Consider if purging is appropriate
• Data availability from commercial sources?
Other Steps to Help in Redemption

• Do analyses of other CH sampling frames
  • Prison releasees is a good place to start
  • Explore possibility of convergence with arrestees
• Provide richer information re time off the streets in confinement
• Seal closed records rather than purging
• Facilitate access to out-of-state CH records
• Get commercial CH providers to adhere to sealing policies
A Source Document

• Available from NCJRS (National Criminal Justice Reference Service)
• Document No. 240100 (Nov. 2012)
• Extension of Current Estimates of Redemption Times: Robustness Testing, Out-of-State Arrests, and Racial Differences
• https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf
Thank you!

Questions & Suggestions?