

# Hidden Barriers: Background Checks and Access to Housing

Merf Ehman, Columbia Legal Services  
Vanessa Hernandez, ACLU

# Disparate Treatment or Impact?

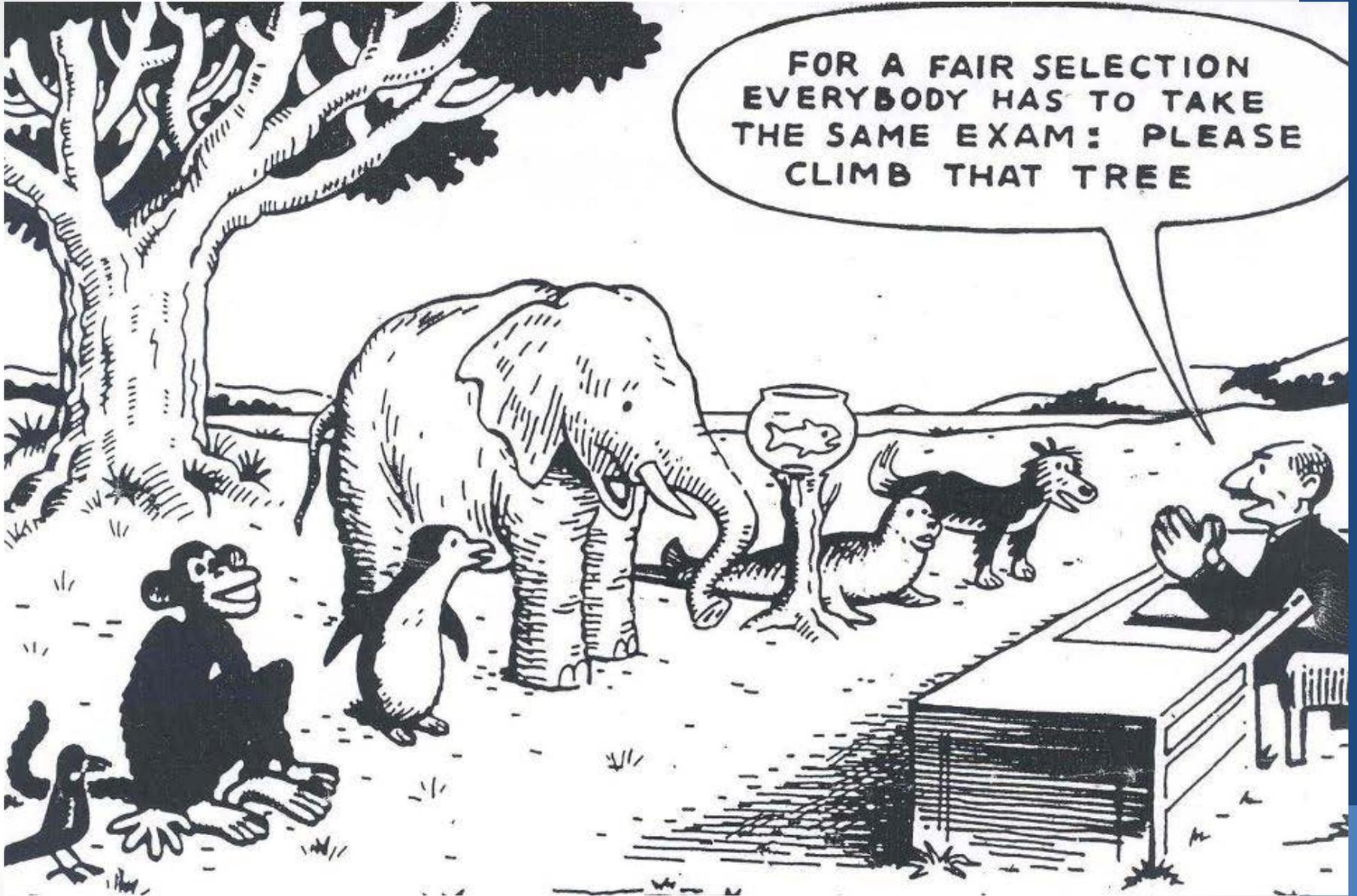
## Treatment

- Refusing to sell, rent or lease housing to an interested tenant based on a protected class
- Applying different sale, rental or occupancy terms for different people based on protected class

## Impact/Effect

- Neutral policy
- Discriminatory effect
- No sufficient business justification
- Less discriminatory alternative available

FOR A FAIR SELECTION  
EVERYBODY HAS TO TAKE  
THE SAME EXAM: PLEASE  
CLIMB THAT TREE



# HUD Rule, 24 CFR 100.500

- “A practice has a **discriminatory effect** where it actually or predictably results in a disparate impact on a group of persons . . . because of race, color, religion, sex, handicap, familial status, or national origin.”

# HUD Rule Continued

- “A legally sufficient justification exists where the challenged practice
  - Is necessary to achieve **substantial, legitimate and non-discriminatory interest** and
  - Those interests could not be served by another practice that has a **less discriminatory effect**

# Examples of Disparate Impact Cases

- Mt. Holly, NJ redevelopment project to replace old homes
  - only 21% of African Americans and Hispanic households would be able to afford the new redeveloped housing as compared to 79% of Whites.
- The Road Home program was supposed to provide Katrina storm victims with funding to rebuild their homes, but based their compensation on their house's original value rather than the cost of damage.
  - Houses in black neighborhoods that were identical to houses in white neighborhoods were given far less money to rebuild.

# Unintended consequences

## Neutral Policy

- Example – Must be at least 5'6" to qualify for prison guard job
- Must be capable of living independently to qualify for housing

## Considerations

- Goal of policy?
- Who is impacted?
- Possible discriminatory effect?
- Another way to accomplish goals?

# Examples of screening criteria

- “Blanket bans”
- Crime + time categorical exclusions
- Catch-all provisions (any offense which...)
- Individual Circumstances

# Legitimate Business Needs

**What the  
background check  
says:**

Assault 4 (2005)  
Guilty

**What a housing  
provider legitimately  
wants to know:**

Does this person pose a  
risk to property, staff, or  
other residents?

Can this person comply  
with the requirements of  
tenancy?

# Unintended consequences?

## Neutral Policy

No Assault convictions

## Considerations?

- Goals of policy?
- Who is impacted by policy?
- Possible discriminatory effect?
- Another way to accomplish goal?

# Issues to consider - less restrictive alternatives

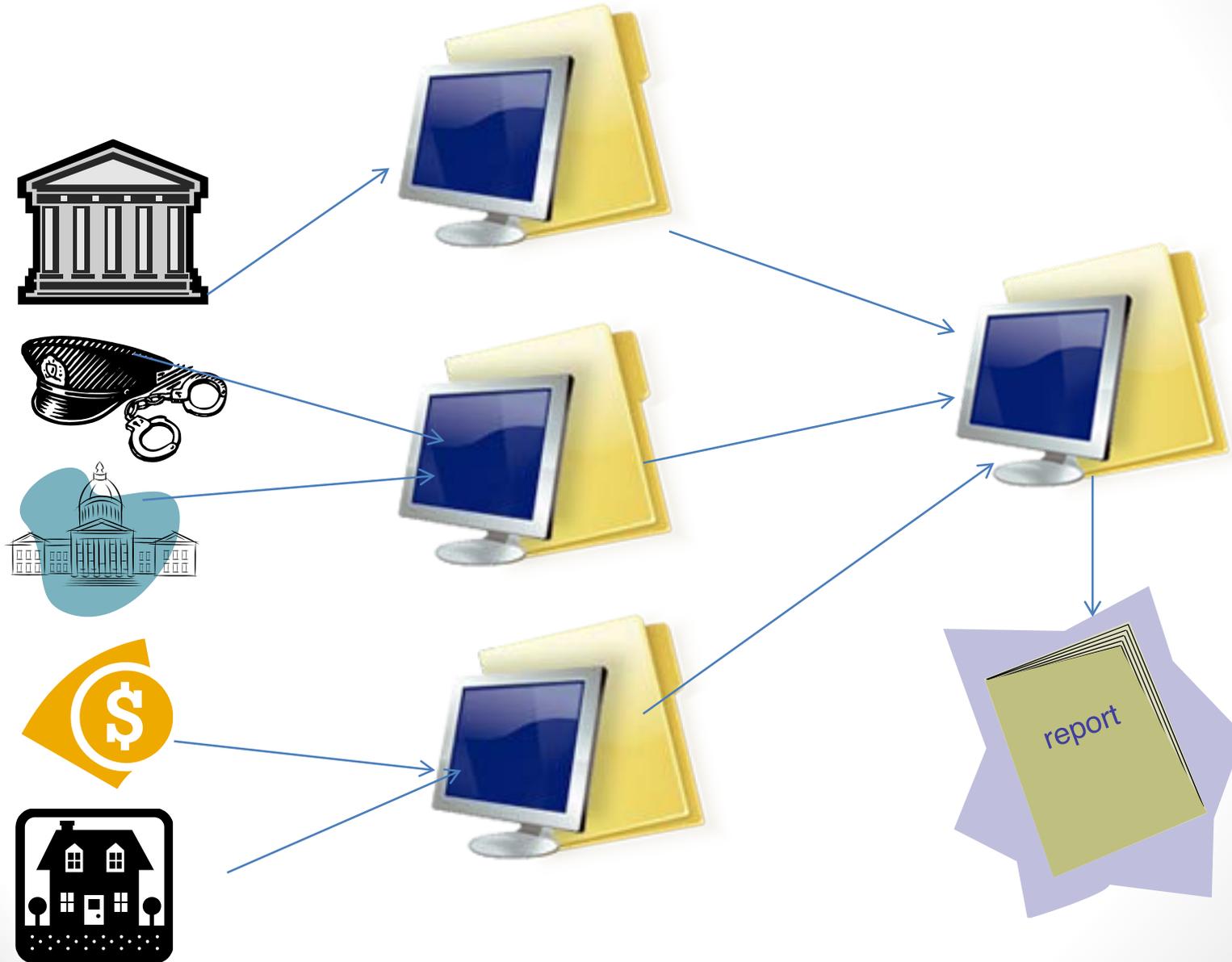
- What does the background check tell me about the person's past conduct?
- Were there mitigating circumstances?
- What are the essential housing requirements?
- What specific conduct may demonstrate inability to meet those requirements?
- What is the time period for exclusions?
- What has the person done since the case? What other factors matter?
- Who can I consult with and what research can I review to help make these decisions?

# UNDERSTANDING SCREENING REPORTS

# Tenant Screeners



# How does it work?



# Background Checks are Often Inaccurate or Misleading

- Mismatch the subject of report with another person
- Omit information about how the case was resolved
- Report inaccurate charges
- Mischaracterize the seriousness of the charges (felony v. misdemeanor)
- Repeat the same charge multiple times
- Incorrect dates (conviction date v. closing date)

# Even when correct, background checks don't tell the whole story about the conduct

ARREST 1

DATE OF ARREST: 03/28/1992

NAME USED: [REDACTED]  
CONTRIBUTING AGENCY: WA0170700 KENT POLICE DEPARTMENT  
LOCAL ID: 11167 PCN: N/A TCN: N/A

ARREST OFFENSES

DISPOSITION

CONTRIBUTOR OR RESPONSIBLE AGENCY:  
WA017033J AUKEEN DISTRICT COURT  
COURT CASE NO: [REDACTED]

STATUS: GUILTY  
08459 MUNICIPALITIES CODE VIOLATION  
RCW: 35.00.000  
MISDEMEANOR  
STATUS DATE: 08/18/1992

COMMENT: SALE OR POSSESSION OF  
DANGEROUS DRUGS

SENTENCE: FINE: \$250.00

\*\*\*\*\*

What do you think when you read this?

## 9.12.20 **Sale, possession or use of dangerous drugs**

It is unlawful to **sell, offer to sell, purchase, offer to purchase, give away, barter, exchange, distribute, possess or use any dangerous drug** except as now or hereafter authorized or permitted by the laws of the state or except upon the written or oral order or prescription of a physician, surgeon, dentist, or veterinary surgeon, licensed to practice in the state, which order or prescription shall not be refilled without the written or oral order of the prescriber.

1/24

| MASTER CASE REPORT FORM                                                                                                                                                |                                                                         |  <b>KENT POLICE DEPARTMENT</b><br>220 4th Avenue South<br>Kent, Washington 98032<br>(206) 859-3315 |                            | CROSS-REF 1<br>CROSS-REF 2<br>CROSS-REF 3<br>CROSS-REF 4               |                                                                        |                     |          |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|------------------------------------------------------------------------|------------------------------------------------------------------------|---------------------|----------|
| <b>MASTER INCLUDES:</b><br><input checked="" type="checkbox"/> SUSPECT FORMS<br><input type="checkbox"/> ADD'L PERSONS/VEH<br><input type="checkbox"/> PROPERTY REPORT |                                                                         | <input checked="" type="checkbox"/> EVIDENCE LOG<br><input type="checkbox"/> VEHICLE FORM                                                                                           |                            |                                                                        |                                                                        |                     |          |
| CASE SUMMARY                                                                                                                                                           | <input type="checkbox"/> RCW<br><input checked="" type="checkbox"/> KCC | <input type="checkbox"/> NO CRIME<br><input type="checkbox"/> _____                                                                                                                 | PRIMARY STATUTE<br>9.17.22 | CRIME/INCIDENT TYPE<br>POSS. OF MARIJUANA                              | PRIMARY/COUNTS<br>180109 11                                            | 2ND<br>7            | 3RD<br>1 |
|                                                                                                                                                                        | ADDRESS                                                                 |                                                                                                                                                                                     | APT/SUIT                   | BUSINESS NAME                                                          | LOCATION IF NO ADDRESS                                                 |                     | CITY     |
|                                                                                                                                                                        | [REDACTED]                                                              |                                                                                                                                                                                     |                            | NEW BEST MOTEL                                                         |                                                                        |                     | KENT     |
|                                                                                                                                                                        | OCCURENCE DATE/TIME                                                     |                                                                                                                                                                                     |                            | DATE/TIME                                                              | REPORTED DATE/TIME                                                     |                     | HOW TRK  |
|                                                                                                                                                                        | 03-28-92/0055                                                           |                                                                                                                                                                                     |                            |                                                                        | 03-28-92/0055                                                          |                     | ✓        |
| REPT. OFFICER ID #                                                                                                                                                     | LAST NAME, INITIALS                                                     |                                                                                                                                                                                     | REVIEWER ID #              | LAST NAME, INITIALS                                                    |                                                                        | CASE STATUS         |          |
| [REDACTED]                                                                                                                                                             | THOMAS, K.E.                                                            |                                                                                                                                                                                     | [REDACTED]                 | TOWNE, J.D.                                                            |                                                                        | K                   |          |
| CLOSED BY OFFICER ID #                                                                                                                                                 | LAST NAME, INITIALS                                                     |                                                                                                                                                                                     | IF CLEARED CODE            | OFFICERS INJURED?                                                      | OFFICERS KILLED?                                                       |                     |          |
|                                                                                                                                                                        |                                                                         |                                                                                                                                                                                     | E                          | <input checked="" type="checkbox"/> NO<br><input type="checkbox"/> YES | <input type="checkbox"/> NO<br><input checked="" type="checkbox"/> YES |                     |          |
| INVOLVE RP                                                                                                                                                             | NAME (Last, First, Middle)                                              |                                                                                                                                                                                     | SEX                        | RACE                                                                   | DOB (Age)                                                              | OCCUPATION/EMPLOYER |          |
|                                                                                                                                                                        | PERSON                                                                  |                                                                                                                                                                                     | M                          |                                                                        |                                                                        |                     |          |
|                                                                                                                                                                        | BUSINESS                                                                |                                                                                                                                                                                     | F                          |                                                                        |                                                                        |                     |          |

arrested [REDACTED] in the past for VUCSA and have received information from a street source as well as a Confidential Reliable Informant, that [REDACTED] is living at the NEW BEST MOTEL and is dealing cocaine on a regular basis.

The driver, [REDACTED], then exited the vehicle. While Officer DENNIS ran a computer check on the subjects, I spoke with [REDACTED]. I asked her if she was aware that [REDACTED] may be involved in drug dealing. She said no, that she was just giving him a ride. I asked her if the vehicle was hers and she said yes. I then asked [REDACTED] if there were any drugs in the car and she said no, do you want to search it, go ahead. [REDACTED] said that she works for an attorney and is not involved in drugs.

[REDACTED] was holding a purse. I asked her if I could take a look in her purse first. She said okay and opened the purse. While holding the purse, she moved the items around so I could see. While filing through the purse, I noticed a cigarette package containing suspected marijuana. I seized the suspected marijuana.

[REDACTED] parking lot is a well lighted lot with several lights. I

# Example 2

Case #10 -----  
Case: ██████████  
Court: MUNICIPAL COURT OF SEATTLE  
Code: 12A060100  
Violation: ASSAULT  
Date: 07/21/2007  
Status: GUILTY

What does assault involve?

Assault =

Attempt with unlawful force to inflict bodily injury

Intentional unlawful touching

Putting another in apprehension of harm whether or not the actor intends to inflict harm or is capable of inflicting harm

# Other Examples

**Theft 1:** Not reporting attempted reconciliation with spouse while receiving public assistance

**Malicious Mischief:** Breaking a CD in an argument

**Manufacturing, sale, delivery or possession of a controlled substance:** Possession of less than  $\frac{1}{2}$  g of cocaine

**Obstructing a law enforcement officer:** Running away from a police officer pointing a Taser at defendant

**Assault:** Victim of domestic violence convicted of assaulting her abuser

# How can you verify the facts?

- Applicant's statement
- Statements from probation/attorney/counselor
- Statutes (search for RCW online)
- Law enforcement records
  - Police reports
  - Incident reports
- Court records
  - Information
  - Statement of defendant on plea of guilty
  - Judgment and sentence
  - Case dockets

# Selecting a quality screener

- What **source** information does the screener use?
- How **frequently** does it update its databases? If it relies on another's database, how often is that updated?
- Does the screener **confirm** public record information against the original source?
- What's the **format**? Are all charges related to a single incident reported as a single entry?
- Are **juvenile** cases distinguished from adult cases?
- Is the screener fully compliant with the state and federal Fair Credit Reporting Acts?
- What **criteria** does the screener use to match an applicant with a record (name, date of birth, gender, race, physical description, driver's license number?)

# UNDERSTANDING MITIGATING CIRCUMSTANCES

# “Recidivism”

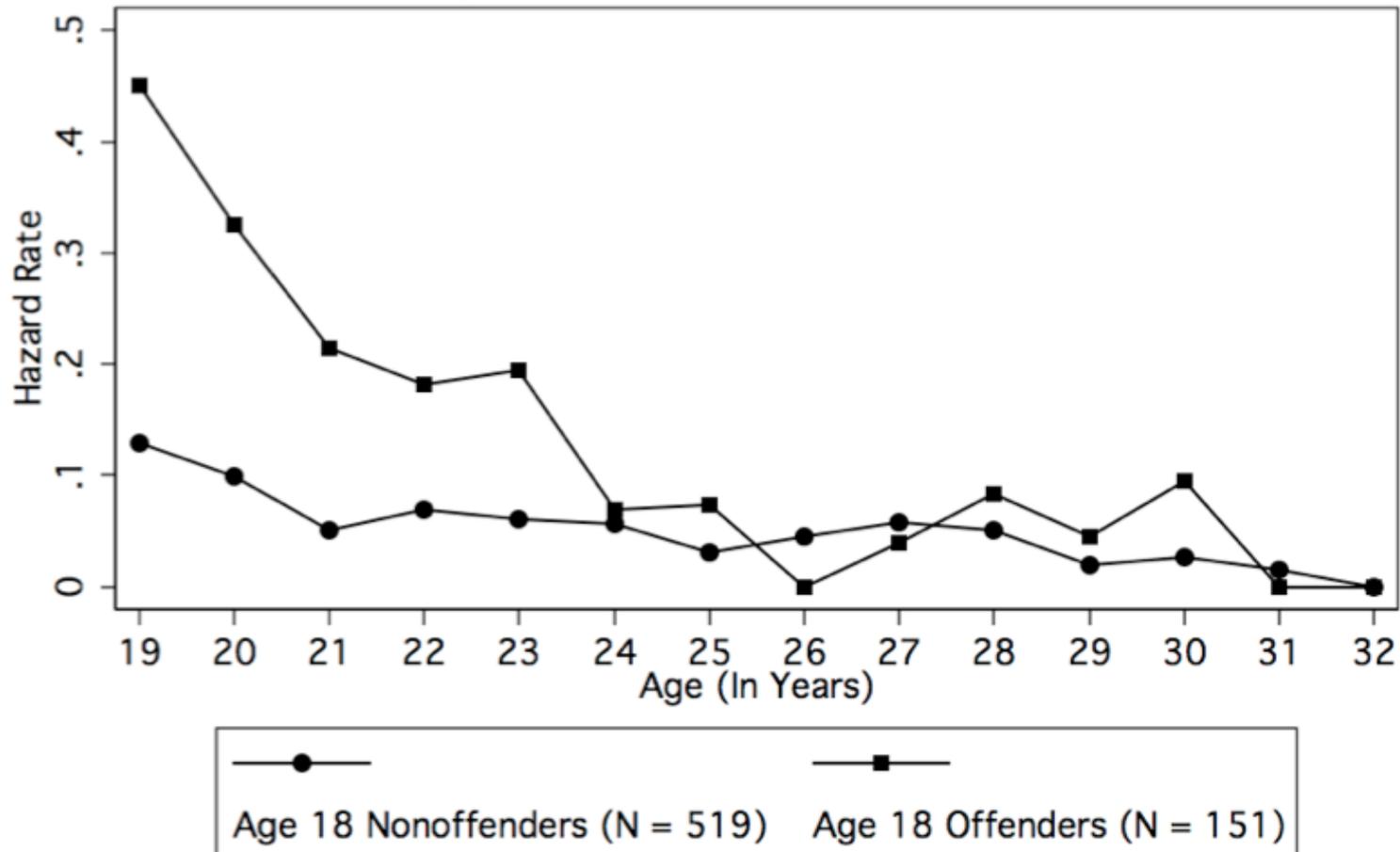
- The likelihood that someone will have continued contact with the criminal justice system (measured by subsequent arrest, conviction or incarceration)
- Studies of people with felonies:
  - 23% Nebraska (2005)
  - 47% (Arizona 2007)
  - 65% (15 states, 2004)
- When misdemeanants included, rates lower
  - Alabama (27.8% in 2007)
  - Louisiana (11.1% in 2008)

# Recidivism in Washington

Table 1b: New Washington State Recidivism Rates for All Offenses (Percent)\*

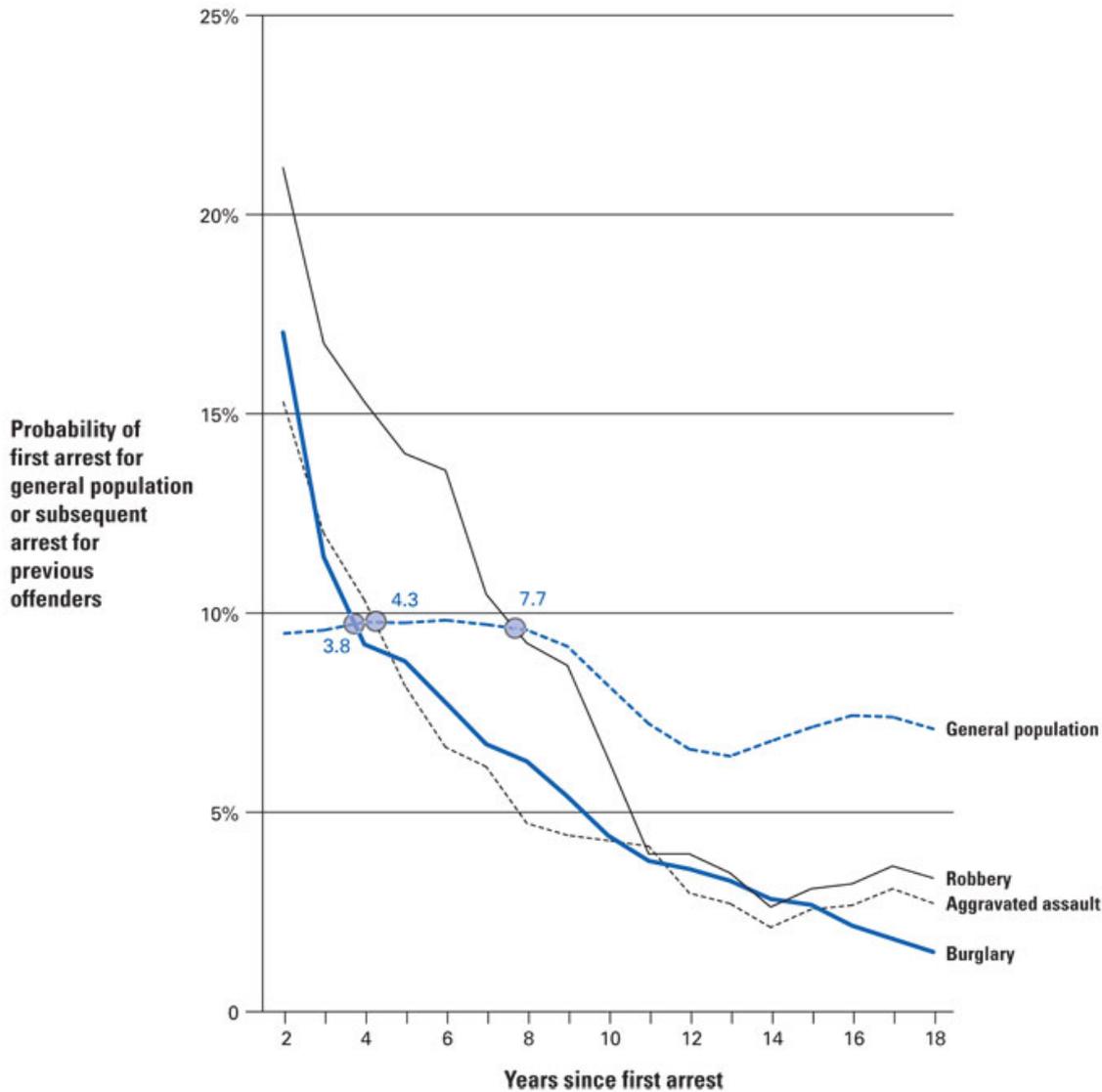
| Year Since Release | Released from Prison in Calendar Year |             |             |             |             |             |             |             |             |             |             |             |             |             |
|--------------------|---------------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
|                    | 1991                                  | 1992        | 1993        | 1994        | 1995        | 1996        | 1997        | 1998        | 1999        | 2000        | 2001        | 2002        | 2003        | 2004        |
| Year 1             | 10.2                                  | 8.6         | 8.4         | 8.5         | 9.0         | 9.6         | 9.4         | 8.9         | 9.6         | 10.7        | 12.2        | 13.5        | 13.7        | 13.1        |
| Year 2             | 8.8                                   | 9.0         | 9.4         | 8.5         | 8.8         | 10.2        | 9.1         | 10.3        | 11.2        | 11.8        | 13.7        | 13.3        | 13.3        | 13.4        |
| Year 3             | 5.1                                   | 5.8         | 5.7         | 6.0         | 6.0         | 5.9         | 6.4         | 6.2         | 6.9         | 6.8         | 7.2         | 7.4         | 7.8         | 7.9         |
| Year 4             | 3.6                                   | 4.3         | 3.7         | 3.7         | 3.9         | 4.3         | 4.2         | 4.6         | 4.5         | 4.9         | 4.2         | 4.6         | 4.4         | 4.5         |
| Year 5             | 2.9                                   | 3.0         | 2.8         | 3.1         | 2.9         | 3.1         | 3.0         | 2.9         | 3.1         | 3.2         | 3.0         | 2.9         | 3.0         | 2.8         |
| <b>Total</b>       | <b>30.5</b>                           | <b>30.7</b> | <b>30.0</b> | <b>29.8</b> | <b>30.6</b> | <b>33.1</b> | <b>32.0</b> | <b>32.9</b> | <b>35.3</b> | <b>37.4</b> | <b>40.3</b> | <b>41.6</b> | <b>42.3</b> | <b>41.7</b> |

# Background checks don't account for how people change



Kurlychek, et al. "Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?," 2006

The probability of new arrests for offenders declines over the years and eventually becomes as low as the general population.



Years to general risk:

Burglary: 3.8

Assault: 4.4

Robbery: 7.7

Blumsten and Nakamura,  
"Redemption in the Presence  
of Widespread Criminal  
Background Checks

# Factors associated with reduction in recidivism

- Age at time of release
- Addiction/drug treatment
- Stable housing
- Mental health treatment
- Medical care
- Completion of high school/ higher education
- Employment services (job skill development and placement)
- Community supports

# How can you verify changed circumstances?

- Applicant statement
- Recommendations from
  - Employer
  - Coworkers
  - Volunteer Supervisor
  - Teachers/ School Officials
  - Training Programs
- Statements from social service providers
- Statements from court/law enforcement personnel
- Certificates of completion or participation
  - Treatment
  - Training

# Sample policies

- Let applicants know they can provide **information about the case or changed circumstances** and when it will be considered.
  - Example: Vancouver Housing Authority: Considers wide range of evidence of rehabilitation
- Consider only **recent and relevant** criminal history
  - Example: Baltimore City Housing Authority: up to 18 months for misdemeanors, 3 years for felonies.
- Provide applicants with a copy of the screening report reviewed by the housing provider
- Document your decision for each applicant whose criminal history is a factor (checklist).

# DISCUSSION