

# Disparate Treatment and Adverse Impact

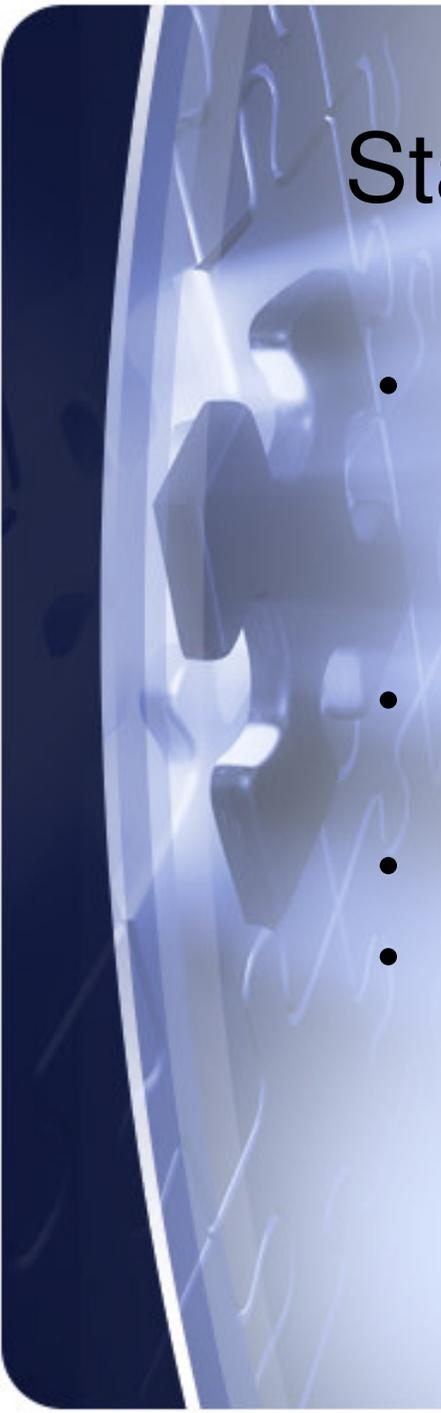
Kimberley Taylor-Riley, Director of Equity and Diversity



# Arrest, Credit History & Employment Status

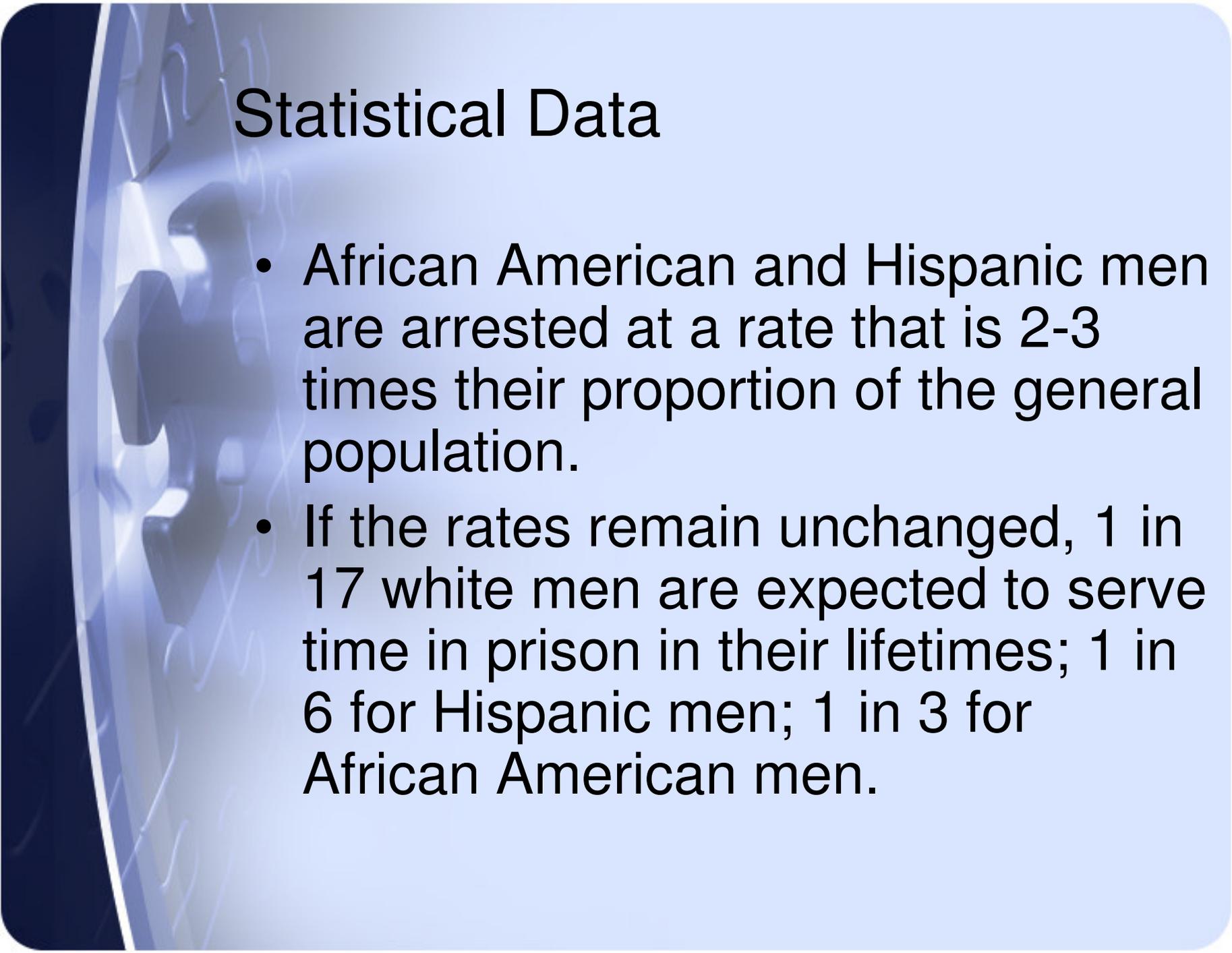
# Credit History

- Grave concerns expressed by Nation Consumer Law Center, that the use of credit histories is mushrooming at the time of economic instability for many Americans (noting that the use of credit histories creates a fundamental Catch-22 for job applicants).
- 10/2010 EEOC public mtg.
- You can't re-establish your credit if you can't get a job, and you can't get a job if you've got bad credit.
- The use of credit histories in the employment context can have a disparate impact on a range of protected groups. Additionally, credit history is a poor predictor of job performance.



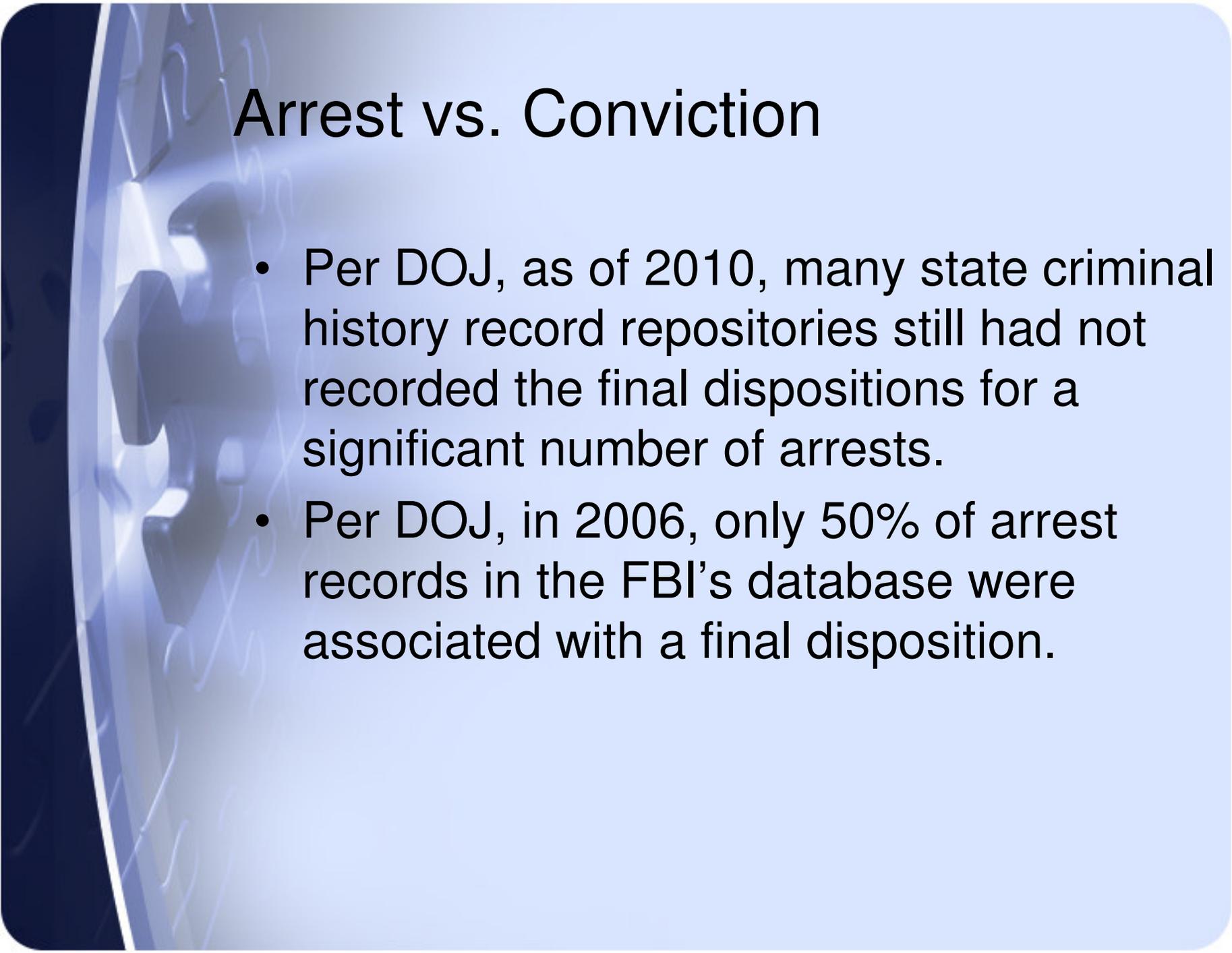
# Statistical Data

- In the last 20 years, there has been a significant increase in the number of Americans who have had contact with the criminal justice system.
- In 1991, only 1.8% of the adult population had served time in prison.
- In 2001, 2.7% (1 in 37 adults)
- In 2007, 3.2% of all adults in the U.S. (1 in 31) were under some form of correctional control.



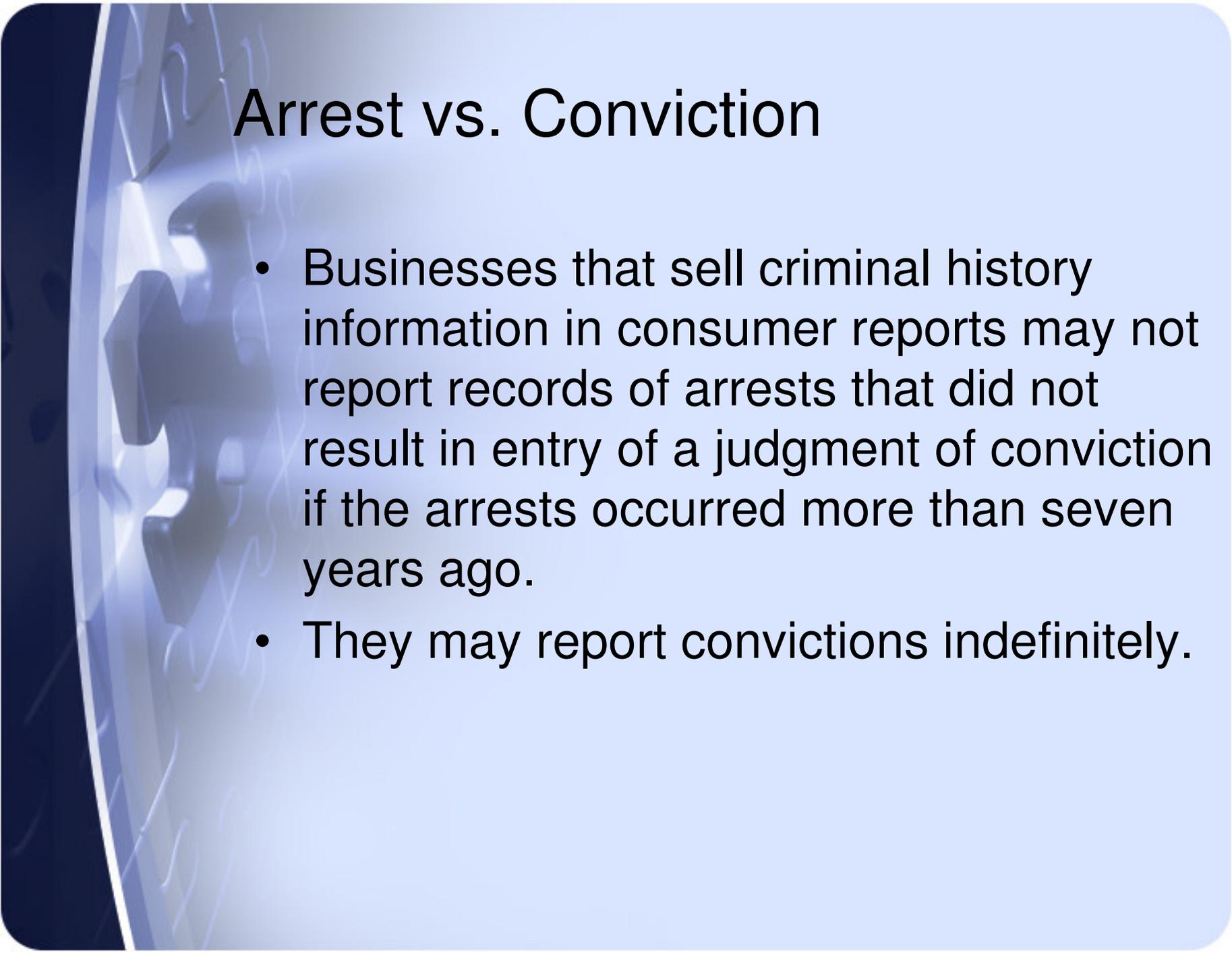
## Statistical Data

- African American and Hispanic men are arrested at a rate that is 2-3 times their proportion of the general population.
- If the rates remain unchanged, 1 in 17 white men are expected to serve time in prison in their lifetimes; 1 in 6 for Hispanic men; 1 in 3 for African American men.



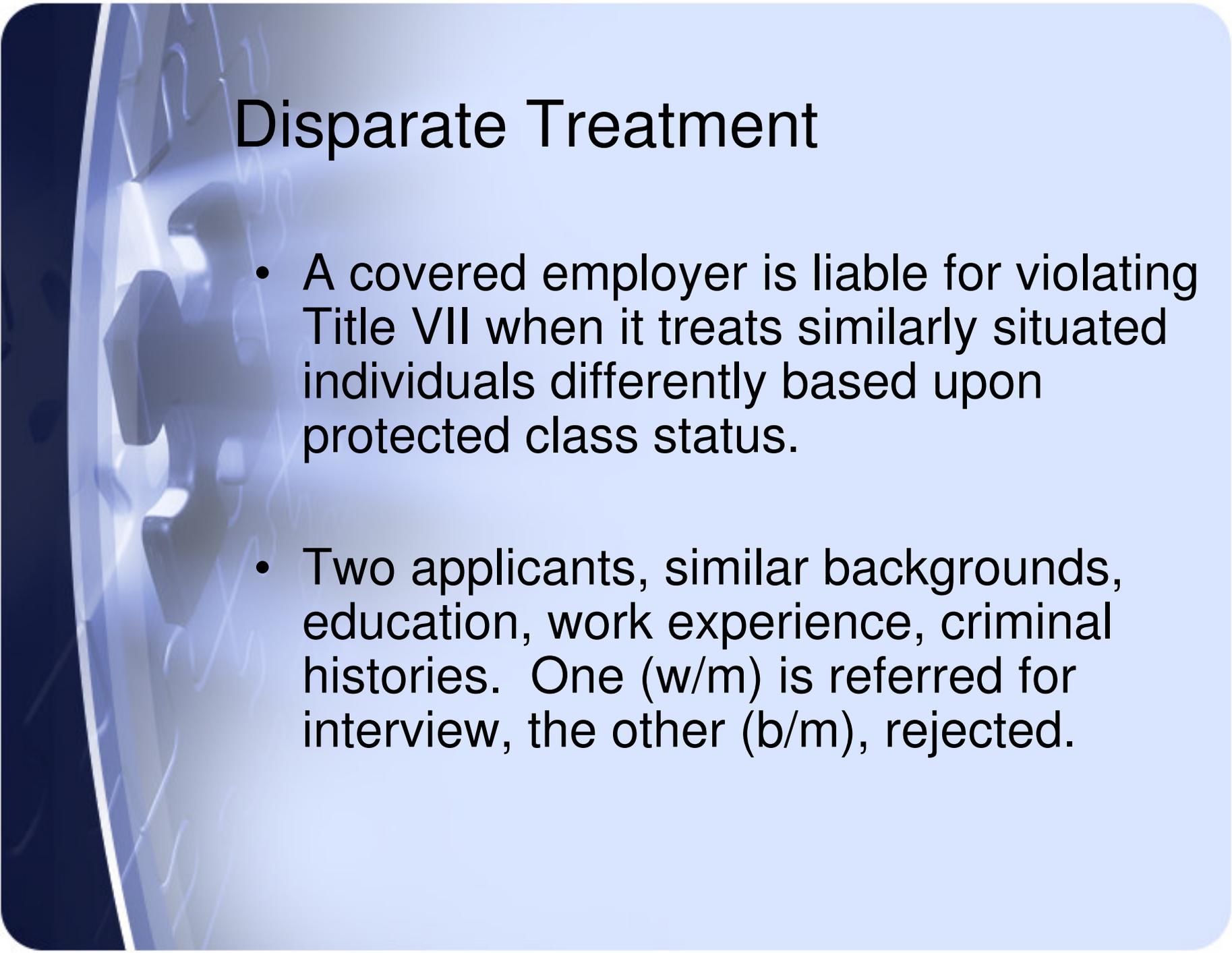
## Arrest vs. Conviction

- Per DOJ, as of 2010, many state criminal history record repositories still had not recorded the final dispositions for a significant number of arrests.
- Per DOJ, in 2006, only 50% of arrest records in the FBI's database were associated with a final disposition.



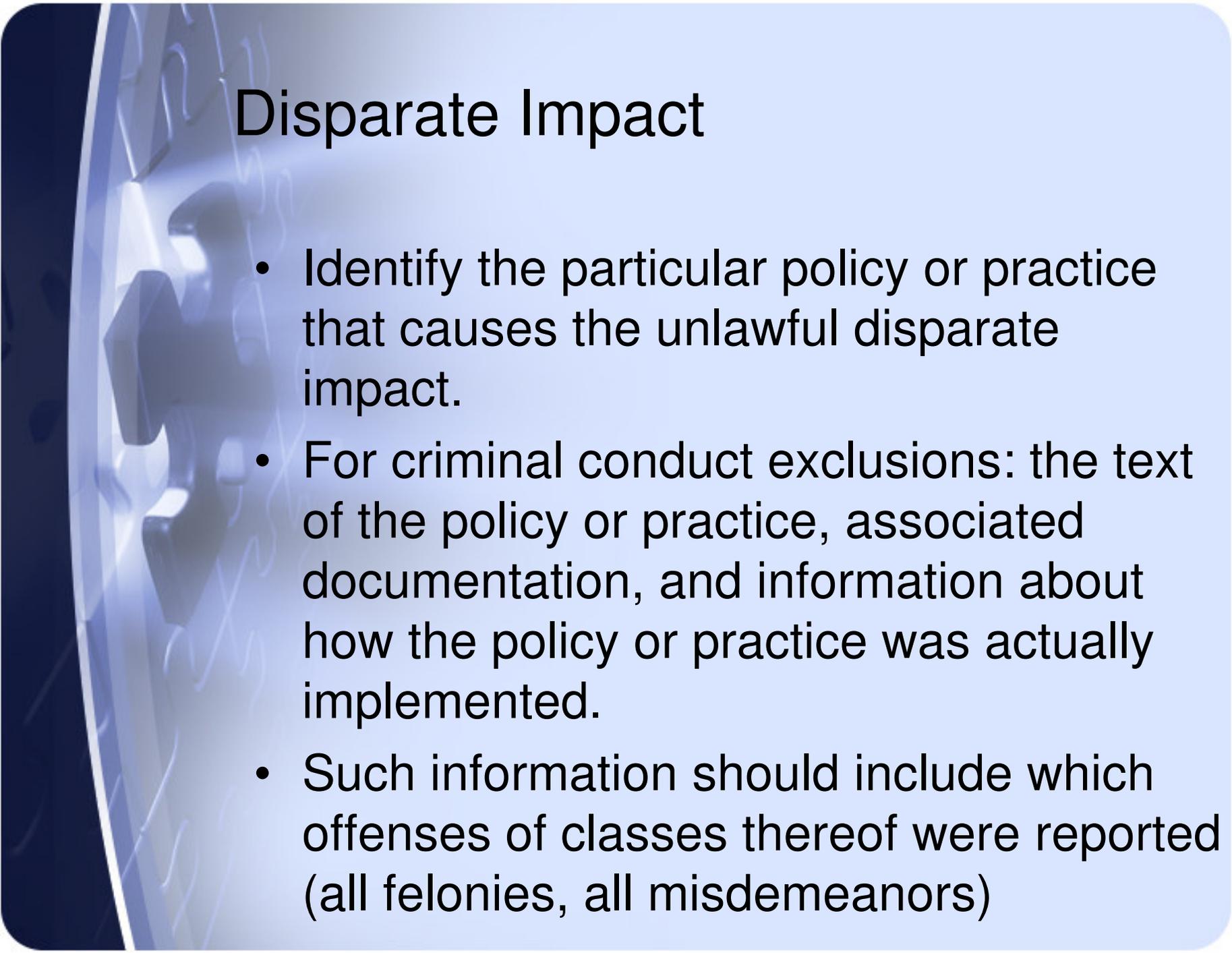
## Arrest vs. Conviction

- Businesses that sell criminal history information in consumer reports may not report records of arrests that did not result in entry of a judgment of conviction if the arrests occurred more than seven years ago.
- They may report convictions indefinitely.

A person wearing a white protective suit and a mask is walking through a doorway. The scene is dimly lit, with light coming from the doorway, creating a silhouette effect. The background is dark and textured.

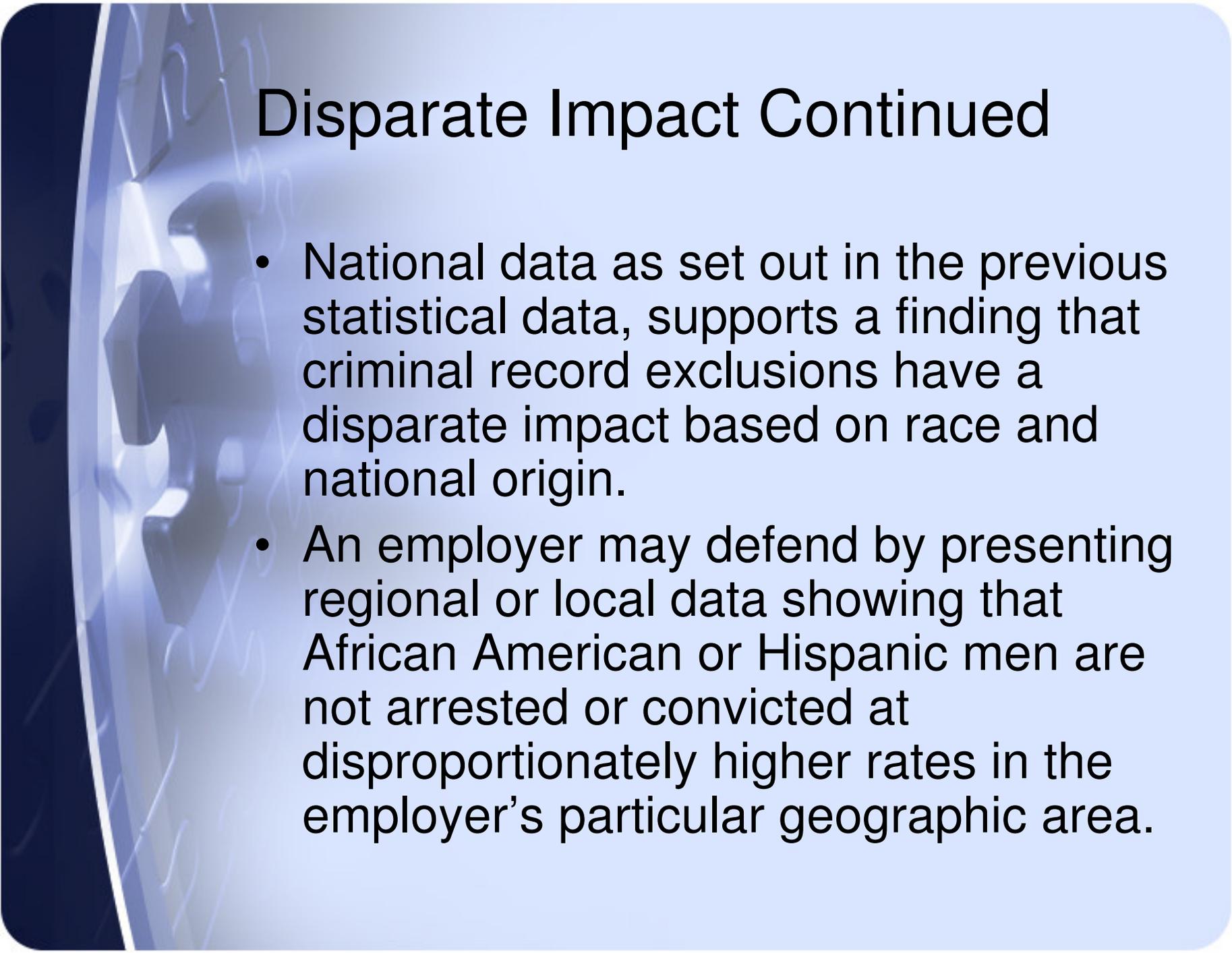
# Disparate Treatment

- A covered employer is liable for violating Title VII when it treats similarly situated individuals differently based upon protected class status.
- Two applicants, similar backgrounds, education, work experience, criminal histories. One (w/m) is referred for interview, the other (b/m), rejected.



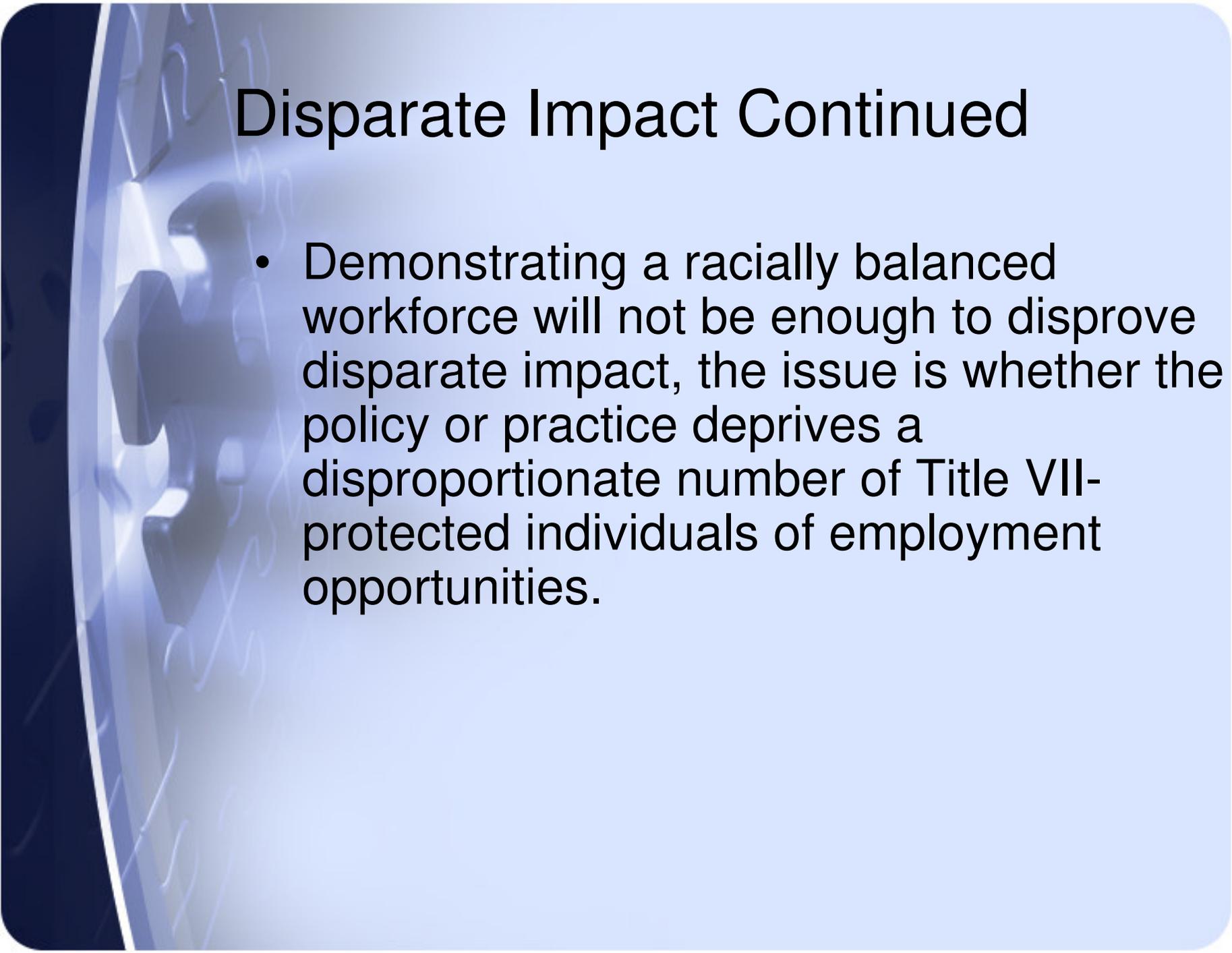
# Disparate Impact

- Identify the particular policy or practice that causes the unlawful disparate impact.
- For criminal conduct exclusions: the text of the policy or practice, associated documentation, and information about how the policy or practice was actually implemented.
- Such information should include which offenses or classes thereof were reported (all felonies, all misdemeanors)



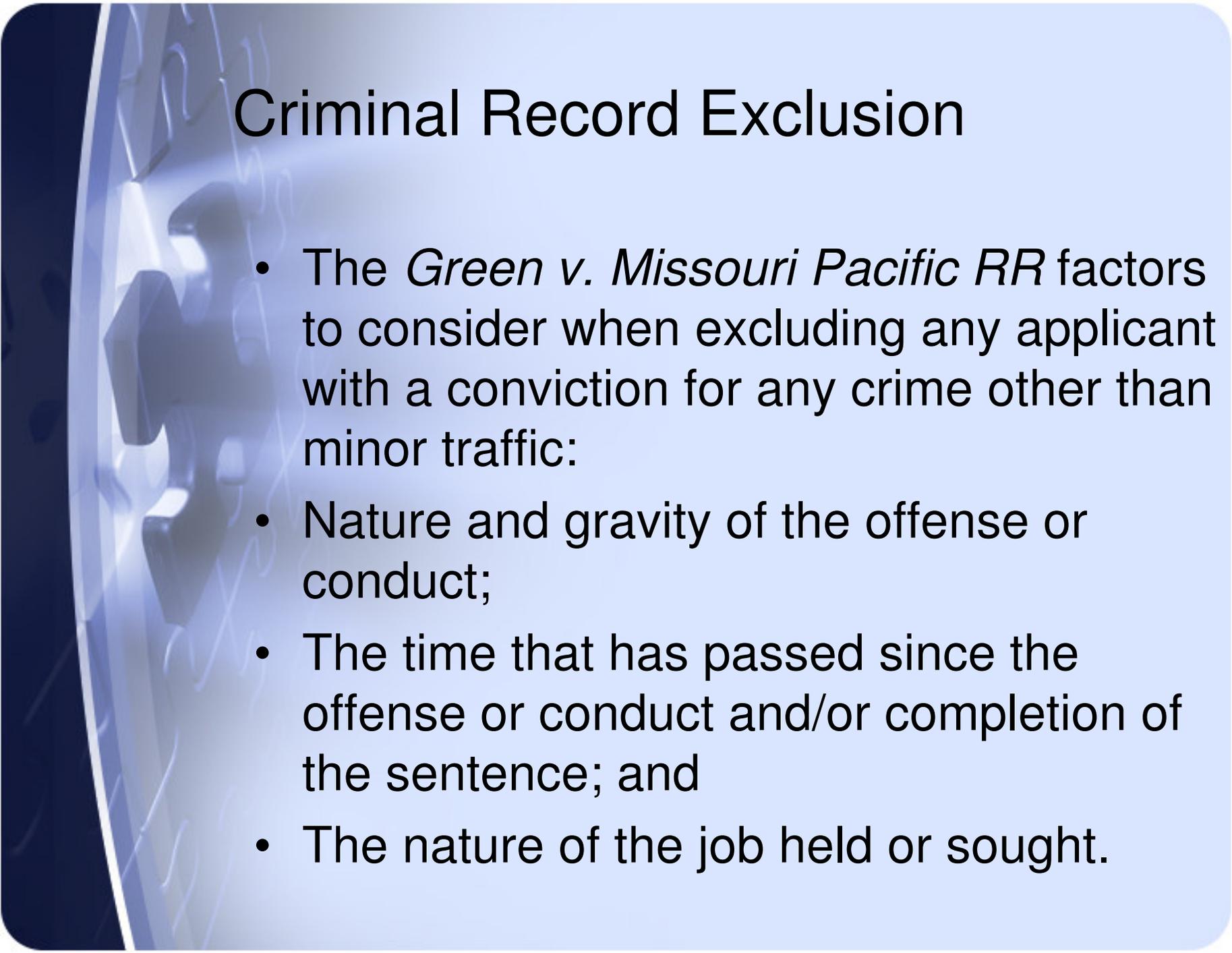
## Disparate Impact Continued

- National data as set out in the previous statistical data, supports a finding that criminal record exclusions have a disparate impact based on race and national origin.
- An employer may defend by presenting regional or local data showing that African American or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area.



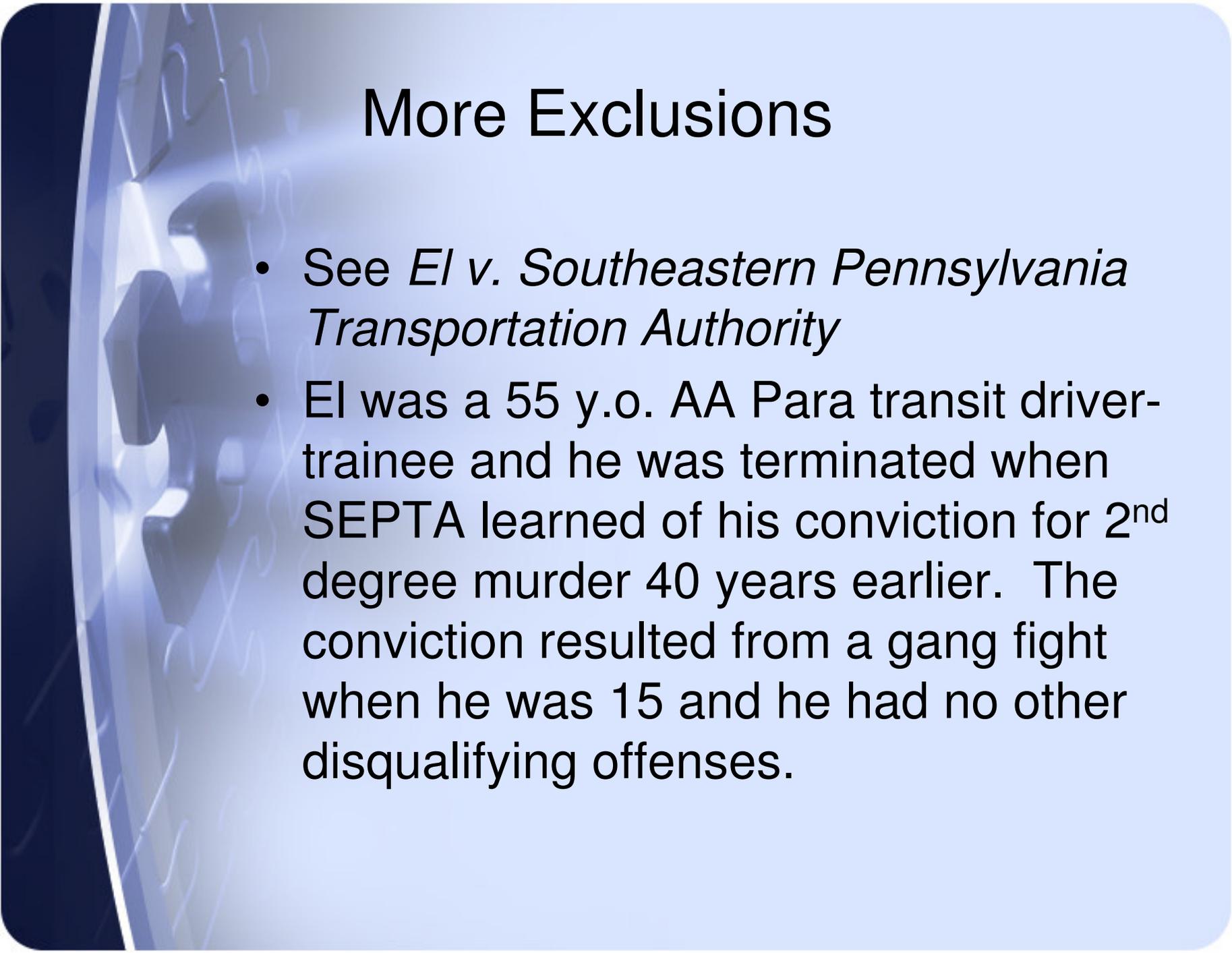
## Disparate Impact Continued

- Demonstrating a racially balanced workforce will not be enough to disprove disparate impact, the issue is whether the policy or practice deprives a disproportionate number of Title VII-protected individuals of employment opportunities.



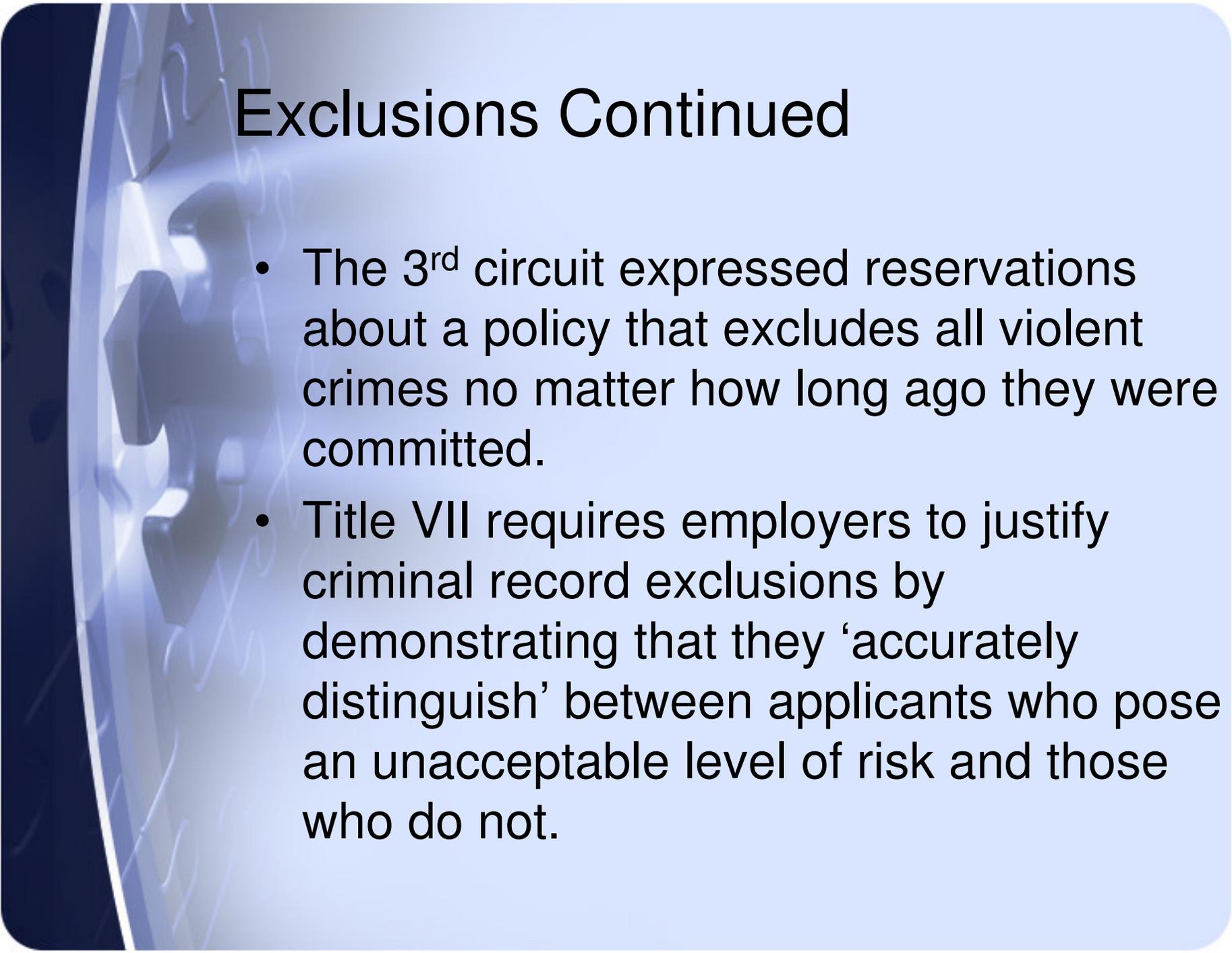
## Criminal Record Exclusion

- The *Green v. Missouri Pacific RR* factors to consider when excluding any applicant with a conviction for any crime other than minor traffic:
- Nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.



## More Exclusions

- See *El v. Southeastern Pennsylvania Transportation Authority*
- El was a 55 y.o. AA Para transit driver-trainee and he was terminated when SEPTA learned of his conviction for 2<sup>nd</sup> degree murder 40 years earlier. The conviction resulted from a gang fight when he was 15 and he had no other disqualifying offenses.



## Exclusions Continued

- The 3<sup>rd</sup> circuit expressed reservations about a policy that excludes all violent crimes no matter how long ago they were committed.
- Title VII requires employers to justify criminal record exclusions by demonstrating that they ‘accurately distinguish’ between applicants who pose an unacceptable level of risk and those who do not.



# Arrests

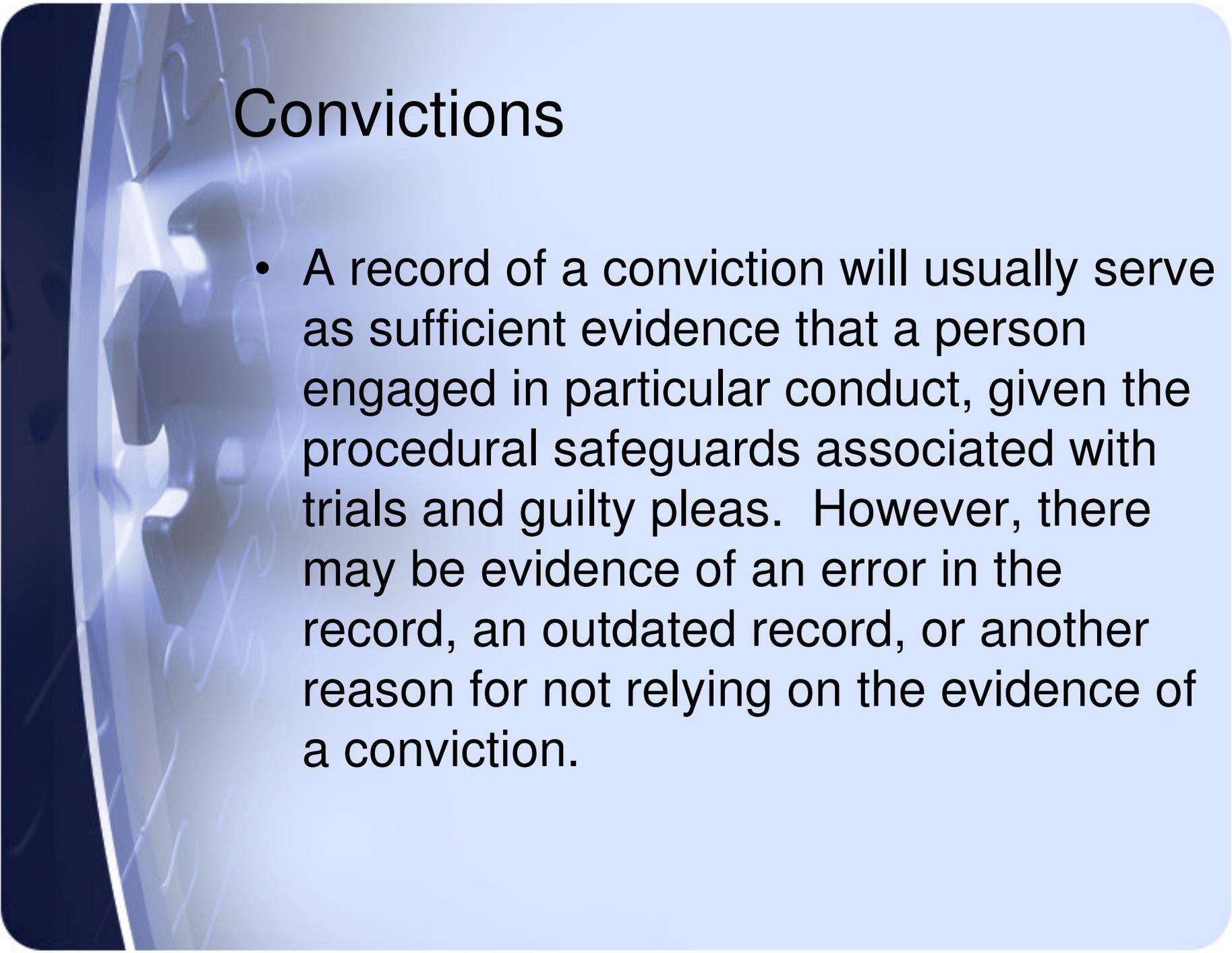
The fact of an arrest does not establish that criminal conduct has occurred. Many arrests do not result in criminal charges or the charges are dismissed. The presumption of innocence attaches until conviction.

An exclusion based on an arrest, in itself, is not job related and consistent with business necessity.



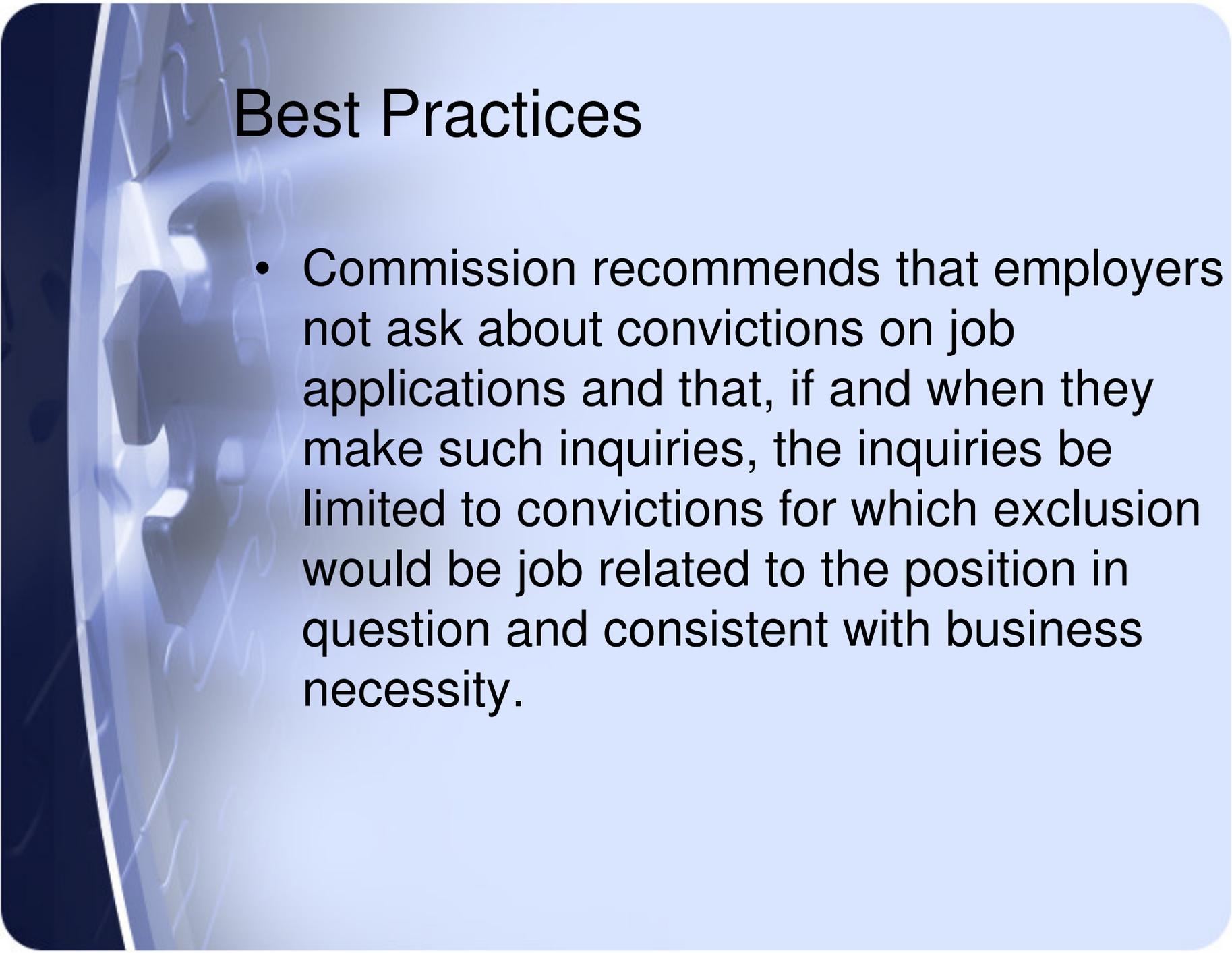
## Arrests Continued

Arrest records also may include inaccuracies or may continue to be reported even if expunged or sealed.



# Convictions

- A record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas. However, there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction.



## Best Practices

- Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related to the position in question and consistent with business necessity.



Thank You So Much For All You Do!!

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