

# REENTRY LEGAL CLINIC: CERTIFIED VOLUNTEER PROGRAM

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Other than public records, the following sources were referenced and used in this handbook.

- Sharon M. Dietrich, Summary of Application of Fair Credit Reporting Act (“FCRA”) to Criminal Background Checks
- Jonathan Cantu & Joan Petersilia, A Survey of Employment Sactions Imposed Upon Ex-Offenders by California Law (1/27/2006), *located at* [http://www.law.stanford.edu/program/centers/scjc/workingpapers/JCantu\\_06.pdf](http://www.law.stanford.edu/program/centers/scjc/workingpapers/JCantu_06.pdf)
- C. Pamela Gómez, Public Counsel Law Center, Occupational Licenses Training
-

## INTRODUCTION

### RELEVANT STUDIES

Pew Research Center, One in 31: The Long Reach of American Corrections (2009)<sup>1</sup>

Holzer, Raphael, & Stoll, The Labor Market for Ex-Offenders in Los Angeles: Problems, Challenges, and Public Policy (Working Paper Series: Center for the Study of Urban Poverty at UCLA, 2003)<sup>2</sup>

Devah Pager, The Mark of a Criminal Record, 108 Am. J. of Sociology 937 (2003)<sup>3</sup>

### PURPOSE

There are too few advocates in the field of reentry law to make any meaningful *structural* difference. If we are to have the kind of impact made in previous civil rights movements, people with conviction history themselves must rise up to demand that their humanity be recognized and respected. *The Certified Volunteer Program* seeks to turn people with conviction history into their own advocates and to build our generation's defining civil rights movement.

In short, with the training you receive here, we want you to educate and organize people with conviction history—so that they, in turn, may go out to educate and organize those around them.

### REQUIREMENTS

This training may seem long at 6 hours, but it's nowhere near sufficient to give you the expertise and knowledge required to become an effective organizer for the movement. That is why we ask that, once you make a commitment to this movement-building project, you continue your training in the real world. For law students, the real world for the time being may be limited to the Reentry Legal Clinic and your interaction with the clients who come to dismiss their conviction history there. For community members, the real world is everywhere around you—your neighborhood, your church, your AA meetings—wherever you go, whomever you meet. We also ask that you come to a monthly meeting of All of Us or None to stay informed of local and national developments affecting people with conviction history.

### ALL OF US OR NONE (AOUON)

We ask that you direct your organizing efforts toward the existing movement of All of Us or None (AOUON). AOUON has a chapter in Los Angeles, Compton, Long Beach, and all over California and across the nation. We prefer that you come to the monthly meeting hosted by A New Way of Life Reentry Project in South Los Angeles and held between 5:30pm and 7pm on the second Tuesday of each month at ***Freedom Hall, WLCAC, 10950 S. Central Ave., Los Angeles, CA 90059.***

AOUON is a national movement created and organized by people with conviction history and their friends. Although the signature project of AOUON has been “Ban the Box,” it has engaged in a far wider range of issues, ranging from voting to housing to criminal justice. It is a growing movement

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<sup>1</sup> [http://www.pewcenteronthestates.org/report\\_detail.aspx?id=49382](http://www.pewcenteronthestates.org/report_detail.aspx?id=49382)

<sup>2</sup> <http://www.spa.ucla.edu/calpolicy/files04/StollAz.pdf>

<sup>3</sup> [http://www.princeton.edu/~pager/pager\\_ajs.pdf](http://www.princeton.edu/~pager/pager_ajs.pdf)

## **Reentry Legal Clinic: Certified Volunteer Program**

for sure—but one that so far hasn't been able to consistently and effectively translate its potential membership base into a potent political bloc.

For more discussion, see the section on Community Organizing.

## LAWS & REGULATIONS

### "CLEAN SLATE REMEDIES"

#### *OVERVIEW*

In California, a criminal record is generated at every point along the criminal justice system from arrest to the conclusion of the case, up to and including the end of post-release supervision, if any. All court records are open to the public, and background check companies have access only to public records. Access to DOJ and/or FBI records is limited to those authorized by law, e.g. law enforcement agencies and licensing agencies. Some records of arresting agencies are open to the public, while others aren't. [FURTHER DISCUSSION]

#### **Agencies & Procedures for Record Correction**

FBI: FBI does not take a request from an individual to clean up their database and only corrects information when requested to do so by the originating agency.

DOJ: To correct an inaccuracy on California Dep't of Justice (DOJ) rap sheet, file a Claim of Alleged Inaccuracy or Incompleteness, BCII-8706, along with a proof of the inaccuracy to DOJ.

COURT: Court records can be changed by various means, including changing a clerical error (a *nunc-pro-tunc* motion) and obtaining a relief under Pen. Code § 1203.4/1203.4a.

LAW ENFORCEMENT AGENCY: Different local Police Departments and Sheriff's Offices have widely-varying methods of addressing record correction. Few take petitions under Pen. Code § 851.8 seriously. However, most will respond to the request to issue a "wrong person certificate" if an outstanding arrest warrant (or an arrest itself) was issued for a wrong person.

CONSUMER REPORTING AGENCY (CRA): CRA is the official legal term for private background check companies. CRAs only have access to publicly available records. The federal Fair Credit Reporting Act (FCRA), 15 USC §§ 1681 *et seq.*, and California's Investigative Consumer Reporting Agencies Act (ICRAA), Cal. Civ. Code §§ 1786 *et seq.*, impose certain duties on CRAs. See below for a further discussion on ICRAA/FCRA.

#### **Juvenile vs. Adult Records**

Juvenile "conviction" is not a criminal conviction, but "adjudication," which means that a person does not have to answer "yes" to the question, "Have you ever been convicted of a crime?" Juvenile records can usually be sealed and destroyed with the help of a local Public Defender's Office, Juvenile Division—provided that:

- (1) The juvenile is now 18 years or older;
- (2) The original charge is not a violent felony or sex-offender registry (PC 290) offense;
- (3) The person was not later convicted as an adult of a crime involving moral turpitude (e.g. theft, fraud, sex offense, serious drug offenses).

There is currently no way to "seal and destroy" adult criminal records. See below for more discussion on dismissal under Pen. Code § 1203.4/1203.4a.

#### **Arrest vs. Conviction**

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Arrest records are generated and maintained at an arresting agency, such as LA Police Department or LA County Sheriff's Office, and are not generally available to the public. In addition, a number of existing laws prohibit employers from inquiring about arrest records from any source or using them in making an employment decision (Labor Code § 432.7; EEOC Notice 915.061); and CRAs from reporting them to an employer (Civ. Code § 1786.18(a)(7)).

However, once a charge/information is filed with the court by a prosecutor, the record is generated and maintained at the court and available to the public.<sup>4</sup>

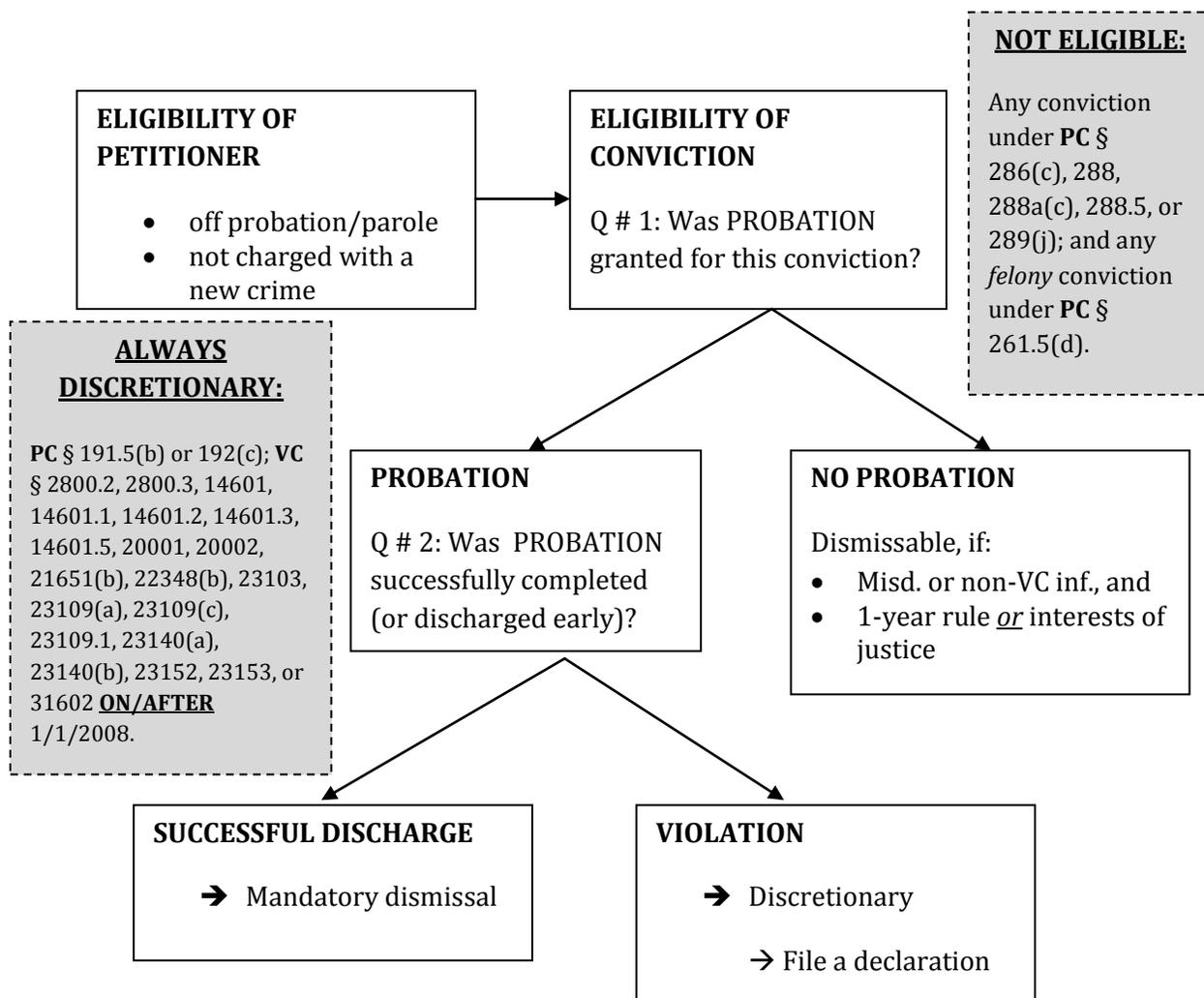
### Table of Relevant Laws

	JUVENILE	ADULT
ARREST	PC § 851.7	PC § 851.8
CONVICTION	W&I § 781; PC § 1203.45	PC § 1203.4/1203.4a

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<sup>4</sup> There is widespread perception that all court records are public records. Note that Cal. Pen. Code § 13300 regulates "local criminal history information," access to which is limited to authorized individuals and not open to the general public. It is unsettled whether the type of bulk database provided by some courts to background check companies constitute "local criminal history information" subject to regulation under § 13300. On the other hand, the records that must be kept by the mandate of the law are always considered public records. *See, e.g.,* Cal. Gov't Code §§ 69842, 69844, 69846.

ADULT CONVICTION: PENAL CODE § 1203.4/1203.4A



ADDITIONAL NOTES ON PENAL CODE § 1203.4/1203.4A

- Convictions resulting in actually serving a term in state prison are not eligible for dismissal under these sections. See *People v. Borja* (1st App. Dist., 1980) 110 Cal.App.3d 378; *People v. Sperbeck*, 2002 Cal.App.Unpub.LEXIS 4734.
- Most sex crimes involving a minor cannot be dismissed. Pen. Code § 1203.4(b).
- There is only discretionary dismissal for common Vehicle Code misdemeanors, such as DUI, driving without a license or on a suspended license, reckless driving, and hit-and-run. Pen. Code § 1203.4(c).
- For some people currently on probation and therefore not eligible to dismiss any conviction under Pen. Code § 1203.4/1203.4a, it may be possible to terminate probation under Pen. Code § 1203.3. The rule of thumb is (1) satisfaction of all terms and conditions of probation other than its period and (2) serving at least 2/3 of the probation period.

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- To reduce a felony to a misdemeanor under Pen. Code § 17(b), (1) the felony must have been a “wobbler”<sup>5</sup>; (2) imposition of sentence was suspended; and (3) probation was successfully completed.

### *EFFECT OF DISMISSING A CONVICTION UNDER PENAL CODE § 1203.4*

Courts have interpreted “all penalties and disabilities” of Pen. Code § 1203.4 to refer only to those penalties and disabilities flowing from the criminal justice system. For example, in *People v. Frawley* (1st App. Dist., 2000) 82 Cal. App. 4th 784, 791, the court stated:

*Section 1203.4 does not, properly speaking, “expunge” the prior conviction. The statute does not purport to render the conviction a legal nullity. ... The limitations on this relief are numerous and substantial, including other statutes declaring that an order under section 1203.4 is ineffectual to avoid specified consequences of a prior conviction.*

There is only one published case in the entire country regarding the precise meaning of Pen. Code § 1203.4, and it comes from a federal district court located in the State of New York. *See generally Obabueki v. IBM* (2001) 145 F. Supp. 2d 371. The court in that case opined that the statute is open to multiple interpretations, either supporting the contention that the conviction is a nullity for the purpose of employment or not. Another federal case, unpublished and not citable, decides that a conviction dismissed under PC 1203.4 is not a nullity and must be disclosed in an employment application. *See generally Roberts v. New York Life Ins. Co.*, 1998 U.S. App. LEXIS 33128.

The only California case on point was *Tietgen v. City of Pomona* (1986) 222 Cal. Rptr. 368. There, the Court answered affirmatively that the plaintiff, who had dismissed his case under Pen. Code § 1203.4 had “a statutory right not to reveal his prior record pursuant to [the statute].” This case has since been de-published and is no longer a binding authority.

See below for discussions on Labor Code § 432.7 and 2 Code of Regulations § 7287.4.

### *CERTIFICATE OF REHABILITATION (PENAL CODE §§ 4852.01 ET SEQ.)*

Certificate of Rehabilitation (COR)<sup>6</sup> is a judicial finding that the court issuing the certificate finds the petitioner rehabilitated. The eligibility requirement is that:

- (1) The person resided in California for 5 years prior to filing;
- (2) The person has not been convicted of violating Pen. Code §§ 286(c), 288, 288a(c), 288.5, 289(j); and
- (3) It has been more than the required number of years since the person’s last release from prison, where the required number of years is calculated as follows:
  - a. 9 years, if convicted of violating Pen. Code §§ 187, 209, 219, 4500, 12310; Military & Veterans Code § 1672; or any crime that carries a life sentence;
  - b. 10 years, if convicted of violating or attempting to violate any conviction requiring a sex offender registration (PC 290), except for violations of Pen. Code § 311.2(b), (c), (d); 311.3; 311.10; or 314; or

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<sup>5</sup> A “wobbler” is an offense for which both state prison term and county jail term (and/or fine) are possible sentences. It gets its name from the fact that it “wobbles” between being a felony (state prison sentence) and a misdemeanor (county jail sentence).

<sup>6</sup> In the County of Los Angeles, the Public Defender’s Office handles the vast majority of COR petitions. The contact is John Garbin, Sr. Paralegal, at 213-974-3057.

c. 7 years, otherwise.

COR does not change a person’s criminal record and has no immediate consequence flowing from the statute authorizing it, except that it becomes an automatic application for Governor’s pardon upon its grant. Its impact is indirect. For example, some licensing agencies are prohibited from denying a license solely on the basis of convictions for which a person has obtained a COR. See Bus. & Prof. Code § 480(b); Labor Code § 267.

## PRIVATE EMPLOYMENT

PRIVATE VS. PUBLIC EMPLOYERS: For our purpose, private employment is defined as one offered by a private employer, i.e. not a government entity or “public” employer. A private employer is generally not authorized to do a fingerprint-based background check on (prospective) employees. There are exceptions, however, because private employers that contract with a public agency may require their employees obtain a background check (“Livescan”) through DOJ. Private employers under a public contract require individualized consideration of their contract to see which laws and regulations apply to them.

HIRING PROCESS: Hiring process for our purpose starts with a company’s job posting and moves on to a job application and potentially through an interview. Somewhere along the process, an applicant will almost always face a yes-or-no question: “Have you ever been convicted of a crime?” The employer may or may not conduct a background check on the applicant through a CRA. In most cases, the applicant that affirmatively answers the question does not proceed to the next stage of the process. Due to the cost of doing a background check, employers tend to order a background check from a CRA only when they are seriously interested in hiring the person. Sometimes, the background check result does not come back until after the person has already started working.

## *NEGLIGENT HIRING*<sup>8</sup>

Negligent hiring is, fundamentally, a theory of vicarious liability. In short, the cause allows the plaintiff to recover damages from the deep-pocket employer of its tortfeasor-employee. The tortious conduct is of the employee, but it’s the employer’s negligence in hiring the employee that allowed the tort to occur—or so the theory goes.

The most effective defense against negligent hiring liability is that the employer did not have notice of the tortfeasor-employee’s propensities to commit the act in question. Recent cases suggest, however, that employers cannot avoid liability simply by refusing to run a criminal background check on prospective employees. Given the ever-decreasing cost of background checks and its prevalence in all industries, courts are increasingly willing to let the jury find negligence in the employer’s failure to run the background check in the first place.<sup>9</sup>

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<sup>7</sup> Licensed regulated under the California Labor Code are in Division 2, Part 6—and include farm labor contractors and talent agencies,

<sup>8</sup> See Appendix II for excerpts from a memorandum prepared for Goodwill Industries International, Inc. by its in-house counsels.

<sup>9</sup> See generally *Blair v. Defender Services, Inc.*, 386 F.3d 623, 629 (4th Cir. 2004) (permitting a negligent hiring claim to survive summary judgment because jury may find the employer was negligent for failing to run a criminal background check of an employee); *Keibler v. Cramer*, 36 Pa. D. & C. 4th 193, 196-97 (1998) (holding a plaintiff stated a cause of action for negligent hiring against an employer for failing to run a criminal background check of an employee who later raped the plaintiff).

*TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 USC §§ 2000E ET. SEQ.*

Title VII and Labor Code regulate *employers*, while ICRAA/FCRA regulates *CRAs*. Title VII is enforced by the U.S. Equal Employment Opportunities Commission (EEOC), which can investigate both private and public employers but can only litigate against private ones.<sup>10</sup> Enforcement of ICRAA/FCRA against CRAs is generally left to individuals and/or state attorney generals. See below for enforcement of these laws.

42 USC § 2000e-2(a)(1) makes it unlawful for covered employers<sup>11</sup> to discriminate against an individual “because of such individual’s race, color, religion, sex, or national origin.”

In *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, the US Supreme Court found that “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” Further, in *Green v. Missouri P. R. Co.* (8th Cir., 1975) 523 F.2d 1290, the court found that the disparate impact of the criminal justice system on blacks operates to exclude them from employment and that, therefore, denial of employment based on a person’s conviction history must be shown to be related to job performance, a.k.a. “business necessity,” which is proven by showing a “nexus” between (1) the nature and severity of the offense(s) and (2) the nature of the position sought, while taking into consideration (3) the passage of time since the last offense(s). The current EEOC guideline incorporates the holding of the Green Court almost verbatim.<sup>12</sup>

Recently, in *El v. SEPTA* (3rd Cir., 2007) 479 F.3d 232, the court found that a legitimate business necessity exists to exclude a black man with a 40-year old conviction for second-degree murder from driving a paratransit bus—because no evidence was offered by El’s attorney to rebut the defense expert witness testimony that a nexus could be found.<sup>13</sup>

In addition, the court in *El v. Septa* strongly advised EEOC to support its guideline by careful research. Accordingly, EEOC has been conducting research to revise the guideline. Most recently, EEOC held a Meeting of the Commissioners on July 26, 2011 on Arrest and Conviction Records as a Hiring Barrier.<sup>14</sup> As of the date this handbook was printed, EEOC has not issued its finding or revised the guideline as a result of its research.

EEOC actively investigates use of criminal records in employment context as part of its E-RACE Initiative<sup>15</sup> and has had a number of settlements against major employers.<sup>16</sup>

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<sup>10</sup> Litigation of Title VII claims against government agencies is carried out by the Civil Rights Division of the U.S. Dep’t of Justice, which has a complete discretion whether to do so or not for any given case.

<sup>11</sup> 42 USC § 2000e(b) defines “employer” as “a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”

<sup>12</sup> See EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (2/4/87) (“EEOC Policy Statement”), located at <http://www.eeoc.gov/policy/docs/convict1.html>.

<sup>13</sup> Other published Title VII cases do not give the impression that it is a robust cause of action. See generally *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), *aff’d*, 468 F. 2d 951 (5th Cir. 1972); *EEOC v. Carolina Freight Carriers Corp.*, 723 F.Supp. 734 (S.D.Fla.1989); *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, L.L.P.*, 537 F. Supp. 2d 1028 1031 (W.D. Mo. 2008).

<sup>14</sup> Located at <http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm>.

<sup>15</sup> Located at <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm#goal3>.

<sup>16</sup> See, e.g., <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

ICRAA(Cal. Civ. Code § 1786 et seq.) /FCRA (15 USC § 1681 et seq.)

ICRAA/FCRA	
CRAs	User (e.g. employer)
<ul style="list-style-type: none"> <li>• CRAs may not report arrests or other adverse information more than 7 years old.<sup>17</sup></li> <li>• CRAs must use “<u>reasonable procedures</u>” to insure “maximum possible accuracy” of the information in the report.<sup>18</sup></li> <li>• A CRA reporting public record information for employment purposes which “is likely to have an adverse effect on the consumer’s ability to obtain employment” must either:                             <ul style="list-style-type: none"> <li>○ notify the person that the public record information is being reported and provide the name and address of the person who is requesting the information, or</li> <li>○ the CRA must maintain <u>strict procedures</u> to insure that the information it reports is complete and up to date.<sup>19</sup></li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• The employer must provide a <u>clear written notice</u> to the job applicant that it may obtain a consumer report.<sup>20</sup></li> <li>• The user also must obtain <u>written authorization</u> from the consumer to get the report<sup>21</sup> and provide a <u>box</u> on the (job application) form to ask the consumer whether he wants a copy of the background check report.<sup>22</sup> If checked, the user must provide a copy within 3 business days.<sup>23</sup></li> <li>• If the employer intends to take adverse action based on the consumer report, a copy of the report and a FTC Summary of Rights must be provided to the job applicant <u>before the action is taken</u>.<sup>24</sup></li> <li>• If an adverse action is taken, the user must <u>notify the consumer</u> that an adverse decision was made as a result of the report and must provide the CRA’s contact info and the right to dispute the accuracy or completeness of the report.<sup>25</sup> The user must also provide a copy of the public record contained therein regardless of the consumer’s previous waiver.<sup>26</sup></li> </ul>

<sup>17</sup> Civ. Code § 1786(a). The 7-year rule does not apply to conviction records under FCRA (though it applies to records of arrest not leading to conviction), and individuals whose annual salary exceeds \$75,000 are not covered by FCRA either. 15 U.S.C. §§ 1681c(a)(5), 1681c(b)(3)

<sup>18</sup> 15 U.S.C. §1681e(b). Elements of cause of action: (1) Inaccurate information in report; (2) inaccuracy due to CRA’s failure to follow reasonable procedures to assure maximum possible accuracy; (3) consumer suffered injury (can include emotional injury); and (4) injury was caused by inaccurate entry. *Crane v. Trans Union*, 282 F.Supp.2d 311 (E.D. Pa. 2003)(Dalzell) (citing *Philin v. Trans Union Corp.*, 101 F.3d 957, 963 (3d Cir. 1996)).

<sup>19</sup> 15 U.S.C. §1681k; Civ. Code § 1786.28.

<sup>20</sup> 15 U.S.C. § 1681b(b)(2); Civ. Code § 1786.16(a)(2).

<sup>21</sup> 15 U.S.C. § 1681b(b)(3)

<sup>22</sup> Civ. Code § 1786.53

<sup>23</sup> Civ. Code § 1786.16(b)(1).

<sup>24</sup> 15 U.S.C. § 1681b(b)(3)

<sup>25</sup> 15 U.S.C. § 1681m(a)

<sup>26</sup> Civ. Code § 1786.53(b)(4).

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### *LABOR CODE § 432.7 & 2 CODE OF REGULATIONS § 7287.4*

These relatively unknown laws are rarely enforced. They regulate employers only and cover what information they can inquire about and how they can use it.

Employers are prohibited from seeking or utilizing the following information from any source, including a job applicant:

- Any arrest or detention that did not result in conviction, except for a pending charge<sup>27</sup>;
- A referral to, and participation in, any pretrial or posttrial diversion program<sup>28</sup>;
- Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated<sup>29</sup>; and
- Any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Pen. Code § 1203.4.<sup>30</sup>

It is clear that an employer cannot ask about arrests or about misdemeanor convictions dismissed under Pen. Code § 1203.4 on an employment application.

It is less clear but may be argued that an employer also cannot ask about any conviction, felonies included, that have been dismissed under Pen. Code §§ 1203.4, 1203.4a. And, arguably, it is also illegal for them to receive a background check report from a CRA that includes these excluded records.<sup>31</sup>

## PUBLIC EMPLOYMENT

The defining characteristic of a public agency for our purpose is that they can order a fingerprint-based background check from the California Dep't of Justice through Livescan, which is regulated under Pen. Code §§ 11105 *et seq.*

Both the County of Los Angeles and the City of Los Angeles require that job applicants go through a Livescan process. However, since they are covered under Pen. Code § 11105(p)—the catch-all subsection—they are not authorized to obtain records of arrests not leading to conviction.

Of the laws discussed so far, ICRAA and FCRA do not apply to public agencies, but some difficulties remain in terms of applying Title VII and Labor Code § 432.7 to public agencies.

Although Labor Code § 432.7 broadly proscribes the use of arrest records not leading to conviction, a number of exceptions exist to allow public agencies, especially licensing agencies, to inquire after and consider such records. For example, law enforcement agencies and licensed care facilities are allowed to do so<sup>32</sup>, provided that they conduct an independent investigation into the facts of the

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<sup>27</sup> Labor Code § 432.7(a); 2 Code of Reg. § 7287.4(a)

<sup>28</sup> Labor Code § 432.7(a); 2 Code of Reg. § 7287.4(c)

<sup>29</sup> 2 Code of Reg. § 7287.4(b)

<sup>30</sup> 2 Code of Reg. § 7287.4(b)

<sup>31</sup> *See also* Civ. Code § 1786.20(c). 2 Code of Reg. § 7287.4 is part of California's equal employment opportunities regulations, implemented under Fair Employment and Housing Act.

<sup>32</sup> Pen. Code § 11105(m)

arrest before making a decision based on the record.<sup>33</sup> In addition, cases that have been dismissed under Pen. Code § 1203.4/1203.4a are reported through Livescan. See below for Occupational Licensing.

EEOC does not have the power to litigate a claim under Title VII against a public agency. Such litigation must be performed by the Civil Rights Division of the U.S. Department of Justice at its discretion. See below for Enforcement.

### *SUBSTANTIVE DUE PROCESS*

*Kindem v. Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980) held that the plaintiff-employee's due process liberty interest was impaired when the City of Alameda denied him employment based solely on a blanket policy against hiring anyone with a felony conviction.

### *EQUAL PROTECTION*

*Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977); and *Furst v. New York City Transit Authority*, 631 F. Supp. 1331 (E.D. N.Y.1986) held that absolute prohibition on public employment or licensing of people convicted of felony violates equal protection. On the other hand, *Schanuel v. Anderson*, 546 F. Supp. 519, 526 (S.D. Ill. 1982) held that the state law barring people convicted of felony from working as an armed guard or investigator for 10 years, does not violate equal protection.

### *COUNTY OF LOS ANGELES*

The "Constitution" of the County of Los Angeles is its charter. The legislation passed by its Board is codified in its municipal code, and there may be various rules and policies that implement the municipal code through its various departments.

In the employment context, the Los Angeles County Charter gives near-complete authority to administer the County's hiring practice to the Director of Personnel, a.k.a. Department of Human Resources. Article IX, Charter § 32 provides:

The Board of Supervisors shall appoint the Director of Personnel who shall under the general direction of the Board of Supervisors, administer the Civil Service system in accordance with the provisions of this Charter and the Civil Service Rules. The Director of Personnel shall, under the direction of the Board of Supervisors, perform such other duties as may be prescribed by said Board pursuant to the provisions of Section 22¾ hereof. The Director of Personnel shall appoint all assistants, deputies, and other persons in the department.

There is no explicit provision in either the charter or the municipal code (with the exception of one<sup>34</sup>) that bars anyone convicted of crime from working for the County of Los Angeles. However, the Director of Personnel has the broad discretion to deny employment to anyone convicted of a crime.<sup>35</sup>

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<sup>33</sup> Labor Code § 432.7(b); Health & Safety § 1522(e)

<sup>34</sup> People convicted of worker's comp fraud is barred from employment in LA County. Los Angeles County Municipal Code, Title 5, Chapter 12, Section 110.

<sup>35</sup> Los Angeles County Civil Service Rules 6.04.

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The director of personnel, subject to the right of any person aggrieved to appeal to the commission as provided in Rule 4, may refuse to accept an application or to examine an applicant, or may<sup>36</sup> withhold the name of a person from the eligible list or an eligible from certification, or after notice may remove the name of an eligible from the eligible list:

E. Who has been convicted of a crime;

It should be noted that the County allows the Director of Personnel to delegate his authority to other departments.<sup>37</sup> In practice, the Department of Human Resources has in fact delegated his authority to screen out people with conviction history to about half of the other departments in the County. And, accordingly, in practice, the County of Los Angeles has no consistent policy to guide the hiring of people with conviction history.

In theory, there is a Resolution adopted by the Board of Supervisors on 11/10/1998 regarding access of criminal history information in connection with employment in sensitive positions. Pursuant to the Resolution, the Department of Human Resources issued a policy number 514, titled "Designation of Sensitive Positions and Requirements for Criminal History Information," on 11/25/1998.<sup>38</sup>

### *CITY OF LOS ANGELES*

Similarly, the City of Los Angeles has its own charter, municipal code, rules, and policies. The relevant basic structure of the LA City government is as follows, in a descending order of (generally) binding authority.

- City Council legislates through ordinance.<sup>39</sup>
- Mayor sets policies through an executive directive<sup>40</sup> and manages all departments with his inherent management power.<sup>41</sup>
- Board of Civil Service Commissioners<sup>42</sup> (Board) sets Civil Service Rules ("Rules"), which regulates the city's civil service examination.
- Chief Administrative Officer of the Personnel Department<sup>43</sup> (CAO) sets Policies of the Personnel Department ("Policies"), which specified in detail how the civil service examination is carried out.

Note that the Los Angeles City Charter ("Charter") specifies that the Board shall set the Rules to regulate civil service examination, including checking an applicant's moral character.<sup>44</sup> The Board has not specified in the Rules a particular procedure for conducting a conviction history

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<sup>36</sup> "May' means ability or power to act at one's discretion." Los Angeles County Civil Service Rules 2.323.

<sup>37</sup> Los Angeles County Civil Service Rules 3.03.

<sup>38</sup> Appendix III.

<sup>39</sup> City of Los Angeles Charter §§ 240, 250 *et seq.*

<sup>40</sup> City of Los Angeles Charter § 231(j)

<sup>41</sup> City of Los Angeles Charter § 230, 231(a)

<sup>42</sup> City of Los Angeles Charter § 245

<sup>43</sup> City of Los Angeles Charter §§ 510, 542

<sup>44</sup> City of Los Angeles Charter §§ 1004, 1005

background check, except to state that a conviction history may disqualify an applicant at any time prior to appointment.<sup>45</sup>

As in the County of Los Angeles, the real substance of considering criminal history for the purpose of employment is set in Policies of the Personnel Department (“Policies”), which further specifies in detail the process by which a person’s conviction history will be analyzed for employment purpose.<sup>46</sup> Again, as in the County of Los Angeles, no ordinance and/or executive directive regulates in the area of background check, except the odd instance of prohibiting the hiring of supervisory staff at a teen dance with a conviction in the past 5 years.<sup>47</sup>

## OCCUPATIONAL LICENSING

Each licensing agency has a particular Code of Regulations provision that deals with the licensing of people with conviction history. It is important to note, also, whether a particular occupational license may be granted as a probationary license despite a problematic conviction record.<sup>48</sup>

There are over 40 licensing agencies regulating 130 occupational licenses in the State of California.<sup>49</sup> Although only about 1/3 of these are directly under the Dep’t of Consumer Affairs and regulated by Bus. & Prof. Code § 480, up to half of all licenses track the language of that section. Of those that do not, obtaining a criminal record exemption to work in a licensed care facility is by far the most common “licensing” type and is covered under Health & Safety Code § 1522.

### *BUSINESS & PROFESSIONS § 480*

Bus. & Prof. § 480(a)(3)(B) requires that a denial of license be based on a finding that “the crime or act is substantially related to the qualifications, functions, or duties of the business or profession for which application is made.”<sup>50</sup> Generally, convictions can’t be attacked collaterally, and dismissal under Pen. Code § 1203.4 is irrelevant.<sup>51</sup>

It is the licensing agency’s burden to prove that such a substantial relationship exists. Once it’s met, the burden shifts to the license applicant to prove, by preponderance of evidence, that he is now sufficiently rehabilitated to warrant the issuance of the license.

For the purpose of writ of administrative mandamus to review the licensing agency’s decision in a superior court, denial of a new license application and revocation of an existing license may be treated differently, depending on whether the decision “substantially affects fundamental vested rights and thus requires independent judgment review.”<sup>52</sup> While the same “abuse of discretion”

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<sup>45</sup> City of Los Angeles Civil Service Rules § 3.5(e)

<sup>46</sup> Appendix IV. Los Angeles City, Department of Personnel Policies § 1.3

<sup>47</sup> Los Angeles Municipal Code § 103.118(q)

<sup>48</sup> For example, 2008 AB 2523 allowed a number of licensing agencies under the Dep’t of Consumer Affairs to issue a probationary license to new applicants.

<sup>49</sup> Jonathan Cantu & Joan Petersilia, A Survey of Employment Sactions Imposed Upon Ex-Offenders by California Law (1/27/2006), located at [http://www.law.stanford.edu/program/centers/scjc/workingpapers/JCantu\\_06.pdf](http://www.law.stanford.edu/program/centers/scjc/workingpapers/JCantu_06.pdf).

<sup>50</sup> See generally *Pieri v. Fox* (4th App. Dist, 1979) 96 Cal.App.3d 802 for analysis of the section.

<sup>51</sup> With one exception. The dismissal can be used as evidence of rehabilitation. See *Clerici v. Dep’t of Motor Vehicles* (5th App. Dist, 1990) 224 Cal.App.3d 1016, 1021.

<sup>52</sup> *Bixby v. Pierno* (1971) 4 Cal. 3d 130, 144. Compare *Wahl v. Division of Real Estate* (3rd App. Dist, 1961) 197 Cal.App.2d 97, 100 (holding that the superior court’s review of denial of a real estate license application in a

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standard applies under Code of Civ. Proc. § 1094.5(b), a new license applicant likely has no vested fundamental interest in the license, so the superior court will review evidence under the “substantial evidence” test. However, an existing licensee has a fundamental vested right in the license being revoked, and the court will utilize the more favorable independent judgment review, *a.k.a.* “weight of the evidence” test under Code of Civ. Proc. § 1094.5(c).<sup>53</sup>

### *HEALTH & SAFETY § 1522*

To work in a licensed care facility, one must obtain a criminal record exemption from the Dep’t of Social Services, using the guideline of Health & Safety Code § 1522, which does *not* track the language of Bus. & Prof. § 480. Instead, like most licenses *not* covered under Bus. & Prof. § 480, it has a list of (1) offenses for which an exemption cannot be granted; and (2) offenses for which an exemption may be granted at the department’s discretion. The defining characteristic of these types of licenses is that dismissal under Pen. Code § 1203.4/1203.4a and/or COR may change the status of some non-exemptible offenses into exemptible ones.

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mandamus proceeding requires the court to exercise independent judgment on the evidence) *with Donley v. Davi* (3rd App. Dist, 2009) 180 Cal.App.4th 447, 455-56; *Harrington v. Dep’t of Real Estate*, 214 Cal.App.3d 394, 404 (holding that “an attempt to obtain a license to engage in a profession” does not involve a fundamental vested right and therefore applying substantial evidence standard).

<sup>53</sup>

## ENFORCEMENT

### EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION (EEOC)

In California, the statute of limitation on filing a claim based on Title VII disparate impact theory is 300 days from the date of the last act of discrimination. Filing an EEOC intake questionnaire with EEOC within 300 days satisfies the filing requirement. The intake questionnaire is available online at <http://www.eeoc.gov/form/>. Although the California Department of Fair Employment and Housing (DFEH) is in charge of enforcing an equivalent law (the Fair Employment and Housing Act, Gov't Code §§ 12900 *et seq.*, which explicitly tracks Title VII of the Civil Rights Act of 1964) in this state, in practice it routinely refers Title VII cases based on conviction history to EEOC.

You cannot file a Title VII claim in court without a right-to-sue letter from EEOC (or DFEH, which always forwards the claim to EEOC anyway). By law, a claim under Title VII must first be investigated by EEOC and the process be exhausted, before it can be brought to the court.

EEOC assigns an investigator to each claim, and the investigator can take a long time in collecting sufficient evidence to make a finding of discrimination—anywhere between 6 months to a year. Once the investigation is complete, EEOC issues its finding. If a finding of discrimination is made, EEOC will attempt to settle the claim between the complainant and the defendant. If no settlement is offered, EEOC may decide to file a Title VII claim on behalf of the claimant in court. At any state, if EEOC decides not to pursue the claim any further, it will issue a right-to-sue letter, giving the claimant a right to file his claim in court.

Remember that, although EEOC does not have the authority on its own to litigate a claim against a public entity, it can investigate it. Often, investigation alone is sufficient to bring about a relief.

See Appendix II for “California Workers with Criminal Records: Know Your Employment Rights” flyer for information on the LA District Office of the U.S. EEOC.

### PRIVATE LITIGATION

Although a private right of action exists for violations of Title VII, ICRAA/FCRA, and/or Labor Code, there are relatively few claims brought through private litigation—due mostly to (1) the relative obscurity and ambiguity of these laws and (2) difficulty in proving a claim (which translates into a high cost of investigation and a low return on investment for contingency-fee attorneys).

Most private litigation in reentry law is focused on 2 areas: Title VII class action lawsuits and ICRAA/FCRA claims. Until these laws become more settled, it is difficult to expect private attorneys to take on claims based on them. However, there is a real potential for recovery of damages on claims of ICRAA violations under Civ. Code § 1786.50, which authorizes award of (1) actual damages or (2) \$10,000, whichever is greater.

Note that Civ. Code § 1786.50 imposes strict liability, not a standard for negligence, for violations of ICRAA. Whereas a traditional negligence claim proceeds in 4 elements (duty, breach, causation, and damages), claims under ICRAA do not require proof of negligence and/or causation.<sup>54</sup>

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<sup>54</sup> This is contested by CRAs, who point to the “reasonable procedure” language in Cal. Civ. Code § 1786.20(a), to argue that proof of negligence is required.

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However, proving causation, i.e. that an adverse employment decision was made based on a person's background check report, is very difficult—because it is very easy for an employer to argue that a person was not hired for a reason other than his/her conviction history.

The statute of limitation on bringing an ICRAA claim is 2 years from the date of the release of the report. And, at minimum, one must have a copy of the report made to the employer in order to verify violations of various ICRAA provisions, including the 7-year limitation. On almost all ICRAA claims against a CRA, there will likely be claims of violations of Labor Code § 432.7 and 2 Code of Regulations 7287.4 against the employer.

### ADMINISTRATIVE HEARINGS

After an initial denial based on the information disclosed on a license application and the result of a Livescan, the licensing agency will request (if the person is eligible for the license at the agency's discretion) that more thorough information be provided to determine (1) the nature of the conviction and (2) the person's rehabilitation. Typically, police reports and case dockets are requested to assess the nature of conviction(s), and the applicant's letter explaining the conviction(s) and reference letters. Any document submitted to the licensing agency is likely going to end up being used against the license applicant at a later administrative hearing before an administrative law judge (ALJ).

The basic flow of the licensing application process for an applicant with conviction history looks something like this:

[application] → [Livescan]  
.  
→ [initial denial] → [appeal + evidence] → [dep't review]  
.  
→ [dep't denial] → [notice of defense] → [hearing]  
.  
→ [ALJ denial] → [appeal to Superior Court]

Keep in mind that no one really cares to read the evidence submitted to a licensing agency; however, the evidence must be submitted to move the case along anyway. The first time that anyone will closely read the evidence is after a notice of defense has been filed. In the vast majority of cases, an attorney from the California Attorney General's Office will review the evidence and make an initial recommendation to the licensing agency. If the agency rejects the recommendation or the attorney feels that the license should be denied, the case will be scheduled for an administrative hearing before an ALJ.

Many cases terminate before coming to an ALJ, however, through "stipulated settlement" and a grant of a probationary license. Stipulated settlement involves the applicant's admission of a disqualifying conviction or convictions and a grant of the license with terms of probation, often involving quarterly reporting requirements.

## REAL-WORLD APPLICATION

### WARNING: UNAUTHORIZED PRACTICE OF LAW

Whether you're doing a client-intake at Reentry Legal Clinic or just shooting the breeze with perfect strangers at a bus stop, it is important to remember that, unless you are licensed to practice law and an active member of the State Bar in the State of California, you should be wary of unauthorized practice of law (UPL). It is a misdemeanor, punishable by up to one year in county jail or a fine up to \$1,000. Bus. & Prof. § 6126(a).<sup>55</sup>

- Make sure that you *never* hold yourself out to be an attorney.
- Do not give individualized legal advice.
  - Do not even think about starting a sentence with “You should” or “In your case.”
  - Make no recommendation as to which course of action the person should take.

### OVERVIEW

As you interact with an individual with conviction history in your capacity as a certified volunteer or a community organizer, the interaction will necessarily include the following 3 components: (1) interview for fact-gathering, (2) issue-spotting to share relevant information, and (3) organizing to connect the individual to a larger movement building.

Although these three components do not necessarily have to happen in the order given above, they generally do. In short, you will talk to the individual to draw out a larger picture of what claims he might have. Then you will spend some time to spot which applicable laws to share with the individual. Finally, you will introduce All of Us or None as a logical next step to both enforce and expand his rights.

### INTERVIEW

Everyone, including you and me, shares a tendency to portray facts in a light most favorable to himself. And we also know that one's conviction history is probably one of the most private and personal facts that one person can share with another. Given this privacy concern and our general bias against objectivity, the interviewer at the clinic tends to sacrifice the need for accuracy and completeness and shy away from asking “tough” questions. You can safely assume, however, that the court won't be as sympathetic to the interviewee's story—hence our need to elicit accurate and complete information from the person we interview at the clinic, no matter how uncomfortable we may feel.

In addition, the need for more accurate information can conflict with the need for confidence and trust required for sharing of a person's story. When such a conflict occurs, it is better to err on the side of preserving the confidence and trust of the individual. Another way of describing this is that you should push the person's confidence and trust as far as you can without breaking it, in order to gain the most accurate information possible.

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<sup>55</sup> See generally LA County Office of the District Attorney, Unauthorized Practice of Law: Manual For Prosecutors (2/2004), located at <http://www.caught.net/prose/uplpublic.pdf>

## Reentry Legal Clinic: Certified Volunteer Program

- (1) Don't ever leave the other person with the impression that you are an attorney, unless you really are an active member of the California State Bar.
- (2) Assure the person that you will not divulge anything you hear from him without his prior consent. And follow up on that verbal assurance with action, i.e. really don't divulge it unless you get a prior consent. Even if you are not bound by an attorney-client privilege, act as if you were. Confidentiality, confidentiality, confidentiality.
- (3) Do not take for granted that the person in front of you should give you his trust. You must take proactive measures to ensure that the person finds you friendly and trustworthy. You can earn their trust by actively building empathy (e.g. by sharing your connection to the community of people with conviction history) and demonstrating it by active listening.
  - a. Don't say "I understand what you're going through." Say "I see" or "I understand."
  - b. Do share your story. But see (a) above.
- (4) Don't check your common sense at the door. If something doesn't make sense, ask questions. You don't have to be rude about it, but be firm. Do not gloss over inconsistencies, but give them an ample opportunity to reconcile them.
- (5) Memorize some open-ended questions and prompts to get an interview going.
  - a. And then what happened?
  - b. Why did you...?
  - c. I'm sorry, but I don't understand. Did you mean...?
- (6) It helps a lot if you can do a rough timeline of events as you perform the interview. Even if you cannot, make sure you understand the relative time frame of each event.

## ISSUE SPOTTING

Unless you know the facts, you won't know which information the other person will likely find useful. As you gather the facts, you can start figuring out which area of the law applies and which potential claims and enforcement mechanisms apply.

Private employment?  
Public employment?  
Occupational licensing?

### **Private Employment:**

ICRAA/FCRA  
→ litigation

Title VII  
→ EEOC

Labor Code § 432.7  
2 CCR § 7287.4  
→ litigation / AG / DFEH

### **Public Employment:**

Livescan result:  
→ DOJ (inaccuracy check)

Title VII  
→ EEOC

DP; EP; Labor Code § 432.7; 2  
CCR § 7287.4  
→ litigation / AG / DFEH

### **Occupational Licensing:**

Livescan result:  
→ DOJ (inaccuracy check)

Administrative remedy:  
→ licensing agency  
→ settlement with AG's office  
→ ALJ

## COMMUNITY ORGANIZING

### *WHAT IS COMMUNITY ORGANIZING?*

In simplest terms, community organizing is (1) connecting a significant number of people (2) to participate in a collective action (3) in pursuit of a common goal. Absent from this simple definition is any assumption about the present existence of a community, because, community organizing often starts by reaching out to and organizing a large number of disparate individuals into a community that shares a common interest.

First and foremost, community organizing needs a common purpose—something toward which to build a community. It is not necessary that a particular collective action be determined prior to building of a community to participate in it. In fact, it is often the case that the community, once formed for a common purpose, will decide on a collective action to take in pursuit of that purpose. Necessarily, then, it is the nature and scope of the common purpose that will determine the nature and scope of the community. And it is the nature and scope of the collective action that will determine how many individuals will constitute “a significant number,” as “significant” is defined as what is necessary to effectively carry out the collective action.

There are many forms that participation in a collective action can take. A collective action itself can take many forms. What is important is that everyone participates and has a sense of belonging to a cohesive collective action. In the prototypical example of Montgomery Bus Boycott, the collective action was the boycotting of the public transportation system. And there were various ways for members of the campaign to participate. Some drove taxi cabs at a reduced fare. Some raised money to support the movement. However, they were all aware that their various participations formed a collective action of boycotting the public bus system in Montgomery.

### *REENTRY LEGAL CLINIC AND COMMUNITY ORGANIZING*

Since its inception in 2006, the partnership between the Critical Race Studies Program at the UCLA School of Law and A New Way of Life Reentry Project was meant to advance the cause of “prisoner reentry” through education and advocacy, not necessarily through provision of direct legal services. In particular, one of the central designs of the partnership was to leverage academic resources of the school to educate and train community members with conviction history in Los Angeles County regarding various laws affecting their lives, including employment and housing. And the main hope was that such community education would result in effective policy advocacy driven by the community members themselves.

Although the partnership was successful in institutionalizing Reentry Legal Clinic over the years, truth is that it wasn’t as successful in bringing about the hoped-for community empowerment and policy advocacy. At the most fundamental level, the Clinic has failed in collecting a significant number of people to one cohesive whole, despite the fact that it serves more than 300 people a year. In addition, it failed to come up with meaningful ways for interested individuals to participate in All of Us or None. These failure remain serious problems for the Clinic to solve in the coming years.

### *LAW AND COMMUNITY ORGANIZING*

## Reentry Legal Clinic: Certified Volunteer Program

“While the positional ambivalence of lawyer-organizers may foster a self-critical awareness that enhances their ability to work in grassroots settings, it can just as easily produce a sense of role confusion that is demoralizing and causes them to doubt their own efficacy.” Scott Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 495 (2001).

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