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### Title

The Classification of Race, Ethnicity, Color, or National Origin (CRECNO) Initiative:A Guide to the Projected Impacts on Californians

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or National Origin (CRECNO) Initiative



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or National Origin (CRECNO) Initiative:  
A Guide to the Projected Impacts on Californians

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## Executive Summary

### **The Initiative**

Californians are scheduled to vote on the Classification of Race, Ethnicity, Color, or National Origin (CRECNO) Initiative in a special recall election on October 7, 2003. If passed by voters, the initiative will amend Article I of the California Constitution effective January 1, 2005, banning the state from classifying any individual by race, ethnicity, color, or national origin, except for certain purposes or under specified circumstances.

CRECNO defines “classifying” as “separating, sorting or organizing . . . including, but not limited to, inquiring, profiling, or collecting such data on government forms.” Classification by race, ethnicity, color, or national origin will still be allowed under the following circumstances:

- If the governor and a two-thirds majority of both houses of the legislature decide that classification in state operations *other than* public education, public contracting, and public employment serves a “compelling state interest.”
- Classification by the Department of Fair Employment and Housing (DFEH) for 10 years after the effective date of CRECNO. DFEH investigates individual complaints of discrimination.
- Classification of medical research subjects and patients.

- The description of suspects in order to aid law enforcement officers in their regular duties. This information cannot be aggregated or tracked to individuals.
- The assignment of prisoners to correctional facilities and cells, and assignments to undercover law enforcement officers.
- Classification that is mandated by federal law.
- Classification that is necessary in order to maintain or establish eligibility for a federal program in order to prevent a loss of federal funds.
- Classification that is mandated by any valid consent decree or court order in force as of the effective date of CRECNO.

### **Program and Policy Level Outcomes**

CRECNO data are used at the program and policy level to identify population characteristics and trends, target and address disparities among different populations, and determine, prevent, and enforce against patterns and practices of discrimination. This report focuses on the program and policy impacts of CRECNO in four main areas: (1) education, (2) public health, (3) law enforcement, and (4) housing and employment discrimination.

#### **Education**

K-12 education mainly uses CRECNO data in order to detect and address achievement gaps amongst different groups, and to integrate schools. Since the federal No Child Left Behind Act mandates much of the data collection that they use to track performance, schools will not be substantially affected in their efforts to address achievement gaps amongst different CRECNO groups. But to the extent that schools will be affected by the initiative, they will rely on other perceived indicators of CRECNO classification such as language, socio-economic status, and neighborhood of residence in order to integrate schools and classrooms.

Postsecondary education primarily uses CRECNO information for research and admissions. Faculty and research centers at California universities classify individuals by CRECNO in their own studies and also rely on statistical information using CRECNO data from state

agencies. CRECNO will hamper research that utilizes state data because these will no longer be available. In addition, if the courts decide that faculty members are included in the definition of “the state” under CRECNO, individual faculty may be restricted from classifying by CRECNO in their original research. This restriction could limit the academic freedom of faculty members and affect recruitment and retention programs by state universities. Under CRECNO, admissions departments will likely rely on other perceived CRECNO indicators, such as socio-economic status and other clues provided by applicants in their personal statements and lists of extracurricular activities. The state will not be able to monitor compliance with Proposition 209 if the initiative passes.

### **Public Health**

Despite the exemption for “medical research subjects and patients,” CRECNO will greatly impact the field of public health. “Medical research” is widely recognized as research intended to evaluate the effectiveness of particular drugs or procedures on a limited number of subjects. Public health, on the other hand, uses population-based surveys to identify and address health hazards and disparities within and across specific populations through research, education, outreach, and prevention.

While the federal government issues many guidelines and recommendations regarding the collection of CRECNO data for public health purposes, only five federally funded programs in California *require* CRECNO data collection. As a result, the vast majority of public health programs and research that use data on race, ethnicity, color, and national origin will no longer be able to collect these data or use such information to target programs. Since public health research and programs are generally acknowledged as cost-effective, the inability to efficiently target public health funds may well result in increased costs to the state. It is likely that public health advocates will lobby the California legislature to override the ban on CRECNO classification in public health with a two-thirds vote.

**Law Enforcement**

Under CRECNO, law enforcement agencies' use of CRECNO classifications will be limited to describing individuals for the purpose of identifying suspects and assigning undercover officers to prisoners. Currently, there are three main uses of CRECNO data under law enforcement: (1) monitoring and analyzing hate crime trends, (2) targeting education and outreach programs regarding hate crimes, and (3) identifying and addressing patterns and practices of racially biased police misconduct, such as racial profiling.

Hate crimes and racial profiling will remain illegal under CRECNO, and officers will still be required to undergo training on both of these issues. However, with the exceptions of agencies dependent on CRECNO data collection for federal funding or mandated by consent decrees to collect CRECNO data, data collection on hate crimes and racial profiling will cease. As a result, hate crime prevention and outreach programs will likely rely largely on anecdotal evidence to determine which communities are most in need. Law enforcement agencies will be unable to prove or disprove whether racial profiling is taking place. This reduced accountability may well result in increased discrimination by individual officers.

**Employment and Housing Discrimination**

Data on the classification of race, ethnicity, color, or national origin by California's Department of Fair Employment and Housing (DFEH) is exempt from CRECNO for 10 years after the initiative's date of effectiveness. After the expiration of the 10-year sunset provision, the exemption will likely be considered for extension. DFEH is mainly responsible for investigating claims of discrimination in employment and housing. To facilitate investigation and to discourage discriminatory practices by employers, DFEH collects CRECNO data on workforce composition from all employers (public and private) with one hundred or more employees, and from public contractors. DFEH also has the authority to collect CRECNO data to investigate claims of discrimination against employers with five or more employees and against individuals or agencies involved in the rental, sale, financing, or management of housing.

If the exemption is not extended after 10 years, DFEH will no longer be able to collect these data. As a result, DFEH will likely rely more on

anecdotal versus empirical data in order to prove patterns or practices of discrimination. In addition, DFEH currently compares the representation of certain groups in a company with the group's representation in the surrounding community. Demonstrating a disproportion of one group over another is one strategy by which DFEH makes the case for "disparate impact," a situation in which allegedly neutral employment policies actually disadvantage one group over another.

### **Personal and Social Impacts**

Many Californians will decide whether or not to vote for CRECNO based on how they perceive it will affect them in terms of their privacy, identity, and how they are treated in relation to others. The outcomes of CRECNO on privacy will vary from individual to individual based on how they feel regarding the government's role in CRECNO data collection, and whether or not they feel pressured to classify themselves on state forms. Many people may frame the debate on CRECNO over whether or not they believe it will lead to a more colorblind society. The outcomes implicitly assessed under this question regard identity and differential treatment. People will continue to both self-identify and be identified with certain groups under CRECNO. In addition, people will likely continue to discriminate because of their reliance on assumptions about people based on perceived CRECNO-related characteristics. Most importantly, the formal eradication of CRECNO classification will not likely substantially change the actions of people who feel strongly about and/or engage in practices that are firmly rooted in differential treatment.



## Part I: Introduction

In the next statewide election, Californians will vote on an initiative that is sure to attract a great deal of attention throughout the state and the rest of the nation. The Classification of Race, Ethnicity, Color, or National Origin Initiative, also known as CRECNO, would prohibit the state of California from classifying any individual by race, ethnicity, color, or national origin. If passed, the initiative could have far-reaching impacts on California's programs and policies, as well as changing the way Californians feel about individual privacy and racial identity. This report assesses how CRECNO will affect Californians should it pass.

CRECNO, formerly known as the Racial Privacy Initiative, will appear on the October 7, 2003 special recall election ballot. If passed, CRECNO will amend Article I of the California Constitution, and take effect January 1, 2005.

### **Legal Language**

The heart of the CRECNO initiative is found in Section 32 (a) of the initiative: "The state shall not classify any individual by race, ethnicity, color or national origin in the operation of public education, public contracting, or public employment." However, the impacts of the initiative will be found not only in these three primary areas, but in numerous other areas, including public health and civil rights enforcement. Assessing how CRECNO will affect these other areas

requires a close reading of the legal language of the initiative. To provide a starting point for analyzing CRECNO, we have reprinted the initiative on the following pages in its entirety:

**Prohibition Against Classifying by Race by State and Other Public Entities**

Section 32 is added to Article I of the California Constitution as follows:

Sec. 32

(a) The state shall not classify any individual by race, ethnicity, color, or national origin in the operation of public education, public contracting or public employment.

(b) The state shall not classify any individual by race, ethnicity, color or national origin in the operation of any other state operations, unless the legislature specifically determines that said classification serves a compelling state interest and approves said classification by a 2/3 majority in both houses of the legislature, and said classification is subsequently approved by the governor.

(c) For purposes of this section, “classifying” by race, ethnicity, color or national origin shall be defined as the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms.

(d) For purposes of subsection (a), “individual” refers to current or prospective students, contractors or employees. For purposes of subsection (b), “individual” refers to persons subject to the state operations referred to in subsection (b).

(e) The Department of Fair Employment and Housing (DFEH) shall be exempt from this section with respect to DFEH-conducted classifications in place as of March 5, 2002.

(1) Unless specifically extended by the legislature, this exemption shall expire ten years after the effective date of this measure.

(2) Notwithstanding DFEH’s exemption from this section, DFEH shall not impute a race, color, ethnicity, or national origin to any individual.

(f) Otherwise lawful classification of medical research subjects and patients shall be exempt from this section.

(g) Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways. Neither the governor, the legislature, nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said

classifications, nor shall the governor, the legislature or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records.

(h) Otherwise lawful assignment of prisoners and undercover law enforcement officers shall be exempt from this section.

(i) Nothing in this section shall be interpreted as prohibiting action that must be taken to comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(j) Nothing in this section shall be interpreted as invalidating any valid consent decree or court order that is in force as of the effective date of this section.

(k) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, California State University, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(l) This section shall become effective January 1, 2005.

(m) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

As can be seen above, the legal language of the initiative is at times highly technical; some terms are clearly defined within the initiative, while the meaning of others is open to interpretation. Given the history of legal challenges to controversial California voter initiatives, CRECNO provisions will probably end up being challenged in the court system. In particular, it is necessary to understand that:

The "state" refers to state and local government agencies, as well as organizations and institutions that receive state funding. The initiative does not prohibit private, nongovernmental organizations and individuals from classifying individuals by race, ethnicity, color, or national origin.

If the California Legislature finds a compelling state interest to classify by race, ethnicity, color, or national origin, it may overturn portions of the initiative with a two-thirds vote in each house and governor approval.

“Classifying,” while explicitly defined in section 32 (c), may still be difficult to interpret. That is, certain actions conducted by the state may or may not be considered as “classifying” depending upon legal interpretation. For example, some debate whether the definition of “classify” includes “use” or not.

Section 32 (i) gives federal law supremacy over state law. Programs at the state and local levels that are federally mandated to collect or use CRECNO information will not be affected by this initiative. In addition, actions taken to establish or maintain eligibility for federal funding will be unaffected, but *only* in the case that ineligibility would result in a *loss* of funds to the state.

Voters should give special consideration to the exemptions outlined in CRECNO. The exemptions exclude certain governmental agencies and actions from the prohibition on classifying by CRECNO characteristics. When considering the implications of these exemptions, it is important to remember that:

Section 32 (e) exempts the Department of Fair Employment and Housing (DFEH) from classifying individuals by CRECNO characteristics for 10 years. DFEH may continue all of its normal operations for the next 10 years, except for the action of imputing CRECNO characteristics for any individual. This will be explained more thoroughly in the proceeding sections. In addition, if CRECNO passes, it is likely that the legislature would review and possibly extend this exemption after the 10-year sunset period.

The exemption regarding “medical research subjects and patients” in section 32 (f) refers to a narrowly defined type of research, which generally does not include the bulk of what is considered public health research. This point will be addressed in more detail below.

Section 32 (g) allows law enforcement officers to continue to classify individuals by CRECNO characteristics in their normal duties. This essentially allows officers to identify the race or ethnicity of a person of whom they are in pursuit.

The assignment of prisoners to cells and undercover officers are unaffected by this initiative.

Section 32 (j) states that CRECNO will defer to consent decrees and court orders that require racial classifications issued prior to the date CRECNO would take effect, January 1, 2005.

## **Why Does CRECNO Matter?**

Californians should pay special attention to CRECNO because it will affect how they, as individuals and as a society, approach, address, and are affected by issues of race. If passed, CRECNO will have impacts on programs specifically designed to address disparities amongst different CRECNO groups, on the state's ability to enforce civil rights law, and on individual notions of privacy and identity. It will have impacts on academic research, on the media's ability to report current trends and disparities across races, and on admissions applications to California's elite universities. CRECNO would redefine how we approach and are impacted by all of these issues, as well as many others.

Many of the impacts from CRECNO will have to be evaluated according to one's own subjective opinions and preferences. Throughout this report we have left this responsibility up to the reader. For example, while we assert that CRECNO will prevent K-12 schools from integrating classrooms on the basis of CRECNO classifications, it is up to the reader to decide whether or not this is a desirable outcome. We will focus the reader on major issues that should not be overlooked.

For the purpose of this report, we divide these issues into two main areas: (1) outcomes on the program and policy level, and (2) outcomes on personal and societal levels. These areas are clearly not mutually exclusive; outcomes on programs and policies will certainly impact Californians on personal and societal levels. Nonetheless, the effects of CRECNO on programs and policies are often more tangible, and an analysis of these effects will in turn enable the reader to have a better understanding of CRECNO's more ambiguous personal and societal impacts.

In California, CRECNO information is collected and used for many different reasons. Sometimes the state uses CRECNO information to identify the specific CRECNO characteristics of an individual. For example, the Department of Fair Employment and Housing (DFEH) identifies both the race of the target and the race of the attacker in requests for civil remedies submitted by victims of racially motivated hate crimes. Other times, the state aggregates CRECNO information in order to identify trends for specific populations. For example, the Department of Justice aggregates reports of racially motivated hate crimes from all California law enforcement agencies in order to compare trends in hate crimes over time.

In general, the state currently classifies individuals by race, ethnicity, color or national origin for the following reasons:

- CRECNO information helps identify population characteristics and trends.
- CRECNO information helps identify disparities among different populations.
- CRECNO information is used to create targeted programs to reduce disparities.
- CRECNO information is used to identify and enforce against civil rights violations.
- CRECNO information helps keep the government accountable by allowing its citizens to evaluate how different groups fare and are treated in society.
- CRECNO information is used to affiliate an individual with a specific group (For example, prison administrators would not want to put a Korean man in the same cell as a white supremacist).

Our discussion of the impacts of CRECNO, should it pass, largely focuses on how CRECNO information is collected and used in California. In the next section, we address several major program and policy areas that would be affected by CRECNO. Afterwards, we discuss how prohibiting the classification of individuals by race, ethnicity, and national origin may affect Californians at the individual and society-wide levels. We end this report by identifying how the passage of CRECNO in California may have national implications.

## Part II: CRECNO's Impacts on California's Policies and Programs

CRECNO would affect the operation of state programs, not only in the ways that information is collected on race, ethnicity, and national origin, but in the ways trends are reported, and the types of programs that are created to address concerns relating to specific CRECNO groups. Currently, numerous state and local government programs collect and use CRECNO information. Due to the broad wording of the initiative, CRECNO's impacts will be widespread throughout California's programs and policies. For this reason, it is extremely difficult to predict how each and every program will be affected.

We have chosen to focus our analysis on the four program and policy areas that are explicitly referred to in the proposition, though of course there will be effects in other areas too. By doing so, the analysis will focus on areas that are most likely to affect Californians. We grouped the programs and policies that we chose to look at into four areas:

- Education—"public education" is specifically mentioned in Section 32 (a) of the initiative. CRECNO could have impacts on both K-12 education as well as higher education. Because the scope of higher education is significantly different than K-12 education, impacts on the two are analyzed separately.
- Public Health—a considerable amount of debate has taken place over Section 32 (f), which exempts "medical research subjects." Our

analysis focuses on what will and will not be affected by this exemption.

- Law Enforcement—two provisions in CRECNO, Section 32 (g) and Section 32 (h), address law enforcement policies.
- Employment and Housing Discrimination—Section 32 (e) regulates the Department of Fair Employment and Housing (DFEH). DFEH is the principal state agency to investigate and enforce state civil rights. Our analysis focuses on how CRECNO may affect this agency's ability to protect Californians from discrimination in employment and housing.

Looking at how CRECNO may affect these programs and policies, we identified six questions that voters may find useful for evaluating the initiative:

- How is information pertaining to race, ethnicity, color, or national origin currently used in state policies and programs?
- How does the legal language of the proposition relate to that specific policy area?
- Which types of programs will not be affected by CRECNO?
- Which types of programs will be affected by CRECNO?
- How will state, local, and nongovernmental agencies change their behavior if CRECNO passes?
- What will be the likely overall impact on Californians?

### **Education: K-12**

The effects of CRECNO on education are presented in two sections: K-12 and higher education. This presentation most logically and clearly shows the impacts of CRECNO on specific policy areas within education.

#### *How are CRECNO data/information used in K-12 education?*

Individual schools, school districts, the California Department of Education, and the federal government use CRECNO data to analyze student populations and performance. Maintaining data on academic performance, disciplinary actions, and CRECNO characteristics, schools keep a permanent record of every attending student. CRECNO data are also collected to understand student performance on various tests such as

the Scholastic Aptitude Test (SAT), the ACT, Advanced Placement (AP) exams, and the Stanford 9.

### **System Performance**

Organizations such as the National Center for Education Studies (NCES) and the California Department of Education keep a variety of performance and population statistics based on CRECNO to help understand the strengths and weaknesses of the education system as a whole. In California, the main database which tracks this information is called the California Basic Education Data System (CBEDS). From CBEDS and other data sources, a school receives an Academic Performance Index (API) score, which helps administrators and educators to rank schools in terms of performance and to make funding decisions.

### **Identifying Achievement Gaps**

Educators and policymakers employ CRECNO data to understand achievement gaps existing in California schools. For instance, Policy Analysts for California Education (PACE), a UC Berkeley affiliated organization, currently compares CRECNO information of students taking AP, honors, and special education courses to students taking non-specialized courses. The Public Policy Institute of California (PPIC) uses state-collected CRECNO data in relation to testing, graduation, and dropout rates in several of their studies. CRECNO data help inform decision makers in designing policies and programs. In addition, school administrators rely on CRECNO data to help with integration efforts required by federal civil rights legislation and court orders.

### **Research Grant Applications**

CRECNO data are also used by organizations to apply for research grants. For example, the Poverty and Race Research Action Council administers a research grant to examine the prevalence of substitute teachers in predominantly minority schools in the Oakland School District.

*How does the legal language of CRECNO relate to K-12 education?*

*Defining “Classify”*

It is clear from the first section of this initiative, section 32 (a), that public education is an intended impact area. The degree to which public education is affected depends on court interpretations of certain clauses and words in the initiative. For example, the way in which the courts interpret the term “classify” will greatly affect CRECNO’s outcomes on K-12 education. “Classifying” is defined by the initiative as “the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms.” State organizations can use data that have already been collected by federal agencies, but it is unclear if state agencies can manipulate that data for their own purposes. This action might be interpreted as “separating, sorting, or organizing” which is prohibited under CRECNO. On the other hand, only the initial inquiry of a person’s CRECNO status may be prohibited, which would mean that subsequent manipulation of that data would be allowed under the initiative.

*“Federal Requirements”*

Section 32 (i) of CRECNO allows state and local entities to collect CRECNO data to comply with federal reporting requirements, though the extent of CRECNO data that states will be allowed to collect under federal laws is unclear. For instance, the new federal legislation “No Child Left Behind” (NCLB) requires states to report specific testing and dropout information disaggregated by race and ethnicity. The federal reporting requirements from NCLB, the Office of Civil Rights, and other federal agencies will likely cover similar areas of data collection mandated by current state regulations and programs. Although many state education programs are designed to be compatible with and to supplement federal programs, the state’s ability to collect the same CRECNO data once CRECNO passes is not guaranteed. The uncertainty lies in whether state databases will be stripped down to collect only data that the federal government requires or whether state databases that collect similar but more detailed data will be allowed to continue uninterrupted.

*What types of programs and policies regarding K-12 will not be affected by CRECNO?*

As mentioned above, programs that are required by the federal government to track CRECNO data will continue to do so if CRECNO passes. NCLB requires states to report achievement data from reading and math testing disaggregated by race and ethnicity. Schools that receive federal funding under NCLB for programs to reduce high school dropout rates will continue to record dropout data disaggregated by race and ethnicity. In addition, the National Center of Education Statistics (NCES) will continue to report the CRECNO composition of schools throughout the nation.

### **Bilingual Education and Other Language Programs**

Schools will still be able to make hiring, program design, and implementation decisions necessary to overcome language barriers if CRECNO passes. For example, schools will still be able to hire teachers and design curricula for bilingual education and other English Language Learners (ELL) programs.

*What types of programs and policies regarding K-12 will be affected by CRECNO?*

Though some achievement data will still be collected by federal reporting requirements, many indicators of achievement gaps will be lost. The California Basic Education Data System (CBEDS) will be greatly affected by CRECNO. This database keeps information on staff and student characteristics as well as enrollment and hiring practices. If CRECNO becomes law, many variables tracked by CRECNO will not be collected, such as:

- High school graduation and drop-out rates by CRECNO for schools not receiving special federal grants under NCLB
- Student enrollment in AP, honors and special education courses tracked by CRECNO characteristics
- Testing scores disaggregated by CRECNO for tests not required to assess achievement under NCLB, such as SAT, ACT, and AP exams.

### **Academic Performance Index**

The Academic Performance Index (API) uses a combination of test scores and other factors to measure the academic performance and growth of schools. Schools are measured by how much their API score improves from year to year. Funding decisions are often made based on changes in a school's score. Although CRECNO data are not used to calculate API scores, school administrators and policymakers compare schools with similar and disparate API scores by CRECNO to get a better understanding of achievement gaps.

### **Grants and Supplemental Funding**

The extent to which public and private grants that fund special programs for schools and school districts will be impacted is unclear. While CRECNO data are used by organizations to apply for research grants, in this report we were not able to fully investigate the types of data used for securing grant funding. Grant proposals may include background CRECNO data in order to persuade organizations to fund a study or a project. The loss of certain state data classified by CRECNO, such as course-taking patterns, will make securing funding more difficult for organizations like the Poverty and Race Research Action Council.

### **Integration Efforts**

Schools and school districts will not be able to use state-collected CRECNO data in school and classroom integration efforts.

*How will K-12 education likely adapt if CRECNO passes?*

#### *Achievement Gap*

Without the ability to attach CRECNO data to certain statistics, education policymakers will likely rely more on other descriptors, particularly the socio-economic status (SES) of students, to measure the achievement gap. This will in turn affect the rhetoric used by stakeholders to describe the achievement gap. For example, poor testing will be linked to certain SES indicators rather than CRECNO indicators. Categorizing student performance by their original spoken language will also be relied upon more to describe the achievement gap instead of

using CRECNO terminology. For instance, policy analysts will track the number of Spanish speakers taking AP classes rather than track the number of Latino students taking AP classes.

### **Grants and Supplemental Funding**

Applicants for grants and supplemental funding will also rely more on SES data and other descriptors, rather than on state CRECNO data, to strengthen their proposals. It is uncertain, however, how funding agencies will respond to these changes. Competition for grants is difficult. Grant requirements and criteria for funding that is specifically earmarked for California will likely cease to rely on CRECNO data under CRECNO. However, although national funding agencies will understand the new restrictions placed on California in proposals seeking to explore issues involving CRECNO, they are not likely to change the criteria they use to make funding decisions.

### **Integration Efforts**

School districts will adopt integration policies that do not use race or ethnicity, as many districts have already done. If CRECNO passes, these strategies will likely be reproduced around the state. For example, San Francisco uses a diversity index, which does not include race, but considers family income, preschool experience for incoming kindergartners, and standardized test scores for older students, a mother's education, language status, and a prior school's academic ranking, to integrate their school district.

*Overall, how will CRECNO affect K-12 education in California?*

#### *Shift to Other Descriptors*

Overall, a shift towards economic, SES indicators, and a student's first spoken language as data descriptors to replace CRECNO is probable. It will become more difficult to understand the achievement gap in California in terms of CRECNO characteristics. Although many achievement indicators will still be collected because of federal requirements, important state data on CRECNO will be lost, such as course-taking patterns, certain types of drop-out rates, and SAT, ACT,

and AP test scores. If not for federal laws like No Child Left Behind, CRECNO would have a severe impact on K-12 education.

### **Grants and Supplemental Funding**

Grants and supplemental funding for schools and organizations attempting to study or implement programs regarding CRECNO will likely be more difficult to secure, especially under national competition.

### **Personal Interactions**

Personal interactions between students, teachers, and administrators will not likely change as a result of CRECNO. Part III about “Personal and Social Impacts” will further discuss how individuals will continue to categorize, identify, and treat others in regards to CRECNO characteristics under CRECNO.

## **Higher Education**

*How are CRECNO data and information used in higher education?*

CRECNO data are used in at least six contexts in higher education:

- Academic research: many faculty members often classify individuals by CRECNO in conducting their research. Researchers also rely on statistical information generated by state agencies.
- Admissions and enrollment: universities collect CRECNO data from applicants, admits, and enrolled students. This allows the schools and the government to observe how various populations are represented in higher education. These data are also used to track the impact of both admissions policies and proposed changes to these policies.
- Financial aid: some financial aid awards involve race- and ethnic-restricted aid.
- Outreach efforts: universities and organizations use CRECNO data to target outreach efforts and to track the effectiveness of their outreach efforts.

- Faculty and academic employment: CRECNO data are collected in order to understand the demographics of the faculty and other employees and to comply with equal opportunity and nondiscrimination laws.
- Institutional planning and research: CRECNO data are collected and analyzed to determine NCAA eligibility and for other accreditation purposes.

The California Post-Secondary Education Commission collects CRECNO data and often uses them when performing analyses for the state legislature and governor. The National Center for Education Statistics also requires institutions of higher education to report CRECNO data for the integrated postsecondary education data system (IPEDS). In addition, colleges, universities, and other organizations use CRECNO data collected by the California Department of Education and the Census.

*How does the legal language in CRECNO relate to higher education?*

As mentioned in the K-12 section above, it is clear from the first section of this initiative, section 32 (a), that public education is an intended impact area. The degree to which higher education will be affected depends on court interpretations of certain clauses and words in the initiative such as “the state,” “academic freedom,” “classify,” and “federal requirements.”

### **“The State”**

The language in CRECNO directs its proscription to “the state,” including the University of California, California State University, and Community Colleges. Though it is fairly clear that the university’s administrative functions would be affected, the extent to which individual faculty members are classified as agents of “the state” is not clear. Many grants faculty members receive to support their research come to the university, and the university usually takes a share of this money to cover overhead costs. In this regard, academic researchers might be considered agents of “the state.” On the other hand, faculty decide what they will research, how to use their research, when, where,

and whether to publish. Predicting the legal interpretation of “the state” in this instance is difficult.

### **Academic Freedom**

Academic freedom is generally understood as the freedom to carry out and publish research, the freedom of teaching, the freedom to criticize the university and the faculty association, and freedom from institutional censorship. If CRECNO affects the ability of academic researchers to perform their daily research, academic freedom, which has been recognized by the court as a “special concern of the First Amendment,” may be compromised.<sup>1</sup> It is not clear to what extent academic freedom would be interpreted as a constitutionally protected right.

### **“Classify” and “Federal Requirements”**

As discussed above under K-12, the extent to which the state can use CRECNO data collected under federal reporting requirements will greatly affect the impact of the initiative on higher education. The way courts interpret the term “classify” will also greatly affect any impacts in higher education. At the very least, public higher education institutions would still be able to use federally mandated data under CRECNO.

*What types of programs and policies regarding higher education will remain unchanged by CRECNO?*

The National Center for Education Statistics will still be able to collect CRECNO data through the Integrated Postsecondary Education Data System (IPEDS). IPEDS collects CRECNO information from all primary providers of postsecondary education. IPEDS collects information on fall enrollment, fall staff (including faculty), awarded degrees, and graduation rates. Collection of data on enrolled students is also federally mandated under Title VI of the Higher Education Act of 1965.

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<sup>1</sup>*Regents of the University of California v. Bakke*, (1978) 438 U.S. 265, 312, quoting *Keyishan v. Board of Regents* (1967) 385 U.S. 589.

Some outreach programs that receive federal funding, such as Mathematics, Engineering, and Science Achievement (MESA) will still be able to collect CRECNO data. MESA is required to report CRECNO data to maintain its funding from the National Science Foundation. In addition, several federal mandates from the Civil Rights Act, the Higher Education Act, and the Equal Opportunity Act will allow institutions to continue their collection of CRECNO data on faculty, academic employees, and applicants for faculty and academic appointments. It is also important to note that the prohibition of CRECNO data under the CRECNO initiative will not likely impact a university's accreditation.

*What types of programs and policies regarding higher education will be affected by CRECNO?*

### **Academic Research**

The extent to which academic research will be affected by CRECNO depends largely on the issues of court interpretation mentioned above. If faculty researchers are considered agents of "the state" and if their research is considered an act of "separating, sorting, or organizing" by CRECNO, then original academic research will be severely impacted in many fields. At the very least, faculty that rely on CRECNO statistical information generated by nonexempted state agencies will be directly impacted. These include faculty across all disciplines that analyze race, ethnicity, color, or national origin. Academic research is the one area in which private colleges and universities will also likely be affected, to the extent that they use state-collected CRECNO data.

### **Applicants and Admits**

Though certain federal mandates require the collection of CRECNO information for enrolled students, the collection of data from applicants and admits would be prohibited. The California Postsecondary Education Commission (CPEC) uses these data for their eligibility studies and for tracking admitted students who choose not to enroll in California universities. The loss of CRECNO data will impede research regarding college preparation for high school students from different backgrounds. In addition, many organizations in California and throughout the nation

would no longer be able to study the impacts of admissions policies and proposed changes to these policies on various groups of people.

### **Financial Aid**

Many financial aid awards involve race- and ethnic-restricted aid. Losing CRECNO data for applicants and admits affects a university's ability to determine aid awards. Private and public donors contribute millions of dollars to incoming students on the basis of CRECNO. Universities will not have the necessary individual information to administer these awards as they currently do. The loss of CRECNO data will have a greater impact on the graduate level because these graduate programs typically have a smaller pool of money to draw from and, therefore, the amount of race- or ethnic-restricted aid might have a greater impact on a department.

### **Outreach**

Many outreach programs target educationally disadvantaged pre-university level students to prepare for college. These programs, such as Early Academic Outreach (EAOP), the University of California Preparation Education Recruitment Program (UCPREP), and Puente, would not be able to collect CRECNO data to track their effectiveness and to develop future program planning. Aside from program designers themselves, financial supporters of outreach efforts use data to assess the effectiveness of a program when deciding whether or not to contribute to these programs. Without the data, these programs might lose funding. In addition, targeting individuals to participate in the programs in the first place will be more difficult without the CRECNO data that these organizations currently use.

### **Faculty and Employment**

Though CRECNO data on university employees are required by the federal government, several uses of these data might be prohibited. Depending on the court's interpretation of "classifying," schools may not be able to compare their CRECNO makeup to that of other institutions, or to monitor personnel patterns on campus that are not tracked under

federally regulated equal opportunity and nondiscrimination laws. In addition, universities would no longer be able to collect CRECNO data on faculty intending to leave the university, or on survey forms used to assess the extent to which different groups understand various university policies.

*How will affected higher education programs likely adapt if CRECNO passes?*

### **Academic Research**

Similar to K-12 education, socio-economic-status (SES), language, and other indicators will be used instead of CRECNO data where this information is appropriate and attainable. Academic researchers will still try to collect CRECNO data for their research to the extent allowed under the law.

### **Financial Aid**

Financial aid awards previously based on CRECNO information will probably be awarded with more consideration given to SES indicators. Private financial aid organizations might be able to administer much of the aid restricted by CRECNO, but they will have to find ways to identify these students other than relying on college applications.

### **Outreach**

Outreach programs will also rely more on SES to measure their effectiveness. They will also use aggregate CRECNO data on college-enrolled students and other general statistics collected by the federal government to convince their financial contributors of their program's effectiveness.

*Overall, how will CRECNO affect higher education in California?*

**Academic Research, Outreach, Financial Aid, and Institutional Planning**

The overall impact of CRECNO on higher education will depend heavily on the court's interpretation of the initiative. Public institutions—Universities of California, California State Universities, and Community Colleges—will feel most of the impact. The passage of CRECNO will also severely impact outreach efforts. Not having data to assess program effectiveness will greatly impact program design and a program's ability to attain private donor funding. Similarly, financial aid awards will likely be reduced, if not eliminated, for recipients of race- and ethnic-restricted aid.

Public institutions of higher education use CRECNO data to better understand the actions and desires of their students and faculty, and to gauge how changes in policies will affect certain groups. This loss of data will hamper efforts to understand their populations in terms of CRECNO.

**Recruitment of Top Faculty and Graduate Students**

CRECNO will also likely impact the ability of top universities to recruit top faculty and graduate students. Aside from affecting CRECNO-based financial aid awards for graduate students, prospective students and faculty across all states, countries, and disciplines might view California as an unfriendly environment in which to study race, ethnicity, color, or national origin. Overall, a loss of CRECNO data in state databases will make academic research in California institutions more difficult. It would naturally be more appealing for faculty and graduate students to select universities located in states without these impediments.

**Admissions**

Admissions policies will not likely change substantially as a result of CRECNO. The question arises, however, of whether schools will be able to ensure compliance with Proposition 209, passed in 1996. This proposition prohibited preferential treatment by the state based on race, sex, color, ethnicity, or national origin in the areas of public education, public contracting, and public employment. Without the ability to track

CRECNO data of applicants and admitted students, it will be difficult, if not impossible, to ensure compliance with 209.

Students who believe that their CRECNO classification is pertinent to and/or may still aid their admittance to college will find other ways to emphasize their CRECNO identity, whether through the personal statement, their listing of select extracurricular activities, or by other means. Similarly, admissions officers who believe that diversity in terms of race, ethnicity, color, and national origin is important will continue to look for this information in other parts of students' applications. It is difficult to predict the number of students or admissions officers, if any, that would change their application strategies based on CRECNO.

## **Public Health**

### *How is CRECNO information used in the public health field?*

Public health professionals, doctors, and academic researchers collect and rely upon data about specific CRECNO groups. There is general agreement that CRECNO data are crucial to promote health and quality health care for all Californians.<sup>2</sup> CRECNO-specific information is necessary for understanding how health status and the nature of diseases differ by population to ensure effective prevention and treatment, and to limit environmental health hazards. A considerable portion of this information is collected by many state-supported agencies, from the California Department of Health Services to the California Health Interview Survey, administered by UCLA's Center for Health Policy Research.

Data about CRECNO groups are collected in order to understand more about health threats to specific populations and to create prevention programs addressing those threats.

Specifically, these data help (1) to identify at-risk populations, (2) to identify the nature of risk and means to address risk, and (3) in designing public education and outreach programs. For example, data collected by San Diego school districts found that very high rates of Filipino girls had suicidal thoughts. Based on this knowledge, a local service organization helped develop an outreach program to help Filipino girls address these issues.

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<sup>2</sup>Perot and Youdelman, 2001.

Current CRECNO information is also necessary to understand and address disparities in health status. Public health researchers have found that specific CRECNO populations face different patterns of disease, exposure to environmental health hazards, and challenges in accessing health care. For example, differences in residential pattern have caused African-American children to be five times more likely to be affected by lead poisoning than are white children.<sup>3</sup>

Public health agencies and officials at all levels of government recognize wide disparities in health outcomes for CRECNO groups and have stressed the need for accurate public health data classified by CRECNO characteristics. At the federal level, the Department of Health and Human Services as well as the Institutes of Medicine have identified large disparities in health status of different CRECNO populations and have urged for additional efforts to collect CRECNO data. Statewide, the California Department of Health Services has identified a wide range of racial disparities, from cancer incidence to infant mortality. The California legislature, informed by public health research, has passed bills addressing health disparities. Their actions led Governor Davis to sign the Environmental Health Tracking Bill, which established the first-ever comprehensive statewide surveillance system for environmental health. Local public health departments across California have also pledged to address disparities in health care.

*How does the legal language of CRECNO relate to public health data?*

Section 32 (f) of the proposition states that, “Otherwise lawful classification of medical research subjects and patients shall be exempt from this section.” As public health professionals across the state agree, “medical research subjects and patients” are a very well defined and extremely narrow research area. Section 32 (f) will not exempt the bulk of public health research. Rather, it will prohibit state and local organizations and actors from classifying individuals by CRECNO characteristics in the standard operations of public health addressed above.

The most widely recognized technical definition of “research subjects” is found in the Belmont Report.<sup>4</sup> This report identifies the basic

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<sup>3</sup>Center for Disease Control, 1997.

<sup>4</sup>National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 1976. Emphasis added.

ethical principles in human subject research and unambiguously states that “medical” research is confined to that which provides “diagnosis, preventative treatment or therapy to particular individuals.” This definition is clearly not applicable to the standard practices of public health research, which include the use of surveys and questionnaires administered to hundreds or thousands of individuals in order to learn more about groups, rather than individuals.

What would the exemption in Section 32 (f) cover? It would exempt clinical trials on a wide range of diseases and conditions. These include studies sponsored by the National Institutes of Health, other government agencies, and the pharmaceutical industry. In a recent search of medical subject trials in California, just over 1,000 studies were found.<sup>5</sup> These studies usually involve medical experimentation in the treatment of a specific disease, and usually involve less than 500 subjects. Public health research, on the other hand, focuses on identifying the overall health status of large populations through studies and surveys that are administered to large numbers of individuals; and this type of research would not be exempted.

*Which types of public health programs will not be affected by CRECNO?*

As stated above, CRECNO classification for research involving medical procedures and pharmaceutical products will continue under CRECNO. Because Section 32 (f) does not exempt public health research, the only public health programs and policies in California that use CRECNO information that will remain unaffected are those that federal law requires to collect CRECNO data. All recipients of federal health care funding are required to follow the guidelines in Title VI of the Civil Rights Act, which prohibits exclusion, denial, or discrimination in federal program participation based on race, color, or national origin. However, very few federal regulations actually mandate the collection of CRECNO data for public health purposes.

The Department of Health and Human Services (HHS), the primary agency responsible for most public health regulations at the federal level, has recommended the collection of CRECNO data, but to date has issued

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<sup>5</sup>The authors conducted a search on May 12, 2003, at [www.clinicaltrials.gov](http://www.clinicaltrials.gov) and found 1,036 such studies.

only a small number of regulations that mandate their collection.<sup>6</sup> Three HHS statutes explicitly call for the collection of CRECNO data:

- The Maternal and Child Health (MCH) Services Block Grant requires states to provide racial and ethnic group information for women who were provided prenatal, delivery, or postpartum care under MCH or Medicaid
- The Substance Abuse and Mental Health Services Administration (SAMHSA) conducts surveys that include information on CRECNO affiliation
- Grant recipients of SAMHSA monies who provide services to children of substance abusers are required to collect CRECNO information on those children.

Two additional HHS statutes implicitly call for the collection of CRECNO information:

- California must report the demographics of families that receive services under the California Child Health Insurance Programs
- California must collect demographic information of individuals served by the HIV/AIDS programs under the Ryan White CARE Act.

However, the vast majority (over 300) of federal programs not covered by these regulations would be vulnerable to CRECNO's state-level ban.

In addition to numerous HHS recommendations for the collection of CRECNO information, many other federal bodies have issued guidelines and suggestions for the collection of CRECNO information. These include, but are not limited to:<sup>7</sup>

- Office of Management and Budget Revised Standards (1997)
- Health Insurance Portability and Accountability Act of 1996
- Initiative to Eliminate Racial and Ethnic Disparities in Health (1998)
- Consumer Bill of Rights and Responsibilities (1997)
- Benefits Improvement and Protection Act (2000)
- Report of U.S. Commission on Civil Rights, "The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality" (1999)

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<sup>6</sup>Perot and Youdelman, 2001.

<sup>7</sup>*Ibid.*

- Executive Orders 13125 “Improving the Quality of Life of Asian Americans and Pacific Islanders” and 13166 “Improving Access to Services for Persons with Limited English Proficiency” (2000).
  - Minority Health and Disparities Research and Education Act of 2000
- While these guidelines provide informative recommendations on the collection of CRECNO data, they are not mandates required by federal law.

*Which types of public health programs will be affected by CRECNO?*

As noted above, many federal programs administered at the state level (such as Medicare, the Women, Infants and Children [WIC] Supplemental Nutrition Program, and Veterans’ Administration Programs) may no longer be able to collect CRECNO information on Californian participants since they are currently not required to do so. This may impair the ability of public health researchers to identify and treat differences across populations.

A significant portion of public health information gathering in California takes place at the state and local level. This research is needed because California’s population is significantly different in terms of CRECNO characteristics from the rest of the nation. Information is collected from myriad sources, from state and local health departments to school districts, from neighborhood surveys to random telephone interviews.

Because so many state-affiliated institutions collect and use CRECNO information for public health purposes, it is impossible to identify every program and organization that would be impacted if CRECNO passes. Rather, we have provided examples of the different *types* of programs and organizations that may be affected.

### **The California Department of Health Services**

The California Department of Health Services (DHS) collects data from hospitals and clinics on CRECNO characteristics. Information is collected on many health factors, including vital statistics such as infant mortality, substance use and abuse, and the incidence of certain diseases. Aggregate statistics broken down by race and ethnicity are provided in reports that are published in both paper and web formats. Doctors, city planners, legislators, researchers, public health education programs, and

a host of other organizations and individuals use these reports to provide useful information about Californians' health status. If CRECNO passes, DHS may be prohibited from collecting or compiling information on vital statistics by race or ethnicity.

### **Public Health Surveys**

Similarly, public surveys provide interested parties with up-to-date information on the health status of Californians. Public health surveys that are fully or partially funded by the state would be affected. These include the California Health Interview Survey (CHIS), administered by UCLA's Center for Health Policy Research. The CHIS, a new source of health information in California, is the largest state health survey in the United States. The first survey, conducted in 2001, collected information from over 55,000 California households on health topics ranging from access to health care, to physical exercise habits, to tobacco use. The CHIS is the product of a collaboration of over 150 public health organizations, including UCLA, the California Department of Health Services, and the Public Health Institute. Future surveys planned by CHIS could not classify data by CRECNO characteristics. The California's Women's Health Survey and other university-sponsored surveys would be similarly affected by the passage of the CRECNO initiative.

### **City and County Public Health Departments and Programs**

CRECNO would also affect public health programs administered at the city and county levels. Many localities, such as Los Angeles, have their own health departments. These departments administer many public health programs including educational campaigns that are targeted to specific populations and often grouped by CRECNO characteristics. For example, the Data Collection and Analysis Unit of the Los Angeles County Department of Health Services issues reports that often include groupings by race and ethnicity. These reports help identify where county resources should be targeted to spend the least amount of money in order to address public health problems. For example, the health department has conducted antismoking campaigns targeted at Vietnamese communities where rates of smoking among men are

excessively high. Both the reports and the programs that identify smokers by CRECNO characteristics would be affected by CRECNO.

### **Nongovernmental Public Health Research and Programs**

In addition to state-sponsored research and programs, the passage of CRECNO would also affect nongovernmental organizations. A significant amount of public health research that is conducted by nongovernmental organizations uses data that is collected by state agencies. For example, the Public Health Institute (PHI) is an independent organization that receives some funding from the state, but also receives funding from federal agencies and private donors. PHI issues reports, creates targeted programs, and works with communities to improve the health of all Californians. The institute relies heavily on CRECNO information collected by cities, counties, and state agencies.

### **Pioneering Research**

Public health is a dynamic research field that must constantly update its knowledge of current trends in order to be effective. Over the past two decades, a significant body of research has accumulated showing large disparities amongst different CRECNO groups in access to health care, incidence of disease, and environmental health hazards. In the mid-1990s, the National Institutes of Health's Center for Research on Health Disparities began funding innovative approaches that address health disparities. In order to qualify for these funds, researchers need access to data that prove such disparities exist.

Section 32 (i) of the CRECNO initiative exempts actions "which must be taken to comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." Depending on how it is interpreted, this section could greatly stifle pioneering public health research. First, it is not clear whether the exemption covers only CRECNO data that are explicitly *required* by federal funding sources, or if a program may make a case that without such data they would not be able to demonstrate the disparities for which the funding is intended. Second, the phrasing "result in a loss of federal funds to the state" implies that federal funding must already be in place. Therefore, although the initiative does not explicitly prohibit researchers from applying for federal funding for programs that

address racial disparities in health care, researchers may be banned from collecting the very information they need in order to prove such disparities currently exist. In addition, CRECNO may further restrict researchers from collecting CRECNO data in order to apply for new funding sources that they do not already receive.

*How will public health professionals adapt without CRECNO data?*

At the federal level, the Department of Health and Human Services (HHS) could compensate for much of the information loss by issuing clear mandates for the collection of CRECNO data. As stated above, only five statutes mandate the collection of such data. HHS has the ability to mandate the collection of CRECNO data for all health care programs that receive federal funding. Yet, this seems politically unlikely. HHS has long been an advocate of the collection of CRECNO data and has issued recommendations urging such collection, but has historically been very reluctant to require states to collect this information. In addition, it is important to remember that HHS mandates apply to federal programs and would not affect the bulk of public health research that is not federally administered or funded.

At the state level, with the governor's approval the California Legislature could pass a bill with a two-thirds vote in both houses to allow data collection for public health purposes. This appears to be a rather likely scenario, should CRECNO pass. Ward Connerly, the author of the initiative, has stated his support for this type of action.<sup>8</sup> Such a bill would most likely be politically popular, though this ultimately depends on its wording and current public sentiment at the time.

*Overall, how would CRECNO affect public health in California?*

Aside from the five federally funded health programs governed by statutes issued by the Department of Health and Human Services that mandate the collection of CRECNO data, all federal, state, and local public health organizations in California may have to stop collecting CRECNO information if CRECNO passes. This would impact both research and the programs that are created in response to research-identified needs that classify individuals by CRECNO characteristics. Educational programs designed to reach those statistically most likely to

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<sup>8</sup>Personal interview, 2003.

smoke, suicide prevention programs targeted to those with the highest risk, and nutrition programs that address CRECNO-specific dietary concerns are examples of the types of programs that would be impacted by CRECNO.

It is generally acknowledged that public health research and programs are cost-effective.<sup>9</sup> This means that the money spent on public health data collection, research, and program design and implementation saves lives and money in the long run. If these programs are cut, California will lose extremely valuable future research. The result will be that California will have to spend much more on health care and public health programs in order to maintain its current level of overall health.

Furthermore, CRECNO would limit pioneering research in the field of public health. Because public health researchers may not have access to data needed to prove racial disparities exist, they would be ineligible to apply for federal funding that would go towards addressing differences in health care access and health status.

## **Law Enforcement**

### *How are CRECNO data used in law enforcement?*

CRECNO data are collected by California law enforcement agencies on officers, criminal perpetrators, victims, and suspects for three main purposes: (1) to identify, enforce against, and monitor civil rights violations; (2) to design and target public education, outreach, and prevention programs; and (3) to assign prisoners and undercover officers.

## **Civil Rights Violations**

CRECNO data are collected to detect and address hate crimes and patterns and practices of race-motivated police misconduct, which include but are not limited to racial profiling.

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<sup>9</sup>U.S. Department of Health and Human Services, 1999.

## **Hate Crimes**

The Bureau of Justice Assistance defines hate crimes as “offenses motivated by hatred against a victim based on his or her race, religion, sexual orientation, handicap, ethnicity or national origin. . . . A hate crime victimizes not only the immediate target but every member of the group that the immediate target represents.”<sup>10</sup>

The U.S. Department of Justice, the California Department of Justice, and county and regional commissions and task forces such as the Los Angeles and Orange County Commissions on Human Relations, the Bay Area Hate Crime Investigators Association, the San Diego Regional Hate Crimes Coalition, and the Greater Sacramento Area Hate Crimes Task Force collect data on hate crimes from local law enforcement agencies. Law enforcement agencies are mandated to report hate crimes to the California Department of Justice under Penal Code 13023, but are not mandated at the federal level. The data are used to identify and address annual trends in the locations, targets, and perpetrators of hate crimes. The Department of Fair Employment and Housing enforces California’s civil rights laws that provide remedies to hate crime victims.

## **Racial Profiling and Other Police Misconduct**

The California Highway Patrol defines “racial profiling” as “when a police officer initiates a traffic or investigative contact based primarily on the race/ethnicity of the individual.” A September 1999 directive by California Governor Gray Davis ordered the California Highway Police to collect racial data on traffic stops and investigative contacts and submit the data to the governor and the legislature in three annual reports from 2000 to 2002. As of 2001, racial data was being collected by 92 out of 433 local law enforcement agencies for submittal to the legislature. The communities served by these 92 agencies account for 40 percent of California’s population.<sup>11</sup>

Data are used to identify law enforcement programs where racial disparities exist, to provide empirical evidence to prove or disprove allegations of racial profiling or bias within those programs, and to address existing problems through officer training, penalties, or changes in policy or procedure. The California Department of Justice has the

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<sup>10</sup>Bureau of Justice Assistance, 1997.

<sup>11</sup>California Legislative Analysts Office, 2002.

power to investigate charges of police misconduct against local law enforcement agencies if local avenues have been exhausted.<sup>12</sup>

### **Public Outreach, Education, and Prevention**

County and regional commissions and task forces along with community based organizations use racial data on crimes to design and target public education and outreach programs in order to (1) create public awareness of hate crimes, foster tolerance, and encourage hate crimes reporting in victimized schools and communities, and (2) identify and prevent youth gang violence.

### **Assignment of Undercover Officers and Prisoners**

Law enforcement agencies may take CRECNO characteristics into consideration when giving out undercover assignments to officers. For example, an agency may search within a database of police officers to identify a Latino officer needed to go undercover in a predominantly Latino neighborhood. Law enforcement may also use race when assigning prisoners to different correctional institutions, cellblocks, and cells. CRECNO characteristics are considered in prisoner assignment in order to prevent, for example, the placement of an African-American male in the same prison cell as a white supremacist.

*How does the legal language of CRECNO relate to law enforcement?*

CRECNO's exemptions relating to law enforcement refer to CRECNO classification under narrow circumstances. Since these exemptions are very tied in with which law enforcement functions and programs will and will not be affected by CRECNO, they will be discussed in detail below. In addition, the outcomes of CRECNO on law enforcement could differ depending on the interpretation of the language in section 32 (i), which addresses exemptions for establishing eligibility for federal funding, and in section 32 (j), which exempts CRECNO data collection that is mandated by court orders and consent decrees.

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<sup>12</sup>California Attorney General's Office, 2001.

### **Funding Eligibility**

Federal departments such as the Department of Justice, the Bureau of Justice Statistics, and the Drug Enforcement Agency provide federal funding to state programs that may be contingent on CRECNO data. It is unclear whether or not CRECNO data have to be explicitly required by the funding agency, or if a program would qualify under the exemption if it could demonstrate that it needs to collect CRECNO data in order to, for example, prove that disparities exist which the funding is intended to address. In addition, it seems that a program needs to already be receiving federal funds to justify collecting CRECNO data to establish or maintain eligibility, as section 32 (i) of the initiative states that actions taken to establish eligibility will be exempt “where ineligibility would result in a *loss* of federal funds to the state.”<sup>13</sup>

### **Consent Decrees and Court Orders**

CRECNO’s exemption under 32 (j), stating that nothing in the initiative “shall be interpreted as invalidating any valid consent decree or court order which is in force as of the effective date of this section,” is especially salient to CRECNO data collection by law enforcement agencies, as both the California and U.S. Departments of Justice have the power to investigate law enforcement agencies and issue consent decrees.

Both Departments often enter into court-enforceable settlement agreements with law enforcement agencies rather than issue court orders or consent decrees. While CRECNO’s language does not explicitly state that “settlement agreements,” calling for the collection of CRECNO data also stand up under CRECNO, these settlements are also court enforceable. While it is feasible that the inclusion of “settlement agreements” may be determined in the courts, we assume that CRECNO data collection under such a settlement agreement will also override CRECNO.

*What existing law enforcement functions, laws, and programs will not be affected by CRECNO?*

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<sup>13</sup>Emphasis added.

## Classification

Section 32 (g) of the CRECNO Initiative allows law enforcement agencies to collect CRECNO data under the following circumstances:

- To describe the race of a suspect, victim, and/or witness while carrying out law enforcement duties. For instance, if a white male has committed a robbery, an officer will be able to put out his racial description in order to aid in finding and arresting the suspect. Law enforcement agencies are explicitly forbidden from tracking individuals on the basis of this classification.
- To assign undercover law enforcement officers and prisoners.

In addition, law enforcement agencies that receive Office of Justice Program Block Grants under the Department of Justice's Bureau of Justice Assistance are mandated to report Uniform Crime Report (UCR) data to the federal government.<sup>14</sup> UCR data includes statistics on crimes sorted by CRECNO classifications. This data reporting by block grant recipients will continue under CRECNO.

## Hate Crimes

Hate crimes are illegal under the U.S. Constitution and California law. In addition, California's Civil Code Section 52.1, the Bane Act, and Civil Code 51.7, the Ralph Civil Rights Act, ensure civil penalties for hate crime perpetrators and entitle victims to civil remedies. California Penal Code Section 13519.6 requires hate crimes training by the Commission on Peace Officer Standards and Training (POST) for all police officers entering law enforcement academies after 1993. None of these laws will be affected by CRECNO.<sup>15</sup>

Programs that must collect data on hate crimes in order to maintain or establish eligibility for federal funding will continue. As discussed above, it is unclear if federal programs must explicitly require CRECNO data collection for state programs to be exempt under CRECNO. For example, the federal Bureau of Justice Statistics (BJS) under the Department of Justice offers grants "To improve the administration of justice by encouraging the development of State-level capabilities for

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<sup>14</sup>Catalog of Federal Domestic Assistance Website, search for "race data law enforcement."

<sup>15</sup>California Attorney General's Office, 2001.

collecting, analyzing, utilizing, and disseminating statistical information pertaining to crime . . . and for providing statistical information to the Federal Government for national compilations.”<sup>16</sup> BJS identifies specific current criminal justice issues of concern from year to year. While the grant is not explicitly intended to fund hate crimes data collection, this type of statistical information would certainly qualify under the program.

### **Racial Profiling**

Racial profiling in California will remain illegal under the Fifth and Fourteenth Amendments of the U.S. Constitution, Title VI of Civil Rights Act of 1964, the Omnibus Crime Control and Safe Streets Act of 1968, and Section 13519.4 of the California Penal Code. Under state law SB 1102, training on racial profiling by the Commission on Peace Officer Standards and Training (POST) will still be mandated for all officers with refresher courses every five years.

The U.S. Department of Justice<sup>17</sup> and the California Department of Justice have the right to investigate individual law enforcement agencies for allegations of police misconduct. As a result of this law, both federal and state Departments of Justice have issued consent decrees mandating the collection of CRECNO data to determine whether racial profiling and/or the use of excessive force are taking place. The Los Angeles Police Department is under a federal consent decree, and Riverside is under a state consent decree. Oakland agreed to a court-enforceable settlement agreement to collect racial data on all vehicle stops, investigations, and detentions.<sup>18</sup> CRECNO data collection will continue by these police departments under section 32 (j) of the initiative, which states that CRECNO will not invalidate any consent decree which is in force as of the effective date of the initiative.

CRECNO data collection by programs that must collect racial data on traffic stops and investigations in order to maintain or establish eligibility for federal funding will continue. Once again, it is unclear whether CRECNO data collection must be explicitly required by the

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<sup>16</sup>Catalog of Federal Domestic Assistance Website, search for “hate crimes reporting.”

<sup>17</sup>The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141.

<sup>18</sup>United States District Court, Northern District of California, *Delphine Allen v. City of Oakland*, 2003.

federal funding source in order for the state to qualify under this exemption.

*What existing law enforcement functions and programs will be affected by CRECNO?*

### **Hate crimes**

Hate crimes reporting to the Department of Justice is encouraged but not mandated by the federal Hate Crimes Statistics Act of 1990 and under the FBI's annual Uniform Crime Report. As a result, California law enforcement agencies that are not required to collect hate crimes data in order to retain eligibility for federal funds will no longer be able to collect or track data on hate crimes. Individual counties and the California Department of Justice will therefore no longer be able to produce annual hate crimes reports.

State, county, and community-based organizations will no longer be able to use hate crimes data to direct funding to outreach and prevention programs in the schools and communities hardest hit by hate crimes or determined to be at risk. Funding and programs currently focus on hate crime prevention by targeting potential perpetrators, fostering tolerance and improved intergroup relations, and/or providing culturally appropriate services for victims and encouraging hate crimes reporting. For example, the Los Angeles Commission on Human Relations has determined from their data collection and analysis that the suspect and victim in hate crimes targeting homosexuals are most likely to be of the same race. As a result, education regarding sexual orientation and hate crimes may be geared toward intrarace relations and perspectives on homosexuality. Also, using its data on the ethnic backgrounds of September 11-related hate crime victims, the L.A. Commission justified its request for emergency funding from the L.A. County Board of Supervisors to add new partners representing Middle Eastern and South Asian communities to their Hate Crime Victim Assistance and Advocacy Initiative.<sup>19</sup>

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<sup>19</sup>Lisa Hart, e-mail interview, 2003.

### **Racial Profiling and Other Police Misconduct**

The collection of CRECNO data by local law enforcement agencies is encouraged, although not mandated, by the federal government. Any CRECNO data collection that is not specifically exempted, mandated by a consent decree, or necessary to maintain or establish eligibility for existing federal funding will cease under CRECNO. As a result, law enforcement agencies will not be able to assess whether racial profiling or other race-related police misconduct is taking place, and will therefore have difficulty holding programs and officers accountable for civil rights violations.

The U.S. Department of Justice (DOJ) has the authority to investigate individual police departments for alleged civil rights violations under the 1994 Violent Crime Control and Law Enforcement Act. The DOJ will have difficulty proving a pattern of civil rights violations if police departments do not track racial data. For example, in the United States District Court case *Rodriguez v. California Highway Patrol*, racial data on consent searches was used to determine a pattern of racial profiling. A settlement reached in February 2003 stated that the California Highway Police (CHP) must collect racial data on all traffic stops and searches and that the moratorium on consent searches was to extend until 2006.<sup>20</sup> It is unlikely the court would have come to this conclusion without the racial data that was available on consent searches.

*How will law enforcement agencies likely adapt should CRECNO pass?*

California law enforcement agencies and advocacy groups may pursue a two-thirds vote by the legislature to allow aggregate CRECNO data collection on hate crimes, traffic stops or investigations, and use of force. While the legislature may determine that such data collection should be *allowed*, they are expressly forbidden under Section 32 (g) of CRECNO from *requiring* law enforcement agencies to track the data or withholding funding if such records are not maintained.

Law enforcement agencies, county programs, schools, and community-based organizations will rely on anecdotal evidence to identify when a spate of hate crimes is taking place in a certain community and/or against a specific group. This will be easier to do in

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<sup>20</sup>United States District Court, Northern District of California, San Jose Division, *Rodriguez v. California Highway Patrol*, 2003.

the closed, structured environments of schools than it will be in communities.

Law enforcement agencies will rely on anecdotal evidence from their officers and surrounding communities to identify programs and individuals engaging in racial profiling or other race-based misconduct.

The U.S. Department of Justice may be more likely to issue consent decrees mandating the collection of CRECNO data by law enforcement agencies in their investigation of civil rights violations, since the Department would otherwise have difficulty proving or disproving misconduct.

*What will be the likely overall impact of CRECNO on law enforcement in California?*

## **Hate Crimes**

The direct impact of hate crimes reporting and programs that address hate crimes on the actual number of hate crimes committed is difficult, if not impossible, to assess. Analysis of hate crimes in California since 1995 shows no sustained decline or increase in hate crimes committed overall or against specific groups.<sup>21</sup> While increased awareness and education is intended to lead to fewer hate crimes, it is also designed to encourage more reporting. As a result, it is unclear after only six years of collecting hate crimes data whether changes in the number of recorded hate crimes is due to a change in actual hate crimes being committed, a change in hate crimes being reported, or some combination of the two. In addition, the number of hate crimes being committed is subject to other factors as well, such as shifting political or social beliefs, a changing economy, or local, national, or world events such as the Rodney King beatings or September 11.

Under CRECNO, the reliance of county- and community-based organizations and law enforcement agencies on anecdotal versus empirical evidence will likely reduce their efficiency and effectiveness in addressing the needs of potential and actual victims and perpetrators of hate crimes. Such programs may prove more costly if organizations target more communities in order to “cover their bases,” or if they target communities that are not in as great a need as others. In addition,

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<sup>21</sup>California Department of Justice, 2001.

reporting of hate crimes could decrease without culturally targeted outreach.

Identifying when a rash of hate crimes is taking place in or against a specific community will become increasingly difficult, especially if hate crime reporting decreases. If hate crimes are not quickly addressed in a community, retaliatory crimes often occur, leading to more harm inflicted on victims and the community and greater costs for law enforcement.

### **Racial Profiling and Other Police Misconduct**

Prior to 1999, most allegations of racial profiling were based on anecdotal evidence. While data collection has not gone on long enough or been sufficiently extensive or uniform to unequivocally state that racial profiling takes place, there is currently a general consensus that it does occur.<sup>22</sup> Under CRECNO, law enforcement agencies will not be able to detect whether people of color are disproportionately targeted under certain law enforcement activities, or whether this disproportion is justified by the rates at which different groups commit crimes.

Some individuals believe that requiring law officers to track race hinders their effectiveness. They assert that officers are less likely to pull over suspects when they have to collect CRECNO data because they are afraid of being accused of discrimination and/or do not want to deal with the necessary paperwork. Furthermore, some claim that racial profiling is necessary, as certain groups are more likely to commit crimes. From these standpoints, law enforcement efforts would be more effective under CRECNO.

Since law enforcement agencies will be very limited in their ability to prove, disprove, or address any allegations of police misconduct without a previously existing federal mandate for data collection, their

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<sup>22</sup>A 2000 U.S. General Accounting Office report, "Racial Profiling: Limited Data Available on Motorist Stops" states that, "in order to account for the disproportion in the reported levels at which minorities and whites are stopped on the roadways, (1) police officers would have to be substantially more likely to record the race of a driver during motorist stops if the driver was a minority than if the driver was white, and (2) the rate and/or severity of traffic violations committed by minorities would have to be substantially greater than those committed by whites. We have no reason to expect that either of these circumstances is the case."

accountability to the communities they serve will decrease. This may be harmful to community relations, resulting in decreased trust, community collaboration, and reporting.

The inability of police officers to record the race of individuals they stop will further prevent them from making any links between these individuals and criminal suspects. This could be detrimental to officer and public safety. For example, a woman pulled over by an officer in a traffic stop may then go on to assault someone. The law enforcement agency will not be able to use the woman's race to make the connection, since her race will not be recorded in the traffic stop.

Under CRECNO, law enforcement agencies will have difficulty holding officers accountable for civil rights violations. Agencies will not be able to determine what agency programs, policies, and/or individuals are engaging in racial profiling or other racially biased misconduct. It will, therefore, be difficult to place a check on discriminatory behavior: officers who are knowingly discriminating against individuals will have less of an incentive to change their behavior, and officers who may be unintentionally engaging in biased behavior will be unlikely to change if they are not made aware of their actions. As a result, incidents of discrimination will likely increase. The continuing requirement that California officers receive training on racial profiling every five years may counter this decrease in accountability, though the training is still too recent to gauge its effect on officer behavior.

## **Housing and Employment Discrimination**

*How are CRECNO data used in investigating claims of housing and employment discrimination?*

CRECNO data are collected by state and federal fair housing and employment agencies: (1) when investigating claims made by an "aggrieved person"—defined as anyone who feels they have been injured by discrimination in housing and employment practices—in order to determine if there is a "reasonable cause" to believe that there has been a fair housing or employment discrimination, and (2) to help public defenders and litigators build evidence of patterns and practices of discrimination to be used in lawsuits. An aggrieved person can take their claim of fair housing or employment discrimination to either local, state

or federal agencies depending upon the nature of their claim and the particular protected right violated.

### **Employment Discrimination**

For employment discrimination, complaints are filed by aggrieved parties with either:

- the Equal Employment and Opportunity Commission (EEOC), who enforces the federal employment law Title VII of the Civil Rights Act of 1964 (42 USC Section 1981), or
- the California Department of Fair Employment and Housing (DFEH), who enforces California's civil rights laws. These are: the Fair Employment and Housing Act (FEHA—California Government Code Sections 12900 et. seq.), the Unruh Civil Rights Act (California Civil Code section 51), the Ralph Civil Rights Act (California Civil Code section 51.7), and the Bane Civil Rights Act (California Civil Code section 52.1).

In both cases, EEOC and DFEH investigate the employer alleged in cases of employment discrimination. In addition, businesses with state contracts or one hundred or more employees must continue to file the "Standard Form 100" (EEO-1) with the DFEH detailing their workforce composition in order to comply with Title VII of the Civil Rights Act of 1964.<sup>23</sup> These forms include questions about employees' race, ethnicity, and national origin.

### **Fair Housing Discrimination**

Aggrieved parties file complaints of fair housing discrimination with either:

- the Department of Housing and Urban Development (HUD), who enforces federal laws such as the Federal Fair Housing Act (Title VIII—42 USC section 3601 et. seq.), Title VI of the Civil Rights Act of 1964 (42 USC section 1982), and the Community Development Act of 1974, or
- the DFEH, who enforces California's civil rights laws (see above).

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<sup>23</sup>Cited from the Legislative Analyst's Office at [http://www.lao.ca.gov/initiatives/fiscal\\_letters/2001/010960\\_int.htm](http://www.lao.ca.gov/initiatives/fiscal_letters/2001/010960_int.htm)

Because the California Fair Housing Act of 1992 brought FEHA into conformity with the Federal Fair Housing Amendments Act and the Federal Fair Housing Act, the majority of fair housing complaints brought to HUD are referred to the DFEH. The DFEH investigates unlawful activities such as: refusing to sell, rent, or lease housing to individuals because of their race, ethnicity, or national origin; refusing to negotiate for the sale, rental, or lease of housing because of race, ethnicity, and national origin; terminating or canceling a sale or rental agreement because of race, ethnicity, and national origin; and any other denial or withholding of housing because of race, ethnicity, and national origin.<sup>24</sup> In investigating claims of fair housing discrimination, DFEH may interview both parties as well as other witnesses, review documents and records, perform on-site inspection of facilities and their operations, and issue subpoenas or depositions.<sup>25</sup> CRECNO data may be collected when reviewing existing documents and records.

### **Imputation or Hot Decking**

DFEH engages in a practice called “hot-decking,” or imputation, of CRECNO data for individuals who failed to include this information when filing forms. Hot-decking is a statistical technique developed in the 1940s for replacing missing values on the census.<sup>26</sup> Hot-decking by race tends to be a highly accurate way of counting those who *do not* mention their racial background, i.e., fill in a race box, on government forms.<sup>27</sup> The extent to which DFEH currently hot-decks or imputes racial or ethnic descriptors upon individuals is unclear; nor can we estimate the degree to which it might decrease under CRECNO.

*What passages in CRECNO explicitly relate to housing and employment discrimination?*

Besides the provision stipulating federal laws will not trump state law, the main clause in CRECNO potentially bearing on Californians’

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<sup>24</sup>See California’s Attorney General’s Office *Civil Rights Handbook* (2001) for a full list of unlawful activities classified as evidence of housing discrimination.

<sup>25</sup>Shasta Fair Housing, *California Fair Housing Laws*, June 2000.

<sup>26</sup>Glenn R. Simpson, 2001.

<sup>27</sup>*Ibid.*

ability to seek redress from fair housing and employment discrimination is the exemption given to the DFEH. Section (e) stipulates DFEH will be exempt from CRECNO unless the legislature does not extend the exemption after 10 years from the effective date of the measure. Below, we refer to short-term outcomes as those likely to occur before the end of the 10-year sunset provision and long-term outcomes as those likely to occur after the end of the 10-year sunset provision.

Furthermore, CRECNO includes a clause specifying DFEH will no longer be able to hot-deck or impute racial or ethnic descriptors for individuals who failed to include their race or ethnicity on DFEH forms. This provision would take place effective January 1, 2005.

*Which types of activities will not be affected by the passage of CRECNO?*

### **Short-Term**

In the short run, CRECNO would have little or no impact on the DFEH, HUD, or EEOC's abilities to collect racial or ethnic information in investigating claims of fair housing and employment discrimination. For instance, businesses contracting with the state and those with more than 100 employees must still continue to file the EEO-1 form detailing the demographics, including CRECNO information, of their work force to DFEH in compliance with Title VII of the Civil Rights Act of 1964.

### **Long-Term**

Laws prohibiting discrimination at both the federal and state levels will remain unchanged. As mentioned earlier, federal and state fair housing and employment laws are quite similar. However, state fair housing and employment laws do tend to be more expansive than their federal counterparts. Consequently, many rights guaranteed under FEHA are likely to be guaranteed under the Federal Fair Housing Act as well. For example, both state and federal laws protect individuals from being denied housing because of their race, ethnicity, and national origin. Federal agencies, such as the EEOC and HUD will still be able to collect information on race, ethnicity, and national origin.

*Which types of activities will be affected by the passage of CRECNO?*

### **Short-Term Impacts: Imputed Data**

If they exist, activities that rely on data containing a significant amount of imputed racial and ethnic information may be adversely affected by the passage of CRECNO. For example, DFEH may not be able to prove a pattern of housing discrimination if the information they collected contains a significant amount of imputed data. Again, the extent to which DFEH currently hot-decks or imputes racial and ethnic descriptors upon individuals is unclear; nor, can we estimate the degree to which it might decrease under CRECNO.

### **Long-Term Impact: State Level**

Without CRECNO information, some victims of fair housing and employment discrimination may have increasing difficulty proving patterns or practices of discrimination. One of the primary tools used to show discrimination has occurred is the disparate impact study. Disparate impacts occur when seemingly neutral policies fall more harshly on one group than another. DFEH often looks at aggregate information by race, ethnicity, and national origin for an entire business to see if that business has employment practices that disproportionately affect a particular group. If DFEH is unable to collect CRECNO information from employers, it will be unable to look into practices that have disparate impacts.

Furthermore, certain types of discrimination may be more difficult to prove at the state level. As mentioned earlier, state statutes like FEHA are not only similar to their federal counterparts but also more expansive. FEHA, for example, covers certain kinds of housing that the Federal Fair Housing Act does not. In particular, the Federal Fair Housing Act does not cover both owner-occupied housing with four or fewer units and any single-family house sold or rented by an owner.<sup>28</sup> These are covered by FEHA. As a result, tenants of either situation who are being

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<sup>28</sup>The owner must “not own at least a part of more than three homes, has not sold a house in the last 24 months, does not use a real estate agent or broker to sell the house, and does not use discriminatory advertising” (Shasta Fair Housing, 2000).

discriminated against may not bring their suit or complaint to federal agencies. Instead, they would either file privately or with the DFEH. However, if DFEH may not collect or use CRECNO data, proving a pattern of discrimination may be more difficult.

### **Long-Term Impacts: Federal Level**

As stated above, HUD and the EEOC will still be able to collect CRECNO information in order to enforce federal civil rights requirements by aiding aggrieved parties with their claims of fair housing and employment discrimination. However, both federal agencies may experience increases in workload because (a) they may decide not to refer discrimination claims to DFEH—as they normally would have prior to the termination of the CRECNO exemption to DFEH—because DFEH may become less able to collect CRECNO data as a result, and (b) aggrieved parties, as part of a compensatory strategy, may likely file their claims with federal agencies instead of the DFEH because of its inability to collect CRECNO data in investigating their claims of fair housing or employment discrimination. Overall, federal agencies will likely experience a heavier workload.

*How will agencies adapt to continue collecting and using CRECNO data, and how will individuals adapt in response to potential CRECNO affects on federal and state agencies?*

### **Imputed Data**

At least two adaptive strategies are possible: (1) advocacy groups may lobby and apply pressure to the legislature to re-instate DFEH's ability to impute racial and ethnic descriptors to individuals, and (2) aggrieved parties may increasingly decide to file their suits and complaints with federal agencies instead of the DFEH. The first possibility may prove difficult considering that CRECNO is an amendment to California's constitution. The second possibility may be more likely as an adaptive strategy to the prohibition given to DFEH to impute racial and ethnic descriptors to individuals.

### **Adaptation Strategies in the Long-Run**

If the exemption given to DFEH is not extended by two-thirds of the legislature and, as a result, DFEH is no longer able to collect CRECNO data when investigating aggrieved parties' claims of fair housing and employment discrimination, then aggrieved parties will increasingly file their suits and complaints with federal agencies.

The lawsuits DFEH will take on will likely rely more on CRECNO data from private sources and anecdotes in order to prove patterns of housing and employment discrimination. It is also important to consider that not all civil rights lawsuits—e.g., harassment lawsuits and disparate treatment lawsuits—rely on CRECNO data, and that it is possible to collect data after a lawsuit has been filed through the discovery process.<sup>29</sup>

*What is the likely overall impact on Californians?*

### **Impact Due to Prohibition of Imputed CRECNO Data**

Depending upon the overall significance of imputed CRECNO data collected by DFEH, it is hard to say to what extent CRECNO will likely affect Californians' short-term abilities to seek and win redress from fair housing and employment discrimination. In the long run, Californians will likely file more complaints and suits with the EEOC and HUD instead of the DFEH. As a result, DFEH will experience a smaller workload.

### **Discrimination May Become More Difficult to Prove**

Disparate impact studies have increasingly been used over the past two decades to prove patterns of discrimination. Without workforce CRECNO information, investigators and litigators will not be able to conduct disparate impact studies. Instead, they will have to turn to other investigative techniques and litigation strategies.

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<sup>29</sup>U.S. Commission on Civil Rights, 2002.

**Impact Due to Differences between Federal and State Statutes**

Because of the similarities between federal and state statutes, not much difference should exist between aggrieved parties' ability to file suits and complaints if CRECNO passes. However, certain tenants living in housing situations not covered in the Federal Fair Housing Act, like either owner-occupied housing with four or fewer units or single-family housing sold or rented by an owner, may find it increasingly difficult to prove patterns or practices of discrimination if DFEH is not given an extension by two-thirds of the legislature. Additionally, certain civil rights violations may be more difficult to prove, as state employment discrimination laws "create slightly more liability for the employer and relief for the employee."<sup>30</sup>

**Possible Long-Term Increase in Overall Fair Housing and Employment Discrimination**

Overall, fair housing and employment discrimination may increase after the termination of the exemption given to DFEH. This could result in discouraging individuals who would have ordinarily filed complaints of fair housing and employment discrimination because they feel they will not likely win their cases in court. Furthermore, the termination of the DFEH exemption may lead to an increase in housing and employment discrimination by landlords, employers, etc. who may feel that infractions of civil rights laws are less likely to be investigated.

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<sup>30</sup>Cited from We Advocate Gender Equity (WAGE) website.

## Part III: Personal and Social Impacts of CRECNO

Classifying one's race, ethnicity, color, and national origin on governmental forms is an issue that resonates with many on a very personal level. Many Californians will decide whether or not to vote for CRECNO based on how they perceive it will affect them in terms of their privacy, identity, and whether or not they receive differential treatment.

### **Privacy**

#### *How Would the Passage of CRECNO Affect My Privacy?*

Privacy is a subjective matter; the effects of CRECNO on privacy will vary from person to person in accordance with individual perceptions and beliefs. The disclosure of CRECNO information on state forms is voluntary. Such data are generally used in the aggregate, rather than being linked to individuals, but the following exceptions exist:

- California university admissions link CRECNO data to individual admissions applications.
- The Department of Fair Employment and Housing engages in “hot-decking,” imputing races to individuals who do not check off a race, based on the racial composition of their other household members or of their neighborhood.

- Law enforcement agencies may take CRECNO characteristics into consideration when giving out undercover assignments to officers, and also when assigning prisoners to different correctional institutions, cell blocks, and cells.
- A person's CRECNO information is recorded on complaints of civil rights violations.

CRECNO would make the former two instances illegal, but the latter two would be unaffected. People's feelings regarding CRECNO's impacts on their individual privacy will range from feeling that CRECNO provides them with greater privacy, to feeling that they have less privacy under CRECNO. For the purpose of simplification, we will divide the impacts people feel on their privacy into three groups: greater privacy, no effect, and decreased privacy.

CRECNO will likely result in greater privacy for individuals who, whether or not they realize that the disclosure of CRECNO data is optional, currently feel pressure to provide the data. Individuals are not always explicitly told that the information requested on CRECNO is optional. Since such data are often requested in formal situations and/or on governmental forms, individuals may infer that the information is required or that it would be to their detriment not to provide it.

Though CRECNO data will still be widely collected on federal forms, by private organizations, and by state organizations that are using the data to comply with federal law, Californians who feel it is invasive for the government to ask for and collect CRECNO data may also gain a greater sense of privacy from the passage of CRECNO. The state does not collect information on religion or sexual orientation. Individuals may feel that race is a matter of personal identity in which government should play no role. Others argue that racial categories are inaccurate constructions that provide little information on individuals or groups, and should thus not be relied upon by the state to inform public policy and programs.

*CRECNO will have no effect on privacy* for individuals who realize that the disclosure of CRECNO data is voluntary, and who additionally feel no pressure to provide the data. Individuals who feel that it is appropriate for the state to collect CRECNO data will also feel no effect on their privacy from CRECNO.

*In the longer run, CRECNO could decrease privacy* for individuals who find that some compensatory strategies adopted by the state to infer individuals' races are more invasive than questions that explicitly requested CRECNO data. For example, a person may be offended that an

admissions committee makes an assumption about her racial identity based on her affiliation with a certain group or her last name.

## **Colorblind Society**

### **Outcomes on Identity and Differential Treatment: Will CRECNO Lead to a More Colorblind Society?**

Much of the discourse on CRECNO centers on (1) whether limiting the color-consciousness of government would be a step toward a more “colorblind” society as a whole, and (2) whether or not this is desirable. An analysis of CRECNO’s impacts on personal and group identity and interaction lends insight to the first part of this debate. The second aspect of the debate is a question beyond the scope of this analysis. A truly colorblind society would meet two criteria: (1) no identification or categorization by CRECNO, and (2) no CRECNO-based differential treatment.

#### *Categorization and Identification by CRECNO*

Under CRECNO, people will continue to sort others into categories based on characteristics such as skin color, accents, language use, names, and appearance. People sort others into groups based on available information in order to facilitate decision making and to understand one’s surroundings.<sup>31</sup> Similarly, individuals will continue to identify with groups, whether by claiming membership in a group themselves, or because others associate them with a group based on perceived CRECNO attributes. Individuals who are empowered by identification with a group may find CRECNO detrimental. Many feel that official recognition from the government provides affirmation of the origin, history, struggles, and/or existence of their group. This may be especially salient for multiracial individuals, who have just begun to be recognized.

On the other hand, individuals may feel negative effects on their self-esteem, life choices, and/or educational or work performance from the stereotypes perpetuated about the group they belong to or are identified with. These individuals may prefer not to self-identify with a group on state forms, and would thus benefit from CRECNO. In addition, students who belong to groups traditionally associated with underperformance on tests may perform better if they are no longer asked to identify with that

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<sup>31</sup>Allport, 1954.

group before taking the test.<sup>32</sup> However, the adverse effects of negative stereotypes will still continue for the most part, as the media play a major role in people's formation of these stereotypes, and as data from federal and private sources will still be widely available.

### *Differential Treatment*

The term "differential treatment" encompasses a number of different actions: discrimination, preferential treatment, redressing past or present discrimination, and addressing disparities by race, for example. Some feel that differential treatment is warranted and indeed necessary in certain cases, such as redressing discrimination or addressing race-based disparities. Others believe that it is never justified: people should always be treated on their current merits as individuals without taking into account their experiences as a member of a certain group.

As discussed above, categorization will still continue under CRECNO. Categorization lends to the formation of stereotypes and prejudices, which in turn often lead to discrimination, both intentional and unintentional. Discriminatory practices by the general public will remain largely unaffected by CRECNO. People can overcome their tendency to form stereotypes and discriminate; to do so, they must be held accountable for their discriminatory actions.<sup>33</sup> Under CRECNO, state employers will lack the empirical evidence that is often necessary to detect and prove (or disprove) instances of one-on-one discrimination. As a result, state employees will be subject to less accountability for their actions, and discrimination will likely increase.

Most importantly, the formal eradication of CRECNO classification will not substantially change the actions of people who feel strongly about and/or engage in practices that are firmly rooted in differential treatment. Those who believe that racial disparities are unjust will continue to fight for their elimination and to work toward redressing past discrimination. Organizations will develop compensatory strategies to try and address race in other ways. Along similar lines, state employees who discriminate against people on the basis of racial information provided on state forms will continue to discriminate on the bases of face to face interaction, phone conversations, or other perceived racial indicators on forms. Human Resources employees who feel that CRECNO diversity should not be a factor in hiring will continue to disregard such indicators.

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<sup>32</sup>Steele, 1997.

<sup>33</sup>Allport, 1954.

Overall, CRECNO *will likely not result in colorblind society*. People will still likely categorize and identify by race, although they will not receive official state recognition in most cases. Differential treatment will probably continue, and in the case of discrimination, may increase. Nonetheless, some still feel that the first step toward a more color blind society is a less color-conscious government, and that racism can never disappear as long as “races” are still recognized.



## Part IV: National Implications

In addition to programmatic, policy-oriented, personal, and social impacts, CRECNO will have implications for the rest of the country. California is seen as a trend setter for policymakers around the country. If CRECNO receives a lot of national media coverage, and if CRECNO passes in California, other states will likely take up similar policy debates. If it fails to pass, it is unclear if a national debate on similar issues will be held.

### **The Analogy of Proposition 209**

Since Proposition 209 passed in 1996, it has had far-reaching effects around the country. The initiative prohibited preferential treatment based on race, gender, color, ethnicity, or national origin in public education, employment, and contracting. One notable change that has resulted is the rhetoric people use when describing race, ethnicity, and diversity issues. The phrase “racial preferences,” introduced by the initiative, has increasingly been used by administrators, policymakers, and politicians around the country in crafting diversity policies for organizations ranging from universities to large corporations.

Just as the phrase “racial preferences” has spread among various communities around the nation, phrases from CRECNO or phrases used by its proponents or opponents might similarly be adapted. For example,

the phrase “colorblind society” might be rejuvenated. People might begin crafting diversity policies around this central idea.

As media attention to CRECNO grows, so will national discourse on laws related to race, ethnicity, color, or national origin around the country. People will more likely discuss the values of a colorblind society and the theories behind why people discriminate.

Furthermore, by passing CRECNO, Californians will send a message to the nation that they think the social and individual benefits derived from government collection of CRECNO information do not outweigh its costs. Some people around the nation will embrace this ideology while others may challenge it. Regardless of the specific effects in California, many Americans will reevaluate their thoughts and beliefs about the importance of policies and laws concerning race, ethnicity, color, and national origin.

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