The Power to Be Lenient and the Power to Discriminate:[1] How Prosecutorial Policies Shape Claims Under the California Racial Justice Act

Authors: Audrey Byrne, Alicia Kuang & Alisa Steel*

Contributors: Zara Alam, Arshi Chawla, Alonzo Harvey, Sarah Varley

SUMMARY

Prosecutorial discretion can allow implicit and explicit biases to infect the decisions of district attorneys, but prosecutors can also wield such discretion to advance racial justice. Prosecutorial policies, or their absence, can limit the discretion of individual prosecutors, and reflect an office's recommended or required practices. Prosecutorial discretion is more expansive either where prosecutorial policies do not exist, or where directives expressly allow for the exercise of discretion. This Article analyzes three areas of prosecutorial policies in California counties where discretion contributes to racially biased outcomes: the imposition of sentencing enhancements, the exercise of diversion, and the use of peremptory challenges. This review provides insight into how prosecutorial policies are relevant to the implementation of California's landmark legislation, the Racial Justice Act (RJA), which prohibits racial bias in criminal charges, convictions, and sentences.

DOI: https://doi.org/10.15779/Z38HD7NV7V

* We thank Chesa Boudin and Emi MacLean for their invaluable guidance. We are grateful for the support from the Berkeley Criminal Law & Justice Center staff, including Toni Mendicino and Taylor Hawkins, as well as from our family and friends. Finally, we thank the Berkeley Journal of Criminal Law staff for their thoughtful feedback.

1. *See* McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (observing that "the [prosecutor's] power to be lenient [also] is the power to discriminate") (quoting Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, 21 CASE W. RSRV. L. REV. 164, 170 (1973)).

INTRODUCTION

A. Racial Bias in California's Criminal Legal System

The California criminal legal system is steeped in a legacy of racial bias that continues to erode fundamental tenets of justice and disproportionately impact Black and Brown communities. In nearly all fifty-eight California counties, Black Californians face the worst outcomes at every level of the legal system from arrest to conviction and imprisonment.[2]

Black and Brown people are overrepresented in the California prison population.[3] A 2021 study found that Black people were only 5% of the California population but accounted for 28% of the prison population, while Hispanic[4] people were 40% of the population and 45% of the prison population.[5] American Indian or Alaska Native people were 0.3% of the population, but 1.1% of the prison population.[6] White people, on the other hand, made up about 36% of the California population, but only 20% of the prison population.[7] Racial disparities are also rampant within California's capital punishment system. A study of capital cases between 1978 and 2002 found that Black defendants faced between 4.6 and 8.7 times higher odds of a death sentence than similarly situated white defendants.[8] Likewise, Hispanic defendants faced between 3.2 and 6.2 higher odds of being sentenced to death.[9]

Yet, these disparities in incarceration and capital punishment do not emerge in isolation—they reflect a culmination of cumulative biases that permeate every stage of the criminal legal process. From the moment a defendant enters the system, race dictates the severity of their punishment, the likelihood of diversion, and the fairness of their trial.

Behind the drivers of disproportionate incarceration are the very same forces that influence who faces sentencing enhancements, who is diverted from facing traditional penalties, and who is excluded from jury service through calculated peremptory strikes. To begin, over 92% of defendants who were sentenced with a gang enhancement were Black or Hispanic, notwithstanding the "uniquely large" number of white supremacist gangs in California.[10] And even when the law mandates alternatives to incarceration, those alternatives are selectively accessible. Unexplained racial disparities persist in criminal dispositions for drug-related cases–despite the implementation of Proposition

2. Colleen V. Chien, W. David Ball & William A. Sundstrom, *Proving Actionable Racial Disparity Under the California Racial Justice Act*, 75 U.C. L.J. 1, 3 (2023).

3. *California Profile*, PRISON POLICY INITIATIVE (2025), https://www.prisonpolicy.org/profiles/CA.html.

4. This Article uses the terms "white," "Black," "Hispanic," "American Indian," and "Alaska Native" because these are the labels used by most of the studies referenced throughout.

5. PRISON POLICY INITIATIVE, *supra* note 4.

6. *Id.*

7. *Id*.

8. Catherine M. Grosso, Jeffrey Fagan & Michael Laurence, *The Influence of the Race of Defendant and the Race of Victim on Capital Charging and Sentencing in California*, 21 J. EMPIRICAL LEGAL STUD. 482, 485 (2024) (noting that the range reflects two logistical regression models: The first model controls for individual special circmstances and the second controls for a defendant culpability scale, which measures the severity of the crime and the defendant's role in it).

9. *Id.*

10. COMM. ON REVISION OF THE PENAL CODE, ANN. REP. AND RECOMMENDATIONS 38 (Feb. 2021), https://courts.ca.gov/system/files/opinion-citing/s278309-link5.pdf.

36, California's mandatory drug diversion program.[11] At trial, racial imbalances only deepen. In cases where objections were raised to peremptory strikes, prosecutors removed Black jurors nearly 75% of the time, while white jurors were struck in only 0.4% of cases.[12] These statistics do not function independently of one another; they interlock, compound, and accumulate to sustain racial inequality at every level of the criminal legal system.

In response to documented evidence of inequities within the criminal legal system, the California legislature passed the Racial Justice Act (RJA) in 2020 to provide remedies to parties seeking to challenge racial bias.[13] While the RJA is a critical step forward, its promise depends on careful implementation of the law to uproot the inequities that have long undermined the integrity of the state's criminal legal system.

B. California's Racial Justice Act

California's groundbreaking RJA allows defendants to challenge a charge, conviction, or sentence based on racial bias.[14] The RJA provides that "the state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin."[15] RJA violations also include instances where a judge, attorney, law enforcement official, expert witness, or juror exhibited racial bias towards the defendant.[16] Pursuant to the RJA, a petitioner need not show intentional discrimination but can establish a claim based on various types of evidence, including statistical evidence of racial disparities in charging or sentencing.[17] Remedies under the RJA vary depending on the violation; for example, courts may dismiss enhancements, declare a mistrial, or vacate the conviction and order a new trial.[18]

Many decisions, like charging, are generally left to the prosecutor's discretion and are theoretically subject to constitutional constraints that arise mainly from the Equal Protection Clause.[19] However, establishing an Equal Protection Clause violation based on racial disparities in charging or sentencing has historically been nearly impossible. In the 1987 U.S. Supreme Court

---

11. John MacDonald et al., *Decomposing Racial Disparities and Drug Treatment Commitments for Criminal Offenders in California*, 43 J. LEGAL STUD. 155, 172 (2014) (finding that 28% to 68% of the racial disparity in diversion to drug treatment remained unexplained after controlling for legal case factors, with the variation arising from different statistical models and datasets).

12. Andrew Cohen, *New Report Shows Ongoing Racial Discrimination in CA Jury Selection* (Jun. 14, 2020), https://www.law.berkeley.edu/article/new-report-shows-ongoing-racial-discrimination-in-ca-jury-selection/.

13. *See* Ash Kalra, *Keynote Speech: Racial Justice Act Symposium*, 29 BERKELEY J. CRIM. L. 7, 9 (2024).

14. CAL. PENAL CODE § 745 (2020).

15. *Id.* § 745(a).

16. *Id.* § 745(a)(1).

17. *Id.* §§ 745(c)(2), (h)(1).

18. *See id.* §§ 745(e)(1)-(4).

19. *See* United States v. Batchelder, 442 U.S. 114, 124-25, n.9 (1979).

decision, *McCleskey v. Kemp*, the Court rejected a Black petitioner's claim that Georgia administered its capital punishment system in a racially discriminatory manner. The Court did so despite evidence demonstrating that defendants convicted of killing a white person were 4.3 times more likely to receive the death penalty than defendants with Black victims, and that Black defendants with white victims faced the greatest likelihood of death.[20]

The *McCleskey* Court held that a petitioner must show proof of the prosecution's discriminatory intent in order to establish an equal protection violation.[21] Justice Brennan aptly recognized in his dissent that the majority was motivated by its "fear of too much justice."[22] Through the intent requirement set in *McCleskey*, the Supreme Court closed the door on most challenges to equal protection violations based on racial disparities in criminal cases.[23] For decades, this legal standard has controlled across the country.

California enacted the RJA in the aftermath of the 2020 murder of George Floyd in response to urgent calls to address deeply rooted racial injustice in the criminal legal system.[24] The RJA purposely departs from the *McCleskey* standard[25] and allows claims based on express *or* implicit racial bias in charges, convictions, or sentences.[26] Looking ahead, according to its author, the RJA aims to drive behavioral change–to acknowledge the inequity etched into the pillars of our justice system, to affirmatively provide redress, and to cultivate a generation in which impartiality is inherent.[27] Given the clear racial disparities in the California criminal legal system,[28] the RJA can be a remarkable tool for defendants seeking remedies.

C. Relevance of Prosecutorial Policies, Practices, and Discretion, to the Racial Justice Act

District Attorney (DA) office policies are an important avenue for exploring RJA claims as well as efforts, or lack thereof, to mitigate racial bias. DA offices typically set office-wide policies, detailing requirements as well as best practices and enforcement priorities. At the federal level, the United States

20. 481 U.S. 279, 287 (1987).

21. *Id.* at 298.

22. *Id.* at 339 (Brennan, J., dissenting).

23. Chien et al., *supra* note 3, at 9; *see also* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1192 (2018) (describing the policy debate over whether discriminatory intent or disparate impact should govern equal protection claims, and major cases in which courts have required a showing of discriminatory intent).

24. Kalra, *supra* note 14.

25. Assemb. B. 2542 § 2(f), 2019-20 Leg., Reg. Sess. (Cal. 2020) (expressing disapproval with the *McCleskey* standard, which "accepts racial disparities in our criminal justice system as inevitable").

26. *See* CAL. PENAL CODE §§ 745 (a)(3)-(4), (c)(2); Bonds v. Superior Court, 99 Cal. App. 5th 821, 823 (2024) ("[A] defendant can seek relief regardless of whether the discrimination was purposeful or unintentional; in other words, the alleged bias can be implied rather than express.").

27. Kalra, *supra* note 14, at 14.

28. *See infra* pp. 7-9.

Department of Justice explains that the department's policy manual exists to "assure regularity without regimentation, and to prevent unwarranted disparity without sacrificing necessary flexibility."[29] Local prosecutors may similarly establish policies clarifying when to file charges for certain offenses or set guidelines for plea bargaining, for example.[30] Whether a DA office has well defined policies, and what those policies are, can influence the role of prosecutorial discretion in racially disproportionate criminal justice outcomes.

Prosecutorial discretion is the "power [of a prosecutor] to consider all circumstances and then determine what legal action is to be taken."[31] Where prosecutorial discretion exists, a prosecutor's subjective judgment–rather than objective facts or express agency guidance–directs the outcome. This discretion might result in a more serious charge, an enhancement, or the availability (or lack thereof) of bail, diversion, or an alternative court. A single discretionary decision can mean the difference between bringing a case to trial or dismissing the charges.[32] This power to shape a person's future underscores the profound responsibility entrusted to prosecutors.[33]

DA policies may either authorize or constrain the scope of prosecutorial discretion.[34] Due to the wide range of situations prosecutors encounter, some degree of discretion is inherent in a prosecutor's role.[35] A prosecutor may have different charging priorities, for example, when one defendant is arrested for reckless driving on an empty road and another defendant is arrested for reckless driving in a busy school zone. When exercising prosecutorial authority, a prosecutor is "not compelled by law, duty, or tradition" to treat two individuals who have committed the same offense identically.[36]

Prosecutorial discretion is a double-edged sword that may be used to either reduce or exacerbate racial disparities in the criminal legal system. On one hand, prosecutors can wield their discretion to reduce disparities and administer justice

---

29. U.S. DEP'T OF JUST., *9-27.001 Preface*, JUST. MANUAL (2018), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution.

30. *See* Kim Banks Mayer, *Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness?*, 1996 WIS. L. REV. 295, 309-10 (1996).

31. Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960).

32. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

33. Former Supreme Court Justice Robert Jackson declared that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America." *Id.*

34. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-2.4(a) (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/.

35. *See id.* ("[T]he prosecutor must exercise sound discretion in the performance of his or her functions."); Bruce Frederick & Don Stemen, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING TECHNICAL REPORT (Dec. 2012), https://www.ojp.gov/pdffiles1/nij/grants/240334.pdf.

36. Newman v. United States, 382 F.2d 479, 481-82 (D.C. Cir. 1967).

with nuance and compassion.[37] On the other hand, that same discretion "makes easy the arbitrary, the discriminatory, and the oppressive,"[38] allowing prosecutors to be guided by racial prejudice. Discretion coupled with limited information and resources can lead prosecutors to rely on racial stereotypes when making decisions about someone's culpability.[39] It is within the arbitrary, the discriminatory, and the oppressive that stark racial disparities take root.

D. Implicit Biases

Troubling discrepancies within criminal legal system outcomes may not always arise from malicious intent. Racial prejudice can operate beneath the surface, manifesting in not only explicit but also implicit biases. Social scientists have posited that implicit racial bias–a cognitive process that can lead even well-intentioned individuals to "automatically classify information in racially biased ways" [40]–may play a significant role in prosecutorial decision making.[41] This type of bias is pervasive, particularly under certain conditions marked by time pressure, ambiguity, and limited cognitive resources.[42] These conditions mirror the work environment of prosecutors, who generally enjoy very broad discretion and work under time pressures.[43]

When decision-makers experience broad discretion, little time to make decisions, and little accountability, biases more easily transfer into discriminatory actions.[44] It follows that prosecutors, expected to make rapid decisions with limited oversight, are potentially influenced by implicit bias.[45] Consider a prosecutor working with limited evidence who must quickly determine whether a shooter acted in self-defense. Empirical research has consistently shown that Americans often implicitly associate Black people with criminality or weapons, raising the risk that implicit bias may distort prosecutorial judgment when the victim of the shooting is Black.[46] These subtle, automatic judgments may explain why prosecutorial discretion can lead to racially disparate outcomes, even where overt bias is absent.[47] Especially in DA

---

37. *See* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 823 (2013).

38. Breitel, *supra* note 33, at 429.

39. Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and A Solution*, 29 CORNELL J.L. & PUB. POL'Y 257, 264 (2019).

40. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE UNIV. L. REV. 795, 797 (2012).

41. *See* Jack Glaser, *Implicit Bias, Science, and the Racial Justice Act*, 29 BERKELEY J. CRIM. L. 17, 23 (2024); Smith & Levinson, *supra* note 42, at 797; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012).

42. Glaser, *supra* note 43, at 22 .

43. Frederick & Stemen, *supra* note 37, at ii, 135.

44. Kang et al., *supra* note 43, at 1142.

45. Smith & Levinson, *supra* note 42, at 822.

46. *Id.* at 807.

47. This is not to say prosecutors are the only actors affected by implicit bias. Public defenders and judges, for example, also are susceptible to implicit biases influencing their decisions. *See* L. Song

offices without clear policies, unchecked implicit biases can shape prosecutorial decisions and lead to RJA violations.

E. Case Study: People v. Windom

To explore how policies, or their absence, can be relevant to an RJA claim, consider *People v. Windom*. In November 2021, Eric Windom, a 23-year-old Black man, was charged with various offenses, including murder and gang allegations.[48] These charges included gang murder special circumstance,[49] a statutory aggravating factor under California Penal Code section 190.2(a)(22) that can increase a murder conviction to a sentence of death or life in prison without the possibility of parole.[50] Mr. Windom filed a motion under the RJA to dismiss the gang-related murder special circumstance.[51] In his motion, Mr. Windom alleged that the Contra Costa County DA Office's disproportionate charging of Black defendants with gang murder special circumstances violated the RJA.[52]

In its May 2023 order granting Mr. Windom's motion, the court considered that in gang-related murder charges between 2015to 2022, the Contra Costa County DA's Office was either 32% or 44% more likely to charge Black defendants with special circumstances than non-Black defendants.[53] The court also considered expert testimony establishing that these racial disparities in charging gang-related special circumstances were highly unlikely to be the product of random chance, with statistical analysis showing a 92% probability that race was the determining factor.[54]

Richardson & Phillip Atiba Goff, *Implicit Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2648 (2013); Jeffery J. Rachlinski, et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 786 CORNELL L. FACULTY PUB. 1195 (2009).

48. *DA Secures Conviction in Antioch Murder Case at the Center of Racial Justice Act Violations*, CONTRA COSTA NEWS (May 7, 2024), https://contracosta.news/2024/05/07/da-secures-conviction-in-antioch-murder-case-at-the-center-of-racial-justice-act-violations/.

49. Evan Kuluk, *Disparate Racial Impact of Discretionary Prosecutorial Charging Decisions in Gang-Related Murder Cases: Litigating the Racial Justice Act in People v. Windom*, 29 BERKELEY J. CRIM. L. 71, 71 (2024).

50. CAL. PENAL CODE § 190.2.

51. Kuluk, *supra* note 51, at 73.

52. Court's Order Re: PC 745(a)(3) Motion 2, People v. Windom et al., No. 01001976380 (Cal. Super. Ct. Contra Costa Cnty. May 23, 2023), www.documentcloud.org/documents/23828698-racial-justice-act-coco-county-courts-order-re-pc-745a3-motion.

53. The Court calculated statistical disparities based on two different population pool samples, with an original dataset of 89 cases, which showed Black defendants were 43.95% (rounded to 44%) more likely than non-Black defendants to be charged with special circumstances, and an expanded dataset of 91 cases, which resulted in a 32% disparity. Both figures were found to be statistically significant, with the court concluding that racial disparities in charging were more likely than not the result of systemic bias rather than random chance alone. *Id.* at 10.

54. *Id.*

Even though 95% of people convicted of first-degree murder in California were eligible to be charged with special circumstance allegations,[55] the Contra Costa County DA's Office lacked formal policies governing when to file these allegations.[56] Nonetheless, the office still maintained that it only considered race-neutral factors when making charging decisions.[57]

The court granted Mr. Windom's motion, finding that a significant statistical disparity existed in the charging decisions of similarly situated Black and non-Black defendants in gang-related murder cases.[58] In doing so, the court considered relevant "the absence of formal written charging guidelines" and "the absence of formal written 'best practice' guidelines for avoiding implicit bias."[59] It was also "important to the court" that the Office did not provide a "case-by-case evidentiary presentation" about the facts considered by the prosecutors who charged gang-related murder cases.[60] After *Windom*, the Contra Costa County District Attorney publicly acknowledged the importance of establishing charging policies to check prosecutors' implicit biases, stating, "The court's ruling provides direction, and my office will review similarly charged cases to promote fair and equitable prosecution."[61]

Windom highlights the relationship between prosecutorial discretion and racial disparities in criminal justice outcomes. In Contra Costa, a county with no guidelines about charging gang murder special circumstances, prosecutors were markedly more likely to charge Black people.[62] This case demonstrates a potent connection between RJA claims and the lack of prosecutorial policies, teeing up potential strategies for other practitioners.

---

55. COMM. ON REVISION OF THE PENAL CODE, ANN. REP. AND RECOMMENDATIONS 51 (Dec. 2021), http://clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf.

56. Kuluk, *supra* note 51, at 78-79; Court's Order Re: PC 745(a)(3) Motion, *supra* note 54, at 2.

57. Court's Order Re: PC 745(a)(3) Motion, *supra* note 54, at 2.

58. *Id.* at 10.

59. *Id.* at 2.

60. *Id.*

61. Nate Gartrell, *Judge Finds Contra Costa DA's Filing Practice are Racist, Dismisses Special Circumstances Charges in Murder Case*, MERCURY NEWS (Mar. 16, 2024), https://www.mercurynews.com/2023/05/19/judge-finds-contra-costa-das-gang-filing-practices-are-racist-dismisses-special-circumstances-charges-in-murder-case.

62. This discretionary charging gap is intertwined with racial disparities in gang databases. For example, the Contra Costa DA's Office could have adopted a uniform charging policy, such as requiring prosecutors to always file gang enhancements against anyone listed in a gang database. However, given the longstanding bias in gang classification and law enforcement practices that are notoriously overinclusive of classifying Black individuals as gang members, such a policy may still disproportionately target Black defendants. *See infra* Part II.B. Even in the absence of explicit racial intent, so-called neutral policies can operate as racialized enforcement mechanisms, producing the very inequities they sought to avoid.

F. Roadmap

While many factors contribute to racially disparate outcomes in California's criminal legal system, this Article explores how prosecutorial discretion, as elaborated by the presence or absence of policies across California's fifty-eight DA offices, may be relevant for RJA claims. This Article analyzes the written policies of California's DAs to identify the significance of prosecutorial discretion in three areas that have ramifications for racial bias in the criminal legal system, and thus for the implementation of the RJA: (1) charging decisions; (2) diversion eligibility and referrals; and (3) jury selection. Part I explains the methodology in gathering and analyzing the policies of California's fifty-eight DA offices. Part II details key findings from an analysis of policies constraining prosecutorial discretion in these three focus areas. The Conclusion considers how prosecutorial policies may shine light on potential RJA claims. We also highlight ways DA offices can design policies to limit racial bias. Finally, we discuss recommendations for future research into DA office policies and the RJA.

I. METHODOLOGY

A. Source of Policies

Starting in 2021, the ACLU of Northern California (ACLU NorCal) and the law firm BraunHagey & Borden LLP used the California Public Records Act (PRA) to request prosecutorial policies, training materials, and data, from all fifty-eight of California's DA offices.[63] While some counties sent hundreds of policies, trainings, and related materials, other counties failed to comply with their statutory obligations, in some cases leading to litigation.[64] ACLU NorCal published all produced policies, training materials, and data on a public website.[65] A team of student researchers at the Berkeley Criminal Law & Justice Center collected and reviewed approximately two thousand responsive documents.[66]

Our team divided documents into two primary categories: policies or trainings. We created guidelines distinguishing policies and trainings, although the difference was often subject to interpretation. Students classified documents as policies if they listed a more formal recommendation, duty, or legal

63. Emi MacLean, *Embracing "Too Much Justice": Realizing the Potential of the California Racial Justice Act*, 29 BERKELEY J. CRIM. L. 89, 96 (2024).

64. ACLU NorCal and BraunHagey & Borden LLP sued the counties of Mendocino, Orange, Santa Cruz, Siskiyou, and Solano for noncompliance with their statutory obligations. Parties may initiate a proceeding to seek compliance under the California Public Records Act. *See* CAL. GOV'T CODE § 7923.000.

65. To access the data and documents produced, see Racial Justice Act, ACLU NorCal, https://www.aclunc.org/racial-justice-act.

66. The results can be found in the hyperlink under Appendix A.

interpretation for prosecutors to follow.[67] Trainings covered documents that informed prosecutors on a certain practice and were generally informal and educational in nature.[68]

Next, we sorted the documents according to issue area, focusing on issues that were particularly relevant to RJA claims or particularly vulnerable to racial bias. The primary categories we tracked were gang prosecution, drug prosecution, diversion courts, sentence enhancements, general charging and sentencing, jury selection, bail, racial bias, and RJA.

This Article provides a more in-depth analysis of prosecutorial policies in three of these priority areas: charging enhancements, referrals to diversion, and the exercise of peremptory challenges in jury selection. We chose the excerpts from DA policies included in this Article because those policies were either representative of broader trends or because they uniquely addressed how racial bias intersects with the role of the prosecutor.

B. Limitations in Analysis

The conclusions drawn from our policy analysis are subject to a number of limitations.

First, a significant number of offices refused to produce or fully release their internal policies.[69] Although we analyzed approximately two thousand documents, we likely only reviewed a portion of the actual number of prosecutorial policies because not all offices produced any or all responsive documents. Second, the policies are limited by time, as our analysis included only policies produced in response to PRA requests as of October 2023. Thus, any policies created or provided by DA offices after this date are not included. Third, smaller counties often had fewer (or no) policies while larger counties had more.[70] In smaller offices, policies may still be an important tool for ensuring that even a single attorney does not make different decisions based on a defendant or complaining witness's race, but uniformity across attorneys'

67. Examples of policies include formal office memos adorned with the office's letterhead, office policy manuals, or emails directing prosecutors to all follow a new set of guidelines in response to new legislation. Generally, either the DA or a more senior prosecutor in the office authored and signed off on policies.

68. Examples of trainings include PowerPoints, treatises, sample briefs, the text of a statute, seminar outlines, articles, or case law summaries. We also created a "Misc." category, describing any miscellaneous document not matching the "policy" or "training" description that did not instruct individual assistant DAs on how to fulfill the job of a prosecutor. Documents labeled as "Misc." included press releases, chain or internal emails, court brochures or forms, attendance lists, evaluations, training announcements, and corrupted files.

69. MacLean, *supra* note 65, at 96-99.

70. For context of the different sizes of California DA offices, the Los Angeles County DA Office is the largest prosecutorial office in the country. *See Office Overview*, LOS ANGELES CNTY DIST. ATT'Y'S OFF., https://da.lacounty.gov/about/office-overview (last visited Aug 10, 2024). In contrast, the Alpine County DA Office is staffed by only one attorney. Email from Sophia R. Meyer, Partner, Prentice Long PC, to Ellen Leonida, Braunhagey & Borden LLP (July 17, 2021), https://drive.google.com/file/d/1T34qCuhirSFSNQ5vqi6xWelvKsbtPCfA/view.

decisions is less of a concern. In all, our team did not categorize a single policy for twenty-eight of the state's fifty-eight DA offices either because the county refused to produce any policies, did not issue policies, or the document did not fit under our team's "policy" definition.[71]

Finally, an evaluation of DA policies does not convey the actual actions of prosecutors in an office (who may or may not follow the policy as written). There is often a disconnect between written policy, even where it exists, and actual practice on the ground. Some DA offices may operate through uncodified norms and internalized practices that, though unwritten, function with the full force of policy. These informal directives can be strategic, enabling prosecutors to implement certain practices while circumventing the public scrutiny or political backlash that formal policies might invite. Practically, almost no outside oversight exists regarding whether a prosecutor follows a written policy in an individual case, particularly where the policies are withheld from the public.

II. KEY FINDINGS

In this Part, we present findings from our analysis of California DA office policies related to our three priority areas: charging sentence enhancements, referring defendants to diversion programs, and exercising peremptory challenges during jury selection. For each Section, we elaborate on the significance of the issue for racial disparities in the criminal legal system, highlight examples of policy trends that may be useful for practitioners in identifying RJA claims, and, where available, present models that seek to limit implicit and explicit racial biases.

A. Charging Sentencing Enhancements

1. Significance of Charging Enhancements for Racial Disparities in the Criminal Legal System

A sentencing enhancement is another term of imprisonment added to the base term of the underlying crime.[72] Enhancements are categorized as either conduct enhancements, based on the circumstances of the offense, or status enhancements, based on characteristics of the accused.[73] As of 2022, about 70% of people incarcerated in California were serving enhanced sentences,[74] and enhancements almost double the average sentence length.[75] Special

---

71. Appendix A (our spreadsheet).

72. Cal. R. Ct. 4.405(5).

73. Elan Dagenais et al., *Sentencing Enhancements and Incarceration: San Francisco, 2005-2017*, STANFORD COMPUTATIONAL POL'Y LAB 1 (Oct. 17, 2019), https://policylab.hks.harvard.edu/media/enhancements_2019-10-17.pdf.

74. Mia Bird et al., *Sentence Enhancements in California*, CAL. POL'Y LAB 3 (Mar. 23, 2023), https://capolicylab.org/wp-content/uploads/2023/03/Sentence-Enhancements-in-California.pdf.

75. *Id*. at 16.

circumstances, which are related to sentence enhancements, can be added to a first-degree murder charge in order to make a defendant eligible for the death penalty.[76] The state has over one hundred different statutory provisions related to sentence enhancements.[77]

Ironically, legislators introduced enhancements in 1976 hoping that they would bring "uniformity" to criminal sentences as part of an overhaul to California's criminal law, supplanting the former system of indeterminate sentencing.[78] However, the law grants DAs discretion to decide when to charge enhancements and special circumstances.[79] As discussed earlier, 95% of first-degree murder convictions could be charged with special circumstance allegations, leaving the decision almost entirely up to the prosecutor.[80] Such broad discretion was at issue in *People v. Windom*, where the Contra Costa County DA's Office had no policies guiding prosecutors on when to charge sentencing enhancements, resulting in racial disparities.[81]

Black and Brown people are sentenced with enhancements at higher rates. Of incarcerated people in California, 78% of Black people have at least one sentencing enhancement, compared to 70.3% of American Indian people, 65.5% of Hispanic people, and 58.4% of white people.[82] Particular status enhancements are also connected to racially disparate sentences. For example, Black people are convicted disproportionately of "nickel prior enhancements,"[83] which increase a person's sentence depending on their prior convictions.[84] Enhancements based on priors contribute to a racial cumulative disadvantage, as "[t]he process by which prior records are built 'institutionalizes' inequality."[85] This process includes racial bias in policing, arrests, charging, and conviction decisions.

Gang enhancements have also been applied in a manner that targets Black and Brown people. The California Street Terror Enforcement and Protection (STEP) Act provides for sentence enhancements of up to ten years for felonies committed "for the benefit of, at the direction of, or in association with" a gang.[86]

---

76. *See* CAL. PENAL CODE § 190.2.

77. Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PUB. POL'Y INST. OF CAL. (SEPT. 27, 2017), https://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform/.

78. Dagenais et al., *supra* note 75, at 3.

79. Bird et al., *supra* note 76, at 4.

80. COMM. ON REVISION OF THE PENAL CODE, *supra* note 57, at 51.

81. *See supra* Introduction.

82. Bird et al., *supra* note 76, at 31.

83. Molly Pickard et al., *California's Nickel Prior Enhancement and Recent Reforms: A Snapshot*, CAL. POL'Y LAB 5 (Dec. 2023), https://www.capolicylab.org/wp-content/uploads/2023/12/Californias-Nickel-Prior-Enhancement-and-Recent-Reforms.pdf.

84. For example, nickel priors increase a person's sentence by five years if he has been previously convicted of a serious felony. CAL. PENAL CODE § 667(a)(1).

85. Audrey Hickert et al., *Prior Punishments and Cumulative Disadvantage: How Supervision Status Impacts Prison Sentences*, 60 CRIMINOLOGY 27, 29 (2022) (citation omitted).

86. CAL. PENAL CODE § 186.22(b)(1).

The STEP Act, first passed in 1988, was one of the first of many anti-gang measures that spread throughout the country.[87] These anti-gang statutes have been criticized for their vague definitions of what constitutes a gang member.[88] The vagueness allows for facially neutral gang enhancements to disproportionately target Black and Brown people, leading to longer sentences. Scholars have noted that gang classifications have been biased against poor, Black, and Brown communities, resulting in significantly disproportionate sentences.[89] The racial disparities in sentence enhancements indicate that this area may be ripe for RJA claims.

2. *California DA Policies Related to Charging Enhancements*

Seventeen California counties produced policies that referenced charging enhancements.[90] A review of those policies revealed two broad categories of policies. First, some policies constrained discretion, directing line prosecutors to always charge applicable enhancements or to obtain a supervisor's approval before deviating from policy or charging a certain enhancement. Second, some DA policies affirmatively acknowledged racial biases inherent in the criminal legal system and aimed to reduce racial disparities. For example, one office discouraged charging based on a person's prior criminal record. Other DA offices limited the charging of gang enhancements based on an awareness of the connection between gang charges and racial stereotypes. These policies recognized that race-neutral factors actually do implicate certain forms of racial bias.

Policy Theme: Maximal Charging of Applicable Enhancements & Requirement of Supervisor Approval for Policy Deviations

At least thirteen county DA policies direct prosecutors to file certain enhancements whenever these enhancements apply.[91] DA policies also often limit the discretion of line prosecutors by requiring supervisor approval for a deviation from this policy, something we observed in thirteen counties, some of which were different from those requiring enhancements whenever applicable.[92] Some of the policies we reviewed required supervisor approval if a line

---

87. Zachariah D. Fudge, *Gang Definitions, How Do They Work?: What the Juggalos Teach Us About the Inadequacy of Current Anti-Gang Law*, 97 MARQ. L. REV. 979, 1001 (2014).

88. *Id.* at 1030.

89. Linda S. Beres & Thomas D. Griffith, *Gangs, Schools and Stereotypes*, 37 LOY. L.A. L. REV. 935, 936 (2004).

90. El Dorado, Fresno, Imperial, Lake, Los Angeles, Marin, Monterey, Placer, Riverside, Sacramento, San Francisco, San Mateo, Santa Barbara, Stanislaus, Sutter, Tulare, and Ventura.

91. Ventura, El Dorado, San Mateo, Monterey, Fresno, Sacramento, Los Angeles, Yuba, Lake, Sonoma, Sutter, Riverside, and Tulare.

92. Ventura, Los Angeles, Sacramento, Fresno, Monterey, Tulare, San Diego, San Mateo, Sutter, Stanislaus, Yuba, El Dorado, and Santa Barbara.

prosecutor chose *not to charge* certain enhancements or file prior convictions.[93] Other policies required supervisor approval in order *to charge* certain enhancements.[94]

An example of such a policy is Sacramento's DUI policy, which is expressly intended "to promote consistency and uniformity." Sacramento's DUI policy requires the prosecution of certain enhancements related to blood alcohol allegations and excessive speed, for example, wherever there is sufficient evidence.[95] Additionally, prosecutors must seek supervisor approval for deviations from this DUI enhancement policy.

SAMPLE POLICY: SACRAMENTO

"DUIs continue to be the leading cause of fatal traffic collisions. The District Attorney's Office is committed to prosecuting these crimes in the interest of public safety and with the goal of the prevention of future offenses."

"[The following guidelines] are provided to promote consistency and uniformity in our handling of DUI cases. They cannot prevail in every situation, as each case must turn on the sufficiency of the evidence. However, deviation from these guidelines requires approval of a supervisor or lead attorney."

"The following allegations and enhancements will be charged, if applicable:

- a refusal to submit to a chemical test at the request of a peace officer pursuant to Vehicle Code sections 23577 and 23538(b)(2)
- high blood alcohol allegation pursuant to Vehicle Code sections 23578, 23538(b)(2), or 23556

93. *See, e.g.,* Fresno Cnty. Dist. Att'y's Off., *6.08 Felony Sentencings* 26 (Feb. 2021), https://drive.google.com/file/d/1s5kgoQ3_u76gZuACWaPQGOX0k_uv5Elx/view (stating that prosecutors must consult with a Chief DDA prior to deciding not to file strike priors).

94. *See, e.g.*, Tulare Cnty. Dist. Att'y's Off., *Policy Manual DA* 26 (2010), https://docs.google.com/document/d/1YYT6bufhfXu8QDSkCCqLGo76hYY0mCpy/edit?usp=sharing&ouid=110850453772318235340&rtpof=true&sd=true (stating that the Supervising Attorney of the Major Crimes Division must approve the decision to file homicide cases with special circumstance allegations); Dist. Att'y Cnty. of San Mateo, *Policy and Procedure Manual: Policy and Procedure #6-04* 116 (Sept. 2019), https://drive.google.com/file/d/1Ic44NE0uu5Tq9SmghcQYYAcxzePkt6O8/view (stating that homicide prosecution unit supervisor of the Chief Deputy District Attorney must approve the decision to file special circumstance allegations); Sutter Cnty. Dist. Att'y's Off. 62 (2018), https://drive.google.com/file/d/1OWpZC13IAyNCRuDbjF40RAtaOIg1cVvf/view (stating that Assistant District Attorney and District Attorney must approve the decision to file homicide cases with special circumstance allegations).

95. The phrase "wherever there is sufficient evidence" is used in statutes and ethical standards, as well as many of the DA offices' policies that we reviewed. This phrase is emblematic of how subjective standards can be, as what constitutes "sufficient evidence" can depend greatly on the eye of the beholder.

> ● multiple victims of a Vehicle Code section 23153 offense pursuant to Vehicle Code section 23558
>
> ● excessive speed enhancement pursuant to Vehicle Code section 23582
>
> ● minor passengers present in the vehicle enhancement pursuant to Vehicle Code section 23572”[96]

Supervisor approval could serve as an important backstop to checking an attorney’s implicit or explicit racial bias and could help ensure uniformity across an office, at least if the office is concerned with racially disproportionate charging. For example, if an attorney may subconsciously not want to charge white defendants with excessive speed enhancements, he may become aware of that pattern if he had to seek supervisor approval. Or, his supervisor may notice the pattern and seek to address the disparity in charging these enhancements. However, supervisor approval may be a deterrent to any deviation, resulting in only maximal charging of enhancements because line prosecutors may not want to deviate from the status quo. Moreover, a survey of prosecutors found that often the line prosecutor’s decision may prevail even if it conflicts with a supervisor’s view of the right enhancement because “the office only functions if the DA and supervisors trust ADAs (assistant district attorneys) to make the right decision.”[97]

By requiring prosecutors to always charge enhancements and limiting any deviation by mandating supervisor approval, these policies limit the discretion of line prosecutors. This may have the effect of restraining implicit biases of line prosecutors in choosing whether to charge an enhancement. A policy that directs prosecutors to pursue applicable enhancements may result in more uniform use of enhancements, regardless of the race of defendants. However, such a policy also results in maximum charging of enhancements, which can have the effect of exacerbating existing biases—for instance, the over-policing of Black and Brown communities means that applying enhancements evenly will still disproportionately impact Black and Brown defendants.[98] Further, by charging these enhancements whenever they apply, prosecutors may lengthen sentences, instead of being lenient when appropriate.

Reformists must grapple with the tension between policies that may temper prosecutors’ racial biases but could result in disproportionately harsh outcomes.

96. Off. of the Dist. Att’y Cnty. of Sacramento, *Legal & Case Prosecution Policy Manual* 16-17 (Dec. 10, 2019), https://drive.google.com/file/d/19xBnHemcFXeP02ZnJEuGcAAT_LEMFLqL/view.

97. Frederick & Stemen, *supra* note 37, at 27.

98. *See* Magnus Lofstrom, *Racial Disparities in Law Enforcement Stops*, PUB. POL’Y INST. OF CAL. 3 (Oct. 2021), https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/ (reviewing the racial disparities found in 2019 California law enforcement stops).

Black and Brown people could be most impacted by such overly punitive policies due to the systemic racism infecting the pre-charging stages of the criminal legal system.[99]

Theme: Acknowledging the Impact of Race on Criminal History

At least two California counties, Santa Clara and Los Angeles, issued policies that direct prosecutors to not pursue certain enhancements based on a person's prior criminal record.[100] By limiting the charging of enhancements related to prior criminal history, these policies direct prosecutors to decline charges that would have otherwise further contributed to the cumulative disadvantage of criminal justice outcomes.[101] This policy is also an example of how discretion can be used to further racial justice. Declination policies affording prosecutors discretion to interpret the law in a manner that seeks to mediate racial disparities can reduce mass incarceration and cumulative disadvantage.

For example, the Santa Clara DA's Office affirms that police have historically stopped Black and Hispanic people more than people of other races. This policy does not completely remove criminal history as a factor in charging sentencing enhancements. Instead, the policy prioritizes more relevant crimes—ones that are recent, violent, or related in kind to the current charge—as opposed to treating all priors equally.

SAMPLE POLICY: SANTA CLARA

"Further, if we know, and we do know, that the criminal justice system has included an outsized number of Latino and African American defendants in our community for a long time, that effect is cumulative over time in the criminal records of people who may have been stopped by the police more often than people in other communities for similar conduct. Recognizing that fact, we will consider in our charging decisions past crimes that are recent, violent, or related to the kind of crime being charged now – and not charge

99. *See, e.g.*, Magnus Lofstrom et al., *Racial Disparities in California Arrests*, PUB. POL'Y INST. OF CAL. 1 (Oct. 2019), https://www.ppic.org/wp-content/uploads/racial-disparities-in-california-arrests.pdf (recognizing that the African American and Hispanic arrest rate was 3.0 and 1.1 times the white arrest rate, respectively); Lofstrom, *Racial Disparities in Law Enforcement Stops*, *supra* note 100, at 3.

100. *See* Santa Clara Cnty. Dist. Att'y's Off., "*Bend the Arc" Reforms Update* 4, https://drive.google.com/file/d/1fMzxofx3ralv91lloFKjEPeQu7_DD2lg/view; L.A. Cnty. Dist. Att'y's Off., *Special Directive 20-08.2 Amendment to Special Directive 20-08* (Dec. 18, 2020), https://drive.google.com/file/d/1ZL3vinIQOLI05RD8bfui1szLAslmj2tv/view (stating that as a part of the office's commitment to "eliminating mass incarceration and fostering rehabilitation," the office will not pursue certain sentence enhancements and allegations).

101. *See* Hickert, *supra* note 87, at 29.

sentencing enhancements drawn from distant parts of a person's record that are unrelated to the crime currently committed."[102]

Policy Theme: Declining Gang Enhancements Because of Historical Racial Disparities

At least four DA offices issued policies that seek to limit gang charges.[103] San Francisco's policy, for instance, prohibited prosecutors from charging gang enhancements, except in "extraordinary circumstances" and even then only upon "approval of the District Attorney or his designee." San Francisco's policy responded to the historic use of gang enhancements to target young Black and Brown men. Los Angeles, San Diego and Santa Clara have similar policies limiting the use of gang enhancements.

SAMPLE POLICY: SAN FRANCISCO

"STEP Act enhancements ("gang enhancements") (Penal Code § 186.22 et. seq.) will not be charged and pending enhancements will be dismissed… In the event extraordinary circumstances present unusual risks of harm to public safety or crime victims, exceptions to this policy may be made with the approval of the District Attorney or his designee."[104]

"Gang enhancements have been widely criticized as unfairly targeting black and brown populations – particularly young men of color."[105]

Categorical declination policies counter racial injustice, especially if the policy limits exceptions. The San Francisco policy allowed for exceptions only in "extraordinary circumstances" and with supervisor approval, which may dissuade prosecutors from seeking exceptions for trivial reasons. By declining to charge gang enhancements, prosecutors can use their discretion to avoid enhancements that disproportionately target Black and Brown people, which has

102. Santa Clara Cnty. Dist. Att'y's Off., *supra* note 102, at 4.

103. Los Angeles, San Diego, San Francisco, and Santa Clara.

104. S.F. Dist. Att'y's Off., *Status Sentencing Enhancements* 1-2 (Feb. 22, 2020), https://drive.google.com/file/d/1SRh310abd5-D1ntIa7NsXFBBe76XcExq/view. Although no documents were released to the ACLU which formally revoked this 2020 policy, the current San Francisco District Attorney has charged gang enhancements in subsequent cases. *See* S.F. Dist. Att'y's Off., *District Attorney Brooke Jenkins Announces Four Charged With Murder and Multiple Felonies in Connection to North Beach Shooting* (July 20, 2023), https://sfdistrictattorney.org/press-release/district-attorney-brooke-jenkins-announces-four-charged-with-murder-and-multiple-felonies-in-connection-to-north-beach-shooting/; *but see* Joe Fitzgerald Rodriguez, *After Firing More Than a Dozen Staff, New SF DA Brooke Jenkins Says She Will Restore "Law and Order to San Francisco"*, KQED (July 18, 2022), https://www.kqed.org/news/11919770/after-firing-more-than-a-dozen-staff-new-sf-da-brooke-jenkins-says-she-will-restore-law-and-order-to-san-francisco.

105. S.F. Dist. Att'y's Off., *Status Sentencing Enhancements*, *supra* note 106, at 3.

the potential to reduce racial disparities in charging and sentencing. This type of policy served as an example of how constraining discretion may promote racial justice if the policy directs prosecutors to stop pursuing offenses rooted in racist policing and racial stereotypes.

Like in *Windom*, policies on gang enhancements—or the lack thereof—may indicate potential RJA claims. Even where there are contemporary policies which limit the reliance on gang or other enhancements, the existence of past policies that did not do so may be relevant for RJA practitioners.

B. Diversion

1. Significance of Diversion for Racial Disparities in the Criminal Legal System

Pretrial diversion allows people who have been arrested to participate in programs and alternative courts outside of traditional methods of criminal prosecution, reducing criminal penalty.[106] In California, three broad categories of diversion programs exist: (1) court-ordered diversion, where the court decides the defendant's eligibility; (2) deferred adjudication or entry of judgment, where the prosecutor may agree to reduce or dismiss the charges if the defendant satisfactorily completes probationary terms;[107] and (3) "DA diversion," where the prosecutor decides whether the defendant can participate in the program.[108] Prosecutors play an important role in deciding whether a defendant is eligible for court-ordered diversion and whether to object to such programs. Prosecutors can also decide whether to agree to deferred entry of judgment or DA diversion.

As with charging decisions, scholars have found racial disparities among defendants offered pretrial diversion. A study analyzing diversion decisions in metropolitan counties from 1990 to 2006 found that prosecutors were more likely to offer or support diversion for white defendants than for Black or Hispanic defendants.[109] Comparing drug defendants with no prior record, Black and Hispanic defendants had odds of receiving a pretrial diversion that were 43% and 34% lower, respectively, than similarly situated white defendants.[110] Given the racial disparities in diversion referrals, we analyzed DA policies to see if and how they addressed pretrial diversion.

106. David Noble, *Mapping the Landscape of Prosecutor-Led Pretrial Diversion*, 11 CRIM. L. PRAC. 8, 13-14 (2020).

107. Brian R. Means, THE HECK DOCTRINE—PRE-TRIAL DIVERSION, POSTCONVICTION REMEDIES § 11:5 (2024).

108. J. Richard Couzens et al., GENERALLY, SENTENCING CALIFORNIA CRIMES § 7:1 (2023).

109. Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts*, 3 RACE AND JUST. 210, 228 (2013).

110. *Id.* at 226.

2. California DA Policies Related to Diversion

At least twenty-two counties produced policies that included reference to pretrial diversion.[111] We identified two main policy themes in our review of these policies. First, some policies direct prosecutors to determine a defendant's eligibility for pretrial diversion using seemingly race-neutral factors. However, in practice, these race-neutral factors may result in disproportionately fewer diversion recommendations for Black and Brown defendants. One of the most common supposedly race-neutral factors incorporated into policies is a defendant's gang affiliation. These policies have important implications for a possible RJA claim alleging that the defendant was not offered the same pretrial diversion opportunities as defendants of other races who committed similar offenses, and that the prosecution more often sought or obtained criminal charges—or more serious charges—against people of the same race as the defendant.[112] Second, we found model policies that explicitly encourage diversion whenever appropriate, which broadens prosecutorial discretion and also may reduce mass incarceration.

Policy Theme: Determining Eligibility Based on Gang Affiliation

At least six DA offices consider a defendant's gang affiliations or gang-related convictions as a factor to determine diversion eligibility.[113] However, using gang affiliation as a proxy for diversion eligibility can exacerbate racial disparities in the criminal legal system because of the close relationship between racial stereotypes and gang membership allegations.[114] The inequities ingrained in California's gang database, CalGang, are one result of the connection between race and gang allegations.[115]

CalGang disproportionately lists Black and Brown people as gang members: 40,043 people in the database were Black or Hispanic out of 45,336 total people listed in the database.[116] Reports have criticized CalGang for being inaccurate, as there have been complaints of police officers lying in order to add people to the database, and for contributing to racial profiling of community members.[117] In fact, at least one California DA office has explicitly chosen not

111. Alameda, El Dorado, Fresno, Inyo, Los Angeles, Marin, Monterey, Napa, Orange, Placer, Sacramento, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Shasta, Stanislaus, Sutter, Tulare, and Yuba.

112. *See* CAL. PENAL CODE § 745(a)(3).

113. San Luis Obispo, San Francisco, Santa Barbara, Sonoma, Napa, and Monterey.

114. *See* Marie Pryor, Kim Shayo Buchanan & Phillip Atiba Goff, *Risky Situations: Sources of Racial Disparity in Police Behavior*, 16 ANN. REV. LAW. & SOC. SCI. 343, 346-47 (2020).

115. *See* Cal. Dep't of Just. Off. of the Att'y Gen., *CalGang® Frequently Asked Questions (FAQs)* (2025), https://oag.ca.gov/calgang/faqs.

116. *See* CAL. DEP'T OF JUST., ATT'Y GEN.'S ANN. REP. ON CALGANG FOR 2020, 5 (2020), https://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/ag-annual-report-calgang-2020.pdf.

117. Anita Chabria & Leila Miller, *Reformers want California police to stop using a gang database seen as racially biased*, L.A. TIMES (June 24, 2020),

to rely on CalGang when considering whether to file gang enhancements.[118] This database is part of a policing system that leads to a disproportionate amount of Black and Brown people with gang convictions.[119] Over 90% of people with gang convictions in California are Black or Hispanic.[120] Given the over-representation of Black and Hispanic people in the gang database and among the population of people with convictions, excluding "gang-affiliated" people from diversion can leave out many Black and Brown defendants. Monterey's Driving Under the Influence (DUI) policy is an example of a policy that uses gang affiliation as a factor in determining eligibility for an alternative court program.

SAMPLE POLICY: MONTEREY

Eligibility Criteria for Misdemeanor Multi-Offender DUI Court Program includes "[n]o current or prior gang affiliation within 10 years."[121]

Monterey's policy shows how gang affiliation is inappropriately used in diversion decisions. While there is a public safety concern in limiting gang violence, there is a dubious connection between gang affiliation and the need to convict a defendant of a DUI instead of offering him diversion. Even if the defendant was a gang member, it's unclear why that person would benefit less than anyone else from substance abuse treatment and other resources offered by a DUI diversion program. As with the policy using criminal history as a factor in determining diversion eligibility, policies using gang membership as a factor may disproportionately deny Black and Brown people diversion opportunities more frequently offered to similarly situated defendants. Practitioners and scholars should explore pairing policies using gang membership as an eligibility factor with data about the race of defendants offered diversion to discover potential RJA violations. Additionally, this policy serves as a reminder that reducing prosecutorial discretion does not necessarily reduce disparate outcomes because facially neutral criteria like gang membership can often be strongly correlated with race.

https://www.latimes.com/california/story/2020-06-24/california-police-urged-to-stop-using-gang-database-deemed-biased.

118. San Diego Cnty Dist. Att'y's Off., *Legal Policies Guide* 10 (June 2021), https://drive.google.com/file/d/1xCmlB_BNkMz_9jtPkN1Fk7WVeFES9xAV/view ("Whether an individual is 'documented' as a gang member within such a database is wholly irrelevant to any charging decisions made by Gangs Division Deputy District Attorneys, and a person being documented in Cal-Gangs as a gang member does not constitute evidence of gang membership.").

119. Fareed Nassor Hayat, *Abolish Gang Statutes with the Power of the Thirteenth Amendment: Reparations for the People*, 70 UCLA L. REV. 1120, 1189 (2023).

120. Abené Clayton, *92% Black or Latino: The California Laws That Keep Minorities in Prison*, THE GUARDIAN (Nov. 26, 2019), https://www.theguardian.com/us-news/2019/nov/26/california-gang-enhancements-laws-black-latinos.

121. Monterey County District Attorney's Office, *Misdemeanor Multi-Offender DUI Court Program*, https://drive.google.com/file/d/161bs931zH-X5L6LFy4MAEGWyD7yrl8PZ/view.

Policy Theme: Encouraging Diversion

Policies that explicitly encourage offices to pursue diversion programs may ameliorate racial disparities in criminal legal system outcomes. Diverting people from the traditional criminal system reduces recidivism, as well as the amount of criminal convictions and the stigma that follows convictions.[122] Since Black and Brown people are arrested at higher rates than white people, an increase in diversion could impact the overreach of the criminal system on communities of color and especially Black and Brown youth.[123] Young people who are diverted instead of formally petitioned in court, commit less violence, have higher rates of school completion, and are less likely to be arrested in the future.[124] By expanding diversion programs in general, fewer Black and Brown people are harmed by the traditional criminal legal system. The Los Angeles County DA Office's policy serves as an example of a policy that encourages diversion.

> **SAMPLE POLICY: LOS ANGELES**
>
> "…[T]his policy is intended to encourage program participation in diversion and ASC [Alternative Sentencing Court] programs whenever it is in the interest of justice and protects victims' rights and public safety."[125]

The Los Angeles DA's Office explicitly states its intention to encourage diversion and alternative court participation in its policy. However, in reality this policy may not significantly constrain a line prosecutor's discretion. The phrase "whenever it is in the interest of justice and protects victims' rights and public safety" is extremely vague, allowing a prosecutor to act in accordance with their own beliefs when determining what qualifies as being "in the interest of justice." This policy is an example of how broad prosecutorial discretion has the potential to either be applied unequally or be used to reduce mass incarceration by encouraging diversion across the board. In crafting policies, DA offices should look to expand diversion by setting objective criteria for eligibility and eliminating factors that may disproportionately disqualify Black and Brown defendants.

---

122. Michael Mueller-Smith & Kevin Schnepel, *Second Chance: The Social Benefits of Diversion in the Criminal Justice System*, MICROECONOMIC INSIGHTS (Mar. 16, 2021), https://microeconomicinsights.org/second-chance-the-social-benefits-of-diversion-in-the-criminal-justice-system/.

123. *See* Richard Mendel, *Diversion: A Hidden Key to Combating Racial and Ethnic Disparities in Juvenile Justice*, THE SENTENCING PROJECT (Aug. 30, 2022), https://www.sentencingproject.org/reports/diversion-a-hidden-key-to-combating-racial-and-ethnic-disparities-in-juvenile-justice/.

124. *See id*.

125. Special Directive 17-08 from Los Angeles County District Attorney Jackie Lacey (Apr. 19, 2017), https://drive.google.com/file/d/1owRWw50aCrfOUPpOGiBxL1_JqMGZZ_at/view.

3. *A Way Forward*

There are a few policy-based solutions to reduce the racial disparities in diversion participation. One solution is to eliminate fee-based diversion programs.[126] Due to the relationship between income and race, fees associated with diversion programs discourage Black and Brown people in particular from participating.[127] Additionally, we have identified DA office policies that sought to address racial disparities by actively encouraging diversion for all defendants. DA offices should consider incorporating these policies because diversion programs not only save money, improve community safety, and decrease recidivism,[128] but they also reduce the impacts of mass incarceration—a system that targets Black and Brown people.

C. *Exercise of Peremptory Strikes*

1. *Significance of Peremptory Strikes for Racial Disparities in the Criminal Legal System*

Because we did not categorize any jury selection policies, we instead highlight the role that California DA training on peremptory strikes plays in contributing to a racially biased jury. To provide context, we first define peremptory strikes and *Batson-Wheeler* challenges.

Peremptory strikes allow the prosecution and defense to remove potential jurors from a jury pool without needing to state a reason.[129] While peremptory strikes have traditionally been justified to ensure the "selection of a qualified and unbiased jury,"[130] peremptories allow parties to act upon prejudices based on "the bare looks and gestures of another."[131] These arbitrary challenges, a prime example of broad prosecutorial discretion, allow the possibility of racially motivated strikes to exclude potential jurors.[132]

---

126. Crime and Justice News, *Critics Say Prosecutors' Diversion Policies Perpetuate Race Disparities*, NAT'L CRIM. JUST. ASS'N (Mar. 10, 2023), https://www.ncja.org/crimeandjusticenews/critics-say-prosecutors-diversion-policies-perpetuate-race-disparities.

127. *See id*.

128. Micah W. Kubic & Taylor Pendergrass, *Diversion Programs Are Cheaper and More Effective Than Incarceration. Prosecutors Should Embrace Them.*, ACLU (Dec. 6, 2017), https://www.aclu.org/news/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors.

129. *See* Batson v. Kentucky, 476 U.S. 79, 91 (1986).

130. Lewis v. United States, 146 U.S. 370, 376 (1892).

131. *Id.*

132. Defense counsel may at times benefit from the use of peremptories. Laurel Johnson, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They Provide*, 5 U. DENVER CRIM. L. REV. 215, 226-27 (2015). However, in a study of California courts of appeal cases, the overwhelming majority (92%) of race-based challenges against the use of peremptories were made by the defense. *See* BERKELEY LAW DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX 13 (June 2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

A party may not use a peremptory strike to remove a potential juror solely based on "group bias," an assumption that someone is biased because of his membership in a cognizable group, which includes race.[133] In *Batson v. Kentucky*, the Supreme Court set forth a three-step process for evaluating discriminatory claims.[134] First, the moving party must make a prima facie case showing an inference of discriminatory purpose.[135] The burden then shifts toward the opposing party to provide a race-neutral reason for the peremptory strike.[136] Finally, the Court must decide if the moving party met his burden to prove purposeful discrimination.[137] About eight years earlier, the California Supreme Court established a similar three-part test in *People v. Wheeler*.[138]

However, the procedures set forth in *Batson* and *Wheeler* have failed to curb racial disparities in the use of peremptory challenges.[139] In his concurring opinion in *Batson*, Justice Thurgood Marshall anticipated the failure of these measures to truly abolish discriminatory peremptory strikes.[140] He noted that the second *Batson* step allows the non-moving party to easily disguise prejudicial intentions or even "unconscious racism" by offering facially neutral reasons to strike a juror.[141] Justice Marshall's premonitions were later confirmed by data and science analyzing the use of peremptories, including studies that demonstrate how implicit biases influence prosecutors' use of peremptories.[142] To illustrate, a prosecutor's association of Black people with a lack of respect for law enforcement may influence his perception of a Black juror's behavior.[143] If he sees the juror avoiding eye contact, he may implicitly assume that the Black juror is less credible.[144]

Explicit biases may also play a role, as some prosecutors use peremptories to kick Black and Brown people off the jury because they know that whiter juries are more likely to convict minority defendants.[145] For example, a district court judge recently ordered an investigation into the purposeful, systematic exclusion

---

133. People v. Wheeler, 22 Cal. 3d 258, 276 (1978); *see also Batson*, 476 U.S. at 97-98 (holding that racially discriminatory use of peremptories violates the equal protection clause under the Fourteenth Amendment).

134. *Batson*, 476 U.S. at 96-98.

135. *Id.* at 96-97.

136. *Id.* at 97-98.

137. *Id.* at 98.

138. *Wheeler*, 22 Cal. 3d at 280-82.

139. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5-6 (Aug. 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

140. *Batson*, 476 U.S. at 105-07 (Marshall, J., concurring).

141. *Id.*

142. *See, e.g.*, BERKELEY LAW DEATH PENALTY CLINIC, *supra* note 134, at v; EQUAL JUSTICE INITIATIVE, *supra* note 141, at 5-6; Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

143. *See* Smith & Levinson, *supra* note 42, at 819.

144. *See id*.

145. *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2137 (2006).

of Black and Jewish jurors from Alameda County death penalty cases.[146] Further, in a comprehensive study of California Court of Appeals cases involving *Batson-Wheeler* challenges, the authors found that California prosecutors used peremptory challenges disproportionately against Black and Hispanic jurors.[147] The reasons prosecutors provided for exercising peremptories against Black and Hispanic jurors relied on racial and ethnic stereotypes, including inappropriate demeanor, expressing a distrust of law enforcement, having a close relationship with someone who has had contact with law enforcement or the criminal legal system, living in high-crime neighborhoods, and having a child outside of marriage.[148] Simply put, prosecutors make up justifications to obscure their systematic reliance on racial and ethnic stereotypes when striking Black and Brown jurors, as discussed in the section below.

2. California DA Trainings Related to Peremptory Strikes

In our review of the DA offices' documents, we found no office-wide policies on jury selection or exercising peremptory challenges. However, many counties issued jury selection trainings.[149] A common theme we found throughout these trainings was instructing prosecutors on how to avoid *Batson-Wheeler* challenges.

Training Theme: Advice for Avoiding Batson-Wheeler Challenges

Many DA offices presented trainings with a list of ready-to-go, race-neutral reasons to employ when responding to a *Batson-Wheeler* challenge.[150] The Berkeley Law Death Penalty Clinic, led by Professors Lis Semel and Ty Alper, also analyzed training materials from fifteen California DA's offices between 1990 and 2019, finding that many trainings instructed prosecutors to offer default explanations for strikes.[151] These training materials listed tricks "for concealing implicit and explicit bias" by producing lists of race-neutral reasons for striking Black jurors and strategies to avoid the appearance of racism at trial.[152]

146. Darwin Bond Graham & Eli Wolfe, *Alameda County Prosecutors Allegedly Excluded Black People and Jews from Death Penalty Juries*, THE OAKLANDSIDE (Apr. 22, 2024), http://oaklandside.org/2024/04/22/alameda-county-prosecutors-allegedly-excluded-black-people-and-jews-from-death-penalty-juries/.

147. BERKELEY LAW DEATH PENALTY CLINIC, *supra* note 134, at 13.

148. *Id.* at 14-22.

149. Alameda, Amador, Calaveras, Contra Costa, Del Norte, El Dorado, Fresno, Inyo, Kings, Los Angeles, Madera, Marin, Merced, Monterey, Orange, Placer, Riverside, Sacramento, San Benito, San Bernardino, San Diego, San Diego, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Shasta, Siskiyou, Sonoma, Stanislaus, Sutter, Tulare, Tuolumne, Ventura, and Yuba.

150. *See, e.g.*, William Woods, *Wheeler/Batson 2016* 14-19 (2016), https://drive.google.com/file/d/1fGACSQ506g43FTzoj0LgR-_7KSNf76QT/view (training produced by San Luis Obispo County District Attorney's Office listing 23 previously accepted race-neutral reasons); Cynthia Nakao, *Wheeler/Batson*, CNTY. OF LOS ANGELES DIST. ATT'Y (Feb. 21, 2018), https://drive.google.com/file/d/1aMH-zmHt3G8Wx4cPhIuJB-xwZN3qfMr0/view.

151. BERKELEY LAW DEATH PENALTY CLINIC, *supra* note 134, at 44.

152. *Id.*

Additionally, the trainings directed prosecutors to rely on their "gut" when choosing whom to strike, ignoring strong research about implicit biases' influence on gut decisions.[153]

RJA practitioners should be alert to the phrases utilized by prosecutors to justify their peremptory challenges, as such justifications may be fabricated to avoid the appearance of racial discrimination. Prosecutors may violate the RJA if they demonstrate racial bias against the defendant through their use of peremptories.[154] In an RJA claim, a defendant could present data showing that a DA office engaged in a systematic practice of impermissibly kicking off Black jurors coupled with trainings that direct prosecutors to choose from a list of race-neutral reasons. The training issued by the Los Angeles DA's Office demonstrates how offices train prosecutors to avoid *Batson*-*Wheeler* violations.

SAMPLE TRAINING: LOS ANGELES

"Best Practice Tips: You are not obligated to state reasons before court finds PF [prima facie case.] Make a full record on the issue before court rules[.] Your voluntary decision to state reasons is not an admission or concession[.]"[155]

"Offer race-neutral reason"[156]

"Bottom Line: May have to engage the juror to get the reason for the strike"[157]

In this training, the Los Angeles DA's Office offers advice on shaking *Batson*-*Wheeler* violations. First, the training directs prosecutors to make a full record, thus preserving the race-neutral reasons in case of appeal. Prosecutors are advised to offer a race-neutral reason for excluding a juror, which could be any of the misleading justifications highlighted by the Berkeley Law Death Penalty Clinic. Moreover, the training notes that prosecutors may have to "engage the juror" to find a race-neutral reason for the strike. This suggests that, in some situations, the prosecutor may have an ulterior, racially biased motive to strike the juror and is just simply fishing for a race-neutral excuse. Based on these findings from the Los Angeles DA's Office, jury selection trainings in other counties could be useful tools for developing RJA claims.

3. Policy Solutions

States and DA offices have enacted several policy and statutory solutions to temper the abuse of peremptory challenges. In 2020, the California

153. *Id.*
154. *See* CAL. PENAL CODE § 745(a).
155. Nakao, *supra* note 152, at 14.
156. *Id.* at 16.
157. *Id.* at 41.

Legislature passed AB 3070, codified as California Code of Civil Procedure section 231.7, which attempted to bolster the current *Batson-Wheeler* framework.[158] Pursuant to AB 3070, the judge need not find purposeful discrimination to sustain a *Batson-Wheeler* objection.[159] Furthermore, the statute makes the use of thirteen supposedly "race-neutral" reasons to exercise a peremptory strike presumptively invalid, imposing stricter standards for evaluating the validity of peremptory challenges.[160] Looking outside of California, DA offices and states have responded to the issue of peremptory strikes in various ways. The former Multnomah County DA in Portland, Oregon, issued a policy directing his office to never use peremptories.[161] Perhaps the most effective way to reduce racial bias in jury selection is to eliminate peremptory challenges statewide, as Arizona has done.[162]

CONCLUSION

Our Article attempts to explain the connection between the RJA, DA offices' policies, and the discretion granted or restricted by these policies. We discuss our findings across three themes: (1) how policies can be used as vehicles to discover RJA claims; (2) rethinking policies in light of the RJA; and (3) the role discretion plays in exacerbating or mitigating racial bias.

We highlight several ways to view DA offices' policies as avenues for RJA claims. First, practitioners should pair our policy analysis with statistics that highlight charging and sentencing outcomes with high racial disparities. For example, there is significant statistical data demonstrating that prosecutors are less likely to offer diversion programs to Black defendants than to white defendants.[163] Guided by county and statewide statistics on diversion outcomes, practitioners can develop RJA claims in counties with no policies on when to offer diversion or policies that use factors influenced by race, e.g., gang affiliation, neighborhood, or criminal history. Moreover, counties with policies that constrain discretion but reinforce racially biased policing could prove fruitful targets. This includes policies that rely on pretextual stops or gang databases. Finally, counties with virtually no policies–on issues like the use of peremptory challenges–are important to explore further because unlimited discretion may allow prosecutors' implicit biases to influence their decisions, as may have been the case in *People v. Windom*.

158. Assemb. B. 3070, 2019-20 Leg., Reg. Sess. (Cal. 2020).

159. CAL. CIV. PROC. CODE § 231.7(d)(1).

160. *See id.* at §§ 231.7(e)(1)–(13).

161. Noelle Crombie, *DA-Elect Nathan Vasquez Questions Timing of DA's New Jury Selection Policy*, OREGONLIVE (July 4, 2024, 11:57 AM), https://www.oregonlive.com/politics/2024/07/da-elect-nathan-vasquez-questions-timing-of-das-new-jury-selection-policy.html.

162. Press Release, Ariz. S. Ct., *News Release: Ariz. S. Ct. Eliminates Peremptory Strikes of Jurors* (Aug. 30, 2021), https://www.azcourts.gov/Portals/201/Press%20Releases/2021/083021Jury.pdf.

163. Schlesinger, *supra* note 111, at 226.

Additionally, this Article offers insights for DA offices. The RJA provides an incentive for DA offices to promulgate policies that reduce racial disparities in all aspects of the criminal legal system because DA offices want to avoid overturning convictions or judicial dismissal of cases. To start, we encourage DA offices to make their policies accessible to the public.[164] Further, DA office policies must recognize the existence of racial bias in criminal cases, like those policies that limit the use of racial stereotypes in gang enhancements and limiting peremptory challenges in jury selection. Prosecutors should be aware of the weight they place on criminal history, which can be a useful element in the decision-making process but can also be tainted by racial bias. DA offices should also consider implementing jury selection policies, explicitly directing line prosecutors to avoid using race as a proxy for a juror's fitness instead of relying on a list of race-neutral reasons if a *Batson-Wheeler* challenge arises.

A theme present throughout this Article is the nuanced role of prosecutorial discretion in promoting or discouraging racial justice in criminal legal system outcomes. Policies that constrain prosecutorial discretion can reduce the impact of racial bias but may solidify racial stereotypes or increase penalties for defendants across the board. For example, a policy can require prosecutors to charge a drug enhancement every time such enhancement applies to the facts of their case, even if refusing the enhancement would lead to a more "just" outcome. If a DA does decide to set guidelines for their office, such guidelines could include specific circumstances where leniency is appropriate, thus ensuring that strict policies do not lead to unnecessarily harsh sentences.

However, some declination policies–like refusing to ever charge gang enhancements–could *reduce* racial disparities. These policies, although constraining discretion, require deputies to check any implicit biases by including specific language about how prosecutors' decisions could have dangerous consequences for Black and Brown communities. There is also evidence that granting prosecutors wide discretion over the criminal legal system can increase racial disparities, at least in charging certain crimes.[165] There is no one-size-fits-all answer to how much, if any, discretion should be included in prosecutorial policies. By eliminating discretion, there will be less room for a prosecutor's implicit bias to skew arresting, charging, and sentencing outcomes. DA office policies can promote consistency in enforcing the law and

164. The refusal to disclose prosecutorial policies limits transparency into the decision-making of public officials and, as suggested here, hinders implementation of the RJA. *See* MacLean, *supra* note 65, at 99. Public transparency is especially important for district attorneys in the United States, as the United States is the only country in the world where prosecutors are elected. DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 28 (2016).

165. *See* Chien et al., *supra* note 3, at 42. In their empirical study analyzing wobblers, crimes that could be charged as either misdemeanors or felonies, Professor Chien's team found that when prosecutors have more discretion over whether to charge a crime, racial disparities increase between Black and white defendants.

theoretically reduce discriminatory prosecutorial practices.[166] But, prosecutors should have leeway to decline filing charges to resolve cases in a less punitive manner or in recognition of the systemic racism rampant throughout the criminal process.

A. Recommendations for Future Research

We hope that our Article encourages future research into the role that prosecutorial policies and trainings play in the implementation of the RJA. First, while our Article analyzed DA offices' policies, interested parties should consider conducting a comprehensive analysis of the DA offices' trainings, which have already been categorized in our attached spreadsheet. Prosecutors may be more candid about the office's actual practices in their PowerPoints and videos of recorded trainings, as opposed to policies cemented in writing. Second, parties may find it valuable to explore policies covering different areas of the criminal legal system. For example, bail policies could reveal what factors DAs consider in pursuing bail–like a defendant's criminal history, the neighborhood where the crime occurred, or the defendant's perceived gang affiliations, for example–which may be used in an RJA motion. Other areas which could prove fruitful to analyze include policies on discovery, plea bargaining, or how to charge wobblers, all areas with much wiggle room for line prosecutors. Finally, we recommend that interested parties base their analysis on RJA claims that have already been filed. For example, a defendant in San Diego charged with gun possession filed an RJA motion challenging the racial animus shown by the arresting police officer, citing evidence of "significant racial disparities" in traffic stops by local police.[167] Following this motion, scholars and practitioners should review any policies governing how to charge crimes based on evidence from pretextual stops or racially biased officers in order to discover more RJA claims.

As the RJA is only a few years old, much work remains in discovering how DA offices' policies and discretion may influence RJA claims. Author of the RJA, Assemblymember Ash Kalra, addressed the need for the act addressing racial justice: "The reality is we either do everything in our power to root out systemic racism from our criminal justice system or allow our proclamations of justice and equality for all to ring hollow."[168] Prosecutorial policies and discretion are important avenues to explore as practitioners continue to challenge racial disparities through the RJA.

---

166. *See* Banks Mayer, *supra* note 34, at 304.
167. *Bonds*, 99 Cal. App. 5th at 825-26.
168. Kalra, *supra* note 14, at 11.

APPENDIX A

All Counties Data Spreadsheet, *available at*:
https://docs.google.com/spreadsheets/d/1T6sfjhzb_VFZv9AASulT_JOhgD23B
Gd6oLtNnTR8A
GU/edit?usp=drive_link