Embracing "Too Much Justice": Realizing the Potential of the California Racial Justice Act

Emi MacLean*

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INTRODUCTION

In the preamble to the Racial Justice Act (RJA), the California Legislature presents the law's bold ambitions: to eradicate racial disparities in the criminal legal system, to provide remedies for those whose proceedings are tainted by racial bias, and to ensure that the public has access to "all relevant evidence" in seeking such remedies.[1] Yet three

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* Emi MacLean is a Senior Staff Attorney at the ACLU of Northern California. I appreciate BraunHagey & Borden LLP for serving as co-counsel with the ACLU of Northern California on RJA-related public records requests since 2021; Brandee Calagui and Haazim Amirali for making prosecutorial records publicly available; Hope Gardner, Sewit Beraki, and Joshua Wilner for invaluable research assistance; and many extraordinary collaborators over the past three years, especially Chessie Thacher and the RJA Implementation Coalition.

[1] Assemb. B. No. 2542 § 2(f-j), Reg. Sess. 2019-20 (Cal. 2020) [hereinafter "AB 2542"] (codified at CAL. PENAL CODE §§ 745, 1473, 1473.7). ("[W]e can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California . . . . It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them[;] . . . to provide remedies that will eliminate racially discriminatory

years after the law's implementation, there are still only a small number of RJA victories in courtrooms across the state. This is not for lack of evidence showing racial disparities in our criminal legal system. Nor is it for lack of trying to highlight, and upend, these disparities. Each court victory has been hard-fought, and has had to overcome resistance from prosecutors and judges, and most of all from an entrenched faith in the criminal legal system.

In the U.S. Supreme Court's notorious 1987 decision *McCleskey v. Kemp*, the divided Court rejected compelling statistical evidence that Georgia's implementation of the death penalty was racially discriminatory, in violation of the Constitution.[2] Justice Powell's majority opinion noted the risk of *accepting* that Georgia's application of the death penalty was racially discriminatory:

> McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our *entire criminal justice system* . . . . [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim . . . could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.[3]

Justice Brennan, in dissent, famously recognized this fear for what it was: a "fear of too much justice."[4] As Justice Brennan wrote, "The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role."[5]

In enacting the RJA, the California Legislature rejected the *McCleskey* standard. *However,* effectively implementing the RJA also requires facing Justice Brennan's "fear of too much justice."[6] The RJA implicates that concern by permitting challenges to racial disparities in charges, convictions, or sentencing.[7] These disparity-based RJA claims pose a particularly potent challenge to systemic injustice. They also present unique challenges that will require collaborative, creative, and

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practices in the criminal justice system[; and] . . . to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.")

2 481 U.S. 279, 286-92 (1987).

3 *Id.* at 282 (emphasis added).

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

5 *Id.*

6 *Id.*

7 CAL. PENAL CODE § 745.

strategic litigation. This essay surveys the success of the RJA in its first three years, and identifies challenges and opportunities for the realization of disparity-based RJA claims in particular.

I. EARLY LEGAL VICTORIES

Many questions about the contours of the RJA remain unresolved in the courts. However, important early interpretive rulings increasingly recognize that the RJA requires a seismic shift in the way that prosecutors and courts consider both implicit bias and racial disparities in policing, prosecutions, and sentences.

The RJA has only one limited discovery provision. Penal Code Section 745(d) requires the disclosure "of all [requested] evidence relevant to a potential [RJA] violation" by defendant's motion "upon a showing of good cause." In the first published RJA decision, the Court of Appeal in *Young v. Superior Court* recognized that the "good cause showing" for mandated disclosure of information relevant to an RJA claim pursuant to Section 745(d) must be low: "a plausible factual foundation, based on specific facts" that a violation "could or might have occurred."[8] The Court of Appeal recognized that lowering the bar to access information about the disparity was one of the ways that the RJA was supposed to change the status quo: "Preventing a defendant from obtaining information about charging decisions without first presenting that same evidence in a discovery motion is the type of a *Catch-22 the Act was designed to eliminate*."[9]

Where a defendant establishes a prima facie case, a court *must* hold an evidentiary hearing.[10] It is only at the evidentiary hearing stage that a court must consider whether the defendant has proven an RJA violation by the preponderance of the evidence.[11] It is now firmly established that the prima facie standard must be low, and that courts must accept the defendant's allegations as true so long as they are supported by the record.[12]

In *Finley*, the first case addressing the proper legal standard for a

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[8] Young v. Super. Ct., 79 Cal. App. 5th 138, 159 (2022).

[9] *Id*. at 162 (emphasis added).

[10] CAL. PENAL CODE § 745(c).

[11] *Id.*

[12] Finley v. Super. Ct., 95 Cal. App. 5th 12, 23 (2023) ("The court should accept the truth of the defendant's allegations, including expert evidence and statistics, unless the allegations are conclusory, unsupported by the evidence presented in support of the claim, or demonstrably contradicted by the court's own records. . . . And again, the court should not make credibility determinations at the prima facie stage.").

prima facie RJA case, the Court of Appeal held that "imposing a 'heavy burden' at the prima facie stage . . . would be contrary to the Act's structure and purpose."[13] Elaborating on that standard, the Court of Appeal held that a defendant meets the standard for a prima facie case if they have "proffered facts sufficient to show a 'substantial likelihood'—defined as 'more than a mere possibility, but less than a standard of more likely than that'—that the Racial Justice Act has been violated."[14]

Further, the courts are clear that the RJA's mandate is to remedy not just explicitly biased proceedings, but also implicit bias. As the Court of Appeal in *Bonds* held: "[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."[15] The *Bonds* court considered a Section 745(a)(1) claim related to alleged police bias in a traffic stop.[16] The trial court found the officer's testimony that he did not know the race of the defendant prior to the stop to be credible, and held that that finding precluded the RJA claim predicated on an allegation of the officer's racial bias.[17] The Court of Appeal reversed the trial court below and ordered a new evidentiary hearing.[18]

Moreover, courts have affirmed that racial profiling by law enforcement *is* relevant in finding an RJA violation. The *Young* court rejected the theory advanced by the prosecutor and the Attorney General that a court cannot consider racial disparities in arrests.[19] The Court of Appeal held in *Young* that "racial profiling" from law enforcement—not just from prosecutors and in charging decision—"is now cognizable under section 745, subdivision (a)(1) of the Racial Justice Act," and reaffirmed that holding in *Bonds*.[20] Any other reading would require a court to ignore

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[13] *Id.* at 22.

[14] *Id.* ("The prima facie threshold is thus lower than the preponderance of the evidence standard required to establish an actual violation of the Racial Justice Act."); *see also* Mosby v. Super. Ct., 99 Cal. App. 5th 106, 131 (2024) (affirming the *Finley* standard and mandating an evidentiary hearing upon finding that the prima facie standard had been met); Bonds v. Super. Ct., 99 Cal. App. 5th 821, 826 (2024) (endorsing the *Finley* standard).

[15] *Bonds*, 99 Cal. App. 5th at 823.

[16] *Id*.

[17] *Id*. at 828-29.

[18] *Id.* at 831.

[19] *Young*, 79 Cal. App. 5th at 161-62.

[20] *Id.* In order to access information to prove his ultimate RJA claim, the petitioner in *Young* presented not just statistical evidence of the racial disparities in drug prosecutions, but also of racial disparities in arrests and, specifically, evidence that racial bias may have played a role in his own arrest. *Id.*; *see also Bonds,* 99 Cal. App. 5th at 827 n.7 ("[I]t now seems clear that a motion under the Racial Justice Act is properly brought to address

the well-documented racial disparities in policing practices. Evidence of racial disparities in police stops, arrests, or law enforcement referrals invariably infects the integrity of charging decisions and subsequent prosecutions.

Lastly, courts have affirmed the relevance of statistical evidence at all stages of an RJA claim, and for all types of RJA claims.[21] Judge Menetrez's concurrence in *Mosby* further contended that statistical evidence must be, on its own, "sufficient for a prima facie case under the RJA" as any other holding would mean that "the RJA is narrower than *McCleskey* despite the Legislature's expressed intent to make it broader."[22]

There are still very few victories at the stage of an evidentiary hearing, but those few wins are important ones. Among them, in the first ever RJA decision on the merits, a Contra Costa County judge ruled that prosecutors violated the RJA by using the defendant's rap lyrics and videos, as well as racially discriminatory language—including the repeated use of the n-word and the terms "pistol whip" and "drug rip"—which primed the jury's implicit bias in a way that was prejudicial.[23] The judge vacated the previous conviction and sentence, and ordered a new trial.[24]

In another Contra Costa County case, a judge found that the defendants had met their burden to prove that prosecutors disproportionately charged Black gang-related murder defendants with certain gang-related special circumstances that carry enhanced sentences of life without parole or death, and that that disparity was attributable to race.[25] As a remedy for this RJA violation, the judge dismissed the special circumstance allegations against multiple defendants charged with gang-related murders.[26]

A Ventura County judge found racial disparity in violation of the RJA for a Black defendant who received a higher sentence from a

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alleged racial bias during a traffic stop.").

[21] *Bonds*, 99 Cal. App. 5th at 831 (holding that statistical evidence "is admissible evidence the trial court is entitled to consider in determining whether a violation of the Racial Justice Act has occurred").

[22] *Mosby*, 99 Cal. App. 5th at 137 (Menetrez, J., concurring). The majority did not reach a position on the sufficiency of statistics in light of the substantial nonstatistical evidence presented by the petitioner. *Id*. at 113 (Miller, Acting P.J., majority opinion).

[23] People v. Bryant, No. 05-152003-0 (Contra Costa Cnty. Super. Ct., filed Oct. 3, 2022).

[24] *Id.*

[25] People v. Windom, No. 01001976380 (Contra Costa Cnty. Super. Ct., filed May 23, 2023).

[26] *Id.*

conviction by jury than his Latine co-defendants who had pled guilty, in part due to a prior strike on his record.[27] His sentence was also higher than every multiple robbery sentence for non-Black defendants in the county over the previous ten years.[28] As a remedy for the RJA violation, the judge dismissed the strike prior and resentenced the defendant to the low term of imprisonment—a reduction of seven years of his sentence, resulting in his immediate release with credit for time served.[29] In its analysis, the court relied heavily on expert evidence of how the Three Strikes Law and prosecution of *Estes* second-degree robberies were not race-neutral.[30]

Public defenders also increasingly report that certain cases are not being brought, offenses are not being charged, and prosecutors are conceding allegations that current or past prosecutions are impermissible in the post-RJA landscape.[31] There is an increased recognition that certain cases, charges or penalties can no longer withstand scrutiny.

II. UNIQUE CHALLENGES OF DISPARITY-BASED CLAIMS UNDER THE RJA

The Racial Justice Act identifies four types of violations which require a remedy under Section 745(a) of the Penal Code:

(1) Where a judge, attorney, or law enforcement officer involved in the case demonstrates racial, ethnic or national origin bias or animus towards the defendant during or outside of the proceedings;
(2) Where there is racial, ethnic or national origin bias or animus in court during the proceedings;
(3) Where there are racial disparities in charges or convictions; and
(4) Where there are sentencing disparities either by race of the defendant or by race of the victim.

Section 745(a)(1) and (a)(2) claims are based on identification and elaboration of racial animus on or off the record—statements made and found in a police report, trial transcript, or otherwise associated with a criminal proceeding. These claims are not without their challenges,

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[27] People v. Lovings, Transcript of Oral Ruling on Motion for 1172.1 Resentencing (Ventura Cnty. Super. Ct., Jan. 2024) (on file with author).
[28] *Id.*
[29] *Id.*
[30] *Id.*; *People v. Estes*, 147 Cal. App. 3d 23, 26 (1983).
[31] *See, e.g.*, California v. Bankston, Case No. S044739, Third Supplemental Respondent's Brief at 5 (Cal., filed Feb. 6, 2024) (conceding that a defendant "is entitled to have his death sentence vacated under the RJA in light of the prosecutor's penalty phase arguments").

especially in reading between the lines for coded racially biased language. These claims typically require experts to interpret statements which expose animus. While we are far from this prospective future now, Section 745(a)(1) and (a)(2) claims may become less common as people involved with the criminal legal system begin to exercise greater caution in their statements.

There are unique challenges inherent to (a)(3) and (a)(4) claims which require a defendant to demonstrate disparities in charges, convictions, or sentencing. These disparity-based claims may prove hardest to win. They invariably require data evaluation, expert testimony, and a review that extends far beyond the written record in an individual case. In any (a)(3) or (a)(4) disparity-based claim, defendants must answer, and judges must consider: What is a more serious comparable offense? What is similar conduct? Who are similarly situated individuals? What is the "evidence [that] establishes" the disparity?[32] Despite their inherent difficulties, these disparity-based claims may also present the greatest opportunity to upend the status quo. Systemic injustice is harder to hide through training prosecutors and other law enforcement actors to avoid language indicative of racial bias.

III. IMPORTANCE OF PROSECUTORIAL TRANSPARENCY FOR THE IMPLEMENTATION OF THE RACIAL JUSTICE ACT

Why does prosecutorial transparency matter? Prosecutors have extraordinary authority—to determine whether and how to charge; to determine whether someone is likely to be in custody or not while they defend themselves; to make a plea offer; to recommend a sentence, or diversion, or the dismissal of charges.[33] It is thus important to know whether prosecutors even *have* charging policies, or whether line prosecutors are free to act entirely upon their own discretion. Further, what does the data show about *how* prosecutors are exercising their extraordinary authority to affect the lives of members of our community?

Section 745(a)(3) and (a)(4) claims, in particular, expressly require county-level data: the defendant must demonstrate that an alleged disparity is "in the county where the convictions were sought or obtained" or "where the sentence was imposed."[34] Such data is in the hands of government actors—prosecutors, law enforcement, and the courts. Thus,

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[32] CAL. PENAL CODE §§ 745(a)(3), (4).

[33] *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

[34] CAL. PENAL CODE §§ 745(a)(3), (4).

one significant challenge in bringing a disparity-based claim is the lack of sufficient and reliable county-level data to develop the claim, or even to make the case for further mandatory disclosures. Access to prosecutorial policies and training materials is also important, along with access to prosecutorial data, to demonstrate where racial disparities are the result of discretion or directive.

With the RJA lacking any mandated proactive disclosure obligations, or any disclosure obligations at all absent a good cause showing, the California Public Records Act (PRA) is a primary tool to access the information needed to give life to the RJA.[35] Over the past three years, the ACLU of Northern California (the ACLU) has been working to force prosecutorial transparency across the state with the goal of effectively implementing the RJA. Soon after the RJA's entry into force, the ACLU partnered with the law firm of BraunHagey & Borden LLP in a statewide effort to access information necessary for defendants, defense counsel, and people in custody to access information to develop and pursue potential RJA claims.[36] Utilizing the PRA, we requested data, policies, training materials, and RJA-related communications from every District Attorney in the state.[37] We publish the records we receive immediately, to facilitate their use by people facing the heavy hand of the criminal legal system, as well as to assist defense attorneys, family members, academics, and the general public. This includes the publication of anonymized prosecutorial data, to the extent that it is collected and produced by prosecutors.

Some prosecutors promptly responded to our PRA requests, with only narrowly asserted exemptions. Yet others ignored our PRA requests for months until we filed litigation. Still others responded, but in responding demonstrated serious misunderstandings of their obligations under the state's public records law, or disclosed the inadequacy of their data collection and management systems.

Among the most concerning deficiencies identified in the ACLU's statewide PRA project, some District Attorneys asserted that they do not collect, or cannot produce, information about the race of the

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[35] *See* CAL. PENAL CODE § 745(d) (authorizing a defendant to "file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state" and requiring the release of the records "[u]pon a showing of good cause").

[36] *See Documents Related to the Implementation of the Racial Justice Act*, ACLU N. CAL., https://www.aclunc.org/documents-related-implementation-racial-justice-act [https://perma.cc/LP9U-VFVG].

[37] *Id*.

defendant.[38] For obvious reasons, an RJA claim alleging racial disparities is impossible without county-level data that can demonstrate disparities *by race*. Many prosecutors also asserted that they do not collect, or would not produce, other consequential data—including data about the custody status of defendants at the time of conviction; whether defendants have been offered, or granted, diversion; or the plea offers provided, and whether they have been accepted. Further, District Attorneys have broadly asserted various exemptions to the disclosure of material prosecutorial data, including related to prior criminal history of defendants, which is important in demonstrating that charges and convictions of similarly situated defendants are racially disparate.

Even where District Attorneys collect the relevant data, and consent to its disclosure, they have sometimes imposed prohibitive costs. The PRA allows responding agencies to impose costs on a requester only for the "direct costs of duplication" or any "necessary" costs for "data compilation, extraction, or programming."[39] Yet in response to our PRA request, we received cost estimates from some counties of thousands of dollars for programming and extraction of data. For instance, Tulare County reported in November 2023 that they "contracted with an outside vendor, Sicuro Data Analytics, LLC" to respond to our data request, and Sicuro "estimate[ed] 5 months of work that would cost $10,000 - $12,000," for work that most other counties do in a matter of hours. Kern and Napa Counties estimated approximately $7,000 each; Placer estimated $10,000, Calaveras $16,000, and San Bernardino a whopping $312,000 for the production of essential public prosecutorial data.[40]

In response to our PRA request, the Orange County District Attorney (OCDA) took the indefensible position that they were not obligated to extract and produce prosecutorial data at all. The OCDA had routinely responded to requests for prosecutorial data prior to the RJA's enactment. In late-February 2021, two months after the RJA's entry into force, OCDA's productions abruptly stopped. In response to every

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[38] Glenn, Placer, Plumas, Sacramento and Shasta District Attorneys either do not collect or cannot extract racial data, and thus can refuse to disclose it. *Id.* Sierra, Sonoma, and Ventura District Attorneys also told the California Department of Justice that they did not collect or could not produce this information. *See* CALIFORNIA PROSECUTORIAL & JUDICIAL RACE SURVEY 851-861, CAL. DEP'T OF JUST. (2023), https://oag.ca.gov/system/files/media/ch31-ca-reparations.pdf [https://perma.cc/XF9E-5UXM] (compiling counties' data reporting practices with respect to race and other data elements).

[39] CAL. GOV'T CODE §§ 7922.530, 7922.575.

[40] See *Documents Related to the Implementation of the Racial Justice Act*, *supra* note 36.

subsequent request for information, the OCDA asserted that it would not extract and produce any prosecutorial data, whether the requester was a journalist, an incarcerated community member, a public defender, or any other member of the public. The OCDA asserted that any "data extraction" request would be redefined as a request for the creation of a new record, to which the PRA does not compel agencies to respond with information.[41]

This position did not hold up in court. Indeed, as soon as we filed litigation challenging the OCDA's noncompliance with the PRA,[42] the District Attorney abandoned this argument entirely. However, the OCDA shifted to other equally meritless justifications for nondisclosure of prosecutorial data. After a trial court judge indicated that he would ultimately reject the OCDA's arguments and require the production of anonymized prosecutorial data,[43] the OCDA disclosed much of the requested data that it had withheld for years.

The Orange County litigation has also resulted in the OCDA's transformation from one of the most recalcitrant District Attorneys to one of the more transparent. After disclosing the prosecutorial data in litigation, the OCDA began publishing the same data on their website. All prosecutors should be *at least* as transparent as Orange County is now.

Some counties have been forthcoming about their policies and training materials in response to records requests, but counties have also asserted overbroad exemptions in response to requests to disclose policies and training materials.[44] Some asserted, for instance, that foundational policies and training materials which guide prosecutors, and authorize or restrain discretion, could be withheld as privileged attorney work product

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[41] This about-face was memorialized in a March 2021 email in which an employee wrote to the District Attorney's Public Information Officer: "going forward we will not prepare records that are not already in existence in response to a Public Records Act request." The email re-defines "data extraction" requests as among those which the DA would interpret as requesting information "not [] in existence" and thus not obligated to be produced pursuant to the PRA. Email from Denise Hernandez to Kimberly Edds, "Re: PRA request for charge data at DA's *[sic]* office," Mar. 2, 2021, Exhibit LL to Petitioner for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *Chicanxs Unidxs de Orange County, et al. v. Spitzer, et al.*, Case No. 30-2022-01291297-CU-WM-CJC (Orange Cnty. Super. Ct., Jan. 26, 2023).

[42] The litigation was brought by the ACLU Foundation of Northern and the ACLU Foundation of Southern California, along with the Peace and Justice Law Center, on behalf of the local organization Chicanxs Unidxs and the ACLU California affiliates.

[43] Tentative Ruling, *Chicanxs Unidxs de Orange County, et al. v. Spitzer, et al.*, Case No. 30-2022-01291297-CU-WM-CJC (Orange Cnty. Super. Ct., Aug. 22, 2023).

[44] *Documents Related to the Implementation of the Racial Justice Act*, *supra* note 36.

or deliberative process, or because the production would be unduly burdensome or not in the public interest. Some counties lack basic policies altogether. Others rely on the California District Attorneys Association for their training materials, and egregiously asserted copyright exemptions in refusing to disclose those policies—even when the trainings were no more than summaries of published cases. Such responses stretch the PRA's narrow withholding provisions beyond their breaking point. Litigation, and potentially also legislative reform, may be necessary to ensure that the public has access to essential policy and training materials critical to the effective implementation of the RJA.

The California Legislature recently sought to remedy this lack of prosecutorial transparency with legislation requiring prosecutors to collect such critical data and to produce it to the California Department of Justice for anonymized public disclosure.[45] This law will be crucial when meaningfully implemented because of the requirement that the data be published, but even more foundationally because of the requirement that the data be collected in the first instance. There is no prosecutor in the state that currently collects *all* of the information that this law will require them to collect. However, the law's successful implementation is conditioned on adequate budgetary appropriation which has not yet happened.[46]

IV. BRIDGING THE CHASM BETWEEN DEFENSE PRACTITIONERS AND DATA ANALYSTS

Fundamental questions remain about how to marshal prosecutorial data to demonstrate a Section 745(a)(3) or (a)(4) violation—to show that a defendant's charge, conviction or sentence violates the RJA due to an illegal disparity. There is a wide chasm of knowledge and expertise between criminal defense attorneys and data experts. Criminal defense attorneys and their clients lack access and the data analysis skills to interpret crucial data on racial disparities. Analysts have expertise to do the relevant comparisons, and often have access to unique datasets. But they typically do not on their own have an understanding of the questions that need to be answered about how the criminal legal system operates, and where disparities might exist. The success of disparity-based RJA claims requires that we bridge the gap between defenders and data

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[45] CAL. PENAL CODE § 13370, as enacted by Assemb. B. No. 2418, Reg. Sess. 2021-22 (Cal. 2022).

[46] *Id*. § 13370(c)(1) ("The operation of this article is contingent upon an adequate appropriation by the Legislature in the annual Budget Act or another statute for purposes of this article.").

analysts.

Researchers have begun to engage with experts in the criminal legal system to do analyses which may demonstrate racial disparities in California prosecutions. University of Wisconsin-Madison researchers Mike Light and Jungmyung Kim are among those contributing their expertise to this endeavor. They have access to over a decade of California criminal history data otherwise inaccessible to people seeking to make RJA claims, and have begun to produce factsheets analyzing racial disparities at the state and county level for certain offenses that may be appropriate for data-based RJA claims.[47]

For example, they have found that Black people are almost four times as likely to be arrested and 3.5 times as likely to be prosecuted as white people for the offense of "resisting arrest."[48] In some counties, this disparity was particularly severe—with Black people more than 12 times as likely to be arrested for this offense as white people.[49] Black and Latinx individuals were also more likely to be more severely charged.[50] Where prosecutors have discretion to charge resisting arrest as a misdemeanor or a felony, they were more likely to charge Black and Latinx people with a felony for the same offense.[51]

Further, while absolute arrest and charging rates decreased overall and in all racial groups for the offenses of marijuana cultivation and possession for sale since the advent of Proposition 64 (when California legalized the use and sale of marijuana)—*disparities* in the arrest for and prosecution of these offenses have *increased.* Asian people were increasingly likely to be arrested for, charged with, and convicted for marijuana cultivation after the implementation of Proposition 64. Meanwhile, the Black-white disparity in arrests and prosecutions for the offense of marijuana possession for sale further increased since Proposition 64. In the most recent period analyzed, Black people were 5.7 times as likely to be arrested and 4.3 times as likely to be prosecuted as white people for this offense.[52]

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[47] Michael Light, *Racial Disparities in California Criminal Justice*, UNIV. OF WISC. MADISON, https://users.ssc.wisc.edu/~mlight/projects/ [https://perma.cc/CZ6A-5V3N].

[48] *Id.*, "Fact Sheet #2: Racial Disparities in *Resisting Arrest,*" https://users.ssc.wisc.edu/~mlight/wp-content/uploads/2023/11/Fact_Sheet_No.001.pdf [https://perma.cc/7RU2-GY3S]].

[49] *Id*.

[50] *Id*.

[51] *Id.*

[52] *Id.*, "Fact Sheet #4: Racial Disparities in *Marijuana Cultivation and Possession for Sale.*"

The disparities in the criminal legal system are well-known to defense attorneys who see them in practice in charging papers and courtrooms every day. However, there remain fundamental questions regarding the development of disparity-based RJA claims which will satisfy the obligations of the new law and require remedy. For instance: What types of offenses are ripe or appropriate for disparity-based RJA claims? Are there sets of statutes that effectively operate as "more serious offenses" for similar underlying behavior? What data is available that could be used to reliably measure disparities as required by the RJA, and how much of it is needed? What are the best data sources to use for different questions? What is the appropriate comparison pool in analyzing charging and sentencing disparities connected to particular conduct? What are the types of analysis best used for calculating disparities in different contexts?

There are exciting conversations happening to answer these and other significant questions about disparity-based RJA claims. Prosecutorial data needs to be available in the first instance for the RJA to be meaningful. The data also must be analyzed by those with expertise and interpreted and presented in a manner which is accessible to jurists. And at this nascent stage, there is a great need for continued engagement, dialogue, and ingenuity for disparity-based claims to be crafted, and for them to be successful.

CONCLUSION: THE TREMENDOUS POTENTIAL OF THE LAW, BEGINNING TO BE REALIZED

The potential of the RJA is massive. Each small victory in a courtroom contributes to what should be the unraveling of systemic racism in our criminal legal system. Individual cases demonstrate proof of concept: it *is* possible to reject the fear of too much justice and to implement the principles that undergird the RJA. The threat of the RJA also can, and should, have a deterrent effect.

We also hope to realize the potential of greater access to, and analyses of, data about racial disparities. Data has the power to demonstrate how individual decisions, made every day in response to or in the absence of policy, combine together to create systemic injustice. The existence, or lack, of prosecutorial policies and training materials also shows what prosecutors care about, how they use their resources, and whether and how they take steps to protect against explicit or implicit biases. Greater prosecutorial transparency allows for effective RJA challenges. The data should also force prosecutors to recognize that certain historic practices require re-evaluation and reform in light of the

RJA's mandate.

The RJA's realization depends on ongoing and increased collaboration between those affected by the criminal legal system, those defending people within it, and those trying to make sense of data disparities with analytical skills. Today, the measurable impact of the RJA is still limited. However, the dedicated focus of a diverse array of practitioners on the implementation of this important legislation foreshadows its transformative potential.