

# Keynote Speech: Racial Justice Act Symposium

Ash Kalra\*

Good evening, everyone. I want to start by thanking the Berkeley Criminal Law & Justice Center and the *Berkeley Journal of Criminal Law* for their work in hosting the 2024 Racial Justice Act Symposium. When I introduced the California Racial Justice Act in 2020,<sup>1</sup> I did not expect that we would be having symposiums on this someday. It is a testament to the work of so many people that we are here today. Thank you, Chesa Boudin, for inviting me to share my experience and insight working on the groundbreaking Racial Justice Act. This Symposium is a fantastic opportunity for all of us to come together as we envision what the future of this law will be, how we can improve its implementation, and how we continue to dismantle the racism that has proliferated throughout our criminal legal system for generations. You are all at the forefront of this work in every different capacity that you hold.

I represent the 25th Assembly District, which encompasses most of San Jose. Prior to my time as an elected official, I served as a Deputy Public Defender for Santa Clara County for 11 years, not only representing clients in dozens of felony jury trials, but also spending time in drug treatment court, where clients were given the opportunity to complete a rehabilitation program and turn their lives around. I was a public defender from 1997 to 2008. Anyone who was a public defender or worked in the criminal justice space in the late 1990s and early 2000s knows how daunting it was. None of us who have been in that space are surprised, or need to be told, about how racism is injected into and infects every aspect of the criminal system. Those formative career years really

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\* Assemblymember Ash Kalra was the keynote speaker for the 2024 California Racial Justice Act Symposium organized at Berkeley Law in February 2024 by the *Berkeley Journal of Criminal Law* and the Criminal Law & Justice Center. Assemblymember Kalra is the author of the Racial Justice Act.

<sup>1</sup> Assemb. B. No. 2542, Reg. Sess. 2019–20 (Cal. 2020), codified as CAL. PENAL CODE § 745.

shaped who I am as a legislator. As you can imagine, that means I have seen firsthand the racial discrimination in our court system which the Racial Justice Act seeks to address. I am now just doing my part to ensure all of you who are doing the real work on the ground have more tools and more backup to confront racism in our courts.

After discussing with the Anti-Death Penalty Coalition towards the end of 2019, I understood that it was the right time to tackle implicit bias and racism in our criminal justice system. With my experience as a public defender in hand, we embarked on this journey in early 2020 with a powerful coalition of criminal justice advocates and legal experts no longer willing to accept that racial and ethnic bias in the criminal justice system is unfixable. We introduced the Racial Justice Act in March of 2020. But we all know what happened in March of 2020: less than two weeks after introducing the bill, the State shut down because of COVID-19. Up to 80% of the legislation that had been introduced up to that point was set aside, including the worthiest bills. It seemed inevitable that the Racial Justice Act would need to wait, despite the mounting evidence clearly demonstrating the worst racial disparities in our criminal legal system.

In California, a Black person is over eight times more likely to be incarcerated than a white person,<sup>2</sup> one of the worst disparities in the country, worse than almost any Southern State.<sup>3</sup> Latino defendants are more likely to be convicted rather than be acquitted or have their cases dismissed than other racial groups.<sup>4</sup> Black and Latino defendants are more likely to receive a felony rather than a misdemeanor conviction when compared to white defendants.<sup>5</sup> Black men convicted of a felony were 42% more likely to be sentenced to prison than white men convicted of a felony.<sup>6</sup> A Latino man convicted of a felony is 33% more likely to be sent

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<sup>2</sup> VERA INST. OF JUST., INCARCERATION TRENDS IN CALIFORNIA 2 (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-california.pdf>; *see also* THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS 5 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

<sup>3</sup> RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS, *supra* note 2, at 7.

<sup>4</sup> JUD. COUNCIL OF CAL., DISPOSITION OF CRIMINAL CASES ACCORDING TO THE RACE AND ETHNICITY OF THE DEFENDANT: 202 REPORT TO THE CALIFORNIA LEGISLATURE 14 (2021), [https://www.courts.ca.gov/documents/lr-2021-criminal-dispositions-by-race-ethnicity-1170\\_45.pdf](https://www.courts.ca.gov/documents/lr-2021-criminal-dispositions-by-race-ethnicity-1170_45.pdf).

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 25.

to prison than a white man convicted of a felony.<sup>7</sup>

After being put on hold in March, our bill was quickly resurrected as the brutal killing and torture of George Floyd by police officers sparked nationwide calls for racial justice. This set in motion a grassroots movement for racial justice that undoubtedly galvanized our need to rid our criminal justice system from the ills of systemic racism. It is important to stress how unusual this was. The fact that the Racial Justice Act even came into being was against many, many odds: not only was it unusual for a bill of that nature to even be introduced or moved through the Legislature, but everything that was happening around it was also unusual, including the pandemic and Black Lives Matter protests. In the middle of a COVID-constrained Session, we quickly re-introduced the bill using the controversial “gut-and-amend” process, which eventually laid the foundation for the California Racial Justice Act.<sup>8</sup> We took the language of the initial Racial Justice Act bill, which had died in the Assembly, gutted out the language of a different bill that was not moving in the Senate, and stuck the Racial Justice Act language into that bill. This was the rebirth of the Racial Justice Act in the summer. And this was only laying the foundation because we knew we would come back to enact other follow-up bills to guide court implementation and affirm our legislative intent given the bill’s relatively short time frame in the Legislature.

The way the bill progressed through the Legislature was one of the most unique experiences I have had in pushing forth legislation. When the revived bill went to the Senate Public Safety Committee, we had to argue why the Racial Justice Act was necessary. A lot of the legislative process became an education process, as we were educating my colleagues and Committee staff on what really happens in criminal courts. My colleagues and others who have not been lawyers, or at least not criminal lawyers, thought that seeking or obtaining a criminal conviction or imposing a sentence based upon race, ethnicity, or national origin was already prohibited and that *of course* we should not allow these racial disparities to occur. As a result, a lot of our work was educating colleagues on what the state of the law actually was, so we could finally meaningfully confront racism in our courts.

The bill continued through the gut-and-amend process in the Senate until the very last day of Session. We were very much aware that if it did not get through the entire Legislature on this day and sent to the

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<sup>7</sup> *Id.*

<sup>8</sup> Assemb. B. No. 2542, Reg. Sess. 2019–20 (Cal. 2020) (“Racial Justice Act”).

Governor's desk, the bill would die. We waited and waited, and sometime around 3:00 PM, the Senate finally heard the bill—and it got through. It was sent over to the Assembly immediately. There were three or four other bills that were rushed over to the Assembly, but there was not enough time to take them through the Committees. So, we received permission to send it directly to the floor of the Assembly around 5:30 PM. In less than 4 hours, the bill got through the Senate, and now it was before the Assembly. That was not normal. But one of the good things was that police officers and district attorneys were busy with other bills, such as anti-police-violence bills and other great righteous bills we were also working on. They probably did not think ours was going to be pushed and moved that quickly and assumed it was going to die. And, they did not have time to react when the bill was brought up. There were 80 legislators, and we needed 41 to pass our bill. We received 49 votes in favor, and the Racial Justice Act got through—in its first year in the Legislature.

I still do not think a lot of my colleagues understood how significant what they had voted on was. Maybe some of them are starting to see it now. But it was extraordinary—everyone involved was kind of stunned. The Act not only confronted racism in courts, but also went a step further to acknowledge the existence of racism in the criminal system and empower defendants to object to charges, convictions, or punishments based upon race, ethnicity, or national origin. Just as prosecutors have powerful tools to bring charges and convict, we too must wield powerful tools to be that counterbalance for justice.

In law school, we were taught about race in the law. The curriculum included the legal precedent established in the U.S. Supreme Court case, *McCleskey v. Kemp*, which required California criminal defendants to prove intentional discrimination when challenging racial bias.<sup>9</sup> Never could I have imagined then that I would be here today as the lawmaker who essentially overturned this 36-year-old legal precedent. For those not as familiar with this ruling, Justice Powell, writing for the 5-4 majority, held that statistical evidence was insufficient to show a constitutional violation.<sup>10</sup> Instead, defendants were required to show “exceptionally clear proof” of discrimination under the facts of their own case.<sup>11</sup> Writing for the minority, Justice Brennan clearly summarized the rationale for the majority's opinion. Although racial discrimination is

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<sup>9</sup> 481 U.S. 279, 297 (1987).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

pervasive in our justice system, the Court was afraid of having to recognize the harm racism and discrimination have in other types of criminal cases. Hence, the Court was afraid of “too much justice.”<sup>12</sup> This insistence on proof of intentional or purposeful discrimination not only made it nearly impossible to prove, but also contributed to some of the worst racial disparities in the country. And for over 36 years, the criminal system allowed one court ruling to ignore the impact that racial bias played in criminal judgments because doing so would be too difficult to remedy. The Court’s majority, however, also observed that State Legislatures concerned about racial bias in the criminal justice system could act to address it.

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. And so, after much determination, negotiation, and advocacy, we passed this first-of-its-kind legislation that took a historic foundational step in upholding constitutional protections for everyone.

However, during the process, retroactivity was taken out to limit the bill’s impact and costs. But we were not going to leave anyone behind. Ordinarily, you have to wait a few years after passing a bill like the Racial Justice Act before adding retroactivity. But we did not want to leave anyone behind, especially those who have already been harmed by unfair judgments tainted with blatantly racist statements from attorneys, judges, jurors, and expert witnesses, by the intentional exclusion of all, or nearly all, Black or Latino people from serving on a jury, or by systemic bias in charging and sentencing decisions as evidenced in the stark statistical differences.<sup>13</sup> Systemic racial disparities are pervasive in mass incarceration in California, where, according to the Public Policy Institute of California, four out of every ten people incarcerated in state prison are African American men—ten times the imprisonment rate for white men.<sup>14</sup>

So, the following year, we introduced AB 256, the Racial Justice Act *for All*.<sup>15</sup> With AB 256, we answered the simple question: If prohibiting racism in our courts and providing a person a means to remedy racial bias in their case is the right thing to do going forward, shouldn’t it also be the right thing to do for everyone, regardless of when the judgment was rendered?

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<sup>12</sup> *Id.* at 339 (Brennan, J., dissenting).

<sup>13</sup> See generally JUD. COUNCIL OF CAL., *supra* note 4.

<sup>14</sup> Joseph Hayes et al., *California’s Prison Population*, PUB. POL’Y INST. OF CAL. (2019), <https://www.ppic.org/publication/californias-prison-population/>.

<sup>15</sup> Assemb. B. No. 256, Reg. Sess. 2021–22 (Cal. 2022).

Throughout that process, we worked extensively with the Judicial Council and Policy Committees to draft amendments that would address workload concerns for the courts by setting a phase-in for retroactivity, as well as taking technical amendments at their and the request of stakeholders such as the California District Attorneys Association. While the latter did not want AB 256 to pass at all, they also had some legitimate technical and cost concerns, which we wanted to address. We also had to fight for immediate retroactivity for individuals facing death row or deportation, given the impending risk of serious consequences that cannot be taken back, which is why they were included in Phase One of the retroactivity process.

Both the inside and outside work on the bill were critical in keeping it alive, especially during its first year of introduction when it was placed on the Senate Appropriations Committee suspense file and became a two-year bill. Unlike the Racial Justice Act itself, which got through its first year, retroactivity, much because of the cost, was delayed into the second year. In this case, we needed to keep the pressure on because the suspense file is often used to kill bills quietly. Whether it was serving as witnesses to share lived experiences of racial discrimination in our justice system during Policy Committees or contributing to the outpour of support across social media and over the phone, community engagement was key to reminding the Legislature why the Racial Justice Act for All was needed. In the end, this was a 2-year effort backed by a coalition of 10 passionate sponsors and over 150 organizations in support. AB 256 is actively being rolled out, with individuals currently incarcerated for a felony being the most recent group eligible to file a Racial Justice Act motion starting this year.<sup>16</sup>

I think back to 25 years ago, to where the criminal justice system was then, where we are now, and how we have made a lot of wonderful changes. None of this would have happened without those fighting for the Racial Justice Act, but it also would not have happened without my colleagues. I get credit as one individual legislator, but it takes a lot of legislators to pass bills, to be co-authors, and to stand on the right side of justice. It also takes governors: Governor Brown and Governor Newsom signed a lot of important criminal justice reform legislation, which helped pave the way for the Racial Justice Act.

But even with all this progress, there is still much work to be done,

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<sup>16</sup> People no longer incarcerated, but with a felony conviction or a juvenile case that resulted in commitment to DJJ will be eligible by January 1, 2026. Assemb. B. No. 256 § 2, Reg. Sess. 2021–22 (Cal. 2022).

and it begs the question of where we go from here. How do we ensure the smooth implementation of the California Racial Justice Act as we intended? Unfortunately, we are in a very difficult place right now. The media and opportunistic politicians are taking advantage of a false narrative that crime is up and that we have to roll back some of the positive things we have changed in the past. They are not suggesting that the Racial Justice Act will be rolled back, but they are making arguments about Prop. 47, which recategorized some nonviolent offenses as misdemeanors, rather than felonies, as they had previously been categorized. We have to be very cautious because what the Racial Justice Act is intended to solve will continue to be perpetuated if we go backward on some of these other criminal justice reforms. The Racial Justice Act is an umbrella piece of legislation that looks at so many other laws passed over generations that feed into systemic racism and bias.

We also know the implementation of the Racial Justice Act is going to cost money. When we wrote the Act, we ensured that the State was obliged to provide counsel for individuals filing retroactive claims, and it was our responsibility to get the money to fulfill that requirement. For instance, just last year, we secured \$8 million in funding to ensure that enough defense counsel can take on the caseload as a result of the Racial Justice Act. However, we had to think strategically about our priorities amidst a bad budget year. Last year, our highest priority was ensuring there was money to take on death penalty cases because, at the time, there were 655 people sentenced to death, and only less than half had an attorney. This year, we are in an even tougher budget year. We are going to do everything we can to fight for resources, for public defenders, and for the right to counsel, not just for the Racial Justice Act but across the board. In fact, as we have implemented reforms in our justice system, public defenders have expanded to provide more holistic services, and county probation, social services, and nonprofits working in tandem have been able to focus on issues beyond just incarceration. We can focus on healing, rehabilitation, job placement, and housing. I remember during the pandemic, our public defenders were outside the jail in Elmwood helping people getting out who did not have housing. Those are the things we can expand more into if we have the resources.

Looking forward to the work to be done is why symposiums or forums like this one, or the one I did in Los Angeles with District Attorney George Gascón, are so important in bringing together the individuals litigating and studying the impacts of the Racial Justice Act. What you are doing is incredibly important because it is laying the foundation not just for our State but for the nation. Other states have inquired about how

they can get this done in their states. We know that the data is on our side, we know morality is on our side, we know justice is on our side. But that does not always mean that justice is served. We all in this room know that. We need to be able to access the tools necessary to demonstrate the very discrimination that we are witnessing. One aspect of bringing public awareness is through cell phone cameras, as we saw with the murder of George Floyd,<sup>17</sup> but another aspect is speaking to what we are seeing when the cameras are not there, every single day in the courtroom. That is why you are the Truth Tellers and the ones who are going to make sure this Act, long after some of us are gone, is going to forever change our justice system.

In the short term, the Act is about overturning convictions, setting new trials, shortening sentences, and getting people out of jail and prison. In the long term, it is about behavior change. It is about recognizing that behaviors in our system are embedded in slavery, racism, and socioeconomic bias. It takes a lot to root that out, like a cancer out of your system. This is about creating a new generation of police officers, prosecutors, defense attorneys, and judges who understand, instinctively, that we cannot allow this to continue.

It will take time. I have written another follow-up bill coming up this year, totaling four RJA bills. The first one was the 2020 Racial Justice Act, the second one was retroactivity, the third one was last year,<sup>18</sup> and this year, we have AB 2065, which will improve access to data to file an RJA motion.<sup>19</sup> I might write a bill on the Racial Justice Act every single year I am in the Legislature! There are also opportunities to expand the RJA into different contexts: keep an eye out for a bill addressing race discrimination in the healthcare system.<sup>20</sup> The reason I keep pursuing these bills is that you are giving me feedback. You are telling me that something needs tweaking and fixing. You have to keep on giving me that feedback. We have the opportunity to fix this system forever, to use these tools for the betterment of justice.

It is an honor to be here at this Symposium. I get a lot of credit for the Racial Justice Act, but literally hundreds of people played a huge role

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<sup>17</sup> Laszlo Christian et al., *The Background and Repercussions of the George Floyd Case*, 8 COGENT SOC. SCIENCES 1, 6 (2022).

<sup>18</sup> Assemb. B. No. 1118, Reg. Sess. 2023–24 (Cal. 2024) (“Criminal Procedure: Discrimination”).

<sup>19</sup> Assemb. B. No. 2065, Reg. Sess. 2023–24 (Cal. 2024) (“Criminal Justice Records: Offender Data”).

<sup>20</sup> Assemb. B. No. 2200, Reg. Sess. 2023–24 (Cal. 2024) (“Guaranteed Health Care for All”).



in making it happen. And thousands, yourselves included, play a huge role in making sure that it is achieving its desired goal on the ground.

And you are the ones applying it. You are the ones making it happen. I want to give a special shout out to all the public defenders here. You are the soldiers, I am simply doing my best to give you the tools and the ability to fight like hell for the indigent, fight for those that need your voice, passion, and commitment. It's great to see some District Attorney's Offices also have their own RJA units, like in Los Angeles. Chesa Boudin was a big supporter of the Racial Justice Act when he was the District Attorney in San Francisco, as was Diana Becton in Contra Costa County. I would never have imagined when I was a public defender that I would be in a position to do what I have done as a legislator. Thinking back, I want to give a special shout out to my roommate from college, Justin Tuttle, who has been a public defender now for over 25 years in California. When we were running around U.C. Santa Barbara, we never imagined that we would be doing this work for justice, that we would be making such a change. So, for people like Justin and all the public defenders out there, I am just trying to give you as much backup as I can. I am grateful to each and every one of you, and I am grateful that we are doing what we can to ensure the Racial Justice Act will not just stand the test of time but will forever transform our justice system. And for all of you making that happen, I am very grateful. Thank you.