

# Introduction: Racial Justice Act Symposium

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Racial disparities in the criminal legal system are extreme, long-standing, and well-documented.<sup>1</sup> To many observers “[r]ace and racism seem pervasive in the criminal-justice system.”<sup>2</sup> Yet, since at least 1987, the U.S. Supreme Court has held that even stark racial disparities are not sufficient to establish an equal protection violation or obtain relief absent proof of “discriminatory intent.”<sup>3</sup> In *McCleskey*, the majority declined to accept the significance of even clearly-established racial disparities. Since that opinion, courts have been “loath to independently reconsider the fairness of criminal justice rules, given the pervasive racial disparities throughout the system and the sheer number of people” impacted and implicated.<sup>4</sup> In his prescient dissent in *McCleskey*, Justice Brennan accused the majority of fearing “too much justice.”<sup>5</sup> After all, it is “justice, in its legal as well as moral and political senses, that structural racism degrades.”<sup>6</sup>

California has finally taken a bold step away from *McCleskey* and may have overcome the fear of “too much justice.” In 2020, California’s Legislature passed, and Governor Gavin Newsom signed, a law that explicitly departs from the *McCleskey* precedent: the California Racial Justice Act (RJA). The RJA represents a highwater mark of the national

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DOI: <https://doi.org/10.15779/Z384746S8N>

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<sup>1</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (documenting the history of racism in the criminal legal system).

<sup>2</sup> Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1506 (2002).

<sup>3</sup> *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987).

<sup>4</sup> Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 229 (2016).

<sup>5</sup> *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

<sup>6</sup> Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1072 (2010).

movement for racial justice: it may well be the broadest, boldest, most ambitious legislative result of the protests and activism in the wake of the murder of George Floyd. The RJA creates a vehicle for relief for criminal defendants who can establish racial disparities or implicit bias in their case, even absent discriminatory intent.<sup>7</sup> Since 2020, the legislature has enacted cleanup legislation to address gaps and clarify gray areas in the original legislation, including a bill that made those convicted prior to the enactment of the RJA eligible for retroactive relief.<sup>8</sup> Litigation under this new law is an emerging and high-stakes arena at the intersection of criminal law and racial justice. The story of the RJA is a history in the making.

The new law and its even newer retroactivity have opened the door to a massive volume of trial-level advocacy, opportunities for strategic appellate litigation, and countless potential post-conviction claims. In addition, the lawyers advancing RJA claims require testimony, declarations, and other technical assistance from statisticians, data analysts, and expert witnesses. Defenders and prosecutors alike lack the skills to coherently analyze and present to judges the data the RJA often requires. Even the process of obtaining data can be daunting. The ACLU and the law firm BraunHagey & Borden LLP spent years litigating public records requests under the RJA to build a publicly accessible database of district attorney policy materials and case-related data.<sup>9</sup> Other organizations such as the Ella Baker Center<sup>10</sup> and the Office of the State Public Defender<sup>11</sup> have stepped into the void and served critical education, training, and coordinating functions, within both prisons and the legal community.

Meanwhile, cases presenting novel questions of law and procedure under the RJA are slowly working their way through the system. Several early Court of Appeal decisions considered the timeliness of RJA claims, such as whether a claim must be raised in the trial court to

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<sup>7</sup> CAL. PENAL CODE § 745.

<sup>8</sup> Assemb. B. No. 256, Reg. Sess. 2021-22 (Cal. 2022).

<sup>9</sup> *Documents Related to the Implementation of the Racial Justice Act*, ACLU N. CAL., <https://www.aclunc.org/documents-related-implementation-racial-justice-act> (last visited Apr. 14, 2024).

<sup>10</sup> *See, e.g., Information About the Racial Justice Act 4 All (AB 256 - Kalra)*, ELLA BAKER CENTER FOR HUM. RTS., <https://ellabakercenter.org/rja-info/> (last visited Apr. 14, 2024).

<sup>11</sup> *See, e.g., RACIAL JUSTICE ACT FOR ALL IMPLEMENTATION FUNDING*, OFFICE OF THE STATE PUB. DEF. (2023), [https://www.ospd.ca.gov/wp-content/uploads/2023/09/RJA-grant-RFA\\_Final\\_Accessible.pdf](https://www.ospd.ca.gov/wp-content/uploads/2023/09/RJA-grant-RFA_Final_Accessible.pdf).

preserve issues for appeal.<sup>12</sup> Other cases applied the RJA on the merits of specific kinds of expert testimony.<sup>13</sup> Another line of cases establish the appropriate standards for trial courts to apply at the prima facie stage, when deciding whether to grant a defendant a full blown hearing on a RJA claim.<sup>14</sup> Still other cases stemmed from disputes over discovery requested to bolster potential RJA claims.<sup>15</sup> Many more are pending decision as of this writing.

In addition to litigation, scholars have also begun to explore the opportunities, challenges, and questions the RJA presents. In an early, seminal article on the RJA, Professors Colleen Chien, David Ball, and William Sundstrom focus on statutory language that will likely need judicial interpretation.<sup>16</sup> For example, the statute provides remedies if the totality of the evidence demonstrates “a significant difference” in convictions or sentencing across race when comparing “similarly situated” individuals who have engaged in “similar conduct.”<sup>17</sup> Even after cleanup legislation in 2022 provided more legislative guidance on these terms, there are still no “definitive numerical answers” to how courts should measure or determine which side of the RJA line a particular case falls.<sup>18</sup>

In this exciting and uncertain context, recognizing the need to foster strategic thinking, sharing of best practices, and interdisciplinary collaboration, the Criminal Law & Justice Center partnered with the *Berkeley Journal of Criminal Law* to host a Symposium on the RJA in February 2024 on U.C. Berkeley’s campus. A testament to the demand for information on this emerging area of law, the day-long gathering

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<sup>12</sup> See, e.g., *People v. Lashon*, 95 Cal. App. 5th 136 (2023) (reversed and superseded by statute as stated in *People v. Lashon*, 537 P.3d 1151 (2023)).

<sup>13</sup> See, e.g., *People v. Johnson*, No. H048633, 2022 WL 17986210 (Cal. Ct. App. Dec. 29, 2022), review denied (Mar. 29, 2023) (unpublished) (denying a RJA claim based on expert trial testimony which the court agreed “raises concerns” but finding no violation).

<sup>14</sup> See, e.g., *Finley v. Super. Ct.*, 95 Cal. App. 5th 12 (2023) (reversing a trial court denial of a hearing and holding that in determining whether a defendant has made a prima facie showing of a violation of the RJA, trial courts should accept the truth of the defendant’s allegations, including expert evidence and statistics, except where the allegations are conclusory, unsupported by the evidence presented in support of the claim, or demonstrably contradicted by court records).

<sup>15</sup> See, e.g., *Young v. Super. Ct. of Solano Cnty.*, 79 Cal. App. 5th 138 (2022) (holding that plausible justification standard applies to threshold showing of good cause for discovery).

<sup>16</sup> Colleen V. Chien et al., *Proving Actionable Racial Disparity Under the California Racial Justice Act*, 75 UNIV. CAL. COLL. L.J. 1, 15 (2023).

<sup>17</sup> CAL. PENAL CODE § 745(h)(1).

<sup>18</sup> Chien et al., *supra* note 16.

attracted approximately 300 in-person attendees and hundreds more on Zoom from far and wide.<sup>19</sup> More than half of the public defender's offices in the State had at least one representative in attendance. While the participants skewed heavily towards the defense bar, some prosecutors joined their numbers, alongside many representatives from community organizations and family members of currently incarcerated individuals.

What follows is a special Symposium Edition of the *Berkeley Journal of Criminal Law* including contributions from many of the speakers at the RJA Symposium in February 2024. For example, one of the biggest draws to the symposium was Assemblymember Ash Kalra, the author of the RJA. In his keynote speech, reproduced below, Assemblymember Kalra offered critical context for understanding why and how the law came to be passed during COVID lockdowns and national protests in response to the murder of George Floyd.<sup>20</sup> Assemblymember Kalra emphasized the need to depart from the *McCleskey* standard and take curative steps to build trust between impacted communities and the criminal legal system even in cases where it is impossible to prove discriminatory intent.<sup>21</sup> He described how the Court's "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."<sup>22</sup> Assemblymember Kalra emphasized the massive amount of work needed to pass the follow-up legislation making the RJA apply retroactively after "a 2-year effort backed by a coalition of 10 passionate sponsors and over 150 organizations in support," and all of the difficult work ahead.<sup>23</sup>

A panel of interdisciplinary data experts from UC Berkeley and beyond helped the audience grapple with the challenges and opportunities of presenting data to courts. For example, Professor Jack Glaser, a preeminent social psychologist at UC Berkeley's Goldman School of public policy, spoke and writes here about the challenges of proving empirically implicit bias in any individual case.<sup>24</sup> As a sought-after expert

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<sup>19</sup> Andrew Cohen, *Implementing Equality: Packed Symposium Addresses California Racial Justice Act*, BERKELEYLAW.EDU (Feb. 13, 2024), <https://www.law.berkeley.edu/article/implementing-equality-packed-conference-addresses-california-racial-justice-act/>.

<sup>20</sup> Ash Kalra, *Keynote Speech: Racial Justice Act Symposium*, 29 BERKELEY J. CRIM. L. 7, 8-9 (2024).

<sup>21</sup> *Id.* at 10-11.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.* at 12.

<sup>24</sup> Jack Glaser, *Implicit Bias, Science, and the Racial Justice Act*, 29 BERKELEY J. CRIM. L. 17, 24 (2024).

witness in RJA claims, his contribution describes the science behind implicit bias to inform its applicability in the context of the RJA.<sup>25</sup> Also on the theme of data, a topic in high demand for litigators working on RJA issues, Berkeley Law Professor Colleen Chien led another panel in which she and collaborators presented the Paper Prison Initiative's data tool.<sup>26</sup> Their groundbreaking, publicly-available tool draws on California Department of Justice data sets and is aimed specifically at helping develop and evaluate claims under the RJA.<sup>27</sup>

Other panels included public defenders litigating a high volume of RJA claims in trial courts across the state. For example, Elizabeth Lashley-Haynes leads the Los Angeles County public defender's RJA efforts in the biggest criminal justice jurisdiction in the country. Lashley-Haynes writes about discovery motions under the RJA, which she points out are "often overlooked" even though they have sometimes won her clients results without any subsequent merits litigation.<sup>28</sup> Evan Kuluk, a deputy public defender in Contra Costa County, shares the story of the first ever RJA victory after a merits hearing in a case pending trial.<sup>29</sup> In *People v. Windom*, Kuluk challenged the charging of gang murder special circumstances as to Black defendants when compared to non-Black defendants, successfully persuading the court, based on powerful statistical evidence, that the murder case should proceed to trial without the gang allegations.<sup>30</sup>

The Symposium, and the contributions that follow, include visionary perspectives from folks doing big picture strategic thinking about how to realize the potential of the RJA. Sean Garcia-Leys, the executive director of the Peace and Justice Center in Orange County, California, makes the case for movement lawyering, particularly in the context of the RJA.<sup>31</sup> He argues the intent behind the law is systemic change and thus there is a need for bold, deliberate, and interconnected

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

<sup>26</sup> Colleen V. Chien et al., *The Paper Prisons Racial Justice Act Data Tool*, 29 BERKELEY J. CRIM. L. 29, 29 (2024).

<sup>27</sup> *Id.* at 30.

<sup>28</sup> Elizabeth Lashley-Haynes, *Racial Justice Act Discovery Motions: A Useful Tool for Defense Practitioners*, 29 BERKELEY J. CRIM. L. 57, 58 (2024).

<sup>29</sup> 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, 78 (2024).

<sup>30</sup> *Id.*

<sup>31</sup> Sean Garcia-Leys, *A Case for Movement Lawyering in Racial Justice Act Implementation*, 29 BERKELEY J. CRIM. L. 81, 82 (2024).

strategies both inside and outside of formal legal spaces.<sup>32</sup> Finally, Emi MacLean, from the ACLU of Northern California, spearheaded the herculean efforts to litigate public records requests and make publicly available a veritable treasure trove of policies, trainings, data, and more.<sup>33</sup> Her contribution below surveys early successes under the RJA and identifies opportunities and challenges in the work ahead.<sup>34</sup>

The RJA is a historic legislative effort to address the shameful history of structural racism in the criminal legal system. It is far too early to know how courts will interpret or criminal justice stakeholders will adapt to the new framework for rooting out racism. What is already clear is that the RJA is encouraging data collection, transparency, community organizing, and creative interdisciplinary approaches to litigation. As the full impact of the RJA emerges, let us hope that we have the courage not to fear too much justice.

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<sup>32</sup> *Id.* at 81.

<sup>33</sup> Emi MacLean, *Embracing “Too Much Justice”: Realizing the Potential of the California Racial Justice Act*, 29 BERKELEY J. CRIM. L. 89, 96 (2024).

<sup>34</sup> *Id.* at 95.